A Class Apart? The Legal Profession in Upper Canada from Creation to Confederation, 1791-1867.

by

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Abstract

This thesis examines the role of the legal profession in Upper Canada from 1791 to 1867. In particular it focuses on whether or not the legal profession became the elite that they were set up to be. It examines the reasons behind choosing the legal profession as the elite. Between the creation of Upper Canada and Confederation there were several political and economic changes and I examine how these changes impacted the legal profession and the role that they had to play in the legal profession. I argue that while the legal profession failed to become the aristocratic elite that the early Upper Canadian leaders hoped for, it did become distinctively Upper Canadian.
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Table of Contents

Introduction..................................................................................................................................... 1
Chapter 1- Choosing an Embryonic Elite ....................................................................................... 5
Chapter 2 - The Upper Canadian Period, 1791-1841 ................................................................. 14
Chapter 3 - The Canada West Period, 1841-1867 ...................................................................... 38
Conclusion .................................................................................................................................... 53
Bibliography ................................................................................................................................. 57
**Introduction**

Following the American Revolution several thousand United Empire Loyalists fled to British North America. It is estimated that at the end of the eighteenth century between five and ten thousand Loyalists arrived from the United States to Upper Canada, which at the time was still part of the province of Quebec\(^1\). The division of the province of Quebec into Upper and Lower Canada occurred in 1791, and was partly due to the arrival of these Loyalists with their demands that they be governed by English laws and not the mix of common and civil law used in Quebec\(^2\). However, despite this influx of political refugees the colony remained little more than a sparsely populated wilderness, and a vulnerable wilderness at that. There was, of course, a significant aboriginal population in Upper Canada but they were not the people that the government of the colony was interested in nurturing\(^3\). Upper Canada’s proximity to the United States, its remoteness, and its lack of a unified and cohesive population made it vulnerable to an American attack, and the likelihood of it surviving as a British colony was low\(^4\).

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\(^3\) The governors of Upper Canada assumed that the aboriginal population would disappear and, in addition, due to the nomadic lifestyles of some aboriginal groups found it hard to accurately count their numbers for census purposes. Bruce Curtis, *Politics of Population: State Formation, Statistics, and the Census of Canada, 1840-1875* (Toronto; University of Toronto Press, 2001) at 192-193.

\(^4\) Flaherty, *supra* note 1 at 24; see also, S.F. Wise, *God’s Peculiar Peoples: Essays on Political Culture in Nineteenth Century Canada* (Ottawa; Carleton University Press, 1993) at 20, 40, 51; Robert L. Fraser, “‘All the Privileges Which Englishmen Possess’: Order, Rights, and Constitutionalism in Upper Canada” in Robert L. Fraser, ed., *Provincial Justice: Upper Canadian Legal Portraits* (Toronto; University of Toronto Press, 1992) xxi at xxx [Fraser, “Order, Rights”].
The first act of the Upper Canadian legislature was to introduce the laws of England to the province, with the hope that British justice would serve as a unifying force for the province\(^5\). The British government wished to avoid a revolution or absorption into the new United States and hence there was a need for stability and loyalty in the newly forged province. A state apparatus was vital if Upper Canada was to survive, and therefore the government of the province set about attempting to recreate England in the North American wilderness.

The aim of Lieutenant-Governor John Graves Simcoe and other early leaders was to recreate as fully as possible the institutions and society of England\(^6\). The early statesmen hoped to fix the flaws of the old American colonies, one of which was the lack of an aristocracy to restrain “democratic excesses”\(^7\). Their vision of Upper Canada included the colony having its own aristocracy based on land\(^8\). However, land was not in short supply in early Upper Canada, therefore the aim of creating a landed gentry in the colony was doomed to fail\(^9\). As much as Simcoe wanted to create Upper Canada in England’s image, the real aim was stability and the fostering of a loyal population. In these circumstances he needed an elite of some sort. Simcoe

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\(^8\) Wylie, *supra* note 5 at 24; Romney, *Mr Attorney, supra* note 1 at 5; Fraser, “Order, Rights”, *supra* note 4 at xxv.

and the Chief Justice of Upper Canada, William Osgoode, looked to the legal profession to fill the role of an Upper Canadian elite\textsuperscript{10}.

At the time of Upper Canada’s creation there was already an elite of sorts in the merchant class\textsuperscript{11}. The merchants even sat as judges in the courts that existed in the Loyalist communities before the creation of the colony. These courts used a simplified common law and were similar in structure to the courts that existed in Quebec\textsuperscript{12}. So why did Lieutenant-Governor Simcoe not nurture the merchants as the Upper Canadian elite? Why did he turn to the legal profession as the source of Upper Canada’s elite? His decision seems unusual considering that in 1791 Upper Canada had so few men with formal English legal training that they could be counted on the fingers of one hand\textsuperscript{13}.

In the first part of this paper I shall examine the reasons for the choice of the legal profession as the Upper Canadian elite before moving on in the second and third parts to examine whether or not the legal profession did in fact become that elite. The second part of the paper shall examine the period from 1791 to 1841, while the third part of the paper deals with the period 1841 to 1867. I shall argue that membership of the legal profession did not always equate with membership of the elite in Upper Canada, though it did always confer gentlemanly status. I shall examine the reasons why so many of Upper Canada’s ruling elite, such as John Beverley Wylie, \textit{supra} note 5 at 16.\textsuperscript{10} 

\textsuperscript{10} Wylie, \textit{supra} note 5 at 16.

\textsuperscript{11} \textit{Ibid.} at 4; Romney, \textit{Mr Attorney}, \textit{supra} note 1 at 20; Gidney & Millar, \textit{supra} note 9 at 17.

\textsuperscript{12} Wylie, \textit{supra} note 5 at 5.

\textsuperscript{13} Moore, \textit{supra} note 2 at 13. There were, however, a number of French Canadian lawyers and untrained attorneys see G. Blaine Baker, “Legal Education in Upper Canada 1785-1889: The Law Society as Educator” in Flaherty, \textit{Canadian Law}, vol 2, 49, \textit{supra} note 2 at 59 [Baker, “Legal Education”].
Robinson and the Baldwins to name the most prominent examples, were lawyers. I shall examine how the political and legal changes of the nineteenth century affected the legal profession, and the role that they had to play in these changes. I shall also examine why lawyers frequently had leading roles in their communities. My discussion will necessarily involve looking at the relationship of the elite with the ordinary people of Upper Canada, as well as the effect of demographic change on this relationship. While I shall argue that ultimately the legal profession failed to become the equivalent of an aristocracy that Upper Canada’s early leaders had hoped for, I shall show that it did become a distinctively Upper Canadian profession, even if that profession never developed into a unified Upper Canadian elite class. The fact that the legal profession failed to become the aristocracy that Upper Canada’s early leaders hoped for does not mean that the attempt to make it an elite group cannot teach us something.
Chapter 1
Choosing an Embryonic Elite

Why did Lieutenant-Governor Simcoe and Chief Justice Osgoode pick the legal profession over the merchants? Was it Osgoode’s snobbery as an English barrister, and a failed one at that, which made him shun the men of trade\(^\text{14}\)? Whilst class snobbery may have played a role, for example lawyers coming to Upper Canada were granted the maximum allowance of land in recognition of their gentlemanly status, the pre-existing merchant elite in Upper Canada was not popular with the ordinary people due to the fact that they abused their position as judges to advance their own interests\(^\text{15}\). Therefore the choice of the legal profession to be the elite of Upper Canada was perhaps partially due to the need to replace the unpopular merchant elite.

There was also a further reason, according to G. Blaine Baker, for choosing the legal profession. Baker argues that although there were some merchants already in Upper Canada the economic prospects of the colony in its early years were poor, and hence a merchant elite might be neither sustainable nor stable\(^\text{16}\). As sustainability and stability were key aims of the Upper Canadian venture as a whole, the potential unreliability of the province’s commercial prospects made the legal profession the only real candidate for the desired elite. One might wonder quite how the


\(^{15}\) For land grants see, Gidney & Millar, supra note 9 at 17; for the popularity of the merchants see Romney, Mr Attorney, supra note 1 at 21.

legal profession was supposed to maintain itself in a colony with such poor prospects. The answer to this question may explain why in the early decades of the nineteenth century the majority of lawyers were also office holders\(^\text{17}\). For now what is important to note is that the legal profession was seen as a group who could survive in Upper Canada, and perhaps more importantly a group removed from the existing and unpopular mercantile elite.

Thus the legal profession was the only real candidate for a provincial elite. Upper Canada lacked even a clerical elite, which had been present in some of the former American colonies, though that is not to say the clergy were not classed among the elite, although only the clergy of certain denominations qualified as gentlemen\(^\text{18}\). The future Bishop of Toronto, John Strachan, was very supportive of the legal profession as the source of the Upper Canadian elite\(^\text{19}\).

The desire to reproduce English legal institutions and replace the merchant elite of early Upper Canada dovetailed, as the leading merchants were the judges in the court system which Simcoe and Osgoode sought to replace\(^\text{20}\). The merchants’ unpopularity was partially derived from the perception that they were biased in their decisions. Simcoe promised to replace this version of justice with the ‘image and transcript of the English constitution’\(^\text{21}\). As such the Upper Canadians were promised British justice and the ideal of British justice was to form powerful rhetoric in later years, a point I shall return to later.

\(^{17}\) Ibid. at 190; Fraser, “Order, Rights”, supra note 4 at xlvii, lxiii.

\(^{18}\) Baker, “Legal Education”, supra note 13 at 64, n59; Gidney & Millar, supra note 9 at 7.

\(^{19}\) Gidney & Millar, supra note 9 at 14; Baker, “Legal Education”, supra note 13at 55; Moore, supra note 2 at 78-9.

\(^{20}\) Wylie, supra note 5 at 7-8, 13; Romney, Mr Attorney, supra note 1 at 21.

\(^{21}\) Romney, Mr Attorney, supra note 1 at 34; Baker, “Legal Education”, supra note 13 at 63.
The introduction of the English common law in all its complexity required that it be administered by legally trained men both as judges and lawyers. None of the merchants of early Upper Canada had legal training, and hence they were unqualified to sit in the Court of King’s Bench when it was created in 1794. However, no-one else in the colony, apart from Chief Justice Osgoode and William Dummer Powell\textsuperscript{22}, was qualified either. This dearth of legally trained men explains why Simcoe and Osgoode settled on the lawyers and not the judges to be the Upper Canadian elite. Both Simcoe and Osgoode would have been aware that in England judges were the pinnacle of the legal profession, and a step up in the social hierarchy compared to lawyers. Therefore it might be expected that they would chose judges as the Upper Canadian elite. However, Upper Canada lacked enough men qualified to be judges, and its first attorney general was a failed English barrister\textsuperscript{23}. Additionally if the judges had been chosen as the elite it would have been a very small elite even if there were enough qualified Upper Canadians for the bench. Perhaps with this in mind the Judicature Act of 1794 provided salaries for King’s Bench judges that were large enough to tempt English barristers\textsuperscript{24}. Of course it is also worth noting that the King’s Bench judges were appointed by the British colonial office\textsuperscript{25}. Thus if the local merchants wished to influence judicial appointments they would have to try to influence the governor who had sole control of judicial appointments. The governor’s criteria for suitable judges were mostly concerned with a candidate’s politics and reliability rather than his connections to the local populace. It would be understandable if Simcoe and Osgoode assumed that for at least a generation or two, the King’s Bench judges would be English barristers who were seeking

\textsuperscript{22}S.R. Mealing, “William Dummer Powell” in Fraser, ed., \textit{Provincial Justice} 135, \textit{supra} note 4 at 140 [Mealing, “Powell”].

\textsuperscript{23}Romney, \textit{Mr Attorney}, \textit{supra} note 1 at 19.

\textsuperscript{24}Wylie, \textit{supra} note 5 at 15.

\textsuperscript{25}\textit{Ibid.}
colonial sinecures. After all Osgoode treated his appointment as Chief Justice of Upper Canada as a career move, leaving almost as soon as he was offered a more prestigious office\(^{26}\). Additionally it was the norm in the British Empire that judges would be appointed from England, especially in the early years of a colony. Thus if Simcoe and Osgoode wanted to lay the foundations for a stable Upper Canadian elite the King’s Bench judges would be unsuitable, as there was a strong likelihood that they were going to be foreign born and transient, and hence Simcoe and Osgoode turned to the lawyers to fill the gap. As it happens the Upper Canadian judiciary became Upper Canadian extremely quickly as no English judge was sent out from 1805 to 1827\(^{27}\), but such developments were unforeseen in 1794.

While the lack of judges in the newly established courts was solved by importing English barristers, the same solution was not going to work for those meant to argue the law in these courts. In the first few years of Upper Canada even the attorney general was struggling to earn enough to survive, and Upper Canada was hardly the sort of province to attract lawyers. After all the only English barristers she had attracted had been lured in by offices with the promise of more prestigious posts to follow\(^{28}\). There had, of course, been lawyers who had fled the American Revolution but of those that fled to British North America, the majority of them went to the more established and successful colonies, such as New Brunswick or Nova Scotia\(^{29}\).


\(^{27}\) Flaherty, *supra* note 1 at 23.

\(^{28}\) Romney, *Mr Attorney*, *supra* note 1 at 38, 40; Moore, *supra* note 2 at 29.

The solution that the Upper Canadian administration came up with was for the Lieutenant-Governor to appoint sixteen men as lawyers. These lawyers appointed by the Lieutenant-Governor did not have to undergo any legal education and were given a monopoly on legal practice. This step of creating lawyers and the provision of a legal monopoly was not unusual in other jurisdictions at this time. Early Nova Scotia had some lawyers that were created in a similar way but they found themselves usurped when trained lawyers arrived from the newly independent America. The reason for having any lawyers at all in Upper Canada would appear to be that they could deal with the complexities of the common law but the lack of legal education possessed by the men that were made into lawyers suggests that the real reason behind creating a legal profession from nothing was tied with the desire to create a loyal leadership.

The majority of these lawyers were chosen for their loyalty and not their legal experience, as a loyal local leadership was what Simcoe and Osgoode desired from the legal profession. In fact the majority of them had no legal experience at all, but they were all loyal British subjects and several were already considered leading citizens of Upper Canada. The administration hoped that it would encourage the lawyers to make a lifetime career of the law. Of course had Simcoe not created these lawyers then the King’s Bench would not have been able to function, and all the court reforms would have been in vain. Unsurprisingly lawyers created by administrative fiat were not exactly able to cope with the complexity of the English common law and evidence from the early years suggests that the King’s Bench judges made allowances for the

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31 Wylie, supra note 5 at 16.

32 Wylie, supra note 5 at 16; Moore, supra note 2 at 25; Gidney &Millar, supra note 9 at 18; for a list of the men see William Renwick Riddell, The Bar and the Courts of the Province of Upper Canada or Ontario (Toronto; The Macmillan Company of Canada, 1928) at 37-38.

33 Wylie, supra note 5 at 16.

34 Moore, supra note 2 at 25.
inexperienced lawyers. Initially the monopoly granted to the Upper Canadian lawyers was not that different to the situation in other jurisdictions but the crucial differences in Upper Canada were that the monopoly was designed to nurture the profession and that the lawyers themselves soon gained control over entry to the profession with the foundation of the Law Society of Upper Canada.

In comparison to the other British North American colonies, the way the Upper Canadian legal profession was created out of nothing was unusual to say the least, and the next major step in the development of the Upper Canadian Bar, the creation of the Law Society of Upper Canada by statute in 1797, was even more unusual. Did the creation of the Law Society have anything to with the creation of a provincial elite, and if so, what?

There are no clear records of the motives for creating the Law Society but from the available evidence some motives can be suggested. According to Christopher Moore the ‘1797 Act cleverly protected this first, and ill-qualified, Upper Canadian Bar from being overwhelmed and dismissed by a few better-qualified legal gentlemen who might arrive from Britain, or even from other colonies. That the creation of the Law Society was motivated by protectionism is a convincing thesis; after all most of the early Upper Canadian Bar did not have the gentlemanly status that an education in the English Inns of Court automatically conferred. The fact that

35 Wylie, supra note 5 at 19-20.
36 The Law Society was created by 37 Geo. III (1797) c.13 (UC); Moore, supra note 5 at 13; for a comparison with New Brunswick see ibid. at 28-29.
37 Ibid. at 30.
Upper Canada had a Law Society whose members had a monopoly on legal practice might have also been attractive to the leading citizens of the colony, for they had sons who needed to advance themselves, and in the frontier province there were few ways to do this. The leading families of early Upper Canada may have aspired to colonial offices but the most prestigious of these offices were appointed from Britain\textsuperscript{39}. Despite this colonial handicap, it was not long before the legal profession became the preferred way for the leading families to set up their sons\textsuperscript{40}.

The protectionism which the creation of the Law Society arguably represents can be explained by more than just a desire of those early lawyers to hold on to their practices. There are two additional and connected reasons why the Law Society may have been set up with an aim to protect the careers of the early Bar. The first has to do with what would have happened had there been an influx of lawyers from Britain or the other colonies. The law has always attracted ambitious young men and as later decades showed, if one region was overcrowded young lawyers would move to the frontiers to carve out a niche for themselves\textsuperscript{41}. The scenario that played out in the second half of the nineteenth century in Manitoba, Alberta and the Yukon could easily have happened to early Upper Canada, for New Brunswick had an excess of lawyers looking to earn a living\textsuperscript{42}. Had there been an influx of foreign-trained lawyers they would have pushed the Upper Canadian lawyers out which might have seriously upset the stability of the

\textsuperscript{39} Moore, supra note 2 at 31-32.
\textsuperscript{40} Gidney &Millar, supra note 9 at 19; Moore, supra note 2 at 48.

\textsuperscript{42} Moore, supra note 2 at 28.
colony. Perhaps more importantly, the influx of lawyers might have been only temporary; what guarantees would there be that they would stay in Upper Canada? For Upper Canada in its early years lacked prospects, and talented, foreign-trained legal professionals may have proven to be transitory. Such transience would not have been conducive to the creation of a stable and loyal elite. Early Upper Canada’s fledging legal profession and best hope for a provincial elite needed protecting for the good of the colony and the Law Society would provide that protection.

The second reason is that the creation of the Law Society made the Upper Canadian legal profession ‘a self-recruiting elite’43. Prior to the creation of the Law Society, the legal profession had been under the control of the judges of the King’s Bench44. In 1797, when the Law Society was created, the King’s Bench judiciary were all English lawyers using the colonial offices as a stepping stone to better offices elsewhere, which meant that their main interest was Great Britain not Upper Canada, and this ran the risk of introducing an element of transience in the governance of the Upper Canadian Bar. Therefore giving control of the legal profession to the lawyers themselves was a further way of ensuring the stability of the profession, and ensuring that it would be an Upper Canadian elite and one that would emerge as quickly as possible45. The creation of the Law Society was highly unusual in the colonial experience, as in the other British North American colonies entry to the legal profession was controlled by the judiciary until well

43 Romney, “Constitutionalism”, supra note 7 at 126.
44 Moore, supra note 2 at 16, 42; Baker, “Legal Education”, supra note 13 at 67.
45 Baker, “Providential Order”, supra note 16 at 188.
into the nineteenth century. Thus the Law Society gave Upper Canadian lawyers a degree of professional independence which was unheard of elsewhere in the colonies.

The Act which established the Law Society set out a mandate for the society. The Law Society was created in part ‘to support and maintain the constitution of the province’. The creation of the Law Society was therefore a recognition of the role the legal profession was expected to play in the development of Upper Canada. There is an argument that the meaning of ‘the constitution’ has changed over time. Baker has argued that when the 1797 Act said constitution what it was understood to mean was ‘the unwritten, and often unspoken, spiritual and social premises upon which this loyalist community was to be based’. These ‘spiritual and social premises’ doubtless included the idea of a social hierarchy, with the lawyers at the pinnacle. With the fledgling legal profession’s status and security enshrined in law, they could set about achieving status and security in fact.

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47 An Act for the better Regulating the Practice of the Law, 37 Geo. III (1797), c.13 (UC).
48 Baker, “Providential Order”, supra note 16 at 188.
Chapter 2

The Upper Canadian Period, 1791-1841

In addition to recognising the role the legal profession was to play in Upper Canada, the 1797 Act gave the Law Society control over legal education, control over who was called to the bar, and control over professional standards. These powers were roughly equivalent to the powers of the English Inns of Court, although the Inns of Court held these powers by custom and not by statute.\footnote{Moore, supra note 2 at 42.} Thus we can see that the Law Society did make Upper Canadian lawyers ‘self-recruiting’ but elite status was not conferred automatically. In fact, the lawyers that Simcoe created between 1794 and 1796 did not seem to be making much of an impact on the colony. Once again Upper Canada was faced with such a shortage of lawyers that in 1803 the legislature had to create more to meet demand\footnote{Ibid. at 47; Wylie, supra note 5 at 29; Riddell, supra note 32 at 52-53. The evidence suggests that the administration did over-rule the Law Society process, the Society was even unable to veto the governor’s choices.}. The Law Society may have been self-recruiting, but evidently in its early years it was not recruiting fast enough. The reason for this lack of speed was the slowness of the path to legal qualification that the Law Society had itself introduced.

For the first twenty-two years of the Law Society any man who wished to become a lawyer had to be at least sixteen, spend five years as a student-at-law on the Society’s books in order to become a barrister, and serve a three year clerkship in order to become a solicitor.\footnote{Baker, “Legal Education”, supra note 13 at 67-68; Moore, supra note 2 at 46.} In Upper Canada the qualifications for solicitors and barristers were linked and the two professions were not mutually exclusive as they were, and remain, in England. In 1803, legislation increased the...
number of clerks each lawyer could take on and after that the legal profession really did become entirely self-recruiting. The number of clerks was limited, though, to no more than four per lawyer which was in contrast to the situation in the United States. The Society imposed no educational requirements for prospective students-at-law but it did impose social and ethical requirements, and it allowed for lawyers licensed to practice in England, Scotland, Ireland, or other British North American colonies to be admitted provided they were of good character.

These early requirements of the Law Society show that the main aim of the Society was to become one of honourable gentlemen, with the hope that they would become the natural leaders of Upper Canada. The consensus seems to be that the Law Society was successful at giving lawyers a place in Upper Canada’s elite, and that it achieved this within a generation. Was this success due to the requirements of the Law Society itself, or were there other factors involved in securing the legal profession’s status?

It had long been the case in England that being a barrister granted the status of gentleman, and much the same was true in Scotland. As it was in Great Britain, so it was in Upper Canada. However, during the early years of Upper Canada it was clear that while the fact of being a lawyer granted the status of gentleman, being a gentleman was not a pre-requisite to becoming a lawyer. The same could not be said for England or Scotland where barristers and advocates were

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52 Moore, supra note 2 at 47, 64; Baker, “Legal Education”, supra note 13 at 80.
54 Baker, “Legal Education”, supra note 13 at 69; Moore, supra note 2 at 43.
55 Gidney & Millar, supra note 9 at 20; Moore, supra note 2 at 34;
from wealthy backgrounds. Of course what Upper Canada lacked was the landed gentry and the stratified class system that existed in Britain. In Upper Canada the gentleman’s position was much harder to recognise as land was readily available, therefore Upper Canadian gentlemen had to distinguish themselves in another way. As with many other facets of English life that Upper Canada was attempting to recreate, the qualifications for gentility had to be adapted to colonial conditions.

The true mark of an elite group in any society is that they play a key role in governing it. Therefore should the leading families of early Upper Canada wish to consolidate their positions and guarantee their sons membership of the elite they would need to find a way to get a role in governing the colony. As Romney rightly points out, the legal profession ‘was an obvious choice, for its function of administering the body of rules that regulated civil relations within the polity made it an ideal nursery for future administrators and legislators’. In addition, in England, lawyers had long been seen as qualified for such roles in local government as Justices of the Peace. Thus the lawyers of early Upper Canada quickly found themselves holding a variety of offices. As most of these offices were paying offices, it might be thought that the lawyers were resorting to offices because they could not earn a living as lawyers. There may be a germ of truth in this but the Upper Canadian Bar could not be described as over-crowded, in

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56 For England see Lemmings, Professors of the Law, supra note 38 at 309; for Scotland see John W. Cairns, “Alfenus Varus and the Faculty of Advocates: Roman Visions and the Manners That Were Fit for Admission to the Bar in the Eighteenth Century” (2001) 28 Ius Commune 214 at 214-223; for Upper Canada see, Moore, supra note 2 at 89.
fact Upper Canadian lawyers did not worry about numbers until the 1830s\textsuperscript{60}. As yet there is no information on how these early lawyers actually earned their living, so it may be that they needed the incomes from the offices to supplement the incomes from their law practice.

For its first two decades the Law Society administered to both branches of the legal profession, barristers and attorneys. Although both branches had different rules for their training, they were effectively united in Upper Canada. Such a situation was undesirable for members of the legal elite as they had hoped to recreate the professional divide that existed in England. Consequently in 1822 the Law Society tried to implement this division. The Law Society’s benchers sponsored legislation which removed the Law Society’s powers of supervision over attorneys. Despite this attempt at separation the majority of lawyers still qualified as both, because if being a barrister made a lawyer a gentleman, being an attorney allowed him to afford to be a gentleman\textsuperscript{61}.

While being called to the Bar of Upper Canada may have been enough to qualify a man for an office such as a magistrate, those who longed for a higher office needed to be called to the Bar by one of the English Inns of Court\textsuperscript{62}. Indeed Upper Canada’s first nine attorney generals were all recognised as barristers by one of the Inns of Court until Christopher Hagerman became attorney general in 1837, excepting John Macdonell who was acting attorney general from 1811-1812\textsuperscript{63}. The shift away from a preference for English legal qualifications coincided with

\textsuperscript{60}Baker, “Legal Education”, supra note 13 at 114.
\textsuperscript{61}Gidney & Millar, supra note 9 at 31-32; Moore, supra note 2 at 86-88.
\textsuperscript{62}Brode, supra note 9 at 26.
\textsuperscript{63}In counting the attorney generals I have counted John Beverley Robinson twice, the first being his period where he was acting attorney general during the War of 1812 and the second when he was officially appointed in 1818.
educational changes introduced by the Law Society and a growing confidence on the part of the Law Society in its status as the governing body of an elite profession.

The educational changes imposed by the Law Society are uncontroversial in the historiography of Upper Canada; but they coincided with increasing political unrest in Upper Canada, at the centre of which was the legal profession, or at least its leading lights. The interpretation of this political unrest has been the subject of some debate, but it is necessary first to look at the educational changes imposed by the Law Society and what these meant for the legal profession as a whole in Upper Canada.

In 1819, four years after the end of the war with America which had been an early test for the young colony, the Law Society introduced an entrance exam for those men who wished to study law. The test required students to show familiarity with the kind of education that was expected of the sons of gentlemen. It is unclear why this test was introduced; it could be seen as a way to restrict numbers of law students but Upper Canada was still suffering from a shortage of lawyers. Or it could be seen as a way of further reinforcing the Law Society’s claim to gentlemanly status. Moore argues that the test may have been introduced in order to maintain educational standards on a par with the English Inns of Court, as several Inns-trained lawyers had just returned or emigrated to the colony.

64 Moore, supra note 2 at 60-61; Baker, “Legal Education”, supra note 13 at 68, 69-70.
65 Ibid.
66 Moore, supra note 2 at 61.
The entrance exam was made more challenging in 1825. The significance of the entrance exam was that it granted access to the Law Society and as such granted gentlemanly status to those who passed it. If the legal profession was to be the elite of Upper Canada it could not be open to all. Therefore the introduction of restrictions to becoming a student-at-law, such as the entrance examination, suggest that the legal profession, or at least the elite members of the profession, were beginning to close ranks, as it was the elite of the profession that pushed for increasing the difficulty of the exam.

During the 1820s the Law Society was developing plans for a lawyer’s hall, Osgoode Hall. The idea behind such a building was primarily educational. It is clear that acquiring a home for the profession was modelled on the English Inns of Court. Thus the building of Osgoode Hall would serve two purposes: firstly, it would help create a close knit profession by providing Upper Canadian lawyers with a place to study and socialise together; secondly, having a tangible, physical place to call the home of the Law Society would strengthen its claim to be the equivalent of the English Inns of Court.

Having acquired such a building, the Law Society introduced term-keeping for aspiring lawyers. Term-keeping required the law students to spend at least part of their training in the provincial capital. Such a requirement meant that the law students would all be educated

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67 Moore, supra note 2 at 88; Baker, “Legal Education”, supra note 13 at 70.
68 Ibid.
69 Moore, supra note 2 at 88.
70 Ibid. at 61.
71 Ibid. at 89; Baker, “Legal Education”, supra note 13 at 86.
together for at least part of the year and was clearly aimed at producing a cohesive profession. It also meant that law students would be able to attend the classes that the Law Society introduced in 1832. These formal classes were voluntary and were introduced following the demise of a student run organisation called the Juvenile Advocates’ Society. This society had a key role to play in the political unrest of the 1820s but before going on to look at it in more detail, one more thing ought to be said about legal education in Upper Canada, namely the impact of Upper Canada’s first university.

In 1837 Upper Canada acquired its first university, King’s College. The Law Society granted concessions to graduates of this college, in that they only had to spend three years on the Law Society’s books before being called to the bar, instead of the usual five. Such a concession only applied, though, to graduates of King’s College and graduates of British Universities. The evidence suggests that initially few graduates took advantage of this concession. A similar provision had been enacted in England in 1793 but Baker argues that the precedent for the Upper Canadian statute was a similar statute in Lower Canada. It is perhaps worth noting that it was not uncommon for English barristers to have graduated from university prior to attending the Inns of Court in London. Indeed the Law Society of Upper Canada was likened by some to a

72 Moore, supra note 2 at 91-92; Baker, ‘Legal Education’, supra note 13 at 74-75, 86-87; Romney, “Upper Canada”, supra note 6 at 187.
73 Baker, “Legal Education”, supra note 13 at 91-93
74 Ibid. at 75-76.
75 Ibid. at 84.
76 Though university graduates were more likely to be aristocrats, and hence when the number of graduates attending the Inns declined, it was symptomatic of the flight of the gentry from the English legal profession. See David Lemmings, Gentlemen and Barristers: The Inns of Court and the English Bar, 1680-1730 (Oxford; Clarendon Press, 1990) [Lemmings, Gentlemen and Barristers] at 17-18, 21, 26; David Lemmings, “Blackstone and Law Reform by Education: Preparation for the Bar and Lawyerly Culture in Eighteenth Century England” (1998) 16 L.H.R. 211 [Lemmings, “Blackstone”] at 223.
university, in much the same way that the English legal profession had viewed its Inns of Courts as equivalent to a university\textsuperscript{77}.

The driving force behind the creation of King’s College was Bishop John Strachan. Strachan was a key member of Upper Canada’s Family Compact. He was committed to seeing the legal profession become the elite of Upper Canada and he saw the creation of a university as crucial to creating a legal profession that shared similar views and values and as such would be committed to maintaining Upper Canada as a British colony\textsuperscript{78}. Significantly, a large proportion of the early bar had attended Strachan’s grammar school, where he had instilled in them the beliefs of the Family Compact\textsuperscript{79}.

Both the creation of a university and the educational changes that the Law Society introduced during the 1820s point to a desire to produce a cohesive, fraternal profession that would perpetuate the political arrangements which existed under the Family Compact. Yet the political situation in Upper Canada was becoming the source of much discontent. There is one particular event in the 1820s which has attracted much controversy and in which the educational, and aristocratic aspirations (or indeed pretensions) of the legal profession played a key role. That event is commonly known as the Types Riot.


\textsuperscript{78} Gidney & Millar, \textit{supra} note 9 at 14-15.

\textsuperscript{79} Baker, “The Juvenile Advocate Society”, \textit{supra} note 77 at 82 ; Wise, \textit{God’s Peculiar Peoples, supra} note 4 at 63.
The Types Riot of 1826 was an incident in which several law students destroyed the printing presses of William Lyon Mackenzie’s *Colonial Advocate*, a newspaper that was highly critical of the Family Compact. The law students were members of the Juvenile Advocates’ Society. The Juvenile Advocates’ Society had been set up in 1821, and though membership was voluntary a significant percentage of the students-at-law appear to have been members. The Juvenile Advocates would debate points of law as well as constitutional topics. Despite the broad topics that the Juvenile Advocates debated, their society was only open to law students. Thus it is clear that the Juvenile Advocates’ Society was part of the ‘self-conscious process of ‘professional’ formation of young lawyer-statesmen’.

The controversy surrounding the Types Riot stems from the fact that following the riot the law students in question received no immediate punishment from the attorney-general, John Beverley Robinson. The lack of immediate reprimand from the attorney general was damaging given that he was considered the head of the provincial bar and thus ought to be upholding the standards of behaviour expected from lawyers and their clerks. Even more damaging was the fact that several of the rioters were Robinson’s own clerks. There has been a debate over how to interpret the political turmoil of this period, and in particular how to assess the Types Riot. Brode refers to it as a ‘display of adolescent temper’ and argues that the subsequent trial was

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80 Romney, Mr Attorney, *supra* note 1 at 137; Romney, “Types Riot”, *supra* note 57 at 117, 127.
81 Baker, “Providential Order”, *supra* note 16 at 184.
83 Baker, “Juvenile Advocate Society”, *supra* note 77 at 76.
84 Baker, “Providential Order”, *supra* note 16 at 185.
85 Romney, Mr Attorney, *supra* note 1 at 134.
‘fair and open’ and seems confused as to why having witnessed this trial of the men who had vandalised his shop, Mackenzie did not ‘alter his convictions about the tyranny of the ruling regime’. The interpretation of the Types Riot favoured by Brode, Baker and Howes is in keeping with the rest of their scholarship on this period. They argue that the unrest during this period should be understood according to the standards of their time. Baker in particular argues that during this period the elite of Upper Canada understood the rule of law differently to how we understand it today. He claims that the provincial elite saw themselves as divinely destined to rule, consequently the rule of law was not a device they relied upon to legitimate their rule. Due to this shift in the meaning of the rule of law Baker and Howes are much less condemnatory of the elite’s actions during the Types Riot. Baker and Howes’s interpretation of the Types Riot has been criticised by Romney who calls their scholarship ‘an artefact not so much of historical scholarship as the romantic imagination inspired by a quasi-nationalistic nostalgia for an idealised past’. Such damning criticism necessitates a closer look at the scholarship in question.

Romney describes Baker and Howes’ work as attempting to reconstruct the code and values of the Upper Canadian elite so as to appreciate the elite’s actions on their own terms. While Romney praises Baker and Howes for illuminating the history of Canadian political thought he accuses them of having an ‘uncritical attitude towards their sources’ and using a ‘very slender

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86 Brode, supra note 9 at 133-134.
88 Ibid. at 196-197, 204-205.
90 Ibid. at 119.
base of historical research’ as well as making ‘startling errors of reasoning and misreading...texts’\textsuperscript{91}. In particular Romney argues that Baker and Howes ignore the contribution of the American settlers to Upper Canada, that they fail to realise the extent of self-interest which motivated the ideology of the Family Compact and that they ignore the existence of a Diceyan understanding of the rule of law in Upper Canada\textsuperscript{92}. While I believe Romney has a point I feel he has perhaps been too harsh with his criticism. It is true that Brode’s work glosses over the Types Riot to such an extent that it does not seem to be the same event that Romney described as an ‘outrage against the rule of law and a betrayal of the rules of conduct that underlay the elite’s claim to political and social pre-eminence’\textsuperscript{93}.

It is also fair to say that the Types Riot highlighted the tension that existed in Upper Canada during this period. The colony’s population was divided into a small, relatively homogeneous elite who monopolised offices and the government of Upper Canada, and a larger, mostly rural population that had little in common with the elite that ruled over them. The demographic contours of Upper Canada had remained largely the same from its creation until the 1820s. The elite of Upper Canada tended to be United Empire Loyalists who had fled to Upper Canada following the American Revolution, while the rest of the population were also Americans, they were Americans who had come to Upper Canada in search of land; they had emigrated not out of a sense of loyalty to Great Britain but out of a desire to earn a living. Their potential loyalty to the United States had been a great fear during the War of 1812 and following that war the tricky

\textsuperscript{91} Ibid. at 120.
\textsuperscript{93} Ibid. at 364; Romney, “Types Riot”, supra note 57 at 130, 139.
question of their citizenship had arisen. By the 1820s, however, the pattern of immigration was beginning to change with more people from Great Britain and Ireland arriving in Upper Canada. Thus it is likely that a significant proportion of the population of Upper Canada did not share the ideology of the Family Compact and as British immigration increased a population was developing who were not used to the Family Compact’s way of governing. Such demographic changes and threats to the security of the Family Compact’s position shed light on the reforms that the Law Society undertook during this period.

As much as the educational changes introduced by the Law Society during the 1820s point to a desire to produce a cohesive profession and the self confidence that the Law Society would be able to do so, the changes could also be read as the Law Society feeling threatened. In the first few decades of Upper Canada the vast majority of newcomers came from the United States, and they were not well educated. Even those United Empire Loyalists who had fled to Upper Canada had been mostly farmers, for the better educated Loyalists had gone to the more well-established British North American colonies on the east coast. The sudden influx of British immigrants beginning in the 1820s greatly increased the pool of potential students-at-law. By the 1820s the legal profession was closely connected with the elite of Upper Canada, at least in the eyes of the

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94 Flaherty, supra note 1 at 26-27; Romney, “Loyalist Fantasies”, supra note 89 at 136, 138-142; Romney, Mr Attorney, supra note 1 at 82-104; Robert L. Fraser, “Jacob Overholser, 1774-1815” in Fraser, Provincial Justice 320, supra note 4 at 321; Paul Romney, “Re-inventing Upper Canada: American Immigrants, Upper Canadian History, English Law and the Alien Question” in Roger Hall, William Westfall & Laurel Sefton MacDowell, eds., Patterns of the Past: Interpreting Ontario’s History (Toronto; Dundurn Press, 1988) 78 [Romney, “Re-inventing Upper Canada”]; Wise, God’s Peculiar Peoples, supra note 4 at 79; Romney, “Types Riot”, supra note 57 at 125.
public who did not distinguish between lawyers who were officials and lawyers who were not. Thus the Law Society really was the schoolroom of the governing class of Upper Canada, and hence should have, in theory at least, attracted ambitious immigrants wishing to succeed in their new home. The problem was that these new immigrants may not have shared the values of the elite Upper Canada such as the elite’s commitment to creating an aristocracy in Upper Canada, or their claims to be akin to the aristocracy of England. Thus entry to the Bar may have been denied them if the new immigrants did not share the ‘principles, education, and habits of life’ which differentiated the Upper Canadian elite. The majority of the immigrants of the early 1820s were poor Irish Catholics who frequently found it hard to peacefully integrate into an Upper Canadian society hostile to their Catholicism. The resulting sectarian riots between local Orangemen and immigrant Irish Catholics cannot have done much to make the Family Compact feel secure in their position.

The twin issues of the Family Compact’s political philosophy and its security in its elite status are at the crux of the Baker-Romney debate. With regard to the Family Compact’s political philosophy the main issue seems to be whether or not the elite of Upper Canada understood the concept of the rule of law in the same way that we do today. Baker argues that the concept of the rule of law has changed over time and that the ‘rights-based, secular, rule of law assertions’

96 Romney, “Types Riot”, supra note 57 at 121.
97 Both the Law Society and the Juvenile Advocates Society had no trouble attracting suitable members. See Baker, “Juvenile Advocate Society”, supra note 77 at 90.
98 Baker, “Providential Order”, supra note 16 at 185; Romney, “Constitutionalism”, supra note 7 at 127; Romney, “Types Riot”, supra note 57 at 137; Romney, Mr Attorney, supra note 1 at 158.
100 Brode, supra note 9 at 132. Though the Protestant Irish that came to Upper Canada found their views matched those of the provincial elite almost exactly. Romney, “Constitutionalism”, supra note 7 at 128.
made by Mackenzie were foreign to the Upper Canadian elite. Romney refutes Baker’s arguments, and claims that the Family Compact shared or should have shared the same concept of the rule of law that exists today and accuses Baker of erroneously omitting this concept from his interpretation of the Family Compact’s ideology. Both men rely on the actions of William Warren Baldwin to support their arguments. Baker argues that Baldwin was outraged by the Types Riot because it was not the behaviour of gentlemen while Romney argues that Baldwin was incensed by the violation of the rule of law that the Types Riot and its aftermath represented, and that he was also angered by the boorishness of the event. While it is doubtless that Baldwin did believe in aristocratic rule, it is clear that he envisaged an aristocratic rule that upheld the rule of law. It is also clear that Baldwin may not have been as committed a member of the Family Compact as Baker’s reliance on his views makes him seem, Baldwin was committed to preserving the privileges of the legal profession, but not the privileges of the Family Compact. The impression given by McLaren’s article is that Baldwin had the credentials to join Upper Canada’s ruling elite, yet lurked on the edges of them, possibly because he was known as an advocate for reform. Due to his reformist leanings and his impeccable background, Baldwin was an ideal leader for the reform movement. If we accept that the Family Compact members were aware of the concept of the rule of law as espoused by men such as William Warren Baldwin, the question remains why did so many of Upper Canada’s elite

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103 Baker, “Providential Order”, supra note 16 at 202; Romney, “Loyalist Fantasies”, supra note 89 at 130-133;
105 Ibid. at 336; for an example of Baker’s reliance on Baldwin’s views see, Baker, “Juvenile Advocate Society”, supra note 77 at 78.
106 McLaren, supra note 104 at 336; Fraser, “Order, Rights”, supra note 4 at xliii-xlvi; Romney, “Loyalist Fantasies”, supra note 89 at 130-133.
107 McLaren, supra note 104 at 336-337.
failed to uphold it? The answer to this question lies in the lack of security of status that plagued the elite of Upper Canada.

Mackenzie’s barbs in the *Colonial Advocate* were well aimed at the Family Compact’s insecurities; this was an elite that, as Howes puts it, ‘took themselves very seriously’\(^\text{108}\). Brode refers to the comments in the *Colonial Advocate* as ‘venom’ and accuses Mackenzie of forsaking ‘political satire for gross and mindless insult’\(^\text{109}\). It is understandable that the colonial elite felt insecure in their position, not only did they have the threat from the United States to the south, but they had a sizable “Late Loyalist” population whose loyalty to Britain had been in question ever since the American War\(^\text{110}\), and their claims to aristocratic status could not rest on land-ownership or tradition, which sustained the English aristocracy’s position, but could only rest on merit and education. Thus any comments which revealed that the Family Compact were little more than provincial arrivistes, could only have been viewed by its members as deeply threatening. One can see why such comments would have been viewed as akin to sedition by Upper Canada’s ruling elite who were ‘obsessed by status’\(^\text{111}\). They were attempting to clothe themselves with the aura of unquestionable authority possessed by the English aristocracy, which would serve the dual purpose of legitimating their right to govern Upper Canada and emphasised their Britishness and hence their distinctiveness from the United States. Anyone could see,
however, that the Family Compact was not an aristocracy like that of England, and they would never become one if Mackenzie and others continued to point out that the Emperor had no clothes.\textsuperscript{112}

The fact that Baldwin was so critical of the events surrounding the Types Riot is indicative of a split in the legal profession. There had been a vibrant tradition of “Irish Opposition” in Upper Canada, of which Baldwin had been a member\textsuperscript{113}. Baldwin’s political views meant that there were some aspects of Upper Canadian society which were closed to him\textsuperscript{114}. Despite holding political views which were something of an anathema to Upper Canada’s ruling elite, Baldwin was a leading member of the Law Society, and was admired and respected by the students-at-law who formed the Juvenile Advocates’ Society\textsuperscript{115}. The split in the Law Society reflected the two political factions in Upper Canada: there was the Family Compact faction led by Robinson, and the Reform faction led by Baldwin\textsuperscript{116}. That the factions in the Law Society should mirror that in the political sphere of Upper Canada should come as no surprise, for the lawyers of Upper Canada were well placed to practise politics in their spare time, or perhaps more accurately, the politicians of Upper Canada were qualified to practise law in their spare time. It should be noted, though, that only seventeen percent of Upper Canada’s legislators were lawyers during the

\textsuperscript{112} Even Sir John Beverley Robinson seemed aware that he would never be an English gentleman. Howes, \textit{supra} note 108 at 373; G. Blaine Baker, “The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire”\textit{(1985)} 3:2 L.H.R.219. at 250 [Baker, \textit{“Reconstitution”}]; Flaherty, \textit{supra} note 1 at 29. For a different interpretation which claims that Robinson only stayed in Upper Canada because he could not get a good enough job in England see Romney, “Loyalist Fantasies”, \textit{supra} note 89 at 137. Such an interpretation suggests that the British authorities did not see the Family Compact as the equals of the English aristocracy, see Buckner, \textit{supra} note 110 at 102-103, 109.

\textsuperscript{113} McLaren, \textit{supra} note 104 at 331.

\textsuperscript{114} \textit{Ibid.} at 329, 334; Robert L. Fraser, “William Warren Baldwin, 1775-1844” in Fraser, \textit{Provincial Justice} 201, \textit{supra} note 4 at 203.

\textsuperscript{115} Moore, \textit{supra} note 2 at 48; The Juvenile Advocates sought out Baldwin’s opinion on membership and duly followed it. Baker, “Juvenile Advocates’ Society”, \textit{supra} note 77 at 76, 78.

\textsuperscript{116} Moore, \textit{supra} note 2 at 70-73; Fraser, “Order, Rights”, \textit{supra} note 4 at lxxv.
period, 1792 to 1841\textsuperscript{117}. Although the proportion of lawyers in the Assembly seems small, it was disproportionate to the percentage of lawyers living in Upper Canada. What cannot be ignored is that the leading lawyers were also the political leaders\textsuperscript{118}.

Although the political split in the profession could be seen as a failure of the Law Society’s project to produce a cohesive profession, it should be remembered that Upper Canadian lawyers came from a wide variety of backgrounds. As such it could not be expected that the Law Society would always function in complete unanimity on every issue. Yet even though Robinson and Baldwin had different political views which were doubtless shaped by their different experiences, there were certain issues they agreed upon, such as the pre-eminence of the legal profession and a desire for an aristocracy in Upper Canada\textsuperscript{119}. Or to put it more succinctly, ‘[t]he elite groups did not share a uniform set of assumptions about public affairs or political ideals but they did share common interests’\textsuperscript{120}. Therefore the fact of a political spilt in the profession is uncontroversial but what is more interesting is how the two factions worked to preserve the privileges of the legal profession when lawyers were extremely unpopular with the Upper Canadian public as evidenced by the anti-lawyer sentiment of the emerging provincial press\textsuperscript{121}.

\textsuperscript{117} Moore, supra note 2 at 108.
\textsuperscript{118} Fraser, “Order, Rights”, supra note 4 at xlvii.
\textsuperscript{119} For evidence of the experiences that shaped Robinson’s and Baldwin’s political opinions see Brode, supra note 9 at 35-36; McLaren, supra note 104 For Robinson’s views on the legal profession and aristocracy see Howes, supra note 108 at 397, Brode, supra note 9 at 68-69; For Baldwin’s views see Romney, “Loyalist Fantasies”, supra note 89 at 130; Romney, “Types Riot”, supra note 57 at 130; McLaren, supra note 104 at 328-330.
\textsuperscript{120} McMahon, “Law and Public Authority”, supra note 108 at 393.
\textsuperscript{121} Romney, “Types Riot”, supra note 57 at 121; Baker, “Providential Order”, supra note 16 at 185.
The political turmoil of the 1820s continued into the 1830s but before going on to look at the events of the 1830s there is one other event during this period worth examining more closely. In 1827 an English judge, William Walpole Willis, was appointed to the Court of King’s Bench. He was the first English judge to be appointed to the bench of Upper Canada since 1805. Willis was appointed because he was an expert in equity and the Colonial Office had at long last decided that Upper Canada should have a Court of Chancery. Despite the reason for appointing a non-Canadian to the bench being a solid one, Willis was to prove an unpopular appointment.

That Upper Canadians should have monopolised judicial appointments for two decades suggests two things. Firstly it suggests that the lawyers of Upper Canada were proving to be successful in achieving elite status; a judicial appointment was, after all, considered the pinnacle of the legal profession. Secondly, it suggests that the Upper Canadian elite would not be pleased at the prospect of an interloper such as Willis taking a judicial appointment that would otherwise have gone to one of their own. As it turns out Willis was viewed with suspicion almost immediately by the colonial administration. Lieutenant-Governor Maitland was instantly suspicious of Willis because he could not understand why an English barrister would accept a position in the colonies and promptly concluded that Willis must be untalented.

122 Flaherty, supra note 1 at 23; Moore, supra note 2 at 59.
123 Romney, Mr Attorney, supra note 1 at 129.
124 Ibid. at 144.
Willis, as an outsider, was unaware of how things worked in the colony and he made numerous faux pas which served to ‘antagoniz[e] every important person in government’. It was not surprising that he should be dismissed only a few months after arriving, though as with the interpretation of the Types Riot there is some disagreement about how to interpret Willis’s dismissal. Brode is of the opinion that it was deserved due to the chaos Willis caused; while Romney has argued that it was more to do with Willis’s attempt to uphold the rule of law to the detriment of Upper Canada’s ruling elite.

Willis was dismissed not because of the opinions he held regarding the correct constitution of the Court of Kings’ Bench but because of the way he had expressed his opinions. Rather than privately communicate them to the government, Willis had published his views ‘in a manner calculated to shake public confidence in the administration of justice’. The treatment that Willis received reveals how cohesive and suspicious of outsiders the elite of Upper Canada was. Maitland’s suspicion of Willis demonstrates how the ruling elite had come to dominate the bench. This domination of the bench is evidence that Upper Canadian lawyers could rise to the top of their profession and society.

Although Willis’s dismissal was hardly surprising given his character and behaviour, the events which precipitated his dismissal played into the hands of the Reform movement. The Willis affair highlighted the need for an independent judiciary in Upper Canada. In 1829 the House of

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126 Brode, supra note 9 at 151-152; Romney, Mr Attorney, supra note 1 at 141-142, 144.
127 Brode, supra note 9 at 152; Johnson, supra note 125 at 157; Romney, Mr Attorney, supra note 1 at 144-150; Oliver, supra note 125 at 450.
128 Romney, Mr Attorney, supra note 1 at 144-145; Brode, supra note 9 at 151-152.
Assembly spent much of its time discussing the Willis affair and demanded that from then on ‘the chief justice should be excluded from the Executive Council, and future appointments to the Court of King’s Bench should be made from the English bar’. The former demand was granted in 1830 and in 1834 the judges of King’s Bench got tenure during good behaviour\textsuperscript{129}.

The Willis affair is seen as the official beginning of the quest for responsible government in Upper Canada. While the quest for responsible government is interesting in and of itself, this paper is more concerned about the effect that quest had on the legal profession, and in particular its effect on the status of lawyers in the colony.

With so many of the leading Family Compact members being lawyers, the legal profession was seen as being intertwined with the corruption of Upper Canadian politics\textsuperscript{130}. Of course not all of them were members of the Family Compact, and a sizeable chunk of the profession had Reformist sympathies. In addition the surge of British immigration to Upper Canada continued, and amidst the political turmoil, and demographic upheaval of the 1830s the Law Society of Upper Canada began to worry about the size of the legal profession. At the same time that the Law Society began to take an interest in the numbers of lawyers, it introduced bar admission examinations\textsuperscript{131}. The number of students-at-law had increased dramatically, from 1829 to 1832 sixty students had been admitted, compared to a total of two hundred students during the Law

\textsuperscript{129} Romney, Mr Attorney, supra note 1 at 150-151; Oliver, supra note 125 at 455-456.
\textsuperscript{130} Romney, “Types Riot”, supra note 57 at 121.
\textsuperscript{131} Baker, “Legal Education”, supra note 13 at 113-114.
Society’s previous history, and numbers were only going to increase as Upper Canada’s population increased\textsuperscript{132}.

Not all reforms to legal education were successful, however. The construction of Osgoode Hall allowed the Law Society to begin an experiment in residential education for its students-at-law. This experiment failed abjectly because the students repeatedly misbehaved leading to confrontations with more senior members of the bar. Ironically the experiment may have failed because it attracted the sons of the colonial elite who, as Moore points out, had not come to Osgoode Hall to study but rather to enjoy themselves\textsuperscript{133}. That the sons of the colonial elite were attending Osgoode Hall shows that the elite viewed the legal profession as providing a secure career for their sons. The Rebellion of 1837 to 1838 provided a much needed excuse for the Law Society to end their experiment in residential education.

During this time, of course, the sons of the colonial elite were attending Osgoode Hall to be called to the bar. Yet not all of those who were qualifying as attorneys went on to be called as barristers, in fact from the 1830s onwards more young men were choosing to qualify as only attorneys (after 1837 attorneys were renamed solicitors), with the result that forty per cent of lawyers in Upper Canada were only attorneys by 1840\textsuperscript{134}. It would be interesting to know where the lawyers who were only attorneys were practising. It might be that there was a regional divide

\textsuperscript{132} Moore, supra note 2 at 85.
\textsuperscript{133} Ibid. at 92-97.
\textsuperscript{134} Ibid. at 86-88; Gidney & Millar, supra note 9 at 77.
between lawyers who were just attorneys and lawyers who were both attorneys and barristers. The issue of the attorney/solicitor-barrister divide is one that I will return to in chapter 3.

Nevertheless it is clear that the elite of Upper Canada viewed the legal profession as their vehicle for maintaining their status through the generations. Of the three professions in Upper Canada it was the one that came to be dominated by Canadian-born practitioners far faster than the clergy or medicine\textsuperscript{135}. Such a high proportion of Canadian-born may help explain the educational changes that were introduced as British immigration increased. Those born in the colonies were painfully aware that they were not as sophisticated or as well educated as those in England, but they desperately wanted to be, and they were keen to be seen as equal to anything England had to offer. Thus while the educational changes may have been designed to keep the number of lawyers down and preserve the law as an elite profession; they may also have been introduced to keep pace with standards in England. How could new British immigrants to Upper Canada look up to the ruling elite, if the ruling elite were poorly educated? Upper Canada had been re-opened to immigration from the very place that it claimed to have recreated exactly; that they had failed would be especially obvious to the newcomers, and these newcomers would be aware that the elite of Upper Canada were not a true aristocracy as they claimed to be. Their “aristocratic” status was based on merit, on education, not on land ownership or breeding\textsuperscript{136}. Therefore if the education that the elite received was sub-standard, how could they legitimate their rule to the new immigrants?

\textsuperscript{135} Between 1850 and 1899, for example, 39\% of lawyers were foreign-born compared to 60 \% of doctors and 55\% of clergy. Gidney & Millar, \textit{supra} note 9 at 196; The legal profession was also overwhelmingly trained in Upper Canada. Baker, “Legal Education”, \textit{supra} note 13 at 118.

\textsuperscript{136} McLaren, \textit{supra} note 104 at 329; Baker, “Reconstitution”, \textit{supra} note 112 at 256-257; Romney, “Types Riot”, \textit{supra} note 57 at 130.
The Upper Canadian political arrangement was the focus of many calls for reform during the 1830s. The quest for responsible government was led by the Baldwins, and a dual party system emerged in the Assembly, with the Conservatives and Reformers\textsuperscript{137}. The Baldwins demanded that the government of Upper Canada look more like that of Britain\textsuperscript{138}. Colonial intransigence prevented responsible government from arriving in Upper Canada as quickly as it was desired. In 1837 rebellion broke out in Upper Canada, not long after rebellion had broken out in Lower Canada. Although the Upper Canadian rebellion was quickly quelled, the rebellions convinced the imperial government that something needed to be done\textsuperscript{139}.

The fact that several of Upper Canada’s barristers had been involved in the rebellion shows just how politically divided the legal profession was\textsuperscript{140}. The legal profession was homogenous in many respects but it did not have political homogeneity. Undoubtedly the 1837 rebellion marked the beginning of the end for the Family Compact, but did it also mark the beginning of the end for lawyers as Upper Canada’s elite?

In one respect it did mark the end of the lawyers as the Upper Canadian elite, for the imperial government’s proposal for dealing with the problems in its North American colonies was to

\textsuperscript{137} Buckner, \textit{supra} note110 at 76-77, 81.
\textsuperscript{138} \textit{Ibid.} at 214; Romney, “Upper Canada”, \textit{supra} note 6 at190; Romney, “Rule of Law”, \textit{supra} note 92 at 110-111; Romney, “Types Riot”, \textit{supra} note 57 at 132; McLaren, \textit{supra} note 104 at 336.
\textsuperscript{139} For more information on the 1837 rebellions see Buckner, \textit{supra} note 110 at 238-239; Brode, \textit{supra} note 9 at 193-202; Romney, Mr Attorney, \textit{supra} note 1 at 153-7. For evidence of the imperial government being moved to act by the rebellion, see Brode, \textit{supra} note 9 at 204; Romney, Mr Attorney at 158.
\textsuperscript{140} Moore, \textit{supra} note 2 at 97-98.
reunite the Canadas, and Upper Canada was renamed Canada West\textsuperscript{141}. I shall now move on and examine whether the elite of Canada West continued to be lawyers, or if the lawyers’ reign in Canada West ended with Upper Canada.

\textsuperscript{141} The reuniting of the Canadas was proposed by Lord Durham. Buckner, \textit{supra} note 110 at 250-264; Brode, \textit{supra} note 9 at 210-212, 216, 222-223. A union of the Canadas had been proposed earlier in 1822 but was rejected. Brode, \textit{supra} note 9 at 81-86; Romney, \textit{Mr Attorney}, \textit{supra} note 1 at 89-90. Although Upper Canada was officially called Canada West, many still referred to it as Upper Canada. For the sake of distinguishing the two periods I will refer to it as Canada West.
Chapter 3

The Canada West Period, 1841-1867

The Union of the Canadas marked the end of the Family Compact’s rule, for Lower Canada had had its own ruling elite, and the ruling elites of each colony could not hope to dominate the other completely. The Union of 1841 was, however, only a legislative union, each of the Canadas retained its own legal system, and as such the lawyers of Canada West did not have to fear being usurped by civilian trained lawyers from Canada East\(^{142}\). In fact the Union of 1841 barely affected the Law Society of Upper Canada at all\(^{143}\). The Union did remove the possibility for the Law Society’s members to act as an aristocracy for the whole Province of Canada but I shall argue that many lawyers retained an elite status in Canada West, as well as continuing to play an important role in the government of the Province much as they had during the Upper Canadian period.

As is well known, the Union of 1841 did not bring responsible government to Canada. The government of the Canadas was a hybrid between popular sovereignty and the system that had existed pre-Union. Therefore the fight for responsible government continued in the early part of the Union period. It is worth noting that Robert Baldwin, a lawyer, played a key role in winning the battle for responsible government\(^{144}\).

\(^{142}\) Romney, *Mr Attorney*, supra note 1 at 159.
\(^{143}\) Moore, *supra* note 2 at 98-99.
\(^{144}\) Romney, *Mr Attorney*, supra note 1 at 169-172.
Robert Baldwin was not the only lawyer to fight for responsible government, in fact many lawyers had played a prominent part in fighting for responsible government, and following the introduction of responsible government, lawyers continued to play a key role in Canadian politics. In fact after 1841 the number of lawyers in the legislature increased. In 1848 lawyers made up over half of Canada West’s members of the legislature, though by 1857 the proportion had decreased to just under forty per cent\textsuperscript{145}. The increase in the number of lawyer-politicians presents what Baker has called an ‘interpretive challenge’: how did the ‘elite provincial lawyers...convert anti-legal republican sparks that were among the causes of the [Canadian Uprisings of 1837-8] into a more democratic state in which they themselves resumed leadership’\textsuperscript{146}?

Baker argues that William Badgely’s Union period attempts to codify Canadian criminal law and procedure should be thought of as ‘manifestations of Canadian professional ambition’. The Law Society was already something of a professional society in the modern sense of the word. Baker notes that events leading up to the Union of 1841 and the achievement of responsible government had somewhat discredited the reputation of the legal profession in Canada West but he argues that some lawyers still saw themselves as ‘guardians of social and political order’; the problem was how to maintain this status in ‘an increasingly democratic state’\textsuperscript{147}.


\textsuperscript{147} Baker, “Strategic Benthamism”, \textit{supra} note 146 at 265.
Through their domination of the legislature the lawyers had no trouble protecting their own privileges as a profession. That is not to say that protecting their own privileges was the only thing that drew so many lawyers to the legislature. The legal profession was the profession with the most Canadian-born or Canadian-trained out of the three major professions in Canada West. As such it is arguable that the legal profession felt more settled within Canada West, and their familiarity with the region may have encouraged them to go into politics. It is more likely that lawyers went into politics because their legal training and knowledge of how the law worked made them well qualified as legislators. It is no surprise that the number of lawyers in the legislature peaked at the same time as the battle for responsible government. During periods of significant constitutional change in England and France lawyers dominated the legislature. Therefore the sheer number of lawyers in the parliament of 1848 fits into a pattern seen in England and France. That lawyers in three countries should play a key role in revolutionary or reform-orientated parliaments suggests that lawyers’ roles as legislators had more to do with the skills that their job entailed than their societal status. Thus the domination of the 1848 legislature by members of the legal profession does not necessarily mean that they held elite status in the communities that elected them. The legal profession may have been highly politicised but they did not agree with some of the more radical reforms that were being

148 Romney, “Upper Canada”, supra note 6 at 211, 213; Even William Warren Baldwin had been keen to protect the privileges of the legal profession. McLaren, supra note 104 at 336. Lawyers were also good at getting public funds for their private interest ventures. Wilton, “Introduction”, supra note 145 at 13.

149 In the lead up to the Glorious Revolution in England, the House of Commons was dominated by the lawyers. Alan Harding, A Social History of English Law (Middlesex, 1966) at 212. Lawyers also dominated the Constituent Assembly that was set up in 1789 following the French Revolution. David A. Bell, Lawyers and Citizens: The Making of a Political Elite in Old Regime France (New York; Oxford University Press, 1994) at 5, 104.

150 In fact there is evidence that the legal profession was viewed with much suspicion. Blackwell, supra note 145 at 160.
suggested, for example, they did not support the ending of their monopolies. Their position in the legislature made them well placed to prevent any changes which would be overly damaging to them.

There were, however, other changes over which they could exert little control and which would eventually see the legal profession lose its social and political pre-eminence. These changes included demographic change and industrial development, the latter of which dramatically changed the pathway to professional success for ambitious lawyers.

Immigration to Canada West from overseas, which had begun in the 1820s, continued to bring large numbers of people to the province. The size of the legal profession also increased with the numbers of lawyers increasing in a manner that was disproportionate to the increase in the rest of the population. Such an increase in the number of lawyers raises questions about the possibility of them all playing a leading role in their communities. Certainly the sheer size of the profession forced many lawyers to leave the major metropolitan areas and spread out across Canada West in order to make a living.

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151 For example Chancery tended to attract the best legal minds, and many Chancery lawyers were leaders in the Reform movement, yet they were reluctant to properly reform Chancery in ways that would harm their income. Moore, supra note 2 at 110; Blackwell, supra note 145 at 145, 160-162.

152 Romney, “Political Corruption”, supra note 95 at 143; Moore, supra note 2 at 102; Flaherty, supra note 1 at 26; Risk, “Law and Economy”, supra note 95 at 89; Toronto’s population trebled between 1850 and 1880, Paul Craven, “Law and Ideology: The Toronto Police Court, 1850-1880” in Flaherty, Essays in the History of Canadian Law vol 2, 251, supra note 2 at 293.


154 Ibid. at 119.
Virtually since the founding of Upper Canada, Toronto had been the centre of the legal profession. During the Union period Toronto retained a sizeable proportion of all the lawyers in Canada West. Bloomfield estimates that over a quarter of all Canada West’s lawyers were in Toronto in 1857, and points out that over half of all the lawyers in Canada West practiced in the twenty-six other county seats\textsuperscript{155}. Thus we can see that lawyers were living mostly in cities or towns. The spread of lawyers away from Toronto was driven by more than over-crowding in Canada West’s legal centre. Baldwin’s Reform government had introduced legislation which changed the way lawyers worked, with the result that from the 1850s ‘lawyers worked in an increasingly decentralized framework, with much of their business concerned with the county courts’\textsuperscript{156}. This decentralization meant that more lawyers could live comfortably outside Toronto.

Of course ambitious lawyers were still qualifying as barristers in Toronto and if they really wanted to reach the pinnacle of the legal profession they needed to travel and follow the courts across Canada West to build a province-wide reputation\textsuperscript{157}. Not all lawyers could or wanted to reach the top of the legal profession but they could live outside Toronto and still be relatively comfortable. Living outside Toronto, however, did not preclude them from entering politics, as Baldwin’s government passed legislation that decentralized government functions, which created a need for legal advice at a more local level\textsuperscript{158}. Such decentralization also created a multitude of

\textsuperscript{155} Ibid. at 117.
\textsuperscript{156} Ibid.
\textsuperscript{157} Moore, supra note 2 at 105-106.
\textsuperscript{158} Bloomfield, supra note 153 at 117.
new political roles which lawyers were well placed to fill. Lawyers tended to be better educated, with the technical expertise and the positions of trust and confidence that made them the obvious choice to fill positions on local councils, local boards of trade and local political associations, and to represent their communities in the legislature\textsuperscript{159}.

Those legislators that passed the laws which created so many roles for lawyers were themselves lawyers and hence it may seem as though lawyers were cynically creating new offices which they were well-suited to hold. Such an explanation for the proliferation of new offices is simplistic. Certainly some sections of the population were wary of the Reform lawyers widening the trough for themselves but a little legal education had always been beneficial for office holding, as the English experience attests\textsuperscript{160}. What is more interesting about the involvement of the lawyers in local government is that there were so many lawyers living and working outside Toronto.

There had long been something of a geographic divide between those lawyers who stayed in Toronto and those who did not. The elite of the legal profession had always lived and worked in Toronto and the educational changes that they had introduced in the Upper Canadian period were designed to ensure that all would-be lawyers had to spend at least some time in Toronto. The aims of these educational measures had been to produce a coherent and relatively homogeneous bar, but these aims were not met. Even in Toronto the bar was spilt politically, and for the

\textsuperscript{159} Ibid. at 112, 133-135, 138

\textsuperscript{160}Romney, Mr Attorney, supra note 1 at 190; Blackwell, supra note 145 at 142, 161. For the English experience see Dawson, supra note 58 at 45.
Canada West bar as a whole there was also a geographic split to contend with\textsuperscript{161}. A lawyer in Guelph would have had very different professional interests than a lawyer in Toronto. At the same time as legislation facilitated a decentralization of the legal profession there was growing discontent with the centralization of legal education\textsuperscript{162}. It had remained essential for young lawyers to spend some time in Toronto\textsuperscript{163}. This requirement of spending time in Toronto placed additional burdens on those from outside Toronto, and there had always been students-at-law from outside Toronto as local centres had long been able to support lawyers, and hence local centres had always had the ability to have articling clerks\textsuperscript{164}. The increase in numbers of these local lawyers meant that the geographic divide was much more pressing. Unfortunately the divide between ‘metropolis and hinterland’ in Canadian legal experience is one that has not yet been fully examined\textsuperscript{165}. A question that might be answered by further exploring the rural-urban divide is where the majority of lawyers working outside Toronto called to the bar or did they just practice as solicitors? For it was during the 1850s that a significant proportion of lawyers opted to qualify only as solicitors or attorneys. In addition solicitors were acting as advocates in the county courts and were thus challenging the barristers’ prerogatives. With the county courts increasingly providing a large proportion of a typical lawyer’s work, it is unsurprising that the Law Society began to re-exert control over the “lower branch” of the legal profession, starting with the Attorneys’ Admission Act in 1857\textsuperscript{166}.

\textsuperscript{161} Blackwell, \textit{supra} note 145 at 141.
\textsuperscript{162} Baker, “Legal Education”, \textit{supra} note 13 at 98.
\textsuperscript{163} Gidney & Millar, \textit{supra} note 9 at 167.
\textsuperscript{164} Moore, \textit{supra} note 2 at 157.
\textsuperscript{165} Wilton, “Introduction”, \textit{supra} note 145 at 28.
\textsuperscript{166} Gidney & Millar, \textit{supra} note 9 at 77-78.
The fact that there were now so many lawyers working outside Toronto points to another phenomenon of the Union period, and that is the overcrowding of the profession. There had been worries about the size of the profession before, but the number of lawyers continued to increase disproportionately to the rest of the population, in fact the number of lawyers all but doubled between 1857 and 1870\(^{167}\). We do not know if all these lawyers were working as lawyers, legal training did after all make lawyers well suited for business, and it was during the Union period that Canada began to industrialise and experience an economic boom that was to transform Canada West from an agricultural society to an urbanised, industrial powerhouse\(^{168}\).

There is some evidence that there may have been too many lawyers and consequently some lawyers found themselves under-employed\(^{169}\). As a consequence of the increase in the number of lawyers the Law Society once again undertook educational reforms designed to reduce the size of the profession. For example in the 1850s the number of students failing the bar examination increased dramatically\(^{170}\). The Law Society also began to make it harder for foreign trained lawyers to practise in Upper Canada which was probably a result of the large numbers of English immigrant lawyers that had arrived in the province during the 1840s and 1850s\(^{171}\).

\(^{167}\) Bloomfield, \textit{supra} note 153 at 113.


\(^{169}\) Bloomfield, \textit{supra} note 153 at 124.

\(^{170}\) Baker, “Legal Education”, \textit{supra} note 13 at 114

\(^{171}\) \textit{Ibid.} at 117-118.
In addition to making it harder for foreign trained lawyers to practise in the province, the Law Society also introduced further educational reforms. The 1850s saw a dramatic increase in the number of university degree holders who applied to the Law Society, with the aim of taking advantage of the decreased period of study. Although the concession granted to university graduates applied to all universities in the UK, few English or Scottish graduates utilised this option, though graduates of Trinity College, Dublin flocked to the Law Society. The reason why there were so many graduates of Trinity applying to the Law Society was probably due to the greater number of Irish people who came to Canada West. According to the 1842 census a third of the population had been born in the UK and of that third, half had been born in Ireland. Of course the chances are that the Irish graduates who applied to the Law Society were markedly different from the Irish population that arrived en masse during this period. Given that Trinity was considered to be the University of the Protestant Ascendancy in Ireland and that members of the Law Society still tended to be overwhelmingly Protestant, usually Anglican, it is likely that those Irish graduates who joined the Law Society fitted in with the Anglican sensibilities that long continued to dominate the elite of the legal profession.

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172 Ibid. at 76.
173 Moore, supra note 2 at 106.
174 Flaherty, supra note 1 at 27.
175 See the evidence presented in a case study of Brantford, ON in Gidney & Millar, supra note 9 at 197. Even as late as 1889 it was for a lawyer’s benefit if he was “British descent; Protestant, preferably Anglican; and Conservative in politics”. John D. Honsberger, “Raymond and Honsberger: A Small Firm That Stayed Small, 1889-1989” in Carol Wilton, ed., Essays in the History of Canadian Law – Inside the Law: Canadian Law Firms in Historical Perspective vol 7 (Toronto; University of Toronto Press, 1996) 430 at 431.
176 Many of the Irish Protestants who came to Upper Canada during the 1820s and 1830s had a ‘garrison mentality’ that matched that of the Family Compact. Romney, “Constitutionalism”, supra note 7 at 128. The experience of the Irish Catholics was quite different, and they were suspected of criminality. The influx of immigrants in the nineteenth century led to concerns about the security of the social order. Constance B. Backhouse, “Nineteenth-Century Canadian Rape Law 1800-92” in Flaherty, Essays in the History of Canadian Law vol 2, 200 at 212. The Irish Protestants and their Orange Order, however, were quite capable of causing trouble themselves. Romney, “Upper Canada”, supra note 6 at 205.
The number of university graduates applying to the Law Society peaked in the 1850s and then declined steadily. Baker argues that during this period Convocation was attempting to mimic the admissions procedures for universities\(^{177}\). If Baker is correct, then it would suggest that the Law Society was trying to make a legal education the equivalent of, or the alternative to, university. Baker also argues that the Law Society was trying to become less exclusive during this period and was encouraging meritocracy\(^{178}\).

1849 saw the foundation of another voluntary organisation of law students, the Osgoode Club. The Osgoode Club was founded following the cancellation of law lectures at King’s College. These lectures had been given by William Hume Blake, and they were seen as an initiative of the Law Society. The Osgoode Club requested lectures and in 1854 the Law Society, having acquiesced to the Club’s demands, made attendance at Law Society lectures compulsory. Such measures were particularly unpopular with students who lived outside Toronto\(^{179}\).

Controlling the size of the legal profession was another reason behind the Law Society regaining control of the attorneys in 1857. In doing so the Law Society reduced the educational differences between barristers and attorneys which resulted in fewer reasons to become an attorney without becoming a barrister\(^{180}\). The attorney had been reborn as the solicitor following

\(^{177}\) Baker, “Legal Education”, supra note 13 at 78.

\(^{178}\) Ibid.

\(^{179}\) Ibid. at 94-100; Moore, supra note 2 at 115-117.

\(^{180}\) Moore, supra note 2 at 109.
Chancery legislation of 1837, and the economic changes that began in the middle of the nineteenth century sent the solicitor to the top of the legal profession\textsuperscript{181}.

Ever since 1791 the leaders of the legal profession had been the barristers, the men who argued cases in court\textsuperscript{182}. The economic changes and industrialisation that took place in the second half of the nineteenth century changed the way the legal profession worked, with the result that by the end of the century the leading lawyers were the corporate solicitors\textsuperscript{183}. The first wave of change to the profession was heralded by the arrival of the railways. Due to their positions in their local communities lawyers were exceptionally well placed to effect the legislative changes that industrialisation needed\textsuperscript{184}. The role of the legislature here cannot be underplayed, for there is significant evidence that the judges were unwilling to adapt the law to suit the new conditions with the result that the necessary changes in the law were brought in via legislation\textsuperscript{185}. Risk claims that there was a real belief during the Union period that the law could help achieve economic development\textsuperscript{186}.

\textsuperscript{181} \textit{Ibid.} at 111.


\textsuperscript{184} Moore, \textit{supra} note 2 at 125; Wilton, “Introduction”, \textit{supra} note 145 at 5, 9, 22; Bloomfield, \textit{supra} note 153 at 136.


Lawyers found themselves well placed to facilitate the economic changes that began with the arrival of the railways and the railway companies rewarded the lawyers with a seemingly endless stream of work. In fact the railway companies produced so much legal work that they pioneered the in-house lawyer. The first lawyer to work for the railways rather than be retained by the railway company was Aemilius Irving, who accepted a job from the Great Western Railway in 1855. His appointment was initially quite scandalous for, as Wilton has pointed out, the period from 1820 to 1880 was the golden age of the sole practitioner, and there was debate as to whether it was proper for a lawyer to accept such an appointment. After all a lawyer was a gentleman, and a gentleman was defined by his independent means and independent mind.\footnote{Wilton, “Inside the Law”, supra note 183 at 5; Moore, supra note 2 at 145; Jamie Benidickson, “Aemilius Irving: Solicitor to the Great Western Railway, 1855-1872” in Wilton, Essays in the History of Canadian Law vol 7, 100, supra note 175 at 103.}

Irving’s success was to prove that you could be salaried and still be a lawyer, in fact after seventeen years with Great Western he was on his way to the top of the profession, along with many other “railway lawyers”.\footnote{Moore, supra note 2 at 145, 124; Benidickson, “Aemilius Irving”, supra note 187 at 116, 117.} Not only that but Irving had risen to a high position within the railway company itself and Benidickson argues that Irving should be considered on a par with the English lawyers who played such a key role in railway capitalism.\footnote{Benidickson, “Aemilius Irving”, supra note 187 at 117. For the English experience see Rande Kostal, Law and English Railway Capitalism, 1825-1875 (Oxford; Clarendon Press, 1994) at 322.} Indeed lawyers had been provided with a good training for business and many but not all were successful in the business world.\footnote{Wilton, “Introduction”, supra note 145 at 22, 6-7.}
In the period leading up to Confederation, industrialisation created a significant amount of work for lawyers. The impact that these changes were to have on the legal profession was beginning to emerge even in the Union period. The demands that business placed on lawyers led to the creation of multi-partner firms, such a trend was especially marked in Toronto, where by 1870 two-thirds of its lawyers worked in a partnership, compared to two-fifths of lawyers outside Toronto\(^1\). It is unlikely that such a concentration of partnership emerged in the three years following Confederation, therefore we can assume that lawyers in Toronto had been practising in partnerships for some time, and that Torontonian lawyers’ tendency to practice in a partnership was at least partially related to the city’s economic success.

While the lawyers remained, by and large, the leaders of their local communities during the Union period, the economic changes that came during this period signalled the beginning of the end for the lawyers as the de facto elite of Canada West, which after Confederation was renamed Ontario. The increasing demands of legal business meant that lawyers were finding it harder and harder to combine legal work with other interests. In 1848 Robert Baldwin had resigned the treasurership of the Law Society upon becoming co-premier of the Province of Canada as he had found that he could not combine Law Society work with active politics\(^2\). While Baldwin’s resignation as treasurer may have been driven more by political concerns than by constraints of


\(^2\) Moore, *supra* note 2 at 112.
time, as the Union period progressed and moved into Confederation a host of leading lawyers found themselves having to choose between practising law and practising politics\textsuperscript{193}.

The rise of the solicitor facilitated by the solicitor’s role in business also had an effect on the visibility of the legal profession. When the leaders of the bar had been the litigators, the men who fought and won criminal cases, the bar had been highly visible, and the leading members had been well-known. Becoming well-known as a litigator had once been essential for a lawyer who wished to succeed, for it was through becoming well-known that a barrister would attract other briefs, but the rise of the solicitor put a stop to this. It remained the case that participating in a high-profile murder trial would bring a lot of publicity but the nature of the main source of a lawyer’s income had changed. The main source of a lawyer’s income, especially in Toronto, was becoming the railway companies and other corporations. These corporations provided a steady stream of work, and while the publicity of a murder trial did not hurt a lawyer’s, or a law firm’s, business, it was hardly financially rewarding, and neither was it the type of work that corporations wanted from the lawyers\textsuperscript{194}. Thus lawyers, during the Union period, were beginning to be less visible to the public and such a decline in visibility raises questions over their ability to maintain their leadership status.

In addition the economic success of business meant that there was an alternative route to success in Canada West; the legal profession was now no longer the only route to the top. In fact as the

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\item Cole, \textit{supra} note 183 at 158, 160.
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nineteenth century progressed the legal profession appeared over-crowded which forced many young lawyers to move west to achieve professional success. Therefore an ambitious young man was more likely to choose a career in business rather than the law if he wished to achieve wealth and status.\(^{195}\)

\(^{195}\) Wilton, “Introduction”, supra note 145 at 3; Honsberger, “Raymond and Honsberger”, supra note 175 at 435.
Conclusion

The colony of Upper Canada was established in 1791 with the aim of recreating English society in its entirety. The founders knew, or very quickly realised, that they could never recreate a landed aristocracy like the one that existed in England. There was quite simply too much land in Upper Canada that was readily available to almost anyone. Thus the first administration of Upper Canada turned to the legal profession to fill the aristocratic gap. They knew that initially it would have to be something of a meritocracy but they hoped that eventually distinct aristocratic class would emerge.

While the legal profession failed to become the aristocratic elite that Simcoe and others hoped it would be, it did not necessarily fail as an elite group. The Family Compact of Upper Canada were probably the closest thing that the colony had to an aristocracy, they were politically and culturally homogeneous, and to a certain extent there is evidence of intermarriage. The evidence of intermarriage would suggest a certain amount of class solidarity yet at the same time one should not read too much into the intermarriage among the lawyers and their families. It is to be expected that in small societies like that of early nineteenth century Toronto there would not have been an abundance of suitable marriage prospects.

The leading members of the Family Compact were undoubtedly lawyers, but so were the leading members of the Reform movement. Thus when the Family Compact lost power following the re-

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196 Baker, “Juvenile Advocate Society”, supra note 77 at 99. There is also evidence that the law was a professional group considered worth marrying into, Gidney & Millar, supra note 9 at 104-5.
union of the Canadas in 1841, it did not mean the end of the legal profession’s influence over politics. If anything, lawyers’ dominance over the political process only increased after 1841. The role in the United Canadas’ legislature was to introduce legislation which reformed the way Upper Canada, then renamed Canada West, was administrated. To a certain extent power was decentralised to municipalities as more cities and towns were incorporated. This decentralisation created roles for those lawyers who did not sit in the legislature. Lawyers found themselves advising local governments on legal matters and on the limits of their power\(^{197}\).

Likewise the economic changes which sped through Canada West with the advent of the railways and then industrialisation created yet further opportunities and work for lawyers. Many lawyers juggled legal practice with entrepreneurial ventures and had significant success. These economic changes were to drastically change the way that the average lawyer worked. The sheer volume of legal work that the railways and industrial corporations provided made it hard for a sole practitioner to handle the work alone. In addition the trend of lawyers working in small communities outside the major metropolitan areas had begun to reverse at the end of the nineteenth century\(^{198}\). Perhaps partially in response to these factors multi-partner firms became much more common, especially in Toronto. These firms often acquired a reputation that was separate from those of their individual partners\(^{199}\). Developments such as these signalled the death knell of the gentleman lawyer, who got by on his own reputation, and who displayed independence of mind and of means.

\(^{197}\) Bloomfield, *supra* note 153 at 125, 136.

\(^{198}\) Bloomfield, *supra* note 153 at 120-121; Wilton, “Inside the Law”, *supra* note 183 at 15.

During the period from the founding of Upper Canada to Confederation, the size of the legal profession in Upper Canada/Canada West increased exponentially. The sheer size of the profession meant that not every lawyer was going to be a member of the elite. That does not mean that the profession itself could not compromise an elite group, after all membership of the Law Society conferred gentlemanly status regardless of wealth, family background, or professional success.

Many of the elite of Upper Canada were also members of the legal profession and the increase in the number of lawyers did not remove their elite status. It is arguable that even after the Family Compact was removed from power following the Union of the Canadas, some of their biases remained in place, for example a preference for British Anglicans. While the Union of the Canadas made it hard for one group to dominate the entire Province, it did not put an end to the elite status that many of the Upper Canadian legal profession had. The reforms that took place during the 1850s provided lawyers with leadership roles at a more local level. The resulting economic developments impacted negatively on the legal profession’s ability to be as involved in their communities as they once had been.

Although the legal profession of Upper Canada did not become the aristocratic elite that it was set up to be, the attempt to make it the elite of Upper Canada is still very revealing. Many of the men who played a key role in the formation of Upper Canada into the modern province of Ontario were trained as lawyers; their political views were at least partially informed by the role that they saw the legal profession as having to play. Thus their conception of the role of the legal
profession shaped not only how the legal profession of Upper Canada evolved, but also how the political landscape of Upper Canada developed.
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