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An Apolitical Advisor: The Fiction of the Attorney General

Edmund Morgan's compelling book *Inventing the People: The Rise of Popular Sovereignty in England and America* opens with an assertion that the success of any form of government requires the acceptance of a number of fictions. In democracies, for example, it is necessary for the population to "believe that the people *have* a voice or ... that the representatives of the people *are* the people."[1] While a necessary deception, the fiction "must bear some resemblance to fact. If it strays too far from fact, the willing suspension of disbelief collapses. And conversely it may collapse if facts stray too far from the fiction that we want them to resemble."[2] Morgan was not, of course, referring to the legal fictions whereby the common law historically responded to novel situations falling outside the traditional forms of action or to the crafted narratives identified by Natalie Zemon Davis in her study of "pardon tales" in sixteenth-century France.[3] Nor was he describing a delusion or untruth. Rather, he was concerned with those instances of "make-believe" where we willingly suspend disbelief so that our world conforms "to what we want it to be."[4] Or, from a different perspective, fictions serve to frame uneven relationships as constituting a desirable and natural order of things. Sometimes depicted as "self-evident truths" or practical arrangements advantageous to the public, these rationalizations traced observable contours of political, economic, and social authority in tandem with the subdued means whereby power could be exercised. In this particular instance, a version of Morgan's fiction refers to the illusory contention that the attorney general functioned as an apolitical legal advisor. Indeed, this particular fiction has been an unwavering theme in the history of the attorney general and, with the creation of the Department of Justice, it too came to be served by this specious notion.

The ingredients of this fiction exist as embedded and often untested assumptions about the very essence of law. Its primary source rests in what Harry Arthurs identifies as the basic paradigm shaping the way in which most legal professionals and much of the public regards the law.

> The law is formal; it exists as a thing apart from society, politics, or economics; law has the capacity to achieve, and does achieve, results by encouraging or discouraging behaviour, by attaching specified consequences to behaviour that facilitate it, deter it or undo its harmful effects; law is made and administered by the state; and access to law is provided in courts by legal professionals – lawyers and judges – who invoke a body of authoritative learning in order to argue and decide cases.[5]

This view sustains a layered assertion that law and its practitioners are both "apolitical and necessary."[6] In effect, those who practise or interpret the law benefit from the notion that its ultimate goal is the pursuit of idealized justice. Or, as Robert Gordon writes, from one perspective, "The law ... is an artificial utopia of social harmony, a kind of collectively maintained fantasy of what society would look like if everyone played by the rules."[7] Accepting for a moment that such a utopia is attainable, it is a risky proposition to conflate the law with the ideal of justice, or the practical realities of its daily administration.[8] Essentially, the law or the administration of justice ought not be confused with the pursuit of justice. Yet the very fact that these distinct elements *are* viewed as synonymous is the bone and marrow of the fiction casting the attorney general as an apolitical legal advisor.

It would be disingenuous to suggest that this willing suspension of disbelief was solely the product of those outside of the legal community. As Arthurs points out, the fiction also reflects how the legal profession has viewed itself historically.[9] Common-law training consciously created the ideology of law that claimed those schooled in the law were endowed with highly specialized and ancient knowledge, which, in course, affirmed the status of those who possessed that learning: "The tradition associated law with both science and high culture, and justified the prestige and power of its practitioners. Law was authoritative because [it was] autonomous; and its autonomy derived from two sources, its formality (or technicality) and its antiquity."[10] Although most practitioners would have disavowed such lofty intellectual pretensions and taken refuge in the self-acclaimed role as skilled artisans applying technical rules, this merely substituted one characterization for another. Either way, lawyers were apolitical because, in one instance, they applied ancient principles that theoretically were not coloured by political interests or, in the other, because they pulled levers in a mechanical legal structure.

While it may be imprudent to leap from the ideology of law to that of the illusory attorney general functioning above politics, a link does exist. It entails the assertion that law and politics are so thoroughly intertwined that it is neither practicable nor useful to pull them apart. Such an attempt would only serve to distort and oversimplify the nexus.[11] Legal decisions

are by their nature inherently political. Further, the legal profession's desire to deny this indissoluble connection through the benefit of an apolitical veneer is yet another political act. Therefore, when the decision was made in the fifteenth century to secure an additional counsellor to further protect and proliferate the English monarch's interests, the newly minted attorney general assumed the status of a personal advisor to the King, to defend at law, the King's interests.[12]

If the political character of the attorney general's origins and function are so easily revealed, why then is it necessary for the fiction to obscure this basic attribute? The answer lies with the rationale for creating, sustaining, and subscribing to such fictions in the first place; in their broadest sense they act as a palliative for a complex and sometimes frightening world. Essentially, the notion that the law and its practitioners are apolitical and can be the means for the pursuit of either idealized or practical justice is obviously more comforting than the contrary proposition. As such, the community and the profession have both an emotional and pragmatic interest to accept and propagate the fiction. The subsequent "social bargain" asserts that the profession, through and by the application of law, dispassionately shoulders a wide range of activities and behaviours on behalf of the community. In exchange, it acquires both individual autonomy and professional self-governance.[13] For the attorney general, this bargain, with its embedded notion of independence facilitating objectivity in applying impartial law, creates and reifies the notion that both the legal advisor to, and the advice tendered for a government, is necessarily apolitical.

Not surprisingly, we find caveats in this world of law, lawyers, and politics. In this instance, we must be mindful that the ideological assertion that lawyers are apolitical and necessary is not written in stone.[14] Indeed, the measure of a fiction rests in its ability to respond in accordance with changing times and attitudes. Lacking this flexibility, the distance between reality and fiction becomes too great and the fiction collapses. For the attorney general, sustaining the fiction requires avoiding, as much as possible, public behaviour demonstrating or suggesting the confluence of law and politics. This is orchestrated by the deft assertion that the attorney general merely provides the government with a selection of legal or constitutional alternatives, but that the final decision ultimately rests with the politicians. Such adroitness veils the political considerations in determining suitable policy alternatives while affirming, for public consumption, the fictional distinction between legal and political decisions.

Although this fiction has coloured the attorney general's history since its inception, the reforms of mid-nineteenth-century British North America fundamentally reoriented the Canadian office. Administrative innovations such as filing systems that engendered an institutional memory, the notion

of governmental possessory rights to departmental records, along with ministerial responsibility, were changes introduced in the wake of Lord Durham's 1839 report on the Canadian political situation. The very idea of political responsibility, both inside the cabinet and to the legislature, raised concerns for the attorney general, such as whether poor legal counsel merited the same consequences as poor political advice.[15] The emergence of individual attorney generals as political leaders served to further muddy the waters. That it remained possible to successfully assert, after the mid-century, that the attorney general functioned as an apolitical legal advisor, even in the face of the evident political role that the office had assumed, was a masterful effort of nurturing the fiction. This effort did not pass entirely unchallenged and on at least five occasions between 1850 and 1878, the attorney general's political character was subjected to scrutiny and public debate.

Indeed, as late as 1863, it was observed that the law officers' departments in Canada West and Canada East shouldered too much political responsibility for the other departments of state while being, on the other hand, rather loosely organized.[16] Although creating the federal Department of Justice in 1868 tightened the administrative organization, the act served to mask these political responsibilities through a reassertion of the fictional attorney general, who merely tendered legal advice. That the attorney general, as the apolitical legal counsel, and the minister of justice, as the political law officer in the cabinet, were to be the same person, required a particularly generous suspension of disbelief. Yet despite its evident implausibility, the fiction remained (and has remained) a central feature of the character of the minister of justice and his or her role in federal statecraft.

Framed in this manner, Chapter 2 outlines the historic office of the attorney general and its evolution in the British North American environment. For while the English office attempted to maintain the veneer of an apolitical legal advisor, the colonial attorney general was, almost from his inception, an overtly political figure who, thanks to the ideology of law and a willing suspension of disbelief, affected an apolitical status. This fiction shaped the attorney general's role within the contours of responsible government and the innovations introduced by the Union of 1867. In fact, the fiction was so pervasive that it remained unscathed on each occasion concerns were raised over the increasing political duties heaped upon the attorney general's office – inquiries that failed to reflect upon the politicized nature of law and legal remedy. Not only did the ideology of law cast the attorney general in a particular light, it would also provide a consequent rationalization for vesting a whole series of duties and responsibilities in the freshly minted Department of Justice within a year of proclaiming the new dominion.

The Politics of Advice

Although it is possible to trace the English attorney general's roots back to the fifteenth century, the administrative changes following the rebellions of 1837-8 set in motion a series of events that recast the office in British North America. True, while the careers of individuals such as Francis Maseres, James Monk, John Beverley Robinson, and Richard Uniacke, Sr., had laid bare the attorney general's inherent political character, the post-rebellion administrative and political reforms raised that character to the forefront of the Canadian office.[17] As Paul Romney argues in his splendid study of the attorney general in Ontario from 1791 to 1899, the effect of responsible government on the law officers was twofold: "The political responsibility of a minister of justice suddenly fell on the Attorney General," and "With it, as an inevitable concomitant of that responsibility, went membership in the cabinet."[18] Romney further argued that although "these developments were unexampled in the history of England and its empire, they were logical consequences of the province's political history and social structure."[19]

Romney's point is well taken, although I hasten to add that the basic paradigm highlighted by Harry Arthurs still shaped the very nature of an attorney general. While local history and social structure provided the attorney general with distinctive regional meaning, that meaning was cast within imbedded notions of law, the legal profession, and the corresponding politics of legal decision making; all were crucial components of the ideology of law and its role in shaping the activities of the federal Department of Justice and its role in completing Confederation. Therefore, while the Durham report initiated a series of reforms giving rise to a particular type of attorney general before 1867, and thus lent a specific flavour to the new Department of Justice in 1868, we must be mindful that these developments were nonetheless framed by a parallel and often unarticulated ideological context.

In voicing his concerns and solutions for the political troubles that had beset the Canadas in 1837-8, Lord Durham emphasized a systemic weakness of the two provinces' administrative structures. Specifically, "The Executive Council, the law officers, and whatever heads of departments are known to the administrative system of the Province, were placed in power, without any regard to the wishes of the people or their representatives; nor indeed are there wanting instances in which a mere hostility to the majority of the Assembly elevated the most incompetent persons to posts of honour and trust."[20] He later continued, "Now, I do not at all exaggerate the real state of the case when I assert, that there is no head of any of the most important departments of public business in the Colony."[21] Finally, "Of no one of these departments is there any responsible head, by whose advice the Governor may safely be guided. There are some subordinate and very capable

officers in each department, from whom he is, in fact, compelled to get information from time to time. But there is no one to whom he, or the public, can look for the correct management and sound decision on the policy of each of these important departments."[22]

Durham's notion of responsibility raised two specific issues for the attorney generals.[23] Institutionalizing responsibility in the legislative assembly acknowledged that when the attorney generals tendered advice within the cabinet they, along with all members, did so as political creatures. The legalistic character of this advice, however, did nothing to shield the law officers in the assembly. Arguably, the absence of any special standing tacitly admitted the confluence of law and politics. Yet despite ordinary status within the assembly, government decision making provided the attorney generals with the singular position of providing allegedly apolitical legal advice and then, as members of cabinet, voting on political initiatives flowing from that legal advice.[24]

Attendant was a second level of responsibility wherein the attorney generals were to be accountable for sound departmental management and policy. Beyond the subtle distinctions created by political responsibility in the assembly and cabinet, the question of what defined sound management created another set of potential institutional quandaries. Was sound management and policy a wholly internal guideline that, on a practical basis, was concerned with the creation and operation of an administrative structure through which policy decisions could be traced to their origins? Or was this to be a manifestation of the broader political responsibility wherein the attorney general, and the government of which he was a part, were to be politically and legally responsible for the action, or lack of action, from the supporting bureaucracy? Essentially, in assuming the role of political and legal head of his office, did the attorney general obtain full administrative and internal autonomy, or was the whole process to be answerable to Durham's broadly conceived political responsibility?

Sorting out the implications of Durham's suggested reforms fell to Charles Poulett Thomson, who, upon his appointment as governor general of British North America, assumed his peerage as Lord Sydenham. Influenced by Benthamite Utilitarianism, Sydenham embraced centralization and reform in the united Canadas as the key elements in solidifying imperial bonds and preventing further outbreaks of disaffection.[25] Indeed, Sydenham and Colonial Secretary Lord John Russell agreed that a complete reorganization of the local departmental structure needed to occur before any fundamental reordering of colonial government.[26] Following the recommendation set out in Durham's report, Russell further thought it crucial that, "The functions of the department heads should be clearly explained to them and that all were to be directly responsible to the governor for the conduct of public business. Recognizing the importance of

unity of command, Russell wanted to provide each department with a responsible ministerial head."[27] Not only would this place the attorney general at the head of his own department, but the direct responsibility of other heads would encourage an increased reliance on the attorney general for guidance in the formulation of a wide range of government initiatives.[28]

The establishment of responsible government, the parallel emergence of political parties, and the coincidence of party leaders being drawn from the legal profession gave rise to yet another change when "it became the practice for the leader of the government party to take the office of the Attorney General."[29] Once again, the attorney general was placed in a position revealing the congruence of law and politics. Considering the genesis of the attorney general, it is clear that responsible government did not create this congruence. Rather, it confirmed that the notion of an apolitical law officer was a fiction. Indeed, as J.E. Hodgetts writes, *"By the time* responsible government had been granted, the offices of the attorney general for Canada East and Canada West had become the centres where parliamentary strategy was planned and major administrative decisions were reached. It was no accident, then, that found the two premiers most frequently operating from these two offices."[30] Indeed, in 1846 it was recognized that the expanding political activities of the attorney generals made it increasingly difficult to perform their traditional legal functions.[31]

Although these elaborations in the stature of the attorney general did not escape criticism, much of the commentary and debate focused on fairly specific concerns. For example, the almost perennial midcentury discussion of the law officers' duties and remuneration only occasionally considered the implications of the congruent legal and political activities.[32] And even when individual members did raise the question, their concerns were framed within the dominant paradigm that the law and its interpretation were apolitical. Thus, rather than wrestling with the question of whether the law was inherently political, critics such as Robert Christie, Lewis Moffat, and John Hillyard Cameron all concentrated on how the political activities of office holders coloured that which normally would be untouched by petty politics and opportunism.[33] This thinking allowed Cameron, for one, to suggest that eliminating the solicitor general's office, creating a cabinet law officer to provide government with advice on policy questions, and restricting the attorney general to nonpolitical legal work would rectify any conflicts concerning legal counsel. Cameron confidently insisted that his reforms provided for the presentation of legal guidance "irrespective of any political bearing."[34]

Not only were the suggestions rejected but the debate provided a forum wherein the attorney general's political aspect was actually extolled. Responding to Cameron's query as to whether an attorney general could provide sound legal and policy advice simultaneously, Attorney General

Robert Baldwin assured the legislative committee that dispensing with the office of attorney general, "as clothed with its present political character ... in a community like ours" would not be "practicable to do so with advantage to the public."[35] Alluding to the circumstances raising men of the bar to political prominence, Baldwin added that the "leading man, of whatever party may be ascendant, will belong to the profession of the Law. In preparing, therefore, the list of an Administration for the consideration of the Representative of the Sovereign, such person will naturally prefer the Office that keeps him, in form at least, connected with his Profession."[36] Portrayed in these terms, Baldwin's description introduced an amended version of the fiction. Rather than simply denying the indissoluble connections between law and politics, he emphasized the public utility and professional advantage of their proximity while, at the same time, stopping short of acknowledging the political essence of the law officer.

The near admission had important consequences for the entire administrative structure of the united Canadas. Consistent with Baldwin's reliance on the utility of the law officers' position, Hodgetts observed the tendency that the law officers came to provide "much of the central co-ordination which was expected of cabinet as a body. Not only were they responsible for directing political strategy in Parliament but also their legal abilities induced other departments to appeal to them for rulings – not always on points of law – which in turn came to be treated as rulings of the whole cabinet."[37] Inasmuch as the development signalled both the prominence of the law officers and the political timidity of their colleagues, it was also rather ironic. While on the one hand it remained necessary to maintain the fiction of law's apolitical character, it had also become convenient for legislators to continually assert the legal character of every decision rather than shoulder the political responsibility for running their respective departments. It was, of course, this exact tendency that compelled D'Arcy McGee to conclude in 1863 that the law officers were assuming too much political responsibility for the other departments.[38]

Although McGee's report was hardly prescriptive, it documented, both consciously and subconsciously, the attorney general's evolution during the previous twenty years. For example, the attempted innovation of registering the various opinions delivered by the two attorney generals was noted as a positive if unevenly executed practice. While the inefficacious policy did not prevent opinions and documents from being carted off, at least it recognized the utility of recording the government's legal memory. In the end, however, McGee was no more able than earlier commentators and critics to move beyond the fictional separation of law and politics: "It seems by no means necessary that references should be constantly made to the Attorney General East or West, on questions of administration as distinguishable

from questions of law. That either of the chief law officers may happen to be Premier and, therefore to be consulted on grounds of public policy, cannot of itself relieve the head of any department from his own proper official responsibility."[39]

On the eve of Confederation, therefore, the ideology of law in tandem with the consequences of the Sydenham experiment in responsibility and centralization had placed the attorney general at the forefront of Canadian politics. Criticized on some fronts, the development was especially targeted because it paralleled the attorney general's withdrawal from the courts at the same time the office became synonymous with political leadership. And while commentators circled around the deeper issue, none recognized the futility of criticizing the attorney general for being political. The widespread subscription to the paradigm of law as apolitical and necessary forestalled such an inquiry and ensured that the apolitical attorney general would continue to be a paradox during the completion of Confederation between 1867 and 1878.

A National Department of Justice

Introduced during the first week of May 1868 and receiving royal assent three weeks later, the bill establishing the Department of Justice retained the historic peculiarities of the attorney general's office under new nomenclature.[40] Specifically, the act created a political minister of justice to advise the government in the Privy Council alongside an attorney general to provide legal direction to the departments of state. That a single individual would occupy both roles was a sleight of hand that escaped any discussion in the Commons. Evidently, the pre-Confederation assertion that a person could comment on law or politics without fear of one influencing the other also applied after Confederation to a similar person holding two distinct, if related positions. As John Edwards writes, "It is difficult, however, if not wholly unrealistic, to make such a distinction drawn by the Act of 1868 in circumscribing the advisory role of the Attorney General, qua Attorney General, to that of advising the Heads of Department, as opposed to the Government itself."[41] Although unrealistic, this distinction was nonetheless maintained throughout the act creating the Department of Justice.

Section one of the act brought into existence a department of the civil service called the Department of Justice and created the post of minister of justice, who would manage and direct that department.[42] The ensuing section elaborated the minister's role within the government. Charged with the responsibility of ensuring that "the administration of public affairs is in accordance with the law," the minister also supervised "all matters in connection with the administration of Justice in Canada" not included within provincial jurisdiction.[43] Finally, the minister was to review legislative acts

and proceedings of the provincial legislatures, comment on all matters of law referred to the Crown and, finally, assume all other duties assigned by the governor general in Council.

Section three pertained to the responsibilities of the attorney general, as distinct from the minister. The attorney general of Canada was to possess the duties ascribed to the same office in England, while also enjoying the powers and duties of the several provincial attorney generals in the provinces prior to Confederation, so far as they did not conflict with the division of powers under the British North America Act, 1867. Substantively, this meant that the federal attorney general would not supervise the daily administration of criminal law, but would continue to advise the government – a duty shared with the minister of justice. Most importantly, the federal attorney general was entrusted with advising the several heads of departments of the government "upon all matters of Law connected with such Departments."[44] In practice, this meant that the Department of Justice reviewed and approved every piece of federal legislation. Specifically, if the government was to be liable for any action, or could be held accountable for nonaction, the attorney general had to be involved in that determination. Furthermore, in any instance where the government was deemed to be liable, or in litigation where the interests of the federal government or Crown were at stake, the attorney general was to represent those interests. Finally, the attorney general was responsible for the administration of the penitentiaries and prisons of the Dominion; he was charged with the settlement of all instruments issued under the Great Seal of Canada; and he was to be accountable for any additional duties assigned by the governor general.

While the legislation failed to elicit any commentary in Canada, the colonial office was less accommodating. The act's provision that the federal attorney general was to supervise the administration of criminal law caught the attention of those at 14 Downing Street.[45] Their concern focused on whether an expansive reading of the act might allow the attorney general to act in an area that, under section 92 (14) of the British North America Act, was delegated to the provinces. Upon submission to the English law officers, however, it was determined that the Department of Justice Act was consistent with constitutional divisions concerning the administration of justice.[46]

Given the act's content, it is surprising that the colonial office did not raise another query. Aside from questioning the fanciful effort to create the impression of duality in a single office, it is puzzling that the division of responsibilities did not give reason to pause. Specifically, that the minister of justice, who was clearly cast in a political role, would be entrusted with the constitutional review of all provincial legislation seems to be a peculiar choice. To the extent that the fictional division between minister of justice

and attorney general could be maintained at all, would it not have been more appropriate for the "apolitical" attorney general to render these highly sensitive and often contentious judgments? However, from the perspective of Sir John A. Macdonald, chief architect of the union scheme and the act creating the department, placing the review of provincial legislation in the hands of the minister of justice made perfect sense. If the completion of Confederation was to be accomplished by building political understandings within the broad contours of the constitution, it was crucial that a political minister of justice be able to round off the edges of strict interpretation. To further this end, two weeks after the Department of Justice Act was passed into law, Macdonald issued a memorandum outlining the terms whereby the minister of justice would reserve or disallow provincial legislation.

The memorandum of 8 June 1868 on reservation and disallowance made three points.[47] First, it was evident that the authority to reserve or disallow was to be used to forward Macdonald's centralist vision of Confederation. Second, the duty of reviewing provincial legislation would place the minister of justice in a quasi-judicial role. Finally, while reservation and disallowance were to be viewed in these terms, it was equally clear that Macdonald remained open to discussions specifying what was practically, as opposed to literally, constitutional.

The most contentious aspect of the memorandum was the minister's prerogative to decide that a provincial enactment was unconstitutional and to then be able to adjudicate the claim. As David Mills, the young reform politician, confided to his diary, declaring a piece of legislation ultra vires "is a judicial determination and should be left to the courts exclusively."[48] Mills concluded that, "Our Court of Error and Appeal should be a Judicial Committee of the Privy Council and then before his Excellency disallowed any Local law they might be called upon to determine judicially whether it is constitutional or not. The Attorney General of the Province being called upon to defend [sic]."[49]

As part of this judicial function, the minister enjoyed considerable latitude in determining what constituted the "interests of the whole Dominion." Given that the minister was to decide, it is evident that this was a political question, despite the constitutional context. The memorandum also cited "cases where the Law and the general interests of the Dominion imperatively demand" disallowance as further grounds for federal action. Although such a decision may initially appear to be one governed by the simple reading of a provincial statute to ascertain its legality and constitutionality, the minister's political inclinations would necessarily have shaped the task. Despite the fiction that legal advice is apolitical, that advice was imbued with the minister's values, just as the law was coloured with the values of those who framed it, or precedents upon which it was based. For the minister, therefore, the task of interpreting the law involved a contest of

balancing the letter and spirit of the law with his personal and political interests alongside the broader social, political, and economic environment.

Following in train from the creation of the department and the memorandum on disallowance and reservation, a circular issued by the department on 11 June 1868 reasserted the attorney general's pivotal role in shaping the federal government's legal persona. Consistent with the centralizing flavour of the Sydenham reforms and the Department of Justice Act, the circular specified that the attorney general was charged with advising all departmental heads upon matters of law. Further, the attorney general was "entrusted with the regulation and conduct of all litigation for or against the Crown and any Public department in respect of any subjects within the authority and jurisdiction of the Dominion."[50] Given this responsibility, the various departments were directed to forward a memorandum "of all suits or matters in litigation," as well as the "names and residences of the professional Gentlemen in whose conduct they may have been placed, to enable me [Macdonald] to see that the same are in proper train." Further, Sir John requested that, as cases requiring litigation occurred throughout the federal administration, it be practice to "transmit the same and all necessary documents or instructions to enable me to take such proceedings as may be deemed advisable."

The combined impression of the three initiatives is striking. The act created the peculiar appearance of duality while it confirmed a fictional apolitical attorney general and instituted a political minister of justice to interpret the constitution. Second, the minister was provided a judicial function in tandem with the latitude to foster political understandings as a solvent to constitutional disagreements. Finally, the attorney general was confirmed as *the* authoritative legal voice for the federal government; a particularly advantageous position given the confluence of law and politics in the art statecraft during the completion of Confederation. Thus, as the union scheme of 1867 approached its first birthday, the ideology of law blended with the political environment of the Canadas in the wake of Durham and Sydenham, producing a Department of Justice in which the minister of justice and attorney general were affirmed as the federal government's legal voice. That the act and the initiatives that followed contained a number of vagaries was less important than providing the department with the means to complete that remaining undone in July 1867. To that end, the act, the memorandum, and the circular provided the minister of justice with considerable room to manoeuvre within the general compass of federal responsibility.

Although Macdonald succeeded in reaffirming the fiction, its continuation relied upon a close approximation to reality. This was to be especially challenging given the difficulty of perpetuating the supposed division

between minister of justice and attorney general. Since it is unlikely that few would be willing to countenance the artificial duality, Macdonald was obliged to be especially conscientious, at least when it came to his behaviour as the first minister of justice. As much as was possible, his actions needed to correspond to expectations for an apolitical attorney general, as opposed to a political minister of justice. Much to his credit, he generally succeeded during his first term in office. Upon his return to the hustings in the general election of 1872, however, politics tripped up Attorney General Macdonald in what became known as the Pacific Scandal.

Beyond the details of the scandal itself, it is especially notable that from Governor General Lord Dufferin's perspective, the alleged financial indiscretions were particularly fatal for an attorney general. Writing on 19 October 1873 as the scandal erupted, Dufferin asserted that it

> is still an indisputable and patent fact that you and some of your colleagues have been the channels through which extravagant sums of money as derived from a person whom you were negotiating on the part of the Dominion were distributed throughout the constituencies of Ontario and Quebec, and have been applied to purposes forbidden by the statutes ... In acting as you have I am well convinced that you have only followed a traditional practice, and that probably your political opponents have resorted with equal freedom to the same expedients, but *as administrator of justice and the official guardian and protector of the Laws, your responsibilities are exceptional*, and your immediate and personal connection with what has occurred cannot but fatally affect your position as Minister.[51]

While Dufferin's words reflect his own conceptions of propriety as much as they comment upon Macdonald's involvement, they nonetheless hinge on the fiction of the apolitical attorney general. Although there was a genuine flaw in what Dufferin termed "a traditional practice," the perceived misdeed was fatal *because* Macdonald was attorney general. Essentially, Sir John answered to the fictional apolitical attorney general despite the fact that that office was unconnected to the financial irregularities. Ironically, Macdonald imbued the fiction with new credibility by the example of his own personal defeat seventeen days after Dufferin's letter.

Although Alexander Mackenzie's Liberal government swept into office on a wave of moral indignation in 1873, there was little reason to resurrect the pre-Confederation inquiries into the function and place of the attorney general. From the Liberal perspective, the scandal had not revealed the legal advisor's inherent political character but rather that the Conservatives could not be trusted to protect the attorney general's apolitical aura. This declared higher morality, in concert with a commitment to the fiction, was, from a

Liberal perspective, one feature distinguishing them from Macdonald's Conservatives. Given the right circumstances, however, these notions might lead an attorney general to adopt what subsequently emerged as a controversial public stance, in the expectation that Liberal morality shielded the office and entrusted to its occupant a wider field of endeavour. Either naïve or arrogant, the assumption marked the federal Liberals during the completion of Confederation. Considering his exaggerated sense of self-importance, moralistic aspirations, and inclination to overreact to criticism, it is less than surprising that of all the Liberal ministers of justice, it would be Edward Blake who found himself in a predicament questioning his judgment and commitment to maintaining the attorney general's apolitical stature.[52]

Initiated by a Charles Tupper speech delivered in Halifax on 16 November 1875 and then embroidered by Sir John eight days later at a banquet for Thomas White in Montreal, the attack concentrated upon Blake's maintenance of his lucrative private practice while accepting his $7,000-a-year government salary.[53] Macdonald's criticism sharpened the censure: "I do not wish to make his holding Briefs, a ground for attack upon Mr Blake, as being wrong, in itself, but I say as Minister of Justice he ought always be at head-quarters (applause); and I know it took me all my time to perform the duties of my office – when holding that position – faithfully and well." Further, "We find Mr Blake, the Minister of Justice, practising before the Judges he himself nominates, and whose salaries he may recommend to be raised, and whom he promotes from Puisne Judges to Chief Justice, and from Vice Chancellor to Chancellors (Hear, hear). This is the experience we have of their administration of public affairs (Applause)."[54] That the *Toronto Globe* defended the besieged Blake by suggesting he should be better paid for his skills as attorney general caused still more aggravation.[55]

As Blake reminded Mackenzie two days after Macdonald's Montreal speech, accepting the attorney general's post had been contingent on his "intention not wholly to dissociate myself from practice during my tenure of office." From Blake's perspective, a principle was involved. If a lawyer built his practice and was then compelled to abandon it upon elevation to office, a class of dependent public men would be created: a result that Blake described as "highly injurious to the country."[56] For his part, Mackenzie reassured the irascible Blake that their understanding had not been forgotten: "I considered the subject before you joined the Government and as I told you then, came to the conclusion that there was no reason why you should not continue your practice though certain cases would as a matter of course come up which you would not accept a brief in. Judges and lawyers have expressed themselves to me in the strongest possible terms in confirmation of these views within the last few days."[57] After threatening to refuse his public salary, Blake reversed course and resolved to distance

himself from private legal business, and the embarrassment passed from the political arena.

The naïveté of the agreement between Mackenzie and Blake, and how it reflected both Liberal self-perception and their faith in the ideology of law, is remarkable. Had a Conservative attorney general, and especially John A. Macdonald, acted in a similar vein, the Liberals would have howled. Yet because as Liberals they drew on a "tradition of respect for the rule of law, popular and individual rights, equality and honesty," they felt entrusted with greater latitude in defining what was appropriate for an attorney general while respecting his apolitical character.[58] The logic was credible only if one was prepared to accept the a priori assertion that liberal ideals necessarily shaped the daily reality of Liberal policy and decision making. Evidently, neither Mackenzie nor Blake considered the possibility that those outside the fold would reject this depiction of Liberal virtue.

Nearing the end of their term, the Liberals acted on their belief that they alone could be trusted to respect the distinctions between the political minister of justice and the apolitical attorney general. Evidently, Blake had long harboured the notion that the department required two leaders and, after having obtained Mackenzie's backing, set about drafting such a reform.[59] Four months after the promise had been made, Blake produced a nine-page memorandum abolishing the receiver general's department and reorganizing the Department of Justice.[60] Blake resigned from office before the measure could be introduced, and so it fell to Toussaint-Antoine-Rodolphe Laflamme to announce Bill 51 regarding the receiver general and attorney general. The substance of the legislation was relatively straightforward; the receiver general's office would be subsumed by the Department of Finance and the Department of Justice would be subdivided into two distinct branches under the supervision of a minister of justice and an attorney general.[61]

The Opposition's attack on Laflamme's bill followed two tacks. Although Peter Mitchell, Independent MP for Northumberland, New Brunswick, accepted the contention that the receiver general's office had become redundant, he objected to a separate office of attorney general since it would further enhance the legal profession's influence in the House. Mitchell took specific offence at seeing "the offices of the country monopolized by the legal sharks of this House."[62] Suggesting that the alleged increase in departmental business was the result of inexperienced ministers, Sir John A. Macdonald resurrected the earlier attack on Blake by suggesting that, "Any Minister of Justice applying himself solely and entirely to the work of his Department could fairly perform it; one man could do it with proper assistance."[63] More importantly, the presence of two legal advisors in cabinet would lead to a division in opinion and perhaps in public

responsibility. Such an environment produced "weakness, vacillation, and want of unity of action."[64] In Macdonald's opinion, "You cannot have two chairmen. You cannot have a double-head. There is a three-headed Cerberus; but there cannot be a double-headed Minister of Justice."[65]

Prime Minister Mackenzie reversed Sir John's criticisms by first pointing out that Macdonald "had four members conducting the legal business of Old Canada, and he never objected to the plan then."[66] And regarding the increased business in the Department of Justice, Mackenzie suggested that, "The right hon. gentleman must be aware that the change in the laws, and many other incidents connected with recent legislation, has materially increased the duties. The Hon. member for South Bruce (Mr Blake) had, perhaps, a capacity for work more than any other member of the House, and yet his powers were taxed to the very up most in order to keep up with the duties of office."[67]

Blake then rose in defence of the measure, arguing that no single individual could, under such circumstances, address the queries forwarded to the Department of Justice and attend the requests of members and government departments: "It was surely impossible for any one man, no matter how great his ability, to accomplish, during a session, the whole of the business assigned to him. No man who held a high political position, no matter how great his talent, could succeed in accomplishing all that business."[68] Although passed by the Liberal majority in the Commons, the Conservative-dominated Senate voted against the bill "as a most unnecessary and unwise move."[69]

The Fiction Remains

The bill's defeat signalled an important event for the attorney general. While both parties had subscribed to the fiction of the apolitical attorney general, by 1878, the Liberals had concluded that they alone could be entrusted to protect the ideal and its function for the federal government. From a Liberal perspective, experience demonstrated that the transparent duality of the Department of Justice Act was untenable in Conservative hands. Further, while the Liberals could be trusted with the original form of two offices held by one person, under their leadership, the suggested reform would have no adverse effects and would improve the department's efficiency. Left in its original form and in Conservative hands, the artificial duality would foster inefficiency, the politicization of justice, and, as the Pacific Scandal demonstrated, corruption. That the initiative fell in the Conservative Senate merely confirmed that their party had no respect for the liberal ideal of justice and the rule of law.

Significantly, the parting of ways over the structure of the Department of Justice did not correspond to a fundamental disagreement as to its function. The Liberal bill sought to create the appearance that the attorney general,

as a distinct person from the minister of justice, would be uninvolved in "political" decisions. As had occurred on every occasion when the attorney general became a subject of debate since the 1840s, the discussion failed to explore the issue that by determining rights, dividing property, imposing rules, or attempting to create stability, law is inherently political. Doing so under the auspices of an allegedly apolitical attorney general did nothing to change this basic attribute. The disagreement over the proposal revealed that while Conservatives were comfortable with the manoeuvrability provided by blurry distinctions between law and politics, Liberals preferred the illusion of fixed and observable boundaries.

Despite the notable divergence over how the law officer should appear, the fiction of the apolitical attorney general nevertheless remained intact. Given that both parties and most of their members would have subscribed to the basic paradigm of law, an unspoken agreement as to the attorney general's function is neither surprising nor accidental. In practical terms this meant that as attorney general or minister of justice, the government's legal advisor possessed enormous latitude in performing his duties. Nor was this accidental. Little was truly fixed in 1867, and completing the Confederation scheme required interpretative flexibility in what was often a charged political environment. While the federal government expected to be the dominant force in shaping the substance of Confederation after 1867, even at that early date it was perfectly clear that this would not be effected by battering the provinces into submission. Regardless of who held power between 1867 and 1878, this view from Ottawa was remarkably consistent.

Breathing life into the act of union, smoothing over rough spots, and rounding sharp edges were not, however, tasks to be completed with great haste. Feeling a way through the new constitution often required understandings and accommodations born of patience and a willingness to build consensus. This was a process that occurred on a daily basis, as the Department of Justice staff attempted to steer the government through the evolving legal and political relationships of Confederation. Some of these relationships eventually appeared within new national institutions while others took form as the daily methods of governance and statecraft. In the final analysis, while the attorney general was able to effect understandings on a political level, the dynamic within the department itself was necessarily framed by a different context. For while the attorney general or minister of justice could administer the appropriate measure of political solvent to a legal impasse, it was the department's responsibility to map the legal terrain in preparation for such a solution. To be effective, the government's legal advisor required sound intelligence on a given situation, and the departmental staff was charged with that responsibility. Their approach to that task is the subject of the next chapter.