

## A Bench in Disarray : The Quebec Judiciary and The Federal Department of Justice, 1867-1878

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Volume 34, numéro 1, 1993

URI : <https://id.erudit.org/iderudit/043197ar>

DOI : <https://doi.org/10.7202/043197ar>

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Éditeur(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (imprimé)

1918-8218 (numérique)

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Citer cet article

Swainger, J. (1993). A Bench in Disarray : The Quebec Judiciary and The Federal Department of Justice, 1867-1878. *Les Cahiers de droit*, 34(1), 59-91.  
<https://doi.org/10.7202/043197ar>

Résumé de l'article

Après la Confédération, on reconnaissait bien l'état lacunaire de la magistrature québécoise, mais il n'y avait pas de consensus quant aux causes et aux solutions. Non seulement la qualité de l'administration de la justice, mais également les postulats philosophiques de la loi de décentralisation, adoptée en 1857 à l'instigation de George-Etienne Cartier, étaient en cause. Malgré les efforts des réformateurs, qui cherchaient à rationaliser l'administration de la justice, les rapports subséquents entre le judiciaire et le ministère de la Justice laissent entrevoir que les intrigues, les entraves et l'opportunisme influèrent davantage sur la qualité de la magistrature québécoise d'avant 1878.

## A Bench in Disarray: The Quebec Judiciary and The Federal Department of Justice, 1867-1878

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Jonathan SWAINGER\*

*Après la Confédération, on reconnaissait bien l'état lacunaire de la magistrature québécoise, mais il n'y avait pas de consensus quant aux causes et aux solutions. Non seulement la qualité de l'administration de la justice, mais également les postulats philosophiques de la loi de décentralisation, adoptée en 1857 à l'instigation de George-Étienne Cartier, étaient en cause. Malgré les efforts des réformateurs, qui cherchaient à rationaliser l'administration de la justice, les rapports subséquents entre le judiciaire et le ministère de la Justice laissent entrevoir que les intrigues, les entraves et l'opportunisme influèrent davantage sur la qualité de la magistrature québécoise d'avant 1878.*

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*The poor state of the Quebec judiciary following Confederation was widely recognized although there was no consensus as to the nature of the problems or possible solutions. At issue was not only the quality of the administration of justice but also the philosophical assumptions underlying George-Étienne Cartier's judicial decentralization act of 1857. Thus despite the efforts of reformers committed to the modernization of Quebec through a rational legal structure, the subsequent relationship between the judiciary and the Department of Justice suggests that intrigue, manipulation, obstruction, and opportunism did more to shape the quality of Quebec's bench prior to 1878.*

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One of the most intractable problems confronting the federal and Quebec governments at the time of Confederation concerned the quality of the provincial bench. At times, there was almost a constant flow of petitions and letters complaining about the behavior, qualifications, health, and habits of various members of Quebec's judiciary<sup>1</sup>. Although some of these missives revealed personal enmity and political opportunism, many resulted from genuine grievances and concerns. In fact, it was acknowledged generally by the press, members of the bar, politicians, and even some of Quebec's sitting judges, that the bench was in disarray. However, while most agreed in the negative appraisal, a consensus as to the cause of the difficulties or plausible solutions remained elusive.

Some saw the problems with the judiciary as merely one aspect of an administrative structure which was fundamentally flawed. These critics could point to the continuation of the *enquête* system of written pleadings in chambers rather than oral arguments in court as a prime example of the entrenched defects<sup>2</sup>. Others focused on the dispersal of the judiciary throughout the province as ignoring the backlog of cases in Montreal while encouraging a fragmented and peculiaristic judicial culture<sup>3</sup>. While disagreeing as to the source of the problems, these two groups of critics shared the assumption that a reformed judicial system could work. The main

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1. See for example, ASSEMBLÉE NATIONALE DU QUÉBEC, « Petitions regarding Administration of Justice in the district of Beauce », in *Débats de l'Assemblée législative* at 140, 142 (4 December 1871); at 172 (9 December 1871); at 184 (13 December 1871); at 193 (15 December 1871); at 202 (16 December 1871).
  2. A. GUGY, *The Beauties of the Administration of the Law in Quebec and the Benefit Conferred upon the Community by the Selection of the Best Judges*, Quebec, s.n., [1868 ?]; A. GUGY, *Facts Disclosed in Some Unreported Cases, Published for the Public Good*, s.1, s.n., [1870 ?] and F.W. TORRANCE, *A Letter to the Attorney General of the Province of Quebec on the Administration of Justice*, Montreal, s.n., 1873.
  3. F.W. TORRANCE, *op. cit.*, note 2, p. 14. Torrance repeated this criticism in 1880, see F.W. Torrance to the Attorney General for the Province of Quebec, 21 June 1880, in *Sessional Papers*, (1881) (no. 56, pp. 15-16).

question concerned how much reform was needed. Intellectually the heirs of Sir George-Étienne Cartier's judicial decentralization bill of 1857, these commentators were unalterably committed to the premise that the administration of justice in Quebec could be reformed in a rational and ordered fashion.

However, while the advocates of further reform could present a compelling case, it was far easier for most observers to simply blame Quebec's judicial personnel for the problems in the administration of justice. Although those who championed further administrative reform saw the criticism of individual judges as short-sighted, the idiosyncrasies of certain judges guaranteed that judicial behavior would be grist for the mill of public debate and complaint<sup>4</sup>. More importantly, those who focused on specific judges could argue that even if the administrative structure was flawless, an unlikely proposition at the best of times, ill-suited or incompetent judges insured that the system would fail the citizens of Quebec. Significantly, such a view of human nature and the limited reach of reform corresponded with Sir John A. Macdonald's vision of the world. Thus in unraveling the various approaches to the administration of justice and the Quebec judiciary in the decade following Confederation, we can discern a tension between the Cartier and Macdonald outlook. Given the turn of events during those years, it is perhaps not surprising that as Macdonald's approach won the day, the advocates of continued reform became increasingly frustrated with the state of affairs in Quebec.

Solving the riddle of the Quebec judiciary after 1867 involved no easy answers because the problems were rooted deeply in the political culture of colonial society and government. Granting positions on the bench, like all aspects of patronage in Victorian Canada, was a central ingredient of political success and longevity<sup>5</sup>. Admitting that previous appointments had been injudicious or ill-conceived was bitter medicine, and neither the Conservatives nor the Liberals were willing to accept such a prescription. Further, while it was evident that improving the quality of the bench was desirable, pursuing such a goal involved potential accusations of meddling with judicial independence. Whether average Canadians were firmly attached to the notion of a clear division between the judiciary and executive is uncertain, but for his part, Sir John A. Macdonald, as the first Minister of Justice, viewed a position on the bench as being parallel to

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4. F.W. TORRANCE, *op. cit.*, note 2, p. 16.

5. See G.T. STEWART, *The Origins of Canadian Politics—A Comparative Approach*, Vancouver, University of British Columbia Press, 1986; S.J.R. NOEL, *Patrons, Clients Brokers—Ontario Society and Politics, 1791-1896*, Toronto, University of Toronto Press, 1990.

entering the monk-hood<sup>6</sup>. The inference, of course, was that once on the bench, appointees were to be politically celibate, and that in turn, politicians were to act accordingly. In practice both the Conservatives and the Liberals regularly failed to maintain such standards, but giving due regard to the division remained an integral part of contemporary political rhetoric.

Finally, while Cartier's reform ideology failed to win the day after Confederation, it could not be rejected completely for a number of reasons. First, the rationale underlying Cartier's judicial decentralization act of 1857 had re-constructed Quebec's judicial system and continued to shape many of its characteristics. That enactment created nineteen new judicial districts throughout Lower Canada in the name of bringing inexpensive justice to the countryside. In fact it was also a patronage bonanza corresponding to a reform process whereby state and institutional structures were reshaped to be more receptive and supportive of « capitalist relations<sup>7</sup> ». Second, given the presumed rationality of the reforms during the 1850s in codification and judicial decentralization, the reformers refused to accept the notion that the idiosyncrasies of individual judges could thwart reform. From their perspective the institutions simply needed more reform. Finally, as long as Cartier and those who subscribed to these reform ideals remained a force in public life, the federal government could simply not afford to ignore such arguments.

The combination of all these ingredients insured that the federal government performed an amazing series of contortions in dealing with Que-

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6. When Oliver Mowat left the Vice-Chancellorship of Ontario in 1872 to return to political life, Macdonald suggested that the move was an imitation of « the American system of judges returning to political life, after having accepted the monkhood of the Bench ». He would repeat these themes on a number of occasions following Mowat's decision. See *National Archives of Canada* (hereinafter *NAC*), MG 26A, vol. 253, pp. 114957-114958, John A. Macdonald to Oliver Mowat, 25 October 1872. Also see Macdonald to Chief Justice William Draper of Ontario, Chief Justice Alexander Morris of Manitoba, and Judge James Gowan of Ontario (*id.* : pp. 27-28, 149-150, and 180).
  7. B. YOUNG, « Positive Law, Positive State : Class Realignment and the Transformation of Lower Canada, 1815-1866 », in A. GREER and I. RADFORTH (eds.), *Colonial Leviathan : State Formation in Mid-Nineteenth Century Canada*, Toronto, University of Toronto Press, 1992, at 50. Also see B. YOUNG, *George-Etienne Cartier — Montreal Bourgeois*, Montreal, McGill-Queen's University Press, 1981, p. 72 and « Dimensions of a Law Practice : Brokerage and Ideology in the Career of George-Etienne Cartier », in C. WILTON (ed.), *Essays in the History of Canadian Law Beyond the Law : Lawyers and Business in Canada, 1830-1930*, t. 4, Toronto, Butterworths, 1990, pp. 103-104. More traditional interpretations of the intent behind decentralization can be found in J.C. Dent, *The Last Forty Years : Canada Since the Union of 1841*, t. 2, Toronto, G. Virtue, 1881, p. 352 ; J. Boyd, *Sir George Etienne Cartier, Bart., His Life and Times*, Toronto, Macmillan Company of Canada, 1914, p. 136 ; and B. SULTE, *Sir George-Etienne Cartier*, Montreal, G. Ducharme, 1919, pp. 19-29.

bec's judiciary. On the one hand it was maintained publicly that the bench was generally sound and, where difficulties existed in the administration of justice, procedural reforms could be initiated to solve those problems. At the same time both Conservative and Liberals administrations acted through the Department of Justice in setting about the delicate task of orchestrating the « honourable » retirement of troublesome members of the bench. Such tactics enjoyed limited success. Specifically, those judges receiving the greatest criticism often demonstrated an unbending resolution to hold their positions on the bench and, in so doing, reinforced the public view that the Quebec judiciary was the worst in the nation.

### 1. The Structural Obstacles

That the difficulties of the administration of justice in Quebec escaped reform through the *British North America Act* of 1867 is less than surprising. Concerned with creating the broad guidelines of governance and responsibility, the Confederation negotiations relegated many specific regional details for later resolution. This is not to suggest, however, that the fathers of Confederation were uninterested in the judiciary. Rather, their discussions focused on three inter-related issues: which level of government would appoint and pay the judiciary; how would that authority affect Quebec's civil law tradition, and how would that tradition be affected if and when a dominion court of appeal was established? Clearly the main concern of individuals such as A.A. Dorion and Joseph Cauchon was that because of the Confederation scheme, Quebec would be saddled with a judiciary unschooled in the legal heritage of the province and would therefore suffer more than the strictly common law provinces<sup>8</sup>. Given the need to placate these concerns, it was determined that the administration, maintenance, and constitution of the courts were to be a provincial responsibility<sup>9</sup>. Accordingly, if there were problems with the administration of justice in Quebec, the province had the authority to address these local concerns on their own accord.

Vesting the responsibility for the daily administration of justice in the provinces did not, in fact, provide the means for Quebec to actually reform its courts. First, by retaining control over the appointment and payment of

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8. J. CAUCHON, 2 March 1865, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, Quebec, Hunter, Rose and Co., 1865, p. 575 and A. A. DORION, 9 March 1865, *op. cit.*, p. 860. These fears were repeated in Quebec by F.-G. MARCHANT, *Assemblée nationale du Québec, Débats de l'Assemblée législative*, at 22 (30 December 1867). Also see P. RUSSELL, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, Ottawa, Queen's Printer, 1969, p. 7.

9. The *British North America Act*, 1867, 30 & 31 Vict., U.K., c. 3, s. 92 (14).

Superior, District, and County court judges, the federal Department of Justice maintained a considerable voice in shaping the nation's judiciary<sup>10</sup>. Second, judicial pensions were also administered by the federal government under section 100 of the *BNA Act*, and the eventual provision of a pension based on two-thirds of full salary did not necessarily guarantee financial security upon retirement from the bench. Pensions did not, therefore, insure that troublesome judges would step down when given the opportunity. Finally, even if the provincial government was willing to create additional districts in response to an obvious need, economic stringency could dictate a certain amount of hesitancy on the part of a federal government wary of shouldering more judicial salaries. In effect, the *BNA Act* divided the administration of justice and the judiciary in such a fashion so as to make it impossible for either level of government to act independently in judicial reform.

However, while Confederation introduced this new jurisdictional arrangement, it did not create the environment in which the province's judicial personnel failed to meet the community's expectations. Rather, the *BNA Act* merely exacerbated the distorted judicial and legal culture which George-Étienne Cartier's judicial decentralization bill of 1857 had done much to encourage. This distortion was revealed in a stark imbalance in the quality of judicial rulings in Lower Canada, an undeniable diminution in the quality and respect of the bench and, finally, the relative absence of a nascent sense of intellectual community amongst the widely dispersed judiciary<sup>11</sup>. Further, as events demonstrated, the decentralized system did not necessarily provide the desired stability for the entrepreneurial community<sup>12</sup>.

The *BNA Act*, by retaining the pre-Confederation judicial districts and personal, maintained these distortions of the past while ultimately wresting control away the level of government responsible for the operation of the court system. In so doing, the constitution of 1867 placed another level of government between the public, who was saddled with the quality of the judicial personnel, and those who held the authority to address the problems. For example, when asked in late January 1868 whether the provincial government would appoint a resident judge for Rimouski to aid in the suppression of crime, Quebec attorney general Gédéon Ouimet acknowledged the desirability of such goals, but was also quick to point out that the nomination of judicial personal was not within

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10. *Id.*, s. 96 and 100.

11. See generally F.W. TORRANCE, *op. cit.*, note 2 and *Archives of Ontario* (hereinafter *AO*), MS 20 (3), no. 17, Judge Robert McKay to Luther Holton, 3 February 1876.

12. See *infra* regarding Pierre Fortin's charges.

provincial jurisdiction<sup>13</sup>. However, while such a response provided Ouimet with an excuse for inaction, it placed the matter squarely at Ottawa's feet. Given the growing concern over Quebec's judiciary, it is perhaps not surprising, therefore, that the entire question was soon aired in the nation's capital.

## 2. A Bench in Disarray

Rising to address the House of Commons on 26 March 1868, Pierre Fortin, Conservative MP for Gaspé, requested a parliamentary return regarding the sittings of court at Amherst on the Magdalen Islands in the Gulf of St. Lawrence. Almost as if waiting for the opportunity, the House launched immediately into an acrimonious debate on the quality of the bench in Quebec. L.H. Masson of Soulanges offered the comment that the judges sitting in Montreal did not have the confidence of the country. According to Masson, two of them were « a little out of their head », two had immoral lives, and the fifth was so deaf that in an action for \$ 10 he gave judgment for \$ 100<sup>14</sup>. Once the House regained its composure after bursting into laughter, the ever mindful Edward Blake suggested that to prevent a repeat of such attacks on the judiciary, a general system of compensation should be introduced for those who had « outlived his capacity for duty<sup>15</sup> ». Overall, there was a consensus that the bench in Quebec was in a « wretched condition », but the cause of the degeneration or a remedy could not be agreed upon.

A.A. Dorion, sensing the opportunity to frame the issue in terms which would demand a response from the Ministry, offered what appeared to him, to be the root of the problem. According to Dorion, whose political and philosophical animosity towards George-Étienne Cartier was without rival, of the twenty-three judges in Quebec « six were totally unfit for office from age or infirmity, while one was grossly omitted from his immoral conduct, and a scandal to the bench, and others from their ignorance of the law ». Further, upon enquiry the Minister of Justice would quickly learn the names of thirteen judges who were « manifestly incom-

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13. J. CARON and G. OUIMET, *Assemblée nationale du Québec, Débats de l'Assemblée législative*, at 62 (23 January 1868). The same tactic was used when Wilfrid Laurier proposed increasing the number of judges in Quebec (see *id.*, 6 December 1871).

14. L.H. MASSON, in *Debates of the House of Commons*, at 420 (26 March 1868) (hereinafter *Debates*). *Newspaper Hansard* notes that following Masson's comments the House erupted into laughter; this is not included in the *Debates* which P.B. Waite constructed from newspaper reports.

15. E. BLAKE, *Newspaper Hansard*, 26 March 1868.



petent<sup>16</sup> ». The reason for such a state of affairs was clear ; some of those who had been appointed Queen's Council, a position which « led naturally to the bench », were frauds, swindlers and scoundrels. Moments before the Speaker would call the six o'clock recess, Dorion concluded with the challenge that « the degradation of judicial administration in Quebec had reached an extent altogether unparalleled, but he hoped that the Minister of Justice would, for the honor of his own profession, take care that no future appointments were made except of gentlemen competent for the position<sup>17</sup> ».

Responding to Dorion's allegations after the dinner recess, George-Étienne Cartier was confronted with a delicate situation. His position as Sir John A. Macdonald's lieutenant had carried with it responsibility for judicial appointments in the province<sup>18</sup>. While he certainly could not deny that the Quebec bench was in some disarray, an acceptance of Dorion's charges, or for that matter, those levied by Masson, might undercut any remaining credibility of the bench and cast his own administration of affairs in a rather critical light. The tack adopted Cartier, was, in a sense, the only one possible.

Cartier thanked the members for their comments, although those of the member from Hochelaga (Dorion) « had been answered before he had the misfortune to have spoken<sup>19</sup> ». Although « answered » Cartier responded to each of Dorion's charges. While it was true that the administration of justice in Quebec suffered, on occasion, from the age of some of the judiciary, none of Cartier's appointments could be subject to any criticism. Branding thirteen members of the bench with charges of dishonesty or immorality was too sweeping a charge to be left unchallenged and, if the member from Hochelaga had the strength of his convictions, why had he not named those thirteen ? Further, the wide condemnation placed upon Queen's Counsels also demanded explanation, and Cartier asserted that any appointment he had made would bear well under scrutiny. In an effort to drive his rebuttal further, Cartier then named Judges Badgley, Drum-

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16. A.A. DORION, *Newspaper Hansard*, 26 March 1868. There is some inconsistency between the version of the debate portrayed in *Debates* and that reported in the *Newspaper Hansard*. In this instance, the *Debates* do not include Dorion's address before recess was called.

17. *Ibid.*

18. As Macdonald wrote Attorney General Gédéon Ouimet of Quebec on 30 September 1872, « I have been in the habit of consulting my Lower Canadian colleagues with respect to these matters. Cartier & Langevin both being of the profession are better acquainted with the matters connected with the judiciary of your Province than myself ». NAC, MG 26A, vol. 576, p. 587, Macdonald to Gédéon Ouimet, 30 September 1872.

19. G.-É. CARTIER, *Newspaper Hansard*, 26 March 1868.

mond, Mondelet, Berthelot, Meredith, Taschereau, Johnson, Winter, Lafontaine, and Bossé as examples of the qualified men that he had placed on the bench<sup>20</sup>. The problems with remodeling the judiciary was not the available talent, but the limited means of pensioning old or infirm judges, «for which they had only £2000 at their disposal in Lower Canada ». Having defended his own appointments, challenged Dorion to name the thirteen, and suggested that the problem was one of finance and not judicial talent, Cartier resumed his seat without having contributed anything to resolving the immediate difficulty.

The debate continued with both recriminations and bravado. Alonzo Wright brought up the investigation of Judge Aimé Lafontaine, while others took the opportunity of clarifying earlier remarks<sup>21</sup>. In a somewhat sanctimonious tone, J.S. Macdonald thought that the House should be aware «that no similar accusation had been brought against the judiciary of Ontario », and hoped that the government might effect changes to put the judiciary of both provinces on equal footing. The final word was left to Prime Minister and Minister of Justice John A. Macdonald, who, while believing that the debate would be «productive of much good [...] regretted that it had taken so wide a range ». Using the occasion for appropriate ends, Macdonald suggested that «after this discussion the Quebec judges who had been spoken of and spoken at would see the necessity of consulting their own dignity and self respect by retiring from the offices whose obligations they were obviously unable to discharge<sup>22</sup> ».

Macdonald's closing remarks betrayed the difficulty of the situation. While fully aware that the Quebec bench was in considerable trouble, any indication that Cartier's administration of affairs in the province was beyond question might aggravate the strained relations between the two men<sup>23</sup>. Wanting neither to undercut the legitimacy of the bench, aggravate

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20. Cartier's list, in hindsight, appears to be somewhat of a rogues gallery. At the time of his speech Lafontaine and Drummond were both subject to investigations, and in the near future, Badgley, Johnson, Winter, Mondelet, and Bossé would all be under review or investigation. While Cartier claimed to have appointed Drummond, that judge had in fact been placed on the bench by the Macdonald-Dorion government in 1864.

21. See *infra*, pp. 72-76, for the charges against Judge Aimé Lafontaine.

22. SIR JOHN A. MACDONALD, *Newspaper Hansard*, 26 March 1868.

23. With the passage of the *BNA Act, 1867*, Governor-General Lord Monck bestowed the honour of Knight Commander of the Bath (KCB) on Macdonald, and the lesser titles of Companions of Bath on Cartier among others. The lesser distinction was viewed by Cartier as a slight and insult to French Canadians whom he represented. It would not be until 22 April 1868, three weeks after the debate on the Quebec judiciary, that Cartier's feelings would be soothed by the awarding of a Baronetcy. A. SWEENEY, *George-Etienne Cartier: A Biography*, Toronto, McClelland and Stewart, 1976, pp. 175-176, and J. BOYD, *op. cit.*, note 7, pp. 283-286.

Cartier, or give the appearance of tampering with judicial independence, Macdonald was left inciting dignity and self-respect as the motive for those in question to remove themselves from the bench. Hoping that his words would have their desired effect, yet knowing that in all likelihood they would not, Macdonald would only have to wait four days for the issue to resurface.

Echoing the motion which set-off debate on 26 March, Pierre Fortin once again requested on 30 March, that a parliamentary report containing all relevant correspondence on the administration of justice on the Magdalen Islands, be placed before the Governor General for review. Citing « the failure of the administration of justice, arising from the absence or illness of certain Judges », the petition laid open the awkward situation<sup>24</sup>. As revealed in a letter from John LeBoutillier of Gaspé Basin, the judicial affairs in the district were in disarray with harmful results :

On my return here I was sorry to learn, that neither of the Judges of Gaspé or Bonaventure attended here the February circuit. It looks very much like a mockery of the thing. I have several cases waiting the presence of a Judge, now some years since. In these, Mr Justice Winter has recused himself, on the ground of affinity ! On the other hand Mr Justice Thompson does not consider it convenient or consistent with his non-residence policy to come to this circuit, or to go to that of the Magdalen Islands, where Mr Winter would recuse himself in my cases, as he does here, and would do at Percé, Nox River Circuit and Superior Court. This grievance is a perfect denial of Justice, which should cease to be overlooked by the Government, the truth of which I feel in a way to disgust me with the trade of this country. Indeed I have ceased to own sea-going vessels, because the shipping interest of this, the sole port in Gaspé, being unprotected, owing to the irregular administration of Justice, and the feeling of uncertainty consequent upon such a regrettable state of things, which coupled with the fact of the continued non-residence of the County Judge, and the urgent want of a County Jail and Court House, more and more felt by the yearly increasing trade of the port, it is no wonder that increased discouragement is the inevitable result<sup>25</sup>.

If one of the desired ends of Cartier's judicial decentralization bill of 1857 had been to provide stability for entrepreneurial activity, LeBoutillier's complaint seemed to document the exact opposite result. A lax administration of justice was bad enough, but the unsettled state of affairs also threatened the region's economic growth.

24. Address to the House of Commons, in *Journal of the House of Commons*, at vol. 1, 167 (30 March 1868). The original petition can be found in Secretary of State for the Provinces, *NAC*, RG 6, c. 1, vol. 310, file 359.

25. *NAC*, *Department of Justice Register*, 1868, no. 406, RG 13, A1, vol. 435a. This file is noted as missing because its contents were forwarded to the Secretary of State. For the extract, see *NAC*, RG 6, A1, vol. 4, file 1080, letter from John LeBoutillier, Esq., Gaspé Basin, 6 April 1868. Some of the registers for 1868 are to be found at the end of 1867 in volume 435. The entries for 1867 end at number 417 and then begin again for 1868 at number one.

Outside of the House of Commons, the debates of 26 and 30 March drew a number of responses. The Legislative Assembly in Quebec was not in session during the month and thus there was no official provincial reply. Reporting the debates on 3 April, the *Montreal Gazette* devoted a lengthy column to the main points and concerns which had been raised. The *Gazette* agreed with Dorion and added that « it is quite possible that there is no exaggeration ; indeed, it is hardly possible to overstate the inefficiency of the Bench<sup>26</sup> ». However, while the charges may have been accurate, the *Gazette* offered the view that neither Dorion nor Cartier were free from blame. Further, although Dorion had avoided naming the judges he thought incompetent, the *Gazette* felt no such restraint in drawing attention to the appointment of Judges Loranger, Sicotte, Duval, and Drummond as all being suspect. For a Conservative newspaper to specify these four Liberal nominations is less than surprising. Further, the *Gazette* paid particular attention to Judge L.T. Drummond by providing a full description of the allegations that he had allegedly attempted to purchase his seat on the bench. As events would develop, this charge was only one of a litany of accusations directed at Drummond and eventually leading to his resignation<sup>27</sup>.

The April edition of the *Canada Law Journal* also provided an opinion of both the debates and the Quebec judiciary. Describing the debate as being of a « painful and personal character », the *Journal* claimed some hesitancy in reprinting the actual comments and accusations. Denying that the root of the problem in Quebec was the incapacity or immorality of sitting judges, the *Journal* emphasized that the issue was one of numbers ; there simply was not « a sufficient number to carry on the work » of the Superior Court in Montreal<sup>28</sup>. More to the point, it was not « fair to describe the judges generally as infirm and immoral, because, in the first place, the want of an adequate pension fund, and, in the next place, the absence of a sufficiently powerful public opinion, has permitted several persons to retain seats on the bench whom the epithets infirm or immoral may without injustice be applied<sup>29</sup> ». Maintaining a faith in rational reform and good will on the part of the judiciary, the *Journal* concluded with the suggestion that

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26. The following is based on « From a Correspondent », *Montreal Gazette*, 3 April 1868, p. 1. One day earlier the *Gazette* offered the view that perhaps the debate had gone too far in denouncing members of the bench : « We protest against the wholesale abuse hurled at the members of the Bench and Bar as well by certain members of the House of Commons on Monday evening last. » « Freedom of Debate », *Montreal Gazette*, 2 April 1868, p. 1.

27. See *infra*, pp. 75-80.

28. « Administration of Justice in the Province of Quebec », *The Canada Law Journal*, April 1868, p. 27.

29. *Ibid.*

the pension fund ought be placed on « a more liberal footing » so as to allow those judges to resign when disabled by age or infirmity<sup>30</sup>.

This opening flurry of accusations and responses revealed a number of important characteristics. Despite the assertion of the *Canada Law Journal* denying the existence of a sufficiently powerful public opinion regarding the state of the Quebec bench, such a body of opinion was clearly present. The Quebec judiciary had been discussed in both Ottawa and Quebec City and, if the comments are an accurate gauge, the bench had been a topic of concern for some time<sup>31</sup>. Second, there was a divergence as to the actual cause of the difficulties. Many saw the problems as arising from the inadequacies of the judicial personal, while others focused on the need for more administrative reform. This difference of opinion was indeed central to the entire debate over the Quebec bench. For the immediate future, the possibilities of further administrative reform won the day as Macdonald's government introduced a new pension scheme in late May 1868. Providing for a life-long pension based on two-thirds of one's salary, the legislation was certainly tailored to address the situation of the Quebec bench<sup>32</sup>. Unfortunately, the dividends of this investment in rational reform would fail to achieve the « salutary effects » predicted by the *Canada Law Journal*<sup>33</sup>.

The debates of late March 1868 had contained a wide variety of serious insinuations and accusations concerning Quebec's judicial personal. Pierre Fortin's initial request sparking the eruption concerned the holding of courts at Amherst on the Magdalen Islands. Subsequent investigations by the Department of Justice documented an almost comical state of affairs at the onset of a four year struggle to insure that Peter Winter fulfilled his commission as resident judge in the county of Gaspé<sup>34</sup>. Winter's intransigence dispelled the notion that the problems of the Quebec judiciary were merely the result of limitations in the pension scheme ; he simply refused to move to Percé, the *chef-lieu* of Gaspé. While a generous pension might remove those clinging to the bench for financial reasons, it had little

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30. *Id.*, p. 28.

31. See *infra* regarding the charges in 1866 against Judge Aimé Lafontaine, pp. 72-76.

32. *An Act respecting the Governor General, the Civil List, and the Salaries of certain Public Functionaries*, (1868), 31 Vict., c. 33, s. 3.

33. « Judicial Pensions », *The Canada Law Journal*, July 1868, p. 53.

34. Much of the conflict with Winter is documented in *Sessional Papers*, (1870), (vol. 6, no. 67). However, more detailed information can be found in *NAC, Department of Justice Memorandum*, RG 13A, vol. 554, pp. 541-543, 20 April 1868 ; see *NAC, Report of the Privy Council to the Secretary of State*, RG 6, A1, vol. 4, file 1080, 23 April 1868 ; *NAC, Report of George Cartier, acting for the Minister of Justice*, RG 13, A3, vol. 599, pp. 888-890, 4 April 1871 ; and *NAC, Report of Hewitt Bernard*, RG 13, A3, vol. 560, pp. 886-888, 25 September 1871.

significance for those who were viewed, for a variety of reasons, to be unfit.

The low point of the entire affair was reached when Winter, learning that he would not sit in Bonaventure county as he desired, but would in fact be left in Gaspé, leveled an acidic attack on the federal government. Describing the news of his assignment to Gaspé as « both astounding and painful », Winter turned to the affront of Ottawa's decision :

The Government would certainly scorn to do me an injustice, to suit the convenience of an individual, who, in point of precedence, is or should be *the thirteenth after me*, and whose superiority I am not prepared to acknowledge. On the other hand, such removal cannot, I presume, have been considered a promotion, for in my estimation (and such is public opinion) it is in both the moral and material point of view quite the reverse. It would seem as a disgrace, which, necessarily, must be hurtful to character, causing dismay, and carrying withal, to a considerable extent, the ruin of my domestic economy. And all of this, most likely much to the satisfaction of some individuals, who though being few in number, would make the most they could of the circumstance, and whose scoffing would be most offensive, not only to myself personally, but to the *prestige*, with which the administration of justice should be surrounded<sup>35</sup>.

That John Maguire, the man who received the judicial commission for Bonaventure was an English-speaking Catholic and brother-in-law of Bishop John Horan of Kingston, one of Sir John A. Macdonald's close associates, no doubt gave some force to Winter's allegations<sup>36</sup>. It must be noted, however, that Winter's own actions during his four year battle against his appointment to Gaspé also served the prestige of the administration of justice rather poorly. For those on the Magdalen Islands who had suffered through Winter's discontent and, having been forced to wait four years for him to fulfill his commission, the judge's long-awaited arrival in the county engendered so little enthusiasm that on 30 April 1872, the inhabitants petitioned for the appointment of their own stipendiary magistrate or a resident judge<sup>37</sup>.

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35. Judge Peter Winter to the Honorable Secretary of State for Canada, 8 September 1868, in *Sessional Papers*, (1870), (vol. 6, no. 67, p. 4). The French sources given Winter's name as Pierre while the English give Peter. Peter has been used here since that is how the Department of Justice addressed the judge.

36. See *NAC*, MG 26A, vol. 573, pp. 347-349, Macdonald to the Very Reverend Oliver Kelly, 1 November 1869, and *NAC*, MG 26A, vol. 576A, pp. 646-647, Macdonald to M.P. Ryan, 11 September 1873.

37. *NAC*, *Department of Justice Register*, 1872, no. 588, RG 13, A1, vol. 446. A similar course of events involved Judge Joseph Noël Bossé who resisted, for almost three years, attempts to live in the judicial district to which he was assigned. While the *Sessional Papers* refer to parliamentary returns regarding Bossé, the returns were not actually printed. See *Sessional Papers*, (1872), (vol. 7, no. 39); (1873), (vol. 6, no. 34); and (1874), (vol. 6, no. 56).

While the inquiries regarding Gaspé set off the debates in late March 1868, they had merely provided the context for other grave accusations. The most damning allegations were those leveled by L.H. Masson claiming that in Quebec two judges were « out of their head », two were immoral and another deaf<sup>38</sup>. Given the events of the decade which followed, questions over Judge Aimé Lafontaine's appointment to the bench, Judge L.T. Drummond's drinking habits, William Badgley's hearing, and Judge Charles Joseph Elzéar Mondelet's behavior, marked these four men as members of Masson's list. The means employed by the Department of Justice to remove these men, or in the very least, quiet the complaints, reaffirms two important points. First, no matter how rational Cartier's reforms of 1857 were, they could not insure a stable legal environment for the pursuit of entrepreneurial opportunity in Quebec. Second, the reason that the reforms could not produce stability was that because the judges, the human element central to the operation of the legal system, maintained a high degree of autonomy from the supposed rational expectations of those who framed the reforms. Unwilling to abandon the premise of rational reform while painfully aware that the idiosyncrasies of individual judges were thwarting the desired goals, the Department of Justice adopted a two-pronged approach. In public the government would continue to assert that the system merely needed additional adjustments while in private they pursued a variety of tacks designed to convince the more troublesome members of the Quebec judiciary to step down.

### 3. « A Mixture of the Grotesque and the Horrible »

Judge Aimé Lafontaine's difficulties began seven years after he had been appointed to the bench on 4 April 1859. Rising to speak on 25 July 1866 before the House of Assembly for the United Province of Canada, Alonzo Wright, representative for the Ottawa district unveiled a devastating list of accusations against Judge Lafontaine, and in so doing, attacked implicitly his original appointment. Having not previously given notice of his intent to bring the matter before the House, Wright moved that the entry in the *Journals of the House of Assembly* of 17 March 1865, concerning a petition from the District of Ottawa praying for an investigation into the conduct of Judge Lafontaine be now read to the House<sup>39</sup>.

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38. L.H. MASSON, *op. cit.*, note 14.

39. Wright's speech and the petition can be found in the *Ottawa Citizen*, 1 and 10 August 1866, and in *The Lower Canada Law Journal*, September 1866, pp. 49-54. The petition dated 14 June 1864 bears the signatures of 196 people, including a number of JPs, doctors, and two mayors. The *Journal* noted Wright's address briefly in its August 1866 edition, p. 29. For the original presentation of the petition see *Journals of the House of Assembly*, vol. 24 at 253 (1865).

The accusations in the petition against the judge turned on three main points. First, it was alleged that as agent for the sale of Crown lands in Hull, Eardley, and Wakefield prior to his elevation to the bench, Judge Lafontaine had embezzled large sums of money by simply pocketing the revenue from sales. Second, as prothonotary of the Superior Court, clerk of three circuit courts, clerk of the Crown, and clerk of the Peace, Lafontaine had failed to keep accurate registers and as a result, had failed to enter judgments in such a fashion so as to allow execution or enforcement. In an attempt to cover-up his omissions while holding these offices, the petitioners charged that Lafontaine had subsequently taken hold of the registers and attempted to make the appropriate entries long after the fact. Finally, it was asserted that his decisions and actions as a trial judge in criminal cases « are a mixture of the grotesque and the horrible<sup>40</sup> ». The effect of having someone such as Lafontaine on the bench was indeed grave :

The evil which he did as Crown lands Agent lives after him as Judge, not only in the serious losses incurred by individuals, but in destroying public confidence in the administration of justice, in trailing the honor of the Judiciary in the dust, and in teaching men to despise and hate those things which they should most reverence and honor<sup>41</sup>.

It was difficult, Wright continued, to understand why Lafontaine retained his honorable position. We « do not see him clad with the variegated garb of the outlaws of society, but clothed in the judicial ermine<sup>42</sup> ». A harsher condemnation would have been hard to imagine.

Cartier's response to Wright and the petition was disappointing. Rather than confronting the allegations with a spirited defense, he objected to the motion since it was made without notice and stated that « the offenses specified being committed before Mr Lafontaine's elevation to the bench, with which the House had nothing to do<sup>43</sup> ». If offenses had in fact been committed, it was the responsibility of the Crown Lands Department to launch an enquiry. Cartier's procedural objection was approved and Wright's entire address was ruled out of order for want of motion. In summarizing the exchange, the *Lower Canada Law Journal* thought it unfortunate « that a charge of such magnitude against a judge of the Superior Court should be treated with so much apparent levity<sup>44</sup> ». However, while Cartier managed to side-step the problem on this occasion, it was quite evident, considering the gravity of the accusations, that the questions would not pass quietly from the public mind.

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40. *The Lower Canada Law Journal*, September 1866, p. 50.

41. *Id.*, p. 49.

42. *Id.*, p. 50.

43. *Id.*, p. 53.

44. *Id.*, p. 54.



The eruption following Pierre Fortin's address concerning the Gaspé circuit also served as an opportunity to attack Lafontaine, both in name and by reference. When A.A. Dorion referred, in that debate of 30 March 1868, to a sitting justice who was « a swindler » and « grossly omitted from his immoral conduct, and a scandal to the bench », there was little question of whom the *Rouge* leader spoke<sup>45</sup>. While Cartier acknowledged that Lafontaine had in fact been subject to a petition, Macdonald's Quebec lieutenant dismissed it as « some complaint against his conduct when he was a Prothonotary or Crown land agent ». Alonzo Wright would not be put-off again, however, and repeated the charges against Lafontaine, adding that « the judge's name had become a byword, the commission of unpunished crime being so extensive as to seriously impair public confidence in the efficiency of the laws<sup>46</sup> ». The wide-ranging debate provided the government with an opportunity to escape taking action on the petition or the charges contained therein.

Outmaneuvered once again, Wright waited five weeks before he moved for reception of the petition on 7 May 1868, and requested that Lafontaine be subjected to an investigation<sup>47</sup>. Liberal member Luther Holton, in supporting Wright's call for an investigation, noted that such an investigation « was a preliminary step towards impeachment », and suggested that the entire petition be printed and circulated to the House<sup>48</sup>. Perhaps again sensing an opportunity for delay, Macdonald agreed with Holton and suggested that the petition be withdrawn so as to allow for printing and circulation, although he warned, such a publication exposed the member to possible charges of libel. Pressing the opportunity, Wright stated he was prepared to assume any such responsibility, and finally succeeded in getting the petition, now four years old, officially received by the House of Commons<sup>49</sup>.

Wright's success, however, was short-lived. Once the petition was entered successfully onto the record, both Holton and Sir John agreed that it was too late in the session for a Committee to investigate fully such a wide range of charges. Thus rather than pursue the matter in the present session, a committee would be struck, but it would not begin its work until the next session. John Sandfield Macdonald, Ontario premier and attorney general, suggested that even a committee was inappropriate and that rather a commission of enquiry should instead be launched. At this point in the brief

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45. A.A. DORION, *op. cit.*, note 16. 30 March 1868.

46. A. WRIGHT, *Newspaper Hansard*, 30 March 1868, and *Debates*, at 423 (1868).

47. A. WRIGHT, *Newspaper Hansard*, 7 May 1868, and *Debates*, at 646 (1868). The petition is noted in *Journal of the House of Commons*, vol. 1, at 297 (1867-1868).

48. L. HOLTON, *Newspaper Hansard*, 7 May 1868.

49. Sir J.A. MACDONALD and A. WRIGHT, *Debates*, at 646 (7 May 1868).

debate, an important point was entered into the discussion. John Hillyard Cameron, member for Peel, suggested that « the government might issue a general commission to inquire into the administration of justice in the District of Ottawa, but they could not at this stage issue a Commission to inquire into the conduct of a Judge<sup>50</sup> ». Essentially, Cameron suggested an investigation to determine if more investigation was needed. Furthermore, the focus of such a commission was « the administration of justice in the District of Ottawa », not Lafontaine's earlier career as Crown Land Agent or his fitness for the bench. Even if a commission was struck, such a mandate would certainly dilute the main questions raised by the petitioners.

Having to be content with half a loaf, Wright and the others agreed to a commission which would include Edward Blake and Luther Holton among others, and be chaired by John Hillyard Cameron. The committee met on 13 May 1868 and ordered that the original petition be referred to it officially for purposes of investigation<sup>51</sup>. Five days later and consistent with the observations made during the debate of 7 May, the committee decided to postpone further action on the petition until the following session<sup>52</sup>.

The government, having first delayed reception and then investigation of the petition against Lafontaine, could not be accused of pursuing the matter with vigor. The progress of the committee itself was similarly unspectacular. It would not be until 26 May 1869, over a year after the original committee had adjourned, that the matter would once again be taken up for consideration<sup>53</sup>. Once the investigation was renewed, a further

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50. J.H. CAMERON, *Debates*, at 685 (13 May 1868).

51. *Journal of the House of Commons*, note 47, at 344.

52. *Id.*, p. 398. Two weeks later, in response to a letter from Judge Drummond concerning the charges against him, Macdonald employed rather suggestive language in referring to the Lafontaine case: «The petition against Judge Lafontaine was so specific in its charges, that it was *forced* on the notice of the Government and a *well selected* committee with Hillyard Cameron at its head was appointed, to look into precedents and report [my emphasis]. » The meaning of « forced » is quite clear, but the exact definition which Sir John intended for « well selected » is open to debate. Was the committee well selected to vigorously investigate the charges against Lafontaine, or well selected to spare the government any embarrassment? See *NAC*, MG 26A, vol. 572, p. 789, Macdonald to Hon. Louis T. Drummond, 30 May 1868.

53. *Journal of the House of Commons*, vol. 2, at 135 (1869). Two months earlier Hewitt Bernard forwarded Cartier a petition from the inhabitants of the District of Ottawa « expressing their confidence » in Judge Lafontaine. See *NAC*, RG 13, A3, vol. 558, p. 490, Hewitt Bernard to George Cartier, 5 March 1869. That petitions in support of Lafontaine began to arrive only in 1868 and 1869, two to three years after the first petition against Lafontaine was filed, suggests that the government's tactics provided Lafontaine's supporters to orchestrate their own petitions. Why they did not spring immediately to his defense is unclear.

petition praying that the complaints and accusations against Judge Lafontaine be declared unfounded was accepted on 14 June, to be followed a day later with the first report of the Committee. Unfortunately, in accordance with a recommendation of the Joint Committee on Printing, the report was printed for distribution only<sup>54</sup>. One day later another petition praying that the complaints against Lafontaine be declared unfounded was presented to the committee, to be followed immediately by its final report concluding that there was nothing in the administration of Justice in the District of Ottawa which demanded further investigation<sup>55</sup>. Therefore almost five years after the petition had been presented initially, and three years after it had been first read, Judge Lafontaine's record was declared to be free from blemish. Given that the substance of the allegations against Lafontaine were apparently never investigated, it is less than surprising that both the judge, and by extension, the administration of justice, remained under a cloud of suspicion<sup>56</sup>.

#### 4. Mr. Justice Drummond and «The Disgrace of Exposure»

The litany of charges against Judge L.T. Drummond revealed political intrigue, personal animosity, opportunism, and in the end, skulduggery and deception. Taken as a whole, the question of Drummond's place on the bench stands as a stark example of the politicization of the Canadian judiciary and how that process counteracted attempts at genuine reform. When the *Montreal Gazette* of 3 April 1868 reported on the latest accusations against the Quebec judiciary, the newspaper gave particular attention to Judge L.T. Drummond. While the debates had not singled out Drummond in person, the *Gazette* went to great lengths documenting the charges against Drummond. Apparently it had long been rumoured that Drummond, a defeated reform candidate and former attorney general, attempted to purchase the judicial seat of Chief Justice Bowen of Quebec's Superior Court in 1864. In the end, Drummond was unsuccessful because, according to the *Gazette*, he « could not obtain an insurance on his life to secure the money to borrow to pay the Chief Justice<sup>57</sup> ».

54. *Id.*, p. 247 and Appendix no. 5.

55. *Id.*, pp. 265 and 272. For the petition in favor of Lafontaine, see *NAC, Department of Justice Register*, 1869, no. 899, RG 13, A1, vol. 439.

56. Applying for a leave of absence in February 1876, the government suggested to Lafontaine that given the long-standing concern over his judgeship, it would be best if he simply stepped down. The judge accepted the government's view. See *AO*, MS 20 (17), p. 334, Edward Blake to Judge Lafontaine, 15 February 1876; MS 20 (18), p. 898, Blake to Alexander Mackenzie, 24 March 1876; and MS 20 (19), p. 477, Blake to Lafontaine, 12 May 1876.

57. « From a Correspondent », *Montreal Gazette*, 3 April 1868, p. 1.

One month after the March debates of 1868, T.K. Ramsay, an abrasive Conservative lawyer and future judge, launched yet another personal attack on Drummond and the entire Queen's Bench. Ramsay's petition to Parliament accused the judge « of malicious and infamous proceedings against the petitioner in the Lamirande affair ; of being a notorious drunkard ; of being an insolvent and fraudulent debtor, and abusing his position as judge to prevent the seizure of his effects ; of using his position, when minister in 1864, to secure by bargain and money consideration, the resignation of Mr. Justice Bowen, and taking his seat<sup>58</sup> ». Given the vehemence of Ramsay's charges in his petition and the similarity between his and those leveled by the *Gazette's* correspondent, it seems quite likely that Ramsay was indeed responsible for the newspaper's column.

Considering the unparliamentary language and the personal quality of the accusations, most of those who participated in the debate of Ramsay's petition on 12 May 1868 thought it should not be accepted<sup>59</sup>. A.A. Dorion was especially adamant that the petition was « couched in language which showed that it was not public justice but private revenge that was sought against a gentleman who was now the honor of the Bench as he had formerly been the honor of the Bar [...] Judge Drummond was one of the most able and efficient men now on the Bench ». Clearly, Dorion concluded, the petitioner was motivated only by « private spleen and animosity<sup>60</sup> ». The fact that it had been Dorion who placed Drummond on the bench no doubt invigorated his defense of the judge. Despite some uneasiness on the part of a few members who disliked rejecting a petition without specifying the appropriate parliamentary language the petition should contain, the House decided that it should be withdrawn<sup>61</sup>. Considering that as agent for the federal attorney general and confidant of Macdonald's, Ramsay would have had ample opportunity to determine the appropriate par-

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58. *Montreal Gazette*, 7 May 1868, p. 2. The Lamirande affair referred to an extradition case in which Ramsay, acted for the Crown against Lamirande, who as a former clerk of the Bank of France at Poitiers, had robbed the bank of 700,000 francs, falsified the books, and then fled to the United States. Ramsay accused Drummond, who presided over the extradition hearing, of twisting the law in such a fashion so as to insure that Lamirande would not be sent back to France for trial. The implication was that Drummond acted to embarrass both Ramsay, as agent for the Attorney General, and Cartier, then attorney general of Lower Canada. See « The Extradition of Lamirande », *The Lower Canada Law Journal*, October 1866, pp. 73-76, and November 1866, pp. 97-98.

59. Sir J.A. MACDONALD, Mr. L. HOLTON, and Mr. A.A. DORION, *Debates*, at 675-677 (12 May 1868).

60. A.A. DORION, *op. cit.*, note 59 and *Newspaper Hansard*, 12 May 1868.

61. The concern over rejection was voiced by Mr. Chamberlin and Mr. C. Dunkin. See *Debates*, at 675-676 (1868) and *Newspaper Hansard*, 12 May 1868.

liamentary language, it is likely that laying and publicizing the charges was more important than actually having them investigated.

The public spectacle ended, Ramsay's petition continued to be considered in private. Three days after *The Montreal Gazette* published the extract from Ramsay's petition, Drummond wrote Macdonald confidentially about the « mischievous assault upon me<sup>62</sup> ». Reacting to rumours that the government had acted in concert with Ramsay in preparing the charges, Drummond suggested that « the general belief is that he [Ramsay] is urged by some one who does not dare shew [*sic*] himself openly as my assailant<sup>63</sup> ». Believing, however, that Sir John was « thoroughly alien » to « exposing judges to be assailed by way of impeachment by every man against whom they may pronounce judgment », the judge requested that reception of the petition be postponed so as to allow him the opportunity of defending himself at the Bar of the House. Responding to Drummond's letter twenty days after it had been written, Macdonald assured the Judge that should the attack be renewed, he would have « plenty of time to prepare » his defense next session. In relation to the inferences of official involvement in the petition, the Minister of Justice said nothing<sup>64</sup>.

The matter rested there until November 1872 when Hector Langevin wrote a brief note to Macdonald concerning a case tried recently before Drummond. It appeared, according to Langevin, that « Judge Drummond was not exactly in a *state of health* to decide this case properly », and it was strongly recommended that the convicted person be set at liberty<sup>65</sup>. Finally, less than a year later the pressure to force Drummond from the bench reached its peak. Responding to a dispatch from the Lieutenant Governor of Quebec, Macdonald outlined the charges against Chief Justice Duval, Judges Drummond, Mondelet, and Badgley to Quebec's Solicitor General. Referring to Drummond's intemperance, Mondelet's and Duval's old age, and Badgley's deafness, Macdonald suggested that a copy of the report be forwarded to the named judges for their comment<sup>66</sup>. Writing to J.J.C. Abbott a month later requesting him to speak to his former law partner Judge Badgley « to take the dignified step of applying for his pension at once », Macdonald did not want him to be « brought before Parl<sup>t</sup> » with Drummond

62. The following is based on NAC, MG 26A, pp. 155967-155969, Louis T. Drummond to Macdonald. 1 May 1868.

63. This rumour was denied by George-Étienne Cartier in the debate of 12 May 1868. See Sir George-Étienne Cartier, *Debates*, at 676, (12 May 1868).

64. NAC, *op. cit.*, note 52.

65. NAC, MG 26A, vol. 226, pp. 96817 and 96822, Hector Langevin to Macdonald, 20 November 1872.

66. NAC, *Report of Sir John A. Macdonald*, RG 13, A3, vol. 564, pp. 774-778, 27 August 1873.

and Mondelet — one drunk and the other mad ». The Minister added that « I do not want to see Badgley *in that crowd*<sup>67</sup> ».

In comparison with the treatment of Drummond, Macdonald's interaction with Badgley betrayed an unblushing favouritism. Two years earlier when the latter's deafness became an issue in a capital case, in which it had been alleged that the fairness of the trial had been impeached on the grounds that Badgley « was so deaf that he could not, and did not hear the evidence », Macdonald approached Cartier to discuss matters with the judge. Sir John suggested that « as you and I are both strong friends of Badgley and are desirous of protecting him to the utmost extent, it seems to me that the safest course for him is to retire on a pension<sup>68</sup> ». Shortly thereafter, Macdonald took it upon himself to correspond with Justice J.A. Berthelot and voice his fears that the attacks « will continue to increase and make it impossible for him to remain on the Bench with usefulness or credit<sup>69</sup> ». Slightly over a year later Macdonald revealed to T.K. Ramsay that despite believing it was « rather a delicate matter to speak to Badgley » about resigning, Cartier had an interview with the judge two days before Macdonald's ailing Quebec lieutenant sailed for England on 27 September 1872<sup>70</sup>. After confiding in Ramsay, Macdonald then wrote Badgley directly and inquired what the judge's thoughts were on the petition against him retaining his seat on account of his increasing deafness. The Minister of Justice concluded: « You know, of course, that I desire to do what is most agreeable to your own feelings, but there is no use in kicking against the pricks.<sup>71</sup> » Finally, one day after Macdonald wrote his memorandum on the Quebec bench, he again informed Badgley of its

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67. NAC, MG 26A, vol. 523, pp. 692-693, Macdonald to Hon. J.J.C. Abbott, 20 September 1873. A further letter to T.K. Ramsay indicated that Badgley was on the verge of accepting Abbott's advice: « Abbott saw Badgley and had a short conversation with him. B was reluctant but A says he thinks he will certainly yield. » See NAC MG 26A, vol. 523, p. 741, Macdonald to Thomas K. Ramsay, 27 September 1873.

68. NAC, MG 26A, vol. 575, pp. 472-473, Macdonald to Sir George E. Cartier, 21 November 1871.

69. *Id.*, p. 618. During the previous session of the Queen's Bench, Judge Badgley became involved in an embarrassing shouting match concerning his poor hearing. Solicitor General George Irvine regretted that the incident had been raised because of the growing tendency to hold the judiciary in low repute. See ASSEMBLÉE NATIONALE DU QUÉBEC, *Débats de l'Assemblée législative*, at 181-183, 12 December 1871.

70. NAC, MG 26A, vol. 576, p. 691, Macdonald to T.K. Ramsay, 28 January 1873. Also see an earlier letter to Ramsay on which notes that in reference to Badgley and the Montreal matter, Sir John was « stirring » things up: *id.*, pp. 542-543, 6 January 1873. Cartier would eventually die in England after a long bout with kidney disease.

71. NAC, MG 26A, vol. 576, pp. 928-929, Macdonald to Hon. Mr. Justice Badgley, 7 March 1873.

contents. However, rather than pushing his friend to consider resigning and accepting his pension, the Minister of Justice merely let the contents of the report speak for themselves<sup>72</sup>.

Although Drummond did not receive the gentler treatment of his colleague Badgley, it was evident that for both men, their time on the bench was limited. However, rather than approach Drummond directly, Macdonald sought a less exposed route to the judge. A month after he wrote his brief memorandum on the Quebec' Solicitor General's report, he informed M.P. Ryan that there was a complaint against Drummond « on account of his intemperate habits ». « This is very distressing to me from my old association with Drummond », Macdonald continued. « It occurs to me that if some friends of his would persuade him to apply, on account of ill health, for a pension », a commission of inquiry could be avoided. Desiring to maintain some distance from the problem, Sir John wisely added that « I cannot of course suggest it, and I do not want you to use my name at all ; but if you are on intimate terms with him you might give him a bit of advice, or get some friend to do so, as if for yourself<sup>73</sup>. »

Macdonald followed this letter with another two days later informing Ryan that perhaps Drummond's son might be used to convince his father to step down. Directing the course of events behind the scenes, the Minister of Justice suggested that it should be explained to the son that « the moment the House meets a Committee will be appointed to enquire into the state of the administration of Justice in Lower Canada and evidence taken ; that if the evidence is such as to prove the truth of the charges of intemperance on the Bench, a motion will be carried for removal, and that it will then be impossible to get him a pension under the law. This consideration, added to the disgrace of the exposure, ought I think be good enough for him<sup>74</sup>. » Insuring that all angles had been considered, Macdonald then wrote his provincial counterpart in Quebec, Attorney General George Irving, stating that if Drummond would send in his application for pension on the grounds

72. *NAC*, MG 26A, vol. 576A, pp. 526-527, Macdonald to Hon. William Badgley, 28 August 1873.

73. *NAC*, MG 26A, vol. 523, pp. 728-729, Macdonald to M.P. Ryan, 25 September 1873. Given Macdonald's own proclivities, his views of Drummond's drinking habits might appear somewhat hypocritical. His thoughts on the issue, however, were quite straightforward. Writing to Mackenzie Bowell in regard to R.P. Jellett, a possible candidate for the bench in Ontario, Sir John observed that there were objections « taken in Prince Edward to his habits and style of life. A Judge should be an example to Society among whom he presides. What are the facts about Jellett ? They say that he is fond of wine, women ; haunts billiard rooms and commits all kinds of enormities. This kind of thing may do for politicians, but will not do for judges. » *NAC*, MG 26A, vol. 522, pp. 22-23, Macdonald to Mackenzie Bowell, 24 October 1872.

74. *NAC*, *op. cit.*, note 73, p. 739.

of ill health, it would be accepted. If the judge delayed until after the House began sitting again, « it will be too late and the pension in all probability lost ». To protect both levels of government as well as Drummond's name, Macdonald assured « that the part of the official communication from your Government which relates to him will be suppressed — so will the portions which affect the other Judges if they resign ». The Minister of Justice had won, and on 27 October 1873 the order-in-council was passed accepting Drummond's resignation and granting him his pension<sup>75</sup>.

By the time Judge Drummond was convinced to step down, Macdonald's government had been in power for six years and was within days of defeat in the wake of the Pacific Scandal. During those years the Department of Justice had pursued the reform of Quebec's judiciary through a number of routes. As Prime Minister and Minister of Justice Sir John A. had employed moral suasion, a new pension scheme, quiet negotiation, and finally, in concert with Quebec's provincial administration, introduced legislation creating new judgeships. In 1869 the number of judicial positions was increased by one to eighteen and in 1872 increased again to nineteen. The largest change would occur barely two months before the Conservatives were forced out of office in November 1873, when the judiciary of Quebec was raised to twenty-five<sup>76</sup>.

While providing a number of patronage opportunities, the creation of six new judgeships suggests a degree of frustration within the Conservative government. Although retirements had allowed some reform of the bench, the basic problems with inefficiency remained. Unable or unwilling to introduce substantial alterations to the judiciary, the government was satisfied with merely appointing more judges in the hope that a larger bench could better manage the volume of business. In fact, during their six years in power, the Conservative government made twenty-three judicial appointments or elevations in the province of Quebec. Yet in the end, adding new judges merely extended Cartier's reforms of 1857 and certainly did not insure a more effective administration of justice.

## 5. An Anomaly of our Constitution

The jurisdictional barriers of the *BNA Act* which placed the constitution and maintenance of the courts in provincial hands, and the Con-

75. *NAC, Department of Justice Register*, 1873, no. 1777, RG 13, A1, vol. 448.

76. A summary of the changes in the composition of Quebec's bench can be found in N.O. Côté, (ed.), *Political Appointments — Parliaments and the Judicial Bench in the Dominion of Canada, 1867 to 1895*, Ottawa, Thoburn, 1896, p. 340. This compilation, which contains lists for all Canadian courts during these years, is an invaluable research tool.



servative's varied approaches insured that the flaws of Quebec's judicial system remained unchecked. For the Liberals this meant that upon assuming office they were confronted with administrative chaos. Judgments in the province were routinely reversed by Courts of Appeal in Canada and England, a number of those questionable judges attacked in 1868 were still on the bench, others refused to live in their assigned districts, and some failed to travel on circuit<sup>77</sup>. From the viewpoint of Judge Robert McKay of Quebec's Superior Court, other problems were the result of the distribution of judges. Referring to the judicial statistics for 1874, McKay pointed out that « in the Superior Court [for] Montreal there were 564 contested cases judged in 1874 ; in Beauce 3 ; Chicoutimi 3 ; Gaspé and Bonaventure none ; Kamouraska 2. The cost of the administration of justice in the last mentioned four districts is *fearful*, considering the work done ; decentralization so called has, in many respects, not profited the people of L.C.<sup>78</sup>. »

The organization of the court system in Quebec, a provincial responsibility, was the source of these deficiencies and was therefore beyond the reach of the central government. As Liberal Minister of Justice Edward Blake wrote Luther Holton, « From all I hear there are radical defects in the Quebec Judicial system, not remediable save by a reorganization which you know is beyond our competence. I think it perhaps the most unfortunate of the anomalies of our constitution that there should be such a confusion as exists in reference to the judicature. It may be necessary for this government to call the attention of that of Quebec to this subject, though save under the extremist [circumstances] there are objections to that course<sup>79</sup>. » So while they recognized that the judicial system in Quebec was in disrepair, the Liberals were also aware that there was little which they could do to address the situation.

77. In his published letter to Attorney General George Irvin of Quebec, Mr. Justice Torrance reported that in three years, the Privy Council in London had reversed 21 judgements from the province of Quebec, while only two from Ontario, two from Nova Scotia, and one from New Brunswick had suffered the same fate. Furthermore, in one session during the previous year, there were a total of 22 reversals out of 40 rendered decisions in the provincial Court of Appeal. See F.W. TORRANCE, *op. cit.*, note 2, p. 3.

78. AO, MS 20 (3), no. 17, Judge McKay to Luther Holton, 3 February 1876. Further to this point, in the *Montreal Gazette* on 22 November 1876, William H. Kerr provided a statistical breakdown of the cases heard in the counties of Gaspé and Bonaventure from November 1873 to October 1876. During that period, there was a total of forty-eight cases. Kerr concludes that such low number provide ample evidence that an appointment to such a judicial seat is a sinecure designed to allow a judge to pursue « a love of shooting and fishing ». See W.H. KERR, « Curiosities of the Judicature System — What a Judge Had to do in Three Years », *Montreal Gazette*, 22 November 1876, p. 2. Also see *id.*, « Superior Court Judges ».

79. AO, MS 20 (16), pp. 125-128, Edward Blake to Luther Holton, 29 January 1876.

Prevented from intervening in the daily administration of justice in Quebec and lacking the personal contacts necessary to reach the majority of sitting judges, the Liberals could not create openings for change. Although the resignation of Chief Justice Duval allowed them to nominate A.A. Dorion in his place and, therefore, gain some access to the judiciary, significant contacts could not be cultivated overnight<sup>80</sup>. However, when opportunities appeared the Liberals, unencumbered by personal associations with the judiciary, demonstrated an unerring firmness in dealing with troublesome judges. One such man, Charles Joseph Elzéar Mondelet, discovered that, unlike the Conservatives, the Liberals were less inclined to reach understandings beneficial to himself and the government<sup>81</sup>. Rather, it appeared as if the new administration was interested only in removing him from the bench with the lowest possible cost to the public treasury.

Nearing the end of a lengthy public career as a legal practitioner, agitator, and free-thinker, Judge Mondelet became a topic of some concern during the first decade of Confederation<sup>82</sup>. It will be recalled, for example, that Mondelet was once described by Sir John A. Macdonald as being mad<sup>83</sup>. When the judiciary of Quebec was targeted for criticism in 1868 and after, Mondelet was one of the two judges who were alleged to be « a little out of their head<sup>84</sup> ». Yet despite the grave doubts concerning Mondelet's fitness for the bench, neither the Liberals nor the Conservatives were provided with an opportunity to remove him. However, when the judge wrote Edward Blake on 26 January 1876 in regard to rumours of a « reconstruction » of the Superior Court of Montreal, the Liberals were finally presented with the opportunity of persuading him to step down.

Blake's response to Mondelet indicates that the judge was willing to resign if the Government provided a retiring pension equal to the full amount of his present salary. Mondelet reasoned that given his thirty years experience on the bench combined with the fact that he simply could not live on the normal pension of two-thirds of his salary, that the government would welcome his request. After dispelling the idea that the Government had started the rumour about reconstructing the bench, Blake stated that « Since you have thought fit to communicate your views to the Government, I am to state that they think their duty to say that in their opinion the

80. See « Jean-François Joseph Duval », in I.J. DESLAURIERS, *La Cour supérieure du Québec et ses juges 1849-1 Janvier 1980*, Quebec, s.n., 1980, at 186. A.A. Dorion is not included in this compilation.

81. See « Charles Joseph Elzéar Mondelet », in I.J. DESLAURIERS, *op. cit.*, note 80, p. 213.

82. See E. NISH, « Charles-Elzéar Mondelet », in *Dictionary of Canadian Biography*, vol. 10, Toronto, University of Toronto Press, 1972, pp. 526-528.

83. See *supra* p. 78.

84. L.H. MASSON, *op. cit.*, note 14.

public interest would be served by arranging for your retirement ; and that they are prepared to recommend a grant of the retiring allowance authorized by the law : but upon consideration you will see that the Government has no power to award you a retiring allowance in excess of the amount so authorized<sup>85</sup>. » While they wanted Mondelet off the bench, the Liberals did not want to be held ransom by that desire.

Despite Blake's rejection of Mondelet's deal, the judge's proposal placed the government in an awkward position. Relating his response to Secretary of State Richard Scott, Blake recalled that while the case had been discussed in Council, it might be brought up again as « it is of extreme consequence that we should intimate as far as we can the desirability of retiring Mondelet<sup>86</sup> ». The difficulty was that if Mondelet could be removed, the vacancy, combined with that created by the death of Judge Joseph-Ubalde Beaudry provided an excellent opportunity to introduce substantial changes in judicial personnel. Unfortunately, the turmoil caused by Beaudry's death and Mondelet's performance on the bench demanded immediate action<sup>87</sup>. However, as Blake wrote Luther Holton, there were advantages to not acting at once : « I see there is to be a meeting today of the Montreal Bar to consider the question. I am glad the present vacancy is not filled as it is preferable that the present excitement may lead to the opportunity of general changes and it is as well that our hands are free<sup>88</sup>. »

As reported in the *Montreal Gazette* of 31 January 1876, the meeting which Blake mentioned was certainly eventful. Presided over by William Kerr, the gathering detailed the continued poor state of the Quebec bench. Kerr noted that not only had Judge Beaudry died recently, leaving a vacancy on the bench, but Judges Berthelot, McKay, and Johnson were all poised to resign in « dissatisfaction with the existing state of affairs<sup>89</sup> ». The source of the aggravation was the fact that Judge Mondelet, claiming

85. AO, MS 20 (16), pp. 114-116, Edward Blake to Judge Mondelet, 28 January 1876. Mondelet's letter to Blake appears not to have survived.

86. AO, MS 20 (16), p. 118, Blake to R.W. Scott, 28 January 1876.

87. Regarding the crisis created by Beaudry's death see *id.*, p. 86, Blake to Rodolphe Laflamme, 27 January 1876. See J.-J. LEFEBVRE, « Joseph-Ubalde Beaudry », *op. cit.*, note 82, pp. 37-38.

88. AO, MS 20 (16), pp. 125-128, Blake to Holton, 29 January 1876.

89. « Bench and Bar — The Deadlock in the Superior Court », *Montreal Gazette*, 31 January 1876, p. 2. Writing to Luther Holton on 27 January, Judge Robert Mackay voiced his willingness to resign in order to « facilitate arrangements for the better administration of Justice in the Province of Quebec ». AO, MS 20 (3), no. 13, Mackay to Holton, 27 January 1876. On the same day, Holton received a similar offer from Judge Francis Godschall Johnson : AO, MS 20 (4), no. 21, Johnson to Holton, 27 January 1876.

*The Insolvent Act of 1875* and *The Dominion Elections Act, 1874* to be unconstitutional, refused to sit on any cases involving that legislation<sup>90</sup>. Therefore, Kerr pointed out, rather than having the full contingent of six judges, Montreal had five and with the expected resignation of Berthelot, that number would soon be reduced to four. When bankruptcy cases came before the courts, the number was again reduced because of Mondelet's unwillingness to act. Given that Montreal handled over half of the cases in the entire province, the impasse with Mondelet could not be allowed to continue. In the very least, Kerr argued, Montreal needed « seven judges to get through business, and they required all those seven judges to be men who were able to do a good day's work, and who were not disabled by any physical infirmities or mental crotchets from grappling with their work before them<sup>91</sup> ». Having aired their concerns and the apparent cause of the difficulties, the meeting agreed to a resolution aimed at bringing the matter to the official notice of the Governor General.

While in a separate column the *Gazette* acknowledged the gravity of the situation, the newspaper voiced some concern over the route adopted by the Montreal bar. Publicly voicing their concerns might produce an opposite response from that desired :

there is the difficulty of keeping the exact mean between two lines of action, either of which may lead from rather than towards the object in view. There is the danger on the one hand of going too far in the expression of censure, and thus producing a recoil in the opposite direction on the part of those who are not prepared to take such a decided stand. And on the other hand, over caution and hesitation in defining the actual grievance may fail to make the desired impression and lead to no practical result<sup>92</sup>.

Therefore, an informal gathering of the Council of the Bar would have allowed the development of a consensus on how to proceed rather than have differences of opinion within the profession displayed for public consumption. True to the approach practiced earlier by Macdonald, the *Gazette* preferred that both the situation on the bench and the response to it be managed to give the impression of ordered and consensus driven rational reform.

Reiterating the sources of the current problem with the bench in Montreal, the *Gazette* touched upon a consideration which was aggra-

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90. Mondelet's objection to both pieces of legislation was based on the contention that in passing the acts, the Federal government had given more duties to the judiciary. In his view, this was unconstitutional in that such authority had been vested in the provincial governments.

91. « Bench and Bar — The Deadlock in the Superior Court », *Montreal Gazette*, 31 January 1876, p. 2.

92. *Ibid.*

vating the situation. Noting that Judge Beaudry had been dead for three weeks, the newspaper offered the view that available telegraphic technology should have allowed the Liberal federal government to fill the vacancy to help alleviate the backlog. Clearly, «the appointment has manifestly delayed from some occult motive, and it is proper that censure should fall upon those who, from political considerations, trifle with the administration of justice<sup>93</sup>». That a Conservative newspaper would suggest «occult» motives in a Liberal administration is hardly surprising, although considering the performance of the previous Conservative administration in bringing about genuine reform in Quebec's judiciary, the opinion was disingenuous. However, while hypocritical, the suggestion was substantively correct. Minister of Justice Edward Blake was delaying the nomination of a replacement for Beaudry, but he was not motivated primarily by political motives<sup>94</sup>. Certainly, there were possible political rewards for bringing about the effective reform of Quebec judiciary, but Blake seemed more concerned with not squandering a rare opportunity by making too hasty a decision. Given the open seat and Mondelet's inquiry, the possibility of rebuilding the bench in Montreal seemed imminent. A letter from Luther Holton on same day of the *Gazette's* column reaffirmed that Blake's patience had in fact, been wise.

Responding to Blake's letter of the 29th, Holton suggested cryptically that «Mondelet must soon go somehow and Bertholet you can let go when you like or keep as long as you like<sup>95</sup>». The inference indicated that the rumour of Judge Joseph Amable Bertholet's desire to resign was accurate, and that the Liberals might also have access to his seat in their plans for reforming the Quebec bench<sup>96</sup>. Writing again to Blake on 2 February 1876, Holton clarified Bertholet's situation. He described the judge as a strong healthy man in his early sixties, who, although not a great lawyer, was a «thoroughly respectable man». He had been a colleague of the French-Canadian reformer Louis-Hippolyte La Fontaine as well as George-Étienne Cartier, and given his talent for making money, was «probably the richest professional man in this province». Most importantly, Holton and Bertholet were admirers of La Fontaine in their youth «and though he has become bluest of the blue we have always been

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93. *Ibid.*

94. Writing to Alexander Mackenzie on 27 January, Blake suggested that Joseph Cauchon be asked to contact Blake as soon as possible in order to deal with the situation in Quebec. While Blake had assured Cauchon «that nothing would be done until his arrival» from Quebec City, the delay could not be allowed to continue much longer: *AO*, MS 20 (16), p. 94. Blake to Mackenzie, 27 January 1876.

95. *AO*, MS 20 (3), no. 14, Luther Holton to Edward Blake, 31 January 1876.

96. See «Joseph Amable Bertholet», in I.J. DESLAURIERS, *op. cit.*, note 80, p. 160.

personal friends. You may fairly consider his seat at your disposal when you want it to make the Court efficient and I think you will want it so soon as you get control of Mondelet, but on the other hand no body can complain of your keeping him till you are quite ready to replace him<sup>97</sup>. »

Although tempting, Blake disliked the idea of retiring Berthelot, who was still both healthy and competent, while there were those among his colleagues who should go first. As he admitted to Holton, « in my experience we have suffered more from refusals to retire than from retirements<sup>98</sup> ». Further, while Berthelot's position offered possibilities for the future, the immediate situation caused by Beaudry's death still demanded action. While L.A. Jetté was a favored candidate, the Liberals could not risk losing his Montreal East seat in the by-election following his nomination. As a result, Holton had advised Prime Minister Mackenzie on 19 January 1876 that Henri Félix Rainville would be acceptable to both the English and French side of the bar<sup>99</sup>. One day after Rainville's appointment was announced on 3 February 1876, Blake's enthusiasm for the new judge was tempered somewhat by complaints from the rural districts that the country bar was being overlooked when judicial vacancies occurred<sup>100</sup>. Despite this slight aggravation, the nomination of Rainville to fill Beaudry's seat solved one of the problems which beset the Montreal bench. Unfortunately the more intractable difficulty, Judge Charles Mondelet, remained.

Reflecting on his response to Judge Mondelet's proposal to be retired with a pension equalling a full salary, Blake wondered if he had been too abrupt on the old judge. As he wrote Luther Holton: « I thought it necessary to speak plainly when the opportunity was given, reluctant though I was to suggest anything that might sound harsh. The interests involved are too serious to be allowed to suffer for want of plain speaking<sup>101</sup>. » Considering Mondelet's nature, Holton assured Blake that he had not been too harsh and added that I « hardly expect that you will succeed without reverting to still more vigorous measures<sup>102</sup> ». Holton's prediction was

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97. *AO*, MS 20 (3), no. 15, Holton to Blake, 2 February 1876.

98. *AO*, MS 20 (16), pp. 216-217, Blake to Holton, 4 February 1876. Notwithstanding Blake's hesitancy to retire competent judges, Berthelot stepped down on 1 September 1876.

99. *AO*, MS 20 (5), no. 99, Holton to Mackenzie, 19 January 1876.

100. *AO*, MS 20 (16), pp. 216-217, Blake to Holton, 4 February 1876. See *AO*, MS 20 (4), no. 46, L.S. Huntington to Edward Blake, 3 February 1876, and Mr. Béchard to L.S. Huntington, 1 February 1876, as the source of Blake's concern regarding the rural bar.

101. *AO*, MS 20 (16), pp. 216-217, Blake to Holton, 4 February 1876.

102. *AO*, MS 20 (3), no. 18, Holton to Blake, 6 February 1876.

correct and Mondelet refused to step down unless upon the terms he requested. Limited by the conditions of Macdonald's pension scheme of 1868 and unwilling to make exceptions, the Liberal government could offer Mondelet nothing. As a result, the judge's intransigence continued and once again in late October 1876 the deadlock caused by Mondelet's unwillingness to hear cases under the *Insolvent Act* drew both press and professional attention.

The issues and the cries of protest remained the same. Asserting the legislation was unconstitutional, despite a court ruling to the contrary, Mondelet refused to hear any cases. The other judges of the court were unwilling to fill Mondelet's place because such an action would allow the recalcitrant judge to get away with what they viewed as obstructionism<sup>103</sup>. In his defense, Judge Mondelet was reported to have stated that he cared nothing for the criticism of his conduct, but that aimed at his character could not go unchallenged<sup>104</sup>. He was not an obstructionist: « He believed the law to be unconstitutional and was, therefore, justified in refusing to administer it. If he believed it was constitutional he would sit, but he could not be obliged to do so simply because his confreres thought it was<sup>105</sup>. » After a heated exchange between Judges MacKay and Mondelet, the latter excused himself and the court, deprived of a requisite number to sit, was adjourned. The backlog was to continue.

Called to protest the continued behavior of Judge Mondelet, a special meeting of the Bar of Montreal once again voiced its displeasure. Although willing to acknowledge that Mondelet's actions were not generated in spite or contempt, they nonetheless caused a considerable amount of turmoil in the courts. The current situation was aggravated further by the absence of Judge Rainville because of illness. Confronted with the impasse, the bar raised the long-standing complaints about the overall organization of the courts in Quebec, arguing that « our present system is required to be recast

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103. « A Dead-Lock », *Montreal Gazette*, 24 October 1876, p. 2.

104. « Court of Review — The Judicial Dead Lock », *Montreal Gazette*, 25 October 1876, p. 2.

105. *Ibid.* A similar course of events involved Judge Louis Bélanger, who refused to take an extra circuit after an enactment by the Quebec Legislative Assembly. See « Return to an Address of the Legislative Assembly of the Province of Quebec, dated the 21st December (1877), praying that copies of all correspondence between the Government of this Province, and the Government of the Dominion of Canada or any of its members since last session, in relation to the administration of justice in this Province and the appointment of judges: also copies of all correspondence between the Government of this Province or any of its members and the Honourable Mr. Justice Bélanger, or any other judge or judges relative to the provisions of the law passed last Session, 40 Vict., chap., 13 and generally concerning the administration of justice » (*Quebec Legislative Assembly Sessional Papers*, 1877).

from beginning to end<sup>106</sup> ». However, rather than debate the intricacies of such reform, the meeting agreed to three resolutions.

First, in order to maintain a full contingent of judges in Montreal at all times, it was proposed that the judges sitting in Montreal be spared from having to attend any judicial matters outside of the city. Second, while not wanting to question Judge Mondelet's character, it was agreed that the inefficiency of the Superior Court in Montreal was in large part the result of Mondelet's position regarding the *Insolvent Act* and the *Dominion Elections Act*. Finally, and most significantly, the bar agreed to a petition praying that the Governor-General be requested to form a committee to investigate, and then take all reasonable actions necessary to alleviate the situation in Montreal. The bar wanted Mondelet impeached<sup>107</sup>. Like those judges who had been the target of criticism before, Mondelet would avoid impeachment. However, while Lafontaine, Badgley, and Drummond were spared through quiet pressure and understandings between gentlemen politicians, Mondelet's escape was more final. He died on 31 December 1876 while awaiting a leave of absence<sup>108</sup>. His beneficiaries were awarded the usual two-thirds salary as a death benefit.

By the time Judge Mondelet died, Cartier's judicial decentralization act of 1857 was approaching its twentieth anniversary<sup>109</sup>. Those two decades had tarnished much of the idealism sustaining reformers and those who subscribed to such notions. Rather than creating a rational and ordered legal structure for an emergent capitalist economy, the act institutionalized a fragmented and often chaotic system devoting considerable energy to managing an uneven collection of judicial talent. Judicial decentralization had fallen considerably short of what Cartier envisioned. The failure did not go unnoticed. In writing of Judge F.W. Torrance's growing disenchantment with the reform possibilities of positive law, G. Blaine

106. « Bar of Montreal — Special Meeting », *Montreal Gazette*, 28 October 1876, p. 2.

107. *Ibid.*

108. Edward Blake was of the opinion that the provincial government was delaying Mondelet's leave with the expectation that he would become frustrated and resign. See *AO*, MS 20 (23), pp. 41-42, Blake to Lt. Gov Letellier, 23 December 1876.

109. Mondelet's death did not end the problems for Quebec's judiciary during the 1870s. Another investigation would be launched against Judge T.J.J. Loranger, based upon complaints of favoritism on the bench and fraudulent charges for traveling expenses. After a lengthy parliamentary investigation and committee hearing, the charges were dismissed as lacking any substance. See « Evidence taken before the Committee appointed to enquire as to the Administration of Justice in the District of Richelieu, and to which was referred the petition of F.X.A. Biron, Notary, et al., complaining of the conduct of the Hon. Judge Loranger, Judge of the Superior Court », in *Journal of the House of Commons*, vol. 11, App. 3 (1877).



Baker notes the judge's involvement with the development of public libraries was « born of the slow realization that neither social nor ideological reconfiguration necessarily would be achieved solely by writing on the pages of law books<sup>110</sup> ». Further, Torrance had greeted his appointment to the bench with ambivalence, a sentiment suggesting he had become resigned « to the state's limited ability to affect social or entrepreneurial practices through formal institutional change<sup>111</sup> ». A possible explanation for this loss of faith can be found both in the inflated expectations of reformers and the hard reality of dealing with individual judges who betrayed the flaws and foibles of less than perfect human beings.

The problems of the Quebec judiciary at the time of Confederation were intractable, in part, because the framers of judicial decentralization expected too much of their project. At its core, the reform of 1857 championed rationality and the power of positive law to mold society. Yet if society and, by logical extension, individuals, were plastic enough to be shaped by ordered and logical reform, the advocates of such notions were slow to realize that the inverse was also true : disorder, illogic, emotion, and irrationality could also shape society. Further, the two decades following 1857 demonstrated that the reach of law was uncertain and conditioned by an ongoing struggle to demonstrate its own legitimacy in the eyes of the public. When the face of law is that of deaf, intemperate, obstinate, and idiosyncratic judges, the ideology of law as reflecting rationality becomes suspect. So great was the disparity that even a judge such as Torrance, who had subscribed to the power of positive law to reform society, was given cause to reconsider such lofty goals.

Thus in the end a faith in the rationality of human beings did not come to characterize the relations between the federal government and Quebec's judiciary. Instead, the Department of Justice employed pensions schemes, diplomacy, thinly veiled threats, patience, and parliamentary committees in its attempts to render the provincial bench less scandalous, if not more efficient. Rather than orchestrating a coordinated legislative assault from Ottawa and Quebec City, the limited measures aimed at the provincial judiciary were consistent with the Macdonaldian practice of introducing significant change only when absolutely necessary<sup>112</sup>. While frustrating to

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110. G.B. BAKER, « Law Practice and Statecraft in Mid-Nineteenth-Century Montreal : The Torrance-Morris Firm, 1848-1868 », in C. WILTON (ed.), *op. cit.*, note 7, p. 69.

111. *Id.*, p. 71.

112. On the suggestive connections between Macdonald's outlook on limited change and that of espoused Edmund Burke, see R. PREECE, « The Political Wisdom of Sir John A. Macdonald », *Canadian Journal of Political Science*, 17, September 1984, pp. 466-467.

reformers, this gradualism preserved the veneer of stability desired by conservatives. That defects in the system remained unchecked is certain, but mending all the flaws and routing all the deadwood was never a goal for the Department of Justice. They merely wanted the Quebec judiciary to stop being a spectacle. By the 1880s the provincial bench had faded into the shared obscurity of the other provincial brethren and, having achieved that limited end, the Department of Justice and the federal government returned to other pressing duties of statecraft.