

4-1-2000

Removing a "Section 96" Judge: An Historical Case Study

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Recommended Citation

Barry Cahill, "Removing a "Section 96" Judge: An Historical Case Study" (2000) 23:1 Dal LJ 233.

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The creation of the Canadian Judicial Council in 1971 and the gradual disappearance of county and district court judges into the superior court judiciary filled a lacuna in the Constitution Act, 1867. The tenure of county court judges was less secure than that of superior court judges, which was constitutionally entrenched and protected. The Judges Act, passed originally to provide for the removal of county court judges, articulated a mechanism which was extended to superior court judges at about the same time as county and district courts were beginning to disappear from the Canadian judicial scene. The lack of such a mechanism had, for over a century, rendered superior court judges virtually irremovable; none was removed, though some resigned under threat of it. Four county court judges, on the other hand, were removed. This article is an historical case study of one of them, a judge of Nova Scotia's county courts—the last in Canada to be abolished.

Avec la disparition graduelle des juges de comté et de district, dont les fonctions ont été reprises par la cour supérieure, la création du Conseil canadien de la magistrature en 1971 a comblé les lacunes de l'Acte d'Amérique du Nord britannique de 1867. La permanence des juges de comté était moins certaine que celle des juges de la cour supérieure, laquelle était protégée et enchâssée dans la constitution. Adoptée à l'origine dans le but d'éliminer les juges de comté, la loi sur les juges prévoyait un mécanisme que l'on a également appliqué aux juges de la cour supérieure à l'époque même où les juges de comté et de district se faisaient de plus en plus rares au sein de la magistrature. En l'absence d'un mécanisme semblable, les juges de la cour supérieure avaient été pratiquement inamovibles pendant plus d'un siècle. Aucun juge n'a été démis de ses fonctions quoique certains ont démissionné de crainte qu'on ne les oblige à quitter leurs fonctions malgré eux. En revanche, quatre juges de comté ont été démis de leurs fonctions. L'auteur de l'article nous donne le compte-rendu historique du cas d'un de ceux-ci, un juge de comté de la Nouvelle-Écosse qui fut le dernier au Canada à être révoqué.

“Why should men eminent only as politicians be made Judges? The wrongs done by this infamous practice are appalling; and it is the public who suffer by the fact that the party seeking justice is driven from one Court to another till he finds it. And happy is he who finds it at all, for the Bench of Canada is overmanned with politicians and undermanned with Lawyers.”

— *Bram Thompson, 1922*¹

* Senior Archivist, Government Archives, Nova Scotia Archives and Records Management. This article is for L.S. Loomer, historian of Windsor Nova Scotia, who graciously shared his recollections of Judge Martell.

1. Bram Thompson was editor of *Canadian Law Times*; the quote is taken from an editorial.

Introduction

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Introduction

For a century after Confederation, no procedure existed for inquiring into alleged misconduct by superior court judges, while the *Judges Act* provided a specific process for investigating complaints against county court judges.² This distinction may help explain why as many as four county court judges were successfully removed from office between 1916 and 1933,³ while it was not until 1996 that the near-impeachment of Justice Leo A. Landreville of the High Court of Ontario occurred. The year 1932 was something of an *annus mirabilis* in the history of Canadian judicial removals, presenting the Conservative government of R.B. Bennett with the opportunity to remove not one but two county court

2. While ss. 96, 99 and 100 the *Constitution Act, 1867* provided for the appointment and removal of superior court judges, and for the appointment and payment of the salaries of county and district court judges, it did not provide for the latter's removal. This lacuna was remedied by *An Act respecting County Court Judges*, S.C. 1882, c. 12, which permitted the Governor General in Council to remove a county court judge on the recommendation of the minister of justice, based on the findings of a commission of inquiry conducted by a superior court judge. The *County Court Judges Act* was afterwards merged in the *Judges Act*.

3. The first was Clarence Russell Fitch (Order in Council PC 586, 24 March 1916). The charges against Fitch, judge of the District Court of Rainey River (Ontario) 1909-16, are not known because the supporting documents were not tabled in Parliament as required by the *Judges Act*. The second was Harold Frederick Maulson, judge of Manitoba's northern judicial district, 1919-28, who was removed for drunkenness and issuing dishonoured cheques (Order in Council PC 1387, 1 August 1928). The third was Lewis Herbert Martell (Nova Scotia) 1932 and the fourth Lewis St George Stubbs (Manitoba) 1933.

judges.⁴ The case of the notorious Manitoban "judicial insurgent", Lewis St. George Stubbs, has attracted a certain literature, but that of Nova Scotia county court judge, Lewis Herbert Martell, has never been analyzed.⁵ This comment explores historically the Martell case from the perspectives of (1) the County Court as a legal institution, (2) the judge himself, (3) the statutory procedure for removal and (4) the actual process in relation to its legal and political contexts.

I. Nova Scotia's County Courts

The *Constitution Act, 1867*⁶ conferred on the provinces exclusive power over "the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction".⁷ In May 1874 Nova Scotia exercised this power for the first time by legislating a system of county courts which saw the province's eighteen counties divided into seven judicial districts, each with its own judge.⁸ The judges, who were not

4. See generally P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at 175 note 40; W. Kaplan, *Bad Judgment: The Case of Mr. Justice Leo A. Landreville* (Toronto: University of Toronto Press, 1996) at 111; M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canada Judicial Council, 1995) at 81-82; G.L. Gall, *The Canadian Legal System*, 4th ed. (Toronto: Carswell, 1995) at 284-85; P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 175-81; A.R. Philp, "Judicial Conduct: Independence and Integrity Discipline and Removal" [unpublished]; T. Kowalishin, "The Removal of Federally-Appointed Judges in Canada" [Canadian Institute for the Administration of Justice Research Project] (Edmonton, 1975) at 20; R. MacGregor Dawson, *The Government of Canada* 3rd ed. rev. (Toronto: University of Toronto Press, 1947) at 476-78; R. MacGregor Dawson, *The Principle of Official Independence, with Particular Reference to the Political History of Canada* (London: 1922) at 39-42. (I am grateful to Mr. Justice Philp, now of the Manitoba Court of Appeal, for providing me with a copy of his paper.)

5. For Stubbs see T. Mitchell, "'Laws Grind the Poor and Rich Men Rule the Law': Lewis St. George Stubbs, the Canadian State and the Ignominy of Judicial Insurgency" (1997) 22 *Prairie Forum* 277. The Stubbs case provides an excellent basis for both comparison and contrast with the Martell case, which was much more straightforward. Mitchell points out that by September 1932, the month following Martell's removal, "the federal minister of Justice had rejected repeated calls for action against Stubbs": *Ibid.*, at 295. In fact, Stubbs would not have been proceeded against at all had it not been for the personal intervention of Prime Minister Bennett. Both Martell and Stubbs were removed for official misconduct.

6. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(14), reprinted in R.S.C. 1985, App. II, No. 5.

7. S.:92(14).

8. *An Act to establish County Courts*, S.N.S. 1874, c. 18; consolidated *County Court Consolidation Act, 1889*, S.N.S. 1889, c. 9. See generally G. Bingay, *The County Court Manual: Being a Collection of the Statutes Relating to the Practice, Procedure and Jurisdiction of the County Courts of Nova Scotia* (Toronto: Carswell, 1891). A peculiar feature of Nova Scotia's county courts was the statutory prescription of *stare decisis*: "The judges of the county court shall be governed by the decisions of the supreme court of Nova Scotia and the supreme court of Canada": *County Court Consolidation Act, 1889*, s. 5.

appointed until 1876,⁹ held office “during good behaviour”—a provision afterwards entrenched in the *County Court Judges Act*.

From the beginning the county courts’ exclusively civil jurisdiction was in part concurrent with that of the Supreme Court. The parallelism was accentuated in 1889, when the county court judge’s criminal court was established. The county court judge thus became both a court for the speedy trial of indictable offences and a court of criminal appeal from stipendiary magistrates. Then in 1897 the county court judges were given the reversion of the judge of probate. Yet county court judgeships were seen to be “practically sinecures”.¹⁰ The standard of appointment—seven years’ standing—and of jurisprudence was low, and, given the proliferation of lower courts, not to mention a higher one with overriding original jurisdiction and a province-wide circuit, there was not enough work to keep all seven judges occupied.¹¹ By 1913, the year of Martell’s call to the bar, the Nova Scotia Barristers’ Society was condemning the system. “With regard to the county courts,” stated John J. Power K.C., the leading criminal defence counsel, “it was notorious that the judges, with one exception [metropolitan county of Halifax], did not work on an average for more than two or three [weeks a year?]; several of them found time to publish books and engage in other like recreation.”¹²

9. The timing of the Act’s proclamation and coming into force on 21 August 1876 was dictated by the convergence of Liberal governments in Halifax and Ottawa. The province could erect the county courts but the dominion had to appoint, and agree to remunerate, the county court judges before the courts became operational.

10. “Radical Reform In Our Law Courts / Nova Scotia Barristers’ Society Ask for Royal Commission to Investigate and Report on Judicial Abuses / Judgeship And Sinecures / Too Many Courts and Too Little Work” [*Halifax Herald* (26 March 1913)]. Three of the original seven—A.W. Savary, Stewart Campbell and Barclay Tremain—were MPs defeated in the federal election of 1874, which saw the unelected Liberal ministry of Alexander Mackenzie returned to office.

11. The number was not increased from seven to eight until 1971, when a second judge was added to Halifax. By the time of the courts’ demise, twenty years later, there were eleven—including the chief judge, who was the senior judge sitting at Halifax.

12. *Supra* note 10. The legal antiquarian whom Power had in mind was his Pictou contemporary, George Geddie Patterson, judge of the County Court of District No. 5, 1907-1939, who wrote extensively on historical subjects. In retirement Patterson even studied the history of his own court: “The Establishment of the County Court in Nova Scotia” (1943) 21 *Can. Bar Rev.* 394. Another was Mather Byles Desbrisay, one of the original judges of the court, and author of *History of the County of Lunenburg*, 2d ed. (Toronto: W. Briggs, 1895). Still another was A.W. Savary, who after his appointment revised and edited for publication the manuscript of W. A. Calnek’s *History of the County of Annapolis* (Toronto: W. Briggs, 1897).

In the years between Martell's call to the bar in 1913 and his elevation to the bench in 1925 the situation did not improve. Though the existence of the county courts considerably widened the scope of federal legal patronage, so unenviable was their reputation that the direct promotion of county court judges to the Supreme Court was unheard of until 1965,¹³ when Vincent-Joseph Pottier, judge of the County Court of District No. 1 (Halifax), was appointed to the Supreme Court.¹⁴

II. A Nova Scotian County Court Judge

Lewis Herbert Martell was born in the small coastal community of Main-à-Dieu (Cape Breton) in 1885 or 1887. His connection with Windsor, the old shire town of Hants County where he spent almost all of his career, began in 1904 when he matriculated at the University of King's College.¹⁵ Between graduating B.A. in 1908 and M.A. in 1914, Martell spent two years at Dalhousie Law School but did not graduate. He interrupted his legal studies in 1911 to become a clerk in the Department of Marine and Fisheries in Ottawa. Though lacking a law degree,¹⁶ Martell articulated with Walter Crowe K.C. of Sydney and Edward Mortimer MacDonald K.C., M.P. of Pictou, scored highest in the bar examination in the autumn of 1912 and was called to the bar in March 1913.¹⁷ For all but the seven years when he served as a county court judge, Martell was a sole practitioner in Windsor, where his reverend uncle, George Rigby Martell (died 1918), was rector of Christ Church and archdeacon of Nova Scotia. Indeed Martell's first career choice was not law but the cloth, the profession of his uncle and cousin.

13. When seeking promotion from the County Court to the Supreme Court in 1927 through 1929, E.H. Armstrong, having in 1925 been frustrated in his desire to go directly from the ex-premiership to the Supreme Court, was told that the Liberal "Minister of Justice, Ernest Lapointe, refused to deviate from a rule, followed for twenty years, of not promoting county court judges to a superior court": J.M. Beck, *Politics of Nova Scotia, Volume 2: Murray-Buchanan, 1896-1988* (Tantallon Nova Scotia: Four East Publications, 1988) at 114.

14. Pottier, a former Liberal MP, was the first Acadian appointed to the Nova Scotia bench. President of the Nova Scotia Historical Society from 1955 to 1957, Pottier did nothing if not uphold the venerable tradition of antiquarian-judges. Over his eighteen years as a county court judge he wrote and published extensively on historical matters.

15. Between 1917 and 1923 he was a member of the UKC board of governors. (For assisting with enquiries about Martell's career at King's I am grateful to Janet Hathaway, Assistant Archivist, University of King's College Archives.)

16. As late as 1939 a law degree was not required for either admission to articulated clerkship or call to the bar.

17. Martell is conspicuous by his absence from Macdonald's "list of the various gentlemen who had been either articulated with me or studied in my office" given in his memoirs, published after Martell's removal from the bench: E.M. Macdonald, *Recollections, Political and Personal* (Toronto: Ryerson Press, 1938) at 379.

But Martell's true *métier* was politics. He served as secretary of the Hants County Liberal Association and was quickly adopted as prospective Liberal candidate for the federal constituency of Hants. The election, expected in 1915, did not take place until 1917 due to wartime exigencies. In an exceedingly bitter and partisan contest, Martell stood as an anti-conscription Laurier Liberal and would have defeated the Conservative-Unionist incumbent, another Windsor lawyer, had it not been for the Service vote.¹⁸ In 1921, when the Liberals, newly reunited under W.L. Mackenzie King, swept the province, Martell was elected.¹⁹

Martell spoke frequently in Parliament and in 1922 was appointed a member of the British Columbia Fisheries Commission.²⁰ The *Redistribution Act* of 1924, however, which merged the parliamentary constituencies of Kings and Hants, brought a voluntary end to Martell's political career. In order to increase the party's chances of retaining the new seat, he stood down in favour of the Liberal incumbent in the former riding of Kings, who in 1921 had had a majority almost three times the size of Martell's in Hants.²¹ Ernest Robinson lost, as did the prime minister in his own constituency, but the ministry was returned to office and Martell's *quid pro quo* was never in jeopardy.

On the eve of election day in October 1925, Martell was one of three Liberal politicians appointed to judgeships in Nova Scotia—one to the Supreme Court, the other two to the County Courts.²² During this period, Martell had an influential patron in the person of his former principal, E.M. MacDonald—"the province's chief Laurier Liberal"²³—who was minister of national defence in the second King ministry (1923-6). The year 1925 was exceptional in that three of Nova Scotia's seven county court judgeships fell vacant. Two judges died,²⁴ while a third, aged 77, was perhaps encouraged to retire to make way for Martell.²⁵ Martell's reward for political services rendered was to be the judgeship of County

18. Though a lieutenant in the Canadian Expeditionary Force, and attached to an overseas battalion, Martell contrived not to be sent overseas. His 'funking' became an election issue and was even raised in Parliament: *House of Commons Debates* (17 Sept 1917) at 5914.

19. "In the 1921 federal election Stubbs ran as a Liberal candidate against T.R. [*sic*] Crerar, leader of the Progressives. He finished a poor third, but as a reward from the federal Liberals, in March 1922, Stubbs was appointed county court judge. . . ." Mitchell, *supra* note 5 at 279.

20. Order in Council PC 1466 (10 July 1922).

21. "Ernest Robinson Unanimous Choice Hants-Kings Liberal Convention ..." [Windsor, Nova Scotia] *Hants Journal* (30 September 1925).

22. William Francis Carroll, Liberal ex-MP, became a puisne judge of the Supreme Court, while Armstrong, defeated Liberal premier, and Martell, another Liberal ex-MP, both became county court judges.

23. Beck, *supra* note 13 at 69.

24. J.W. Margeson and Duncan Finlayson.

25. The mandatory retirement age (since 1903) was eighty.

Court District No. 4, which sat at Truro (Colchester), Windsor (Hants) and Kentville (Kings).²⁶ The incumbent, ex-Conservative MLA Barclay Webster, had been appointed as recently as 1917—by the Unionist ministry of Sir Robert Borden.²⁷

III. *Statutory Procedure*

In 1932 the machinery for removing a county court judge was unchanged from what it had been fifty years earlier when the original legislation was enacted:²⁸

REMOVAL OF COUNTY COURT JUDGES

31. A judge of a county court may be removed from office by the Governor in Council for misbehaviour, or for incapacity or inability to perform his duties properly, on account of old age, ill-health or any other cause; if

(a) the circumstances respecting the misbehaviour, incapacity or inability are first inquired into; and

(b) such judge is given reasonable notice of the time and place appointed for the inquiry, and is afforded an opportunity, by himself or his counsel, of being heard thereat. . . .

. . .

3. The Governor in Council may, for the purpose of making inquiry into the circumstances respecting the misbehaviour, inability or incapacity of such judge, issue a commission to one or more judges of the Supreme Court of Canada or any one or more judges of any superior court in any province of Canada, empowering him or them to make such inquiry and to report, and may, by such commission, confer upon the person or persons appointed, full power to summon before him or them any person or witnesses. . . .

The machinery for removing a county court judge remained unchanged until 1971, when the Canadian Judicial Council was established, and extra-parliamentary procedures for removing a superior court judge were brought into line with those which already existed for county court judges. According to section 32(1) of the *Act to Amend the Judges Act*.²⁹

The Council shall, at the request of the Minister of Justice of Canada or the Attorney General of a province, commence an inquiry as to whether a judge of a superior, district or county court should be removed from office for any of the reasons set out. . . .

26. Order in Council PC 1760 (28 October 1925).

27. Unlike Martell, Webster had significant judicial qualifications; he had been stipendiary magistrate for Kentville and Kings County for thirty years.

28. *Judges Act*, R.S.C. 1927, c. 105, s. 31.

29. S.C. 1970-71, c. 55; now *Judges Act* R.S.C. 1985, c. J-1, s. 63(1).

The new statutory procedure owed a good deal to the old, for the Council was to be composed of chief justices and associate chief justices, one or more of whom could undertake the inquiry as a member of, and on behalf of the Council.

The creation of the Council was in response to the Landreville Affair of 1964-66, which saw a retired justice of the Supreme Court of Canada, Ivan Rand, appointed a commission of inquiry under Part I of the *Inquiries Act* with a view to removing a provincial superior court judge. The whole exercise, which was intended to determine whether grounds existed for instituting parliamentary proceedings under s. 99(1) of the *Constitution Act, 1867*, was *ultra vires* because the *Judges Act* made no such provision for investigating the conduct of a superior court judge. Nor did the government of the day recognize that any procedure having in view the removal of a superior court judge would have to be exclusively parliamentary³⁰—unless and until the *Judges Act* was suitably amended. A public inquiry under the *Inquiries Act* did not remedy the inability to strike a judicial inquiry under the *Judges Act*. As far as the removal of superior court judges was concerned, until 1971 the real *Judges Act* remained the *Constitution Act, 1867*.

So the tradition whereby judges (or ex-judges) of a higher court decided the fate of those of a lower continued more or less unchanged. As Chief Judge Philp (as he then was) observed a few years after the creation of the CJC, “That the Council is composed of the Chief Justice of Canada [chair], the chief justices and associate chief justices of the superior courts, and that county and district court judges are even precluded . . . from participating on an Inquiry Committee, are inexplicable anachronisms of some irritation to county and district court judges.”³¹ In any case, the establishment of the CJC resolved a serious anomaly by rendering all “Section 96” provincial judges subject to more or less the same procedure on removal. Previous to the creation of the CJC, provisions for the removal of superior court judges and inferior court judges were the inverse of each other: the former had a constitutional warrant but no statutory procedure, while the latter had a statutory procedure but no constitutional warrant. The process was not fully “constitutionalized” in respect of county court judges until 1987, when the *Judges Act* was amended to make county court judges removable by the governor general on address of the Senate and House of Commons.³² Previously, s.99 of

30. A point long before recognized by the leading authority on the subject, Robert MacGregor Dawson: see *Government of Canada*, *supra* note 4 loc. cit.

31. Philp, *supra* note 4 at 25.

32. *Act to Amend the Judges Act, the Federal Court Act and the Tax Court of Canada Act*, S.C. 1987, c. 21, s. 5.

the *Constitution Act, 1867* was material only in that county court judges held office during good behaviour. Under the ancien regime, as many as four county court judges could be removed in less than twenty years (1916-1933) because they were far more easily amovable than superior court judges; a precise statutory procedure existed.

IV. *The Inquiry*

In July 1925, three months before the federal election which saw the Liberals returned to office, the Conservatives returned to power in Nova Scotia after a hiatus of 43 years. Then in March 1928 the government revoked the statutory power of County Court judges to grant *habeas corpus* in relation to persons imprisoned under criminal process.³³ That extraordinary action was in direct response to a decision by the Supreme Court of Nova Scotia in banco allowing an appeal from an order by Martell C.C.J. "improvidently" granting an application under the *Liberty of the Subject Act* on behalf of a prisoner convicted for an offence against the *Nova Scotia Temperance Act*.³⁴ Though Martell was guilty of contumacy, nothing was done. Liberal governments did not take action against Liberal ex-politician judges appointed by previous Liberal governments.

From 1927 through 1932 Martell, like a number of other federally appointed judges, was being pursued for income tax evasion.³⁵ In 1932 Parliament passed an *Act respecting debts due to the Crown*,³⁶ which authorized the deduction of money due the federal crown from moneys payable by it. Under this statutory authority Martell's wages were garnisheed to cover eight years of income tax arrears. Meanwhile another

33. *Act to Amend Chapter 215, Revised Statutes 1923, Entitled "The County Courts Act"*, S.N.S. 1928, c. 50; the power had originally been conferred a mere four years earlier—before Martell's elevation to the bench.

34. *Re Harry Hood* (1927), 59 N.S.R. 387 (N.S.S.C in banco); [1927] 4 D.L.R. 537 ("Re Wood"); cf. *In re Harry Hood* (1927), 59 N.S.R. 471. On the latter occasion Harris, CJ spoke thus for a unanimous court: "The result (much to be deplored) is that a case in which this Court [Supreme Court of Nova Scotia in Banco] had unanimously decided that there was ample evidence to justify the conviction, the proceedings have been so carried on that a prisoner properly convicted, and who undoubtedly should have served a period of three months' imprisonment in gaol, has been during the whole period of his sentence improperly out on bail and absolutely escapes all punishment" (at 476).

35. Canada - Department of Justice - Judge L.H. Martell case file, RG 13 A 2 vol 2425 file 1112/1932, National Archives of Canada.

36. S.C. 1932, c. 18.

situation was coming to a head.³⁷ In April 1930 a private citizen of Windsor, Nova Scotia, one Harold MacKeen Bissett, wrote a letter of complaint to the then Liberal minister of justice, Ernest Lapointe,³⁸ asking for an inquiry into Martell's conduct. Lapointe asked for specific charges but, by the time they were submitted, the Conservatives had returned to power and Lapointe replaced by Hugh Guthrie. The new Minister of Justice ordered his deputy to inform the attorney general of Nova Scotia of the complaints against Martell, which were that he

- (1) was under the influence while on the bench
- (2) was often under the influence in public places
- (3) appeared frequently in public in an unkempt personal condition
- (4) discussed cases *sub judice* in his court
- (5) talked politics loudly, publicly and offensively
- (6) verbally abused and slandered many individuals, including prominent citizens
- (7) dispensed legal advice, particularly in respect of cases likely to come up before the county court.

Guthrie wanted to know whether the attorney-general of Nova Scotia considered a judicial inquiry advisable in the public interest and, if so, what individual or body should be called on to gather evidence. Attorney-General John Doull replied that the actions of Judge Martell "have been widely discussed in the Province of Nova Scotia and are regarded by the public as a scandal of considerable importance" and recommended that an inquiry be held.³⁹

On 29 January 1932 the deputy minister of justice wrote Martell informing him that the government had decided to set up an inquiry under the *Judges Act* and inviting him to submit his resignation; Martell did not reply. Two days later, the former attorney-general of Nova Scotia, W.L. Hall, apparently on his own authority, wrote the deputy minister of justice detailing "repeated acts of personal and official misconduct" on the part

37. This and what follows are, unless otherwise indicated, based on the following official sources: Judge Martell case file (*supra* note 35) and *In the Matter of the Judges Act, Chapter 105 of the Revised Statutes of Canada, 1927*, and *In the Matter of the Inquiry into the Conduct of His Honour Louis [sic] Herbert Martell, County Court Judge for District No. 4 in the Province of Nova Scotia*, unpubl. sessional papers, 4th Session of the 17th Parliament, 6 October 1932-27 May 1933, No. 143, RG 14 D 2 vol 262, NA (mfm at NSARM).

38. Minister of Justice when Martell was appointed to the bench in October 1925.

39. Letter from Doull to Edwards (deputy minister) (28 December 1931): Chisholm Commission file, Miscellaneous Manuscripts Collection, MG 100 vol 187 file 6, NSARM [hereinafter Chisholm file].

of Judge Martell and asking for an inquiry under the *Judges Act*.⁴⁰ Events then moved quickly. On 13 February the Chief Justice of Nova Scotia, Joseph A. Chisholm, was asked to serve as inquiry commissioner and he agreed to do so. There was no apparent reason why the chief justice rather than a justice of the Supreme Court should act as the commission of inquiry, or for that matter why the commissioner should have been a member of the Supreme Court of Nova Scotia rather than of another province. The Stubbs inquiry commissioner, for example,⁴¹ was a Supreme Court justice not from Manitoba who, though a Conservative appointee, had never been actively involved in politics. The reason for Chisholm's appointment appears to have been entirely political:⁴² all the other justices but one (ex-Attorney General) were Liberals and Liberal appointees. Perhaps the Conservative government in Ottawa did not care to risk that a Liberal commissioner, sympathetic to a good party man like Martell, might *not* find grounds sufficient for the minister of justice to recommend his removal.

By 10 March 1932, when the official announcement was made in Ottawa that Chief Justice Chisholm was to be appointed a commission of inquiry "to investigate certain complaints bearing on the conduct" of Judge Martell, the pre-inquiry investigation was already well underway. Attorney-General Doull having suggested that the RCMP be asked to prepare the government's case, a senior non-commissioned officer with the criminal investigation branch conducted the investigation and submitted a full report to the Commissioner of the RCMP.⁴³ Among the more sensational revelations was that Martell had been found in a compromising position with a young bootlegger who had been up before him in court

40. Letter from Hall to Edwards (31 January 1932): Chisholm file. William Lorimer Hall, a former leader of the Conservative Party in Nova Scotia, had recently been appointed a justice of the Supreme Court, filling the vacancy created by Chisholm's promotion to chief justice. Perhaps Hall was lobbying for the appointment of inquiry commissioner.

41. Mr. Justice Frank Ford of the High Court of Ontario.

42. Chisholm was the brother-in-law of the late Sir John S.D. Thompson, Conservative prime minister, 1892-94, and had run unsuccessfully for the Tories in Thompson's old constituency in the federal by-election of 1895. While at the bar he had been in Robert Borden's law firm, and it was to Borden that he owed his appointment as puisne judge in 1916. He owed his appointment as chief justice in 1931 to the next Conservative prime minister from the Maritimes, R.B. Bennett.

43. The involvement of the RCMP, which had only just taken over policing duties in Nova Scotia, is highly suggestive in that Martell was neither suspected, nor had he been accused of criminal behaviour. (The bill 'establishing' the RCMP was rushed through the legislature in March: *An Act to Amend Chapter 44 of the Revised Statutes, 1923, "The Constables Act"*, S.N.S. 1932, c. 26.) The Attorney-General did not want it to appear that his department was preparing a criminal case against Martell, while neither the Department of Justice nor either of the local lawyers known to have been approached was interested in conducting the investigation.

and had had his conviction overturned. (Needless to say, this incident was not raised at the public hearings.) Doull arranged for Henry P. Duchemin K.C., a Tory newspaper proprietor from Sydney (Cape Breton), to act as counsel for the commission, and then advised the deputy minister of justice that the province was ready for the inquiry to commence.

It was also in March that R.W.E. Landry K.C., Liberal M.L.A. for Yarmouth,⁴⁴ introduced a bill to restore the statutory power of county court judges to grant *habeas corpus* in relation to persons imprisoned under criminal process. When Bill No. 31 came up for second reading, Conservative Premier Gordon S. Harrington moved that it be given the three months' hoist. He

took the stand that there was a "blank stone wall facing the solution of the problem" which Mr Landry wished solved, that it could not be done. Many members were in ignorance of the reason for his stand...but others were not and it was a substantial reason of a material kind which he did not propose to state publicly. ... The general principle was not the objection, but it was simply and solely an "insurmountable obstacle" which would not enable carrying out of the proposal. In perhaps a short time the objection might be removed and perhaps then the Attorney-General would consider the matter and introduce legislation next year.⁴⁵

Landry agreed to withdraw his private member's bill on condition that, if the "obstacle" were removed, the bill would be reintroduced as a government one. Harrington kept his promise.

On 8 June the commission to Chief Justice Chisholm issued,⁴⁶ and on 11 July the public inquiry commenced at Truro, one of the three county towns where Martell held court. It then proceeded to Windsor and Kentville, before concluding in Halifax on 28 July. Martell, present throughout the public hearings, was represented by counsel. A parade of witnesses, some 39 of the 43 subpoenaed, gave damning testimony against the judge, whose chronic alcoholism had so overwhelmed him that his doctors dissuaded counsel from allowing him to give evidence on his own behalf. One of the expert medical witnesses, who had known the judge in university, described him as having "an exalted ego" and suggested that he was temperamentally unsuited to the bench. Among those testifying to Martell's having been under the influence when in court were several RCMP officers (including the recently-promoted

44. Landry was the first Acadian to open a law practice in Nova Scotia; in 1911 he had succeeded to that of E.H. Armstrong, who was to become a county court judge the same time as Martell.

45. "Substantial Reason," [*Halifax Herald*] (24 March 1932); cited in J.M. Beck, *The Government of Nova Scotia* (Toronto: University of Toronto Press, 1957) at 298 note 69.

46. Order in Council PC 1319 (8 June 1932); the commission is in the Sir Joseph Chisholm fonds at NSARM: MG 1 vol 220 doc 5.

inspector who had conducted the investigation), Windsor's chief of police, the sheriff of Hants County and the probate registrar in Kings. Far more serious, however, than Martell's habitual drunkenness or his passing bad cheques at hotels where he repaired to drink was his alleged partiality towards the known criminals with whom he consorted and his taking larger fees out of estates than he was entitled to as probate judge. Not only did he unreasonably quash bootlegging convictions appealed from the municipal courts. On one occasion he removed from the Windsor courthouse contraband liquor which had been impounded and was in the custody of the clerk of the court. A witness testified,

there was no certain case [out of twelve] in which the Judge [Martell] sustained any conviction obtained with respect to a liquor case under either the Provincial or Dominion law during the whole period he was in office in the Town of Windsor. Disallowed all convictions that were made.⁴⁷

One week before the inquiry concluded Martell belatedly submitted his resignation, conditional on receiving a pension. A *deus ex machina* had intervened to rescue him. Charles B. Smith K.C., president of the Conservative Association and number two in the elite Halifax law firm which acted as agent to the Department of Justice, wrote the minister forwarding Martell's letter of resignation and recommending that it be accepted.⁴⁸ Because it had the support of the minister of finance, Edgar Nelson Rhodes (formerly premier of Nova Scotia), the proposal was nearly accepted. But neither the deputy minister nor Justice solicitors felt that the commission of inquiry, then nearly complete, should be superseded or that a judge on the verge of removal for official misconduct should be granted a retiring allowance. The minister of justice, perhaps at the urging of the prime minister, recanted.⁴⁹

On 6 August 1932 Chief Justice Chisholm submitted his report, in which he declined the request from counsel for the judge to find on his mental or physical incapacity. "Even with the somewhat positive evidence given by the medical men," the inquiry commissioner stated,

I am unwilling to make a finding - one way or the other - as to the condition of Judge Martell's mind. To make a finding that a man's mind is so unsound as to free him from responsibility for his actions is a serious matter, serious in its immediate and in its ultimate consequences.⁵⁰

47. Minutes of evidence (stenographic report), p. 96: *supra* note 37.

48. Letter from Smith to Guthrie (22 July 1932): Chisholm file, *supra* note 39. James McGregor Stewart, head of Stewart, Smith, MacKeen & Rogers (now Stewart McKelvey Stirling Scales), was standing external counsel to the Department of Justice throughout the Bennett ministry, 1930-35.

49. "Everyone at the time [1932] on both political sides wanted a pension for him [Judge Martell] and some of our strongest Conservatives worked to secure it but the Hon. R.B. Bennett was the final stumbling-block I believe. Hon. E.N. Rhodes was very favourable": Letter from Ethel (Mrs L.H.) Martell to W.L. Mackenzie King (14 August 1936): Chisholm file *ibid*.

50. *Supra* note 36.

Nor did the inquiry commissioner find that the well-attested personal misconduct constituted grounds for removal. The sole grounds were official misconduct, involving both misfeasance and malfeasance. As the government was more or less obliged to act on the findings of the Chisholm commission,⁵¹ on 19 August Martell was ordered removed from his judgeship.⁵² The next day he was still on the bench, having presided while the judicial inquiry was in progress. On the 23rd Herbert Warren Sangster K.C., Windsor's senior barrister, a Tory and the crown prosecutor for Hants County, was appointed to replace him. What Premier Harrington five months earlier had called an "insurmountable obstacle"⁵³ to the restoration of the power of County Court judges to grant *habeas corpus* in relation to persons imprisoned under criminal process was the continuing presence of Judge Martell on the bench. That obstacle was now removed. The first legislative session after Martell's displacement saw the power restored.⁵⁴

Conclusion

Unlike the Stubbs case, the Martell case was not political except in that Martell had been as successful and determined a politician as Stubbs was unsuccessful. Though the Liberal opposition in Parliament criticized the Conservative government for its handling of the Stubbs case, no such concern was expressed over the treatment of Martell. The bipartisan consensus of opinion was that Martell must cease to be a judge. Unlike Stubbs, Martell did not wish to exploit his position on the bench for political ends but simply to continue to be a "political animal" regardless of being a judge. He was not so much a judicial insurgent as a judicial pariah whose fate disclosed that, in the final analysis, quality control of judicial appointments was still subject to the vagaries of electioneering.⁵⁵ The Martell case highlighted the utter failure of the spoils system of judicial candidature. If the judiciary was the preserve of ex-politicians, or at least known supporters of the party in government at Ottawa, then the County Court was a safe harbour for ex-politicians who had not necessarily proven themselves as lawyers. None of the appointments to Nova

51. "The statute has committed to the judges of the Superior Courts when named for the purpose by the Governor in Council the duty of inquiring into the conduct or behaviour of the County or District Court [Judge]s and in the view of the Minister of Justice the findings of the Commissioner in any such case should be accepted as conclusive": Order in Council PC 1848 (19 August 1932).

52. Order in Council PC 1848; see also Order in Council PC 1822 (16 August 1932).

53. *Supra* note 45.

54. *Act to Amend Chapter 215 of the Revised Statutes, 1923, "The County Court Act"*, S.N.S. 1933, c. 47.

55. Paraphrasing Mitchell, *supra* note 5 at 313.

Scotia's County Court bench, 1876-1984, went to a lawyer who did not adhere to the party of government; very few went to other than ex-politicians.

After a tempestuous seven years, Martell receded into the obscurity of his small-town law practice. He kept his K.C. and was not disbarred. Throughout the remaining thirty years of his life,⁵⁶ he was politely referred to as having "retired" from the bench. He continued interested, though not active, in federal politics.⁵⁷ "Herb" Martell was not cut out to be a judge. Law was but a shortcut to a political career, and the bench a pale imitation of and poor substitute for the political arena. Though a judge, he did not know how to behave judiciously on or off the bench. He was too reckless and restless for the judicial shelf. Had he deferred plucking the patronage plum, he could have had the Liberal nomination in Kings-Hants for the asking in 1926. It might then have been Martell—not James Lorimer Ilsley, another politically ambitious young lawyer—who reclaimed the seat for the Liberals in 1926 and held it for 23 years.⁵⁸ Once a politician, always a politician; that was Martell's tragedy.

Martell scored a pyrrhic moral victory in April 1938 when William Angus Livingstone M.C., K.C., county court judge for District No. 3 for less than four years, resigned in advance of being tried, convicted and sentenced to two years in Dorchester Penitentiary for theft and perjury.⁵⁹ Livingstone, a war hero, had no qualifications for the bench other than his party-political affiliation, which was (of course) Conservative. A company director with links to Halifax's corporate law establishment, Livingstone was appointed to the bench in September 1934 by the same Conservative minister of justice who had removed Martell. Like Martell, he was a Cape Bretoner transplanted to the mainland; like Martell, too, he was out of his depth as a county court judge. Unlike Martell, he had not performed any significant party political service. In view of Prime Minister Bennett's observation in May 1932 (when the Martell case was *sub judice*) that the result of "too much political patronage concerned in

56. He died, rather suddenly, in Halifax in August 1962.

57. L.S. Loomer recalls Martell's attending a political meeting in Windsor at which John Bracken, federal Conservative leader, 1942-1948, gave a speech.

58. Ilsley, whom Judge Martell had once verbally abused, attempted unsuccessfully in 1937 (after he had become minister of national revenue) to help Mrs Martell obtain a compassionate allowance for her indigent husband.

59. Beck, *supra* note 45 at 298; see generally *R. v. Livingstone* (1941), 75 C.C.C. 125; (1941) 15 M.P.R. 551. Livingstone, who underwent six trials, was originally accused of stealing from an estate of which he was the executor. After resigning, Livingstone fled to British Columbia, where he was called to the bar in 1939 and practised for a few years in Vancouver. He was disbarred in 1943, while incarcerated. (I am grateful to Bernice Chong, Archivist, Legal Archives of British Columbia, for sharing information about W.A. Livingstone.)

appointments to the Bench” was “that the test whether a man is entitled to a seat on the Bench has seemed to be whether he has run an election and lost it,”⁶⁰ the “offence” was therefore greater in Livingstone’s case. Martell had lost once, won once and then stood down in the vain hope of improving the party’s electoral prospects in a new constituency. He at least had performed party service useful enough to “deserve” a patronage reward. Needless to say, the party of government having changed between Livingstone’s appointment in 1934 and his resignation in 1938, his replacement was a Liberal partisan, though not an active politician.⁶¹

60. Dawson, *supra* note 4 at 479-80.

61. Kenneth Crowell of Bridgetown (Annapolis County).

