

## **Storms, Roads and Harvest Time: Criticisms of Jury Service in Pre-Confederation Nova Scotia**

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## RESEARCH NOTE/NOTES DE RECHERCHE

### Storms, Roads and Harvest Time: Criticisms of Jury Service in Pre-Confederation Nova Scotia

THIS ARTICLE EXAMINES ATTITUDES TOWARDS jury service in 19th-century colonial Nova Scotia. It argues that while a few Nova Scotians expressed views consonant with what has been called English “jury ideology” – that is, the idea that emerged in 17th-century England that juries were valuable protectors of individual freedom in the face of state oppression<sup>1</sup> – many more complained about jury service, avoided jury duty and called for limits on juries for ordinary civil and criminal business. In colonial Nova Scotia, difficult travel on bad roads, in poor weather and at inopportune times of the year made jury duty time-consuming, inconvenient and sometimes even dangerous.

This demonstration of the reluctance of jurors to serve in Nova Scotia both amends and extends David Murray’s finding that men in one Nova Scotia township often sought to be excused from jury duty. Murray suggests that his research may be unrepresentative of attitudes to jury service throughout Nova Scotia and argues that the jury remained important to the colonial elite of Nova Scotia. He asserts, for example, that “Nova Scotia’s elites were especially vocal in their support of juries”<sup>2</sup> though he offers little evidence in support of this proposition. As will be shown here, the reluctance to serve as jurors was, rather, a common view throughout Nova Scotia.<sup>3</sup>

This attitude towards jury duty played an important role in weakening the jury’s

1 Lois G. Schworer, “Law, Liberty, and Jury ‘Ideology’: English Transatlantic Revolutionary Traditions”, in Michael A. Morrison and Melinda Zook, eds., *Revolutionary Currents: Nation Building in the Transatlantic World* (Lanham, 2004), p. 54. See also Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago, 1985), p. 381.

2 David Murray, “Just Excuses: Jury Culture in Barrington Township, Nova Scotia, 1795-1837”, in Margaret Conrad and Barry Moody, eds., *Planter Links: Community and Culture in Colonial Nova Scotia* (Fredericton, 2001), p. 43.

3 Note, however, that while many of those eligible for jury service were reluctant to serve, communities occasionally expressed a desire that more of their inhabitants should sit as grand jurors because of the important role of grand juries in local governance. In addition, in high-profile cases in British North America concerning ethnic or political intrigue, such as the trials of Joseph Howe, Robert Gourlay, Francis Collins and Joseph Armand Chartrand, jury composition became an important issue that overcame more mundane concerns with the trouble of jury service. See R. Blake Brown, “The Jury, Politics, and the State in British North America: Reforms to Jury Systems in Nova Scotia and Upper Canada, 1825-1867”, PhD diss., Dalhousie University, 2005; Paul Romney, “Upper Canada in the 1820s: Criminal Prosecution and the Case of Francis Collins”, in F. Murray Greenwood and Barry Wright, eds., *Canadian State Trials, Volume I: Law, Politics, and Security Measures, 1608-1837* (Toronto, 1996), pp. 505-21; Barry Wright, “The Gourlay Affair: Seditious Libel and the Sedition Act in Upper Canada, 1818-19”, in Greenwood and Wright, *Canadian State Trials: Volume I*, pp. 487-504; and F. Murray Greenwood, “The Chartrand Murder Trial: Rebellion and Repression in Lower Canada, 1837-1839”, *Criminal Justice History*, 5 (1984), pp. 129-59.

place in the legal culture of Nova Scotia,<sup>4</sup> which, in turn, was a substantial and historically under-appreciated factor in legislative initiatives that undermined the importance of juries in the 19th century.<sup>5</sup> Legislators in British North America decreased the use of trial juries for many criminal and civil proceedings while increasing the scope of summary justice before magistrates and judges.<sup>6</sup> Legislation also greatly limited the role of grand juries in local governance.<sup>7</sup> This decline in the importance of juries occurred throughout the common law world.<sup>8</sup> Historians have not

- 4 Legal culture is an elastic concept that, according to American historian Lawrence Friedman, refers to “ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds”. Friedman argues that cultural practices interact with the economic and social conditions of colonial environments to re-shape legal culture to meet local circumstances. He thus reminds us that social and economic conditions, if they are important enough, can bring “about changes in attitudes, expectations and desires; and this in turn creates a situation in which people may put new demands, or modify old demands, on legal systems and the legal order”. See Lawrence M. Friedman, “The Concept of Legal Culture: A Reply”, in David Nelken, ed., *Comparing Legal Cultures* (Aldershot, 1997), p. 34. For other discussions of “legal culture” as a tool of analysis see, for example, Roger Cotterrell, “The Concept of Legal Culture”, in Nelken, *Comparing Legal Cultures*, pp. 13-31 and Richard J. Ross, “The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History”, *William and Mary Quarterly*, 3rd ser., L, 1 (January 1993), pp. 28-41.
- 5 Despite an extensive international literature on the jury, historians have spent little time considering jurors’ views on their own role. At most, historians have noted briefly that officials sometimes experienced difficulties filling juries because of the unpopularity of jury service. See, for example, Richard D. Younger, *The People’s Panel: The Grand Jury in the United States, 1634-1941* (Providence, 1963), p. 5; Neal Garnham, *The Courts, Crime and the Criminal Law in Ireland, 1692-1760* (Dublin, 1996), p. 144; Douglas Greenberg, *Crime and Law Enforcement in the Colony of New York, 1691-1796* (Ithaca, 1976), p. 172; P.J.R. King, “‘Illiterate Plebeians, Easily Misled’: Jury Composition, Experience, and Behaviour in Essex, 1735-1815”, in J.S. Cockburn and Thomas A. Green, eds., *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* (Princeton, NJ, 1988), p. 257; David J. Seipp, “Jurors, Evidences and the Tempest of 1499”, in John W. Cairns and Grant McLeod, eds., *The Dearest Birth Right of the People of England’: The Jury in the History of the Common Law* (Oxford, 2002), p. 78; John Beattie, *Crime and the Courts in England, 1660-1800* (Princeton, NJ, 1986), pp. 378-9; and James C. Oldham, “The Origins of the Special Jury”, *University of Chicago Law Review*, 50 (1983), p. 147.
- 6 Nancy Parker, “Swift Justice and the Decline of the Criminal Trial Jury: The Dynamics of Law and Authority in Victoria, BC, 1858-1905”, in Hamar Foster and John McLaren, eds., *Essays in the History of Canadian Law, Volume 6: British Columbia and the Yukon* (Toronto, 1995), pp. 171-203; Paul Romney, “From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture”, *Law and History Review*, 7 (1989), pp. 121-74; Paul Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Toronto, 1986).
- 7 In 1841, Nova Scotia passed a municipal reform bill that vested all the powers of the Halifax grand jury and General Sessions in the city council or specific officials. While the grand jury’s role decreased in Halifax, the extension of incorporated municipal government took time to spread to other parts of Nova Scotia. This marked a sharp contrast with Upper Canada, which successfully implemented important and effective reforms to municipal government that decreased the traditional role of grand juries. See J. Murray Beck, *The Evolution of Municipal Government in Nova Scotia, 1749-1973* (Halifax, 1973), pp. 12-5; Ian Radforth, “Sydenham and Utilitarian Reform”, in Allan Greer and Ian Radforth, eds., *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada* (Toronto, 1992), pp. 81-5; and J.H. Aitchison, “The Municipal Corporations Act of 1849”, *Canadian Historical Review*, 30 (1949), pp. 107-22.
- 8 Lawrence M. Friedman, *Crime and Punishment in American History* (New York, 1993), pp. 250-2; R.M. Jackson, “The Incidence of Jury Trial During the Past Century”, *Modern Law Review*, 1 (1937),

fully accounted for this important change, though they have pointed to several possible explanations. Historians of the Canadian criminal justice system, including John Weaver and Paul Romney, have argued that efforts to eliminate juries resulted from a desire to professionalize the administration of the law.<sup>9</sup> Nova Scotians' attitude to jury service, however, sheds light on another important factor that led to limitations on the use of juries. A series of functional factors, including Nova Scotia's geography, climate, economy, topography and transportation systems, reduced the tendency of inhabitants to support the jury system.

### **The Nova Scotia Jury System**

The 1713 Treaty of Utrecht transferred an ill-defined area corresponding to the old Acadia from France to England. The British military regime that attempted to rule over today's mainland Nova Scotia between 1713 and 1749 from its base in Annapolis Royal did not employ juries. The Acadian population would have made the application of English law haphazard and, according to David Bell, "the number of 'gentlemen' required at common law for convening a grand jury put trial of felonies beyond practicality".<sup>10</sup> Instead, Acadian priests and elders settled many disputes while the governor and council sat together as a court to settle disputes left unresolved through less formal mechanisms.

The establishment of Halifax in 1749, the expulsion of the Acadians and the Planter migration led to the introduction and extension of traditional English legal institutions in Nova Scotia, including several courts that employed juries. The Supreme Court was established in 1754 and it originally sat only in Halifax, unless special commissions of oyer and terminer and general delivery adjourned it to a locality outside of Halifax to hear criminal matters (in 1774 the government established a circuit court system).<sup>11</sup> Initially, two Supreme Court judges visited Annapolis, Kings and Cumberland counties on circuit; over time, the legislature slowly added other circuit stops requiring the justices of the Supreme Court to venture to more far-flung communities. The Inferior Court of Common Pleas (Common Pleas), established in 1752, also employed juries. It consisted of five local magistrates appointed by commission, and sat two or four times per year to try civil cases.<sup>12</sup> In addition, the General Sessions, which took place in each county or district, had jurisdiction over a number of criminal and civil matters.

pp. 132-44; E.P. Thompson, "In Defence of the Jury", in Thompson, *Persons and Polemics* (London, 1994), pp. 143-68; John H. Langbein, "On the Myth of Written Constitutions: The Disappearance of the Criminal Trial Jury", *Harvard Journal of Law and Public Policy*, 15 (1992), pp. 119-27; Nancy Kay Parker, *Reaching a Verdict: The Changing Structure of Decision-Making in the Canadian Criminal Courts, 1867-1905*, PhD diss., York University, 1999.

9 John C. Weaver, *Crimes, Constables, and Courts: Order and Transgression in a Canadian City, 1816-1970* (Montreal and Kingston, 1995), pp. 157-8, 269; Romney, *Mr. Attorney*, pp. 290-310.

10 D.G. Bell, "Maritime Legal Institutions under the *Ancien Régime*, 1710-1850", *Manitoba Law Journal*, 23 (1996), p. 106. See also T.G. Barnes, "'The Dayly Cry for Justice': The Juridical Failure of the Annapolis Royal Regime, 1713-1749", in Philip Girard and Jim Phillips, eds., *Essays in the History of Canadian Law, Volume III: Nova Scotia* (Toronto, 1990), pp. 27-8.

11 *Supreme Court Circuit Act*, Statutes of Nova Scotia (SNS) 1776, c.6.

12 Cahill and Phillips, "The Supreme Court of Nova Scotia", p. 72; Sandra E. Oxner, "The Evolution of the Lower Court of Nova Scotia", in Peter Waite, Sandra Oxner and Thomas Barnes, eds., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto, 1984), pp. 59-79.

In the early-19th century, juries played important roles in the legal and political governance of Nova Scotia within these bodies. Grand juries determined whether an accused would have his or her case go to trial and grand juries also had significant responsibilities in local government; drawn from the prominent men of the community, the grand juries worked at the General Sessions with magistrates to help administer local government. Trial juries (otherwise called “petit” or “petty” juries) rendered judgment on a substantial number of criminal offences and civil claims.

The jury selection processes that developed in Nova Scotia in the 18th century had important ramifications for how future jurors experienced jury duty. For approximately the first decade after Halifax’s founding, Nova Scotia did not draft its own criminal procedure statutes – relying instead on the laws of England.<sup>13</sup> This held true for jury selection; not until 1759 and 1760 did Nova Scotia pass jury statutes. As in England, early-Nova Scotian legislation established property qualifications for service.<sup>14</sup> The selection procedure laid down for grand juries consisted of the “provost-marshal” (later the sheriff) using his discretion to draw up a list of 55 potential grand jurors. Twenty-three of these names were drawn by ballot and constituted the grand jury for the Supreme Court for that year. The 32 un-drawn names were then divided into two groups of 16 and became the grand juries for the General Sessions.<sup>15</sup>

In 1777, the legislature made an important alteration to this method by deciding that a single grand jury would be drawn that would serve at both the Supreme Court and the General Sessions for the entire year.<sup>16</sup> Jim Phillips notes that this seems to have been an “entirely indigenous innovation” due to the small size of Halifax.<sup>17</sup> This important provision meant that inhabitants selected for grand jury service would therefore be required to attend the courts several times each year. Throughout the pre-Confederation period, this made grand jury service an especially onerous duty for those selected. As will be shown, grand jurors from rural parts of Nova Scotia would complain vociferously about the challenge of attending multiple court sessions over the course of each year.

The selection process for trial juries also established procedures that would make jury service in Nova Scotia arduous. Early legislation required that each year the sheriff return a list of eligible jurors to the prothonotaries or clerks of the courts.<sup>18</sup> Before the changes of 1777, the prothonotaries drew 24 names by ballot for the Common Pleas

13 Jim Phillips, “‘Securing Obedience to Necessary Laws’: The Criminal Law in Eighteenth Century Nova Scotia”, *Nova Scotia Historical Review*, 12, 2 (1992), pp. 92-106.

14 These acts required that grand jurors possess a freehold estate of 10 pounds per year or a personal estate of 100 pounds. The property qualification for petit jurors was considerably lower: 20 shillings in freehold estate or a personal estate of 10 pounds.

15 Jim Phillips, “Halifax Juries in the Eighteenth Century”, in Greg T. Smith, Allyson N. May and Simon Devereaux, eds., *Criminal Justice in the Old World and the New* (Toronto, 1998), pp. 138-40.

16 *An Act in amendment of the Several Acts for Regulating Juries*, SNS 1777, c.4. A copy of this act can be found in RG 5, series S, vol. 4.5, file 1777, c.4, Nova Scotia Archives and Records Management (NSARM).

17 Phillips, “Halifax Juries in the Eighteenth Century”, p. 149.

18 The “prothonotary and clerk of the Crown” acted as the chief clerk of the Supreme Court in Halifax. The prothonotary completed the administrative work of the court as well as serving as the clerk of the Crown in criminal cases. Deputy prothonotaries performed the work of the chief prothonotary in each county. See Barry Cahill and Jim Phillips, “The Supreme Court of Nova Scotia: Origins to Confederation”, in Philip Girard, Jim Phillips and Barry Cahill, eds., *The Supreme Court of Nova Scotia 1754-2004: From Imperial Bastion to Provincial Oracle* (Toronto, 2004), pp. 71-2.

and the General Sessions and 36 names for the Supreme Court.<sup>19</sup> This method diverged from the process in England, where balloting to select the panel was not employed during the 18th century. English sheriffs possessed the discretion to choose jurors from the lists of eligible men, and sheriffs typically selected jurors who lived close to the courts to help ensure that they attended.<sup>20</sup> This difference in the law of Nova Scotia may have reflected the small number of eligible jurors in Nova Scotia in the mid-to-late-18th century. Ballots ensured that sheriffs did not continually call upon the same citizens for jury duty. Over time, however, this provision meant that officials lacked the discretion to select jurors likely to attend; instead, they would be forced to draw jurors from the entire district or county. As a result, many jurors found themselves required to travel long distances to attend court.<sup>21</sup>

### Attitudes to Jury Service in Nova Scotia

At the beginning of the 19th century, Nova Scotia consisted of a number of relatively small communities strewn about its rocky coastline and more fertile farming areas. In addition, scattered Mi'kmaq clung to old, migratory patterns of existence. Settlement in the 19th century was thus “generally fragmented and discontinuous”<sup>22</sup> and officials in Halifax faced substantial challenges in administering this heterogeneous society.

- 19 *An Act for regulating Petit Juries, and declaring the qualification of Jurors*, SNS 1759, c.5; *Juries*, SNS 1760, c.9. A copy of the 1759 act can be found in RG 5, series S, vol. 1, file 4, c.5, NSARM.
- 20 After the sheriff selected the panel, the 12-member jury was drawn by ballot. See John H. Langbein, “The English Criminal Trial Jury on the Eve of the French Revolution”, in Antonio Padoa Schioppa, ed., *The Trial Jury in England, France, Germany, 1700-1900* (Berlin, 1987), p. 26 and R. Blake Brown, “‘A Delusion, A Mockery, and a Snare’: Challenges to the Array and Jury Selection in England and Ireland, 1800-1850”, *Canadian Journal of History*, 39 (2004), pp. 1-26.
- 21 The legislature employed similar selection procedures when it passed a more comprehensive Nova Scotian jury-selection statute in 1796 and legislators continued to amend Nova Scotia’s jury selection procedures throughout the pre-Confederation period. For example, in 1838 Nova Scotia implemented a number of important changes, including a new method for selecting grand jurors. The most important innovation was the adoption of a system using jury “committees”. In each county, the General Sessions were to select three magistrates representing different parts of the county. These three magistrates, along with the sheriff or his deputy, were to prepare lists of all people eligible to be grand jurors. The General Sessions then determined the number of grand jurors that should come from each of the townships and settlements of the county, and then the sheriff and prothonotary balloted from boxes. An 1840 amendment extended the use of the jury committees to the formation of the lists of eligible trial jurors. See *An Act to regulate Juries*, SNS 1796, c.2, ss.2, 3; *An Act for the Regulation of Juries*, SNS 1838, c.6; and *An Act to continue and amend the Act for the Regulation of Juries, and to render valid the proceedings of certain Grand Juries*, SNS 1840, c.8, ss.2-6. For a contemporary description, see Beamish Murdoch, *Epitome of the Laws of Nova Scotia*, vol. 3 (Halifax, 1833), pp. 171-4. Cape Breton, which existed as a separate colony from 1784 to 1820, employed a similar jury selection system. See “An Ordinance for regulating Grand and Petit Juries and Declaring the Qualification of Jurors”, MG 9, B11: Cape Breton Ordinances, Library and Archives Canada (LAC). For a full discussion of changes in the jury selection system of Nova Scotia see Brown, “The Jury, Politics, and the State in British North America”, chaps. 2, 4, 6, 8.
- 22 Robert Mackinnon, “Roads, Cart Tracks, and Bridle Paths: Land Transportation and the Domestic Economy of Mid-Nineteenth-Century Eastern British North America”, *Canadian Historical Review*, 84 (2003), p. 179. For a sense of the regional, ethnic and economic divisions in Nova Scotian society see Graeme Wynn, “On the Margins of Empire, 1760-1840”, in Craig Brown, ed., *The Illustrated History of Canada* (Toronto, 1987), pp. 268-9; Brian Cuthbertson, *Johnny Bluenose at the Polls: Epic Nova Scotia Election Battles, 1758-1848* (Halifax, 1994); Rusty Bittermann, Robert A. MacKinnon



The extension of formal legal and governance systems in Nova Scotia (and thus also the jury system), for instance, led to many complaints about jury service in the press and through petitions. Petitions were sent from across Nova Scotia, sometimes to the lieutenant governor, but most often to the legislative assembly, which frequently received hundreds of petitions each year. Today, petitions are usually seen as nothing more than as a way to create publicity for a cause or pester a government unwilling to adopt a particular proposal. For much of the 19th century, however, petitions were an important means of communication between the periphery and the centre of the colony. Legislators took seriously the complaints and concerns of petitioners, frequently passing statutory reforms in response. Petitions thus offer very valuable insights into the views of Nova Scotians eligible for jury service, including their feelings about the place of the jury in the colony's legal culture.<sup>23</sup>

What, then, did people say about their duty to act as jurors? Halifax jurors offered more muted complaints compared to those from more rural areas of the colony. By the end of the 18th century, the Halifax grand jury was an upper-middle class body while the trial jury consisted of middling and respectable artisans.<sup>24</sup> Both juries remained the preserve of Halifax's relatively well-to-do until Confederation.<sup>25</sup> The more respectable classes also filled "special juries" in Halifax. Special juries were usually composed of jurors of a higher social rank than petit juries, and in England were often

and Graeme Wynn, "Of Inequality and Interdependence in the Nova Scotia Countryside, 1850-1870", *Canadian Historical Review*, 74 (1993), pp. 1-43; and Graeme Wynn, "Places at the Margin: The Atlantic Provinces", in Larry McCann and Angus Gunn, eds., *Heartland and Hinterland: A Regional Geography of Canada*, 3rd ed. (Scarborough, 1998), pp. 174-7.

- 23 Petitions, however, pose certain problems for historians. To some extent, petitioners tended to adopt a standardized format in phrasing their complaints. One must also be aware that petitioners were frequently "making a case" – they prepared their arguments as forcefully and convincingly as possible and were thus quite capable of exaggerating the support for their position. For example, in debating a petition in 1825 that concerned the movement of a Supreme Court sitting from River Philip to Amherst, an opponent of the bill examined the petition and dismissed it by asserting that of the 270 names on the petition, about 100 were "small boys, apprentices, hired servants, transient persons, blacks or colored persons". See "Provincial Parliament", *Novascotian*, 13 April 1825. There is also the question of whether petitions can be read as truly reflecting a broad spectrum of public opinion. J.I. Little and J.K. Johnson recognize that local leaders often drafted petitions, but both assert the value of petitions since other inhabitants could decide whether or not to sign on. In addition, Johnson notes that while community leaders submitted many petitions, they "certainly had no monopoly on the practice" and that the "great majority of petitioners were ordinary people". As Johnson points out, petitions can therefore reveal "quite a bit about the problems, hopes, and expectations" of many inhabitants. See J.I. Little, *State and Society in Transition: The Politics of Institutional Reform in the Eastern Townships, 1838-1852* (Montreal and Kingston, 1997), pp. 10, 12 and J.K. Johnson, "'Claims of Equity and Justice': Petitions and Petitioners in Upper Canada, 1815-1840", *Histoire Sociale / Social History*, 28 (1995), pp. 222, 223.
- 24 Phillips, "Halifax Juries in the Eighteenth Century", pp. 150-1.
- 25 Nancy Parker estimates that the Halifax grand jury list at Confederation included less than four per cent of Halifax's adult male population while the petit jury list included eight per cent. See Parker, "Reaching a Verdict", pp. 267, 322. Grand juries outside of Halifax consisted of prominent local men, though their occupations tended to be more diverse. For example, the grand jury in Queens County in 1857 included fourteen farmers, four merchants, three lumbermen, one blacksmith, one millwright and one seaman. See Queens County Grand Jury Lists, 1812-1857, RG 34-319, G1, NSARM. Similarly, the grand jury in Shelburne for 1860 had ten farmers, four mariners, four fishermen, two carpenters, one merchant, one seaman, one sawyer and one blacksmith. See Shelburne County Court of Sessions, Grand Jury Lists, RG 34-321, G269, NSARM.

formed in commercial disputes, libel cases and marital cases involving infidelity.<sup>26</sup> There were different procedures for the formation of special juries.<sup>27</sup>

The complaints about the jury system in Halifax thus reflected the particular concerns of the select group of men eligible for jury duty. “Civis” from Halifax wrote in the *Acadian Recorder* in 1822 that the frequent request by litigants for special juries constituted an evil that inconvenienced the Supreme Court.<sup>28</sup> A “Special Juror” wrote to the *Novascotian* in 1825 to urge the assembly to “provide some remedy or a fair remuneration for the valuable time spent on Special Juries”. Too many litigants asked for special juries, the writer charged, and this was especially troubling for Halifax merchants who had to deal with jury summons on a frequent basis: “The man of Business, however inconvenient to attend, must either neglect his own affairs, or be liable to a heavy fine”. By increasing the pay for special jurors – “by making Special Jurors Guinea Pigs” – the assembly could ensure that the court “would then never be delayed by an empty jury box, and the Public would be much benefited”.<sup>29</sup>

In bringing forward a bill for the regulation of special juries in 1825, Halifax member of the assembly Charles Rufus Fairbanks advocated increasing the fees and fines for special jurors as well as reducing the size of the special jury panels and special juries. A Halifax lawyer with investments in gristmilling, sawmilling, marine insurance, whaling, coal mining and land speculation, Fairbanks consistently represented the interests of prominent Halifax businessmen in the assembly.<sup>30</sup> In advocating a reduction in the number of special jurors, he noted that the smaller number would relieve the merchants of Halifax, whom he chiefly had in mind when framing the bill, from “so oppressive a duty; for he knew it to be in fact, that, what with attendance upon the grand and other juries, individuals were often compelled to spend one hundred days during the course of the year in the service of the public and without remuneration”.<sup>31</sup> Fairbanks explained his remarkable claim that some spent

26 On their use in England see Oldham, “The Origins of the Special Jury”, pp. 137-221 and James Oldham, “Special Juries in England: Nineteenth Century Usage and Reform”, *Journal of Legal History*, 8 (1987), pp. 148-66.

27 When parties requested a special jury in Nova Scotia, the prothonotary or his deputy formed a panel of 48 potential special jurors by drawing them from the general list of qualified freeholders. The parties received a copy of this list. The plaintiff then struck out one name, then the defendant struck out a name until 24 names were left and the sheriff summoned the remaining 24 jurors. See Murdoch, *Epitome of the Laws of Nova Scotia*, vol. 3, pp.175-6 and *An Act to regulate Juries*, SNS 1796, c.2, s.6.

28 *Acadian Recorder*, 26 January 1822.

29 “Special Juries”, *Novascotian*, 9 March 1825. The reference to “guinea pigs” drew from the English experience of paying special jurors. In 18th-century England, special jurors received one guinea for each case they decided. This was a sufficiently large sum that some citizens sought out this type of jury duty. This led Jeremy Bentham to complain about “guinea-men” while in popular vernacular a more vulgar phrase – “guinea pigs” – was used. See Jeremy Bentham, *The Elements of the Art of Packing, as Applied to Special Juries, Particularly in Cases of Libel Law* (London, 1821) and Oldham, “Special Juries in England”, p. 157.

30 David A. Sutherland, “Charles Rufus Fairbanks”, *Dictionary of Canadian Biography (DCB)*, Volume 7: 1836-1850 (Toronto, 1988), pp. 278-80.

31 “Jury Bill”, *Novascotian*, 12 March 1825. In 1832, the *Novascotian* again repeated this remarkable claim of lengthy jury service. See “Jurors”, *Novascotian*, 3 May 1832. The claim regarding jury pay may have been misleading, since legislation passed in 1805 allowed special jurors two shillings and six pence for each cause they tried. See *An Act for the further regulation of Inferior Courts, and Special Jurors*, SNS 1805, c.15, s.2.



100 days as jurors through reference to the total of eight terms annually of the Supreme Court and the General Sessions, which led grand jurors in some years (who were selected for the year and sat on both courts) to attend more than 80 days.<sup>32</sup> The eventual special jury act passed by the legislature in 1825 did not decrease the number of required jurors, but it did provide special jurors five shillings for each case they tried. To discourage litigants from asking for special juries, the act also gave judges the discretion to force the requesting party to pay the costs of the special jury if the court thought that a common jury could have tried the issue without any inconvenience.<sup>33</sup>

In 1827, the legislature passed a measure to ensure that jury duty would be less frequent for some citizens of Halifax County. The 1796 jury act did not require the sheriff to create a list of all eligible jurors around Halifax; rather, the sheriff needed to select only those jurors who lived on the Halifax peninsula. This selection bias, however, led to complaints from city residents that they bore a heavy burden of jury duty while rural residents enjoyed too light a burden. The 1827 act sought to rectify this perceived inequity: it noted the “great inconveniences” that had arisen because grand and petit jurors for the Supreme Court, the Common Pleas and the General Sessions were “returned and summoned from the Town and Peninsula of Halifax only” and that it was, instead, “just and expedient that all the inhabitants within the vicinity of the said Town” should attend as grand and petit jurors at the courts. The act thus allowed the selection of any eligible juror living within 15 miles of Halifax.<sup>34</sup>

Outside of Halifax, a common grievance was that jury duty required too much travel. Nova Scotians often grumbled that the location of the county courthouse made it very difficult for jurors to attend. For example, several petitions came from Hants County complaining that the county courthouse was in the town of Windsor. This meant that the petitioners had “long laboured under a very great disadvantage” since “many of your Petitioners who reside in the eastern parts of the county, have to travel nearly sixty miles to attend Court”.<sup>35</sup> In 1825, petitioners from the townships of Amherst and Fort Lawrence in Cumberland County noted that the assembly in its last session had passed a bill requiring the Supreme Court to hold court at Amherst instead of at River Philip. Even though most residents of the county lived near Amherst, they claimed that the legislative council refused to assent to the bill because of appeals by the residents of Remsheg.<sup>36</sup> The result was inconvenience for “those persons Jurors, Suitors and Witnesses whose necessities oblige them oftenest to resort to the Courts”. In making their case, the petitioners warned legislators not to be misled by pathetic appeals “about the hardships to which the few who travel from Remsheg to Amherst are said to be exposed”. To bolster their argument, the petitioners detailed who had served as jurors and, thus, which community had been most inconvenienced by the location of the courthouse. During the nine years the court had been held at River Philip, 141 jurors had attended from Amherst and vicinity, while only 16 grand jurors and 8 petit jurors from

32 “House of Assembly”, *Novascotian*, 26 February 1829.

33 *An Act relating to Special Juries*, SNS 1825, c.24, ss.1-3.

34 *An Act in amendment of, and in addition to, an Act, passed in the thirty-sixth year of His late Majesty’s Reign, entitled, An Act to regulate Juries*, SNS 1827, c.32.

35 Petition from Hants County concerning the removal of the court house from Windsor to Newport, RG 5, series P, vol. 2, no. 29, NSARM.

36 The place name Remsheg was in later years changed to Wallace.

Remsheg had attended.<sup>37</sup> Despite the petition, the legislature took no immediate action.<sup>38</sup>

Underlying these complaints about travel was the state of the roads in many areas of Nova Scotia in the early-to-mid-19th century. While some parts of the road system were relatively well developed by 1830, Robert Mackinnon tells us that “overland transportation everywhere was difficult and time-consuming”.<sup>39</sup> By 1820, roads were established from Halifax to Truro and Pictou and from Halifax to Windsor and Annapolis. The government spent considerable sums for road construction in the 1820s and 1830s, and the statute labour system ostensibly required all able-bodied men to work a specified number of days on the upkeep and improvement of roads. By 1850, Nova Scotia had upwards of 1000 miles of “Great Roads” running between many of the major towns of the colony. The Great Western Road that linked Halifax to the Annapolis Valley ran to Yarmouth by mid-century. The Great Northern connected Halifax with Amherst (and New Brunswick) by mid-century and, by 1843, the Great Eastern that ran from Halifax to Truro reached the Strait of Canso, where a ferry connected it to the Old Sydney Road that snaked its way through Cape Breton to Sydney. Travel, though, remained slow despite the road improvements. A stagecoach trip between Halifax and Annapolis still took three days in the 1840s. The route along the eastern shore of Nova Scotia east of Musquodobit Harbour was an ill-maintained path and the road connecting Halifax to Liverpool along the south shore was only good enough to permit limited stagecoach service.<sup>40</sup> Even those who could

37 Petition from the inhabitants of Amherst and Fort Lawrence concerning the possibility of a move of the court house from River Philip to Amherst, RG 5, series P, vol. 3, no. 1 (1825), NSARM.

38 Such complaints continued well into the 1850s. In 1850, petitioners from North and South Sydney complained of the vast size of the County of Cape Breton, which rendered the attendance of magistrates and jurors at the courts held at Sydney to be extremely burdensome and expensive. See *Journal of the House of Assembly of Nova Scotia (JHA)* 1850, p. 434. Inhabitants of the township of Chester wrote to the assembly in 1857 to note that their township was “situated at the eastern end of this County, and that many of the inhabitants are now obliged to travel forty miles and upwards to Lunenburg for the purpose of attending on Juries, and for other public business”. See Petition of the undersigned Inhabitants of the Township of Chester re: becoming separate from Lunenburg for taxes and court purposes, RG 5, series P, vol. 16, no. 26 (12 February 1857), NSARM as well as the following: Petition of the residents of East Hants County asking that the area be set off as a district and that a new court house and jail be erected, RG 5, series P, vol. 3, no. 67 (13 February 1828), NSARM; Petition protesting the possible removal of the Supreme Court from Sydney to Ship Harbour, Gut of Canso, RG 5, series P, vol. 4, no. 5 (26 January 1830), NSARM; and Petition of some inhabitants of the North district of Queens County re: The enactment of a law authorizing the holding of General Sessions of the Peace in that district, RG 5, series P, vol. 18, no. 68 (24 February 1863), NSARM.

39 Mackinnon, “Roads, Cart Tracks, and Bridle Paths”, p. 184.

40 Joseph Howe, *Western and Eastern Rambles: Travel Sketches of Nova Scotia*, ed. M.G. Parks (Toronto, 1973), pp. 15-27; John N. Grant, “Travel and Travelers on the Eastern Shore”, *Nova Scotia Historical Quarterly*, 6, 1 (1976), pp. 17-32; Bradford G. Yuill, *The Origins and Development of Colchester Roads* (Truro, NS, 1981); Arthur J. Stone, *Journey through a Cape Breton County: Pioneer Roads in Richmond County* (Sydney, NS, 1991); Reginald D. Evans, “Stage Coaches in Nova Scotia, 1815 to 1867”, *Collections of the Nova Scotia Historical Society*, 24 (1938), pp. 107-34; G.P. de T. Glazebrook, *A History of Transportation in Canada, Volume 1: Continental Strategy to 1867* (Toronto, 1964), pp. 104-39; Rosemary E. Ommer, “The 1830s: Adapting Their Institutions to Their Desires”, in Phillip A. Buckner and John G. Reid, eds., *The Atlantic Region to Confederation: A History* (Toronto, 1994), p. 295.

afford the best available comforts found traveling difficult in the mid-19th century. According to Barry Cahill and Jim Phillips, circuit travel for the justices of the Supreme Court was “often far from pleasant or dignified and hardly exemplified ceremonial majesty”.<sup>41</sup> Another serious problem for those called to jury service was the state of the side roads that connected their homes to the minor county centres that accommodated the courts. While the “great” roads improved, the routes connecting them to outlying communities remained of disparate quality. It is therefore unsurprising that the state of the roads was a common grievance among those who took issue with the travel involved in attending court. For example, in January 1828 petitioners from the community of Arichat in Cape Breton County asked that the dates of the Common Pleas and General Sessions be moved. At the time, the spring sittings of these courts occurred in March, a time that caused special trouble “owing to the incomplete state of the Road from Sydney to Arichat, a distance of upwards of sixty miles, and the great depth of snow with which the roads are usually covered at that Season”.<sup>42</sup>

From Yarmouth came another complaint about the state of the roads. In 1834, over 60 people from Yarmouth and Argyle asked for a second sitting of the Supreme Court because of the “serious inconveniences, delays and impediments to the due Administration of Justice which are suffered by your Petitioners”. Yarmouth was part of Shelburne County until 1836, and litigants and jurors from Yarmouth had to attend the Supreme Court in Shelburne.<sup>43</sup> Shelburne had been a major Loyalist community in 1783, but by the 1830s Yarmouth had long surpassed it as a commercial centre. The Yarmouth petitioners argued for a sitting of the Supreme Court in their area; they emphasized that the Supreme Court sat in July in Shelburne at a distance of 67 miles from Yarmouth “between which places the Post Road is always bad and sometimes almost impassable” and that this could not “be supposed to be either a convenient or appropriate tribunal for the trial of causes between the Inhabitants of this district”.<sup>44</sup>

Travel on Nova Scotia roads was also said to be dangerous because of the weather. The challenges of winter travel meant that, as the Supreme Court added more communities to its list of circuit locations, the court business had to take place between the months of May and October. Judges were reluctant to travel in the winter or when roads turned into “morasses of rutted mud”.<sup>45</sup> Chief Justice Brenton Halliburton said in 1838 that it could not “be expected that men who have attained the age, at which most persons have arrived, before they are appointed Judges of the Supreme Court, would be equal to travel Circuits in our inclement Winters, or when the roads are nearly impassable early in the Spring or late in the Fall”.<sup>46</sup>

41 Cahill and Phillips, “The Supreme Court of Nova Scotia”, p. 66.

42 Petition of the magistrates and inhabitants of Arichat requesting that the second Tuesday in April be set aside as the time for the sitting of the courts, RG 5, series P, vol. 3, no. 65 (22 January 1828), NSARM.

43 Charles Bruce Fergusson, *The Boundaries of Nova Scotia and its Counties* (Halifax, 1966), p. 55.

44 Petition from Yarmouth and Argyle seeking a sitting of the Supreme Court in the area, RG 5, series P, vol. 5, no. 4 (17 January 1834), NSARM.

45 Howe, *Western and Eastern Rambles*, p. 15.

46 *JHA*, 1838, Appendix 39, p.115. Halliburton had never enjoyed circuit work. See Phyllis R. Blakeley, “Sir Brenton Halliburton”, *DCB, Volume 8: 1851-1860* (Toronto, 1985), pp. 354-7.

Jurors did not find winter travel any easier. One hundred and thirty inhabitants of Parrsborough, in what was then Kings County, outlined their particularly difficult situation in requesting that their community become part of Cumberland County. As Parrsborough was on the opposite side of the Minas Basin from the capital of Kings County, they were thus “compelled to go by water to Horton, where all His Majesty’s Courts of Justice are held” as suitors, witnesses and jurors. This entailed a trip that was “expensive and unpleasant” and exposed to “the sudden gusts of winds which endanger the Navigation of the Bay of Mines”. The winter made travel worse, as ice prevented travel by water and those who had to attend court had to travel through Halifax – “a distance of nearly two hundred miles”.<sup>47</sup> In an 1829 letter to the *Novascotian*, “Moderator” suggested that Parrsborough should be part of Cumberland County. One of the writer’s arguments was that attending court was too difficult from Parrsborough: “Nature appears never to have intended that Parrsborough should form part of King’s C. from which it is separated by an arm of the sea at least 25 miles wide. This obstruction cannot be got over without a great sacrifice of both time and money to the poor man, who is obliged to attend twice in every year at the Supreme Court at Kentville, on the opposite side of the bay, and is frequently detained a week (sometimes longer) for an opportunity to return home”. It would be better to go to Amherst, which was “only 45 [miles] from the most distant part of Parrsborough, and that on a good road”.<sup>48</sup> A series of petitions also came from Cape Breton complaining of the weather-related travel difficulties. For example, the magistrates of northeastern Cape Breton asked that the date of the Common Pleas be moved from the second Tuesday of April, a date that was “extremely inconvenient by reason that almost invariably at that time the ice on the lakes and rivers is breaking up”, which made “passage over it extremely precarious and unsafe” for jurors. In the previous two years “much inconvenience was experienced by the said Jurors and other persons in giving such attendance, and in some instances, several of them were . . . prevented from attending, some during a part, and some during the whole said Term”.<sup>49</sup>

Jurors faced additional burdens once they completed their journeys. First and foremost, they had to find a place to stay. If jurors had travelled long distances to attend court, they were precluded from returning home in the evening and instead had to find an inn or private home in which to stay. Part of Moderator’s complaint about the

47 Petition of inhabitants of Parrsborough wishing to be considered a part of Cumberland, rather than King’s County, RG 5, series GP, vol. 1, nos. 22, 23, NSARM. See also Fergusson, *The Boundaries of Nova Scotia and its Counties*, p. 29.

48 *Novascotian*, 26 March 1829. See also Petition from Hants County concerning the removal of the court house from Windsor to Newport, RG 5, series P, vol. 2, no. 29, NSARM.

49 Petition of the Chief Justice and the Justices of the Peace, Northeastern Cape Breton, asking that the Court not meet the first Tuesday in April, RG 5, series P, vol. 3, no. 66 (10 February 1828), NSARM. In 1842, petitioners from Cape Breton said they had to travel 60 miles to attend the only courthouse in the county, “to arrive at which several ferries must be crossed (over one of which a horse cannot be taken but in calm weather)”. See Petition of the inhabitants of the Northern section of the County of Cape Breton, RG 5, series P, vol. 8, no. 113 (27 September 1842), NSARM as well as Petition of the magistrates and inhabitants of Arichat requesting that the second Tuesday in April be set aside as the time for the sitting of the courts, RG 5, series P, vol. 3, no. 65 (22 January 1828), NSARM and Petition of the residents of the North Eastern District of Cape Breton protesting the times when the courts now sit, RG 5, series P, vol. 4, no. 38 (5 January 1833), NSARM.

responsibility of Parrsborough residents was that they were detained a week or more “all the time perhaps on expenses at a public inn”.<sup>50</sup> Moreover, in many small towns in Nova Scotia finding acceptable lodging during court sittings was a difficult task. In larger centres there were a few fine inns offering good food and nice accommodations, but in more rural areas some farmers operated “inns” in their farmhouses to supplement their incomes.<sup>51</sup> The government was aware of this practical issue. In discussing whether one of the terms of the Supreme Court should be held in Barrington rather than only in Shelburne, a committee of the assembly pointed out that the people of Barrington had furnished a courthouse, around which “the Judges, the Bar, and Jurors, and Suitors, could be sufficiently and comfortably accommodated”.<sup>52</sup>

The trouble of accommodation was discussed in *Gould v. Gould*, an 1842 Supreme Court case from Amherst. During the trial the defendant, George Gould, had one of the jurors, Martin King, lodge at his home and had also shared a glass of rum with another of the jurors, John Roberts, at Ferguson’s Inn. On appeal, Chief Justice Brenton Halliburton and Justice William Blowers Bliss held that these transgressions did not require a new trial. In excusing the juror from sleeping at the defendant’s house, Halliburton emphasized the difficulty of finding accommodations in many communities and concluded that the courts should not punish citizens who provided hospitality to their neighbours:

In a country like this, where our little county towns are so crowded during the sittings of the Court, that persons frequently find great difficulty in procuring a night’s lodging, I cannot think that extending an act of hospitality so very common throughout the Province to a Juror who sought for it, ought to vitiate the verdict. A party is bound not to do any act to win the favor of a Juror who is trying his cause, but can he be required to do an act so offensive to him as to turn him out of doors when he came to seek what I repeat is a most common act of hospitality here, and at a time when it is often difficult to procure such accommodation at the little inns in the country towns.

Halliburton was also not especially concerned about the defendant sharing rum with a juror, as the incident had occurred accidentally when one of the jurors sat with Gould, who, “in accordance with a custom” asked the juror “to participate in the glass he had just ordered”. Bliss also refused to grant a new trial, saying that it made little

50 *Novascotian*, 26 March 1829.

51 Howe, *Western and Eastern Rambles*, pp. 27-9.

52 *JHA*, 1846, Appendix 37, p. 129. In a petition addressed to the lieutenant-governor, residents of Hants expressed concern with lodging in asking that the courthouse be moved from Windsor to a more central part of the county. Many people had to travel 60 miles to attend court, but if the courthouse was in a more central location, then “every Inhabitant of the County would be enabled to reach the Court House in one day”. The petitioners stressed that the move would alleviate problems of accommodation; residents from several communities “could leave their own dwellings in the morning attend Court and return to their respective houses at night”. Also, their suggested location was “a place well calculated to furnish every kind of accommodation for those who might stand of need”. See Petition from Hants County concerning the removal of the court house from Windsor to Newport, RG 5, series P, vol. 2, no. 29, NSARM.

sense to set aside every verdict for a party who “may have incautiously, perhaps, given a Juror the most trifling article of food, as a few figs, a pippin, or a sandwich”.<sup>53</sup>

The travel and expense incurred were more irksome when Nova Scotians attended court but did not actually serve as jurors. In 1839, petitioners from Cumberland County asked for the abolition of one sitting of the Common Pleas. The petitioners complained of wasting money and time bringing actions in inferior court, only to subsequently take appeals to the Supreme Court. They also felt that the grand and petit jurors might have some of their burden removed, especially the petit jurors, who frequently stayed at the inferior court for several days “only to be told that there were no suits for trials to require their further attendance”.<sup>54</sup> This complaint is understandable given that there were relatively few jury trials in the Common Pleas and the Supreme Court in the 1830s. In April 1837 the assembly formed a committee to examine the number of suits brought before the Supreme Court and the Common Pleas in all of the counties except Halifax. This committee also analyzed the number of jury trials.<sup>55</sup> While the committee received incomplete data from some counties, it estimated that in the five-year period from 1832 to 1836 there were a total of 389 civil suits in the Common Pleas and Supreme Court, exclusive of those in Cape Breton and Halifax. This meant that there was an average of just 80 civil trials per year spread out over 25 terms of the Supreme Court and 26 terms of the Common Pleas.<sup>56</sup> Clearly, many jurors attended court and had little to do.<sup>57</sup>

The timing of courts magnified complaints about jury service. A common irritant was that jury service interfered with planting or harvesting. The majority of people in Nova Scotia in the 1830s and 1840s lived on farms, often combining mixed farming with fishing, lumbering and other seasonal activities.<sup>58</sup> Petitioners from Lunenburg told the assembly that the dates of the General Sessions and the Common Pleas (the second Tuesday in April and the second Tuesday of October) were inconvenient because they interfered with the times in which the petitioners were “employed in carting seaweed and other manures and when following in various other ways their farming occupations”.<sup>59</sup> A Hants County petition expressed the “great inconvenience and expense incurred by the number of Courts as present established by Law”. One court, it continued, “takes place in the most inclement season of the year and the other three in seed time and harvest”.<sup>60</sup> A petition from Cumberland County in 1834 carefully laid

53 *Gould v. Gould* (1842), 3 *Nova Scotia Reports* 87, pp. 87, 94.

54 Petition from Wallace, Cumberland County re: abolishing the second Sitting of the Inferior Court, RG 5, series P, vol. 7, no. 75 (1839), NSARM.

55 *JHA*, 1837, p. 218.

56 *JHA*, 1838, Appendix 39, pp. 109-10. See also *JHA*, 1838, Appendix 12.

57 A second study of the caseload of the Nova Scotia courts reported to the assembly in 1841 that between 1835 and 1839 there were 548 trials in the Supreme Court and the Inferior Court of Common Pleas across the entire province. See *JHA*, 1841, Appendix 22, p. 102 and also Cahill and Phillips, “The Supreme Court of Nova Scotia”, p. 90.

58 T.W. Acheson, “The 1840s: Decade of Tribulation”, in Buckner and Reid, *The Atlantic Region to Confederation*, p. 320.

59 Petition from Lunenburg County concerning the time that the General Sessions of the Peace and the Inferior Court of Common Pleas meet, RG 5, series P, vol. 2, no. 34 (n.d.), NSARM.

60 Petition from the eastern section of Hants County concerning the court system, RG 5, series P, vol. 6, no. 98 (7 March 1837), NSARM as well as the following: Petition from Pictou County praying for alteration to the time for holding Supreme Court and that two sittings of the Inferior Court be



out the concerns about the timing and number of courts. The petitioners said that they were “chiefly engaged in agricultural pursuits – the time for carrying on which in this Country being exceedingly limited and precarious, their attention has been drawn to the great and wasteful drawbacks on their time which is made in attending on the Supreme and Inferior Courts Four times in each year, as Grand and Petit Jurors, Witnesses etc. Two of these Courts take place in seed time and harvest – times of all others peculiarly valuable to the Husbandman”.<sup>61</sup> This perception led Alexander Stewart, a lawyer representing Cumberland County in the assembly, to introduce a bill (that failed to become law) to dispense with the attendance of grand and petit jurors at the June terms of the inferior courts of Cumberland County. Stewart said that his aim was to relieve the jurors from being brought from their homes.<sup>62</sup>

It was not only farmers who found jury service disruptive. Those employed primarily in the fishery also grumbled. In 1826 residents of Guysborough, for example, complained about the distance to the courthouse at Antigonish. The grand jurors from communities such as St. Mary’s and Canso, who were compelled to attend court, faced “an annual expense of six or seven pounds”. This was made worse by “their great loss of time at that critical period of the fisheries”.<sup>63</sup> Another petition from what became Guysborough County gave a sense of how courts could interfere with both fishing and farming in a mixed economy. The Common Pleas and General Sessions were held annually at Guysborough on the second Tuesday of May and the fourth Tuesday of October. This meant that the courts were held in the spring “when Farmers are most busily employed” and in the autumn “at a time which to Fishermen and others engaged in the Fisheries is the most valuable and important during the fishing season, and when these persons can seldom or ever attend without great inconvenience and detriment”.<sup>64</sup>

Some sheriffs also expressed annoyance at the long travel required to form juries. For much of the pre-Confederation period, sheriffs were not compensated for summoning jurors. In 1830, a committee of the assembly noted this burden, which was made worse by the “extended limits of the Counties and Districts, and, in many, the detached situations of the population”. Sheriffs were thus “called on to discharge duties which necessarily are accompanied with fatigue and labour”.<sup>65</sup> In January 1840

dispensed with, RG 5, series P, vol. 7, no. 26 (1838), NSARM; Petition from Cumberland County concerning the time when the Supreme Court would sit, RG 5, series P, vol. 6, nos. 107-109 (n.d.), NSARM; Petition from Cumberland County concerning the time when the Supreme Court would sit, RG 5, series P, vol. 6, no. 108 (n.d.), NSARM; and *Novascotian*, 23 April 1835.

61 Petition from Cumberland County concerning a fall sitting of the Supreme Court, RG 5, series P, vol. 5, no. 72, (1834), NSARM (emphasis in original).

62 *JHA*, 1834-1835, pp. 754, 777, 804; *Novascotian*, 26 March 1834; J. Murray Beck, “Alexander Stewart”, *DCB, Volume 9: 1861-1870* (Toronto, 1976), pp. 746-8.

63 Petition of the inhabitants of Guysborough asking that there be a sitting of the Supreme Court at that town, RG 5, series P, vol. 3, no. 30 (13 February 1826), NSARM.

64 The petitioners offered a solution, telling the assembly that if the dates of the courts were moved to after seed time and the end of the fisheries, then the assembly would “ensure a more willing and punctual attendance of Jurymen, Witnesses and others whose irregular attendance and absence” had “not infrequently protracted the sittings of the said Courts and have delayed the Administration of Justice”. See Petition from the lower district of Sydney concerning the sittings of the Inferior Court of Common Pleas, RG 5, series P, vol. 5, no. 13 (4 February 1834), NSARM.

65 *JHA*, 1830, p. 681.

Edward Harrington, the High Sheriff for the County of Sydney, petitioned the assembly for an annual salary in addition to his fees.<sup>66</sup> The selection of jurors was the prime motivation for his request. Harrington said he had to travel 140 miles on the main roads to summon 24 grand jurors and 36 petit jurors. As he had to call upon many inhabitants, however, in “back settlements from ½ mile to 4 miles off the roads, averaging say 2 miles each”, he thus had to travel an additional 120 miles “making in all 260 miles travel for each term”. Harrington had called jurors for 12 terms from June 1836 to December 1839, but, since there was no specific allowance for such service in the table of fees for sheriffs, he had applied, unsuccessfully, to the grand juries to grant him compensation in the annual assessments. He hoped that in the future sheriffs would receive remuneration for summoning jurors on a permanent basis; in the meantime, he asked for 93 pounds in compensation from the assembly for the 12 terms he had summoned jurors.<sup>67</sup> The government responded by passing a bill permitting grand juries to present to the General Sessions for approval a sum of up to five pounds as compensation to sheriffs for summoning juries.<sup>68</sup>

“A Farmer”, writing in the *Novascotian* in 1835, nicely summarized many of the criticisms of jury duty in Nova Scotia during this period. The writer began by countering the perceived importance of the jury in British constitutional rhetoric: “The glorious privilege of Trial by Jury has been so often extolled as the *sumum bonum* of British individual felicity, by statesmen—patriots—orators—philosophers—historians—demagogues, and though last not least, poets, both native and foreign, that you may, perhaps, be disposed to question my sanity in entering a caveat against such a universal; but at the same time, unexamined axiom”. The writer, however, said that this discourse told only part of the story, for the jurors themselves had something to say about jury duty. The writer criticized elites who lauded juries, but shirked jury duty, and thus forced the middling classes to leave their businesses and bear an excessive burden. He suggested that “the great man, and the rich man, and the nobleman, and some gentlemen may not have been petit jurors”, but in Halifax every honest person “in the middle walks of life that has a reputation for good morals and industry” has been “forced against his own will and inclination, to leave his own business, however important, and attend to the affairs of his—neighbor, I was about to say; but this is not always the case, it being oftener the affairs of strangers, with

66 Sydney County was created in 1784 to administer the eastern mainland of Nova Scotia (now Antigonish and Guysborough counties). Between 1824 and 1836, Sydney County was divided into upper and lower districts. In 1836, the lower district became Guysborough County and the upper district became a separate county, taking the name Antigonish County in 1863. See Fergusson, *The Boundaries of Nova Scotia and its Counties*, pp. 17-8 and Harriet Cunningham Hart, *History of the County of Guysborough* (Belleville, ON, 1975), p. 163.

67 Petition of Edward H. Harrington, Antigonish, High Sheriff for the county of Sydney for annual salary in addition to his fees, RG 5, series P, vol. 8, no. 17 (22 January 1840), NSARM (also see vol. 8, no. 50 and 52 as well as vol. 9, no. 97); *JHA*, 1839-1840, p. 672.

68 *An Act to enable Grand Juries and Courts of Session to make compensation to Sheriffs, in certain cases*, SNS 1841, c.31. The discretionary aspect of this bill did not suit Harrington who again petitioned the assembly. The assembly responded by creating a committee to evaluate whether sheriffs should receive compensation for the great distances they had to travel. By 1846, the legislature had partly capitulated. The new fee schedule for sheriffs in 1846 provided two shillings and six pence for summoning a jury for each cause; and fifteen shillings for every special juror returned by the sheriff. See *JHA*, 1841, p. 29 and *An Act for the Regulation of Sheriffs' Fees*, SNS 1846, c.16.

whom not one of the twelve has any concern whatever”.<sup>69</sup>

The situation was worse for country jurors, said “Farmer”. This was because a townspeople, when not immediately engaged as a juror, could attend to some part of his business. The urban juror could also always return to his own home at night. So, if the decisions of his peers were “at times protracted until a late hour at night or an early one in the morning, yet, even then *he* has the privilege of entering the threshold of his own dwelling”. This was not the case for the “hapless countryman”. If he resided far from the courthouse “every day of the whole term, and every hour of it, is completely swallowed up; the morning is occupied in preparation—the roads muddy, and perhaps the day wet—the boat has gone from the wharf just as he arrives; wet roads make damp feet—and damp feet require a glass of grog—and a glass of grog sometimes lays the foundation of another law suit; but this is digression; when the Juror has got to the temple of justice, it being an hour or so past the time required, he is fined, of course”.<sup>70</sup>

Given the multiple impediments to serving as a juror – the long distances some jurors had to travel on poor roads and often in bad weather, the expense of lodging, the substantial possibility that the time spent traveling would be wasted if they were not called to serve, and the time jury duty took away from farming and fishing at key times of the year – it is perhaps unsurprising that some jurors failed to attend court when summoned. For example, in Barrington Township, Shelburne County, jury absenteeism was common and, according to David Murray, “the biggest challenge for Shelburne County’s sheriff and magistrates in running a court system on the British model was finding enough qualified jurymen willing to serve”. A rare cache of surviving excuse letters sent by summoned jurors explaining why they could not attend provides a glimpse into some of the reasons offered for why they should be excused. These reasons included illness, injuries, weather and age (even if the juror was younger than the mandatory cut-off for jury duty). The distance between Barrington and the courts at Shelburne was also clearly a factor. Today, the trip is 36 kilometers, but a road was not built until the 1830s. Until that time, the journey from Barrington to Shelburne “on what was little more than a blazed trail was long and sufficiently taxing as to be avoided unless absolutely necessary”.<sup>71</sup> Even after the road was built between Barrington and Shelburne, complaints continued about traveling for jury service.<sup>72</sup>

To encourage attendance, Nova Scotian judges could fine jurors and they often did so. The 1796 *Act to Regulate Juries* stipulated that any person summoned for jury

<sup>69</sup> *Novascotian*, 23 April 1835.

<sup>70</sup> *Novascotian*, 23 April 1835.

<sup>71</sup> Murray, “Just Excuses”, pp. 46, 49-52, 53. See also Shelburne County Court of Sessions, Barrington Excuse letters, 1795-1837, RG 34-321, files G320-373, NSARM and Shelburne County Supreme Court, excuses for jury duty, 1837, RG 39c, vol. 2, files 14.20 and 14.21, NSARM.

<sup>72</sup> In 1846, inhabitants of Barrington petitioned the assembly to ask that one of the two sittings of the Shelburne County General Sessions and of the Supreme Court be held in Barrington Township. The distance between the communities meant that the business of the county that concerned Barrington Township was completed unsatisfactorily because Barrington jurors failed to attend the courts in Shelburne. The petition led a legislative committee to study the question. It found that the people of Barrington had built a suitable courthouse; it also discussed the distance people had to travel, but ultimately accepted Brenton Halliburton’s view that, since the courthouse at Shelburne stored all of

duty who failed to appear without a reasonable cause was subject to a fine of up to 20 shillings per day if called for the grand jury and 10 shillings per day if called for the petit jury. If necessary, this fine could be levied by a “warrant of distress” which allowed for the taking of the goods or chattels of the person fined.<sup>73</sup> Special jurors were made liable to the same fines as petit jurors in 1805 and the maximum fine for such jurors was increased in 1825 to 20 shillings.<sup>74</sup> While it is uncertain how strictly judges imposed these fines, there is evidence that many jurors were ordered to pay for their delinquency. A summary of fines imposed at the General Sessions for the County of Halifax in 1835 and 1836, for example, reveals that in November 1835 the court fined petit jurors 5 shillings for each day that they did not appear. Thus when Samuel Cupples avoided jury duty for three days the court ordered him to pay 15 shillings.<sup>75</sup>

The statutory list of those exempted from jury service was sometimes contentious because of the reluctance of jurors to serve. The early Nova Scotian jury legislation excused members of the assembly and council from jury duty as well as the provincial treasurer and secretary, the law officers of the courts, staff officers of the army and army clerks, labourers and clerks in the naval yard and ordnance, officers of the customs, the registrar of deeds, the chief surveyor, naval officers, clergy, attorneys, physicians, surgeons, engine men, and persons above 70 years of age. The jury act of 1796 replicated this list.<sup>76</sup> The jury reform statute of 1838 reduced the maximum age of jurors from 70 to 60 years old and the act also expanded the exemption list by including firemen and the cashiers, tellers and accountants working at banks.<sup>77</sup> In March 1844 the government extended the exemption to certain employees of the ordnance department, the dock yard, victualling and the naval hospital at Halifax.<sup>78</sup>

Changes to the exemption list could lead to acrimonious debate. For example in 1838 William Bruce Almon told the Legislative Council that he did not understand

the county records, it made little sense to have the courts sit in Barrington. This was not the end of the matter however. In 1854, Josiah Coffin presented a bill to the assembly to divide Shelburne County into two districts because of grand juror absenteeism, but the bill did not become law. See Petition from Barrington to change the time of the Supreme Court and Court of Sessions in the township, RG 5, series P, vol. 9, no. 66 (8 January 1846), NSARM and *Halifax British Colonist*, 1 April 1854, p. 2.

<sup>73</sup> *Act to Regulate Juries*, SNS 1796, c.2, s.4.

<sup>74</sup> *An Act for the further regulation of Inferior Courts, and Special Jurors*, SNS 1805, c.15, s.2; *An Act relating to Special Juries*, SNS 1825, c.24, s.2.

<sup>75</sup> *JHA*, 1838, Appendix 44, p. 127. There is ample additional evidence that jurors failed to attend Nova Scotia courts despite the fines. The surviving proceedings books of General Sessions in Nova Scotia, for instance, are replete with references to absent jurors. See, for example, Kings County Court of Sessions Proceedings, 1812-1844, RG 34-316, P10, NSARM; Annapolis County General Sessions Grand Jury Book, RG 34-301, vol. P2 (1829-1841), NSARM; Halifax Grand Jury Book, 1843-1851, RG 34-312, P17, NSARM; and Queens County General Sessions Grand Jury Lists, RG 34-319, G1, NSARM. See also “For the Recorder”, *Acadian Recorder*, 26 January 1822; *An Act relating to Special Juries*, SNS 1825, c.24; Petition of the inhabitants of the Northern section of the County of Cape Breton, RG 5, series P, vol. 8, no. 113, (27 September 1842), NSARM; *Halifax British Colonist*, 24 March 1857, p. 2; and Petition from Guysborough for an additional sitting of the Supreme Court, RG 5, series P, vol. 8A, n. 84 (27 February 1844), NSARM.

<sup>76</sup> *Juries*, SNS, 36 Geo III, c.2; *An Act to regulate Juries*, SNS 1796, c.2, s.1.

<sup>77</sup> *An Act for the Regulation of Juries*, SNS 1838, c.6, s.2.

<sup>78</sup> *An Act to exempt certain Officers and persons . . .*, SNS 1844, c.11, s.1.

why the 1838 act exempted bank employees from jury duty. His reasoning reflected the belief that Halifax merchants also had better things to do than sit on juries. He said that it was inconvenient for merchants to leave their counting houses, but they were required to serve and thus “the accountants and others about a bank had just about as much right to be called on”. Almon claimed that there were 14 employees of the Nova Scotia Bank, “every one of whom would be exempt by this act; while merchants, whose time is of quite as much importance to them in their private counting houses, would have to attend or pay their fines”. Another member of the council, William Ousley, was also against the exemption of bank employees, saying that if “they cannot attend it will be no great hardship for them to pay their fines”.<sup>79</sup> Once received, the exemption was not easily given up. In 1848, the fire-engine men of Pictou sent a petition to the assembly requesting that they “may not be deprived by any legislation of the privilege they now have of exemption from service upon Juries and otherwise”.<sup>80</sup>

### Conclusion

Historians of the jury have given insufficient attention to the views of jurors in explaining the decline of juries in the 19th century. As has been shown here, for many Nova Scotians trial by jury was not a cherished cornerstone of the British constitution, but an often bothersome duty that fell upon the farmers, fishers and merchants of the colony. Practical concerns led the legislature to reduce the frequency of jury service to placate Nova Scotians, particularly rural residents, who were eligible for jury duty but reluctant to serve. For example, the 1838 jury act included an important new provision that alleviated the burden of frequent jury service by stipulating that no person had to serve as a juror more than once every three years.<sup>81</sup> Records from several courts indicate that this provision ensured that the membership on grand juries changed every year.<sup>82</sup> In 1841 Nova Scotia further reduced the burdens of jury service: the legislature eliminated the Inferior Court of Common Pleas, in part because of the complaints of jurors, and also eliminated petit juries at the General Sessions outside of Halifax.<sup>83</sup>

The constitutional rhetoric concerning the value of trial by jury stemmed, in large part, from its place as the defender of those facing politically motivated charges. In such disputes, juries became famous or infamous based upon their willingness to stand up to perceived tyranny. For example, in his seditious libel trial in 1835, Joseph Howe ended his address to the jury by asking the assembled jurymen to consider their constitutional role as the defender of liberty. “An English jury will do justice to the poorest wretch on earth, though menaced by the proudest oppressor”, he argued. “The victim may be bound, and prepared for sacrifice, but an English jury will cast around

79 *Novascotian*, 8 March 1838.

80 *JHA*, 1848, p.98.

81 *An Act for the Regulation of Juries*, SNS 1838, c.6, s.2.

82 See, for example, Halifax Grand Jury Book, 1843-1851, RG 34-312, P17, NSARM and Shelburne County Court of Sessions, Grand Jury Lists, RG 34-321, G245-G270, NSARM.

83 *An Act to improve the Administration of the Law, and to reduce the number of Courts of Justice within the Province, and to diminish the expense of the Judiciary therein*, SNS 1841, c.3.

him the impenetrable shield of the British law".<sup>84</sup> The jury did not take long to find Howe innocent, and word of the case's outcome soon spread across the province through the press and the sale of a popular pamphlet.<sup>85</sup> A consistent theme in this coverage was the valiant decision of the jury.<sup>86</sup>

On a daily basis, however, in cases lacking such political intrigue, trial juries in communities such as Shelburne, Horton or Sydney did not hear disputes concerning English liberties. Rather, they found verdicts in, for example, civil cases concerning debts or criminal cases of assault. These were important issues to be sure, but many citizens undoubtedly smiled when they saw the local sheriff walk pass their door and deliver a juror summons to their neighbor. After all, who had the time or the money to act as a juror? The importance of juror attitudes to the decline of the jury undoubtedly varied depending upon the particular challenges, jury qualifications and selection procedures in a given jurisdiction. In 18th-century England, for example, members of the English gentry, who had more time and money than the average Nova Scotian farmer, filled this role.<sup>87</sup> For citizens scratching out an existence in Nova Scotia, however, and potentially in many other jurisdictions, time and money were too precious to spend in jury service.

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84 William Annand, ed., *The Speeches and Public Letters of the Hon. Joseph Howe*, vol. 1 (Halifax, 1858), p. 66. For discussions of the case see Barry Cahill, "R. v. Howe (1835) for Seditious Libel: A Tale of Twelve Magistrates", in Greenwood and Wright, *Canadian State Trials, Volume I*, pp. 547-75; J. Murray Beck, *Joseph Howe, Volume I: Conservative Reformer, 1804-1848* (Kingston and Montreal, 1982), pp. 129-35; and J.M. Beck, "'A Fool for a Client': The Trial of Joseph Howe", in P.A. Buckner and David Frank, eds., *The Acadiensis Reader, Volume I: Atlantic Canada Before Confederation* (Fredericton, NB, 1985), pp. 227-44.

85 Beck, *Joseph Howe, Volume I*, pp. 140-1.

86 In his 1858 reporting of Howe's case, publisher and reformer William Annand told of the celebrations and how the crowd left the courtroom to "teach their children the names of the TWELVE MEN who had established the FREEDOM OF THE PRESS" (emphasis in original). See Annand, *The Speeches and Public Letters of the Hon. Joseph Howe*, p. 81.

87 Douglas Hay, "The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century", in Cockburn and Green, *Twelve Good Men and True*, pp. 305-57.