The Admiralty Court in Colonial Nova Scotia

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The Admiralty Court in Nova Scotia was the second of the colonial Admiralty courts to be established in the colonies that were later to become Canada. The records of the Court, dating from the founding of Halifax where it was headquartered from 1749 onward, present an interesting picture of its judges and officials and of the variety of cases which came before it.

In this article, the author tells about the origins and organization of the Nova Scotia Court of Vice-Admiralty, and its activities and administration through 142 years until its jurisdiction was superseded in 1891 by the Exchequer Court and later the Federal Court of Canada. Throughout the article the author adds details about the lives of some of the Nova Scotia personalities who were associated with the Admiralty Court from its foundation to its abolition. He makes clear the significance of the Court as a judicial institution, especially in times of war, and its place in the history of the City of Halifax and the Province of Nova Scotia.

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* This paper is based on research which was conducted by the author during a National Study Leave from the Federal Court of Appeal, at the Dalhousie Law School, Halifax, Nova Scotia, from September 1 to December 31, 1993. The author acknowledges the cooperation and assistance of Patricia Kennedy of the National Archives of Canada, Allan C. Dunlop, Lois K. Yorke and J. Barry Cahill of the Public Archives of Nova Scotia and Aiden H. Lawes of the Public Record Office, in conducting the underlying research. He wishes to thank Ms. Kennedy, Mr. Cahill and Dr. Michael C. Tolley of Northeastern University, Boston, Massachusetts, for reading this paper in draft and for their suggestions.
Introduction

When Colonel Edward Cornwallis arrived in Nova Scotia in the early summer of 1749 to found Halifax and to give old Acadie a new direction, he carried with him as Governor an instruction from His Majesty requiring him

... to signify Our Will and Pleasure to the Officers of Our Admiralty Court hereafter to be nominated in Nova Scotia that they do not presume to demand or exact other fees than which are taken in this Kingdom. ... 1

The establishment of the "Admiralty Court", which was formally known as the Nova Scotia Court of Vice-Admiralty, had preceded Cornwallis's arrival by several years. In the late summer of 1720, when Richard Philipps was both Governor and Vice-Admiral at Nova Scotia's old royal capital of Annapolis, Daniel Henry was appointed as Judge, Arthur Savage as Register and Cypryan Southack as Marshal in vice-admiralty. 2 Less than a decade later, during the winter of 1729, the principal offices of a court of vice-admiralty went to John Bradstreet as Judge, Erasmus James Philipps as Advocate General, James Gibson as Register and Archibald Rennie as Marshal. 3 In the summer of 1737, a commission was granted to Edward How as Judge of the Court. 4 How had moved from Massachusetts several years after Nova Scotia was con-

1. Royal Instructions, 29 April 1749, para. 112, Public Record Office [hereinafter PRO], CO 218/3, p. 98 (Mfm. at the Public Archives of Nova Scotia [hereinafter PANS] and at the National Archives of Canada [hereinafter NAC].
2. High Court of Admiralty commissions, 9 September 1720, Admiralty Muniment Books, PRO, HCA 50/9, f. 19r–22r. The last two names appear as "Arthur Salvage" and "Cypryan Southwark" in their respective commissions. As part of the reference just given is a commission in favour of "Richard Philips" as Vice Admiral. All four appointments were with respect to "Placentia in Terra noviter inventa et Provincia Nova Scotia vel Acadia in America". Arthur Savage, the province's first secretary, and Cypryan Southack were among Richard Philipps's first twelve councillors appointed in 1720 (see T.G. Barnes, "'The Dayly Cry for Justice': The Juridical Failure of the Annapolis Royal Regime, 1713–1749" in P. Girard & J. Phillips, eds., Essays in the History of Canadian Law, vol.3, Nova Scotia (Toronto: University of Toronto Press, 1990) at 23. For Savage generally, see Dictionary of Canadian Biography, vol.2, (Toronto: University of Toronto Press) at 600–01 [hereinafter Canadian Biography]. For Philipps and Southack generally, see Canadian Biography, vol.6 at 83–87, respectively.
3. High Court of Admiralty commissions, 23 February 1729, Admiralty Muniment Books, PRO, HCA 50/10, f. 18, 8r–10r (John Bradstreet); f. 18v–19r (Erasmus James Philipps); f. 19r–20r (James Gibson); and f. 20v–21r (Archibald Rennie). The "Philipps" surname of Nova Scotia archival records appears as "Philips" in the particular commission. (See e.g. infra note 5). Some light on Bradstreet's career in Nova Scotia and elsewhere may be found in T.B. Akins, Selections from the Public Documents of the Province of Nova Scotia (Halifax: C. Annand, 1869) at 25, 52 and 62 as well as in Canadian Biography, vol.6 at 83–87.
4. High Court of Admiralty commission, 27 August 1737, Admiralty Muniment Books, PRO, HCA 50/10, f. 82–85v. 124. This commission was in the form of letters patent "of the same
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queried by the British in 1710 and had served the colony in various capacities. In 1736 he was appointed a member of the governing Council. At the time of Edward Cornwallis’s arrival, How still held the office of Judge of Vice-Admiralty. The Court’s other offices were vacant, as indeed Cornwallis’s instructions clearly indicated. Three years earlier, a court of vice-admiralty was established for Cape Breton, after which a judge and officials were appointed.

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5. Royal Instructions, supra note 1. Unfortunately, surviving records of the Annapolis Royal regime give but little assistance in establishing when the Court of Vice-Admiralty became active in Nova Scotia. Despite the appointments made in February 1729 (supra note 3), in September of the same year the Lieutenant-Governor informed London that “a Court of Admiralty [was] a thing much wanted in this country” (Calendar of State Papers: Colonial Series (1728-1729) at 411 [hereinafter CSPC]). There does appear rather clear evidence, however, that by November 1730 at the latest “the Court of Admiralty at... Nova Scotia” had become active (Letter, 17 November 1730, Dunbar to Popple, CSPC (1730) at 344). In 1742, Erasmus James Philipps held the office of “King’s Advocate” to the Court (C.B. Fergusson, Minutes of His Majesty’s Council at Annapolis Royal, 1730-1749 (Halifax: Public Archives of Nova Scotia, 1967) at 68). On 27 October 1746, How authored a letter at Annapolis Royal as “Judge of the Court of Admiralty in the Province of Nova Scotia” (PRO, ADM 1/3818 (transcript at NAC)). No case records of the Court of Vice-Admiralty prior to 3 October 1749 have been found.

6. The commission of 20 March 1746 pursuant to which this court was established may be found in Admiralty Muniment Books, PRO, HCA 50/11, f. 42-43r.

7. On 22 August 1746, John Choate was appointed as Judge of the Court while on the same day Benjamin Green and John Clockenbrink were appointed as Register and Marshal respectively. (High Court of Admiralty commissions, Admiralty Muniment Books, PRO, HCA 50/11, f.43v-48r). In 1748, when Cape Breton was returned to France, this Court passed out of existence. Subsequently, the official view at Halifax was that according to “His Majesty’s Instructions, the Islands of Saint John [Prince Edward Island] and Cape Breton, are annexed to, and Dependencies of the Government of this Province, the Jurisdiction of the Court of Vice Admiralty established here accordingly extends to both Islands”. (Letter, 11 November 1788, Parr to Fanning, PANS, RG 1/137, p. 84. A court of vice-admiralty at Quebec was established in 1764 with the appointment on 24 August of James Potts as Judge, William Kluck as Register, John Dalglis as Marshal and, in September, George Suckling as Advocate General (Warrants for payment of salaries in the public accounts of Quebec, 1760-1791, NAC, RG 1, E 15 A). Some sequentially arranged case records of the court at Quebec for various periods of the nineteenth century and scattered records for other years, as well as a few of the court’s register books for the early years of that century, are in the custody of the Administrator of the Federal Court of Canada at Ottawa. On 12 June 1787, a court of vice-admiralty for New Brunswick opened at the City Hall in Saint John, with Gabriel G. Ludlow as Judge, William Wyly as Register, Mather Byles Jr. as Marshal and Ward Chipman as Advocate General (J.W. Lawrence, The Judges of New Brunswick and Their Times (Fredericton: Academienss Press, 1983) at 157). Three years earlier, a list of specific forms and formulae for various commis-
The Nova Scotia Court of Vice-Admiralty was by no means the first of its kind in Britain’s royal or proprietary colonies in North America. One such court had already been established in each of Massachusetts, New York, Pennsylvania, Maryland, Virginia, Georgia and the Carolinas as well as in Bermuda, the Bahamas and certain of the islands of the West Indies including, in 1662, Jamaica. In Newfoundland, courts having some of the features of a court of vice-admiralty had sprung up even earlier. These were personified by the so-called “fishing Admiral”, the master of the first fishing vessel to arrive in the spring of each year. In 1710, after a need was seen for “erecting an Admiralty Court” for Newfoundland, a judge of vice-admiralty was appointed.

What then was the policy which underlay the establishing of a court of vice-admiralty at Annapolis Royal? Nova Scotia was a small colony which, while of much strategic value militarily, contributed only marginally to trade with the mother country. Nevertheless, it was primarily because trade among the North American colonies and with Great Britain was not being conducted in the manner required by Imperial laws, that the need was seen for a court of this kind at Nova Scotia. Moreover, special maritime law remedies were available only in a court of Admiralty—to seamen in wage disputes, to pilots or salvors, to equippers and suppliers of ships and to persons incurring damage from collision; a judge of vice-admiralty could be authorized in time of war to declare a captured enemy vessel a lawful prize; and a court of vice-admiralty could be authorized to enforce penalties and forfeitures for breach of Imperial trade and revenue laws.

In England, the High Court of Admiralty was well established long before the eastern coast of North America was colonized by the British.
During the seventeenth and eighteenth centuries, when Parliament was determining upon ways of enforcing its trade and revenue laws, no attempt was made at interfering with the jurisdiction of the common law courts at Westminster. In the colonies the development of court structures was at an elementary stage, affording the British Parliament a wider choice of possible methods for enforcing such laws. In 1696, Parliament adopted a statute addressing the question of a suitable vehicle for the colonies, which enacted:

... that all the Penalties and Forfeitures before mentioned, not in this Act particularly disposed of, shall ... be recovered ... in ... the Court of Admiralty held in His Majesty's Plantations respectively where such Offence shall be committed, at the Pleasure of the Officer or Informer or in any other Plantation belonging to any Subject of England. ... 12

Until this legislation was adopted very few colonial vice-admiralty courts existed. Afterwards, their number grew in response to the new policy.

Whenever a court of vice-admiralty was called upon to exercise its ordinary civil and maritime jurisdiction in respect of such claims as seamen's wages, salvage, pilotage and collision, or to enforce penalties and forfeitures for breach of Imperial trade and revenue laws, it was known as the "Instance Court". The territorial jurisdiction of the instance court was confined to the province and its dependencies. When its judge heard and determined prize causes, which he could do only upon the express authorization of the Sovereign under a special commission, he did so as the "Prize Court". The prize court's jurisdiction, which ordinarily extended to all vessels taken along the coast or on the high seas and brought within the territory, was much expanded during the time of Dr. Alexander Croke, Judge of the Court of Vice-Admiralty at Halifax between 1801 and 1815. 13 The ancient jurisdiction of a court of Admiralty or of vice-admiralty over crimes committed on the high seas was later withdrawn, because the civil procedural law applying in such a court provided neither for the examination of witnesses in open Court nor for trial by jury. Criminal trials passed to commissioners specially appointed by the Sovereign and, ultimately, to the local courts of judicature. 14 As will be seen, some difficulty was experienced in Nova Scotia about the role of the Judge of Vice-Admiralty in trials before special commissioners.

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12. An Act for preventing Frauds and regulating Abuses in the Plantations Trade (U.K.), 7 & 8 Wm III, c. 22, s. 7, (commonly known as the "Navigation Act, 1696").
13. See text infra at note 114 et seq.
The Nova Scotia Court of Vice-Admiralty was both an instance court and a prize court in the senses just discussed. Its work in both respects is reflected in such records of cases as have come down to us from the period since 1749. None of its earlier records appear to have survived. Those records that are available constitute a rich repository and not only tell much about the work of the Court but of its judges and officials. Other records both in Canada and in England add to a fuller understanding of the nature of the institution and the part it played in the administration of justice in Nova Scotia and, indeed, in Canada, until it was superseded in 1891.

I. Setting up the Court at Halifax

Three months passed after the arrival of the new Governor in 1749 before the Nova Scotia Court of Vice-Admiralty began to exercise its jurisdiction at Halifax. Its Judge and member of Council, Edward How, was already in place but there was need for court officials. How's commission was cast in sweeping language which granted him full power...
First among the officers of the Court was the “Register and Scribe”. At the time the Halifax Court held its initial sitting in October 1749, the office was held by Charles Morris, who was born at Boston in 1711. He had come to Nova Scotia in 1745 to carry out a survey in anticipation of future English settlement, and had served during that same year under William Pepperrell at the first siege of Louisbourg. Morris held several provincial offices at Halifax, including Justice of the County Court, Surveyor General and, from 1755, a member of the Council. In December 1749 the Lords Commissioners of the Admiralty called upon the High Court of Admiralty to cause letters patent to be issued forthwith in favour

15. High Court of Admiralty commission, supra, note 4. How’s commission was “read” in open Court before his surrogate Benjamin Green on 25 November 1749 in the case of The Schooner "Sunflower", an illicit trader (Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/491, p. 5). The commission authorized How, among other things, to “sit and hold Courts” throughout the province; “compel all manner of Persons ... as the case shall require to appear and to answer with power of using any temporal coercion and of inflicting any other penalty or Mulet according to the Laws and Customs aforesaid”; “compel Witnesses in case they withdrew themselves for interest, fear, favour or ill will or any other Cause whatsoever to give Evidence to the truth”; and, within the province, “to fine, correct, punish, chastise and imprison ... in any Goals ... the Parties Guilty and Violators of the Law and Jurisdiction of Our Admiralty aforesaid”. It is generally recognized that the jurisdiction of a colonial court of vice-admiralty during the period in question, despite the broad language of the judges’ commissions, fell under three distinct heads, viz, ordinary civil or “instance” jurisdiction over maritime causes in general, a special jurisdiction during war over prize causes, and jurisdiction concurrent with that of the common law courts over prosecutions for breach of Imperial trade and revenue laws. See e.g. A. Stokes, A View of the Constitution of the British Colonies in North America and the West Indies (1783), (London: Dawsons, 1969) at 270–271. It has been suggested by an eminent jurist that the vice-admiralty courts on the North American continent possessed an even broader jurisdiction than that of the High Court of Admiralty of England (F.L. Wiswall, The Development of Admiralty Jurisdiction and Practice Since 1800 (Cambridge: University Press, 1970) at 70–71). That view was indeed expressed in The Arch Royal (1857), Swa. 269, 166 E.R. 1131. Compare The Apollo (1824), 1 Hagg. 306, 166 E.R. 109 and see also The Rajah of Cochlin (1859), Swa. 473, 166 E.R. 1223; The Australian (1859) 13 Moo. P.C. 132, 15 E.R. 50. An outline of the jurisdiction that was exercised by the Nova Scotia Court of Vice-Admiralty in the early years of the nineteenth century may be found in B. Murdoch, Epitome of the Laws of Nova Scotia, vol 4 (Halifax: J. Howe, 1833) at 103–115. See also, infra note 153. This eminent jurist was mistaken, however, when he suggested, at page 104, that the Judge of Vice-Admiralty “holds a commission from the governor”, when that could only be said of a pro tem. commission issued after the death or retirement of an incumbent in order to enable the Court to function pending the making of a permanent appointment by the High Court of Admiralty upon a warrant from the Lords Commissioners of the Admiralty. For a study of the development of maritime and Admiralty law in Canada, see P.D. Darling, Canadian Maritime and Admiralty Law: From Piracy to Pilferage (LL.M. Thesis, McGill University, 1989) [unpublished].

16. See Sir J. Chisholm, “Three Chief Justices of Nova Scotia” (1948) 28 Colls. of the Nova Scotia Historical Society 148. An Acting Chief Justice, Morris was included as one of the three about whom the author wrote. Morris built a house on what is now the southeast corner of Hollis and Morris Streets in Halifax, and it is his surname that the latter street bears (Acadian Recorder (Halifax), 21 December 1918, 8 November 1919, “Occasional”, PANS, MG 9/79).
of “the said Charles Morris accordingly, in His Majesty’s name, in the manner & form accustomed in the room of the former deceased, and to continue in force ‘til further Order.” These letters patent vested Morris with the

... Offices of Register and Scribe of the acts Causes and Businesses Whatsoever which are now depending or Shall hereafter Depend in Our Vice Admiralty Court within our Province of NOVA SCOTIA or ACADIA in America as well of meer office mixt or promoted as at the Instance of any Party and also the Custody and Keeping of the Registry thereof and of the Records Plaints acts Pleas Muniments Books and exhibits brought in or to be Brought in in all Causes instituted or that shall be instituted in our Said Vice Admiralty Court ... together with all and every the fees Salaries Incomes Regards Rights Profits Commodities Emoluments and Appurtenances Whatsoever to the said office of Register and Scribe of the Acts Causes and Businesses of the Said Court belonging and Appertaining or howsoever due and Accustomed to the same ...

and authorized him to appoint “Sufficient Deputy or Deputies”. His remarkable family would serve the Court in the same capacity for the next seventy-five years.

Next in importance to the Register was the Marshal and Serjeant of Mace, whose duties included the serving of processes, taking custody of persons and things arrested by authority of the Court, selling property which was the subject of the Court’s processes and otherwise executing decrees or sentences. In early October 1749, Cornwallis appointed William Clapham as the Court’s first Marshal and Serjeant of Mace at Halifax, “to Exercise and enjoy the said Office ... with such powers as thereunto appertain and with all fees and perquisites thereunto belonging,

17. Admiralty’s Warrant, 12 December 1749, PRO, ADM 2/1055, f. 128. While these records do not identify “the former deceased”, it is noted that James Gibson was named to the same office in 1729 (see supra note 3).
18. High Court of Admiralty commission, 6 February 1749 (O.S.), Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1491. Morris’s appointment to the office of Register and Scribe, which he was to exercise in October 1749, was probably made by Governor Cornwallis on a pro tem basis until it would be confirmed in London. The title “Register” had become “Registrar” by the early years of the nineteenth century.
19. About 1762, Charles Morris II became the Deputy Register. Later he became the Register of the Court, an office which he held until his death in 1802. Subsequently, the position of Register was held by Thomas Parker of London who chose to have the duties executed by the third Charles Morris, a son of Charles II (PRO, CO 217/86, p. 30 (Mfm. at PANS and NAC)), who continued in office until 1825. In January 1822, John Philip Hood became the Registrar of the Court but in 1825 he appointed Scott Tremain of Halifax as his deputy. (Appointment, 17 October 1825, Memorial of Scott Tremain, 1 March 1837, PRO, HCA 30/814). For the names of holders of this office as well as those of surrogate or deputy judge and marshal in subsequent years, see Belcher’s Farmer’s Almanac (Halifax: McAlpine).
Requiring you faithfully to discharge the duty of the said Office."20 In January 1751, Cornwallis named County Court Justice James Monk to fill the vacancy which Clapman had left.21 The staff of the Court was completed by a crier and a door-keeper.22

The Advocate General of the Court, also known as Procurator General, played a prominent role before the Court as representative of the Crown in all causes in which the Crown had an interest, the leading examples being prize and revenue causes. In January 1751, Cornwallis appointed

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20. Commission from the governor, 3 October 1749, PANS, RG 1/164, p. 27. In England, the title “Serjeant of Mace” or “Serjeant at Mace” signified that the Marshal of the High Court of Admiralty was custodian of the Silver Oar of the Admiralty. The oar is of ancient origin, dating at least to the reign of Elizabeth I. It was originally viewed as a symbol of the Marshal’s authority to arrest persons and things and for leading persons convicted of a crime committed on the high seas to the place of execution, as was done in London in 1802 when a sea captain was hanged for defrauding underwriters by sinking his vessel. Nowadays in London, the use of the Silver Oar is limited to special or ceremonial occasions, such as the opening of the Court or while its judge is sitting in an Admiralty matter. After the use of such a mace was authorized for the colonies, silver oars were struck for the vice-admiralty courts at Bermuda, Boston and New York. No reference has been found in the records of the Nova Scotia Court of Vice-Admiralty to such an oar being used at Annapolis Royal or Halifax. In 1862, a replica of the Silver Oar, except for the Canadian and Ontario coats of arms, was presented to the Judge of the Nova Scotia Court of Vice-Admiralty District of the Exchequer Court of Canada by members of Ontario’s Admiralty Bar and is now in the custody of the District Administrator of the Federal Court of Canada at Toronto. See also, G. Bernard Hughes, “Silver Oar of the Admiralty”, Country Life (10 April 1958).

21. Commission from the governor, 16 January 1751, PANS, RG 1/164, p. 58. Monk, it seems, served as Aide-de-Camp to William Pepperrell at the 1745 siege of Louisbourg where he remained until he moved to Halifax shortly after its founding. (See Acadian Recorder (Halifax) (2 April 1921) “Occasional”, PANS, MG 9/79). In 1762, Thomas Day served as Monk’s deputy (Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/494, p. 2). In June 1769, one William Smith served as the Marshal (Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/495, p. 13), but in September 1774, George Henry Monk was named to the position by Lieutenant-Governor Francis Legge (PANS, RG 1/168, p. 373). Subsequently, in 1776, J.M.F. Bulkeley, the Judge’s son, was appointed Marshal of the Court (Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/495, p. 219), but the following year William Smith was restored to the office (ibid. at 550). In 1785, Stephen H. Binney held the position of deputy (Records of Nova Scotia Court of Vice-Admiralty, PANS, RG 1/497). On 6 September 1797, James Putnam of London was named to the office but chose to deputize Robert Hill of Halifax to act in his stead (PANS, RG 1/501, p. 554), and for several years thereafter both Robert and Charles S. Hill served as deputy marshals. In 1815, Putnam appointed Stephen Wastie Deblois of Halifax as deputy marshal. When Putnam resigned as Marshal in January 1831, he strongly recommended the appointment of Deblois as his successor (Letter, 4 January 1831, Putnam to Maitland, PRO, ADM 1/3823 (transcript at NAC)). His recommendation was accepted. Quaere whether Deblois’s predecessor was the “James Putnam”, son of Judge James Putnam of the Supreme Court of New Brunswick, who went to England from Halifax to serve in the household of the Duke of Kent and died in that country in 1838 at the age of eighty-two. (See Lawrence, supra note 7 at 57).

22. See e.g. the records of the first case heard by the Court at Halifax on 5 October 1749 before Judge How, infra note 31. Today, their functions largely belong to a single individual—the court usher.
the King's Attorney Otis Little "to be His Majesty's Advocate Gen'l in his Vice-Admiralty Court... now vacant by the resignation of Erasmus James Phillips." Little's rights and duties were detailed in his commission, under which he was granted...

...the Office and Place of Advocate Gen'l in the vice Admiralty Court... in all Causes and Business's whatsoever now depending or that shall hereafter depend in the s'd Court as well as meer Office mixt or promoted, as at the Instance of any Party Together with the Fees Incomes Salarys Regards Rights Profits Commodities Emoluments and Appurtenances whatsoever to the same or in any Manner belonging and appertaining or howsoever due and accustomed to the same... and make ordain & constitute his Majesty's Advocate Gen'l in his Court of Vice Admiralty afores'd in all Plaints Pleas Informations suits and Prosecutions whatsoever exhibited and to be exhibited there and in all Acts Causes and Business's whatsoever and in any wise to be expedited therein.

Two years later Little was dismissed by the Governor, who appointed William Nesbitt in his stead upon terms identical to those set forth in the earlier commission. Like Little, Nesbitt held the office of Attorney General simultaneously with that of Advocate General.

Finally, there were the advocates and proctors in Admiralty, who were practically non-existent at the recommencement of the Court at Halifax in 1749, but whose numbers gradually increased. In England, advocates...
and proctors performed distinct functions just as did barristers and solicitors. An attempt to introduce this distinction in Nova Scotia failed to take root. Before very long the lawyers appearing before the Court came to be regarded both as “proctors and advocates”. In practice, admission before the Court was by virtue of being a barrister of the Supreme Court of Nova Scotia, a practice which gained statutory recognition as early as 1811.

Wood, James Monk Jr., George Thomson, Michael Hawkins, Gerald Fitzgerald, Richard John Uniacke Sr., Jonathan Sterns, Joseph Aplin, Edward Brabazon Brenton, James Stewart and Martin I. Wilkins (Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/491–497). As of 1813, those acting as proctors and advocates in the Court were John Harvey Tucker (an English barrister), Lewis M. Wilkins, Simon B. Robie, Crofton Uniacke, Samuel G.W. Archibald, David Shaw Clarke, Charles R. Fairbanks, William Hill and Robert Skipsey Martindale, while two former advocates and proctors were then puisne judges of the Supreme Court of Nova Scotia—Foster Hutchinson and Brenton Halliburton. See J. Stewart, Reports of Cases Argued and Determined in the Court of Vice-Admiralty, at Halifax, in Nova Scotia (London: J. Butterworth and Son, 1814).

27. The Dickensian character Steerforth, not inaccurately portrayed English proctors of the nineteenth century as “a sort of monkish attorney...what solicitors are to the courts of law and equity” and advocates as “men who have taken a doctor’s degree at college...The proctors employ the advocates. Both get very comfortable fees...” The Complete Works of Charles Dickens: David Copperfield, Vol. 1 (New York & London: Harper & Bros.) at 372, 373. Proctors and advocates of the period represented parties in both ecclesiastical and Admiralty matters before the courts at Doctors’ Commons in London. In 1859, the Imperial Parliament adopted a measure ((U.K.) 22 & 23 Vict, c. 6) by which “Serjeants and Barristers-at-Law shall and may have and exercise the same Rights and Privileges of practicing, pleading, and audience in the... High Court of Admiralty as Advocates now have and enjoy in the said Court, and... Attorneys and Solicitors shall and may have and exercise the same Rights and Privileges of practicing in the... High Court of Admiralty as Proctors now have and enjoy in the said Court”.

28. The practice of swearing in advocates and proctors in open Court varied. Sometimes an individual was sworn in as a “proctor” as in the case of Archibald Hinshelwood, and sometimes both as a “proctor and advocate” as in the case of Richard John Uniacke Sr. (Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/491 and 496). In practice, the proctors prepared the papers and usually appeared in Court up to and including the trial itself, while the advocates seemed to be mainly engaged much in the way present-day counsel function in most courts in Canada.

29. See e.g. Records of the Nova Scotia Court of Vice-Admiralty, “Minutes of Proceedings before Charles R. Fairbanks”, 19 August 1834 to 19 December 1836, (PANS, RG 40/9(a)) where the “King’s Advocate moved for the admission of several Gentlemen of the Bar of the Supreme Court as Proctors and Advocates of the Court”. See the Testimonial signed by barristers of the Supreme Court of Nova Scotia “and as such Advocates and Proctors of the Vice Admiralty Court”, 1 March 1839, PRO, HCA 30/814, containing the names of several “Barristers & Advocates” and “Barristers, Advocates & Proctors” as well as “A Return of all Suits commenced and prosecuted since 1840” (hereinafter “A Return of all Suits”), giving the names, places and residences of advocates and proctors as of June 1852. PANS, RG 1/262, f. 4.

30. (U.K.) 51 Geo LIII, c. 3. See also Of Barristers and Attorneys, R.S.N.S. 1851 (First Series), c. 132, s. 10, which, among other things, made “[b]arristers of the Supreme Court... advocates, proctors and solicitors of the... court of vice admiralty”.
II. The Early Years of the Court at Halifax

In the autumn of 1749, the Court was at last ready to hear its first case at Halifax. It had not long to wait. On the very day that William Clapham was appointed Marshal and Serjeant of Mace, a young English sailor, Michael Hendly, approached the Register, Charles Morris, with a view to launching a suit against Ephraim Cook, master of the ship *Baltimore* on which Hendly had served during a voyage between London and Chebucto carrying immigrants. Once in Nova Scotia, Hendly was required by Cook to serve on a brigantine bound for Louisbourg, which he did, and then on yet another ship, which he refused to do. He returned to the *Baltimore* but left in September because “he could serve Cook no longer”. A complaint or “libel” was duly filed before Edward How, who promptly ordered that Cook “be cited to answer... on Thursday next at ten o’clock in the forenoon at the house of Benjamin Green, Esq. in Halifax”.31 The Marshal served a copy of the libel the following day, clearing the way for a trial on October 5. After hearing the evidence and the parties, How decreed that Cook “shall pay to the Complainant wages from the Day of Shipping to the Day of his Dismissal”, that he return Hendly’s bedding and clothes and that he pay the court costs which were fixed.32 The whole matter had passed through the Court within three days. Hendly must have been well satisfied that justice had not only been done but done so speedily.

Michael Hendly’s suit proved to be the only one to come before Edward How at Halifax. In October 1750, How was killed in an ambush while negotiating with the French on the Isthmus of Chignecto, where he had been sent by Cornwallis “to try at a peace with the Indians and to get our prisoner out of their hands”. His superior knowledge of the adversaries stood him not. Shortly after parleying with a French officer across a narrow river (the Missaquash) under a flag of truce, “a party that lay perdue fired a volley at him and shot him through the heart”.33

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31. Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/491, p. 1. Throughout its long history, the Court sat in several other Halifax locations: in the first Court House at the southeast corner of Argyle and Buckingham Streets until that building was destroyed by fire in July 1789; in rented premises in the Cochran Building on Hollis Street where the old Post Office building now stands, from May 1790 until Province House was opened to the public in 1820; in Province House until the new Court House was ready for occupancy in 1860; in this new Court House on Spring Garden Road until the Court was abolished in 1891. It is not clear where the Court sat immediately following the fire of 1789, although it may have done so in the Golden Ball Tavern at the southwest corner of Hollis and Sackville Streets where the Court of Sessions then sat. From time to time some of the judges held Court in their own homes, Richard Bulkeley being the most notorious example (see *infra* note 97).

32. *Ibid*.

When the second matter reached the Court on 8 November 1749, a prosecution brought by William Nesbitt for forfeiture of the schooner *Seaflower* on account of the breach of Imperial revenue laws, “the Honourable Benjamin Green, surrogate Judge of the said Court” presided.\(^{34}\) Green, the former Register of the Cape Breton Court of Vice-Admiralty, was also a member of the Council, Provincial Treasurer and Naval Officer at Halifax. Both as surrogate and as Judge of the Court\(^{35}\) in his own right, Benjamin Green heard a variety of cases over the next year and a half.\(^{36}\) His performance was well accepted, except by those whose

\(^{34}\) Records of the Nova Scotia Court of Vice-Admiralty, PANS RG 1/491, p. 5. Green was appointed as Judge by High Court of Admiralty commission, 9 September 1751, Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/492. It was customary for the Admiralty to endow the principal judge in his commission “with Power of Deputing and Surrogating in Your Place for and concerning the Premises one or more Deputy or Deputies as often as you shall think fit”. By (U.K.) 56 Geo III, c. 82, respecting surrogates of vice-admiralty courts abroad, “... all judicial Acts of Surrogates... shall have the same Force and Validity... as if the said Acts had been done by the Authority of Judges regularly appointed by the Lords Commissioners of the Admiralty”.

\(^{35}\) High Court of Admiralty commission, *supra* note 34. Green, who had served with William Pepperrell at the siege of Louisbourg in 1745, was a graduate of Harvard and a Boston merchant. For Green generally, see *Canadian Biography*, vol.4 at 312–13.

\(^{36}\) Among the claims asserted in the Court during Green’s time as Judge were those of seamen’s wages, illicit trading, cargo damage and salvage. As early as 1750, an appeal was launched from one of his decrees (Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/491) and in another case some attempt appears to have been made to have the Council as the General Court for the province prohibit Green from proceeding. The argument here was that if the claim was for a breach of a charterparty agreement rather than of a bill of lading, it was beyond the jurisdiction of the Court assuming that the charterparty had been executed within the body of the County of Suffolk, Massachusetts Bay and, if so, should be “tried by a jury in the other Court” (*ibid.* at 38). The 1761 case of *Hickey v. Advocate General* in the Court of Chancery, exemplifies a strategy sometimes resorted to with a view to prohibiting the Court of Vice-Admiralty from exercising jurisdiction vested in it by the Imperial Parliament. Advocate General William Nesbitt took out a libel in the Court of Vice-Admiralty against Hickey, the master of the schooner *Dolphin* of New York, as well as against the ship and cargo, on the ground of exporting war provisions contrary to a British statute. When proctor James Brenton, instructed by Halifax agent Malachy Salter, failed to persuade Judge John Collier that the Court of Vice-Admiralty was without jurisdiction, he presented a petition to the Council as Court of Chancery for a writ of prohibition. Brenton’s submission, relying on statutes passed in the reigns of Richard II and Henry IV, was to the effect that the Court of Vice-Admiralty had no jurisdiction over “penalties for the breach of any Act or Statutes committed on shore or for any other cause whatsoever whether by land or water happening arising or Issuing within the body of any country within the Dominions of the King of England” and that the case should be heard and determined in “some one of his Majestie’s Courts of Common Law”. Nesbitt pointed out that the statute did confer jurisdiction in the matter on the Court of Vice-Admiralty as well as on the courts of common law. (Court of Chancery Fonds, PANS, RG 36 “A”, Box 375, file 1877). Brenton’s position echoed the seventeenth century views of Sir Edward Coke in the third part of his *Institutes of the Laws of England* (London, 1817), para. 3, where he pontificated that charterparty disputes were “to be tried and determined by the ordinary court[s]
interests were not thereby served. In 1753, however, London took the view “that it is contrary [to] Law and inconsistent with his Majesty’s Instructions for the same person to hold the Offices of judge of the court of Vice Admiralty and Naval Officer”. Green was put to a choice. Having “a large family to care for” and no salary attaching to his judicial office, he elected “to resign not without much regret the place of Judge of the Admiralty the profits of which are very precarious & have hitherto been but small”.

Governor Peregrine Thomas Hopson moved quickly to fill the vacancy by choosing John Collier, a native of England and a “Gentleman well versed in the Law and every Way Qualified”. While Collier, like his predecessors at Halifax, had no formal legal training, he had acquired significant experience in government and in the judiciary as a member of the Council, a Justice of the Peace in 1749, Chief Justice of the County Court (afterwards the Inferior Court of Common Pleas) at Halifax in 1750, Register of Wills and Probate in 1751 and Provincial Register in of common law” and that the High Court of Admiralty should be prohibited from hearing them. See also T.F.T. Plucknett, A Concise History of the Common Law, 5th ed. (London: Butterworth, 1956) at 197–98, 662–64.

37. One of these, Joshua Mauger, resolutely rejected the authority of the Court of Vice-Admiralty in a revenue case by refusing to allow his warehouse to be searched by the Marshal of the Court for suspected contraband goods because, in his view, the Court’s authority “does not Exceed the high water mark upon the Seaward, & not on Land”. (Letter (n.d.) Mauger to Cornwallis, PRO, CO 218/4, p. 85 (Mfm. at PANS and NAC)). Mauger was His Majesty’s Victualling Agent at Halifax. When his complaint reached the ears of the Lords Commissioners of Trade in London they sharply instructed Cornwallis to ascertain whether Mauger’s complaint “appears to him to be such in all the circumstances as may make it advisable for the Commissioners of the Victualling to discontinue their contract with him” (Letter, 10 March 1752, Hill to Cornwallis, PRO, CO 218/4, p. 85 (169) (Mfm. at PANS and NAC)). See also Mauger’s letter (n.d.) to Green in the case of The Catherine, a revenue case, PRO, CO 218/4, p. 111 (Mfm. at PANS and NAC). Mauger had apparently earned the dubious reputation in these years as “King of the Smugglers” (Acadian Recorder (Halifax) (7 August 1920), “Occasional”, PANS, MG 9/79)). As to Mauger generally, see Canadian Biography, vol.4 at 525–29.

38. Letter, 4 April 1753, Hopson to Lords Commissioners of Trade, PANS, RG 1/220. The need for judicial independence seemed not to have otherwise troubled the British Government during the early years of the Court. The office of Naval Officer, which was concerned with clearing ships into and out of the port, dated at least to the reign of Charles II. An incumbent was required to give security to the Commissioners of the Customs for the faithful performance of his duties. (See (U.K.) 7 & 8 Wm III, c. 22, s. 5).


40. Commission from the governor, 11 April 1753, PANS, RG 1/164, p. 22. In this way, a provincial governor could fill a vacancy on a pro tem basis thereby allowing the Court to continue to function. It remained the prerogative of the Lords Commissioners of the Admiralty to make a permanent appointment under a warrant directed to the High Court of Admiralty of England which had authority to issue a commission in the form of letters patent.

41. Letter, 14 April 1753, Hopson to Lords Commissioners of Trade, PANS, RG 1/220, p. 8.
1753. His selection by the Governor was very soon afterwards approved by London.\footnote{Admiralty’s Warrant to the High Court of Admiralty, 16 May 1753, PRO, ADM 2/1053, f. 268. A copy of Collier’s Imperial commission is not among the records of the Court at Halifax.}

It was during Collier’s time as Judge of Vice-Admiralty that the newly established House of Assembly sought to bring his Court within its control upon the pretext that the fees taken by the Judge and officers were excessive. The Assembly resolved that the “Register of the Admiralty . . . forthwith lay before this House, a List of all Fees heretofore Demanded and taken . . .”.\footnote{Nova Scotia, House of Assembly, Journal and Proceedings (4 December 1758) [herein-after JPNSHA].} Collier refused to comply. In his view, “the fees in the Court of Admiralty [did not] fall under the Consideration of the House” as, indeed, his commission made clear by granting him “the power of taking and Recovering all and every the Wages, Fees, Profits, Advantages and Commodities whatsoever, and in any manner due and Anciently belonging to the said Office, According to the Custom of Our High Court of Admiralty of England . . . “.\footnote{JPNSHA, 5 December 1758.} George Suckling, a member of the Assembly and a proctor in Admiralty who had practised before the Court, accused Collier and the officers of the Court of “taking such fees as were Grievous and Oppressive”.\footnote{JPNSHA, 6 December 1758.} The Assembly dispatched a message asking that the Governor require the Register to “lay before us an exact List of all Fees Commissions poundage and other perquisites whatsoever demanded and recovered . . .and from what authorities”.\footnote{Ibid.} Obviously stung, Collier moved in the Council that Suckling waive his privilege by making good his charge before that body,\footnote{Nova Scotia, Minutes and Proceedings of the Council (6 December 1758) [hereinafter MPNSC].} but the Assembly would not agree. In the end, the Council rejected outright the Assembly’s intervention, stating:

That if the Judge, Register or Marshal of the Court of Vice Admiralty, had given in to the Assembly on Account of their Fees and Prequisites, as demanded, it would have been unconstitutional, an high Contempt of His Majesty’s Instructions to His Governor and contrary to the express Authority given to that Court by His Majesty’s Commission. . . .\footnote{MPNSC, 29 March 1759.}

Despite this rejection, the Assembly could not resist a parting shot. The Council’s opinion, in its view, was: “Void of any proof or Argument to Support it . . . when We Consider that [it] at present Consists of no more
than four Members, one of whom was formerly a Judge of the Court of Admiralty, another the present Judge and a third the Register of that Court".  

The Assembly was not alone in opposing the scale of fees prevailing in the Court of Vice-Admiralty. In 1763, the Admiral at the Halifax station reported that "[f]ees taken by the Vice Admiralty Court of this Province upon the condemnation of illicit traders, have always been deemed exorbitant, and looked upon by the Captains concerned as a Grievance and Imposition". The Admiral had his own axe to grind. Under a new law of 1763, officers and crew of a capturing ship were entitled to a substantial share of sales proceeds. The Navy was decidedly unhappy with New York and New England vice-admiralty judges, who "still persist in condemning and distributing...by such Statutes as make no Provision for the Commander in Chief, the Officers and the Ships Companies" and with "American Lawyers, Judges and Governors [who] will not allow us any Benefit from the last new Act, as they may say that nothing is the Sea but that part of the Ocean which is without the Coast, whereas we flatter ourselves that the true meaning and Intention of the Legislature is, that we should share in every Seizure we make afloat".

As Judge of Vice-Admiralty, Collier had to determine a mix of cases which included claims for seaman's wages, illegal trading, pilotage, salvage, derelict, freight, assault at sea and, during the Seven Years' War, many prize cases pursuant to a special commission from the Admiralty in London. Although John Collier's appointment ran until his death in April 1769, he heard his last case in the Court of Vice-Admiralty in June

49. JPNSHA, 2 April 1759. The reference here, of course, was to Benjamin Green, John Collier and Charles Morris respectively. The fees complained of were "in cases of Seizure and in all others where the money passes through the said court", five percent for condemnation, five percent for poundage and two percent on sales "over and above other Great Fees to the Judge, Register and Marshall of the said Court frequently amounting together to more than a Quarter part in Value of the matter in Demand" (JPNSHA, 26 March 1759).

50. Letter, 26 December 1763, Colville to Stephens, PRO, HCA 30/814. To support the complaint, the Admiral submitted an account of the condemnation of a vessel which had been seized by the Royal Navy in Gaberous Bay, Cape Breton, which had been made available by Judge Collier who had explained "that none of these Fees are established in Law but that the Court pleads Prescription and Example of the Courts in New England". On the positive side, the Admiral noted that Judge Collier had paid "strict Observance to the late Act of Parliament for the Distribution of Seizures, which we have reason to apprehend will not be duly regarded at Boston & New York". The "late Act" was (U.K.) 4 Geo III, c. 15. A table of fees was, in fact, in use from the time the Court was set up at Halifax in 1749. (See The Schooner Hiram, in Stewart, supra note 26 at 586, 590).

51. See also letter, 22 September 1764, Colville to Stephens, PRO, ADM 1/482, p. 393 (Mfm. at PANS and NAC).

52. Ibid.
1764. In May of that year, he was appointed a Master of the Court of Chancery and, in June, the Senior Assistant Justice of the provincial Supreme Court. There then commenced a period of inactivity in the Court of Vice-Admiralty, which did not come to an end until after Collier’s death in 1769. The reasons for this inactivity are not clear, but they may have been related to the creation of another admiralty court at Halifax at that time.

III. A Court of Vice-Admiralty for all America

London had come to the realization by 1763, that losses being suffered by the national treasury due to illicit trading in North America and from the colonies not contributing towards the recently incurred war debt, required that a new approach be found for dealing with the problem. The foremost difficulty was widespread smuggling along the eastern coast of the continent, despite the best efforts of the Royal Navy to contain it. A secondary problem, in the Navy’s view, prevailed in:

... the Admiralty Courts of New York and New England. The Judges are generally supposed to be too much interested in the Welfare of their Neighbours; and the Practice of smuggling has become so common, that it almost ceases to be looked upon as criminal or unfair. Besides 'tis too much to be apprehended, that the Judges would be intimidated from giving an impartial Verdict, by the Threats and well known mobbish Disposition of the Inhabitants. I believe all these Inconveniences might be very well avoided, by sending the Prizes to be tried at this Place [Halifax]...

The problem of illegal trading was not new. Parliament had tried to address it by tightening enforcement procedures and vesting colonial courts of vice-admiralty with exclusive jurisdiction over prosecutions for breach of Imperial trade and revenue laws occurring in the colonies.

In 1763, the Lords Commissioners of the Treasury moved quickly by recommending a number of internal reforms which would require all officers “belonging to the Customs in America and the West Indies to be fully instructed in their Duty to repair forthwith to their respective Stations and constantly reside there for the future” and “to give an Account as well of their own proceedings as of the Conduct of the Officers under them, and inform Us likewise of any Obstructions they may meet in discharging the Business of their respective Offices”. Changes in the statute laws were recommended along the following lines:

53. PANS, RG 1/163.
54. Ibid. at 277.
55. Letter, 25 October 1763, Colville to Stephens, PRO, ADM 1/482, p. 304 (Mfm. at PANS and NAC). See also letter, 21 December 1763, Colville to Stephens, ibid. at p. 326.
And lastly it appears to Us highly necessary, that there should be Established by Law, a new and better method of condemn'g Seizures made in the Colonies. The Commissioners of the Customs have reported to Us, That they have received various Complaints of great difficulties and partialities in the Tryals on these Occasions, and the several Statutes in force, from the 12th of Charles the second to the third of your Majesty vary so much both as to the Mode and place of Tryal and the Officers of the Revenue when they have made a Seizure; cannot but be under great doubt and uncertainty in what manner they should proceed to the condemnation of it; It is therefore humbly submitted to Your Majesty whether from the importance of this Object it would not be of the greatest publick Utility that an uniform Plan be prepared for establishing the Judicature of the Courts of Admiralty in that Country under persons qualified for so important a trust in Order that Justice may hereafter in all Cases be diligently and impartially administered, and that such Regulations as Parliament may think proper to make may be duly carried into Execution.57

The Crown’s law officers advised that a Vice-Admiral over all of North America could be appointed “with a Court, and proper Officers, who may exercise a concurrent jurisdiction with the Courts of Vice Admiralty already established there” but that any new Court could not entertain jurisdiction “where particular Acts of Parliament have confined the Recovery of Penalties and Forfeitures to local Jurisdiction”.58 Within these broad guidelines Parliament could act, which it did in 1763. The statute adopted provided that from and after 29 September 1764, all prosecutions for breach of Imperial trade and revenue laws in the North American colonies

... may be prosecuted, sued for, and recovered, in any Court of Record, or in any Court of Admiralty in the Colonies or Plantations where such Offence shall be committed, or in any Court of Vice Admiralty which may or shall be appointed over all America (which Court of Admiralty or Vice Admiralty are hereby respectively authorized and required to proceed, hear, and determine the same) at the Election of the Informer or Prosecutor.59

It remained for London to establish the “Court of Vice-Admiralty... over all America”. There had first to be found “a Civilian of eminence in his Profession with a proper Salary sufficient to maintain his Dignity” who would carry the august title of “Commissary Deputy & Surrogate in and throughout all and every the Provinces of North America, and Maritime Parts thereof and thereto adjacent whatsoever”60 and would

57. Ibid. at 285.
58. Ibid. at 281–82.
59. (U.K.) 4 Geo III, c. 15, s. 41.
60. Transcript of the Shelburne MSS, supra note 56 at 284. Under the infamous Stamp Act (U.K.), 5 Geo III, c. 12, concurrent original jurisdiction for recovery of penalties for its breach was conferred on courts of record and provincial courts of admiralty, as well as appellate
The Admiralty Court in Colonial Nova Scotia

possess "Concurrency of Powers with the several Judges of the Vice-Admiralty Court already appointed in each Province" but with no appellate jurisdiction. In due course William Spry, a Doctor of Civil Law of Doctors' Commons, was chosen at an annual salary of £800 sterling, and was formally appointed under a commission from the High Court of Admiralty on 15 June 1764. Halifax became the new court’s venue largely because of its being the principal North American station of the Royal Navy, whose duty it would be to effect seizures under the new legislation.

Dr. Spry soon repaired to Halifax where he arrived in late September 1764, shortly after the officers of his Court had been appointed. The Court was opened on 9 October 1764 amid considerable pomp and ceremony:

The Right Worshipful William Spry, Doctor of Laws, in his scarlet Robes attended by his Lordship Jonathan Belcher, Esq., Chief Justice of His Majesty’s Supreme Court, etc. likewise in his scarlet Robes the Gentlemen of the Law in their Gowns and Bands, went in Procession to the Court House where His Majesty’s Commission under the Seal of the High Court of Admiralty of England... was read and published; after which the Court being opened he appointed the Deputy Register and Deputy Marshall of his Court, and... admitted the Gentlemen who had applied to act as Advocates and Proctors. At the opening of the Court was present the Right Hon. Lord Colville, the Gentlemen of the Army and Navy and Ladies of the Place.

In the evening,

... an elegant Assembly was given by Dr. Spry and Lady, to the Gentlemen and Ladies, and a very grand cold Collation. The whole was conducted with great Elegance and Propriety, and the Evening concluded to the general satisfaction of all present.

The following week, lawyer and Rhode Island native James Brenton, the Court’s Deputy Register, placed a notice in a number of colonial newspapers with a view to informing the public of the new Court at Halifax "where all Causes, civil and maritime, arising in any Province of

jurisdiction on the Court for all America in all cases originating in provincial vice-admiralty courts.

61. The High Court of Admiralty commission by which Dr. Spry was appointed has not been found. However, this date was published in a notice of 16 October 1764 which appeared in the Boston Gazette and Country Journal (12 November 1764). See infra note 65.

62. In August, Spencer Percival was named as Register and Charles Howard as Marshal of the new Court. (C. Ubbelohde, The Vice-Admiralty Courts and the American Revolution (Chapel Hill: University of North Carolina Press, 1960) at 53–54.)


64. Ibid.
America, or the maritime Parts thereof or adjacent thereto may be prosecuted".  

Dr. Spry’s Court was now ready to try cases but cases were slow in coming. In the colonies to the south, there was much resistance to the Court’s main purpose, with the result that trade and revenue prosecutions tended to gravitate to the provincial courts of vice admiralty despite the view of the Crown’s law officers that they fell within the exclusive original jurisdiction of Dr. Spry’s Court. The new policy was quite obviously a failure. Martin Howard of Newport, Rhode Island, but purporting to be of Halifax, wrote a letter which shows the “hold one’s nose” attitude which prevailed in some quarters:

There is, I own, a severity in the method of prosecution, in the new established court of admiralty, under Dr. SPRY, here; but it is a severity we have brought upon ourselves. When every mild expedient, to stop the atrocious and infamous practice of smuggling, has been try’d in vain, it is justifiable in making laws against it, even like those of Draco, which were written in blood. . . .

By the end of 1766, London was already considering ways of “restructuring” the jurisdiction of the courts of vice-admiralty in America, as a result of which the following was recommended:

It is humbly proposed to revoke without further delay the Vice Admty Court of general Jurisdiction over all America still subsisting at Halifax & by that means to reduce this necessary Evil within the bounds which it kept before the late innovations, & in order to give Credit to the Proceedings & to reconcile the Americans to the decisions of the Provincial Courts of Vice Admty, It is proposed to regulate & reform the fees of the Officers which are at present settled with so little regard to justice or Equality that they depend in a great measure upon the Condemnation of the Ship or the Conviction of the Offender, . . .

A new posting would have to be found for Dr. Spry—perhaps as judge of the provincial court of vice-admiralty at New York. However, in June 1767 London appointed him Governor of Barbados.

In late December 1767, Dr. Spry approached Admiral Hood requesting that a ship of the Halifax squadron be put at his disposal to carry him and his retinue to the new appointment in Barbados. In the expectation

67. Quoted in Lionel H. Laing, “Nova Scotia’s Admiralty Court As a Problem of Colonial Administration” (1935) 4 Canadian Historical Review 158.
69. Letter, 20 December 1767, Hood to Stephens, PRO, ADM 1/483, p. 30 (Mfm. at PANS and NAC).
that his Court would continue, Dr. Spry appointed Joseph Gerrish, a Halifax merchant, member of the Council, justice of the Inferior Court of Common Pleas and Naval Storekeeper in charge of the day-to-day operations of the Halifax Careening (or Dock) Yard to act as surrogate in his absence. The step did not escape the attention of the Lieutenant-Governor of the day, who raised the question whether Dr. Spry could make such an appointment.70

In the event, the decision of 1766 to revoke the jurisdiction of Dr. Spry's Court, led to the adoption of another policy under an Act of Parliament passed two years later. By this statute, from and after 29 September 1768

... all Forfeitures and Penalties inflicted by any Act or Acts of Parliament relating to the Trade of Revenues of the British Colonies or Plantations in America, may be prosecuted, sued for, and recovered, in any Court of Vice-Admiralty appointed, or to be appointed, and which shall have Jurisdiction within the Colony, Plantation, or Place, where the Cause of such Prosecution, or Suit shall have arisen.71

This measure would spell the end of Dr. Spry's Court.

Not surprisingly, Dr. Spry left little mark at Halifax due in large part to his having had so very little to do as Judge of the new Court.72 He had ingratiated himself with the Governor, Colonel Montagu Wilmot, who in November 1765 granted "the Right Worshipful William Spry LL.D. Judge of his Majesty's Court of Vice-Admiralty over all America", a lot of land near Halifax.73 The following year, in recommending Dr. Spry for a vacancy on the Council, Wilmot described him as "a learned and ingenious Gentleman and well deserving of a mark of his Majesty's favour".74 The appointment was never made.

The apparent inactivity of the Nova Scotia Court of Vice-Admiralty during Dr. Spry's time did not mean that the Court had been allowed to die. The evidence points the other way: John Collier's appointment remained in effect until his death in 1769 when his successor was named

70. Letter, 20 January 1768, Franklin to Shelburne, PRO, CO 217/39, p. 22 (Mfm. at PANS and NAC). See also Ubbelohde, supra note 62 at 105. Gerrish built a house in the "north suburbs" of Halifax, on what became and has remained Gerrish Street, between Barrington and Water Streets (Acadian Recorder (Halifax) (21 December 1918) "Occasional", PANS, MG 9/79).
71. (U.K.) 8 Geo III, c. 22. The appearance of the first preposition "of" in the second line is probably a misprint, given that the phrases previously used in this Act were either "Trade and Revenues" or "Trade or Revenues".
72. See Ubbelohde, supra note 62 at 82.
73. Land grant, supra note 62 at 105. Gerrish built a house in the "north suburbs" of Halifax, on what became and has remained Gerrish Street, between Barrington and Water Streets (Acadian Recorder (Halifax) (21 December 1918) "Occasional", PANS, MG 9/79).
74. Letter, 13 February 1766, Wilmot to Lords Commissioners for Trade, PANS, RG 1/37, f. 47.
"in the room of John Collier, Esq., Deceased"; Dr. Spry's Court was granted appellate jurisdiction from decisions of provincial vice-admiralty courts in trade and revenue cases under the Stamp Act suggesting, perhaps, that the Nova Scotia Court had retained its capacity in such cases; the new governor of Nova Scotia was instructed during the same year to "signify to the officers of Our Admiralty Court in Nova Scotia" not to demand or exact fees in prize cases beyond the limit of those exacted in the High Court of Admiralty of England; in 1813, the Acting Registrar of the Court, Charles Morris III, stated that he and his father, who had become Deputy Register about 1762, had together held the position "for upwards of 50 years". Any lingering question arises from the curious and, as yet, unexplained circumstance that there is at Halifax an absence of records of the Nova Scotia Court of Vice-Admiralty from June 1764 to May 1769. An explanation awaits. That explanation could be as simple as the records being lost when the old Halifax Court House was destroyed by fire in 1789, or their being mislaid. The most likely explanation is that no records were created because the Court was in abeyance, given that John Collier's appointment and term of office as Senior Assistant Justice of the Supreme Court of Nova Scotia coincided roughly with those of Dr. Spry's.

Before the Nova Scotia Court of Vice-Admiralty would be reactivated, London took steps to implement the 1768 legislation. It decided that not one but four vice-admiralty courts for the North American colonies—corresponding with the number of districts—would be established. One of these would be based at Halifax which district would consist of Quebec, Newfoundland and Nova Scotia and the adjacent waters. The jurisdiction of this Court, according to the Judge's commission, extended thus:

In all Causes arising within the Limits of Our Colonies of Quebec, Newfoundland and Nova Scotia and within three Leagues of the Shores thereof, And Also with Original Jurisdiction in all Causes Arising from the Capture of Ships to the Northward of the Latitude of Forty three Degrees Fifteen Minutes North or of ships whose Port of Destination shall be within either of Our said Colonies, Also with Jurisdiction in Appeals from the

75. High Court of Admiralty commission, 8 September 1769, Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/492.
76. Supra note 60, s. 58. This statute was repealed by (U.K.) 6 Geo III, c. 11.
77. Royal Instructions to Lord William Campbell, (para. 67), 30 August 1766, PRO, CO 218/7, p. 108 (Mfm. at PANS and NAC).
78. Answer of the Registrar in The Schooner Hiram, Records of the Nova Scotia Court of Vice-Admiralty, NAC, RG 8, IV, Vol. 128.
Courts of Vice Admiralty Established or to be Established in either of Our Colonies before mentioned. ... 79

By the terms of these letters patent, the decrees of this Court would be subject to appeal to the High Court of Admiralty of England and from that Court to the High Court of Delegates. 80

In October 1768, Jonathan Sewall of Boston was appointed Judge of the new district Court at Halifax. He preferred to reside in Boston, but travelled to Halifax in the summer of 1769 in order to appoint the peripatetic Joseph Gerrish as his surrogate. 81 Later, in 1773, Sewall appointed James Brenton as surrogate. 82 The place of registration of Sewall’s commission must have caused some consternation in Halifax officialdom, for it fitted neatly neither in the pages of the provincial Commissions Book nor in the records of the Nova Scotia Court of Vice-

79. High Court of Admiralty commission, 17 October 1768, Halifax County Land Registry, Book 9, p. 263. See also Admiralty Muniment Books, PRO, HCA 50/12, f. 91–94. The commission of 4 August 1768 establishing Jonathan Sewall’s Court, may be found in the same Books, PRO, HCA 50/12, f. 85–87.

80. In instance cases, appeals from courts of vice-admiralty lay to the High Court of Admiralty of England, as was affirmed in The Fabius (1800), 2 C.Rob. 245, 165 E.R. 304. Prior to 1813, they were sometimes entertained by the Privy Council. There was a further appeal from the High Court of Admiralty to the High Court of Delegates which was composed of commissioners or delegates appointed by commission under the half-seal. In prize cases, the appeal was directly to the Commissioners of Prize. However, appeals to the High Court of Delegates and to the Commissioners of Prize were, by (U.K.) 2 & 3 Wm IV, c. 92, transferred to the King in Council. By (U.K.) 3 & 4 Wm IV, c. 41, the Judicial Committee of the Privy Council was established and section 2 of that statute enacted that all appeals from courts of Admiralty or of vice-admiralty or from any other court in His Majesty’s dominions abroad which could be made to the High Court of Admiralty or to such Commissioners, should be made to the King in Council and not to the High Court of Admiralty. Finally, section 22 of the Vice-Admiralty Courts Act, 1863, (U.K.) 26 Vict, c. 24 provided for appeals from courts of vice-admiralty to Her Majesty in Council which were subject to a period of limitation of six months from the date of the decree. See H. Jenkyns and Albert Gray, “Memorandum as to Appeal to the Queen in Council”, 16 December 1886, NAC, RG 13/2371. See also J.H. Smith, Appeals to the Privy Council from the American Plantations (New York: Octagon Books, 1950) at 177 et seq.

81. For Gerrish generally, see Canadian Biography, vol.4 at 291–92. The Lords Commissioners of the Admiralty had apparently recommended Gerrish “... as a proper person to be continued in the employment he at present fills, as Judge of the Vice Admiralty Court at Halifax”, (Letter, 7 October 1768, Hood to Stephens, PRO, ADM 1/483, p. 146 (Mfm. at PANS and NAC)). See also Ubbelohde, supra note 62 at 139. Worth mentioning here is that in the short period that elapsed between Dr. Spry’s departure from Halifax in January 1768 and the appointment of Jonathan Sewall in October of the same year, a prosecution for breach of Imperial revenue laws which had occurred at Petit de Grat in Cape Breton, was brought by the Attorney and Advocate General William Nesbitt in the Supreme Court of Nova Scotia upon the libel of Joseph Gerrish. Supreme Court of Nova Scotia Fonds, PANS, RG 39, Box 7, 1768–1769.

82. Commission from Sewell, 27 October 1773, PANS, RG 1/168, p. 343. Brenton, who has been described by a noted historian as “the ambitious Deputy Judge of Vice Admiralty” (J.B.
Admiralty. A place was finally found for it in the books of the Halifax County Land Registry Office.

IV. Richard Bulkeley's Court

In the late spring of 1769, following the death of John Collier in April, the Nova Scotia Court of Vice-Admiralty was reactivated under Richard Bulkeley, a native of Ireland, who had laboured for many years in the provincial civil service at Halifax. Bulkeley held a variety of positions including Provincial Secretary and member of Council and he later became Master of the Rolls in Chancery. In May 1769, Governor Lord William Campbell appointed Bulkeley as the new Judge of Vice-Admiralty under a provincial commission, a step which was soon afterwards confirmed by London. Bulkeley was assisted by Charles Morris II, who had assumed the post of Deputy Register about 1762 and by William Smith whom Bulkeley had appointed as the Marshal of the Court.

The first case to be heard by Richard Bulkeley, on 3 June 1769, involved the prosecution of an illicit trader at the suit of Advocate General William Nesbitt. It gave no difficulty. However, when the next two cases
of the same kind reached him in July of the same year, Bulkeley was met with objections to his jurisdiction. James Monk, the respondents’ proctor, argued that “full power of authority” over such causes had been granted to Jonathan Sewall under his commission of 17 October 1768, and that Jonathan Sewall hath proceeded to this place & taken the several Oaths... and made publick the Commission... which appears on Record in his said Court and in the Register’s office of the Province... and hath legally and duly appointed Joseph Gerrish Esq. his deputy & Surrogate to Act & Transact all and all manner of Civil & Maritime Business and who is upon the spot to carry the Execution of the Commission... into full force & Effect.

Bulkeley dealt with the objections peremptorily: the suits, he ruled, “should be retained” and “more Especially as no Publication of a Commission appointing such a Court has ever been made”. Two months later he took care that his own Imperial commission was “published” in open Court “in the presence of William Nesbitt, Esq., Advocate General, James Brenton, Esq., Sol’tr General and Richard Gibbons, Jun’r, Esq., King’s Proctor and other officers of the Court” and duly recorded.

Between 1770 and 1775 only two cases of illicit trading came before Richard Bulkeley for adjudication. The 1779 case of The Ship Betsy illustrates the Court’s procedure in such prosecutions. In January of that year, the Sloop of War Hunter suspected the Betsy, then lying alongside at Simeon Perkin’s store on the Liverpool waterfront, of engaging in illicit trading. The matter was reported to William Nesbitt, the Advocate General, who instituted a forfeiture prosecution in the Court of Vice-Admiralty by filing of a libel; the Court allowed the libel and ordered the Marshal to affix notice of the suit to the ship’s main mast and to cite all interested persons to appear on a date and at a time appointed; witnesses

89. Ibid. at 45, 72.
90. Ibid. at 46, 73. The Court under Bulkeley seemed somewhat uncertain with respect to allowing appeals to go forward from its judgments or decrees to the new district Court at Halifax. Thus in July of 1769, Bulkeley overruled a motion of a proctor “for an appeal to the Court of Admiralty of Appeals at Halifax... as no Publication of any Commission establishing such a Court had been made” notwithstanding that Jonathan Sewall’s commission of 17 October 1768 (supra note 79) had been registered at the Halifax County Land Registry on 5 July 1769. Bulkeley nevertheless allowed a further motion “that an appeal be entered... to the High Court of Admiralty of England”. (Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/495, p. 59.) This initial uncertainty seems to have been cleared up at least by 5 August 1771, when Bulkeley allowed a motion by James Brenton (Solicitor General) on behalf of Joseph Gerrish “for an appeal to the Court of Vice-Admiralty of Appeals at Halifax from the decree of this Court made and pronounced the 22 day of July last...”. (Ibid. at 199).
91. Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/495, p. 99.
on behalf of both sides were examined by the Register upon interrogatories; the ship’s papers and the answers to the interrogatories were read in open Court before Judge Bulkeley, after which George Thomson, proctor for the master, entered a claim for the ship’s release and an answer to the libel; further evidence was taken, filed and read in open Court; when the case was ready for decision, the Crown moved that “the Court would pass Sentence in the said Cause and Decree that the Ship & Cargo as Forfeited with Costs for the Promovent”; Bulkeley reserved his decision until April 26 and then decreed accordingly.

Richard Bulkeley disposed of the usual run of cases as Judge of Vice-Admiralty, including claims for seamen’s wages, salvage, assault at sea,

93. Ibid. In such proceedings the Crown was referred to as the “Promovent” while the respondent was called the “Impugnant”. Civil law procedure, if strictly applied, allowed the Register to administer interrogatories in the absence of proctors at whose instance the witnesses were being examined (A.A. Stockton, Reports of Cases Decided in the Vice-Admiralty Court of New Brunswick (St. John: J & A McMillan, 1894) at lxvi). At Halifax, however, it was the practice of the Register in cases of any consequence to notify the person at whose instance an examination would be taken, or the proctor of that person, and to allow his attendance at the examination but not his participation therein (Affidavit, 19 July 1794, Richard John Uniacke, Records of the Nova Scotia Court of Vice-Admiralty, NAC, RG 8, IV, Vol. 4 (Pt. 2), p. 1773). It appears not to have been customary for the judge to give reasons for his decisions or, if he did, no such reasons have survived except for those of Dr. Alexander Croke and certain of his successors, particularly William Young.

94. In 1771, Bulkeley heard a salvage cause involving the destruction of the sloop Granby, a Government vessel with total loss of life at the entrance to Halifax Harbour, while carrying stores and money from Boston to the Halifax Careening Yard where Joseph Gerrish was still the Naval Storekeeper. The tragedy later led to an inquiry by the council at which it came out that it may have been caused in some measure by the Sambro Light not functioning at the time, a lighthouse that was apparently built “upon the same plan” as “its sister light house at Boston” (Letter, 9 October 1771, Gambier to Stephens, PRO, ADM 1/483, p. 426 (Mfm. at PANS and NAC)). There was evidence from the Royal Navy that not infrequently they had to “fire at the Light House to make them show a light” (Letter, 12 May 1771, Gambier to Stephens, PRO, ADM 1/483, p. 398 (Mfm. at PANS and NAC)). Gerrish dispatched a team of salvors to the scene, where they took possession of money recovered by fishermen. On the team was one Malachy Salter a merchant, formerly of Boston (who was the Marshal of Jonathan Sewall’s Court), to whom Gerrish had given a warrant to support the salvors “with authority”. About £2000 having been recovered, a proceeding was commenced by Salter in the Court of Vice-Admiralty “to ascertain the property and determine the Rights of several Claimants for Salvage”, the Storekeeper laying claim “to the whole on behalf of His Majesty and objected against any salvage being allowed” Salter (Letter, 2 August 1771, Gambier to Stephens, PRO, ADM 1/483, p. 418 (Mfm. at PANS and NAC)). Before the Court of Vice-Admiralty, Richard Gibbons, proctor for the salvors, disputed Gerrish’s entitlement to the money over the salvors’ rights. As Gibbons put it, Gerrish had “no lawful authority to meddle with the property or give any order to the ... Marshall or any other officer of that Court ... Until a proper Suggestion had been filed and a Maritime Cause in due form Instituted in the said Court ... and ... only by a Warrant under the Seal of that or some other Admiralty Court ...”. (Records of Nova Scotia Court of Vice-Admiralty, PANS, RG 1/495). In the end, Salter was allowed his expenses and an amount in lieu of salvage. For Salter, who was to be charged with treason during the American Revolution, see Canadian Biography, vol. 4 at 695–97.
repairs to a ship, warrants for the survey of damaged ships or cargoes, freight, discharge of seamen and ownership. Following the outbreak of the American Revolution in 1775, numerous prize cases involving enemy ships and property taken by British warships and privateers came before him for adjudication. Prize litigation ceased after the signing of the Treaty of Paris in 1783 which brought the war officially to an end, but it began again ten years later upon the commencement of the French War.

During a period of war officers and men of the Royal Navy at Halifax, who stood to gain significantly from the condemnation of captured vessels and cargo, were legitimately concerned that the law of prize should be properly administered. In the summer of 1798, the captains of the Navy’s ships at Halifax initiated an unusual complaint when, with the acquiescence of Lieutenant-Governor Sir John Wentworth, they called for the removal of the octogenarian Richard Bulkeley and his replacement with James Brenton, who was the second puisne judge of the Supreme Court. The complaints against Bulkeley were that:

... many of the late decisions of the Admiralty Court of this province, being seemingly in contradiction to each other; and from other circumstances attending the manner of these decisions as well as the place of trial being in a private Dwelling House and that we consider our interests and that of our fellow officers & ships companys under our respective commands materially injured thereby.

Bulkeley, who was in failing health, sent a stiff rejoinder in which he reminded the captains that they, like other litigants, “have the usual and Established remedy of Appeal”. Nor would he accept the criticism of holding Court in his house, for “altho the House is mine, on such occasions it is made Publick, the room is 24 feet long by 18 feet, with a Spacious Hall, the Doors Always Open and free Access to all Persons”.

95. Between August 1779 and September 1782, Richard Bulkeley issued sixty letters of marque to Nova Scotia privateers. (Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/496, p. 512 et seq.).
96. Petition, 16 June 1798, PRO, CO 217/69, p. 164; letter, Wentworth to Portland, 23 June 1798, ibid., at 161; letter Portland to Wentworth, 3 July 1798, ibid., at 175 (Mfm. at PANS and NAC). The references by both Wentworth and Portland to Brenton having been “deputy to Judge Spry and Judge Sewall” is supported by other evidence only to a point, there being nothing persuasive to indicate that Brenton had ever served as Dr. Spry’s surrogate. Brenton was also a former Solicitor and Attorney General of the province.
97. Letter, 16 June 1798, Capt. Murray et al. to Wentworth, PRO, CO 217/69, f. 2 (Mfm. at PANS and NAC).
98. Letter, 20 June 1798, Bulkeley to Wentworth, PRO, CO 217/69, ibid., f. 3 (Mfm. at PANS and NAC).
99. Ibid. This house, which was built in 1760 from stones recovered from the ruins of Louisbourg, stood at the southeast corner of Argyle and George Streets in Halifax. A fine photograph of it (N-898) is preserved in the Documentary Art Collection of the Public Archives.
William Scott, Advocate General and later Judge of the High Court of Admiralty of England (the celebrated Lord Stowell), advised the Lords Commissioners of the Admiralty that in the circumstances Bulkeley could neither be forced into retirement nor compelled to appoint a surrogate. The question was resolved when Bulkeley voluntarily gave way in favour of Brenton but only on the basis that he continue to receive the emoluments of his office. This arrangement remained in place until Bulkeley died in December 1800.

With the death of Richard Bulkeley, a debate ensued at Halifax over whether Brenton should be named his successor or a new appointment made. Opinion was divided. The Admiral at Halifax, asserting an exclusive power of filling the vacancy, was much against Brenton continuing because he was “connected” with the United States. The Lieutenant-Governor favoured Brenton however, and moved swiftly by granting him a provincial commission within days of Bulkeley’s death. Brenton’s position remained precarious. He had done himself much harm in the so-called “Judges Affair” a decade earlier, when the House of Assembly voted to impeach him and his fellow puisne judge of the Supreme Court, Isaac Deschamps; they were exonerated by the Privy Council two years later. Another factor telling against Brenton was his lack of formal training in civil and maritime law, especially so in time of war when numerous enemy ships were being carried daily into Halifax for adjudication as prizes. Brenton would soon be replaced. By the time the position was permanently filled by London in 1801, the British Parlia-

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of Nova Scotia. In 1798, the “Court House” consisted of rented space in the Cochran Building down the hill from Bulkeley’s place of residence, on Hollis Street where the former Post Office building now stands.

100. Letter, 28 August 1798, Scott to Lords Commissioners of the Admiralty, Records of the Nova Scotia Court of Vice Admiralty, PANS, RG 1/499/3, p. 160.

101. Letter, 20 December 1800, Parker to Nepean, PRO, ADM 1/495 (Mfm. at PANS and NAC).

102. Ibid. The previous day, Admiral Parker had impliedly criticized Brenton for misunderstanding a London instruction concerning the conduct of the Royal Navy with respect to the carrying of enemy property by neutral vessels (Letter, 19 December 1800, Parker to Nepean, PRO, ADM 1/495, p. 180 (Mfm. at PANS and NAC)).

103. Commission from the Lieutenant-Governor, 8 December 1800, Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/499/3, p. 227.

104. See “Articles of Impeachment”, JPNSHA, 1790.

105. Following Brenton’s death in 1806, his widow in petitioning the House of Assembly for assistance, noted that as a judge of the Supreme Court, her husband had been paid by warrants on the treasury which could not be negotiated except at a discount of 25/30 per cent, thereby depriving him of a quarter of his small income and causing him to contract many heavy debts which remained unpaid “until he was appointed Judge of the Court of Vice Admiralty in this province... and by the emoluments of which he was enabled to extricate himself from his difficulties”. The British Government’s decision to appoint “a gentleman regularly educated
ment had adopted new legislation for reorganizing and strengthening colonial courts of vice-admiralty, rationalizing the exercise of their prize jurisdiction, appointing judges from among lawyers trained in civil and maritime law and increasing the salary paid them in addition to their other emoluments. 106

V. Dr. Alexander Croke’s Court

The 1801 Imperial statute empowered the British Government to revoke all outstanding prize court commissions for North America and the West Indies with the exception of Nova Scotia, Jamaica and Martinique. Shortly after Martinique was given up by the British, its court of vice-admiralty was replaced by one at Barbados. The statute in question provided that

... each and every of the said Courts, and the several and respective Judges and Officers thereof in any two of the Islands in the West Indies and at Halifax, shall and may exercise over all Prizes carried into any of his Majesty’s Colonies in the West Indies, including therein the Bahama and Bermuda Islands, and over all Persons in any way concerned therein, and in all Matters and Things relating thereto. ... 107

No doubt intending to address the criticisms concerning the scale of fees in colonial courts of vice-admiralty, the statute now provided for judges’ salaries “not exceeding the Sum of two thousand Pounds per Annum”108 from the Consolidated Fund and for “the Profits and Emolu-

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106. (U.K.) 41 Geo III, c. 96.
107. Ibid. s. 5.
108. Ibid. s. 1. Shortly before the measure was adopted, the Admiral in charge of the Halifax station once again raised the matter of the fees being taken in the Court of Vice-Admiralty, the complaint, as always, being that in cases of capture, the fees were “exorbitant”. The practice at the time was for each of the Register and the Marshal to take a five percent commission “in addition to all other Fees and Charges paid”, and in cases involving multiple cargo owners, for these officers to take separate fees in respect of each cargo. After getting no satisfaction from the Judge who was “not inclined... to lessen those exorbitant charges”, the Admiral invoked the assistance of London as a last resort: “As there appears so much oppression to the Parties concerned in these Proceedings, I hope and trust you will be pleased to move their Lordships to take such steps as may be judged proper to relieve the Grievances complained of” (Letter, 6 November 1800, Parker to Nepean, PRO, ADM 1/495, p. 171 (Mfm. at PANS and NAC)). Indeed, the principal officers of the Court were rather well remunerated for their services. Over a three year period Thomas Parker, the absentee Register, collected on average about £3000 sterling, while James Putnam, the absentee Marshal, collected about £3500 sterling in a single year on account of commissions and fees (“Return of the Officers within the Province”, with letter, 14 October 1809, Prevost to Castlereagh, PRO, CO 217/86, pp. 30, 31 (Mfm. at PANS and NAC)).
ments of the said Judges ... in no Case [to] exceed the Sum of two thousand Pounds to each or any or either of the said Judges in any one Year". The measure would thus ensure that the judges of vice-admiralty would no longer be dependent on fees alone.

A suitable candidate for the Halifax Court was soon found in the person of Dr. Alexander Croke, a native of England, who had studied law at Oxford from which he graduated in 1783, after which he was called to the Bar of the Inner Temple in 1786. In 1794, he recommenced legal studies with a view to becoming an advocate at Doctors’ Commons in London and three years later was admitted after earning the degrees of Bachelor and Doctor of Civil Law. He was a friend and Oxford classmate of William Scott, the Judge of the High Court of Admiralty of England. Indeed, it appears to have been due largely to this relationship that Dr. Croke gained celebrity at about the same time the position at Halifax fell vacant. He had acquired considerable experience in litigation before the High Court of Admiralty of England following his admission to Doctors’ Commons. Dr. Croke was offered the Nova Scotia post “without solicitation”, and preferred to accept “the severe, yet healthy air of Nova Scotia to the luxuriant but hazardous climate of the West Indies”. Knowing that his appointment was imminent, in July 1801 Dr. Croke asked to be considered for one of three vacancies on the Council which he regarded as “not only very desirable to myself or whoever may obtain the situation but likewise [it] would not be disagreeable, or useless to government”.

In September 1801, Dr. Croke was formally appointed to the Nova Scotia Court; he moved to Halifax in November and took up residence

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109. Ibid. s. 2.
111. His name may be found associated with a number of cases that were heard by Sir William Scott in 1799 as reported in 165 E.R. 194, 297, 307, 364 and 529.
112. Stewart, supra note 26 at vii.
113. Letter, 18 July 1801, Croke to King, PRO, CO 217/37, p. 296 (Mfm. at PANS and NAC).
114. High Court of Admiralty commission, 7 September 1801, Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/499½. His commission, like those of his predecessors, conferred broad jurisdictional powers and also included “full power to carry into effect the several provisions of an Act passed during the late Session of Parliament for the better Regulation of Our Prize Courts in the West Indies (and America)”. On the same day, Dr. Croke was granted a commission “to take cognizance of and judicially to proceed upon all and all manner of captures seizures Prizes and Reprisals of all Ships and Vessels and goods seized and
with his wife in rented premises. In 1802 he purchased a “little Villa . . . in the Country, about two miles from hence”, a step that turned out to be wise for in 1804 his newest landlord sold the house Dr. Croke then occupied “to a Gentleman who designs to live in it himself.”\footnote{115} In the same year, Dr. Croke came up with a plan for permanently solving the accommodation problem when he fixed his gaze on old Government House (which stood where Province House now stands), well knowing that new Government House which was then in the course of construction, would soon be available to the Lieutenant-Governor. He beseeched Whitehall to let him use it:

If the old Government house which belongs to his Majesty is not already appropriated to other uses, may I take the liberty of suggesting . . . that if it were assigned for the residence of the Judge of the Admiralty, the inconveniences I have mentioned would be avoided. It is not too large for the accommodation of a moderate family, and, though rather old, with some small repairs may last many years. As the office will probably be always filled by persons sent from England, ‘till this country is very considerably advanced in opulence they will always experience the same difficulty in procuring a house. I must, at the same time call to your Lordship’s recollection, that the Commissioner and all the Officers of the Dock Yard, the Military and indeed most of his Majesty’s principal servants who are sent from England are provided with houses by Government.\footnote{116}

When Whitehall rejected Dr. Croke’s plan, he decided to build a house at his “little Villa . . . in the Country”, on about the spot where the Arts and Administration Building of Dalhousie University now stands,\footnote{117} calling it “Studley” after his ancestral home near Wheatley in Oxfordshire.\footnote{118}

\footnote{115. Letter, 2 May 1804, Croke to Hobart, PRO, CO 217/74, p. 207 (Mfm. at PANS and NAC).
116. \textit{Ibid.}
117. From records available in the Dalhousie University Archives, it appears that Dr. Croke’s house stood on land which the north wing of this building now occupies, and was reached from Coburg Road by a lane running directly northward and by another lane running diagonally to the same street at the northeasterly corner of the estate. The house was later described as “large and commodious” and “the grounds laid out with much taste” (Archibald, \textit{supra} note 110 at 119).
118. Letter, 20 November 1815, Croke to Goulburn, PRO, CO 217/97, p. 162 (Mfm. at PANS and NAC). In this letter, Dr. Croke referred to his English home by the name of “Studley Priory” whereas it was apparently known as “Studley House”. Dr. Croke was granted authority from}
“Studley” was no mean house. As “one of the best family residences in the Province”, it consisted of:

... a Dining Room, a drawing Room, a Study and Sitting Room, 4 bed rooms and ... large closets, 3 Servants’ bed rooms, a large Garrett, Wash House, Butler’s Pantry and store room. In the lower floor—a Dairy, Larder, Beer Cellar, Roast House, Wine Cellar, Coal Cellar capable of holding 24 cauldrons of coal, and a vat containing 1200 gallons of rain water, all frost proof.

The estate also included:

A large Coach House of 3 or 4 carriages, Stables for 4 horses with corresponding hay lofts, etc., Cow House, Pigsty, Poultry Yard, a garden of near an acre in the finest state of Cultivation surrounded by a high wall for fruit.

There were also “walks through the woods commanding the most picturesque views”.119 The Croke mansion was destroyed by fire on 1 February 1831, but the name “Studley” survived. Since 1910, it has been the name by which the main campus of Dalhousie University has been known.120

Dr. Croke took a broad view of his jurisdiction:

The Judge of the Court of Vice Admiralty is the representative of the Lord High Admiral in his judicial capacity. He has the same power and authority within his jurisdiction as the Judge of the High Court of Admiralty and like him is only subject to an appeal to the Privy Council. The authority of the Judge of the Court at Halifax, is not confined to the province but it extends by his commission & acts of Parliament over all His Majesty’s Dominions on this side of the Atlantic including Quebec, the West Indies, and all parts of America.121

119. Acadian Recorder (Halifax) (8 July 1815) (at PANS). The house had been “lately considerably added to”.

120. The “Studley” estate was purchased from Dr. Croke by Halifax merchant Matthew Richardson a few years after Dr. Croke left Halifax for England in 1815. Following the fire, Richardson built a new house upon the same site but in a different style, to which the name “Studley” was attached. The estate passed out of the Richardson family in the 1870s and into that of the Reverend Robert Murray in the 1890s, where it remained until 1910 when it was acquired by Dalhousie University. A fine watercolour painting of “Studley House” (N-7708), apparently as it stood in the time of Dr. Croke, may be seen in the Documentary Art Collection of the Public Archives of Nova Scotia at Halifax. Although the name of the artist is not known, it is entirely possible that Dr. Croke himself painted this work, for “he had some reputation as an artist” and had “made sketches of Nova Scotia scenery while here” (Archibald, supra note 110 at 128).

121. Letter, 1 August 1814, Croke to Sherbrooke, PRO, CO 217/93, p. 221 (Mfm. at PANS and NAC). Dr. Croke’s prize jurisdiction was as broad as that described but his instance
By any standard, he was a judge of the highest ability. The Americans, whose ships were often the subject of adverse decisions in prize cases, applauded his gifts as a jurist in one instance near the end of the War of 1812. A Nova Scotia legal digester of the last century described Dr. Croke as "the enlightened Judge of the Vice-Admiralty Court at Halifax". John George Marshall, a contemporary of Dr. Croke at Halifax and subsequently Chief Justice of the Inferior Court of Common Pleas for Cape Breton, who had attended sittings of the Court of Vice-Admiralty during the War of 1812, described Dr. Croke as "one of the most learned and eminent advocates in the High Court of Admiralty" and gave this evaluation of his skills as a judge:

His arguments, in the decision of any specially important case would afford intellectual enjoyment to all who could duly appreciate them, for the orderly arrangements of the various points, the precision and soundness of logical argument, chasteness of language, dignity and attractiveness of address, and all the other qualities which constitute the highest style of judicial skill, eloquence, and ability. I remember one instance, especially, in which I experienced a degree of that enjoyment, in hearing his eloquent and powerful argument, in a decision on one of those prize cases.

A number of his judgments, mainly in prize causes, were collected in 1813 by James Stewart, then Solicitor General of the province who had regularly appeared before the Court in that capacity during the Napoleonic Wars and the War of 1812 on behalf of owners of captured property. A few of these decisions pertain to "instance" matters such as contempt, trade and revenue prosecutions, evidence and the duties of the Register and the Marshal.

The process by which prize causes were dealt with in Dr. Croke's Court followed a familiar pattern. A representative of the captor, usually

jurisdiction was confined by his commission to "Nova Scotia or Acadia and Maritime parts thereof and to the same adjoining".

122. A "Boston paper" carried on its front page an account of Dr. Croke's decision in the case of the release of the "David Porter's" prize "Legal Tender" which was "found on perusal to merit the great praise which has voluntarily been bestowed upon it for learning, magnanimity and independence by every American who heard it delivered" (Acadian Recorder (Halifax) (12 June 1815)).

123. Cong. Digest, 1890, preface. These words were purportedly taken from Kent's Commentaries.


125. Stewart, supra note 26 at 22, 49, 83, 95, 98, 112, 169, 180, 200, 202, 301, 379, 427, 446, 541, 553. No fewer than 800 prize cases (captures and recaptures) were disposed of by Dr. Croke. The "instance" cases touched such matters as customs seizures, cargo, illicit trading, seamen's wages, wreck and salvage, ship repairs, bottomry and derelict, and totalled approximately 90 in number. The records of these cases, both "instance" and "prize", are preserved in NAC, RG 8, IV, Vols. 41-114, 120-127 and 130-138.
the midshipman or prize master, would present the captured ship’s papers to the Advocate General and relate the circumstances of the capture. The Advocate General would then prepare a set of allegations which were meant to constitute a prima facie case for declaring the property lawful prize. This document, known as a “libel” when filed, was in reality an application for a “Monition” which, when allowed, constituted an order for the Marshal to take custody of the ship and cargo, to notify all concerned by affixing a copy of the document to the main mast and to cite them to appear in the Court on the date and at the time appointed therein.

A set of statutorily prescribed questions, called “Standing Interrogatories”, would be administered under oath by the Register to representatives of the captured ship, usually the master or mate or both. The parties and any others interested appeared before the Judge in open Court, where the evidence would be read and filed. Sometimes the property would be released or “restored”, as when it was found to be owned by a British subject, an ally or a neutral; otherwise, the matter proceeded to disposition by way of a “definitive sentence” under which the property was either declared “good and lawful prize” or restored to its owner. Occasionally, an interlocutory decree would be made to allow for the filing of further proof. Throughout the proceeding, the Court might be asked to issue a variety of commissions, e.g. for the appraisal of the captured property, for surveying it or for allowing cargo to be unloaded into the custody of the Marshal. Whenever property was declared to be good and lawful prize it would be delivered to the captors, sold at public auction and its net proceeds divided according to statute among the captors, the Crown and the Lieutenant-Governor, with one-third going to each. Where a capture had been effected by a privateer ship which was not properly commissioned under validly issued letters of marque, no award was allowed and the property would be forfeited to the Crown as a “droit of the Admiralty”.

It was chiefly Dr. Croke’s activities away from the bench which embroiled him in controversy at Halifax. As one critic put it, his judgment was “deficient” whenever “he comes down from the judgment-seat and takes part in the ordinary business of life, or is called upon to perform work with which he is little familiar”. Dr. Croke was not adverse to coming “down from the judgment-seat”. At the very outset, he actively sought a place at the very centre of government as a member of the governing Council. Within a year of his arrival, in January 1802, two vacancies opened on the Council by reason of the death of Charles Morris II and Henry Newton, allowing the Lieutenant-Governor to recommend

126. Archibald, supra note 110 at 112–13.
"Dr. Alexander Croke, the Judge of the Court of Vice-Admiralty". 127 His appointment to that body followed in a matter of months; 128 Dr. Croke was granted precedence next to the Chief Justice, who was ex officio President of the Council. That same year, an opinion was sought from the Crown’s law officers “on whether the Duties of the Judge of the Court of Vice Admiralty in the Province of Nova Scotia are such as to render it inexpedient that such judge Should in Case of Death or absence of the Lieut. Governor take upon him the Administration of the Government until the appointment can be filled up”. The law officers could see “no incompatibility”. 129

Just such a situation developed in 1808, when the new Lieutenant-Governor, Lieutenant General Sir George Prevost, was obliged to leave the province on a military mission abroad. Sir George had obvious misgivings about leaving the province in charge of Dr. Croke whom he dismissed as “an able though rather unpopular character”. 130 An extreme Tory with ultramontane notions of a colony’s subservience within the British Empire, Dr. Croke soon found himself at the centre of a rising political storm by refusing consent to an Appropriation Bill which had been passed both by the House of Assembly and the Council. He saw the members of the Assembly as a contemptible lot who were capable of easy manipulation by the Council of the day:

The lower House is, as usual, composed principally of farmers, who have a little leaven of American democracy amongst them. They are consequently, as a body, suspicious of Government, jealous of their rights and strongly retentive of the public tune. Little or nothing however of party division prevails amongst them. They are not all under the Control, or influence of any individual, either in or out of the House but the Government of the Province has always a considerable power over them from its means of bestowing little favours and advantages upon the members and their friends. 131

As Judge of Vice-Admiralty, Dr. Croke managed to attract the undisguised scorn of Lieutenant-Governor Sir John Coape Sherbrooke, because of a decision he handed down during the War of 1812. The Council had earlier determined that certain American vessels carrying vital supplies into Nova Scotia, despite their status as enemy ships, would be

127. Letter, 5 February 1802, Wentworth to Hobart, PRO, CO 217/76, p. 100 (Mfm. at PANS and NAC).
128. Order in Council, 8 September 1802, Court at St. James, PRO, CO 217/77, p. 191 (Mfm. at PANS and NAC).
129. Letter, 6 October 1802, Nicholl to Hobart, PRO, CO 217/77 (Mfm. at PANS and NAC).
130. Archibald, supra note 110 at 114.
131. Letter, 23 December 1808, Croke to Castlereagh, PRO, CO 217/84, pp. 106-07 (Mfm. at PANS and NAC).
exempted from capture and condemnation as prizes of war provided they carried a licence issued by the Lieutenant-Governor. Great consternation arose, therefore, when Dr. Croke refused to recognize these licences because, in his view, “there is no power either in the Crown, or in any persons appointed by it, to grant exemptions”. The frustration felt by Sir John, a general officer faced with the defence of the colony at a critical time, can best be summed up by his own words:

There is a vulgar saying that the Devil can only run the length of his Tether—That of Bonaparte snapped short of Moscow, And I am willing to hope that Dr. Croke has nearly reached the end of his.

It was a forlorn hope. Dr. Croke remained on the bench at Halifax until the War of 1812 had finally ended, ever stirring the local political pot. His preoccupation with precedence in Halifax society led him to enhancing his own at the expense of others and even to refusing to sit as a member of a commission for the trial of piracy and murder on the high seas, because he could not achieve thereon precedence after the Chief Justice. As a member of the Board of Governors of King’s College, he promoted sectarian post-secondary education in Nova Scotia.

132. See The Economy in Stewart, supra note 26 at 446.
133. Quoted in Canadian Biography, vol.7 at 217–18.
134. This refusal occurred in the case of Edward and Margaret Jordan who were passengers on board the vessel Three Sisters of Halifax on a voyage from Gaspé. Circumstances of their crimes are well documented (Records of the Nova Scotia Court of Vice-Admiralty, NAC, RG 8, IV, Vol. 157). The process by which crimes occurring on the high seas were tried at Halifax pursuant to a commission from the Sovereign, is illustrated by the report of the trial of Patrick Crane who, while on board a sailing vessel from St. John’s, Newfoundland to Prince Edward Island, shot and killed the master somewhere near the south coast of Cape Breton. The Commissioners, consisting of six men, were presided over by Judge Halliburton and sat with a jury. Prosecuting was Archibald, the Attorney General, while Uniacke acted for the defence. The witnesses were duly called by the prosecutor and were cross-examined by Uniacke, who was not permitted to address the jury on points of law. The accused made a brief statement. After Judge Halliburton charged the jury a verdict of “guilty” was brought in and a sentence of death was passed, at which time the judge also mentioned “the place of execution as being between high and low water mark; according to the law respecting offenses on the high seas". (Trial of Patrick Crane, [Halifax, 1832]). For an earlier instance of a trial before special commissioners for murder committed on the high seas in the time of Judge Richard Bulkeley, see the prosecution of William Corran in “Papers Relating to Criminal Prosecutions in Nova Scotia, 1794–1832”, PANS, RG 1/343 and a brief description of the case in B. Murdoch, A History of Nova Scotia or Acadie, vol.3 (Halifax: J. Barnes, 1867) at 127. See also infra, note 195.
135. See letter, 9 December 1809, Prevost to Castlereagh, PRO, CO 217/86, p. 64 (Mfm. at PANS and NAC); letter, 11 December 1809, Prevost to Castlereagh, ibid. at 62. See also letter, 25 January 1802, Croke to Hobart, PRO, CO 217/77, p. 137; letter, 27 December 1808, Croke to Castlereagh, PRO, CO 217/84, p. 106 (Mfm. at PANS and NAC); letter, 17 August 1816, Sherbrooke to Goulburn, PRO, CO 217/93, p. 275 (Mfm. at PANS and NAC).
136. Archibald, supra note 110 at 115–18.
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versy followed Dr. Croke almost to the day he boarded the *Princess Elizabeth* to carry him home to England on 7 July 1815, because of a claim he had recently submitted to the London for fees which were surplus to those to which he was strictly entitled as part of his emoluments under the 1801 statute.

VI. *The Court in Transition*

A month before leaving Halifax in 1815, Dr. Croke appointed a surrogate to act in his absence for, technically, his 1801 commission continued in effect. His choice was Crofton Uniacke, lawyer son of Richard John Uniacke, Sr. who was still the Advocate General of the Court. The wars with France and with the United States had ended. The harbour was no longer overflowing with captured ships and cargoes awaiting adjudication in the prize court.

Dr. Croke’s decision in December 1815 to retire as Judge of Vice-Admiralty touched off something of a political tug-of-war between the two principal factions of Halifax society which were represented in the Council by the descendants of the old British settlers and the more recently arrived Loyalists refugees from the United States. They struggled to control from which of these two groups Dr. Croke’s successor would be drawn. The prime contenders were Crofton Uniacke and Michael Wallace, a Loyalist, senior member of the Council and a Halifax

137. Letter, 5 July 1815, Sherbrooke to Bathurst, PRO, CO 217/96, p. 184 (Mfm. at PANS and NAC).
138. Letter, 4 July 1815, Croke to Bathurst, PRO, CO 217/97, p. 96; petition, 4 August 1815, Croke to Bathurst, *ibid.* at 121; letter, 14 November 1815, Croke to Bathurst, *ibid.* at 156 (Mfm. at PANS and NAC).
139. Agreement, 6 June 1815, Fawson Family Fonds, PANS, MG 1, Vol. 313(b). By the terms of this agreement, Dr. Croke took care to reserve to himself “all such salary as shall become due and payable to the Judge of the Court of Vice Admiralty from the Treasury or elsewhere in England, Nova Scotia or elsewhere”, leaving to Uniacke only “all such fees and perquisites, as shall become due and payable to the Judge of the said Court, according to the table of fees . . . settled by His Royal Highness the Prince Regent in Council and not otherwise”.
140. Uniacke’s appointment as Advocate General was made by Governor Parr in 1784 following the death of William Nesbitt, but Nesbitt’s other office, that of Attorney General, went to Sampson Salter Blowers later in the year upon the resignation of Richard Gibbons. However, in 1797 after Blowers’s appointment as Chief Justice of Nova Scotia, Uniacke became the new Attorney General (see also, *supra* note 25). Until his retirement in 1819, he held both offices, but it was as Advocate General in the Court of Vice-Admiralty, particularly during the War of 1812, that enabled him to amass a considerable fortune, which some scholars estimated as approximating £50,000 after expenses. See J.S. Martell, “Halifax During and After the War of 1812”, (1943), 23 Dalhousie Review 291; “Richard John Uniacke: A Sketch”, (1881) 9 & 10 Colls. of the Nova Scotia Historical Society 92–93; *Acadian Recorder* (Halifax), 17 July 1922, “Occasional”, PANS, MG 9/79; B. Cuthberton, *The Old Attorney General: A Biography of Richard John Uniacke* (Halifax: Nimbus, 1980) at 16, 17, 37, 61.
merchant. The Loyalists as the majority soon gained the day, by persuading Lieutenant-Governor Sherbrooke to appoint Wallace. The Advocate General was not at all pleased with this turn of events. Ever astute and with a sharp eye to detail, he soon spotted a flaw in Wallace’s appointment: his was a provincial commission, whereas the prerogative of making permanent appointments had always lain with the Lords Commissioners of the Admiralty in London. Crofton Uniacke was dispatched to London to plead his own case with the support of a letter from his father, who wrote:

I beg leave to assure your Lordships that my son had no expectation that he would receive such an appointment as Dr. Croke held; he knew well that if it was the intention of His Majesty’s Government to continue the establishment of the prize Courts, that we should have a Judge sent from England, but he did expect, and his character and abilities well entitle him to expect, that no person in this Country would be put over his head and as the local situation of this Colony particularly requires both capacity and knowledge in law whoever fills the Vice Admiralty Court, he hoped that such a regulation would take place as would enable him to act in that situation until occasion should require Government to renew the former establishment such as Dr. Croke held it.

As he was about to depart from Halifax Crofton Uniacke left a tender letter with his children, which he sealed with a lock of his own hair. He would soon enjoy success in London. By early August, his “appointment had already gone forward and has been notified to Sir William Scott by the usual Warrant”, leaving him “only to apply at Doctors’ Commons for his Commission”. Later that same summer he returned to Halifax triumphant, an Imperial commission in hand appointing him Judge of Vice-Admiralty. The battle had been won, but the war raged on.

In 1817, the House of Assembly took up a cause which had been raised in the same body some six years earlier when it had resolved that in prosecutions for breaches of Imperial revenue laws “His Majesty’s loyal subjects” were being “deprived of their Constitutional right of having their cause tried by a jury” and were being put to “great and unnecessary expenses”.

144. Letter, 8 August 1816, London to Uniacke, PANS, MG 1/1769, f. 31.
145. High Court of Admiralty commission, 15 August 1816, Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/500A, p. 365.
146. JPNSHA, 3 April 1811.
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colonies to the south during the years leading up to the American Revolution. Now with the solid backing of the Halifax business community,\textsuperscript{147} which was dominated by Loyalist merchants, the Assembly pursued the matter with renewed vigour by adopting a series of resolutions in the spring of 1817 and dispatching them to London.\textsuperscript{148} Two years later, the Assembly would call for the outright abolition of the Court of Vice-Admiralty:

That this House do unanimously agree in the opinion so generally expressed by former Houses of Assembly, that the jurisdiction exercised by the Instance Court of Vice-Admiralty in this Province, is grievous and oppressive; and do therefore request Mr. Speaker to continue his correspondence with the Agent of the Province, and to state, that from the manner in which all the official situations in that Court are held, it is more particularly objectionable than at any former period, and most earnestly to solicit to His Majesty’s Government to abolish that Court.\textsuperscript{149}

London would neither abolish the Court nor withdraw its jurisdiction in revenue cases which was concurrent with that of the common law courts. Henceforth, however, the Chief Justice of the province would also be the Judge of Vice-Admiralty. Crofton Uniacke did his own cause no good when he persisted during this delicate period in seeking an increase of salary and an \textit{ex officio} seat on the Council.\textsuperscript{150} He failed on both accounts. His salary was reduced and, finally, he was removed from office upon the appointment of Sampson Salter Blowers, Chief Justice of Nova Scotia, as Judge of Vice-Admiralty in February 1821.\textsuperscript{151}

\begin{footnotes}
\item 147. Petition of Sundry Merchants (n.d.), PANS, RG 1/305, f. 99.
\item 149. JPNSHA, 16 April 1819. The criticism concerning “the manner in which all the official situations . . . are held” did not dissuade Crofton Uniacke as the Judge of Vice-Admiralty from appointing his own father to be “my lawful Deputy and Surrogate” or the Lieutenant-Governor from naming Richard John Uniacke Jr. the new Advocate and Procurator General in the Court of Vice-Admiralty, in October 1819 (Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/501, p. 569).
\item 150. Treasury Minutes, 21 March 1820, PRO, CO 217/139, p. 275; letter, 27 March 1820, Treasury Chambers to Goulburn, \textit{ibid.} at 275; letter, 15 March 1820, Admiralty Office to Goulburn, \textit{ibid.} at 156; letter, 6 February 1818, Downing Street to Dalhousie, PRO, CO 218/29, p. 100 (Mfm. at PANS and NAC).
\item 151. High Court of Admiralty commission, 15 February 1821, PANS, O/S MSS. For a brief period in 1779, Blowers had been Judge of the Rhode Island Court of Vice Admiralty. He lived for twenty-one years after his appointment to the Nova Scotia Court of Vice-Admiralty in 1821 at the age of nearly eighty, leading one observer to observe that Blowers had “lived to be 100 and never wore an overcoat” (G. Patterson, \textit{Studies in Nova Scotia History} (Halifax: Imperial, 1940) at 55). A few years before he was named Chief Justice of Nova Scotia Blowers was described by Chief Justice Thomas A. Strange as the “most considerable person at the Bar of...
Even before Blowers resigned as Chief Justice at the end of January 1833, the British authorities had begun to implement a number of reforms in the practice, table of fees and jurisdiction of the colonial vice-admiralty courts. The reforms as enacted\(^1\) grew out of a report of referees who had set forth the heads of jurisdiction then being exercised by the "Instance Court":

- Seamens Wages
- Pilotage
- Bottomry
- Damage to a ship by Collision
- Damage to a person by beating or assault on the High Seas
- Contempt in breach of the regulations & Instructions relating to His Majesty’s service at Sea—wearing illegal Colours, etc.
- Salvage
- Possession
- Security for the safe return of a ship
- Proceedings relative to Ships & Goods found Derelict
- Proceedings against Property seized in the possession of Pirates
- Prosecution for breach of the Slave Trade Abolition Laws
- and
- Prosecution for breach of the Revenue and Navigation Laws\(^2\)

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\(^1\) An Act to regulate the practice and the fees in the Vice-Admiralty Courts Abroad, and to obviate doubts as to their Jurisdiction (U.K.), 2 & 3 Wm IV, c. 51.

\(^2\) Report of Referees to the Lords Commissioners of His Majesty’s Treasury (PRO, HCA 30/814). This particular version of the report is in holograph form and contains a number of interlineations. Section 6 of the 1832 statute also clarified that these courts possessed jurisdiction “for Seaman’s Wages, Pilotage, Bottomry, Damage to a Ship by Collision, contempt in Breach of the Regulations and Instructions relating to His Majesty’s Service at Sea, Salvage, and Droits of the Admiralty” in all cases that “shall come within the local Limits of any Vice-Admiralty Court".
The referees’ report dealt also with the forms and modes of proceeding of vice-admiralty courts and with the duties of the Registrar and Marshal. It is of interest here to note how the Marshal’s duties were viewed by the referees, particularly in effecting service of process whenever it was difficult for the Marshal to do so in person:

The Marshal . . . is the Officer of the Court, for the purpose of executing all such Warrants, Decrees, Monitions or other Instruments as may issue therefrom directed to him. Notwithstanding the execution of these Instruments, is generally speaking, the province and privilege of the Marshal, it may occasionally be proper to employ other persons for that purpose. On such occasions, the Instrument should be addressed as follows:

To all and singular Mayors, Justices of the Peace, Bailiffs, Constables, Officers, and Ministers of Justice, or, literate Persons whomsoever, and more especially to the Collector and Comptroller of Our Customs at the Port of .

or, in some similar form if more appropriate to the existing authorities in the Colonies. It might be found particularly convenient that Instruments addressed in this manner should be always executed by either the Collector or Comptroller of His Majesty’s Customs provided that they are not parties in the suit.

The advantages of this mode of proceeding are obvious, when the Instrument is required to be executed at any considerable distance from the Court, on account of the expense which would be incurred, if the same were to be executed by the Marshal in person. For a similar reason, it may be sometimes expedient, that other duties, which properly belong to the

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154. Ibid. at 17 et seq. No formal rules of practice applying in the Nova Scotia Court of Vice-Admiralty prior to 1832 have been found. Indeed, the former practice appears to have consisted of that which obtained in the High Court of Admiralty of England and especially as that practice was applied and articulated by Sir William Scott, the Judge of that Court, as reported by Christopher Robinson in his set of law reports. The major textbooks on civil law procedure, Sir James Marriott, Formulare Instrumentorum (London: Bickerstaff, 1802) and Arthur Browne, A Compendious View of the Civil Law (London: J. Butterworth, 1802), were evidently much relied upon. Occasionally, the Halifax Court would adopt a ruling upon a motion of counsel, which was intended to serve as a guide or direction in a procedural matter. Thus on 25 February 1777, Richard Bulkeley in granting a motion ruled “that in future when any attorney, proctor or other persons Libeling in behalf of mariners for wages or other maritime matters relative to seamen, before hearing the libel, such attorney, proctor or other person shall give security in the sum of £30 sterling, conditioned to respond to the Judgment of the Court should the decree thereof be adjudged against the Promovent” (Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 1/495, p. 495).

155. The duties so described were incorporated practically verbatim in Rules 5 and 6 of the Rules and Regulations Touching the Practice to be Observed in Suits and Proceedings in the Several Courts of Vice-Admiralty Abroad (adopted by Order in Council, 27 June 1832) (London, 1833). A set of these rules may be found at Bibliothèque, Le Séminaire de Québec, in respect of the Vice-Admiralty Court at Quebec and in A.A. Stockton, The Rules and Regulations of the Courts of Vice-Admiralty in the British Dependencies, (St. John: G.W.Day, 1876). For subsequently adopted rules, see infra note 217.
office of the Marshal, and which require to be performed at a distance from
the Court, should be executed by other Persons. In these Cases, Commis-
sions may be addressed specially to any competent Persons by name,
resident near the place, where such duties are required to be performed. 156

VII. Three Masters of the Rolls
The nonagenarian Chief Justice Blowers's resignation raised a question
of whether the position of Judge of Vice-Admiralty had also become
vacant. At the time of Blowers's appointment in 1821, some attempt at
avoiding the need for fresh appointments was incorporated into his
commission which was addressed to: "Our Beloved SS Blowers Esq.,
Chief Justice of Our Province of Nova Scotia or the Chief Justice of Nova
Scotia for the time being or the person executing the duties of that office
... to be Judge or Commissary at Halifax". 157 Taken literally, this
language would have entitled Blowers's successor in the Chief Justiceship,
Judge Brenton Halliburton, to the position of Judge of Vice-Admiralty
without further formality. While Blowers had not actually to "resign" as
Judge of Vice-Admiralty, he steadfastly refused to carry on. 158

By the summer of 1834, Deputy Registrar Scott Tremain would report
that "one vessel had remained in the custody of the Court for want of a
Judge and repeated applications had been made for libels". 159 The
Admiralty in London seemed reluctant to make a fresh appointment at

156. Ibid., at 10-14. These views were incorporated virtually verbatim in Rule 6 of the 1832
rules (supra note 155). In the rules which became effective in 1884, (infra note 217), the term
"Marshal" was defined in Rule 1 as meaning "the marshal of the court, or any deputy or assistant
marshal thereof", and the duties of the Marshal were briefly described in Rule 189 as follows:
"The marshal shall execute by himself or his officer all instruments issued from the court which
are addressed to him, and shall make returns thereof".
157. High Court of Admiralty commission, supra note 151. Indeed, after the question of
making an appointment was raised with London, the initial reaction was that it was unnecessary
because the warrant authorizing Blowers's commission was drawn in favour of "SS Blowers,
Esq. Chief Justice of Nova Scotia; or the Chief Justice of Nova Scotia for the time being; or
the person executing the duties of that office" (Letter, 21 June 1834, Barrow to Hay, PRO, CO
217/157, p. 17 (Mfm. at PANS and NAC)).
158. It appears that Blowers took no steps to have the commission renewed following the
accession of William IV (Letter, 4 August 1834, Campbell to Spring Rice, PRO, CO 217/156,
p. 392 (Mfm. at PANS and NAC)). Blowers had apparently made plain his unwillingness to
continue as early as July 1833 (Letter, 28 May 1834, Stewart to Hay, PRO, CO 217/157, p. 318
(Mfm. at PANS and NAC)).
159. Quoted in letter, 11 July 1834, Stewart to Hay, PRO, CO 217/157, p. 332 (Mfm. at PANS
and NAC). At the same time Tremain recommended the appointment of "Alex Stewart, Esq.
who is at present in London a leading and influential member of our Assembly and a Barrister
of high standing at the Bar of Nova Scotia" to the Halifax Court (Letter, 27 July 1834, Tremain
to Spring Rice, PRO, CO 217/157, p. 338 (Mfm. at PANS and NAC)). Tremain had become
the Deputy Registrar in October 1825 under a commission from John Phillip Hood, who had
been appointed as Registrar on 8 January 1822 by commission from the High Court of
least until it was known that Blowers would not continue, or lest it prevent Chief Justice Halliburton from assuming the office. By August, the Lieutenant-Governor could wait no longer. He offered the position to the Chief Justice and then to the Attorney and Advocate General but both declined because they perceived it as "incompatible with their respective Offices". At their suggestion, however, the Lieutenant-Governor issued an acting commission to the newly appointed Master of the Rolls, Charles Rufus Fairbanks, "believing that his talents and legal acquirements eminently qualify him for it". In accepting, Fairbanks added this caveat about the urgent need for a Judge of Vice-Admiralty at Halifax in the person of someone other than the Chief Justice:

This measure was taken upon a Representation of the immediate necessity of filling that Office; and under an impression in which I am informed the present Chief Justice concurs, that there exists such an incompatibility

Admiralty (Memorial of Scott Tremain, 1 March 1839, PRO, HCA 30/814). In 1839, Tremain sought to replace Hood who was ill, and had the support of Attorney General S.G.W. Archibald, who also enlisted the aid of his son Charles then residing in London. While Tremain was not successful, London authorities decided that thenceforward the Registrar would have to perform his duties "in person" (Letter, 1 November 1838, Wood to Hood, ibid.).

During a trip to England in 1834, Alexander Stewart was anxious to make clear that his wish for the vacancy to be filled should not "be taken to divest from the present Chief Justice of Nova Scotia an office which though it will give him little else but trouble he might properly wish to retain" (Letter, 11 July 1834, Stewart to Hay, supra note 159).

This same view had been earlier expressed by Alexander Stewart who wrote: "It is desirable that the office of Judge of the Admiralty & that of the Chief Justice should not be held by the same person, their duties being incompatible, as the Supreme Court has controlling and superintending jurisdiction over the Court of Vice Admiralty" (Letter, 28 May 1834, Stewart to Hay, supra note 158; see also letter, 26 September 1834, Campbell to Hay, PRO, CO 217/156, p. 424 (Mfm. at PANS and NAC)). Stewart probably had in mind the practice of prohibiting Admiralty courts from hearing and determining cases considered as impinging upon the jurisdiction of the ordinary courts (see supra note 36) and perhaps of issuing writs of habeas corpus. An instance of the latter was given by Richard John Uniacke (supra note 93), where the Chief Justice of the province compelled captors to put on shore several witnesses who were about to be examined before the Register.

The function of the Master of the Rolls in Chancery to the office of Judge of Vice-Admiralty was not without precedent, for in 1782 while Richard Bulkeley was holding this latter office, he became the province’s first Master of the Rolls (Commission from the lieutenant-governor, supra note 84) although the office had yet to be officially recognized by statute. The Master of the Rolls in England was originally keeper of the records and assistant of the Lord Chancellor. During the reign of Edward I, he acquired judicial authority in the Court of Chancery which was a court of equity. The function of the Master of the Rolls in Nova Scotia also developed into that of exercising judicial authority in the Court of Chancery.
between the duties of the Office of Chief Justice and Judge of Admiralty, as renders it inexpedient that they should again be held by the same individual. The late Chief Justice Mr. Blowers, held an admiralty Commission which it was understood expired by the demise of His late Majesty; and as he did not renew it during the present Reign, and has not held a Court of Admiralty since he resigned the Chief Justiceship, the office has been considered vacant; and consequently no proceedings have been had in that court, altho several occasions have occurred in which the exercise of its Powers was required.  

In 1821, when Chief Justice Blowers was appointed Judge of Vice-Admiralty, "no salary attached" to the office and the amount of the fees were "but trifling". At the time of his appointment Fairbanks had expressed the hope, nonetheless, of a "modest provision for the Admiralty Judge here, if obtainable, joined to the Colonial allowance for the Rolls [a mere £600 sterling], will place these important offices in a more equal standing in point of emolument than they now are with other colonial situations". No provision was made. The question of whether the Judge should be salaried persisted well beyond Fairbanks’s own term of office. Despite his concern with remuneration, Fairbanks agreed to serve and was soon confirmed by London.

The scale of fees in the Court continued to be a source of complaint. Seamen claiming small amounts of wages were being particularly penalized, so much so that the Legislature decided to intervene on their side. In the spring of 1839, a measure was adopted which would have had the effect of removing the Court’s jurisdiction over wage claims of less than £20 but Fairbanks opposed it. London gave an unequivocal response—it would be disallowed. In its view, the Legislature had overlooked the very critical circumstance that:

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164. Letter, 13 August 1834, Fairbanks to Hay, PRO, CO 217/157, p. 167 (Mfm. at PANS and NAC).
165. Letter, 28 May 1834, Stewart to Hay, supra note 158.
166. Letter, 13 August 1834, Fairbanks to Hay, supra note 164.
167. High Court of Admiralty commissions, 12 November 1834 and 3 June 1838, PANS, MG 1/2150A, f. 1 & 2. The death of William IV in 1837 and the accession of Victoria explains the issuance of this second Imperial commission. Apparently, Fairbanks continued to retain his seat in the House of Assembly for a time after his appointment to the Court, which led to the passing of legislation in February 1835 requiring "the present Master of the Rolls and Judge of the Court of Vice-Admiralty" to vacate the seat. (An Act respecting the Offices of Master of the Rolls and Judge of the Court of Vice-Admiralty (N.S.), 8 Wm IV, c. 24).
169. Ibid. Fairbanks’s objection lay in the view that the proposed legislation would “interfere with a Jurisdiction which—from the ancient times—has been exercised by the Admiralty”.
170. Letter, 27 November 1839, Russell to Campbell, Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 40/13, file 12a.


... the Court of Vice Admiralty at Halifax, is to all intents and purposes an Imperial Court, and consequently, that it was not competent to the Legislature of Nova Scotia to pass an Act interfering as the Act in question would do, with the Jurisdiction of that Court.¹⁷¹

Some of Fairbanks’s own contemporaries cast doubt on his judicial temperament. One of these, Lewis M. Wilkins a puisne judge of the Supreme Court, noted that,

He is extremely industrious, persevering and speculative, but good judgment I fear has no dent in his brain and he thinks too highly of himself or meanly of others to consult on any subject.¹⁷²

The accuracy of this assessment was borne out in a case coming before Fairbanks in 1837, in which William Sutherland—one of the Court’s leading proctors—was acting for Captain George Barker, the master of an American immigrant ship which had been forced into Halifax by stress of weather en route to New York from Ireland. While at Halifax, some of the passengers instituted three suits in the Court under contracts made with Barker and a fourth for breach of an Imperial statute. They were represented by James B. Uniacke, a future Premier of Nova Scotia. Warrants were taken out for the arrest of the master, who was soon lodged in a Halifax jail—from which Sutherland managed to effect his release in October under habeas corpus in the Supreme Court. Nevertheless, Fairbanks determined to “exercise the Jurisdiction of the said Court of Admiralty as Justice may require”¹⁷³ by promptly setting the suits down for trial on short notice. The litigants saw Barker’s release in a different light. To Uniacke it had dealt a crippling blow, so much so that a week later he conceded in open Court that his clients were left with “no remedy for anything he might recover” and were declining to take “any further step in the cause”.¹⁷⁴ Fairbanks determined to press on with the trials, musing that if he should decree in favour of the passengers “the Marshal would be obliged to produce the prisoner Barker or account legally for his discharge or otherwise... answer for it”.¹⁷⁵ When Beamish Murdoch, the advocate for Barker, was called upon to respond, he could scarcely conceal his glee. In the circumstances, no defence would be offered. To everyone in the courtroom but Fairbanks, the proceedings had wholly collapsed. As for him, he “would take the Papers and decide upon the matter without argument”.¹⁷⁶

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¹⁷¹. Ibid.
¹⁷². Quoted in Canadian Biography, vol.7 at 279.
¹⁷⁴. Ibid.
¹⁷⁵. Ibid.
¹⁷⁶. Ibid.
A few days later, Barker turned to Sutherland to seek redress for his arrest and imprisonment. It was a matter of obvious sensitivity. Sutherland decided to write Fairbanks suggesting that he might wish to offer "such fair measure of remuneration as may supersede the necessity of litigation".\textsuperscript{177} The situation was understandably tense on 4 December 1837, when Sutherland next appeared before Fairbanks. Clutching the letter menacingly, Fairbanks promptly confronted Sutherland: to send it while the suits against Captain Barker "were still undetermined" amounted to "a high contempt of this Court", unless Sutherland was not serious about launching a suit against the Judge. Sutherland refused to relent. As "an Attorney and Barrister of other Courts besides being a Proctor and Advocate in this one", he was perfectly entitled to represent Barker; and that, while he intended no disrespect to the Court, he was fully "determined to follow [my] instructions" by commencing a law suit "as the letter had indicated".\textsuperscript{178} It was a moment of high drama, as indeed the following dialogue reveals:

\textbf{Judge:} Then Mr. Sutherland the Court holds you in contempt and will inflict such punishment as it thinks proper. Have you anything to say why the Court should not prosecute its judgment of contempt against you?

\textbf{Mr. Sutherland:} Not anything further, may it please your Worship.

\textbf{Judge:} The Court then is of opinion that you are in contempt, and imposes on you a fine of £20 and orders that you, unless paid at once, shall be committed to custody, and there remain till it be paid and further that, after the termination of the causes in which you are now engaged, you shall not be permitted to practice in this Court till the contempt is purged.

\textbf{Mr. Sutherland:} I will intimate to the Court that I do not intend to pay the fine.

\textbf{Judge:} To the Marshal: Sir, take Mr. Sutherland into custody.

\textbf{Mr. Sutherland:} I will hold -

\textbf{Judge:} Be silent!\textsuperscript{179}

Again Sutherland held fast. Before very long, Fairbanks caused a Writ of Attachment to issue for his arrest, pursuant to which the Marshal

\ldots took his Body into my Custody and on his declining to remain so unless under greater restraint, I conveyed the said William Sutherland to Her Majesty's Jail in the Town of Halifax and for safekeeping committed his Body to the Custody of the Jailer thereof.\textsuperscript{180}

\begin{footnotes}
\begin{enumerate}
\item[177.] \textit{Ibid.}
\item[178.] \textit{Ibid.}
\item[179.] \textit{The Novascotian} [Halifax] (6 December 1837) 386.
\item[180.] \textit{Report of the Committee of the Bar}, supra note 173. A writ of attachment was employed by the courts in ordinary cases of disobedience to an order or judgment or for other contempt of court committed in the course of a suit. It is not to be confused with maritime attachment
\end{enumerate}
\end{footnotes}
Two days later, when it appeared that "the facts disclosed in the said Writ of Attachment, could not be construed into a contempt", Chief Justice Halliburton discharged Sutherland. The following summer, Sutherland jumped at a chance of having his suspension lifted when Fairbanks was absent in England. Beamish Murdoch made an application which surrogate John Whidden readily granted, thereby allowing Sutherland to resume his practice in the Court. His good fortune was short-lived. The following January upon returning to the bench, Fairbanks took the first opportunity to inform Sutherland that he would not "be heard at the Bar of this Court nor recorded as a Proctor thereof" until he had purged his contempt. A month later, a petition containing Sutherland's half-hearted apology was presented by Beamish Murdoch but rejected by Fairbanks. There the matter rested, apparently until after Fairbanks's death two years later.

In the spring of 1841, Samuel George William Archibald, the new Master of the Rolls, was appointed to fill the vacancy caused by Fairbanks's death. Archibald had a solid background in the Court as Advocate General since the death of Richard John Uniacke Sr. and the appointment to the Supreme Court of Richard John Uniacke, Jr.—both of which occurred in 1830—and was viewed in some quarters both as "one of the most remarkable men Nova Scotia has ever produced" and as "one of its best judges". His prowess as a counsel was legendary:

which enabled a libellant to gain jurisdiction in personam and security for a claim against property other than that which was directly involved in the dispute. This remedy fell into disuse in England but retains its full vigour in the United States (see Manro v. Almeida, 23 U.S. 473 (1825); Schiffarartsgellschaft v. Bottacchi, 773 F.2d. 1528; 1986 A.M.C. 1)
As a lawyer he displayed remarkable astuteness in the ease with which he acquired a knowledge of all the strong points of his own cause, and the weak ones of his adversary, and had a singular readiness of repartee which those opposed to him often shrunk under to their chagrin. When aroused by some exhibition of fraud or trickery his denunciations were most scathing and his expressions of scorn and ridicule given with great incisiveness cut to the bone, never to be forgotten.  

Archibald seemed well-placed to add needed lustre to a Court which had so recently fallen in public esteem.

The signing in 1818 of an Anglo-American treaty for regulating the fisheries along the eastern coast of North America resulted in additional work for the Nova Scotia Court of Vice-Admiralty. Foreign fishing "within three marine miles of any coasts, bays, creeks or harbors" would for the most part be forbidden.  

The enforcement mechanism settled upon by London in 1819 would be "by such and the like ways, means and methods, and in the same Court as ships, vessels, or boats may be forfeited, seized, prosecuted and condemned for any offence against any laws relating to the Revenue of Customs, or the laws of Trade and Navigation, under any Act or Acts of the Parliament of Great Britain . . .". The impact of these new arrangements was felt by Archibald in 1842, when he reported a large increase in his workload as well as a need for "rules and regulations", which the province decided to supply. During the early months of 1842 alone, seven American vessels were seized for fisheries violations and brought before Archibald for adjudication.

The volume of work and improved state of the Court soon encouraged Archibald to suggest that he be salaried "at least for the increased duties which I am called upon . . . to perform" and in any event, because his situation "differs from that of any other Judge of Vice Admiralty in the

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Admiralty under Crofton Uniacke (I. Longsworth, Life of S.G.W. Archibald (Halifax: S.F. Huestis, 1881) at 21).
187. Ibid. at 200.
188. Article 1 of the 1818 Treaty, as reported in Stockton, supra note 93 at 204.
189. (U.K.), 59 Geo III, c. 38. In 1868, the Canadian Parliament adopted a similar measure, which expressly provided for the same remedies "to be prosecuted and recovered in any Court of Vice-Admiralty within Canada" (31 Vict, c. 61, s. 3).
190. Letter, 28 April 1842, Archibald to Provincial Secretary, PRO, CO 217/182, p. 247 (Mfm. at PANS and NAC). The provincial statute was 6 Wm IV, c. 8. This measure was soon afterwards adopted by London as if it were an Order in Council made pursuant to the 1819 Imperial statute.
191. Letter, 28 April 1842, Archibald to Provincial Secretary, PRO, CO 217/182, p. 147 (Mfm. at PANS and NAC).
Colonies”192. The request fell on deaf ears at the British Treasury, who were not convinced that any “Special circumstance attached to Archibald’s appointment as would warrant an exception in his case from the general rule under which Judges of the Vice-Admiralty Court in the Colonies are remunerated only by the fees”.193 Archibald was informed accordingly.194

The Court’s jurisdiction over crimes committed on the high seas had long since ended, but under the new regime the Judge of Vice-Admiralty was to have a role in their prosecution. Precisely what that role would be was not always clear. In the summer of 1844, a commission was issued for the trial at Halifax of prisoners charged with murder and piracy committed on board the ship *Saladin* which had run aground near Country Harbour on the eastern shore of the province. On the assumption that he would preside at the trial, Archibald wasted no time in making arrangements by first locating a venue. As the Supreme Court was in session, he approached the Chief Justice to see “if he would adjourn over the day fixed . . . to allow him the Court House”. This was quickly agreed. A panel of three would be required and, as he saw it, it would consist of himself as president, the admiral at Halifax and a member of the Council. As a precaution to ensure the required number, the Chief Justice and other members of the Supreme Court were also named in the commission. All seemed in order for the trial to proceed as planned. Archibald was not a little surprised at the situation that greeted him on the day which had been fixed:

At the time appointed the Judge attended at the Court House, and there met the Admiral, and while waiting for Mr. Dodd a Member of the Council, and a gentleman of high legal character who was to sit with him, the Chief Justice and three puisne Judges of the Supreme Court came down, which was the first Notice he had of any intention of the common law judges to sit on the Commission, the Judge of the Vice Admiralty then asked Mr. Justice Hill, the Senior puisne Judge, if they intended to sit on the trial of the prisoners, and was informed in the affirmative, Mr. Hill adding that altho as Master of the Rolls, the Judge of the Vice Admiralty, had precedence of the puisne Judges, yet as they were first named in the Commission, they Could not give up their right but must take their seats above him, finding therefore that the Common law judges were disposed to take the direction of this Cause, they Commenced and proceeded in by

192. *Ibid.* Letter, 11 June 1842, Archibald to Stanley, PRO, CO 217/182, p. 242 (Mfm. at PANS and NAC); letter, 8 June 1842, Archibald to Stanley, PRO, CO 217/182, p. 244 (Mfm. at PANS and NAC).


194. Letter, 7 September 1842, Wood to Archibald, PRO, CO 217/182, p. 251 (Mfm. at PANS and NAC). The official reason here given was that “H.M. Gov’t are precluded, by way of funds from entertaining your application”.
the Judge of the Admiralty and that the Chief Justice and the Assistant Justices had assumed the whole direction in it, he declined entering into any Controversy as to precedence, and having adjourned the Vice Admiralty Court withdrew from the Court and from a Cause the incidents of which, as judge of the Court he was fully possessed of... 195

While the Halifax authorities were sympathetic, they could see no way of assisting Archibald when the rules and regulations for Her Majesty’s Colonial Service had expressly ranked members of such a commission “according to the Order in which they are designated”. 196 Nevertheless, his voice was heard in London, where it was decided that in future such commissions would be drafted so as to ensure the precedence of the Judge of Vice-Admiralty. 197

The death of Archibald in 1846 was seen by the Lieutenant-Governor as inducing “a great change in the position of several leading members of the Bar of this Province”. 198 J.W. Johnston, the Attorney General, refused the appointment. 199 After turning to the Chief Justice for assistance, the Lieutenant-Governor could soon report that:

... in accordance with two former precedents [I have] given the Chief Justice a Temporary Commission as judge of the Admiralty Court, the functions of which he performs gratuitously, and the business of the Court of Chancery can always be attended to by myself as Chancellor with the advice and assistance of the Judges of the Supreme Court. 200

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195. “Protest”, 18 July 1844, PRO, CO 217/187, p. 191 (Mfm. at PANS and NAC). Judge Archibald set forth in his Protest a number of arguments for excluding the common law judges, one of which was that as Imperial statutory law had provided for the Judge of the High Court of Admiralty to preside over such trials, the “course of the proceedings in the Colonies ought to conform in all respects with those of the Court of Commissioners in England”.


197. Letter, 19 October 1844 to Falkland, PRO, CO 217/187, p. 189 (Mfm. at PANS and NAC). In 1849, under the Admiralty Offences (Colonial) Act (U.K.), 12 & 13 Vict, c. 96, trial by commissioners was abolished and the jurisdiction transferred to the ordinary criminal courts of the colonies. See Prichard, supra note 14 at 58.


199. Letter, 2 March 1846, Falkland to Gladstone, PRO, CO 217/192, p. 85 (Mfm. at PANS and NAC). In 1849, while James B. Uniacke was the Attorney General, London authorities required J.W. Johnston to vacate the office of “Advocate and Procurator General of the Vice Admiralty Court of Halifax” because the office was one “which has been commonly, if not uniformly, combined with that of Attorney General” (Letter, 22 February 1849, Colonial Secretary to Harvey, PRO, CO 217/201, p. 21 (Mfm. at PANS and NAC)).

200. Letter, 2 March 1846, Falkland to Gladstone, supra note 199.
A month later Alexander Stewart, the new Master of the Rolls, was appointed under a provincial commission, both the Attorney and the Solicitor General having declined. London readily approved. Stewart possessed a background in provincial politics, having been a member of the Executive Council for six years, the Legislative Council from its formation and the House of Assembly for some twelve years previously.

Stewart's workload was never very heavy and his remuneration was correspondingly small. Between 1846 and 1854, for example, his fees (about £10 annually) amounted to "little more than the daily wages of a labouring mechanic" and "would hardly suffice to keep my library and supplies with the necessary additions of the current year". In the year of his appointment, Stewart had gone to England where he met with Dr. Stephen Lushington, the Judge of the High Court of Admiralty, who had had a hand in framing the table of fees for the courts of vice-admiralty abroad. The table, it seemed, tilted rather more in favour of the court officials than of the judges, for which Stewart was provided the following explanation:

Having had occasion to wait upon Doctor Lushington with reference to my recent appointment I begged him to inform me how it had happened when himself Drs Jenner and Dodson prepared the table of fees they had allocated such trifling fees to the Judge at the same time that for all the other officers they had allotted liberal and ample fees. To which Doctor Lushington replied that this had been done to avoid a recurrence of the complaints of foreign nations which had theretofore been made against the judicial charges of the Vice Admiralty Courts, but that it was the distinct understanding that H.M. Government would in cases wherein the...
importance of the jurisdiction and the amount of the business done called for it provide the Judge with an adequate Salary.\textsuperscript{207}

The province’s opposition to any increase in judicial fees\textsuperscript{208} left Stewart to argue for a fixed salary either because of his availability for hearing prize causes or because he was already adjudicating disputes under the fisheries convention of 1818.\textsuperscript{209} His arguments were of no avail. London took the view that the province itself should pay Stewart a salary,\textsuperscript{210} while doing so would be to set an undesirable precedent for the Imperial Treasury:

His Grace quite admits that remuneration which you have received for these services is very small. This happens also in several British Colonies in which the office of Vice-Admiralty Judge is not so much to be viewed as a substantive office of emolument as representing certain duties attached often with no adequate remuneration to a colonial Judicial appointment. And His Grace is unable to find any Circumstances in the present instance which would justify him in recommending you for an exceptional remuneration. While there appears some ground for considering that any additional compensation is requisite it should be paid directly, or indirectly, by the Province of Nova Scotia.\textsuperscript{211}

In 1862, at about the time Stewart was making his final attempt at securing a fixed salary, the British Government was actively considering a measure for further clarifying and extending the jurisdiction of the colonial vice-admiralty courts. The jurisdiction of the High Court of Admiralty of England had been considerably enlarged by Acts of Parliament in 1840\textsuperscript{212} and in 1861.\textsuperscript{213} Now the focus turned to the jurisdiction of the vice-admiralty courts and led to the adoption of legislation in 1863\textsuperscript{214} and in 1867.\textsuperscript{215} The 1863 statute extended or confirmed jurisdic-

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207. Statement of the Services . . ., 25 August 1854, PRO, CO 217/213, p. 173 (Mfm. at PANS and NAC). Stewart noted in this statement that remuneration by fees “has a tendency to subject him in a small community to invidious remark”.

208. Letter, 2 June 1846, Falkland to Gladstone, PRO, CO 217/193, p. 3 (Mfm. at PANS and NAC).

209. Statement of the Services, \textit{supra} note 207.


211. Letter, 23 May 1862, Falkland to Stewart, PRO, CO 217/230, p. 172 (Mfm. at PANS and NAC). The Judge of Vice-Admiralty at Quebec was then being paid an annual salary of £200 out of local reserves (Letter, 27 October 1856, Narroway to Blackwood, PRO, CO 217/213, p. 163 (Mfm. at PANS and NAC)). See also letter, Downing Street to Harvey, PANS, RG 1, Vol. 88, p. 177 and Order in Council establishing a Table of Fees for the Vice Admiralty Court at Quebec, \textit{ibid.} at 720. The Judge of Vice-Admiralty in Newfoundland was being paid £500 annually (Memorandum, August 1834, PRO, CO 217/154, p. 173 (Mfm. at PANS and NAC)).

212. (U.K.) 3 & 4 Vict, c. 65.

213. (U.K.) 24 Vict, c. 10.


215. (U.K.) 30 & 31 Vict, c. 45.
tion over claims for seamen’s wages, master’s wages and disbursements, pilotage, salvage of life or property, towage, damage by ships, bottomry or respondentia, mortgage in limited circumstances, ownership, possession, employment or earnings of a ship as between co-owners, necessities in limited circumstances, and for building, equipping and repairing ships in limited circumstances. Yet the reform of procedures applying in these courts, adopted pursuant to Imperial statutes, while far-reaching, remained complex.

The Imperial statute of 1863 also provided for a mode of succession in the office of vice-admiralty judge and for the appointment of registrars and marshals:

4. In any British possession, where the office of Judge of a Vice Admiralty Court is now or shall at anytime hereafter become vacant, the Chief Justice or the principal judicial officer of such possession, or the person for the time being lawfully authorized to act as such, shall be ex officio Judge of the Vice Admiralty Court, until a notification is received in the possession that a formal appointment to that office has been made by the Admiralty in the manner hereinafter mentioned.

5. In any British possession where the office of registrar or marshal of any Vice Admiralty Court is now or shall at any time hereafter become vacant, the Judge of the Court may, with the approval of the Governor, appoint

216. (U.K.) 26 Vict, c. 24, s. 10. By s. 12, jurisdiction “for breach of Revenue Customs, Trade, or Navigation Laws, or of Laws relating to the abolition of slave trade, or to the capture and destruction of pirates and piratical vessels, or any other jurisdiction now exercised by any such Court, or any jurisdiction now lawfully exercised by any other Court within Her Majesty’s Dominion” was preserved; by s. 13, the jurisdiction of a vice-admiralty court of a particular possession could “be exercised whether the cause or right of action has arisen within or beyond the limit of any such possession” unless the Act otherwise confined the jurisdiction to matters arising within the possession. Among the vice-admiralty courts listed in Schedule “A” to the 1863 statute are: British Columbia, Lower Canada otherwise Quebec, New Brunswick, Newfoundland, Nova Scotia otherwise Halifax, Prince Edward Island and Vancouver’s Island. The schedule inaccurately refers to “Lower Canada”, a name which, like “Upper Canada”, was done away with by the so-called Act of Union, 1840 ((U.K.) 3 & 4 Vict, c. 35), which had the effect of uniting the provinces of Upper and Lower Canada as the “Province of Canada”.

217. A useful compendium of the old rules, regulations and tables of fees may be found in Stockton, supra note 155. In 1877, a committee undertook a general revision of the practice, procedure and fees applying in the vice-admiralty courts abroad which culminated in the adoption of new rules and tables of fees by Order in Council of 23 August 1883, effective from 1 January 1884, a copy of which may be found in NAC, RG 13/2371. Apparently, the rules adopted for the High Court of Admiralty of England by Order in Council of 29 November 1859 were used as a guide by the framers of the 1884 vice-admiralty courts rules (Letter, 27 July 1876, H.C. Rothery to Secretary to the Admiralty, Canada, Sessional Papers (1877) No. 13). These rules, which marked a sharp break with the former practice, were reflected in the rules and regulations governing the practice, procedure and fees in the Exchequer Court of Canada on its Admiralty side which were adopted in 1893 (see Stockton, supra note 93 at lxvi–lxvii). The rules in Division G of the Federal Court Rules are based to a significant extent on the 1893 model. For the 1893 rules, see infra note 259.
some person to the vacant office until a notification is received in the possession that a formal appointment thereto has been made by the Admiralty in the manner hereinafter mentioned, and may, for good and reasonable cause, to be approved by the Governor, remove the person so appointed. The Judge may also appoint some person to act as registrar or marshal during the temporary absence of either of those officers.

6. On any vacancy in the office of Judge, registrar, or marshal of any Vice Admiralty Court, the Governor of the British Possession in which the Court is established shall, as soon as is practicable communicate to one of Her Majesty's principal Secretaries of State the fact of the vacancy, and the name of the person succeeding or appointed to the vacant office.

7. Nothing in this Act contained shall be taken to affect the power of the Admiralty to appoint any Vice Admiral, or any Judge, registrar, marshal or other officer of any Vice Admiralty Court, as heretofore, by warrant from the Admiralty, and by letters patent issued under the seal of the High Court of Admiralty of England.218

In 1865, following the death of Alexander Stewart while William Young was Chief Justice, the Lieutenant-Governor of Nova Scotia had to be reminded of the 1863 change: “To issue a special commission to Mr. Young in the case of Nova Scotia would be entirely contrary to the spirit of the Act”.219 While the legislative scheme allowed a local Chief Justice to assume the office of Judge of Vice-Admiralty without formal appointment by London, the former method of appointment was preserved and, indeed, could be exercised at any time.

The new Judge of Vice-Admiralty, William Young, had a considerable background in provincial politics both as Premier and Attorney General during the 1850s.220 In 1860, he had succeeded Sir Brenton Halliburton as Chief Justice. During his tenure as Judge of Vice-Admiralty, the work of the Court consisted largely of routine matters involving such claims as for seamen’s wages, collision, salvage, jurisdictional disputes and trade and revenue prosecutions. Many of his judgments are collected under his own name.221

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218. Supra note 214. Section 5 of the 1867 statute ((U.K.) 30 & 31 Vict, c. 45) empowered the Judge of any Vice-Admiralty Court, with the written approval of the Governor of the British possession, to “appoint one or more Deputy Judge or Judges to assist or represent him in the Execution of his Judicial Powers.”


220. For Young generally, see Canadian Biography, vol.11 at 943–49. No mention is made in this biographical sketch of Young having been Judge of Vice-Admiralty from 1865 to 1881 which, admittedly, was a relatively quiet period in the Court.

221. Young's Admiralty Decisions, which cover the period 1865–1880.
VIII.  *Towards a National Admiralty Court*

At the time William Young succeeded to the office of Judge of Vice-Admiralty at Halifax, the movement towards uniting Nova Scotia, New Brunswick and the Province of Canada (Canada East and Canada West) was already well underway. Earlier in the same decade, local officials in Canada West sought an extension of British vice-admiralty jurisdiction over inland waters, particularly those of the Great Lakes. Two years after Confederation, the Canadian Government itself proposed, and later withdrew, a measure which, if adopted, would have conferred exclusive Admiralty jurisdiction over inland navigable waters on a Supreme Court of Canada in the following terms:

The said Supreme Court shall also have and possess exclusive jurisdiction in Admiralty in cases of contract and tort, and in proceedings *in rem*, and *in personam*, arising on or in respect of the navigation of, and commerce upon the inland navigable waters of the Dominion, above tide water, and beyond the jurisdiction of any now existing Court of Vice-Admiralty.

During the following decade, pressure was again mounted in the House of Commons for a specialized Admiralty tribunal for Ontario. In the summer of 1876, the matter was taken up in London by the Minister of Justice, Edward Blake, with the Earl of Caernarvon, the Colonial Secretary and H.C. Rothery, the former Registrar of the High Court of Admiralty. Agreement on an approach came surprisingly quickly, the Minister of Justice reporting that a court of Admiralty could be established “by local legislation . . . as may be found advisable to meet the wants of the trade on the great lakes and inland waters”, although “different considerations might apply to a proposal to give to such courts prize jurisdiction”, something which was not then in the contemplation of the Canadian Government.

Two views on the question emerged in the House of Commons. Some saw the whole enterprise as unnecessary because there already existed the common law courts of the province. Others maintained that a specialized tribunal was needed in order to afford litigants special remedies in proceedings *in rem*, which were available on the other side of the

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222.  Canada, *Sessional Papers* (1877) No. 54. This paper and *Sessional Paper* No. 13 (infra note 224), include an exchange of correspondence between Ottawa and London concerning the desired extension of the jurisdiction and how it might be accomplished.


international boundary in the admiralty courts of the United States.\textsuperscript{225} The Canadian Cabinet cast the problem and its solution in this way:

That much difficulty has of late years been experienced on the Inland Lakes, where shipping and commerce have greatly increased, owing to the difficulty in recovering claims against vessels, both British and American, but particularly the latter, on account of wages, collisions or debts, as in the case of United States vessels, the owners of which are sometimes unknown, and are not generally within the reach of process \textit{in personam}, whereas if the proceedings could be taken \textit{in rem} the claim could be promptly adjudicated, and it would not only be in the interest of persons in Ontario to be able to take proceedings in this manner, but it would even be in the interest of American shipping that such proceedings could be taken, as supplies and outfits for vessels, would be much more readily and cheaply furnished if the persons who supplied such goods were sure that their debts could be secured by proceedings \textit{in rem}.\textsuperscript{226}

The Minister of Justice favoured concurrency with the common law courts, but only up to a point. As he saw it:

The right to petition \textit{in rem}, the new principle which was being introduced, was a class of cases over which the local Courts would have no jurisdiction, and in which there could be no conflict of jurisdiction.\textsuperscript{227}

After a relatively short debate, an Act establishing the Maritime Court of Ontario was adopted.\textsuperscript{228} The constitutionality of the measure was upheld by the Supreme Court of Canada two years later.\textsuperscript{229} While not a vice-admiralty court per se, the jurisdiction of this Court was with respect to rights and remedies that would have been possessed by any colonial court of vice-admiralty if the process of such a court extended to Ontario.

An early initiative for abolishing colonial courts of vice-admiralty in Canada was taken by the Legislature of British Columbia at its 1879 session, when a resolution was adopted which noted that “the constitution of the Vice Admiralty Court of this Province remains the same as before Confederation”, and which urged the Government of Canada “to move the Imperial Parliament to confer Admiralty jurisdiction upon the Supreme Court of this Province, and the Judges thereof, with a right of

\textsuperscript{225} See \textit{The Genesee Chief v. Fitzhugh}, 53 U.S. 443 (1851), wherein the Supreme Court of the United States upheld the constitutionality of an 1845 federal statute which had conferred admiralty jurisdiction on the District Courts in contract and tort with respect to certain classes of “steamboats and vessel upon the lakes and navigable waters connecting such lakes”, a decision which seemed to have had a profound influence on London’s decision to allow for the extension of Admiralty jurisdiction over the Great Lakes and inland waters of Canada.

\textsuperscript{226} Report of a Committee of the Honourable the Privy Council approved by the Governor General 18 May 1874, Canada, \textit{Sessional Papers} (1877) No. 54.

\textsuperscript{227} Canada, \textit{House of Commons Debates} (29 March 1877) at 1058.

\textsuperscript{228} (Can.) 40 Vict, c. 21; as amended by 41 Vict, c. 1, 42 Vict, c. 40 and 45 Vict, c. 34.

\textsuperscript{229} \textit{The Picton} (1879), 4 S.C.R. 648.
appeal to the Supreme Court at Ottawa". In forwarding the resolution to Ottawa, the provincial Executive Council highlighted the sources of local grievance with respect to the British Columbia Court of Vice-Admiralty as the “excessive” cost of litigation and “the mode of procedure in matters of evidence”. In the view of the Executive Council,

... as the power of passing merchant shipping laws has been conceded to Canada with relation to her own mercantile marine, that the constitution of Vice Admiralty or other Courts for the trial of causes arising under her [Britain’s] Merchant Shipping Act should be invested in the Dominion, as the local requirements of the Province would naturally be best understood by the Federal power.

The Executive Council noted as well the “convenience of amending the rules, practice and scale of fees from time to time by a power near at hand such as at Ottawa ...”.

In the spring of 1882, a Joint Address of both Houses of Parliament was forwarded to the Colonial Office in London urging the abolition of the new Ontario court together with the courts of vice-admiralty in Canada, the establishment of a single “Maritime Court for Canada” and the vesting in Parliament of power to confer on a national Maritime Court “that part of the jurisdiction of the existing British Vice-Admiralty Courts over which the Parliament of Canada has not now legislative authority”. The British Government was then in the course of adopting a new set of rules and tables of fees for its courts of vice-admiralty, and of preparing a measure which would have had the effect of extending the jurisdiction of

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230. Memorandum, December 1879, Z.A. Lash (Deputy Minister) to James McDonald, Q.C. (Minister of Justice), NAC, RG 13/2371. This document also contains interesting accounts of the history of vice-admiralty courts, of maritime law and Admiralty jurisdiction. McDonald succeeded Sir William Young as Chief Justice of Nova Scotia and as Judge of Vice-Admiralty at Halifax in 1881.
231. Ibid.
232. Ibid.
233. Ibid.
234. Canada, Journals of the Senate (1882) at 205. See also Ibid. at 231, 232 and Canada, House of Commons Debates, 15 May 1882. Prime Minister Sir John A. Macdonald noted during the debate on the Senate’s Address that, because of “their members, their form of procedure and their expenses”, the courts of vice-admiralty in Canada were “not at all adequate to our system”. Edward Blake, now on the opposition benches, was even more critical, calling these courts “anomalous in their existence here at all; and they are even worse than the hon. gentleman has said in practice, because there exists in them the older, more cumbrous, more antiquated, and more expensive system, which has for a long time got rid of in ... the United Kingdom”. The former Liberal Minister of Justice went on to describe the vice-admiralty courts in Canada as a “practically a blot on our administration of justice”.
235. See supra note 217.
those courts and consolidating the statutory laws relating to them from 1863 onward.\textsuperscript{236}

The Joint Address seems to have excited very little interest in London at least until the summer of 1883 when a new Canadian High Commissioner, Sir Charles Tupper, arrived on the scene. Earlier in the year the Minister of Justice, in responding to a Bill which proposed extending the jurisdiction of courts of vice-admiralty and consolidating their constituent statutes, urged the British Government to respond favourably to the Address and suggested the language of a measure which, if adopted, would have accomplished that objective.\textsuperscript{237} The primary concerns were with the cost of litigating in the vice-admiralty courts\textsuperscript{238} and with the Bill as drafted. The latter, it was thought, would regard each province of Canada as a “British possession” and thus be in “direct conflict with the theory and distribution of powers contained in the British North America Act, inasmuch as by that Act legislative authority over Navigation and Shipping, Trade and Commerce is vested in the Parliament of Canada”,\textsuperscript{239}

An alternative suggestion, that the British Government consider empowering the Canadian Parliament to confer Admiralty jurisdiction on “existing Courts . . . to prevent multiplicity of Courts”,\textsuperscript{240} attracted a measure of interest in London which seemed prepared, initially, “to authorize the Supreme Court of any Colony to exercise the jurisdiction of a Vice-Admiralty Court as part of its ordinary jurisdiction”\textsuperscript{241} in the same

\textsuperscript{236} Circular letter, 16 February 1883, the Earl of Derby to Canada, NAC, RG 13/2371. The text of the proposed legislative measure is not available in this source.
\textsuperscript{237} Report of a Committee of the Privy Council approved by the Governor General 17 April 1883, with letter, 25 April 1883, Governor General of Canada to the Earl of Derby, PRO, CO 42/774, p. 166 (Mfm. at NAC).
\textsuperscript{238} Ibid. It was noted in the Report that these courts were “so expensive that they are not used when it can be avoided and are not therefore as useful as otherwise they might be” and that the cost of pursuing an appeal to the Privy Council, pursuant to section 22 of the Vice-Admiralty Courts Act, 1863 (\textit{supra} note 214), was “so great that the provisions of the Act as they now stand and as the law now is are a practical denial of Appeal in many cases”. Other concerns were with respect to the perpetuation in the new rules governing practice and procedure in the vice-admiralty courts, adopted 23 August 1883 (\textit{supra} note 217), of the notion of the Judges being paid out of fees and the doubt which had been caused by a recent decision of the Supreme Court of Nova Scotia as to the ability of the Parliament of Canada to confer concurrent jurisdiction on vice-admiralty courts in Canada for the enforcement of penalties and forfeitures under its revenue laws. That decision was soon afterwards reversed by the Supreme Court of Canada in \textit{The Attorney General of Canada v. Flint} (1884), 16 S.C.R. 707, which concluded that, while the federal jurisdictional provisions had been validly enacted and the jurisdiction so conferred could be exercised, the Court of Vice-Admiralty at Halifax as an “Imperial Court” could not be compelled to exercise such jurisdiction.
\textsuperscript{239} Supra note 237.
\textsuperscript{240} Ibid.
\textsuperscript{241} Draft letter in Minute, 28 December 1883, the Earl of Derby to the Governor General of Canada, PRO, CO 42/775, p. 131 (Mfm. at NAC).
way that such jurisdiction was being exercised by the High Court of Justice in England ever since the abolition of the High Court of Admiralty on 1 November 1875. London appeared to favour the prayer of the Joint Address subject only to “certain further consideration”. 242 For their part, the Crown’s law officers saw the matter as “entirely a question of policy”, opining that “it would be competent for the Canadian legislature to create Courts which should exercise jurisdiction in respect of matters arising within the territorial waters of Canada and in some cases beyond those limits” but that “it would not be within their power to create a Court which should possess complete Admiralty jurisdiction”. 243

By the autumn of 1883, Sir Charles Tupper would be informed that while “nothing official can be written yet you may be glad to learn that I think we may regard the principle as conceded, and that, unless some unforeseeable obstacle should arise, the desired Court will eventually be established: for civil matters—Questions of Prize etc. arising out of a state of war would necessarily remain under the cognisance of Imperial Courts”. 244 There remained to be considered whether the proposed new Court should exercise jurisdiction over droits of Admiralty and forfeitures to the Crown as, for example, in cases of derelict, piracy, slave trade and customs. 245 London very soon accepted that jurisdiction in such matters could be transferred to Canada. 246

The legislative process which led to the supersession of the Nova Scotia Court of Vice-Admiralty was well underway in London by January 1884, when a Bill was put in draft form for presentation to the Imperial Parliament. 247 By clause 2(1),

Every court of law for the time being established in a British possession and having original unlimited civil jurisdiction shall be a court of Admiralty ...  

London also proposed that a provision be introduced “which would enable the Queen either by Order in Council or by Warrant from the

242. Ibid., p. 133.
243. Opinion [20 June 1883] of Messrs. James, Herschell and Hill with letter, 26 June 1883, Grym to Under Secretary of State for the Colonies, PRO, CO 42/775, p. 278 (Mfm. at NAC). According to Grym, the Lords Commissioners of the Admiralty considered it desirable to retain the existing vice-admiralty courts system, particularly in time of war when “these Courts have to administer the Laws of Blockade and of Prize together with various branches of International Law” and to preserve uniformity of decisions.
244. Letter (n.d.), Bramston to Tupper, PRO, CO 42/775, p. 324 (Mfm. at NAC).
245. Draft letter in Minute, 17 October 1883, Bramston to Under Secretary of State for the Colonies, PRO, CO 42/775, p. 328 (Mfm. at NAC).
246. Letter, 29 October 1883, Admiralty to Under Secretary of State for the Colonies, PRO, CO 42/775, p. 335 (Mfm. at NAC).
Admiralty to authorize the Supreme Court of any Colony to exercise the jurisdiction of a Vice-Admiralty Court as part of its ordinary jurisdiction subject to final appeal to the Judicial Committee of the Privy Council." The suggestion was rejected by Ottawa which felt obliged to remind London that Canada had a national Parliament and local legislatures, national as well as provincial courts and a great extent of territory—factors which called for "some exceptional provisions". It was pointed out in particular that

2. The Supreme Court of Canada is a Court of appellate and not of original jurisdiction and could not conveniently exercise the jurisdiction now exercised by the Vice Admiralty Courts. But by the Supreme and Exchequer Courts Act (1873) the Chief Justice and Judges of the Supreme Court are the Chief Justice and Judges of the Exchequer Court, by which Court this jurisdiction could be exercised if the necessary procedure was provided.

3. The Supreme Courts of the Provinces differ much in their constitution, procedure and practice, being in these respects with certain limited exceptions under the legislative authority of the local Legislatures. It is submitted that Courts exercising Admiralty Jurisdiction should be Dominion Courts subject wholly to the legislative authority of the Parliament of Canada.

4. To whatever Court or Courts in Canada is given Admiralty Jurisdiction the change it is thought will fall short of meeting the views of the Parliament of Canada, or of adequately providing for the future exercise of that jurisdiction unless there is at the same time conferred upon the Parliament of Canada power to make the laws with respect to the jurisdiction, practice and procedure of such Court or Courts in Admiralty Causes.

5. . . . if Admiralty jurisdiction is given to the Exchequer Court of Canada the appeal might with advantage in the first instance be to the Supreme Court of Canada as in other cases with an ultimate appeal in important cases to the Judicial Committee of the Privy Council.

In addition, clause 2 of the draft Bill was seen as preventing the assigning of Admiralty jurisdiction to the Exchequer Court of Canada because it was not a court of "original unlimited jurisdiction", something that could be said only of the superior courts of the provinces. Although the draft Bill was found to be flawed, the drafting of a measure which would lead eventually to the abolition of courts of vice-admiralty had begun in earnest.

249. Ibid.
250. Letter, 25 August 1884, Campbell to Tupper, PRO, CO 42/778, p. 385 (Mfm. at NAC).
Two years later a much enlarged version of the draft measure was prepared in London for circulation to colonial governments.\footnote{251} Whereas clause 2 of the 1884 draft Bill had proposed that every court of law for the time being established in a British possession and having “original unlimited civil jurisdiction” be a court of Admiralty, the 1886 draft Bill, apparently in response to Canada’s objection, amended that clause to read:

\begin{quote}
2.(1.) Every court of law in a British possession, which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a court of Admiralty.
\end{quote}

Subclause 5(a) would enable the legislature of a British possession, by statute, to declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a court of Admiralty.

Canada’s difficulty with the expressions “British possession” and “unlimited civil jurisdiction” would be satisfied by definitions that were proposed in clause 14. While the former expression would include “any part of Her Majesty’s dominions”, the following was added to the definition:

\begin{quote}
...and where parts of such dominions are under both a central and a local legislature all parts under one central legislature are for the purposes of the definition deemed to be one British possession.
\end{quote}

The expression “unlimited civil jurisdiction” would be defined as meaning:

\begin{quote}
...civil jurisdiction unlimited as to the value of the subject-matter at issue or as to the amount that may be claimed or recovered.
\end{quote}

The Canadian Government was now faced with deciding whether the new Ontario court and the British courts of vice-admiralty in Canada should be replaced by a single court of Admiralty for Canada—as was its preference—or by several such courts corresponding in number to the provinces in which courts exercising vice-admiralty jurisdiction then existed. After the issue was raised by British Columbia in 1879, it was actively considered within the Ministry of Justice at Ottawa, where the view was formed that the Parliament of Canada had ample legislative competence to establish a national Admiralty court pursuant to section 101 of the\textit{British North American Act, 1867}[\textit{Constitution Act, 1867}], and

\footnote{251. “Colonial Courts of Admiralty Bill”, 21 December 1886, NAC, RG 13/2371. This draft measure was circulated with memoranda prepared by H. Jenkyns and A. Gray, in one of which was described the background of the Bill and in the other (\textit{supra} note 80) the manner in which appeals would be taken from the proposed new colonial courts of Admiralty.}
of investing such a court with jurisdiction in Admiralty matters pursuant
to the "navigation and shipping" and "trade and commerce" clauses of
that Act. To the question, "Is the power to legislate respecting Vice-
Admiralty vested in the Provincial Legislatures?", the Deputy Minister of
Justice gave the following answer:

... it would not be a Provincial Court which would be created to enforce
rights and remedies of Vice Admiralty jurisdiction. The Parliament of
Canada has express power notwithstanding anything in the British North
America Act to provide for the establishment of any Court for the better
administration of the Laws of Canada (See 101 British North America Act
1867).

If the subject matter of Vice Admiralty jurisdiction be within the legisla-
tive authority of the Parliament of Canada then all laws upon that subject
written or unwritten now in force or hereafter enacted are and would be
"Laws of Canada", and it will hardly be denied that such laws would be
better administered in a Court having jurisdiction from one end of Canada
to the other than in a Court whose jurisdiction would end at the centre of
a river or at an imaginary line dividing two Provinces.

There seems little doubt that as between Canada and the Provinces the
legislative authority over the subject matter of the jurisdiction of Canadian
Vice-Admiralty rests with Canada. ... 252

Virtually from the outset, the choice of the Government of Canada was
to designate the Exchequer Court of Canada as "the proper Court to have
Admiralty jurisdiction"253 for to do so would allow for the establishment
of "local courts in which we can administer the Laws of Canada without
let or hindrance".254 Moreover, the Exchequer Court was "the only Court
having original jurisdiction throughout the whole of Canada", whereas
"the constitution and modes of procedure" of provincial superior courts
presented a "matter of no inconsiderable difficulty to adapt to them a
uniform system of procedure in admiralty matters" as compared with the
Exchequer Court, where "it would all be very easy". The Exchequer
Court had been established by Parliament, "to which rightfully belongs
the authority to legislate in Admiralty matters", and the appointment of
local judges in Admiralty within the Exchequer Court system would
relieve the puisne judges of that Court, who were also judges of the

252. Memorandum, December 1879, Lash to McDonald, supra note 230.
253. Letter, 5 August 1884, Burbidge to Campbell, NAC, RG 13/2371. The Minister of
Justice at this time was Sir Alexander Campbell. George W. Burbidge (who became the first
President of the Exchequer Court of Canada when the formal association with the judges of the
Supreme Court of Canada was severed in 1887 by virtue of (Can.) 50 & 51 Vict, c. 16), was
the Deputy Minister of Justice.
254. Ibid.
Supreme Court of Canada, from travelling "great distances at great expense to hold Court". 255

In 1890, the British Parliament finally moved formally to abolish its colonial courts of vice-admiralty when it enacted legislation under which self-governing Dominions were empowered to establish their own courts of Admiralty but exercising only the British jurisdiction.256 On 11 May 1891, a Bill was introduced in the Parliament of Canada with a view to accomplishing that objective.257 The debate in the House of Commons once again centred on the choice of a vehicle or vehicles for exercising Admiralty jurisdiction in Canada. Should this be a single national Admiralty court or a combination of provincial courts? The intent of the 1890 Imperial statute was clear: either the Parliament of Canada declare a court to be a Court of Admiralty or the Admiralty jurisdiction which that statute had transferred to Canada would vest automatically in the courts of the provinces. The Minister of Justice, Sir John S.D. Thompson, put the case for a national Admiralty court:

As regards the present phase of the jurisdiction, we find ourselves confronted with the Imperial statute passed eighteen months ago, which provides that this jurisdiction is no longer to be controlled by Imperial legislation, and that these courts are to be abolished, subject only to the power of this Parliament to vest the jurisdiction in some other authority. If this Parliament does not exercise that power the jurisdiction merges in the provincial courts, and this Parliament has to decide whether it is better that that should occur, or that we should retain that jurisdiction under federal authority. Now, what are the advantages of the two methods

255. Memorandum enclosed with letter, 5 August 1884, Burbidge to Campbell, supra note 253.
256. Colonial Courts of Admiralty Act, 1890 (U.K.), 53 & 54 Vict, c. 27. This Act repealed all previous legislation with respect to vice-admiralty courts abroad and provided for the abolition of those courts. Paragraph 3(a) empowered the legislature of any British possession to declare by any "Colonial law" "any court of unlimited civil jurisdiction, whether original or appellate, to be a Colonial Court of Admiralty" and, absent such a declaration, subsection 2(1) provided that every court of law in the possession having "original unlimited jurisdiction" (defined in section 15 to mean "civil jurisdiction unlimited as to the value of the subject-matter at issue, or as to the amount that may be claimed or recovered") would be a court of Admiralty. While the Act furnished no definition of the expression "British possession", it did define, in section 15, the expression "Colonial law" as meaning "any Act, ordinance, or other law having the force of legislative enactment in a British possession and made by any authority other than the Imperial Parliament or Her Majesty in Council, competent to make laws for such possession." The Act conferred on a colonial court of Admiralty the same Admiralty jurisdiction "over the like places, persons, matters and things" as that possessed by the High Court in England, "whether existing by virtue of any statute or otherwise" and, subject to approval, empowered a colonial court of Admiralty to adopt rules of practice and procedure. As to these rules, see infra note 259.
respectively? As the hon. member for Queen's has argued, there is some advantage in letting the jurisdiction merge into the provincial courts. The advantage is simply this, that you have one set of tribunals for dealing with all classes of litigation, whether arising on the sea or on the land, which I admit has some convenience. But there are some disadvantages in that proposal. One is, that if we adopted that system the jurisdiction would cease to be exercised by men who had derived considerable skill from their past experience in those courts; and, on the contrary, any judge, whether he has ever held a brief in an admiralty case or not, would be constituted an admiralty judge . . . As regards the question, whether, in the interest of the future, which we have to consider, we should allow this jurisdiction to merge into the provincial courts, or should retain it under our control, it seemed to me that the weight of argument, besides the reasons which I have already given and the others which I shall mention in a moment, are in favour of keeping the jurisdiction within our control. When the Imperial Parliament has vested in us the power to create an Admiralty Court, it seems more consistent with the dignity and authority of this Parliament that the court should be one of our own creation, and that we should not simply acquiesce in that jurisdiction passing from our hands and being exercised by courts of provincial constitution . . .

There is no doubt of the jurisdiction of our Legislatures to give a court authority over our own subjects, and over any persons who come within our jurisdiction, but I very much doubt, indeed, the authority of the Provincial Legislature to give to a provincial court, or to any other court, jurisdiction over a vessel on the high seas. At present the Admiralty Courts and the High Court of Justice of England, exercising its jurisdiction through the Probate and Admiralty division, has that jurisdiction by virtue of Imperial statutes; and by virtue of our Imperial statute, this jurisdiction will come to our Canadian court. It is true there would be several classes of cases over which the Provincial Legislatures could give jurisdiction to our provincial courts, but I very much doubt that they could do so in respect to many of the subjects of admiralty jurisdiction.  

These views prevailed.

258. Canada, House of Commons Debates (26 June 1891) at 1417–19, 1428. For a short period before entering the federal cabinet in 1885, Thompson (a future Prime Minister of Canada) served as a puisne Judge of the provincial Supreme Court. The Assignation Book (now in the custody of the Administrator of the Federal Court of Canada at Ottawa), contains the following entry at 65: “The Hon. James McDonald Chief Justice and ex officio Judge of the V. Admiralty Court on the 10th day of Feb’y A.D. 1883 by writing under seal appointed Hon. John S.D. Thompson a deputy Judge of said Court under and by virtue of the Imperial Act 30 & 31 Victoria chap. 45—which appointment was approved by Lieut. Governor Archibald on the 13th day of Feb’y and by the Governor General the Marquis of Lorne on the 22d day of Feb. 1883—and this record is made in attestation thereof”. Thompson heard a number of cases in the Court of Vice-Admiralty, as appears at 64, 65, 115, 119 and 131 of the Assignation Book.
With the new law declaring the Exchequer Court as Canada's Admiralty Court\textsuperscript{259} in place, in early autumn of 1891 Nova Scotia's Chief Justice James McDonald (the former federal Minister of Justice), who had succeeded Chief Justice Sir William Young in 1881 as Judge of Vice-Admiralty, was faced with adapting to the new regime. There was then pending a number of suits in the Court of Vice-Admiralty at Halifax—for collision, salvage, necessaries, repairs and for forfeiture and penalties under the customs laws. The last of these, for necessaries and repair services, was commenced on 8 June 1891.\textsuperscript{260} All suits pending in the old Court passed to James McDonald as Judge of the Nova Scotia Admiralty District of the Exchequer Court of Canada.\textsuperscript{261} One hundred forty-two years after it was set up at Halifax, the Nova Scotia Court of Vice-Admiralty was no more.

IX. Epilogue

The new statutory scheme was as yet incomplete, for the Admiralty jurisdiction of the Exchequer Court of Canada, while broad, had its genesis in Imperial legislation. A belief that this jurisdiction would expand as the Admiralty jurisdiction of the High Court in England expanded, proved to be mistaken. In 1927, the Privy Council ruled that the Exchequer Court possessed only such Admiralty jurisdiction as had been conferred by the 1890 Imperial statute, no more and no less.\textsuperscript{262} Admiralty jurisdiction exercisable in Canada was thus frozen as of the date of its conferral.

\textsuperscript{259} The Admiralty Act, 1891, (Can.) 54 & 55 Vict, c. 29. In 1893, General Rules and Orders regulating the Practice and Procedure in Admiralty Cases in the Exchequer Court of Canada, were adopted pursuant to the Imperial statute of 1890 and the Canadian statute of 1891 (see Stockton, supra note 93 at 409 et seq.). The same rules including a 1903 amendment of Rule 37, may be found in E.C. Mayers, Admiralty Law and Practice (Toronto: Carswell, 1916) at 204 et seq.

\textsuperscript{260} The Ship Cachar, file 522, Assignation Book, supra note 258 at 273. Among the prominent proctors and advocates of the day whose names are recorded in this book were R.L. Borden (a future Prime Minister of Canada), Joseph A. Chisholm (a future Chief Justice of the province), W.A. Henry, Hector McInnes and E.L. Newcombe (afterwards of the Supreme Court of Canada).

\textsuperscript{261} See e.g. file 519, Records of the Nova Scotia Court of Vice-Admiralty, PANS, RG 40/47. A suit commenced in the Court of Vice-Admiralty on 18 April 1891 for penalties under the Customs Act, was, as of 20 September 1891, restyled: "In the Exchequer Court of Canada, Nova Scotia Admiralty District". The Admiralty Act, 1891 came into force 2 October 1891. According to the Assignation Book (supra note 258) at 277, the first suit to be instituted in the Nova Scotia Admiralty District, on 8 October 1891, involved an action for salvage services against The Quebec, with the cargo and freight.

\textsuperscript{262} The Woron, [1927] A.C. 906.
What then was Canada to do? A distinguished Canadian practitioner noted at the time, that Canada could neither benefit from useful expansions of British Admiralty jurisdiction nor legislate changes on its own:

Since the year 1890, when the Colonial Courts of Admiralty Act was passed, the Admiralty jurisdiction of the High Court in England has been increased by statute, the most notable increase being in the year 1920, when authority was conferred upon that Court to permit the trial of an action in rem against ships, whose owners were not domiciled within the jurisdiction of the Court, for any breach of charterparty or other damage claimed in respect to carriage of goods by sea. . . . It is highly important to the merchant or importer of goods (and, incidentally, to barristers practising in the Admiralty Courts, in Canada), that Canadian Admiralty Courts should possess similar jurisdiction. An action in rem gives a powerful and speedy remedy, as the ship can be arrested and detained until bail is furnished to satisfy the claim. The only remedy which can be obtained in the common law Courts is to sue the shipowner in Japan or Germany or wherever he may reside, which in most cases is very unsatisfactory and always expensive. 263

This was a serious problem. A solution emerged at a conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, which was held in London in the autumn of 1929, where it was recommended that the Dominions be granted power to repeal the 1890 Imperial statute, to establish their own Admiralty courts and to vest them with jurisdiction. The recommendation was acted upon in 1931 when the British Parliament enacted legislation 264 which had the effect of enabling the Parliament of Canada to adopt laws respecting Admiralty and shipping matters in general. Parliament soon afterwards enacted The Admiralty Act, 1934. 265 Its importance lay not so much in the jurisdiction it conferred, which was very broad, 266 as in the fact that Parliament could now legislate to the fullest extent of its competence in Admiralty and shipping matters under the Constitution Act, 1867. The Exchequer Court of Canada continued as Canada’s Admiralty Court until 1971 when it was superseded by the Federal Court of Canada which became the repository of the former Admiralty jurisdiction restated and enlarged. 267

265. (Can.) 24 & 25 Geo V, c. 31.
266. Ibid., Subsection 2(2) of the 1934 statute vested in the Exchequer Court the self-same jurisdiction as that which it had received in 1891, viz, over “the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise” (emphasis added).
Today, more than 245 years after the Nova Scotia Court of Vice-Admiralty was set up at Halifax, the exercise of Admiralty jurisdiction is traceable back in a direct line from the Federal Court of Canada to that old Halifax institution and, indeed, beyond. Deputy Attorney General of Canada, E.L. Newcombe (afterwards of the Supreme Court of Canada), arguing before the Exchequer Court in a prize case in 1914, drew Mr. Justice Cassels's attention to this historical connection by quoting liberally from James Stewart's *Reports* of 1814, and by describing Dr. Alexander Croke as

... the immediate predecessor of your Lordship, in point of the exercise of prize Jurisdiction in Canada. ... It was not necessary for him to add that Mr. Justice Cassels was indeed the successor of all the judges who had ever sat on the Nova Scotia Court of Vice-Admiralty during its long existence, and that he could exercise all of the jurisdiction which that Court had from time to time possessed in “prize” as well as in “instance” matters, except as modified by statute, from its foundation during the first half of the eighteenth century to its supersession in 1891.

268. See *supra* notes 2–5. Since 1949, when Newfoundland joined Confederation, the exercise of Admiralty jurisdiction in Canada is traceable at least as far back as 1710 (see *supra* note 8).