A Perspective on Legal Pluralism in 19th-Century New Brunswick

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What I offer is a sort of rumination on the difficulties posed by the phenomena of "legal pluralism" in my historical work on 19th-century legal culture, using New Brunswick as a focus. Taking legal pluralism seriously is a challenge the contemporary lawyer is ill-equipped to meet. Most of us are products of a legal education which simply presumes the formal, conflict model of dispute resolution as normative, ghettoizing arbitration and mediation as esoteric alternatives of interest only to devotees of labour law. Moreover, New Brunswick is a jurisdiction which has gone to perhaps unique extremes to eradicate the local, the non-standardized and the non-professional from the administration of justice. Justices of the peace, once the workhorses of our legal system, can be found in contemporary New Brunswick only in nursing homes. County courts, like county governments before them, are consigned to oblivion, so that counties — until recently the fundamental units of legal and governmental administration — are now of hardly more relevance than the long-forgotten parishes. Private criminal prosecution, which in the early decades of this province was commonplace, is today regarded as merely an anomalous theoretical possibility — a weird survival

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[1]No doubt there was proportionately more public prosecution in British North America than in the Mother Country but private prosecution was commonplace nonetheless. When, for example, in 1841 the Supreme Court judges urged the appointment of public "prosecuting Barristers" in five judicial districts they carefully emphasized that:

> neither the right to institute private Prosecutions as at present practised, nor the functions of the Magistrate in the preliminary investigation of Criminal Charges, is intended to be interfered with....Many cases, such as the ordinary Assaults and Batteries and other misdemeanors, where the injury is rather of a private than a public nature, will be best left as heretofore, to private prosecution: Letter from Chief Justice W. Chipman *et al* to Lieutenant-Governor W.M.G. Colebrooke, 1 December 1841, in *Journal of the Legislative Council* (1842) at 402-03.

On private prosecution as "a value...reflected in the ideological history of the criminal law itself" despite a paucity of contemporary instances see Law Reform Commission of Canada, *Private Prosecutions* (Ottawa: L.R.C.C., 1986) at 4,27. On Canadian courts' overwrought fears of "the malignant dangers lurking in private use of the law" see D. Hay, "Controlling the English Prosecutor" (1983) 21(2) *Osgoode Hall LJ* 165 at 165-67.

from the last juridical Ice Age.[1] All prosecutions are now public; practically all prosecutors are full-time public servants pursuing a centrally-articulated prosecutions policy. Similarly, the work of coroners is now orchestrated from Fredericton. Even municipal police forces are under the jurisdiction of a central police commission. On the civil side New Brunswick has joined other jurisdictions in suppressing trial by jury. Under intense professional attack as early as the 1850s,[2] civil juries survived the latest Rules Revision Committee's all-but-unanimous recommendation for their final abolition only because of the eccentricities of the then Minister of Justice.[3] They remain on the books, but merely as ideological window dressing — a lay intrusion which lawyers and judges tolerate only because it is never invoked. Like the vanished justices of the peace, civil juries represent an unwelcome, unpredictable, often anti-commercial intrusion of community values into the realm of the legal professional.

In all of these areas — to say nothing of health, education and welfare — lay participation in the machinery of government and justice has been ousted, and local institutions have been swept away for the sake of what the "Byrne" Royal Commission proclaimed famously as "a complete functional rationalization of provincial and municipal government activities."[4] Despite recent agitation for administrative dualism along linguistic lines, the New Brunswick of the 1980s has perhaps the most centralized and professionalized legal and governmental system in the whole common-law world. It is hardly surprising, then, that this is the dominant — one might say the only — perspective instilled in the law schools. Nor can it be surprising that the Rules Revision Committee's 1982 initiative in Rule 77 to provide a "quick and inexpensive" informal alternative to "time-consuming adversarial procedure[s]" has been largely ignored by the profession. To the extent not ignored, its operation has actually been subverted by lawyers and judges who have no sympathy for its aims.[5] To legal professionals a process that is other than formal and fully adversarial expresses alien values. When, therefore, a contemporary lawyer sets out to explore the New Brunswick legal culture of the 18th and 19th centuries he runs the danger of automatically filtering out local and

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[2]In their responses to queries from the Law Commissioners on the state of the jury system in New Brunswick, four of the judges of the Supreme Court and most of the ten barristers whose opinions survive favoured reduction of the jury's role. Several, including Chief Justice James Carter, would have reduced the jury's size and dispensed with the unanimity requirement even in criminal trials of non-capital offenses: N.B. Legislative Council, *Law Commission: Queries and Answers* (1852) (Fredericton, 1854). This attack on the role of the jury became the view of the Law Commission itself:

> We...recommend that the number of Jurors should be reduced to seven, except for the trial of a capital felony, and in civil cases that five should render a verdict, after deliberating two hours; if after six hours deliberation five cannot agree, we propose that they should be discharged. In all criminal cases we require unanimity: W.B. Kinnear *et al*, "Third Report of the Commissioners," R.S.N.B. 1854, vol. II at xx.

[3]According to one member of the Rules Revision Committee:

> The Revision Committee recommended the abolition of civil jury trials. I [Patrick A.A. Ryan] was the lone dissenting voice. I abhor any invasion of the civil or criminal rights of Canadians to be tried or have the issues of their cases tried by their peers. The jury system is the fundamental safeguard which protects democracy from erosion.....

The Committee was apparently so embarrassed by continence of even the bare possibility of civil jury trials that it ushered Rule 46 into the world with a terse, two-sentence commentary — conspicuously less than for any other Rule: Barristers' Society of New Brunswick, *Practice Manual* (Fredericton: Barristers' Society of New Brunswick, 1982) at 44, 196.

[4]Province of New Brunswick, *Report of the New Brunswick Royal Commission on Finance and Municipal Taxation* (Fredericton: Queen's Printer, 1963) at 3.

[5]J.A.G. Dickson, "A Capsule Summary: Revision of the Rules of Court in the Province of New Brunswick" (1982) 31 *UNB LJ* 282 at 294; L.E. Clain, "Rule 77: Quick Ruling — Stillborn?" in (Fall 1985) 2(1) *Solicitors' Journal* 5 at 5,7.

informal regimes of law; of looking only at lawyers and ignoring justices of the peace; of studying law only in the operation of the Supreme Court, passing over the working of local courts; of being blind to manifestations of ordering other than those curial or legislative. Embarked on an examination of New Brunswick legal history prior to the First World War, I am challenged to attune myself to the polyphony of an pre-centralized legal culture.

The phenomena of legal pluralism fall into two often overlapping categories: alternate "sources" of law — i.e., those not deriving their legitimacy directly from a court or legislature; and alternate "mechanisms" of dispute resolution — which may apply the state's law, but in an informal manner. One rarely finds an alternate mechanism of dispute resolution which does not to some extent apply an alternate source of law, but it is the latter category which is the more difficult for the legal historian to grasp. It demands radical expansion of our usual working notion of what law is to include manifestations of non-state ordering and sanctioning.[6] Moreover, much of this informal ordering is too elusive to be more than glimpsed in the surviving sources, even for an historian set on detecting it. For example, books have lately been published on lumberer and sailor culture in 19th-century New Brunswick.[7] Both break new ground in part because the authors draw on legal records. Yet what is missing from both these accounts of major labour cultures is any focussed treatment, or even recognition, of the possibility that the tens of thousands of men isolated annually in the lumber camps or on the high seas ordered their communal lives — in suppressing and resolving disputes — according to conventions we can fairly call "law." Both groups gave rise to a rich and distinctive linguistic and musical tradition, and both generated a vivid popular stereotype. I suggest that one also might find a significant pattern of conduct and sanction in the relatively isolated worlds of the deep sea vessel and the lumber camp.[8] That these cultures have probably not generated the kind of sources which make them susceptible of easy study should not lead to the conclusion that what we cannot see was not there or was of no importance. Scholars make their contributions in great measure by the questions they raise, not because they always succeed in nailing down answers.

I have suggested that the number and the isolation of lumbermen and sailors should make one alert to detect conventions of behaviour that we can usefully understand as "law." That observation is the more true of New Brunswick's 18th and early 19th-century Acadian communities. Settled on the geographical periphery of the province,

[6]This broader sense of law as any scheme of social ordering is discussed in the opening chapters of H.W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: Toronto Univ. Press, 1985) and in J.S. Auerbach, *Justice Without Law?* (New York: Oxford Univ. Press, 1983).

[7]J. Fingard, *Jack in Port: Sailortowns of Eastern Canada* (Toronto: Toronto Univ. Press, 1982); G. Wynn, *Timber Colony: A Historical Geography of Early Nineteenth Century New Brunswick* (Toronto: Toronto Univ. Press, 1981). Similarly, if Richard Rice is correct in arguing that mid-19th-century Saint John had the most heavily-unionized waterfront in North America, then we may suppose that here, too, the conventions of group solidarity gave rise to a well-understood code of conduct which for some purposes can usefully be thought of as "law": J.R. Rice, "A History of Organized Labour in Saint John, New Brunswick, 1813-1890" (UNB. 1968) [masters' thesis].

[8]For example, the Dibblee Papers at the New Brunswick Museum (NBM) include three cases which reveal incidentally much of rafting and booming customs on the St. Croix and the St. John Rivers: *Coombs* v. *Caldwell* (1839): Shelf 91, Box 6, F18(40); *Daley* v. *Marks* (1836-38): Shelf 91, Box 7, F22(1); *Miller* v. *Fisher & Currie* (1828): Shelf 93, Box 15, F62(3). One stimulating example of what is possible when an historian is attuned to the conventions of group conduct is Ruth Bleasdale's "Class Conflict on the Canals of Upper Canada in the 1840s" (1981) 7 *Labour/Le Travailleur* 9.

precluded from participation in larger provincial life because of language, excluded for several decades from most forms of public service on account of religion, Acadians were also heirs to a generations-old strategy of collective survival which enjoined them to live quietly and give no offense to the dominant culture.[9] It is not surprising, therefore, that in the pre-Confederation period Acadians seem to have had little voluntary recourse to the institutions of formal justice or that they developed alternate means of dispute resolution. In 1825, for example, the first historian of New Brunswick commented that the Roman Catholic priest at Madawaska "with the assistance of one or two leading persons regulates the internal police of the settlement by settling disputes, keeping the peace, &c. and so successful have they been that although there are neither lawyers or magistrates in the place, the Courts of Justice have had but little trouble from that quarter."[10] Similarly, in 1837 a British visitor observed that the Madawaskans had "no dissensions or disputes which the *bon curé* could not settle."[11] In another account, published in 1841, Acadians at Madawaska are described as "a harmless and inoffensive people, who pay implicit obedience to their clergyman, by whom all disputes are settled. And it is but recently, that a magistrate has been appointed in that part of the Province."[12] While acknowledging that these accounts are in some measure stereotypical, one can add that contemporary historians of the Acadians confirm rather than contradict these views.[13] The very fact that Acadians did not produce their first lawyer until 1870 suggests a settled habit of resolving disputes communally in a way that both reinforced the collectivity and minimized contact with the institutions of an alien culture. A scholar unprepared to recognize dispute resolution by a priest and his advisors as part of "legal" culture would be condemned to write legal history for the 19th century in which Acadians did not appear.

A less successful but still notable instance of a group which held to internal dispute resolution as an affirmative value is that part of the New Brunswick Protestant tradition which drew its impulse from New England Congregationalism — particularly the Baptists and Free Baptists. As one set of early Maritime church articles cogently put it:

> We beleave that altho' it may be lawfull & right to Sue a wicked man...yet Bretheren in christ that have covenanted to walk in all the rules...of the

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[9] Two instances of Acadian "isolation" are the fact that, as late as the 1820s, no one from the extensive Madawaska settlement was ever summoned for jury duty and that, at least by the 1840s, the Acadians of Westmorland County were informally exempted from county poor rates on the ground that they always looked after the poor within their community: *R.* v. *John Baker* et al. (1828): Ward Chipman bench book (evidence of E.W. Miller), A361, NBM; Petition of Fox Creek Acadians to Westmorland County General Sessions, 21 Nov. 1843: Dibblee Papers, Shelf 96a, Box 44, F7(2), NBM. On the subject of Acadian institutional responses to isolation see H.G. Thorburn, *Politics in New Brunswick* (Toronto: Toronto Univ. Press, 1961) at 23.

[10] [P. Fisher], *Sketches of New-Brunswick* (1825) (Woodstock: Non-Entity Press, 1980) at 53. The comment was repeated in similar terms in Fisher's *Notitia of New-Brunswick* (Saint John, 1838) at 98.

[11] "Peter Pivot," "Letters from New Brunswick" (1837) No. 7(3) *United Service Journal and Naval and Military Magazine* 514 at 515.

[12] E. Ward, *Account of the River St. John* (1841) at 87.

[13] For example, R. Brun, *Pionnier de la Nouvelle Acadie: Joseph Gueguen, 1741-1825* (Moncton: Editions d'Acadie, 1984) at 70-71.

> gospel...ought not to go to law with another: but all their Differences ought to be Desided by the Brethren.[14]

By shunning lawyers and lawyer values sectarian Protestants, like Acadian Roman Catholics, found a way not merely to suppress strife but actually to affirm the bonds of community.

By the time New Brunswick was settled, late in the 18th century, much of the purist drive in sectarian Protestantism had dissipated. Though Baptist churches were numerous here by the early 19th century, their records bespeak instability and indecision. Churchbooks were not kept up and the church forum for dispute resolution was not often invoked or insisted on. Yet a number of such cases do appear in surviving churchbooks. Though the machinery of church dispute resolution may not have been very effective in the early 19th-century and wholly absent thereafter, one can entertain at least the possibility that this earlier underlying distrust of court values persisted in the "folk" consciousness, supplying a potent source for widespread anti-lawyer sentiment at the mid-century.[15] It is certainly tempting for the legal historian to dismiss these briefly-sketched manifestations of legal pluralism as of no consequence because they cannot be tracked and analyzed as easily as litigation over a promissory note; but we do so at the risk of failing to understand that, in the unpoliced world of pre-Confederation British North America, high social value was placed on individual and group self-control.[16]

No survey of alternate forms of dispute resolution in New Brunswick can fail to note the vanished popularity of arbitration. Perhaps the most startling discovery in a thorough canvass of surviving 19th-century New Brunswick lawyers' papers is the pervasiveness of arbitration. Though I can offer nothing by way of statistics, my confident impression is that resolution of disputes by arbitration rather than litigation was so frequent as to be commonplace. This was so even when the dispute had already reached the pleading stage, and one would suppose that many disputes were referred directly to arbitration without even going to a lawyer.[17]

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[14]F.C. Burnett, "Henry Alline's 'Articles & Covenant of a Gospel Church'" (1984) 4(#2) *N.S. Hist. Rev.* 13 at 21. For similar practices in Upper Canada see D.J. Green, "Pioneer Baptist Churches in Upper Canada as Moral Courts" (1963-64) 6 *Can. Bapt. Home Missions Digest* 238.

[15]See for example G. Marquis, "Anti-Lawyer Sentiment in Mid-Victorian New Brunswick" (1987) 36 *UNB LJ* 163.

[16]Analogous to Congregationalists and Baptists in holding that the brethren ought not to "go to law" with one another were members of secret societies. Just how extensively the Masons (for example) resolved disputes internally cannot now be known; but note the scandal caused by one early Saint John instance in which the taboo against litigation within the Masonic fraternity was broken: J.W. Lawrence, *Judges of New Brunswick and Their Times* (1907) (Fredericton: Acadiensis Press, 1985) at 285-88.

[17]Something of level of cultural acceptance arbitration attained in early 19th-century New Brunswick can be glimpsed from a not altogether admiring lawyer's account of an arbitration in a Nackawic tavern:

> There had been what they called court that day....[I] cannot forbear mentioning the decision, or more properly award, for the matter was decided by referees — "that the plaintiff do pay to the defendant the sum of one penny, and each party settle his own costs, to be agreed upon amongst ourselves," was the solemn decision of this puissant tribunal: [Moses Perley], "Scenery of the St. John" *[Saint John] New Brunswick Courier* (29 September 1832).

While this account is obviously a parody, it would not have been thought amusing if the phenomenon described did not correspond to common perception.

The dozens of agreements and awards I have located cover a surprising range of controversies. One was an 1827 arbitration for deciding how much the putative father of a bastard child owed the Westmorland County Overseers of the Poor.[18] Another was an 1865 agreement to settle custody disputes between separating spouses in Kings County.[19] Most arbitrations involved land or business disputes. Merchants preferred arbitration to a litigated solution because it was quicker, cheaper and would yield a result on the merits. It was particularly popular where the dispute fell within the jurisdiction of the chancery court. Even so professionalized a lawyer as Ward Chipman counselled arbitration over the expensive morass of chancery proceedings.[20] In addition to its inherent procedural flaws, chancery was a particularly uncertain venture in New Brunswick until 1838 because it was the lieutenant-governor himself who sat as chancellor. But even when a dispute was within the jurisdiction of the common law, arbitration was routinely preferred. As a New Brunswick Supreme Court judge explained to a Saint John merchant in 1823:

> the party who offers & is anxious for arbitration always makes a strong argument of it in his favor before a Jury, & no argument is more likely to prejudice them against the party who declines that method of settling the dispute.[21]

By the third quarter of the 19th century resort to arbitration, at least in New Brunswick, appears to have fallen off greatly. In part this may have been because rationalization of court procedure and jurisdiction, particularly as regards equity, made litigation rather less unattractive. As well, commercial partnership disputes — a key field for arbitration — declined in relative importance as the corporate form became pervasive. Further, by the early 20th century arbitration in both England and the United States had been in great measure "legalized." In the United States, according to Jerold Auerbach, the American Arbitration Association was simply taken over by lawyers and lawyer values.[22] In England, according to Harry Arthurs, arbitration was reined in by the courts' determination to impose, as Lord Justice Atkin said in a leading 1922 case, "a uniform standard of justice and one uniform system of law."[23] Thereby lawyer values were made to predominate over merchant values and much of the purpose of commercial arbitration was lost. In the particular case of New Brunswick one can posit another sort of reason for the decline of commercial arbitration: the collapse of the merchant and industrial class itself on account of post-Confederation federal tariff and transportation polices.[24] Arbitration typically involves two commercial or industrial concerns in the same "community." When a conjunction of federal policies precipi-

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[18]Thomas O'Donald arbitration: F7 (31), NBM.

[19]*Barberie* v. *Barberie* (1865-66): George Otty Papers: Shelf 134, F5, NBM.

[20]Letter from W. Chipman to D. McDonald, 11 May 1809: Chipman Papers, Shelf 38, F5, P3 (9), NBM.

[21]Letter from E.J. Jarvis to W. Jarvis, 13 November 1823: Jarvis Papers, Shelf 81, Box 7, NBM.

[22]*Justice without Law?*, *supra*, note 6 at 108-14. Morton Horwitz, Auerbach's mentor, puts the neutering of arbitration considerably earlier: *Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard Univ. Press, 1977) ch. 5.

[23]"*Without the Law*," *supra*, note 6 at 67-77; *Czarnikow* v. *Roth, Schmidt* (1922) 2 KB 478 at 491 (C.A.).

[24]Argued in T.W. Acheson, "The Maritimes and 'Empire Canada'," in D. J. Bercuson (ed.), *Canada and the Burden of Unity* (Toronto: Macmillan, 1977) 87 at 94-99.

tated the closure, bankruptcy or take-over of most of the great Maritime commercial houses and industrial concerns between the 1880s and the 1920s, sometimes in the context of vertical integration, there were, as a result, fewer disputes between autonomous enterprises within the same community and hence, less occasion to resort to the traditional means of dispute resolution within that community.[25]

I turn finally to that aspect of informal dispute resolution in 19th-century New Brunswick that is best known: the work of justices of the peace. Perhaps the first thing a 20th-century lawyer notices about the 19th-century magistrate is the hybrid character of the office. For most of the century justices of the peace, sitting collectively, were the only form of county government. These unelected justices met annually to appoint constables, fence viewers, hog reeves and most other parish and country officers, to levy poor rates, to issue liquor licences and the like. For the first half-century of New Brunswick's existence — before the advent of party politics or a significant civil service — this administrative function played the key role in mediating the concerns of the settlement frontier to the central executive in Fredericton, and vice versa.

In their judicial capacity each JP, sitting alone, had an absolute jurisdiction in debt cases up to £5 for most of the 19th century. Sitting collectively their absolute jurisdiction was £20, with a permissive jurisdiction up to £50. When the limits were fixed, early in the century, these were very large sums and as such were strenuously opposed by the legal profession. Lawyers themselves were only rarely appointed as justices of the peace, so that the presiding officer in an inferior court was invariably a layman. Moreover, the first generation of New Brunswick lawyers — heirs to the most advanced professionalism of the pre-Revolutionary New York and Massachusetts bars — considered it beneath their dignity to appear in an inferior court where, in any event, the costs allowed by the fee table were small. Hence Ward Chipman's 1802 declaration that he did not know of a single instance where a New Brunswick lawyer had condescended to appear in an inferior court in a civil action.[26] The very existence of a civil jurisdiction in justices of the peace was an affront to the legal profession, and the successful agitations of the early 19th century to enlarge the justices' absolute monetary jurisdiction were unmistakable attacks on lawyers and professional values. Though lawyers did come to make occasional appearances in inferior courts, their presence was hotly resented by presiding JPs. Justices of the Peace seem, in the main, to have envisaged their role as doing substantive justice, to which the presence of lawyers was a serious impediment.[27] In 1850, for example, a leading Saint John JP:

> enquired whether there was any method...to prevent Attorneys pleading in Magistrates' Courts. At present the Magistrates could not refuse the interference of those legal gentlemen, and the consequence was that much injury had

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[25]Although, for example, the Saint John Board of Trade annually elected a Board of Arbitration in the 1880s and 1890s, it appears not to have functioned. The Board's interest in arbitration revived in the early 20th century, but in the context of resolving labour disputes: Board of Trade Papers: Shelf 148, NBM.

[26]Letter from W. Chipman to J. Odell, 10 Mar. 1802: Lawrence Collection, MG23 D1 vol. 6, National Archives of Canada.

[27]For example, a Grand Manan JP noted that "I often *advise* parties to settle their disputes without going to law": J. Lorimer to G.S. Grimmer, 15 Oct. 1875: Grimmer Papers, Shelf 45, Box 1, F3a (39), NBM.

> followed. He knew of a case, upon which he had sat as one of three Magistrates, which would have been decided in ten minutes from the conclusive nature of the evidence; but a lawyer had been called in at this stage...and the whole case got immediately into the most admirable confusion.

He then urged that "Magistrates...be permitted to stop this mode of proceeding; their court was, properly speaking, a court of equity, and could in no way be benefited by the introduction of those legal technicalities which puzzle the heads of more assuming practitioners."[28] Here we have epitomized the cultural clash between the magistrate offering equity and the lawyer thriving on technicality.

As early as 1832 there were upwards of 200 justices of the peace in New Brunswick, each a court of record with absolute jurisdiction in the recovery of debts up to £5.[29] Thereafter, appointments became even more numerous as the magisterial honour was liberally bestowed in the context of emerging party government. By the 1860s magistrates as a class had fallen into such public disrepute that newspapers contain almost as much anti-JP sentiment as anti-lawyer sentiment. Magistrates were even accused of stirring up litigation so that they could profit from the fees, the very charge typically leveled at lawyers. With the advent of county courts in 1867 and universal county government a decade later, the positive contribution of JPs to the administration of justice and government came to an end. New Brunswick lawyers today meet the work of justices of the peace only in the context of title searches, an encounter likely to provoke only thanksgiving that this accursed race of amateur conveyances can no longer compete with the professionals. Perhaps, however, as we look about for ways to make substantial justice cheaper and more accessible to the public, at least in small claims, the model of the lay justice of the peace – essentially dormant in New Brunswiock since 1867 – is worth reconsidering.

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[28]C. Simonds in *[Fredericton] Head Quarters* (27 March 1850).

[29]*Report...by the Commissioners Appointed to Inquire into the Judicial Institutions of the Province* (Fredericton, 1833) at 31.