Case Comments and Notes • Commentaires

A Note on the Reception of English Statutes in New Brunswick

> You will remember, Sir, that the Statute Law of England relative to Elections was repeatedly urged by us, and as often rejected as not Extending hither, and with it, of course, *the Bill of Rights,* which is an English Statute and the Basis of Parliamentary Freedom.[1]

This intriguing message was directed at the High Sheriff of Saint John on 22 December 1785 by six defeated opposition candidates in the wake of New Brunswick's first election campaign. To the historian it is but a minor episode in the continuing political turmoil that rocked early Loyalist Saint John. To the legal scholar the passage has another significance entirely. The allegation that New Brunswick's interim law maker — the Governor-in-Council[2] — had refused to extend to the new province the benefit of the election laws of England, or of even the *Bill of Rights,* raises directly the fundamental question, what laws actually did extend to the newly created colony of New Brunswick. Early in the province's history our greatest chief justice declared this to be "one of the most grave questions which can occupy the attention of a colonial judicature".[3] That a New Brunswick case turned upon this very point as recently as 1970 emphasizes that the question remains of practical importance as well as academic interest.[4]

In the parlance of legal scholars the question is that of ascertaining the "reception" date of English statutes in New Brunswick. The "reception" point is the latest date at which every existing act

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[1]New Brunswick Museum, Ganong Manuscript Collection, Box 36A, Packet 1: Dickinson *et al.* to Oliver.

[2]The governorship of New Brunswick did not become a lieutenant-governorship until 23 August 1786.

[3]*Doe d. Hannington* v. *M'Fadden* (1836) 1 Berton (1st) 153, at 159.

[4]*Scott* v. *Scott* (1970) 2 N.B.R. (2nd) 849.

of the British Parliament is deemed to apply automatically in a given colony, without need of local re-enactment.[5] All English statutes extant on this date are said to have been "received" by the colony as its own law. At any time subsequent to the reception date a colony's statute law consists of the statutes of England existing at the reception date, English statutes of later date expressly extended to the colony, and enactments of the colony's own legislature. It is thus impossible to know fully what laws were (and are) in force in a former colony like New Brunswick without knowing the date as of which it received English laws.

One of the more curious features of New Brunswick's legal history in the pronounced disagreement over the date at which the statutes of England are rightly considered to have been "received." Currently there are three distinct propositions, two propounded by the academic community and the third by the New Brunswick Court of Appeal. What follows is an attempt to dispel this embarrassing uncertainty by setting forth the three conflicting positions, and by pointing to that which is historically the most sound.

Probably the reception date most widely accepted is 1758. The present Chief Justice of Canada has endorsed it in his celebrated Hamlyn lectures,[6] as has the leading authority on the reception of English law in Canadian jurisdictions.[7] The rationale for the year 1758 is as follows: Nova Scotia received the statute law of Britain as of 1758, when its legislature first met; New Brunswick was then part of Nova Scotia; therefore New Brunswick inherited the statutes of Britain complete to 1758. This argument is based on two historical premises, both of which could be challenged on historical grounds. That, however, would be superfluous, for the 1758 hypothesis is undoubtedly incorrect.

Another group of legal academics has advanced the view that New Brunswick's reception date was 1784, the year the province was severed from Nova Scotia. Elizabeth Brown, one of the continent's foremost legal historians, has expressed such an opinion;[8] and John Whyte and William Lederman have adopted 1784 in their well known casebook on constitutional law.[9] Brown cites 1784 because she purports to have

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[5]Only those laws which could logically extend beyond the Mother Country were received in the colonies.

[6]Bora Laskin, *The British Tradition in Canadian Law* (London, 1969), at 6.

[7]*The Reception of English Law*, in Alberta L. Rev., Vol. XV (1977) at 87. See also such standard texts as A. W. Rogers, *Falconbridge on Banking* (7th ed) (Toronto, 1969) at 12; G. L. Gall, *The Canadian Legal System* (Toronto, 1977) at 45; and A. W. Mewett & M. Manning, *Criminal Law* (Toronto, 1978) at 4.

[8]*British Statutes in the Emergent Nations of North America: 1609-1949*, in Am. J. of Legal History, Vol. 7 (1963), at 136.

[9]*Canadian Constitutional Law* (2nd ed.) (Toronto, 1977) at 2-7 *(sic)*.

found such an implication in either the Commission or the Royal Instructions issued that year to New Brunswick's first governor; but the documents in question will not support such a reading.[10] Whyte and Lederman suggest 1784 because they suppose that this was the year New Brunswick's legislature began making laws locally. It is a matter of record, however, that the legislature did not first meet until 1786. This aside, there is at least common sense in the view that the reception date is in some way involved with the erection of New Brunswick into a separate colony. But again, as with the 1758 suggestion, there is no need to resort to historical speculation, for their is a third and far more eligible choice.

The soundest choice for a reception date, and the one which has generally been observed in the decisions of the New Brunswick Supreme Court over the last one hundred and fifty years, is 1660,[11] the year of the restoration of Charles II to the thrones of Scotland and England. This date, however, is so implausibly early that, despite its recent affirmation by the Court of Appeal, one might incline to doubt its validity. For this reason especially it is gratifying to find among the earliest state papers of this province a very informed commentary on the original decision to adopt 1660 as New Brunswick's reception date. That commentary comes from the pen of one of the architects of New Brunswick's legal system, the province's first Solicitor-General, Ward Chipman.[12]

Following the prorogation of the first session of New Brunswick's first General Assembly in 1786 the newly enacted statutes were forwarded to London for the usual overview. To acquaint the British Government with the principles observed in framing the first laws of the infant colony Solicitor-General Chipman prepared a statement of "General observations on the laws passed in the first Session of Assembly of the Province of New Brunswick".[13]

> Previous to re-enacting any particular law it seemed necessary to adopt some general principles respecting the extension of the British Statutes. The doctrine universally received by the Colonists was that all the laws of England passed before the existence of a Colony and applicable to its situation were binding on its inhabitants. The Ara [sic] of the restoration [1660] was generally fixed upon by the Courts of Law in the explanation of this principle because the Colonies were not of sufficient importance before this period to become an

[10]The documents are printed in Coll. N. B. Historical Society, #6 (1905) at 391-438.

[11]The only reference to this date which I have found in a scholarly context is in R. W. Kerr, *Regina v. Murphy and Language Rights Legislation*, in U.N.B. L. J., Vol. XX (1970), at 35-48. On the basis of *The King* v. *McLaughlin (infra)* Kerr assumes, rather than argues, that 1660 was New Brunswick's reception date.

[12]For an overview of Chipman's career see P. A. Ryder, *Ward Chipman Sr., An Early New Brunswick Judge*, in U.N.B. L. J., Vol. XII (1959), at 65-82.

[13]Enclosed in Public Archives of New Brunswick, C.O. 188/3: Carleton to Sydney, 12 June 1786. The "observations" were transmitted over the signature of Governor Carleton but were authored by Chipman. A complete draught in Chipman's hand, from which version this quotation comes, will be found in the Public Archives of Canada, Lawrence Collection, Chipman Papers, Vol. 7.

> object of attention to the Parliament of Great Britain, and after it so many acts are found expressly noticing and binding the plantations [*i.e.*, colonies] that a presumption arose [that] they were not intended [to apply to the colonies] unless named, or words of universal import made use of. These, with many other legal reasons, influenced the Council and Assembly here to abide by a limit so long established and practiced on: And as it appeared most safe and convenient in our present situation to reduce the number of laws that would otherwise require consideration; and by admitting all the statutes of a general tendency which were passed before the restoration as of force amongst us, the stability of the Province will be guarded from a spirit of innovation. . . . This adoption is . . . tacitly made by common consent of the Legislature, for the Old Statutes are supposed by their intrinsick force already Law in the Province. The Acts extended, therefore, consist either of those Statutes which are of later date, or of such of the Nova Scotia Laws as were thought applicable and proper for this province.

Chipman's commentary indicates that the reception policy tacitly adopted by the executive and legislative branches (both then including all the justices of the Supreme Court) at the foundation of New Brunswick was based upon three principles:

1. all English statutes existing in 1660 (the "Old Statutes") were deemed to have been received by the province;[14]
2. English statutes passed after the Restoration had no force in New Brunswick unless they explicitly extended to the colonies, or were re-enacted by the local legislature; and,
3. the statutes of Nova Scotia, from which New Brunswick had just been been severed, were deemed to have no more force in the new province.[15]

The absence of provincial law reports prior to 1826 virtually precludes any certain knowledge of how the early New Brunswick courts deal with the reception issue.[16] It is not until the 1830 case of *The King* v. *McLaughlin*[17] that one finds a judicial pronouncement on

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[14]As 1660 precedes the union of Scotland and England it is correct to speak of "English" rather than "British" statutes.

[15]This presumption, that Nova Scotia statute law had ceased to have effect in the new colony of New Brunswick, apparently came under judicial question. As a result the General Assembly in 1791 passed an act "to declare that no Law passed in . . . Nova Scotia before the Erection of . . . New Brunswick shall be in force in this Province" (31 Geo III c.2). In transmitting a copy of this new statute to the Colonial Secretary the Lieutenant-Governor took occasion to explain that:

> The received opinion had been that the Laws of Nova Scotia were in force in this province until our own provincial acts took [their] place, and that the provisions in the acts of Nova Scotia, having many of them been enacted here with such alterations as were thought advisable, the operation of the former laws was, of course, determined without the formality of an express repeal; some doubts, however, having arisen on this subject, it was thought necessary to pass this act, taking care at the same time to provide against its having any retrospective operation. *(Observations respecting the acts . . . which were passed in the fifth session of the General Assembly in the province of New Brunswick,* in Public Archives of New Brunswick, C.O. 188/4: Carleton to Grenville, 10 June 1791).

This 1791 enactment survives as s.6 of the *Interpretation Act,* R.S.N.B. 1973, c. I-13.

[16]Yet the reception policy must have well known for it is succinctly recorded in the journal of a British visitor to the province in 1811: "The old English laws and Acts of Parliament that were in force previous to the Restoration constitute the code of this country. Posterior Acts of the British legislature do not extend to this province unless they are expressly particularised so to do." Howard Temperley, ed., *Gubbins' New Brunswick Journals* (Fredericton, 1979) entry of 22 July 1811.

[17](1830) 1 Allen (2nd) 218.

the question of what English statutes New Brunswick was deemed to have inherited. Coincidentally, the fullest and most lucid remarks on the subject were delivered by Justice Ward Chipman, Jr., son of the former Solicitor-General:

> I concur with the rest of the Court. I consider the true principle to be as laid down by Lord Mansfield in *Lindo* v. *Lord Rodney,*[18] that each colony at its settlement takes with it the common law and all the statute law applicable to its colonial condition. It may not be a clear point as to what period of time shall be deemed the time of the settlement of this colony. The period of the restoration of Charles 2, it is understood, was in practice adopted by the General Assembly of this Province at its first session, as the period anterior to which all acts of Parliament should be considered as extending, and the reason which has been given for this is that it was about that period that the plantations began to be specially mentioned in acts of Parliament, and the inference therefore was that if any act after that period was intended to extend to the plantations, it would be so expressed. The statute of frauds and perjuries was re-enacted in this Province, the English statute having been passed in the reign of Charles 2. On the other hand the statutes of limitations, passed in the reign of James I, were not re-enacted, yet have always been acted upon and deemed in force in this Province.

Chipman's understanding of the principles and practices of the first General Assembly regarding the extension of English statutes to New Brunswick is clearly at one with that enunciated by his father half a century earlier. Both deemed English statutes passed prior to the Restoration of the Stuarts in 1660 to extend automatically to this province, but not those passed subsequently. Thus the junior Chipman cited the re-enactment in the first session of the New Brunswick Assembly of the "statute of frauds and perjuries", dating from shortly after the Restoration. He might also have noted the Assembly's notorious re-enactment of the statute against "Tumults and Disorders" from the same reign.

The Supreme Court's pronouncement in *The King* v. *McLaughlin* has never been openly contradicted in the New Brunswick courts. It was implicitly followed in *Milner* v. *Gilbert,*[19] where the junior Chipman, as Chief Justice, had occasion to reiterate his earlier opinion. As well, the question of the reception of English statutes has been considered incidentally in at least seven cases, none of which has queried the *McLaughlin* decision: *Doe d. Hannington* v. *M'Fadden,*[20] *Kavanagh* v. *Phelon,*[21] *Ex parte Ritchie,*[22] *Doe d. Allen* v. *Murray,*[23] *Doe d. Hazen* v. *The*

[18]A 1782 case, substantially reported as a footnote (pp. 385-92) at p. 391 in *Le Caux* v. *Eden* (1781) 99 E.R. 375.

[19](1847) 3 Kerr (2nd) 617.

[20]*Supra,* footnote 3.

[21](1842) 1 Kerr 472.

[22](1842) 2 Kerr (1st) 75.

[23](1844) 2 Kerr (1st) 359.

Rector, Church Wardens and Vestry of Saint James' Church,[24] *and Fudge* v. *Boyd.*[25] The *McLaughlin* decision also earned the learned endorsement of Sir John Allen in his commentary on *Doe d. Hare* v. *McCall,*[26] published in 1849.

Although the 1660 date set forth in *McLaughlin*'s case has never been openly disputed in the New Brunswick courts, there have been at least three cases in which it was ignored: *In re Taylor,*[27] *In re Davis,*[28] *In re Mary Elizabeth Kelly.*[29] Each of these cases involved the question of testamentary guardianship, and each held a post-Restoration statute (of 12 Charles II) to be part of the law of New Brunswick as though it had been received here. In none of these cases was the *McLaughlin* precedent raised, and it would seem that the Supreme Court decided them *per incuriam.*

It was not until 1970 that the Court of Appeal had occasion to review these two conflicting lines of authority on the reception question and make a definitive pronouncement. *Scott* v. *Scott*[30] was another testamentary guardianship case turning directly upon whether the aforenoted post-Restoration statute of 12 Charles II was part of the received law of New Brunswick. All three sitting judges used the occasion explicitly to repudiate the *Taylor, Davis,* and *Kelly* decisions and to endorse the *McLaughlin* precedent. Chief Justice Bridges put the matter most succinctly: "I think this appeal can be decided entirely on the fact that the statute 12 Car. II c.24 was passed after the Restoration of Charles II". "It is therefore my opinion that section 8 [respecting testamentary guardianship] never extended to this province . . . ."[31]

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The fact that 1660 was the fictional date adopted at the foundation of New Brunswick as the reception point for English statutes confirms the truth of the message directed by the exasperated opposition candidates at the Sheriff of Loyalist Saint John in 1785. By choosing to receive the laws of England as they stood in 1660 the Governor-in-Council had indeed denied its political opponents the benefit of the more important English election laws (mostly post-1660) and of even the

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[24](1879) 2 Pugsley 479.

[25](1964) 50 M.P.R. 384.

[26](1827) 1 Allen 90.

[27](1897) 1 N.B. Eq. R. 461.

[28](1910) 40 N.B.R. (1st) 23.

[29](1919) 46 N.B.R. (1st) 464.

[30]*Supra,* footnote 4.

[31]*Ibid.,* at 859.

Bill of Rights (1688).[32] There is also reason to suppose that the opposition candidates were correct in hinting that the Government had manipulated this statutory vacuum to its advantage. Yet it seems clear from the passages authored by the senior Ward Chipman in 1786 and his son in 1830 that the decision to adopt 1660 was based upon a thoughtful interpretation of colonial constitutional law, and one which was commonly held in the late eighteenth century. It is agreeable to reflect that the New Brunswick Court of Appeal, undeterred by the speculations of academic lawyers, has now settled upon that same reception date enunciated first by Solicitor-General Chipman nearly two centuries ago.

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[32]New Brunswick appears to be the only Canadian jurisdiction in which the *Bill of Rights* was not a part of received English statute law. This does not, however, mean that New Brunswickers were ever denied its benefits. Had the question ever arisen the courts would doubtless have held that the *Bill of Rights* was merely declaratory of English common law, which was fully inherited here.

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