

## **Admiral of the Court: Sir Alexander Croke in Nova Scotia, 1801-1815**

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## **Abstract**

Maritime conflicts were among the first modern international law problems. In North America in the early 1800s, one of the pre-eminent fora addressing these disputes was the Nova Scotia Court of Vice-Admiralty. The jurists on this court deeply influenced the development of a proto-Canadian approach to international law. One jurist, Sir Alexander Croke, a British born judge who served on the court from 1801-1815, is of particular importance. Croke was a profoundly conservative presence in the Nova Scotia colonial administration. He was deeply loyal to the British Empire and rigidly adhered to the letter of British law, at the expense of Nova Scotian interests. In his rulings he aimed to reflect the literal meaning of Imperial statute, and willfully ignored political and economic realities on the ground. The Nova Scotian approach to international law was therefore constrained to a narrow interpretation of British dictates regardless of how those dictates might negatively impact Nova Scotia's welfare. The precedents set by Croke delayed the development of Nova Scotia itself into a self governing entity capable of protecting its own interests on the international stage, and helped shape the slower development of Canada, vis-à-vis other nations, into an independent international presence.

## Introduction

At the dawn of the 1800s, it would be inaccurate to speak of the nation of Canada. However, the seeds of the future country were being sown. Nova Scotia was, at the time, one of the leading centers of trade and colonial activity in the nascent nation. Particularly in Halifax, the seat of the colonial government, there was a rising struggle between those who saw loyalty to the British Empire as paramount, and those who believed that Nova Scotia had her own interests separate and apart from imperial ones.

The Court of Vice Admiralty, seated in Halifax, was an essential part of the colonial administrative regime that tied Nova Scotia to Britain. The judges who enforced the laws of Britain in the colonies were placed in the position of having to make rulings in situations where the interests of the colony and the empire were in opposition. Moreover, they often dealt not only with imperial legal conflicts, but conflicts involving French, Spanish, and American interests.

The histories of Nova Scotian colonial law usually address the native born sons of Nova Scotia and how they shaped the formation of Nova Scotian law. From Phillip Girard's work on Beamish Murdoch to Jim Phillip's work on William Bliss, the high and low elements of the roots of home grown colonial law have been explored.

Admiralty law has received a fair amount of attention due to its central role in the Nova Scotian economy. M.J. Prichard<sup>1</sup> notes that the Court of Admiralty incited envy from the common law courts throughout the Empire because of its independence and lucrative cases. Admiralty law was also a field for the development of novel legal concepts like declaring pirates *hostis humani generis* or an enemy of all men and nations.

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<sup>1</sup> M.J. Prichard, "Crime at Sea: Admiralty Session and the Background to Later Colonial Jurisdiction," in *Law In a Colonial Society: The Nova Scotia Experiment*, eds. Peter Waite, Sandra Oxner, and Thomas Barnes (Toronto: Carswell, 1984) 43 at 43.

While the Court of Vice Admiralty has been generally examined, and certain native Nova Scotian judges studied, there has been little on the foreign born judges who sat on the court in its crucial period of development in the early 19<sup>th</sup> century.

Sir Alexander Croke was one such judge who served on the Court of Vice Admiralty at a pivotal period in its development, from 1801-1815. Born in England in 1758, he would spend the majority of his life in that country. Yet, he would be a significant figure in Nova Scotia's history, serving both as a judge and as colonial administrator twice in the period of 1801-1815. Surprisingly, given his role in maritime colonial society, very little modern scholarship has focused on Dr. Croke.<sup>2</sup>

The scholarship that does exist tends to ignore Croke's unique position in the development and application of international and domestic law in Nova Scotia. The Vice-Admiralty Court at Halifax was the central Imperial Admiralty Court in North America in 1800. It adjudicated not only domestic disputes, but disputes between the Empire and other nations. For example the Court had jurisdiction over prize law (the law concerning the capture of enemy ships during times of war). The legal claiming of a prize was a long and complicated legal process that often involved deciding claims between foreign and domestic entities, usually with high financial stakes. The continued supply of these cases was crucial to the political significance and economic well being of the colony.

Croke's rulings helped to shape how the Court interacted with both foreign and domestic elements. Croke was throughout his time in Nova Scotia a profoundly conservative presence in the Nova Scotia colonial administration. Conservative in this case implies a deep loyalty towards England, to the exclusion of a consideration of

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<sup>2</sup> Carol Anne Janzen "The Tentacles of Power: Sir Alexander Croke and the Court of Vice-Admiralty in Nova Scotia, 1801-1815" Masters Thesis, University of New Brunswick Department of History, 1978 at 2 [Janzen, *Tentacles of Power*].

independent Nova Scotian interests. By virtue of his significant position on the Court, Croke was able to extend this conservative influence over the jurisprudence of the Court and therefore profoundly affected how the colony dealt with other nations in the international legal community of that era. By instilling a continuing respect for the legal traditions of the Empire instead of encouraging the development of a more colonially oriented judicial policy, Croke ensured that in her early dealings with other nations, the Nova Scotian approach to international law was an extension of British interests.

## **I. Croke's Legal Education**

To understand how Croke approached his role as a judge, it is important to understand the context in which he received his legal education and his early practice as a barrister.

### **Oxford Studies**

Most of what is known about Croke's early life comes from Croke himself, who recorded it as part of larger work of his family's genealogical history, and when available, alternate sources have confirmed its general veracity.<sup>3</sup> A career in law was a natural step for Croke, whose family had for several generations before also pursued the profession.<sup>4</sup> Croke attended Oxford, studying at Oriel College for five years before beginning his study of law in 1780 at the Inns of Court. While at Oriel College, Croke primarily focused on legal theory, rather than focusing on gaining practical experience.

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<sup>3</sup> Janzen, *Tentacles of Power*, *supra* note 2 at 5.

<sup>4</sup> *Ibid.* at 6.

As he himself noted “although I have studied the theory of law, I never engaged in the practice of it, or attended much in Westminster Hall.”<sup>5</sup>

His preference for legal theory over practice may have been influenced by the fact that two years into his studies his father died, leaving him a substantial family estate. Croke was aware that he had little need to toil as a barrister or solicitor. However, Croke did not come of age until 1779, which may explain why he did not leave his studies earlier than he did.

He was called to the bar in 1780, whereupon he promptly abandoned his studies for several years in favour of undertaking improvements to his property. However, by his own report, tired of idleness,<sup>6</sup> he returned to Oxford in 1794. By 1797 he had earned his DCL, at which time he elected to become a barrister.

The era in which Croke studied law is a significant period in the evolution of the common law. William Blackstone had only 20 years prior published his Commentaries on the Law of England which had a major influence on shaping the interpretation of the common law, giving the precedent (rather than code) based common law the appearance of rationality and order. Blackstone and his contemporaries contrasted the protections provided by the common law with the tyrannical power of courts like the Star Chamber.<sup>7</sup>

Training in law was not only about formal legal education. Accordingly, as was required by the bar at that time, Croke had an apprenticeship, during which he was

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<sup>5</sup> Sir Alexander Croke, *The Genealogical History of the Croke Family, originally named LeBlount*, 2 vols (Oxford, 1823) 1:709 as cited in Janzen, *Tentacles of Power*.

<sup>6</sup> Carol Anne Janzen “Sir Alexander Croke”

<http://www.biographi.ca/EN/ShowBio.asp?BioId=37458&query=croke> [Janzen, “Sir Alexander Croke”]

<sup>7</sup> Douglas Hay “Origins: The Courts of Westminster,” in *The Supreme Court of Nova Scotia, 1754-2004: From Imperial Bastion to Provincial Oracle* eds. Philip Girard, Jim Phillips, and Barry Cahill (Toronto: The Osgoode Society, 2004) at at 23.

supposed to acquire the technical skills he would need as a barrister.<sup>8</sup> Extensive emphasis was placed on this practical instruction, which was considered far more significant than any formal education.<sup>9</sup> During this time Croke served at the Inns of Court in London, training as a barrister. Interestingly, Croke would only have 4 years of this concrete training before he took the bench.

## II. Croke's Early Career

His return to the law from his idyll was probably motivated by his ambition. Croke was quite aware of the opportunities the judiciary could offer to a person of his ability and education. After all, his own family had by and large acquired their wealth by virtue of their participation in the legal profession.<sup>10</sup> Moreover, while at Oxford he had developed a reputation for scholastic achievement.<sup>11</sup> Also, it was well known that a judgeship was a highly lucrative career, especially for men such as Croke who had extensive family connections in the legal field already.<sup>12</sup> It was also likely motivated in part by boredom. By all accounts Croke was quite intelligent and capable, and also restless, as would be later demonstrated in his inclination to meddle in colonial politics and his extensive non judicial writings.

In any case, once Croke decided to return to the law, he promptly zeroed in on one of the most active, and profitable, areas of the judiciary: the Court of Admiralty. Britain's imperial power rested on her formidable navy, especially in times of war.

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<sup>8</sup> Daniel Duman *The English and Colonial Bars in the Nineteenth Century* (London: Croom Helm, 1983) at 78 [Duman *The English and Colonial Bars*].

<sup>9</sup> *Ibid.* at 80.

<sup>10</sup> Janzen, *Tentacles of Power*, *supra* note 2 at 10

<sup>11</sup> *Ibid.*

<sup>12</sup> Duman, *The English and Colonial Bars in the 19<sup>th</sup> Century*, *supra* note 8 at 138.

Furthermore, in the period of the late 1790s, Britain was at war with France, and as such, the Court was very active.

As early as 1800, a mere three years into his practice, Croke was asked by the government to address the criticism leveled by a Dutch lawyer against the Court of Admiralty's legal position towards neutral nations in times of war. The Court had upheld the right of British ships to board and search neutral ships in times of war, and to treat noncompliant ships as hostile. This approach was understandably unpopular among neutral European naval powers.

Croke published an eloquent defense in *The Gentleman's Magazine*.<sup>13</sup> His defense was cited by several sources for its competence and demonstrated scholarship.<sup>14</sup> More importantly, he was praised for his highly pro-governmental stance. Croke was successfully establishing a reputation as a loyal supporter of the current regime.<sup>15</sup> This reputation made him an ideal choice for appointment to judicial office. Happily for Croke, due to a reform of the colonial court structures, positions on the Courts of Vice Admiralty in Jamaica, Martinique, and Nova Scotia became available, among which Croke was given his choice.

### **Political Context**

Furthermore, it should be noted that when Croke returned to the law in 1794 it was in the wake of two revolutions: the American and the French Revolutions.

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<sup>13</sup> *The Gentleman's Magazine*, 19 (1843).

<sup>14</sup> *The Anti-Jacobin Review, and Protestant Advocate: or Monthly Political and Literary Censor*, 39 (September, 1801).

<sup>15</sup> Janzen, *Tentacles of power*, *supra* note 2 at 13.

Croke benefited greatly from these international events. The French Revolution allowed him many occasions to appear before the High Court of Admiralty, before which his legal abilities earned him great acclaim. He was praised by political conservatives in the contemporary government for his well articulated strongly pro imperial arguments.<sup>16</sup> It is also possible that he was psychologically influenced by these events: he would in his Nova Scotian career frequently put the interests of the Empire above the interests of Nova Scotia, showing a deeper interest in preserving the economic and political power of the mother country than allowing a colony to gain that power for itself.

As K.E. Knorr noted, the ruling class in Britain blamed the American Revolution at least in part on the political freedom the Thirteen Colonies had been allowed. “It was, for this reason, that the government, determined to keep what was left of the Empire, now embarked upon a reactionary course [post 1777] and imposed upon its old and new colonies a system of centralized supervision and control.”<sup>17</sup>

Of course, this attitude is also explicable by his British birth and education—however, it is still possible that witnessing this volatility early in his career shaped his attitude toward colonial governance. A rigid adherence to the laws and policies of the mother country discouraged any organic (revolutionary?) evolution of independent legal thought and encouraged social stability for the current order.

### **III. Croke as Jurist**

#### **The Legal Regime of the Courts of Vice-Admiralty**

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<sup>16</sup> Janzen, “Sir Alexander Croke,” *supra* note 6.

<sup>17</sup> K.E. Knorr, *British Colonial Theories, 1570-1850*, (Toronto: University of Toronto Press, 1944) at 210.

In 1790 Attorney General Randolph created a broadly accepted definition of the content of admiralty law in that era. According to him, admiralty law comprised of dealing with issues surrounding prize taking (the act of capturing enemy ships) during times of war; criminal sea law; tax law relating to maritime activities, and claims that arose from events occurring on board the vessel.<sup>18</sup> William Casto notes that Randolph structured his list in order of their importance.<sup>19</sup>

His definition is evidence of the evolution of admiralty law in the common law world. As early as 1340, during the Hundred Years' war, England began to declare its domination of the sea after the crushing defeat of the French navy in the battle of Sluys, and to enforce that domination with a legal regime and a court to enforce it.<sup>20</sup> During the 1500s, Henry VIII extended the jurisdiction of the Court of Admiralty to cover a broad range of commercial maritime disputes, including contracts concluded on land and disputes over bills of lading.<sup>21</sup> In 1800, there were already numerous formal and informal treaties, laws, and customs governing maritime activities between the Empire and other nations.

The main body of laws that the Courts of Admiralty and Vice Admiralty enforced were the Navigation Acts, also known as the Acts of Trade.<sup>22</sup> The Acts of 1651 and 1660 “confine[d] all transportation connected with the colonies to English shipping and

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<sup>18</sup>William R. Casto “The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates” 37:2 *American Journal of Legal History* (1993) 117 at 120.

<sup>19</sup> *Ibid.*

<sup>20</sup> Lionel Laing, “The Historic Origins of Admiralty Jurisdiction in England” in 45:2 *Michigan Law Review* (1946), 163 at 166.

<sup>21</sup> George F. Steckley, “Merchants and the Admiralty Court during the English Revolution,” 22:2 *The American Journal of Legal History* (1978), 137 at 141.

<sup>22</sup> As Larry Sawyers notes in his article “The Navigation Acts Revisited” in 45:2 *Economic History Review* (1992), pp. 262 at 263, there were several incarnations of these Acts, with various revisions, from 1651 to the 1770s. As he further notes, in spite of the revisions, the central thrust of the Acts did not change over this period. When I refer to the Navigation Acts, I am referring to the collective of Acts. When referring to a specific Act, I add the date for further clarity [Sawyer, “The Navigation Acts Revisited”].

ensure[d] that the benefits to be derived from colonial establishments fell exclusively to the mother country.”<sup>23</sup> Significantly, the Navigation Acts of 1696 provided that the Courts of Vice Admiralty shared jurisdiction with common law courts in issues of revenue and trade.<sup>24</sup>

The legal effects of the Navigation Acts were twofold: first, they protected the colonies from the competitive pressure of French, Dutch, and Spanish merchants, and second, they placed merchants in the colonies at an economic disadvantage to those of Britain. Among other provisions, the Acts imposed both importation and exportation tariffs, as well as bans on the manufacture of certain materials in the colonies.<sup>25</sup>

When the Navigation Acts were first put into place in the 17<sup>th</sup> century, the lack of commercial sophistication of the colonies meant that the beneficial economic effects of the Navigation Acts far outweighed their negative effects. However, by the late 18<sup>th</sup> and early 19<sup>th</sup> century the colonies had developed to the point where their development was severely hindered by the restrictions contained in the Acts.<sup>26</sup>

Nova Scotia in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries was particularly vulnerable to the requirements of the Acts because of its great dependency on maritime trade. Few products could be manufactured entirely within the province, and with the loss of the American colonies from the market created by the Acts, Nova Scotia became heavily dependent both on Britain and illegal trade with the new United States for raw and manufactured goods. In both cases, Nova Scotian traders were at a distinct economic and legal disadvantage. In fact, it has been suggested that the central reason Nova Scotia did

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<sup>23</sup> Janzen, *Tentacles of Power*, *supra* note 2 at 20.

<sup>24</sup> Carl Ubbelohde, *The Vice-Admiralty Courts and The American Revolution* (University of North Carolina Press: Chapel Hill, N.C., 1960), at 15.

<sup>25</sup> Larry Sawyers, “The Navigation Acts Revisited,” *supra* note 22 at 273.

<sup>26</sup> *Ibid.* at 276.

not rebel in the same way the American colonies did against the Imperial regime is that they were such accomplished smugglers that they did not feel the economic impact as heavily.<sup>27</sup>

The fact that Judge Croke was so willing to enforce the Navigation Acts to the letter, rather than take a more pragmatic view in cases of smuggling and prize taking, was understandably provocative and damaging to the economic and legal self sufficiency of Nova Scotia.

Not only did the Court enforce the Navigation Acts, it regulated prize taking. The seizing of enemy ships was a bustling business in times of war, and Britain, with its large professional navy, was vigorously engaged in this practice. Prize taking was highly profitable both for the individual ships and for the Empire, which taxed the revenue of each seizure.

Prize law arose from the need to differentiate between piracy and legitimate conduct of capture.<sup>28</sup> Royal ships could legally capture either pirates, or during times of war, enemy vessels. Once a ship was legally captured, the captor had to submit his claim to impartial adjudication. The Court had to determine that a ship was indeed an enemy ship, and if so, transfer legal ownership of the vessel to the captor.

Seizure of a ship was only the first step in a complicated legal process. As Kert notes, “[t]he seizure of a prize became much of a gamble”<sup>29</sup> because of the time and expense associated with substantiating a claim. A captor had to swear an affidavit before the local registrar. Then he had to petition the court to issue several standard documents.

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<sup>27</sup> Faye M. Kert, *Prize and Prejudice: Privateering and Naval Prize in Atlantic Canada in the War of 1812*, (St. John’s: International Maritime Economic Association 1997) at 19[Kert, *Prize and Prejudice*].

<sup>28</sup> *Ibid.* at 35.

<sup>29</sup> *Ibid.* at 56.

A monition (essentially, serving notice to the other party) had to be issued. The captor also had to present allegations, i.e. his reasons why he should be allowed to keep his prize. The court then undertook standard interrogatories, questioning the captured crew. Finally, the court would issue a disposition of the case, deciding whether or not to grant the captor the right to claim his prize. The captor meanwhile had to pay custody and maintenance fees for the upkeep of the captured vessel.<sup>30</sup>

A judge sitting on the Court of Vice Admiralty, since there was no jury, played a significant role both in the fact finding and the legal reasoning aspects of a prize decision. There were often large sums of money at stake, sometimes as much as \$12,000 for a single capture.<sup>31</sup> Furthermore, because of the international dimension that was often present in these cases, his role was a complex balance of adherence to international and domestic law, as well as sensitivity to political and economic realities. While Croke proved himself to be a knowledgeable judge in applying the laws, he displayed a singular ability to ignore the political and economic consequences of that application.

### **The Colonial Nova Scotian Court of Vice Admiralty**

It is appropriate to first give a very brief overview of the history of the Courts of Vice Admiralty in the British colonies to better understand the role Croke was assuming as a judge of the Nova Scotia Court. As Faye M. Kert explains, the Courts of Vice Admiralty in the colonies were put into place primarily to protect the economic interests of the Empire by protecting the Imperial monopoly on trade and facilitating the seizure of

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<sup>30</sup> *Ibid.* at 62-69.

<sup>31</sup> *Ibid* at 36.

foreign vessels.<sup>32</sup> Courts practicing admiralty law in the colonies were modeled on the home Court of Admiralty: there was no jury, which necessarily gave the judges who sat on those courts an enlarged power compared to the typical common law judge.

The first Vice Admiralty Court established in Nova Scotia was at Annapolis in 1720, and moved to Halifax in 1749. By 1801, the Court at Halifax was considered a “crucial” part of the legal and economic machinery of the colony.<sup>33</sup> This was in large part due to the fact that France and England were at war from 1790-1815. Moreover, in 1812 war broke out between Britain and the new United States. Because of these wars, prize takings were common, as were disputes arising from them, which only the admiralty court could resolve.

As a reflection of the Court’s importance, the judges who sat on the Court were well compensated: £2000 per year.<sup>34</sup> By this point in time there was extensive trade between the various British colonies, the mother country, and other nations. This trade created incentive for a strict enforcement of the Navigation Acts such that Britain could gain the maximum revenue from this commerce. The importance of Halifax as a trade centre was demonstrated by the fact that the population doubled from 5,000 to 10,000 from 1800-1812.<sup>35</sup>

By the time Croke arrived in Halifax, the Court had been operating for half a century. Croke himself held firm views of the role of the Admiralty Court from the outset

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<sup>32</sup> *Ibid.*, at 48.

<sup>33</sup> *Ibid.*, at 55.

<sup>34</sup> James Stewart “*Reports of cases argued and determined in the Court of Vice-Admiralty at Halifax in Nova Scotia from the commencement of the war, in 1803, to the end of the year 1813, in the time of Alexander Croke LL.D., Judge of that Court*” (Halifax, N.S, 1813) at 317 [Stewart, *Reports*]. Stewart was Croke’s law clerk while Croke served as a judge on the Court of Vice-Admiralty.

<sup>35</sup> Kert, *Prize and Prejudice*, *supra* note 27 at 18.

of his term, as indicated in his judgments. This fact is not surprising given that Croke was coming from three years of experience litigating before the Court of Admiralty in Britain.

One particularly revelatory early opinion of Croke on the role of the Court is seen in the case of *La Reine Des Agnes*,<sup>36</sup> heard by the Court in 1803. In this case, a British captain had seized a French vessel, becoming its captor. Normally, the captor would then apply to the Court to have possession of the vessel legally transferred to him, as this was required under Imperial law and international treaty law. However, in this case, the captor sold the vessel on to a third party before gaining approval from the Court.

The tone of Croke's judgment conveys his outrage:

If captors suppose that a Court of Admiralty is merely an appendix to a fleet, to hold up the tail of a capture, and just to give it the last seal of formality, and that it is under their control and direction, and subject to their caprices, they have formed a very erroneous opinion on the subject.

The Court was not, in Croke's mind, a rubber stamping figurehead, and Croke was furious at this attempt to circumvent the Court's jurisdiction. He refused to legitimize the sale, and because the ship had already been sold on, ordered the British captain to pay damages to the French shipmaster.

The ruling flew in the face of the reality of the situation (the ship was already sold on at this point and long gone), and penalized a British citizen at the expense of an enemy citizen. The fact that the British ship captain could sell the ship on indicates the limited power of the court to *actually* control the actions of independent captors. However, the fact that the French shipmaster could and did successfully bring a claim in a British Court for satisfaction and the British captain responded to the claim also shows that the Court was not considered irrelevant. Croke's willingness to apply the law in this way, with an

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<sup>36</sup> Stewart, *Reports*, *supra* note 34 at 10.

eye to the letter of the law and not just political expediency, may have been an attempt to give the Court continued relevance as an independent institution both from a domestic, and international, perspective.

Moreover, Croke's reaction is key to understanding how he approached his role both as a judge, and as the head of this Court. He went on in the *La Reine* decision to explain precisely what he feels the role of the Court is. The Court fulfilled the essential function of ensuring that Great Britain was compliant with her obligations under "the general conventional law of nations, and of particular treaties."<sup>37</sup> And it was the duty on honour of the court to "obey His Majesty's directions, whether conveyed in his proclamations, in acts of Parliament, or in particular instructions" and ensure that they are followed by not only British officers, but all persons "whatever murmurs of discontent it may occasion in those persons who stand as parties before it."

Croke's firm stance is significant for the role of the Court. His strong statement that the Court would enforce the law of the Empire has several purposes. First, it is important to remember that this was supposed to be one of the most important Courts in the colony, and he was the head of the Court. As L.H. Liang noted "the admiralty court was...one of the strongest bulwarks of imperial control, and a conscious effort was always maintained to preserve its independence."<sup>38</sup> Croke recognized the need to assert the right of the Court now under his control to the respect of all, especially the military, from the outset. Otherwise, the Court's importance could easily be usurped by the officers and wealthy citizens who were already accustomed to acting as they pleased in reference to maritime issues.

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<sup>37</sup> *Ibid.*

<sup>38</sup> L.H. Liang "Nova Scotia's Admiralty Court as a Problem of Colonial Administration," *Canadian Historical Review* (1935) 151 at 158.

Furthermore, Croke himself wanted respect as a judge. Judicial appointments in this time period were not done on a meritocratic basis, but thanks to patronage. In spite of this fact, he did not feel that his position was a sinecure. His sense of entitlement to the position is not surprising, given that Croke had been a respected advocate before the Court of Vice Admiralty in England.<sup>39</sup> As a barrister, he would have been part of the elite of the legal profession, and accustomed to a certain level of esteem by virtue of his profession. Moreover, he would have been inculcated with a deep respect for the power of the Admiralty Court as an institution and the judges on it as its representatives. He was aware that in order for his position to have significance, the Nova Scotian Court itself had to be treated with respect.

Moreover, Croke's judgment reveals a formalistic approach to his legal judgments. He was going to enforce the law to the letter, even if it meant stepping on toes. In this case, he was willing to risk the wrath of the military in order to enforce what he saw as the proper interpretations of Imperial law.

This formalistic approach appears in other judgments. For example, in the case of *Les Trois Freres*,<sup>40</sup> a private British ship of war seized a French ship on the high seas and took it to Halifax to have the capture legally acknowledged. Britain was at war with France, and this type of seizure was typical, as the intention of an enemy ship on the high seas was assumed to be to aid the enemy, therefore justifying the capture.

However, there was an interesting wrinkle in this case: the ship had been captured while attempting to return to Baltimore. Apparently, the ship had left port unaware of the recently declared war between the two countries, and the master of the French ship had

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<sup>39</sup> Kert, *Prize and Prejudice*, *supra* note 27 at 58.

<sup>40</sup> Stewart, *Reports*, *supra* note 34 at 1.

presented witnesses to this effect. The significance of this fact was that it could potentially render the ship neutral, and the capture illegal, rendering the captor responsible for paying damages to the captured ship's master. On the way to France, it had met up with an American vessel which had informed it of the war, at which point the ship had immediately reversed course, ironically not wanting to risk capture by the British Navy *en route* to France.

The decision that had to be made was whether or not to consider this reversal of course sufficient intention not to aid the enemy such that the capture could be rendered illegal. The King's Advocate, on behalf of the Captors, argued that because the master had left the port without the intention of every returning, merely reversing course was insufficient to demonstrate an intent of neutrality. Essentially, they argued that ignorance of the war was no defense.

It was open to Croke to accept this argument and favour the British citizen who had taken the enemy vessel in a time of war, over the citizen of the enemy country who was claiming relief. He chose not to do so. In his judgment, he conducted a detailed inquiry into the state of mind of the shipmaster, including studying letters that had passed between the shipmaster and his father in France, in order to ascertain his true intentions.

It was significant to him that the vessel was captured as it was attempting to return to America, not while she was heading to France. This fact, coupled with an affidavit from the shipmaster swearing his intent not to sail to France until the war was over, satisfied Croke that his intention was one of neutrality. He therefore ordered the ship and its contents returned to the French citizen.

The fact that Croke would, in a time of war, deny the capture of the ship of enemy nationality on the high seas is indicative of his formalism. This decision could easily have been made on the grounds of *realpolitik*, and instead Croke chose the rule of law.

His motivation for doing so could spring from many sources. He could have done so out of an honest belief in the rule of law: given his educational background, this is not an unrealistic perspective. He could have done so to assert the power of the Court over the consequences of the actions of captains at sea. Additionally, he might have felt that the best way to establish respect for the Court was to issue rulings such as this one that appeared fair and impartial, rather than swaying in the direction of whatever political wind happened to be blowing at the time. This appearance of impartiality would give the Court a unique position as mediator between the Empire and other nations (as in the case of the *La Reine*) and attendant prestige.<sup>41</sup>

Most likely, his actions represent a combination of all these motivations. What these judgments also reveal about Croke is a respect for international law. He considered it quite important to respect not only the rights of British citizens, but of the citizens of other nations as well, even enemy nations. He also considered the protection of the rights of these citizens under international law to have significance and weight, which necessarily implied that at least some international law had significance and weight.

It is particularly important that in the *La Reine* judgment he makes reference not only to treaty obligations but to a more general law that existed between (European) nations pertaining to the sea. In both these judgments he accepted that the obligations created by this legal regime imposed on Britain were obligations that took precedence

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<sup>41</sup> My thanks to Professor Fernandez for suggesting this argument.

over temporary political situations such as war. Croke did not view Nova Scotia as entering into the international plain as anything other than an extension of the Empire.

Croke's view of Nova Scotia as a cog in the machinery of empire was by no means universal. Croke's attitude can be contrasted instructively with a native born legal thinker of the same era, Beamish Murdoch. Croke would have felt no need for reference to any law other than that of Britain, since Nova Scotia was no more than a part of that legal universe. Murdoch, on the other hand, created his *Epitome* in order to demonstrate that "Nova Scotia possessed its own legal tradition, flowing out of, but distinct from, that of the mother land."<sup>42</sup>

If Nova Scotia could be seen as possessing an independent legal tradition that could mean that it was something more than a colony of Britain. After all, if she could make her own laws, and enforce them within her borders, Nova Scotia could govern herself. And if she could do that, she was at least partially independent from Britain. This independence could lead to Nova Scotia acting for herself on the world stage, which would deeply undermine the importance of British appointed judges like Croke on the Court of Vice-Admiralty.

This difference in attitudes between Croke and Murdoch can be explained by their legal training and nationality. Croke, as a British born and educated appointee, had no incentive to encourage, or even acknowledge, Nova Scotian independence. In fact, it was to his distinct benefit for Nova Scotia to remain a colonial tool. Murdoch, on the other hand, as a native born Nova Scotian with familial roots in the colony, was more

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<sup>42</sup> Phillip Girard, "Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his *Epitome of the Laws of Nova Scotia*," 11 *Law and History Review* (1993) 101 at 106.

interested and invested in establishing an independent Nova Scotia, run by Nova Scotians and not British appointees.

It should be noted that by the time Murdoch was publishing the *Epitome* in 1832, Nova Scotia had undergone significant growth and development that would not have informed the legal community of Croke's era as much. However, given the explosive growth of Halifax during Croke's tenure, it is not unreasonable to think of that period as the genesis of many of the independent legal traditions Murdoch set to paper in the late 1820s and 1830s.

While Croke did attempt to promote the rights of Nova Scotians per se, he was very interested in protecting the individual rights of all those who came before his court, be they Imperial citizens or foreigners. This devotion to rights on the international plain is possibly an outgrowth of a training in a deep respect for rights on the domestic plain. As Elizabeth Manacke noted, "British subjects were deeply committed to a set of legal rights,"<sup>43</sup> for individual citizens, and Croke was not only a British subject in general, but trained in the British legal system, and therefore had been deeply inculcated with these beliefs.

Of course, neither of these cases presented a British statute that came into direct conflict with a general international law, and therefore they do not indicate the extent to which Croke would prioritize international over domestic law. And it is certainly possible, and even likely, that Croke, if presented with such a situation, would have ruled in favour of the British law. After all, his first duty, as he stated in *La Reine* was to His Majesty, and not to any international community.

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<sup>43</sup> Elizabeth Manacke, "Colonial and Imperial Contexts," in *The Supreme Court of Nova Scotia, 1754-2004: From Imperial Bastion to Provincial Oracle* eds. Philip Girard, Jim Phillips, and Barry Cahill (Toronto: The Osgoode Society, 2004) at 31.

Significantly, Kert notes that few of Croke's cases were overturned by the High Court during his term as a judge in Halifax.<sup>44</sup> However, it should be noted that the appeals process was both lengthy and expensive,<sup>45</sup> and this fact, as much as the quality of Croke's judgments, could explain the lack of reversals.

### **Croke's Rulings within the Larger Political Context**

While Croke may have been faithful to the letter of British Admiralty law, his rulings sometimes had negative consequences even for the interests he was trying to serve. This inability to adapt his legal stance to suit the political realities of the situation can be read either as a refusal to pander to political interests or an inability to recognize a need for flexibility in certain circumstances of necessity. His style can be seen as either admirably impartial or needlessly rigid. In any case, his unwaveringly loyalty to the law, especially in reference to international trade disputes, created a body of judicial precedent that was often out of step with contemporary colonial needs.

It should be noted at the outset that there were no allegations of impropriety made against Croke's conduct while he was on the bench.<sup>46</sup> The fact that Croke was not recalled in spite of his unpopularity suggests that while his actions were often considered disagreeable, he himself was not considered venal or immoral by his compatriots. However, direct attacks on Croke would have been difficult, given that he was one of the highest ranked authorities in the colony, and removal from the bench would have required an order from Parliament. He may well have been subject to attack in more subtle forms, such as publications by enemies in the colony

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<sup>44</sup> Kert, *Prize and Prejudice*, *supra* note 27 at 55.

<sup>45</sup> *Ibid.* at 71.

<sup>46</sup> *Ibid.*, at 55.

An example of Croke's unyielding fidelity to the Navigation Acts is the case of the *Economy*. At the outbreak of the war of 1812, the British army in Nova Scotia found itself unable to rely solely on Nova Scotian resources to sustain the troops. Up until this point, Nova Scotia had been heavily dependent on trade with the American colonies, and the cessation of this trade had a devastating effect on crucial stocks and supplies. In response to the needs of the army, Lieutenant Governor Sherbrooke tried to override the Navigation Acts by allowing renegade American merchants to do business at Halifax.<sup>47</sup>

He attempted to do so by granting special trade licenses to certain American trading ships. These licenses were often granted by the Imperial government in times of war to ships of enemy nations that were carrying vital supplies between countries. These licenses rendered the ships legally neutral<sup>48</sup> in the eyes of the British government, and therefore they were immune from capture.

The *Economy* was an American ship carrying supplies such as pitch and grain to Halifax which had been granted one of these licenses. The issue was whether or not Lieutenant Governor Sherbrooke actually had the authority to override the current laws and grant the license in question. The King's Advocate argued that Sherbrooke was not the competent authority, and only the King could grant this type of license. The Solicitor General argued that because Sherbrooke was the King's representative in Nova Scotia, and therefore the highest authority in the land, exercising power granted directly by the King, the license was legally sound.<sup>49</sup>

The ramifications of Sherbrooke's actions were significant. Because the license rendered the ship neutral under international law, the crux of the problem was how much

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<sup>47</sup> Janzen, *Tentacles of Power*, *supra* note 2 at 30.

<sup>48</sup> See Croke's discussion of licenses in the case of *The Henry*, Stewart, *Reports*, *supra* note 34 at 493.

<sup>49</sup> Stewart, *Reports*, *supra* note 34 at 447-8.

autonomy the Lieutenant Governor had over certain matters of international trade and relations. It was up to the Court of Vice-Admiralty to set the scope of this power. This case can and should be read on one level as a power struggle between the Court and the Lieutenant Governor; for the Lieutenant Governor to be overruled after issuing these licenses would be humiliating. As the Solicitor General put it, “there is almost an indelicacy in raising a question upon [the license] especially when it is considered in what a pure and respectable source it emanated.”<sup>50</sup>

Croke was clear as to the real power behind the laws in question. Only the British Parliament, the source of the Navigation Acts, was able to alter them, and only the King was capable of granting exceptions to them.

As Janzen notes, this ruling was deeply unpopular in the province. There was an undeniable dependency on American products, especially foodstuffs, even during a time of war, that Croke refused to acknowledge.<sup>51</sup> As she observes “Croke created inconvenience, if not considerable hardship and ill feelings among the colonists and his colleagues by his conviction that the stability and continued existence of the British empire depended on the observance of every jot and tittle of Navigation Laws, no matter what sacrifices this would entail.”<sup>52</sup>

Not only was Croke’s philosophy out of step with Nova Scotian desires, it was actually not reflective of Imperial desires either. The home government was aware of the thriving and necessary illegal trade in the province. One startling example of this fact was that British soldiers were forced to smuggle flour across the border from the United

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<sup>50</sup> *Ibid.*, at 449.

<sup>51</sup> Janzen, *Tentacles of Power*, *supra* note 2 at 35-6.

<sup>52</sup> *Ibid.* at 7.

States in order to feed themselves.<sup>53</sup> In response to this need, even though they were at war, the British government began to issue special licenses to American ships bearing specific cargo such as flour and pitch. In fact, they had been in the practice of doing so with French ships as well during their wars with France.

Croke would have been aware of these facts, and it is therefore somewhat puzzling that he would be obstreperous in his rulings. It is possible that as a judge and a wealthy member of Nova Scotia society who was not involved in the shipping industry as a merchant or underwriter, he simply had no conception of the dire straits of those classes who would be severely affected by a rigid adherence to the letter of the law.

Alternatively, he simply chose to prioritize the law over the human consequences in the absence of a direct legal fiat.

In either case, Croke's judicial approach raises the interesting question of to whom Croke felt he owed his loyalty. If he owed to the Empire, it would seem he would rule in such a way as to enable it to be victorious in war, regardless of legislation. After all, as Croke himself proclaimed, every license was "a nail driven in to the coffin of the British empire."<sup>54</sup> It would seem rather that Croke felt his loyalty was owed to a system of British law and governance that was, by 1812, anachronistic. The irony is that the legislation Croke was seeking to uphold was undermining the goal he had been sent to Nova Scotia to preserve: the protection of British economic supremacy. And by ruling as he did, he further encouraged willful disobedience of the laws he sought to enforce.

But Croke was not always so rigid. A brief ruling issued in June of 1813 is telling. The *Expedition* was sailing under another special license, this time issued by Admiral

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<sup>53</sup> Gordon Blake, *Customs Administration in Canada: an essay in tariff technology*, (Toronto: University of Toronto Press, 1947) at 29.

<sup>54</sup> Stewart, *Reports*, *supra* note 34 at 467.

Sawyer, admiral of the port of Halifax.<sup>55</sup> The license was granted to protect the ship from capture while traveling between the two American ports of Boston and Eastport. Both Croke and the Solicitor General, who appeared on behalf of the ship, recognized that the license was not legally valid, but the Solicitor General argued that it should be recognized on the grounds of political expediency.

Croke permitted the capture, noting that the case made by the Solicitor General was “not defensible.” However, he went on to remark “but as it appears that this vessel had been permitted to run for the convenience of the neighbouring provinces of New Brunswick and Nova Scotia...and had been tacitly connived at by...British cruisers,” that costs be awarded to the captain of the *Expedition*. Given the expense involved in litigating a prize claim, this was not an inconsiderable award.

The fact that Croke did not comment on the wider political implications of his decision is particularly surprising in light of his decision in the case of *Orion*,<sup>56</sup> rendered in 1813 but dealing with an issue arising from the outbreak of the war of 1812.

The *Orion* was an American ship that had been granted a special license to trade with Halifax before the port of New York was declared by a British official, Lord Castlereagh, to be under blockade in the name of the King. After the blockade of the port was declared, the ship sailed from port and was seized by a British naval vessel. According to Croke, the case broke down into a question of fact as to whether or not there was actually a blockade at the time, and a question of law as to whether or not the existence of the blockade would nullify the validity of license.

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<sup>55</sup> *Ibid.*, at 488.

<sup>56</sup> *Ibid.*, at 499.

The captors of the ship argued that this declaration was sufficient to prove the existence of the blockade. What is significant in this judgment is that Croke did not accept this argument. Instead, he turned to earlier precedents of the Court of Admiralty, noting that “as early as the *West India* cases it was decided by the Court of Appeals, ‘that a declaration unsupported [by proof that the port was indeed physically blockaded] will not be sufficient to establish a blockade.’”<sup>57</sup>

As he further pointed out, notice of the blockade would lead a person to presume that the orders to establish the blockade had been given. But Croke cautioned that a mere statement of blockade was not “conclusive.”<sup>58</sup> Croke relied on the testimony of the captain of the captured ship, that there were no vessels in or around the port area, to prove that there was a state of blockade.

This portion of the judgment illustrates again Croke’s strict adherence to the letter of the law. The fact that the command of the highest British authorities in Nova Scotia was not sufficient to prove a blockade to Croke’s satisfaction was another assertion of the independence and power of the Court of Vice Admiralty to evaluate the actions of other colonial authorities.

Once the fact of the blockade was established, Croke moved to the issue of whether the license was still, in fact, valid. He noted that

[s]ince it [the license] is a privilege which is to protect the property of the enemy, and *for the benefit of the country who grants it* (italics original) not only the interest, but the good faith and honour of the country and implicated and pledged to respect them. They ought not to be revoked without full and timely notice. Adverse considerations ought not to be pressed too rigourously against them...[i]n case of doubt, the balance should decline in their favour.<sup>59</sup>

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<sup>57</sup>*Ibid.*, at 501.

<sup>58</sup>*Ibid.*

<sup>59</sup>*Ibid.*, at 511.

Upholding the license is not just a legal right to Croke, it was a moral duty. To disallow this license would be to undermine the credibility of the empire, even though the captured ship was an enemy ship sailing out of a blockaded port and had been captured by the British navy.

Croke can be contrasted with a contemporary Judge of the Court of Admiralty, Sir William Scott, Lord Stowell. Like Croke, Stowell practiced before the Admiralty Court before his appointment, but for a significantly longer period of nearly 20 years.<sup>60</sup> Possibly because of this longer experience with the issues that arose in admiralty law, unlike Croke, Stowell's judgments tended to emphasize economic realities.

As Henry Bourguignon notes, Stowell had a "profound grasp of the economic and social realities of the shipping industry," and his prize judgments "show his deep understanding of the much more complex realities of military strategy, shifting government policy, and conflicting social and economic forces."<sup>61</sup> Therefore his judgments tended to contain not only applications of the current law, but policy justifications for those applications. A good demonstration of his sensitivity is seen in how he handles the unique difficulties of neutral Swiss merchants in times of conflict, and sometimes pardoned their trade with enemy French ports on the basis of economic necessity.<sup>62</sup>

He also demonstrated a willingness to go beyond the letter of the law in order to achieve what he felt to be a just result. For example, in the case of the *Endraught* a Danish man tried to claim that he was domiciled in Prussia and provided a certificate to

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<sup>60</sup>Henry J. Bourguignon, *Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty, 1798-1828* (Cambridge: Cambridge Press, 1987) at 130.

<sup>61</sup>*Ibid.*, at 115

<sup>62</sup>*Ibid.*, at 161.

this effect. However, Stowell noted that the certificate was valueless because there was no proof that the man had ever lived in Prussia, and there was substantial documentation of his ongoing residence in Denmark. Typically, the certificate would have been sufficient to establish residency. But Stowell instead created a legal test for establishing residency, in which the certificate should only be presented if it represented an “honest” and “*bona fide*” statement of where the person actually lived.<sup>63</sup>

However, like Croke, he was still willing to rule harshly when it came to British subjects trading with the enemy. In the 1801 case of the *Jonge Pieter*, a British subject tried to use the fact that he was trading out of Holland with the French to excuse him from the prohibition against wartime trading with the enemy. Stowell responded to this contention saying “an *Englishman* trading from Holland is just as much a *Dutch* merchant as is a *Swede* or a *Dane*.”<sup>64</sup> He then levied a massive fine against the merchant. Like Croke, he also tended to interpret shipping licenses rigidly, as in the case of the *Madonna Delle Gracie*: if someone granted a license for export used it to facilitate import, for example, he refused to accept the argument of ‘virtual license’ (that a license permitting one type of trade must permit the other kind as well.)<sup>65</sup> However, he was alive to the economic realities as well. In the 1802 case of the *Juffrow Catharina* he allowed the importation of lace from France without license because of the “peculiar characteristics of the lace trade.”<sup>66</sup>

What Stowell’s judgments show is that there was level of flexibility at the central Court of Admiralty. The Court did not always apply the law strictly while turning a blind

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<sup>63</sup> *Ibid.*, at 155.

<sup>64</sup> *Ibid.*, at 167.

<sup>65</sup> *Ibid.*, at 168.

<sup>66</sup> *Ibid.*

eye to the consequences of their rulings on trade or international relations. Croke and Stowell had essentially the same formal educational background, but there were crucial differences in their legal careers, specifically as to how much each actually practiced the law, before they assumed their posts as judges. While Stowell's extensive experience allowed him a more multifaceted perspective on the role law played in a larger social dynamic, Croke's limited external understanding seemed to lead to a more rigid legal philosophy.

#### **IV. Croke in Colonial Politics**

One of the more interesting aspects of Croke's career in Nova Scotia was the fact that he was not only a judge. He was also actively engaged in the political and social community, serving as administrator to the colony of Nova Scotia on two separate occasions. The fact that he held this position is somewhat strange. In fact, there was historically a great deal of tension between the Nova Scotia Assembly and the Court of Vice-Admiralty.<sup>67</sup>

This tension was due to the fact that the interests of the Assembly and the Court were often at odds. The Court was an independent institution devoted to serving the policies of mother country, whereas the members of the Assembly had great incentive to avoid these policies, especially in the area of admiralty law. As Carol Ann Janzen notes, the colonists wanted to engage in trade for their own profit, not to better the position of Britain, and strict enforcement of the Navigation Acts was often to their detriment.<sup>68</sup>

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<sup>67</sup> Janzen, *Tentacles of Power*, *supra* note 2 at 25.

<sup>68</sup> *Ibid.*

While Croke was respected for his legal knowledge by his contemporaries<sup>69</sup> (and modern historians<sup>70</sup>), the former despised him as a person.<sup>71</sup> Some historians have explained this hatred by noting that while Croke might have been an excellent judge, he was also arrogant and impolitic.<sup>72</sup> These personality traits can be seen in his actions as provincial administrator.

However, his practice of strongly enforcing the letter of the Navigation Acts should also be part of the consideration of his unpopularity. While Croke was at times demonstrably haughty and self important, he also displayed considerable loyalty to the British empire. One consequence of this loyalty, however, was the continued retardation of the development of an independent Nova Scotian policy on dealing with legal complexities of trade with other nations.

It is not surprising that Croke chose to extend his career to the political realm. In fact, it was fairly typical for lawyers in England to enter politics. As Daniel Duman points out, “few students of the English legal profession would take issue with the assessment that ‘all too frequently...are in the House...to serve their professional ambitions.’”<sup>73</sup> Croke was nothing if not ambitious, and likely saw entering into Nova Scotian politics as part of a natural progression of his career.

Croke’s first opportunity to serve in the capacity of administrator came in 1808, when the Lieutenant Governor, Sir George Prevost, was sent to attempt to calm a rising rebellion in Martinique. Because Croke was the senior member of the Legislative

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<sup>69</sup> Kert, *Prize and Prejudice*, *supra* note 27 at 60

<sup>70</sup> Nova Scotia historian T.H. Raddall refers to him as “brilliant, cynical, and grasping” in his continued attempts to assert himself into Nova Scotian politics. See T.H. Randall, *Halifax, Warden of the North*, (Toronto: University of Toronto Press, 1980), at 133.

<sup>71</sup> Hon. Adam G. Archibald, “Sir Alexander Croke,” *Nova Scotia Historical Society* (1880) at 120.

<sup>72</sup> See both Janzen and Archibald, who comment on how strongly he was disliked.

<sup>73</sup> Duman, *The English and Colonial Bars of the Nineteenth Century*, *supra* note 8 at 176.

Council, he assumed Prevost's role both as Lieutenant Governor and as president of the legislature. He was allowed to do so because, after Prevost, he was the most senior colonial official. By this time in Nova Scotia, the legislature was accustomed to acting as an independent decision making body, with the president of the legislature rubber stamping the measures they passed.

Given Croke's demonstrated aversion to rubber stamping in the legal context, it is perhaps not entirely surprising that he refused to play a similar role in the legislative context. He actually *withheld* consent for a provincial appropriation bill, which meant that the province was hamstrung: it was unable to use the tax money it had collected for various expenditures such as road repair.<sup>74</sup> The legislature was both outraged and impotent. It was only on Prevost's return that the bill could be, as was, passed.

The sheer arrogance of Croke's actions in this case is somewhat stunning. He had never held any kind of administrative position beyond that of being a land owner, nor had he ever held an elected position in Nova Scotia. And yet he considered himself more fit than the legislature to determine which bills should and should not be passed.

One possible, and already implied, explanation is that Croke was applying his formalist judicial posture to his political position. After all, ostensibly the president of the legislature was in fact entitled to examine a bill and refuse consent if he, in his good judgment, found it lacking. Croke, by this point knowing his judgments were rarely overturned, probably felt fairly confident in his ability to judge any given situation, and was acting in the way he was accustomed to acting.

This explanation indicates a definite rigidity of character and lack of insight in Croke. He was unable to read the political situation effectively by attempting to

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<sup>74</sup> Kert, *Prize and Prejudice*, *supra* note 27 at 60.

emphasize and negotiate with members of the legislature. Rather, he treated them as he did claimants in his court: as creatures subservient to his control. He failed to recognize the change of a balance in power between his position as judge and his position as president.

His actions can also be explained as a reassertion of colonial power. By exercising his imperial fiat, Croke was reminding the legislature that they were not really an independent body. Rather, they were always subject to the will of their imperial master, at that moment embodied by him. And as a judge, he was practically immune from removal, except at the behest of the king.

On this reading of his actions, the analysis of his character remains the same. Croke seemed either unable, unwilling, or both, to recognize the political context in which he operated. However, his position was essentially unassailable, so that his willful blindness was not damaging to his career. Unfortunately, because this was the case, Croke had no impetus to alter his behaviour, and therefore continued to behave in such a way as to alienate the majority of his peers.

Unfortunately for Croke, his actions had the probably unforeseen consequence of provoking the legislature to attempt to assert a level of control over the Court of Vice-Admiralty in 1811. The Assembly criticized the Court in a resolution, asserting that because of the expense of litigation before the Court, potential plaintiffs were abandoning rightful claims, and that the Court should relinquish exclusive jurisdiction over the enforcement of the Navigation Acts.<sup>75</sup> Luckily for Croke, the Assembly did not take any further steps, however, to attack the Court's jurisdiction.<sup>76</sup>

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<sup>75</sup> Journals and Proceedings of the House of Assembly, Nova Scotia, 3 April 1811.

<sup>76</sup> Janzen, *Tentacles of Power*, *supra* note 2 at 25.

Despite his unpopularity, Croke was allowed to reprise his role in 1811, albeit for a period of 6 months. This time, the legislature was not in session during that period, and his term passed without incident.

His actions in the political context help to flesh out the image of Croke as a detrimental influence to the development of colonial independence. His presence, even when unwanted by many of his peers, was apparently unavoidable, and his position had considerable impact on the way the colony functioned on at least one occasion, even above and beyond the legal realm in which he usually operated.

The continued assertion of colonial dependence in a legal sense when dealing with other nations, whether enforced by his actions on the Court or in the legislature, can help to explain why the colony of Nova Scotia remained substantially subservient to the British empire: no alternative was permitted.

## **V. Croke and Colonial Haligonian Society**

A further insight can be gained by studying a poem that Croke wrote in 1805, called “The Inquisition.” The poem is written as a satire written in heroic couplets, the mode and verse form meant to reflect the British poets like Alexander Pope and Charles Churchill.<sup>77</sup> Vincent Thomas points out that the poem is in fact a competent work that “heap[s] scorn and ridicule on the objects of his satire while retaining a sense of...dignity in his work.”<sup>78</sup>

The most revelatory part of the poem for the modern reader is the preface. While the verses themselves refer to specific contemporary disputes and scandals in Nova

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<sup>77</sup> Vincent Thomas, “The Inquisition: Alexander Croke’s Satire on Halifax Society during the Wentworth years,” in *The Dalhousie Review* (1973) 404 at 411.

<sup>78</sup> *Ibid.*, at 407.

Scotia society, the preface offers Croke's view of the moral state of Haligonian society. He notes explicitly that those reading the poem who are "malicious, or envious, flatter themselves that there is anything of a Personal nature in the following Poem."<sup>79</sup> He then goes on to explain that his inspiration for the poem is the desire to uphold the virtues and morals of good Christian society in Halifax, especially to protect the women therein.<sup>80</sup>

He then goes on in the poem to list specific incidences of depravity in Nova Scotia society. Among other things, he called into question the paternity of one wealthy family's son,<sup>81</sup> and mocking the cowardliness of a well known Haligonian trader in a famous incident involving the abandonment of his ship when it foundered during a storm.<sup>82</sup>

It appears from the chastising tone of the poem that Croke felt himself competent by 1805 to sit in moral judgment of others in the colony, even when they were his social equals. His feelings were reinforced the role he was allowed, and even encouraged, to play in the development of formal education in Nova Scotia.

Although Croke managed to alienate many in the colony, he was still able to exercise a lasting influence in provincial education. By studying Croke's comments on education one can gain greater insight into why he behaved as he did on the judicial and political plains. While Croke firmly supported higher education, he did so in a highly classist way. While the upper class should be encouraged to engage in intellectual study, education for the lower classes was supposed to instill in them a strong sense of morality

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<sup>79</sup>*Ibid.*, at 411.

<sup>80</sup>*Ibid.*, at 412.

<sup>81</sup>*Ibid.*, at 419.

<sup>82</sup>*Ibid.*, at 422.

and submission to the upper class. As he put it “the great characteristic of this enlightened age is an overweening self-conceit.”<sup>83</sup>

Moreover, Croke’s attitude towards religion is telling of his more general loyalist mentality. For example, he persuaded the governors of King’s College, the first college established in Nova Scotia, to adopt requirements that effectively eliminated all but Anglican students.<sup>84</sup> As Janzen notes, “Croke felt that adherence to the Church of England would naturally strengthen one’s allegiance to the crown and government of Britain.”<sup>85</sup>

Croke’s view on education, when coupled with his reflexively formalistic approach to the law leads to an image of a man who had a clear and set belief on the arrangement of society in a certain hierarchy. Just as the lower class man should not aspire to raise himself to the upper class, the colony should not presume that it can have a position on par with the mother country.

Croke therefore presents an interesting problem: how someone so disliked was able to have so much impact in diverse areas of Nova Scotian society. One answer perhaps is the size of Halifax. The population was relatively small, a mere 5,000 in 1800, growing to 10,000 by 1812. Croke was a relative rarity: an Oxford educated man with an advanced degree who had not only studied, but practiced his craft in the home country. As the head Bishop of Nova Scotia, Bishop Inglis noted, Croke was an accomplished

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<sup>83</sup> Sir Alexander Croke, “Plain Truths: Five Letters, Addressed to the Members of the Conservative Association of the County and the City of Oxford,” reprinted from the Oxford Herald (Oxford, 1837) as cited in Janzen *Tentacles of Power*, *supra* note 2 at 78-79.

<sup>84</sup> Dalhousie University Earth Sciences Department “About Us,” page, <http://earthsciences.dal.ca/aboutus/otr/otr-ch02.html>

<sup>85</sup> Janzen, *Tentacles of Power*, *supra* note 2 at 81.

scholar who was familiar with the structure of British higher education, which made him well suited to assist in this colonial project.<sup>86</sup>

This answer illustrates the more general mentality in colonial Nova Scotia of submission to the mother country. Croke's British education renders him superior because of his ability to reproduce what can be found in Britain again in Nova Scotia. There is no thought given to objectively evaluating British education and then shaping Nova Scotia's educational system in response to that assessment.

Predictably, Croke then began to act without paying significant attention to the wishes of the Bishop in designing the schools, but rather began to design the statutes of the school as he saw fit.<sup>87</sup> This situation reinforces the more general appearance of Croke as at best a tactless, and at worst totally insensitive official who acted in accordance with his own judgment in every situation regardless of the wider implications of his actions.

## **Conclusion**

It is the Nova Scotian reaction to Croke that helps to clarify his influence on a Canadians approach international law. The colony did not blindly submit to Croke's attempts to bind them into legal submission. There was angry reaction to his actions from both British and colonial officials. What their reactions demonstrate was the evolving reality of the importance of Nova Scotia. Nova Scotians emphatically did have their own commercial interests to protect that they clearly viewed as separate from imperial interests: they no longer existed to serve the mother country, nor did they see virtue in that mentality.

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<sup>86</sup> Letter from Bishop Inglis to the Archbishop of Canterbury, 28 September 1802, as cited in Janzen, *Tentacles of Power*, *supra* note 2 at 90.

<sup>87</sup> Janzen, *Tentacles of Power*, *supra* note 2 at 91.

Moreover, the British saw the importance of vesting Nova Scotia with a measure of independence, as demonstrated by, for example, requiring the legislature to pass its own by-yearly appropriations bills. The legislature by 1800 was demonstrably capable of administering to the needs of the province without continued intervention by the British government. So not only were Nova Scotians cognizant of their growing individual identity, the British government did, to a certain extent, want to encourage that independence.

This theory is borne out by the incidences of special licensing. Certainly, their issuance is partly due to the exigent situation of supplies in the colony. However, the fact that the Lieutenant Governor of the colony felt comfortable granting these licenses without first getting further imperial permission can be read as an indication of a growing colonial comfort with acting and governing for itself. That Croke's denial of their ability to do so was met with anger indicates the sense of entitlement the Nova Scotians must have felt to address their commercial problems in a way that they themselves felt was legally valid.

Croke's rulings slavishly adhered to laws that were out of step with the political reality of his context. They reinforced a negative social and economic ideal that undermined the legal development of Nova Scotia as an independent actor in the international commercial and political arenas. As a colonial administrator, Croke was obstructionist, but his influence was relatively short lived. However, in his position as judge on the Court, Croke was able to create precedents pertaining legal issues from prize law to licenses. His judgments were influential in a detrimental sense to the advancement

of the Nova Scotian economy and international relations between Nova Scotia and important trade partners such as the United States.

In studying the early development of Nova Scotia, it is important to consider not only the home grown influences, but the significant Imperial influences that contributed to the creation to Nova Scotian law. The judges of the Court of Vice Admiralty are particularly worthy of examination, given the significant influence of the court on various aspects of colonial expansion. Further study into characters such as Croke will further the understanding of how external legal philosophies helped to shape the colony's legal personality, even if that shape was formed in opposition to, rather than alongside, the influence in question.