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THE UPPER CANADIAN LEGAL RESPONSE TO THE CHOLERA EPIDEMICS OF 1832 AND 1834

A thesis presented to the Faculty of Law, University of Ottawa

in partial fulfillment of the requirements for the

Doctor of Laws degree

by

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ABSTRACT

Much of the recent legal historiography of Upper Canada dwells on the motivations of the governing class in implementing statute law and operating legal institutions. Some authors employ a relatively radical interpretation of élite motivation, insisting on a self-interest manifested through the manipulation and, occasionally, the outright disregard of law, institutions and legal ideology. For others, a fair interpretation of the behaviour of historical actors attempts to understand those actors on terms consistent with contemporary ideals. The result is a more conservative functionalism that interprets the role of law in history relative to the accomplishment of those ideological imperatives to which decision-makers were committed.

However, the tendency in both approaches is to the subordination of law in legal history. The consequence is a reductionism in Upper Canada's legal history, by which the law is rendered epiphenomenal, secondary to politics, economics or, perhaps, self-interest. The overarching theme of this thesis is that very little legal-historical activity can clearly be characterized as purely self-interested, or purely idealistic. Rather, much of what occurs in the legislative chamber and in the minds of decision-makers is concerned with the mundane events of ordinary life, and not with the political intrigue and idealism that arguably emerges from consideration of events of particularly high political drama.

To illustrate, this thesis will consider the Upper Canadian legal response to the cholera epidemics of 1832 and 1834. First, an attempt will be made to analyse the reluctance of the executive government to employ initiatives (both executive action and legislation) to combat the disease similar to initiatives in neighbouring jurisdictions. The executive and legislative responses will be seen to be motivated in large part by commitment to a widely shared vision of the public good inconsistent with many ordinary public health measures, including quarantine,

reflecting some of the idealism one might predict through the conservative functionalism that characterizes much of Upper Canada's recent legal historiography.

Secondly, the municipal legal response to the disease will be considered to illustrate the way in which a great deal of law develops not out of self-interest or idealism, but rather out of environmental pressure. The history of the legal response to the cholera epidemics is incomplete unless proper account is taken of the more mundane response of municipal authorities to the disease. It is in this arena that the legal historian can overcome the subordination of law to politics, and instead consider law as a mechanism to defend a relatively pristine legal community from environmental threat. The conclusion is that, to be more complete, Upper Canada's legal history must privilege environmental pressures as well as élite motivation in the design and implementation of law and legal institutions.

THE UPPER CANADIAN LEGAL RESPONSE

TO THE CHOLERA EPIDEMICS OF 1832 AND 1834

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ABBREVIATIONS

In this thesis, the following abbreviations shall have the following meanings:

"AO" -	Archives of Ontario, Toronto
"CTA" -	City of Toronto Archives, City Hall, Toronto
"NLC" -	National Library of Canada, Ottawa
"PAC" -	National Archives of Canada (formerly the Public Archives of Canada), Ottawa
"TFR" -	Thomas Fisher Rare Book Library at the University of Toronto
"TPL" -	Baldwin Room at the Metropolitan Reference Library, Toronto Public Library system

CHAPTER ONE – INTRODUCTION

CHOLERA AND THE LAW IN UPPER CANADA

Much of the recent legal historiography of Upper Canada dwells to a great extent on the motivations of the governing class in designing, enacting and implementing statute law. Some of this scholarship employs a relatively radical interpretation of élite motivation, insisting on a self-interest manifested through the manipulation and, at times, the outright disregard of law and legal ideology. Other works, whose authors resist the temptation to cast historical judgment from the comfort of retrospective intelligence, are more sympathetic to the actions of the governing class. For these latter authors, a fair interpretation of the behaviour of historical actors is one that insists on the attempt to understand those actors on their own terms, on terms consistent with contemporary ideals and understandings. In an attempt to contribute to the ongoing debate between these two camps, it is the overarching theme of this thesis that very little legal-historical activity can clearly be characterized as purely self-interested or purely idealistic. Rather, much of what occurs in the legislative chamber and in the minds of decision-makers at every level of the legal and administrative bureaucracy is concerned with the mundane events of ordinary life, and not with the political intrigue and high-minded idealism that arguably emerge from consideration of events of particularly high drama. This is the case with everyday debates over the design and implementation of law, yet is also true when those in authority are confronted with emergencies of a kind unprecedented in local experience.

Such an emergency presented itself to decision-makers in Upper Canada with the arrival of cholera in the late spring of 1832. Cholera was to the nineteenth century what bubonic plague was to the fourteenth and seventeenth, the dreaded scourge apparently born of filth and squalor that swept away thousands of unfortunate victims so quickly that many died before ever being

diagnosed. First identified in India in the second decade of the nineteenth century, cholera spread relentlessly across western Asia and north into Russia. Accompanying the Russian army on its excursions into Poland in the early 1830's, cholera easily penetrated Western Europe, eventually surfacing in Sunderland, England, in the fall of 1831.[1] While other diseases surpassed cholera in death tolls during the 1800's, none initiated fear quite so absolutely.[2] The disease was horrible to suffer, and perhaps even more horrible to witness, with its violent evacuation of fluids from the body to the point of virtually complete dehydration and death. The end often came within a few short hours of the appearance of the first symptoms.

When cholera made its appearance in the early 1830's, Upper Canada was a relatively isolated outpost of the British Empire, connected to the major shipping lanes of the Atlantic Ocean only by the St. Lawrence River through Lower Canada, and by a series of canals and rivers linking New York City to the Niagara Peninsula. Dependent exclusively on these two river systems for communication of British and other European news, and for transmission of official despatches from the Colonial Office in England to the executive government at York, Upper Canadians often laboured under the twin disabilities of outdated information and an inability to consult those of high authority and experience in a timely, beneficial way.

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[1] Many sources outline the progress of cholera across Asia and into Europe during the early 1830's. See, for example, R. J. Morris, *Cholera 1832: The Social Response to an Epidemic* (London: Croom Helm, 1976), especially 11-15.

[2] In *Cholera, Fever and English Medicine, 1825-1865* (Oxford: Oxford University Press, 1978), Margaret Pelling relates that other diseases, in the United Kingdom at least, caused greater total mortality during the nineteenth century than did cholera. Among them were scarlet fever, smallpox and measles. But cholera, according to Pelling, carried perhaps the greatest "shock value" among these afflictions, and generated a great deal of contemporary literature as a result. See especially 3-5.

According to most accounts,[3] cholera first appeared in Upper Canada in June of 1832. While there are suggestions in the historical record that cholera, or a disease very much like cholera, may have been prevalent in the Niagara area as early as March 1832,[4] and in Hamilton at least two weeks before the earliest accounts from the Districts further east on the St. Lawrence,[5] scholars seem to agree that the disease identified in Prescott in June was the first certain Upper Canadian manifestation of the disease that had been ravaging Europe for about two years. But whether the accurate date for the arrival of cholera in Upper Canada is March or June

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[3] See, for example, Geoffrey Bilson's *A Darkened House: Cholera in Nineteenth-Century Canada* (Toronto: University of Toronto Press, 1980), especially Chapter 3, "'Nothing is to be heard but the Cholera': Upper Canada 1832," pp. 52-64, and Charles M. Godfrey, *The Cholera Epidemics in Upper Canada, 1832-1866* (Toronto: Seccombe House, 1968), especially pp. 5-15.

[4] The earliest record is in a letter of 26 March 1832, in which James Muirhead of Niagara reports to Lieutenant Governor John Colborne on an outbreak of disease in the area. Based on the report of one Dr. Telfer, Muirhead was quite alarmed, fearing that the disease was the same one, cholera, that had recently been ravaging Europe. He pleaded with Colborne in the following terms: "I have to suggest to Your Excellency in the event of the disease assuming a wider field the expediency of having a plan for the reception of the patients – by having them together more efficient medical aid could be ministered to them – and it might be the means of circumscribing the disease. I therefore trust Your Excellency will be pleased to direct the Military Hospital here to be placed at our disposal for that purpose." Muirhead to Colborne, 26 March 1832, PAC, Civil Secretary's Correspondence, Upper Canada Sundries, March-April 1832, RG5, A1, Vol. 115, pp. 64637-64641.

[5] Sheriff William Jarvis of the Gore District wrote to the Civil Secretary on 2 June 1832, asking that the Lieutenant Governor reconsider a pardon recently granted to a named prisoner. Attached to this letter in the Civil Secretary's file is an undated letter from the influential John Beverley Robinson to Colborne, in which Robinson speculates that the sheriff may be worried about an apparent increase in cholera in the Gore District, and the problem of what to do with the inmates in that event. Jarvis to Civil Secretary, 2 June 1832, PAC, June 1832, RG5, A1, Vol. 117, pp. 65511-65517. This recognition of the prevalence of cholera in or near Hamilton is curious, given that the disease was not officially recognized in Upper Canada until confirmed in Prescott on 18 June 1832. Civil Secretary to Alpheus Jones, President of the Prescott Emigrant Society, 19 June 1832, PAC, Governor General's Office, Civil Secretary's Letterbooks, 1799-1841, RG7, G16C, Vol. 26.

of 1832, or perhaps some other date, and whether it first appeared at Niagara, Hamilton, or Prescott, the disease encountered very little resistance from authorities in Upper Canada.

Despite a fairly rigorous legal and administrative attempt to prevent the introduction and spread of the disease in both the United Kingdom and the other colonies of British North America, Upper Canada was virtually completely unprepared for the epidemic. The extent to which the people of Upper Canada suffered for this unpreparedness is not clear, primarily because the measures used to combat the spread of the disease in other jurisdictions were either sadly ineffective or based on often conflicting medical opinion. But it is evident that the people of York, for example, endured a mortality rate of about four per cent during the outbreak of 1832, with at least 200 deaths in a resident population of little more than 5000.[6] A mortality rate of this magnitude would be alarming if the sample were limited to those *infected* with the disease; but to lose four per cent of a community's population in a short span of about ten weeks underscores just how dangerous cholera really was. For purposes of comparison, Paris suffered a mortality rate of less than two and one-half per cent (18,000 deaths) of its 1832 population of

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[6] The extent to which immigrants and transients made up the numbers of those suffering and dying from the disease is not clear, and this difficulty may tend to distort the mortality rates for permanent residents. In addition, the mortality and morbidity reports of the various Boards of Health were notorious for being incomplete and inaccurate, and as a result it is virtually impossible to come to any firm conclusion on the impact of the disease in Upper Canada relative to other jurisdictions. See Bilson, *A Darkened House: Cholera in Nineteenth-Century Canada*, *supra* note 3 at 180, for a consolidated mortality table relative to the epidemic of 1832 in Upper Canada. The mortality and morbidity reports of the Boards of Health in Upper Canada (other than those filed by the York Board of Health) for the period 26 June to 10 September 1832 are found together at Reports of the Boards of Health in Upper Canada, 10 September 1832, PAC, September 1832, RG5, A1, Vol. 121, pp. 67000-67193. Reports from the York Board of Health for the months of June, July, August and September 1832 are found at Reports of the York Board of Health, 17 September 1832, PAC, September 1832, RG5, A1, Vol. 121, pp. 67258-67333.

785,000,[7] Glasgow one and one-half per cent,[8] and the settlement at Québec, probably the first point of entry of the disease into the Canadas, about four and one-half per cent.[9]

This thesis is, first, an attempt to understand and explain the apparent reluctance of the executive government at York to employ legal and regulatory initiatives to prepare Upper Canada for the onslaught of the disease in a manner consistent with the steps undertaken in Nova Scotia, New Brunswick, Prince Edward Island, and Lower Canada. As will be seen, the accepted legal model for preventing the introduction, and then the spread of communicable disease was the system of quarantine first developed in England with the Act of James I, passed in 1603.[10] King James's Act remained unaltered throughout the seventeenth century. Its framework was adjusted slightly by the Act of Queen Anne in 1711,[11] and then reformed a bit more elaborately during the middle years of the reign of George I.[12]

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[7] François Delaporte, *Disease and Civilization: The Cholera in Paris, 1832*, trans. Arthur Goldhammer (Cambridge, MA: The MIT Press, 1986), 5.

[8] Morris, *Cholera 1832: The Social Response to An Epidemic*, *supra* note 1, 82. Morris reports 3174 cholera deaths in Glasgow in an 1831 population of 202,420. Less than one per cent of the Edinburgh population of approximately 139,000 died during the 1831-32 epidemic. Morris refrains from giving mortality rates in London for the period, reluctant apparently because of wildly inaccurate and incomplete reporting at the time.

[9] According to Geoffrey Bilson, the death rate in Québec settlement during the outbreak was eighty-two per thousand, compared to the average annual mortality rate of thirty-seven per thousand, a difference of forty-five per thousand, or four and one-half percent. Again, however, the figures are highly unreliable. Bilson refers to sources from 1832 reporting as few as 2218 deaths from cholera at Québec, and as many as 3451. Bilson, *A Darkened House: Cholera in Nineteenth-Century Canada*, *supra* note 3, at 48 and 180.

[10] 1 Jac. I c. 31 (Eng.), to be referred to below as "King James's Act."

[11] 9 Ann. c. 2 (U.K.), to be referred to below as "Queen Anne's Act."

[12] During Robert Walpole's administration in the early 1720's, three statutes were passed to make adjustments in the law of quarantine first enacted by virtue of King James's Act. These statutes were 7 Geo. I c.3 (U.K.), 8 Geo. I c.10 (U.K.), and 8 Geo. I c.18 (U.K.). These reforms

Simply put, the English model of quarantine had two principal thrusts. First, local authorities were given the power to establish lazarettos for the sick, hospitals dedicated to the reception and isolation of those suffering from a particular disease. Coincident with this power was the legal right to inspect private dwellings and make orders consistent with the findings on inspection. These powers were vested primarily in civic officials, as opposed to judicial authorities, although constables and bailiffs were specifically empowered to act when they were the "chief officer" in any particular locality. In their mildest form, orders enforced pursuant to these powers might compel the householder to attend to various tasks intended to improve cleanliness in the home and remove filth from adjacent streets. In their even more intrusive form, these orders could forcibly separate the sick from the well by removing one or the other to a place of isolation. Alternatively, local authorities might order that a house, and all its inhabitants (both the sick and the well), be quarantined for a period equivalent to the official understanding of the contagious period of the disease. Armed guards were stationed outside these houses to ensure that no one entered or left, sometimes for a period as long as sixty days. This was the controversial regulatory practice of "the shutting up of houses," particularly offensive to many observers during the Great Plague of London in 1665.[13] I shall refer to

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made no significant changes to the domestic restrictions inherited from King James's Act, but repealed and replaced Queen Anne's Act, relative to import and immigration restrictions, in its entirety. Domestic provisions remained unaltered throughout the eighteenth century, while import and immigration matters were again adjusted by 26 Geo. II c. 6 (U.K.), and 28 Geo. III c. 34 (U.K.), passed in 1753 and 1788 respectively. For a summary of the development of the law in Britain during the eighteenth and nineteenth centuries, see Charles F. Mullett, "A Century of English Quarantine (1709-1825)" (1949), 23 *Bulletin of the History of Medicine* 527, and J.C. McDonald, "The History of Quarantine in Britain During the 19th Century" (1951), 25 *Bulletin of the History of Medicine* 22.

[13] For a particularly vehement denunciation of the regulatory regime, see Thomas Cock, *Hygiene, or a Discourse upon Air* (London: Philem. Stephens, 1665). The literature of the Great Plague of 1665 is replete with similar examples.

measures such as these, that is, measures designed to stem the spread of disease once it had established itself in a community, as "domestic quarantine."

Secondly, English quarantine legislation gave government the power to interfere directly in the import of goods from abroad, and to restrict or prevent the entry of persons (whether citizens or aliens) into the United Kingdom from foreign ports. I shall refer to measures such as these as "trade restrictions," as they relate to goods, and "immigration restrictions," as they relate to people. These restrictions were the subject of the reforms resulting in Queen Anne's Act, and gave rise to often bitter controversy when Robert Walpole's administration attempted to make further adjustments in the early 1720's. Trade restrictions allowed government representatives to quarantine cargo at designated holding locations for specified periods, a practice that particularly infuriated traders in perishable goods. In some circumstances, cargo could be destroyed by order of the official port inspectors. Similar powers were comprised in the immigration restrictions, where those arriving from infected foreign ports could be forced into harbourfront lazarettos until they either died or survived for a period of forty-five or sixty days. As might be expected, trading vessels were notorious in their attempts to avoid the law, especially the system of trade restrictions. But the penalties for disobedience were often severe, involving heavy fines and sometimes imprisonment for the master of the vessel, and in some circumstances, the deliberate sinking of the vessel and its cargo offshore.

When colonial legislatures of British North America confronted the possibility of epidemic disease at the end of the eighteenth century and early in the nineteenth, it was principally to this early English model, with its regime of domestic quarantine largely unchanged since the days of James I, and its trade restrictions and immigration restrictions modified only

marginally since the 1720's, that they looked for inspiration. The tenor of the English legislation on import and immigration restrictions was captured by the Legislature of Lower Canada when it passed the first Canadian statute on quarantine in 1795.[14] New Brunswick followed with a modest statute in 1796, and then repealed and replaced it with two enactments in 1799. These were then amended in various respects throughout the period prior to mid-1831.[15] Later, as cholera approached the colonies in late 1831 and early 1832 on board vessels laden with immigrants primarily from England, Scotland and Ireland, the House of Assembly in Nova Scotia passed statutes to regulate quarantine and help in the prevention of the spread of infectious diseases.[16] A revised statutory regime was put in place in New Brunswick[17] (replacing

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[14] *An Act to oblige ships and vessels coming from places infected with the plague or any pestilential fever or disease, to perform Quarantine, and prevent the communication thereof in this Province*, 33 Geo. III c. 5 (L.C.). This statute dealt exclusively with restrictions on ships arriving from infected ports, defined in the statute as "any country or place where the plague or any pestilential fever or disease may prevail," and related matters. As cholera became more imminent in late 1831 and early 1832, the Legislature introduced and then passed in February the statute 2 Wm. IV c. 16 (L.C.), by which standard domestic provisions were provided, and by which the quarantine station at Grosse Isle was established.

[15] The first statute was *An Act to prevent bringing infectious distempers into the City of Saint John*, 36 Geo. III c. 5 (N.B.) (1796). This Act was repealed and replaced by *An Act to repeal an Act made and passed in the thirty-sixth year of His Majesty's reign, intituled "An Act to prevent bringing infectious Distempers into the City of Saint John," and to make more effectual provision for preventing the importation and spreading of such contagious Distempers*, 39 Geo. III c. 9 (N.B.) (1799). It was passed concurrently with *An Act to prevent the importation or spreading of Infectious Distempers within this Province*, 39 Geo. III c. 8 (N.B.). Both statutes were amended several times prior to mid-1831.

[16] *An Act to prevent the spreading of Contagious Diseases, and for the performance of Quarantine*, 2 Wm. IV c. 13 (N.S.), and *An Act more effectually to provide against the introduction of Infectious or Contagious Diseases, and the spreading thereof in this Province*, 2 Wm. IV c. 14 (N.S.), both passed 14 April 1832.

[17] There were four principal statutes in the revisions done in 1831 and 1832, prior to the actual arrival of cholera in the Maritime colonies. They were *An Act to amend an Act, intituled "An Act to repeal all the Acts now in force relative to the importation and spreading of infectious distempers in the City of Saint John, and to make more effectual provisions for preventing the same,"* 1 Wm. IV c. 35 (N.B.) (1831); *An Act, to make more effectual provision for preventing*

the earlier statutes of 1799, as amended, referred to above) and Prince Edward Island,[18] prior to the actual arrival of cholera in the Maritime colonies in mid-1832. Each of these later legislative initiatives was largely similar to the domestic quarantine inherited by Walpole's regime from King James's Act, and to the import restrictions and immigration restrictions secured by Walpole through the reforms of the 1720's, as they were amended from time to time during the eighteenth century.

Despite this legislative activity in the area of public health protection throughout much of British North America, the executive government in Upper Canada did not introduce into the Legislature anything like a public health measure relative to epidemic disease until late January 1833.[19] By this date the cholera outbreak of 1832 had run its terrible course. The delay may have been of great significance in the extent to which the disease had impact on Upper Canadian life in the early 1830's. Even if the delay did not actually contribute to a heightened mortality rate in Upper Canada, then it certainly had profound impact on the legal and social practices that emerged at the local level during and after the epidemics.

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the importation and spreading of infectious Distempers within the Towns and Settlements in the Counties of Charlotte and Northumberland, 1 Wm. IV c. 40 (N.B.); *An Act to provide against the importation and spreading of distempers in the Counties of Westmorland, Gloucester and Kent*, 2 Wm. IV c. 19 (N.B.) (1832); and *An Act, to prevent the spreading of infectious or pestilential Distempers*, 2 Wm. IV 2nd c. 5. These statutes continued to be amended, repealed and replaced throughout legislative sessions in 1833 and 1834.

[18] *An Act to prevent the importation and spreading of infectious diseases within this Island*, 2 Wm. IV c. 13 (P.E.I.)

[19] *An Act to establish Boards of Health, and to guard against the introduction of malignant, contagious and infectious diseases, in this Province*, 3 Wm. IV c. 47 (U.C.). This statute will be referred to as the "Boards of Health Act" in the balance of this thesis. In the Revised Statutes of Upper Canada published in 1843, the Boards of Health Act is catalogued as chapter 47, while in the 1832-33 Sessional Volume, it is listed as chapter 48. It is reproduced in full in Appendix 1 below.

It has often been said that "plagues bend history,"[20] possibly in a number of ways to be canvassed briefly in the Introduction to Chapter Two below. However, in connection with the *writing* of history at least, the Upper Canadian cholera epidemics of the early 1830's provide a serious challenge to much contemporary interpretation of the role of law in seeing to the realization of the goals of the legal and administrative élite. In the chapters that follow, it will be my argument that the executive government at York felt constrained in its ability to both protect the public health through legislation similar to that in place in Lower Canada and the other colonies on the one hand, and to protect public economic well-being through the encouragement and facilitation of continued high levels of emigration from the British Isles, on the other. While both of these objectives might claim for their foundation a communitarian understanding of executive responsibility for the advancement of the public welfare,[21] it is evident from the

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[20] This is a "recently overworked phrase" referred to by William H. Foege, "Plagues: Perceptions of Risk and Social Responses," in Arien Mack (ed.) *In Time of Plague: The History and Social Consequences of Lethal Epidemic Disease* (New York: New York University Press, 1991), 9-20, at 9.

[21] By "communitarian," I mean that ideology that sees institutional strength and the right exercise of the leadership function of the governing class as indispensable to the well-being of society. The health of institutions of society, whether political, social, economic or legal, must be maintained at virtually any cost, according to this perspective, so as to ensure the proper organization of society and its proper functioning. Leadership is ultimately responsible for seeing to the accomplishment of this result, based on a genuine belief in the right organization of existing institutions. Co-incident with this perspective is the tendency to privilege community interests over individual interests, and this tendency is often manifested through arguments that would see the sacrifice of individual commercial success for the benefit of overall community health. Especially in Chapter Three below, we shall see this argument at least implicitly advanced in Upper Canada through several examples from the historical record. For an elaboration of this vision and its impact on nineteenth century law-making in the United States, see William J. Novak, *The People's Welfare: Law & Regulation in Nineteenth Century America* (Chapel Hill, N.C.: The University of North Carolina Press, 1996), especially Chapter One, "The Common Law Vision of a Well-Regulated Society," 19-50.

historical record that each vision made its own peculiar demands on executive authority and resources.

In the legal and administrative response to the cholera epidemics in Upper Canada, considering executive behaviour at least, we find the collision of these two often incompatible visions of the public good, and the executive government had ultimate responsibility to see to the accomplishment of both. The cholera outbreaks highlighted the tension between these two visions, and because of the extremely high level of public anxiety prevalent at the time, the response of the legal and administrative élite is particularly revealing as to that élite's allegiance to one vision or the other. This is the administration in the throes of an emergency, when decisions as to the optimal employment of law in furtherance of policy objectives could be expected to have immediate impact on the lives of hundreds, perhaps thousands, of Upper Canadian settlers. As will be seen in Chapter Three below, during the crisis of 1832 the executive government resisted calls for the imposition of quarantine, ignored requests to summon the legislature so as to consider legislation to assist local authorities in their struggles with recalcitrant citizens, and claimed to have done everything humanly possible to protect the populace against the disease without assuming anything like a leadership role. Viewed from this perspective, it will be seen that the immediate executive legal response to the epidemic of 1832 provides a unique window on the controversy between historians who claim a radical functionalism in their interpretation of the role of law in Upper Canadian history, and those who are more understanding of the commitment of the legal and administrative élite to a communitarian vision of the public good, in one form or another.

But the Upper Canadian legal response to the epidemics of 1832 and 1834 involves more than simply a reluctant executive government, at best bewildered by the emergency, at worst

manipulative and duplicitous. In Chapter Four below, I will review in some detail the legislative response to cholera during the session of 1832-1833, comparing that response in several critical areas to the responses of colonial legislatures in Lower Canada, New Brunswick, Nova Scotia and Prince Edward Island. My argument in this chapter will be that the Boards of Health Act was a perfunctory statute, put forward by the administration so as to maintain the appearance of an executive genuinely concerned with protection of the public health through measures consistent with predominant trends in medical thinking and regulatory practices.

However, the Boards of Health Act was weak in a number of key respects, to be illustrated by reference to statutes in other jurisdictions of British North America. These weaknesses give further support to the argument introduced in Chapter Three, that the executive commitment to the vision of the public good embodied in strict domestic quarantine, trade restrictions and immigration restrictions, all of which tended to support arguments for the protection of public health whatever the cost, was never clearly established. Rather, given the weaknesses in the statute relative to precedents in neighbouring jurisdictions, it appears that the executive could only have put forward the Boards of Health Act for purposes of appeasement. The beneficiaries of this approach were those who called for some legislative initiative to assist in battling epidemic disease, while at the same time avoiding the potential threat to the overarching commitment to continued commercial expansion and high levels of immigration that would have been raised by more comprehensive legislation. It will be my argument that, while other interpretations of executive and legislative activity during 1832 and 1833 are supported to some extent by the historical record, it is this demonstration of a commitment to a particular vision of the public good, at the expense of a competing but nevertheless highly popular vision, that emerges most clearly from the evidence. The competing vision had its pragmatic

foundations in widely accepted models of regulatory intervention, which were founded in their turn on respected (although not universally applauded) medical theory. The executive authority at York opted for a course of action that rejected this latter model, despite its widespread appeal and despite its adoption in many other jurisdictions.

There is yet another layer to the Upper Canadian legal response to the cholera epidemics of 1832 and 1834, comprised of the reactions of a number of different administrative, judicial and supervisory bodies which I will refer to collectively as the "municipal response." A consideration of this level of the legal response to the epidemics will necessarily involve reflection on the contemporary structure of local legal institutions, and their relationship to the implementation of new public health initiatives, especially during 1832. In considering this level of legal and administrative activity, we will encounter the day-to-day struggles of those officials who, to some extent because of executive inaction, were vested with the principal responsibility for planning and implementing programmes to protect their fellow citizens from epidemic cholera. Before the executive became involved in preparations for the arrival of the disease in any substantive way,[22] local committees had been formed in many Upper Canadian communities

[22] The first substantive involvement of the executive came with Colborne's circular to Chairmen of the several District Quarter Sessions of 20 June 1832, in which he recommended the establishment of Boards of Health, and in which he committed £500 to the use of each District in erecting hospitals, supplying medicine, retaining medical personnel, and meeting other necessary expenses. Circular – Civil Secretary to Chairmen of District Quarter Sessions, 20 June 1832, PAC, RG7, G16C, Vol. 26. Prior to that, on the urgings of the Bishop of Québec, Colborne had proclaimed a public day of fasting and thanksgiving for 16 May 1832, so as to demonstrate the humility of the public before God. Bishop of Québec to Colborne, 31 March 1832, PAC, March-April 1832, RG5, A1, Vol. 115, pp. 64739-64741; Colborne to Bishop of Québec, 9 April 1832, PAC, Governor General's Office Letterbooks, Upper Canada Lieutenant Governor's Internal Letterbook, 1818-1837, RG7, G16A, Vol. 2; Colborne to Bishop of Québec, 18 April 1832, PAC, RG7, G16A, Vol. 2; *Upper Canada Gazette*, NLC, "Proclamation," 3 May 1832 and 10 May 1832.

along the St. Lawrence.[23] Their purpose was to respond to the alarming reports in local newspapers of the progress of the disease along the Lower Canadian section of the river. These committees emerged for the most part from town meetings, organized and held without official sanction. In Chapter Three below we shall see the struggles endured in these communities to reconcile their local mandate for the promulgation of an effective regulatory regime with instructions given to the District Magistrates by the executive government at York.

This is not to say that the Magistrates performed their official duties relative to the law without difficulty, given their privileged relationship with the administration. They too encountered resistance from Colborne's regime in their attempts to put in place effective regulatory initiatives, and these difficulties will be addressed in Chapter Three as well. The municipal response is further complicated by the role of the Board of Police in Brockville, and by the involvement of Boards of Health appointed by the Magistrates, as opposed to Boards of Health established by the town meetings referred to above. Each of these legal responses will be considered in Chapter Three below. And each of these responses will function as illustration of the confusion, ineptitude and frustration that arguably resulted primarily from the failure of the executive government at York to respond to the threat of epidemic disease through a decisive implementation of legal and regulatory controls. Consequently, it will be argued that this failure of the executive to act in a conventional, interventionist way can be attributed for the most part to the reluctance of the administration to embrace a particular vision of the public good. That vision considered community health as worthy of protection at any cost, including perhaps a sacrifice of something of the economic well-being of the colony.

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[23] *Infra*, notes 219-221 and 224-225, and accompanying text.

In Chapter Five, the epidemic of 1834 will be considered, primarily in light of the implementation of the Boards of Health Act of 1833. We shall see that many of the difficulties encountered in the legal response to the epidemic of 1832 persisted in 1834, despite the apparent preparation of the executive and the legislature. Delays, fiscal concerns and continued indecision on the methods of catching and spreading the disease functioned to undermine the effective operation of the statute. In addition, the statute by which the City of Toronto was incorporated in 1834 ostensibly transferred to the city much of the authority otherwise provided for in the Boards of Health Act, while at the same time repeating many of the problems already evident in that earlier legislation.[24] These difficulties, coupled with the inherent weaknesses of the Boards of Health Act described in Chapter Four, resulted in the persistence of a legal and regulatory impotence that continued to undermine the ability of the citizens of Upper Canada to unite in a concerted and, to the extent possible given contemporary medical understandings of cholera, effective response to the disease.

It is true that the actions of the executive government of Upper Canada in responding to the cholera epidemics of 1832 and 1834 can be cast as self-interested, to the extent that Lieutenant-Governor Colborne manipulated the legal process so as to fulfill his duty to the British Colonial Office to maintain high levels of immigration during 1832.[25] However, it would be misleading to suggest that the history of the relevant law is primarily characterized by that self-interest. And while there are fairly clear ideological motives evident in the struggles of the executive to see to the accomplishment of a particular vision of the public good, perhaps at the

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[24] *An Act to extend the limits of the Town of York; to erect the said Town into a City; and to incorporate it under the name of the City of Toronto*, 4 Wm. IV c. 23 (U.C.), ss. XXII and LXXI. This statute will be referred to as the "City of Toronto Act" in the balance of this thesis. Excerpts from this statute are reproduced in Appendix 3 below.

expense of a competing ideology, the law that emerges from a review of the events of 1832, 1833 and 1834 was not driven principally by ideology. Rather, especially in the case of the municipal response but also to some extent in the executive and legislative response, the law was employed by decision-makers as a simple shield against a serious environmental threat, a shield designed so as to protect the citizenry against the disease to the greatest extent possible, given the state of contemporary medical knowledge. Viewed in this light, the law remains an instrument, but loses its insidious character. And considered from this perspective, the law in history is rescued to a certain extent from its current historiographical role as lieutenant to the commands of politics and economics, a role whose dominant purpose is to see to the accomplishment of objectives conceived and plans designed outside of conventional legal arenas.

To introduce this overarching theme, it is necessary to review at some length certain of the recent legal historiography of Upper Canada, so as to position this thesis relative to the debate between a rather radical functionalist interpretation of the role of law in history, and an interpretation that is less condemnatory of élite activity relative to the employment of law. This will be done in Chapter Two, an attempt to rescue law from its subordination to politics and economics in history. The stage will then be set for a detailed consideration of the Upper Canadian legal response to the cholera epidemics of 1832 and 1834 in the chapters to follow.

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[25] This issue will be canvassed in depth in Chapter Three below.

CHAPTER TWO

THE 'NEW LEGAL HISTORY' OF UPPER CANADA RECONSIDERED

A. Introduction

If it is true, as was suggested in Chapter One above, that "plagues bend history," then it is incumbent on us to inquire into the general nature of the historiography of Upper Canada. This will allow us to come to some understanding of the trends in that material that we might expect to be challenged by the history of the legal response to the cholera epidemics of 1832 and 1834. To begin, there are at least three distinct senses in which we might argue that the intervention of epidemic disease in ordinary life does in fact change the face of the historical record. First, and perhaps most obviously, plagues alter the course of events, interfering in the worldly order in a way similar to war, famine and other catastrophic events. Political, economic and social resources are deflected from their ordinary preoccupations to confront an immediate and dangerous threat to community viability, rendering much typical activity secondary, if not trivial, relative to the activity necessary to preserve public health. Secondly, plagues and other disasters often compel a community to re-evaluate its basic assumptions and priorities, triggering fundamental shifts in normative behaviour and ordinary decision-making criteria. Thirdly, and perhaps most subtly, the appearance of epidemic disease in the chronology of historical events oftentimes illustrates a challenge to the *writing* of history, yielding anomalies and exceptions to otherwise conventional historical interpretation and explanation. Socio-political and socio-economic trends identified through careful analysis of the events of the past are often interrupted

by epidemics, bending (if not breaking) the theories of past action that historians labour so carefully to produce.

It is with the influence of the Upper Canadian cholera epidemics in this third sense that this thesis is primarily (although not exclusively) concerned, and consequently, it is necessary to come to terms with the dominant contemporary interpretations of the legal history of Upper Canada. As will be seen in Chapters Three and Four below, the manner in which the Upper Canadian administration used law in response to the disease is, in important respects, inconsistent with dominant interpretive trends evident in much recent legal historiography of the 1820's and 1830's. The manner in which law was employed by the government will be seen to belie, in part at least, historical interpretations both sympathetic to and highly critical of oligarchic activity during that period. In this chapter, then, I want to outline some of the significant trends and debates in Upper Canadian legal history of recent years, so as to identify in later chapters the extent to which the Upper Canadian legal response to the cholera epidemics is both inconsistent with those trends and anomalous with both sides of much academic debate about the period.[26] The argument will be that the continued focus in Upper Canadian legal historiography on dramatic political events and élitist motivations may tend to distort the role of law in history by ignoring that vast body of law and regulation developed for the relatively mundane purposes of ordinary life. Included in this latter body of law, I want to suggest, are the

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[26] The historiography of Upper Canada is a long and rich tradition, perhaps exemplified in general treatment by Gerald M. Craig's *Upper Canada: The Formative Years, 1784-1841* (Toronto: McClelland and Stewart Limited, 1963), and in political history by Aileen Dunham's *Political Unrest in Upper Canada, 1815-1836* (Toronto: McLelland and Stewart Limited, 1971), first published in 1927. In this thesis, however, the concern is principally with the development of law in Upper Canada, a subject that, arguably at least, has only relatively recently emerged as an historical phenomenon worthy of study in its own right. For that reason, much of what follows in this Chapter and later in the thesis will be devoted to reflection on that new legal historiography, with only occasional reference to the broader historiographical spectrum.

municipal regulatory initiatives developed in Upper Canada in response to cholera. These initiatives tend to contradict much contemporary treatment of Upper Canadian legal history, despite the problems with ideology and motive that, I admit, emerge from a consideration of the executive and legislative response to the cholera epidemics of 1832 and 1834.

This chapter begins with a quick review of the general nature of the "new legal history," follows with a summary of some of the important recent work that has been done on, and the debates that have emerged from, the new legal history of Upper Canada, and concludes with an attempt to position the approach to be taken in this thesis relative to that body of work. This will set the stage for analysis of the way in which the administration and local authorities responded to the outbreaks of cholera during the 1830's, using law as the defense to a natural threat.

B. The Nature of the 'New Legal History'

In the early 1980's, Barry Wright and David G. Bell issued virtually simultaneous pleas for a renewed approach to the legal history of Canada.[27] Professor Bell's "note," perhaps less a clarion call than a recognition of a shift in emphasis among Canadian historians of the law, pointed out with great precision the new focus among legal academics on an historical recognition of the law as a social phenomenon, connected inextricably to broad economic and political trends. For this new approach to Canadian legal history, the mission was "to reveal the extent to which legal rules are historically contingent rather than doctrinally inevitable."[28] Such an orientation would encourage legal history to take its rightful place among the other sub-

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[27] Barry Wright, "Towards a New Canadian Legal History" (1984), 22 *Osgoode Hall Law Journal* 349; David G. Bell, "The Birth of Canadian Legal History" (1984), 33 *U.N.B. Law Journal* 312.

[28] Bell, "The Birth of Canadian Legal History," *supra* note 27, 313.

disciplines of history and overcome the parochialism that, arguably at least, accompanies the study of law in the conventional law school. The birth of Canadian legal history, in the sense of a history distanced from narrow doctrinal concerns and more sensitive to the socially embedded position of law, was promoted, argued Bell, through the publication by the Osgoode Society of Volumes I and II of *Essays in the History of Canadian Law*[29] in the early 1980's.

Citing the liberating force of Morton Horwitz's *The Transformation of American Law, 1780-1860*,[30] a work whose intellectual appeal and spirit may have actually compelled the wholesale re-orientation of American legal-historical scholarship, Bell applauded the rescue of Canadian legal history from the margins of conventional academic inquiry in the law, such that it could assume its deserved place as a contributor to "general history." But he ended his "note" with a word of caution, suggesting that the tendency among Canadians toward "intellectual colonialism" should not be allowed to push the emerging new legal history of Canada toward the American model of legal history exemplified in Horwitz's book. The "radical instrumentalist's" explanation of legal-historical developments, an approach more or less successfully employed by Horwitz, was to be avoided, argued Bell, or at least not blindly adopted. In other words, while the view of Americans toward their legal history might settle on the idea that, at least from the perspective of historians of the nineteenth century, the law developed largely as the tool of a conspiracy among professional and business élites, often at the expense of the realization of more humanitarian ideals, Canadian legal historians ought to profit from resisting the temptation

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[29] David H. Flaherty (ed.), *Essays in the History of Canadian Law, Volume I* (Toronto: University of Toronto Press for the Osgoode Society, 1981); David H. Flaherty (ed.), *Essays in the History of Canadian Law, Volume II* (Toronto: University of Toronto Press for the Osgoode Society, 1983).

to simply mimic their American colleagues. The challenge to Canadians was to avoid merely teasing out of our history a catalogue of motives similar to those offered up by American scholarship unless, of course, the evidence rendered such conclusions inevitable, or at least defensible. Otherwise, the emancipation of legal history from the constraints of doctrinal concerns might be subverted by constraints of another kind, those that impose on a particularly Canadian legal history conclusions appropriate for another set of historical conditions, in another historical locale.

Despite Bell's concerns about the continuing colonial mentality of Canadian scholars generally, and legal-historical scholars in particular, there can be no doubt about the impact of Horwitz's work in the United States and beyond. Horwitz has been credited by some with actually lifting legal history out of the perfunctory description of statutes and cases that had permeated virtually all writing on the history of law prior to the mid-twentieth century. At last, the law was recognized in history as something more than a static, sterile thing, remote from people's lives. Finally, legal historians were free to question the role of law in history outside of the traditional focus on major cases, constitutional struggles, and the lives of famous jurists. All at once, it must have seemed, legal history had been elevated to the status of social history, or political history, or history generally, freed from the doctrinal weight of dusty treatises and the plodding progress of legislation.

The principal innovation in Horwitz's work was his inquiry into the possibility that the common law was actually open to be designed and perhaps manipulated in the same way that statutes and regulations were the products of deliberation and choice in conceiving and

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[30] Morton Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA: Harvard University Press, 1977).

implementing policy. Prior to the early nineteenth century, the common law was considered to be a body of immutable rules, transcendent of historical contingency. While this perspective on the law is generally thought to have continued through the nineteenth and into the twentieth century, in Horwitz's interpretation American common law judges began to make decisions based on the exigencies of commercial life and political expediency during the middle decades of the nineteenth century. In effect, this adjustment in the function of the common law changed the nature of the common law from an object of mystical awe to the tool of the entrepreneurial class. Nineteenth century histories of the law continued to pay obeisance to the traditional interpretation of the common law, focussing on justifying the current state of the law through an explanation of its ancient and medieval origins.[31] But Horwitz insists that, during the early and middle years of the nineteenth century at least, the common law was no less an instrument of policy choices around questions of politics and economics than were statutes and other like initiatives.[32]

The possibilities inherent in this new approach to the history of the common law were not lost on American academics. In a laudatory article published shortly before the appearance of Wright's and Bell's essays, Wythe Holt extolled Horwitz as the leader in the American movement to upset the conventional paradigm of legal history, crediting him with that "freshness and progressiveness" necessary to overcome that which was "previously arid, antiquarian,

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[31] Perhaps the best and most well-known example of nineteenth century legal history written in this genre is Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, Second Edition (Cambridge, U.K.: Cambridge University Press, 1968). The first edition of this work was published in 1895.

[32] See especially Chapter One, "The Emergence of an Instrumental Conception of Law," at 1-30, and Chapter Five, "The Relation between the Bar and Commercial Interests," at 140-159, of *The Transformation of American Law, 1780-1860*, *supra* note 30.

oriented toward the colonial era, and relatively unpopulated with sound scholars."[33] In words that could not be clearer, Holt celebrated the release of legal history from the myopia from which it had previously suffered.

> Horwitz has shattered the grip of conventional legal history upon the past, making it now impossible for the old apolitical, deterministic or idealistic categories to seem so powerful, so convincing, or so useful....[T]he rest of us have an example of a critical approach to legal history, one which by its emphasis upon political, economic, and social interaction recommends the study of legal practice and adjudication as *praxis* – as world-creating, meaning-endowing, value-full, living human activity. Horwitz has opened a whole new universe for us, the real universe of the past and present.[34]

Legal history, as a discipline, had been transformed by Horwitz, and Holt suggested that, the dangers and difficulties of Horwitz's radical instrumentalism notwithstanding, conservative critics were unable to successfully challenge the fundamental change in the way in which the role of law in history would be considered henceforth.[35]

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[33] Wythe Holt, "Morton Horwitz and the Transformation of American Legal History" (1982), 23 *William and Mary Law Review* 663, at 663-664.

[34] *Ibid.*, 667-668.

[35] This is not to say that every response to Horwitz's work was as supportive as Holt's. A large body of review literature emerged shortly after the publication of *The Transformation of American Law* to challenge the foundations on which Horwitz's interpretation of the development of American law was based. For example, Eric Foner wrote in the *New York Review of Books* that

> ...there are some serious shortcomings in Horwitz's interpretation...[H]e never adequately defines either the 'commercial and entrepreneurial' interest who shaped and benefited from the transformation of law, or the 'other' interests who suffered from it. Nor does he take into account the possible differences in ideology and aspirations within these groups...More important...most of the references he cites tend to be narrowly legalistic ones.

Eric Foner, "Review of *The Transformation of American Law, 1780-1860* by Morton J. Horwitz" (1977), 24 *New York Review of Books* 37. Similar critical responses can be seen in Stephen B. Presser, "Revising the Conservative Tradition: Towards a New American Legal History" (1977),

While Horwitz may have been credited by Holt with the transformation of the writing of American legal history, there can be little doubt that Horwitz owed a significant debt to Willard Hurst. It was Hurst, according to David H. Flaherty,[36] who blazed the trail for Horwitz and others to follow, who outlined the possibilities inherent in a legal historiography that overcame a stultifying focus on doctrine to the exclusion of more broadly cast social and political issues. Through several monumental volumes, including the widely acclaimed *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915*,[37] Hurst passed on to his successors the recognition that "[l]egal history has not been integrated with the general history of the United States, and has often been written not as *history*, but rather as law. The focus of legal historians has too consistently been on studies of origins or narrowly institutional approaches. In particular, legal historians have not begun their work by posing broadly conceived questions, but have followed narrowly circumscribed paths."[38] Here we see Flaherty pausing over the idea that legal history must be *history* first and foremost, a radical notion in the 1960's that had to be strongly reinforced in the United States through the work of Morton Horwitz to gain acceptance inside the traditional ranks of legal scholarship.

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52 *New York University Law Review* 700; Grant Gilmore, "From Tort to Contract: Industrialization and the Law" (1977), 86 *Yale Law Journal* 788; and Eugene D. Genovese, "Review of *The Transformation of American Law, 1780-1860* by Morton J. Horwitz" (1978), 91 *Harvard Law Review* 726.

[36] David H. Flaherty, "An Approach to American History: Willard Hurst as Legal Historian" (1970), 14 *The American Journal of Legal History* 222.

[37] J. Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Cambridge, MA: Harvard University Press, 1964).

[38] Flaherty, "Willard Hurst as Legal Historian," *supra* note 36, 224-225. Emphasis in original: footnote omitted.

Flaherty, of course, was not alone among scholars in recognizing Hurst's contribution to legal history as a watershed in the development of legal-historical scholarship, even prior to the emergence of Horwitz's most significant work. Robert Gordon came to a similar conclusion in 1975 when he argued that Hurst's work represented a "defection from the main line of legal historiography,"[39] a final recognition of law as social process, inextricably connected to, perhaps in certain respects indistinguishable from, political and economic and social events. This insistence on the relational qualities of law proved to be foundational for the new legal history that emerged in the 1970's and 1980's, and Morton Horwitz's instrumentalism, depending to a great extent on this idea, functioned as the catalyst that compelled legal history to fashion a new beginning.

There are many aspects of Hurst's work that can be considered significant in stimulating the re-orientation of legal-historical scholarship that found its clearest early expression in the work of Morton Horwitz. First and foremost, perhaps, was Hurst's recognition that, in many respects, nineteenth century law developed as the facilitator of commercial and industrial expansion. His analysis of this possibility found a convenient outlet in *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970*, published in 1970.[40] In this work, Hurst investigated the ways in which law served to encourage the transformation in the idea of the corporation from its pre-nineteenth century roots as the product of royal discretion, to its late nineteenth century position as the preferred vehicle of much ordinary commercial

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[39] Robert W. Gordon, "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography," [1975] *Law & Society* 9, at 45.

[40] J. Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville, VA: The University Press of Virginia, 1970).

activity. Through this study, Hurst made explicit the connection between law and the process of socio-economic change, a connection explored in Hurst's earlier works but still relatively new for legal history as a discipline. His focus was on legislation here: there is little if any acknowledgement of a neutral, distant, apolitical, ahistorical common law, as earlier legal historians might have framed it. Instead, Hurst investigated the way in which the initiatives of the legislature actually imposed themselves on otherwise private law relationships, which in turn eventually provided the conditions necessary for a fundamental change in the way in which commercial activity in the private sector was understood.

In addition, Hurst explored the various ways in which policy makers and legislators used law as a tool for the response to many economic and environmental issues that presented themselves in the early nineteenth century. Much of this legislative activity, according to Hurst, was fairly mundane, the expected response of the custodians of aspects of public welfare. In his later work *Law and Social Order in the United States*, Hurst wrote that, in our attempt to come to a comprehensive understanding of the role of law in history, "[b]asic also is the fact that people generally have used law in a narrowly practical way. Typically they were concerned with law more as an instrument for desired immediate results than as a statement of carefully legitimated, long-range values."[41]

At the same time, however, Hurst tended to look for broad ideological consensus as the impetus for much in the way that the statute law of the early United States developed. In attempting to explain the widening availability of limited liability protections as the concept of the corporation gained credence during the nineteenth century, Hurst introduced only to dismiss

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[41] J. Willard Hurst, *Law and Social Order in the United States* (Ithaca, NY: Cornell University Press, 1977), 23.

the argument that influential commercial classes hoped to capitalize on the increased comfort that limited liability offered. Rather, he argued that the expansion of the availability of limited liability actually reflected a widely shared liberal egalitarianism that, it seems clear, actually gained momentum in the nineteenth century. According to Hurst's argument, toward the end of the century it finally came to pass that anyone who wanted to join the entrepreneurial ranks would have access to the same protections as those more successful and experienced in commercial life,[42] explaining this development by reference to the success of the argument from egalitarianism. For this focus on the possibility of ideological consensus as the driving force behind much nineteenth century legislative reform, Hurst has suffered some criticism.[43] Be that as it may, however, there can be little doubt that, despite the caution displayed by Hurst in advancing this form of functionalism in his interpretation of nineteenth century American legal history, his interpretation remains one that distinguishes his history a great deal from earlier, more conventional histories of doctrinal law.

Central to Hurst's functionalism, too, was a concentration on the extent to which early American lawmakers used the legislative power to respond to a variety of environmental threats and challenges. Responsible persons of all political allegiances "... were alike confident that men could materially control their environment through the legally mobilized power of the

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[42] See Chapter One, "From Special Privilege to General Utility, 1780-1890," in Hurst, *The Legitimacy of the Business Corporation in the United States, 1780-1970*, *supra* note 40, at 13-57, *passim*.

[43] See, for example, Mark Tushnett, "Lumber and the Legal Process," [1972] *Wisconsin Law Review* 114, in which Tushnett criticizes Hurst's failure to account for the effect of the unequal distribution of power in society. If Hurst's insistence on the existence and significance of ideological consensus is to be maintained, then how is it that "all people came to share a world view which advanced the interests of only some of them?" Tushnett, 131.

community."[44] Key to understanding Hurst's focus on environmental challenge in the arena of nineteenth century lawmaking is that, for Hurst, law was quite clearly a human *response* to the demands of the environment, rather than the instrument by which environmental conditions were *created.*

> It also helps in seeking pattern in a turbulently confused nineteenth century to note that men faced the challenge of three environments. Most obvious was that presented by nature apart from man. Equally imperative, however, were the conditions of social living, the social environment, without which man is only another animal. Subtlest and the last to be envisaged as presenting a challenge was the individual's internal environment, formed by the pattern of deepset emotional drives and the values resting thereon, within whose frame reason must operate.
>
> Nineteenth-century policy moved in successive waves of response, now to one felt challenge of environment, now to another.[45]

In a similar vein is Hurst's interpretation of the relationship between nineteenth century lawmaking and the contemporary understanding of a "creative, active will" as the key to a civilized existence. In Hurst's view, law was used as the instrument by which policy makers responded to environmental threats to the free exercise of that will.

> Active will confronted two external challenges. It might be overborne by the implacable, impersonal facts of the physical and biological setting of life, and it might be denied or frustrated by the swamping variety, detail, and complexity of social relations, customs, and habits, or by the accumulated weight of social experience. A great deal of United States legal history is a clear effort to use legal processes to overcome these challenges to using creative will to shape life in society.[46]

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[44] J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, WI: The University of Wisconsin Press, 1971), 33. First published in 1956.

[45] *Ibid.*, 39.

[46] Hurst, *Law and Social Order in the United States*, *supra* note 41, 214.

From this perspective, law was not so much an active participant in the sweeping changes that affected all aspects of American life during the nineteenth century. Instead, law was primarily a passive instrument of response, accommodating change rather than generating it.

Consistent with this interpretation of the role of law in much of nineteenth century American history is Hurst's explanation of the manner in which much legal decision-making took place. Hurst focussed on what he termed "inertia," that is, the tendency for decisions to be made in policy and legal areas based on conventional decision-making criteria, rather than on criteria perhaps better adapted to new social and economic conditions as they developed over the course of the century. This is a key concept in Hurst's interpretation of legal history. Mark Tushnet summarized the idea like this:

> Routine decisions are made by a process which Hurst calls inertia...To suggest a rough definition, inertia is a decisionmaking [sic] process in which a new problem is solved in a way very similar to the way some previous, related problem was solved...[T]he decisionmaker's [sic] beliefs may set blinders on him, so that he does not look to many problems and solutions which could be relevant.[47]

Again, the image is one of passive response to changing social conditions, rather than one in which the law is seen as either the actual instrument of change for some well articulated policy vision, or the tool of influential commercial classes in the way in which Morton Horwitz would have us believe.

Perhaps coincidentally, in the same period during which Hurst's later work and Horwitz's *The Transformation of American Law, 1780-1860* were published, similar experiments with a social conception of law in history were emerging in Canada with the work of R.C.B. Risk. Professor Risk's series of studies on the relationship between law and economy in nineteenth

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[47] Tushnett, "Lumber and the Legal Process," *supra* note 43, 124.

century Ontario had a revitalizing impact on Canadian legal historiography.[48] Within a few short years, David Bell was sounding his note of caution for the emerging "new legal history" of Canada, urging Canadian scholars to be circumspect before jumping onto what might have turned out to be a particularly American instrumentalist bandwagon.

At the same time, however, Barry Wright was developing a schema for a progressive legal history that would both capture the strengths of more conventional scholarship and capitalize on the liberating force of the discipline's transformation in the United States. Despite pointing out that "[t]raditional descriptive legal history creates illusory objectivity by using a narrow range of sources,"[49] Wright was compelled to acknowledge that any progressive legal history must still rely on the law, in its purely doctrinal form, as its starting point, and in that respect the new approach to the discipline does not differ all that much from the conventional. But where traditional histories conclude, progressive histories get down to serious analysis, and this is where Wright suggests that, in the early 1980's, an unprecedented opportunity presented itself to historians of the law in Canada.

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[48] R.C.B. Risk, "The Nineteenth Century Foundations of the Business Corporation in Ontario" (1973), 23 *University of Toronto Law Journal* 270; Risk, "The Golden Age: The Law about the Market in Ontario in the Nineteenth Century" (1976), 26 *University of Toronto Law Journal* 307; Risk, "The Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century" (1977), 27 *University of Toronto Law Journal* 199; Risk, "The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective" (1977), 27 *University of Toronto Law Journal* 403. For Risk's vision of the future of legal history, see "A Prospectus for Canadian Legal History" (1973), 1 *The Dalhousie Law Journal* 227, and for a brief appraisal of Risk's impact on the contemporary state of legal-historical scholarship, see Andre Morel, "Canadian Legal History – Retrospect and Prospect" (1983), 21 *Osgoode Hall Law Journal* 159. See also the recent collection of essays in G. Blaine Baker and Jim Phillips (eds.) *Essays in the History of Canadian Law, Volume VIII, in Honour of R.C.B. Risk* (Toronto: University of Toronto Press for the Osgoode Society, 1999), especially Baker's "R.C.B. Risk's Canadian Legal History," 17.

[49] Wright, "Towards a New Canadian Legal History," *supra* note 27, 362.

From Wright's perspective, of what did this opportunity consist? For the most part, he argued that legal history must employ an approach to its subject that is recognizable from within the broader disciplinary structure of historical writing. This entails "a combination of methodological rigour, comprehensive scope and historical focus on change. The analytical marriage of theory and empirical research, the addressing of the complex external forces and phenomena operating on and influenced by the legal system, and the critical demystification of notions of continuity are the positive challenges which must be dealt with."[50] In other words, the standard set by the work of Morton Horwitz must be acknowledged, must form part of the rubric of legal history, must actually become the fundamental way in which scholarly work in legal history is done. And this opportunity to re-orient the practice of legal history must be seized, pleaded Wright, despite the threat it posed to the recognition of legal history as occupying a disciplinary location distinct from mainstream history. Echoing the conclusion of Graham Parker of a decade earlier,[51] Wright conceded that the ascension of strict historical theory and method within legal history threatened the very existence of legal history as a recognizable entity. But, as he concluded, "if scholars are to be committed to the notion that the law must be explained in context, then the loss of clearly delineated and discrete categories must be accepted."[52]

While perhaps more enthusiastic than Bell about the possibilities for Canadian legal history inherent in the new approach to legal historical scholarship typified by the work of Morton Horwitz, Wright was careful to point out that the Canadian historical setting brought

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[50] *Ibid.*, 363.

[51] Graham Parker, "The Masochism of the Legal Historian" (1974), 24 *University of Toronto Law Journal* 279, at 316.

with it particular problems that required particularly Canadian solutions. He identified "regional diversity, institutional conservatism and the country's unique mode of economic development"[53] as issues to which mainstream histories had been directed over the years, and suggested that a legal-historical perspective might assist in unraveling persistent problems in Canadian historiography. For example, a comparison of the ways in which the various jurisdictions in Canada had dealt with the problems of the reception of English law could contribute to a larger understanding of Canadian regional differences in historical perspective.[54] Wright's vision for Canada's new legal history, therefore, was explicitly connected to a larger understanding of the significance of history generally, and his description of this fresh approach yielded a reflective, analytical, critical framework for the future.

It is fair to say, I think, that even given the importance of Morton Horwitz's work (and, in Canada, the work of R.C.B. Risk) to the development of legal-historical scholarship generally, Bell and Wright owed a great deal to the inspirational work of both David Flaherty[55] and Graham Parker.[56] "The Masochism of the Legal Historian," an undeniably gloomy and pessimistic piece, functioned as an early call to arms for scholars interested in the role of law in history, and in the role of legal history in Canadian law schools. Despite its tone of exasperation with the failure of modern scholarship to adequately define just what it is that legal historians are expected to do,

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[52] Wright, "Towards a New Canadian Legal History," *supra* note 27, 362.

[53] *Ibid.*, 366.

[54] *Ibid.*

[55] See, for example, David H. Flaherty, "Writing Canadian Legal History: An Introduction," in Flaherty (ed.) *Essays in the History of Canadian Law, Volume I*, *supra* note 29, at 3.

[56] Graham Parker, "The Masochism of the Legal Historian," *supra* note 51.

Parker's essay could not help but strike a responsive chord in those who believed, as did Parker, that the law performs a unique function in its historical setting. Many of Wright's and Bell's demands for a new legal history, integrated with mainstream scholarly history and eschewing the doctrinal preoccupations of the law school curriculum, found their inspiration in Parker's annoyance with the rudderless drift of legal history prior to the 1960's. "[T]he study of legal history may be more legitimately pursued in a school of humanities than in a school of law,"[57] wrote Parker, foreshadowing Wright's admission of the possibility that the new legal history might be overwhelmed by its connections to general history. "To write legal 'history' from a collection of cases, statutes, treatises, and administrative regulations is a simple but questionably useful task,"[58] argued Parker, anticipating nicely David Bell's prediction of a legal history more "innovative" and "cross-disciplinary."[59] In the same tone is Barry Wright's assertion that "[i]n coming to terms with the law's relationship to its environment, progressive legal history contributes to and benefits from the other social sciences."[60] And, as mentioned above, Parker's conclusion that "[l]egal history does not exist, of itself," and his related point, that "[t]he history of the law must be history, not law,"[61] function as scholarly precedent for Wright's concession on the likelihood of the absorption of legal history by its larger, more robust relative, general history.

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[57] *Ibid.*, 282.

[58] *Ibid.*, 284.

[59] Bell, "The Birth of Canadian Legal History," *supra* note 27, 315.

[60] Wright, "Towards a New Canadian Legal History," *supra* note 27, 361.

[61] Parker, "The Masochism of the Legal Historian," *supra* note 41, 316.

Flaherty's essay, "Writing Canadian Legal History: An Introduction,"[62] the opening piece in the volume credited by Bell with signaling the birth of a new Canadian legal history, functioned as even more immediate impetus for the production by Wright of his roadmap for the emerging scholarship. For Flaherty, "[f]ocusing on the broad interactions between law and society requires the identification of important general questions in advance of detailed empirical research,"[63] in retrospect a somewhat obvious call for the methodological rigour that later formed an element in Wright's outline of the connection between legal history and general history. In Flaherty's work, too, we find mention of the importance of Canada's economic history to its emerging legal history,[64] and reference to the ideological sources of law in a Canadian context,[65] both themes deftly taken up by Wright in his new legal-historical model.

And so at the start of the 1980's we have an emerging new legal history in Canada, a trend in legal-historical scholarship away from the conventional focus on legal doctrine in history and toward a recognition of the law as social phenomenon. Historians must understand the law in history primarily through its connection to socio-political and socio-economic circumstances, and not through its interpretation as an autonomous, perhaps ahistorical, thing. The new legal history must be founded on strict historical methods, must be recognizable as history from within mainstream historical scholarship, must be committed to true interdisciplinarity in its themes. It was this fresh vision of legal-historical scholarship, based in the work of Willard Hurst and Morton Horwitz in the United States and R.C.B. Risk in Canada,

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[62] *Supra*, note 55.

[63] *Ibid.*, 4.

[64] *Ibid.*, 9.

that gave rise to an explosion in research in Canadian legal history during the 1980's and 1990's. Surveys by Margaret Ogilvie in 1987[66] and Jamie Benidickson in 1997[67] reveal the enormous extent to which legal history in Canada has emerged from the margins of legal scholarship, citing dozens and dozens of books and articles on virtually every aspect of Canada's legal past. Much of the work referred to in these two surveys concerns the legal history of Upper Canada, and it is to the major trends in that work that we now turn.

C. Major Trends in Upper Canadian Legal History

The new legal history has spawned a revival in interest among legal academics in the history of Upper Canada, especially that of the politically turbulent 1820's and 1830's, and it is this scholarship with which we are most concerned in this thesis. Various trends emerge from this body of work, all of which depend to some degree on the instrumentalist interpretation of legal history fostered by Morton Horwitz, and all of which combine a focus on doctrine with the interdisciplinarity called for in early explanations of the new legal history. In particular, we are interested in three consistent themes, embodied in the work of four scholars. First, we have the radical functionalism of Paul Romney, exemplified in a series of books and articles that attempts to explain the development of the law in Upper Canada as epiphenomenon, secondary to the conspiratorial activities of the ruling élite. According to Romney, in large measure the law was but a tool for the accomplishment of self-interested projects by the commercial and political

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[65] *Ibid.*, where Flaherty argues for the significance to legal history of "the writings of Gad Horowitz on conservatism, liberalism, and socialism in Canada."

[66] Margaret Ogilvie, "Recent Developments in Canadian Law: Legal History" (1987), 19 *Ottawa Law Review* 225.

[67] Jamie Benidickson, "Survey of Canadian Legal History in the '90s" (1996-97), 28 *Ottawa Law Review* 433.

classes, a fundamentally Horwitzian explanation for the development of Upper Canadian law. Secondly, we find the work of David Howes and Blaine Baker, both of whom bring a somewhat softer functionalism to their interpretation of the role of law in Upper Canadian history. For Baker and Howes, law was the necessary means by which the established hierarchy was maintained and an ordered society preserved, all in the service of a higher, common good. Finally, Russell Smandych presents a somewhat hybrid interpretation of Upper Canada's legal history, at times suggesting that Romney's more radical interpretation of the instrumental use of law by the élite is consistent with much in the way the law developed, but at other times arguing the influence of strict moralistic motives in the reform of law and legal institutions. Each of these approaches to the legal history of Upper Canada has its appeal, and each will be considered in turn.

(i) Romney's Radical Functionalism

If any body of work stands as the epitome of the new legal history of Upper Canada, it is likely that of Paul Romney. Highly rigorous in its methodology and the demands it makes on its sources, unabashedly interdisciplinary in its treatment of historical events, and firmly positioned in the Horwitzian instrumentalist camp, Romney's work brings a fresh and powerful re-interpretation to the behaviour of Upper Canada's leaders during the 1820's and 1830's. The prediction of Graham Parker and Barry Wright that a new approach to legal history would see the discipline enveloped by general history comes true in the work of Paul Romney. He is interested in political events, such as William Lyon Mackenzie's term as first mayor of Toronto in 1834,[68] the "types riot" of 1826 and its relationship to the rebellion of 1837,[69] and the "alien

[68] Paul Romney, "William Lyon Mackenzie as Mayor of Toronto" (1975), 56 *Canadian Historical Review* 416; Romney, "Rebel as Magistrate: William Lyon Mackenzie and His Enemies," in Jim Phillips, Tina Loo and Susan Lewthwaite (eds.) *Essays in the History of*

question" of the early 1820's.[70] His focus is on the interconnections between political and social change, and the way in which power was distributed among members of the élite so as to accomplish their personal and political goals.[71]

But Romney weaves into his interpretation of politics an insistence on the role of law in political and social histories, and it is this interdisciplinarity that defines his work most completely. For Romney, the law functioned as a tool in the hands of the élite for the accomplishment of personal political and social goals, and it performed this function in at least two ways. First, the actual legislative machinery of government was manipulated by the ruling class of Upper Canada so as to put in place statutes and rules of court particularly conducive to the accomplishment of oligarchic ends. Romney illustrates this point, for example, by reference to the troubles of Robert Randal during the "Bridgewater Affair" and the "Chaudière Affair" of 1816 to 1820, in which Randal was deprived of his property holdings through the arguably underhanded manipulation of the courts and legal process by both Sir James Macaulay and Solicitor General Henry Boulton. According to Romney, the law of debt in Upper Canada was in service of a legal and administrative élite at the expense of the small landholder.

Canadian Law, Volume V: Crime and Criminal Justice (Toronto: University of Toronto Press for the Osgoode Society, 1994) 324.

[69] Paul Romney, "From the Types Riot to the Rebellion: Élite Ideology, Anti-legal Sentiment, Political Violence, and the Rule of Law in Upper Canada" (1987), 79 *Ontario History* 113.

[70] Paul Romney, "Re-Inventing Upper Canada: American Immigrants, Upper Canadian History, English Law and the Alien Question," in Roger Hall, William Westfall and Laurel Sefton MacDowell (eds.) *Patterns of the Past: Interpreting Ontario's History* (Toronto: Dundurn Press, 1988) 78.

[71] Paul Romney, "A Struggle for Authority: Toronto Society and Politics in 1834," in Victor L. Russell (ed.) *Forging a Consensus: Historical Essays on Toronto* (Toronto: University of Toronto Press, 1984) 9.

> Judgments of debt could be obtained, and estates seized and sold in execution thereof, under circumstances that favoured their disposition at far below market value, without any obligation even to notify the debtor of what was in train, and in this instance as always the same little clique, or network of cliques, often mutually related by blood or marriage, turned out to be the gainers.[72]

According to Romney, the abuse of Randal by Macaulay and Boulton, an abuse that found its expression in an equally abusive treatment of the law, raised Randal to the status of "martyr...to the avarice and oppression of the 'family compact' and its regional affiliates...Nothing did more than his sufferings to discredit the legal profession and the administration of justice."[73]

Less successful perhaps than the manipulation of the law of debt and the rules of court by Macaulay and Boulton was the attempt of Attorney General John Beverley Robinson in the early 1820's to use legislation in connection with the rights of "aliens" in political matters.[74] While Robinson was eventually unsuccessful in his efforts to legislate limits on the right of certain immigrants from the United States to take part in political process, for Romney the attempts provide evidence of the attitude of the governing élite toward the use of law for the accomplishment of personal goals. Over and again Romney refers to the alien question as serving Robinson's "ulterior political motives" and furthering his "secret political agenda,"[75] and

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[72] Romney, "From the Types Riot to the Rebellion," *supra* note 69, 122.

[73] Paul Romney, "Robert Randal," in Robert L. Fraser (ed.) *Provincial Justice: Upper Canadian Legal Portraits* (Toronto: University of Toronto Press for the Osgoode Society, 1992) 420, at 431. The "family compact" has been the subject of a great deal of attention from historians over the years. See Robert E. Saunders, "What Was the Family Compact?" in J.K. Johnson (ed.) *Historical Essays on Upper Canada* (Toronto: McClelland and Stewart Limited, 1975) 122, and David Gagan, "Property and 'Interest': Some Preliminary Evidence of Land Speculation by the 'Family Compact' in Upper Canada, 1820-1840" (1978), 70 *Ontario History* 63 for two examples among many.

[74] Romney, "From the Types Riot to the Rebellion," *supra* note 69, 123; Romney, "Re-Inventing Upper Canada," *supra* note 70, *passim*.

Romney does not hesitate to suggest that the entire issue was simply manufactured by Robinson out of political spite and loathing for some of his opponents of the day.[76] These examples illustrate Romney's tendency to see the law in Upper Canadian history primarily, if not exclusively, as an instrument for the exercise and extension of power by those in positions of political authority, and to view the machinery of government as simply the vehicle of the ruling class.

Secondly, Romney concentrates on the effect that legal and constitutional ideology had on the behaviour of Upper Canada's legal and administrative élite. In this approach to the role of law in history, Romney is not so much interested in the actual product of law-making activity in the legislative and executive branches of Upper Canadian government. Rather, he is concerned with the ways in which the élite relied on questionable ideological arguments to justify their entrenched positions. This is his theme in a number of essays that directly confront a more conservative approach to the instrumental use of law by historical actors.[77] For Romney, the members of Upper Canada's élite deliberately exploited inconsistencies in constitutional and legal theory so as to maintain their dominance in political and legal affairs. There are two

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[75] Romney, "Re-Inventing Upper Canada," *supra* note 70, 89.

[76] *Ibid.*, 95-97. For an extended treatment of Robinson's role in the alien question, see Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899* (Toronto: University of Toronto Press for the Osgoode Society, 1986), 82-104. For a more sympathetic interpretation of Robinson's role in the issue, see Patrick Brode, *Sir John Beverley Robinson, Bone and Sinew of the Compact* (Toronto: University of Toronto Press for the Osgoode Society, 1984), 126-137.

[77] Paul Romney, "From the Types Riot to the Rebellion," *supra* note 69; Romney, "Very Late Loyalist Fantasies: Nostalgic Tory 'History' and the Rule of Law in Upper Canada," in W. Wesley Pue and Barry Wright (eds.) *Canadian Perspectives on Law & Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 119; Romney, "From the Rule of Law to Responsible Government: Ontario Political Culture and the Origins of Canadian Statism," [1988] *Canadian Historical Association Historical Papers* 86.

distinct elements of this theme in Romney's work. First, he spends considerable effort in explaining how the constitutional precept of the "rule of law" was ignored by the élite, despite occasional deference by the élite to companion constitutional principles. Secondly, he points out ways in which the tension between the primacy of constitutional principles on the one hand and the supremacy of the legislature on the other served to enhance the position of the ruling élite.

There is considerable debate on the exact nature of the "rule of law" as a constitutional principle and its role in Upper Canadian political thought, much of which emerges in disagreements among Romney, Blaine Baker and David Howes. Romney is interested in debunking the notion, especially prevalent in certain of the work of Baker to be referred to below, that an inviolable "rule of law" was a late nineteenth century invention that could not have been considered by early nineteenth century political figures as a guiding tenet of constitutional thought. For Romney, this possibility is simply inconsistent with the eighteenth century toryism that formed the foundation of much of Upper Canadian élite activity during the 1820's and 1830's. Romney argues that it is misleading to suggest that members of the élite understood themselves as somehow exempt from the individualistic egalitarianism that characterized contemporary notions of the rule of law. If such an egalitarianism was in fact a principle of English constitutionalism, then it must have been simply ignored by the Upper Canadian establishment, primarily because much of contemporary behaviour was perfectly consistent with the constitutional traditions out of which the rule of law emerged. For example, suggests Romney, the élite's devotion to "king and empire" underscored their close ideological connection to the selfsame constitutional perspective that holds forth the rule of law as fundamental to English freedom. A.V. Dicey's late nineteenth century description of the precepts of the rule of law, a description on which Baker in particular relies to defend his

argument that the Upper Canadian élite could not be expected to live up to a standard that was not part of their particular constitutional perspective, was actually a summary of principles prevalent in English constitutional thought for centuries, suggests Romney.[78] The implication, of course, is that the ruling élite was guilty of what might be referred to as "selective constitutionalism," choosing to rely only on those principles of the English constitution that served their ends and helped them to maintain their dominance of local affairs. The conclusion from Romney's arguments can only be that those precepts of the rule of law that were inconsistent with the efforts of the élite to maintain their privilege and place were simply ignored by that élite to the extent necessary to fulfill their goals, despite their paying obeisance to companion constitutional precepts when it served their interests to do so.

In a similar vein is Romney's interpretation of actions he argues were designed by the administrative élite and executed by their minions to discredit Mackenzie during his short tenure as mayor of Toronto in 1834.[79] The particular incident involved Mackenzie's role as chief magistrate in the Mayor's Court, and his apparent decision to sentence a number of women to especially difficult stints in jail. Of special significance here was the allegation that he had ordered two prostitutes, Brown and Milligan, to serve their sentences "without fire and candle," a

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[78] Romney, "Very Late Loyalist Fantasies," *supra* note 77, 120-127. The ideological orientation of members of Upper Canada's ruling class has been the subject of much historical treatment. For particularly interesting examples, see S.F. Wise, "Upper Canada and the Conservative Tradition," in E.G. Firth (ed.) *Profiles of a Province: Studies in the History of Ontario* (Toronto: Ontario Historical Society, 1967) 20, and "God's Peculiar Peoples," in W.L. Morton (ed.) *The Shield of Achilles: Aspects of Canada in the Victorian Age* (Toronto: McClelland and Stewart Limited, 1968) 36; Terry Cook, "John Beverley Robinson and the Conservative Blueprint for the Upper Canadian Community," in Johnson (ed.) *Historical Essays on Upper Canada*, *supra* note 63, at 338; and Peter J. Smith, "Civic Humanism vs. Liberalism – Fitting the Loyalists In" (1991-92), 26/2 *Journal of Canadian Studies* 25.

[79] Romney, "Rebel as Magistrate," *supra* note 68, 340-342.

deplorable order by any interpretation. Romney does a masterful job in sifting through the evidence to show how Mackenzie was the victim of a conspiracy in this event, a deliberate campaign to manufacture evidence, condemn the magistrate for lacking compassion, and show him to be the tyrant that many suspected he was. While the evidence tends to support Romney in his conclusions about the conspiratorial political background to this episode, it is far from certain that he is right. But nevertheless, he takes the possibility of a conspiracy to signify that the establishment "fostered a climate of public opinion which stripped Reformers, Mackenzie above all, of the protections comprised in the rule of law."[80] This conclusion, perhaps a bit grandiose, is consistent with Romney's other interpretations of the ways in which the legal and administrative élite manipulated the law and legal institutions to serve selfish political ends, and consistent with his overall thrust that principles of the rule of law, if not mere hurdles to be overcome in governing Upper Canada, were certainly to be selectively applied.

The second aspect to Romney's interpretation of the exploitation of constitutional and legal theory by the ruling élite relates to the tension between the idea of the supremacy of parliament and the notion of the indefeasibility of constitutional principles. This is a central paradox of Whig constitutionalism, according to Romney, and his article "From the Rule of Law to Responsible Government: Ontario Political Culture and the Origins of Canadian Statism"[81] is first and foremost an elucidation of that argument. The sovereignty of the legislative branch of government, Romney argues, was used by the Upper Canadian élite to justify the enactment of statute law and the operation of institutions that, arguably at least, could be interpreted as

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[80] *Ibid.*, 342. See also F.H. Armstrong, "William Lyon Mackenzie, First Mayor of Toronto: A Study of a Critic in Power" (1967), 48 *Canadian Historical Review* 309.

[81] *Supra* note 77.

contrary to constitutional precept. The suggestion, often quite subtle in Romney's article, is that the élite exploited this dichotomy in constitutional thought for their own political purposes. In response to their theoretical position (labeled "legalism" by Romney) was the constitutionalism of moderate reformers such as the Baldwins. This "constitutionalist alternative" to Upper Canadian governance tended to isolate the élite by appealing to a mix of agrarian or communitarian populism[82] and a royalism that viewed the King as the sovereign over an *otherwise* sovereign provincial legislature. Because of the widely cast appeal of this alternative, there was increasing pressure on the élite to re-define their constitutional position, to explain inconsistencies in their understanding of the relationship between the ideas of the sovereignty of the legislative branch and the indefeasibility of constitutional principles. This pressure ultimately played a significant role in the impetus for reform in Upper Canadian affairs, and eventually affected the movement towards responsible government in the 1840's, in Romney's view.

Romney illustrates the manipulation of this constitutional inconsistency in Upper Canadian élite thought through his description of the types riot of 1826 and its legal and political aftermath. Several young law students and lawyers were responsible for vandalizing Mackenzie's print shop, and many of the perpetrators had direct connections to members of the establishment, including Attorney General John Beverley Robinson himself. The matter was never resolved to everyone's satisfaction, to the point that, as late as 1828, W.W. Baldwin

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[82] See generally Susan Lewthwaite, "Violence, Law, and Community in Rural Upper Canada," in Phillips, Loo and Lewthwaite (eds.) *Essays in the History of Canadian Law, Volume V*, *supra* note 58, at 353, and Michael S. Cross, "'The Laws are Like Cobwebs': Popular Resistance to Authority in Mid-Nineteenth Century British North America," in Peter Waite, Sandra Oxner and Thomas Barnes (eds.) *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: The Carswell Company Limited, 1984) 103.

complained to Robinson about the shoddy way in which Robinson had disposed of the affair. Romney's interpretation of this event is especially interesting for us, because it underscores how he attaches ideological significance, in the sense of both political and legal ideology, to relatively mundane political happenings of the day, events like Baldwin's response to Robinson. For Romney, the types riot and its political aftermath illustrate quite plainly how the administrative and legal institutions of Upper Canada were allowed by the governing élite to drift away from the models established by English precedents, the models from which they gained their inspiration. Romney suggests that the administration could point to its continued loyalty to constitutional precepts, including the rule of law, to justify superficially its continued domination of local affairs. In addition, the design of local institutions seemed to reflect the best of what English institutions, founded after all on those same constitutional precepts, had to offer. But in actual practice, Upper Canadian institutions were open to abuse, manipulation and connivance, all in the service of maintaining power and place for the ruling class.

To justify its continued grip on power, Romney suggests that the élite opportunistically embraced what he calls "Loyalist providentialism," the idea inherited by the élite from the early Loyalists that fervent commitment to king, country and constitution, under the watchful eyes of God, would see the province through its most difficult times. Romney dismisses the possibility that the motives of the élite were anything but self-interested in this respect, suggesting that the entrenched position of the élite, maintained at the expense of the rule of law and expressed through the questionable operation of institutions ostensibly established on English constitutional grounds, was deliberately and calculatedly contrived. "[W]hile the subordination of the rule of law to the rule of the elect may have been one of the 'unspoken political premises' of Loyalist providentialism, Loyalist providentialism itself was never more than the creed of a political party

– albeit a party that claimed to be above politics."[83] And in perhaps his most pointed words, Romney condemns the actions of the adminstrative élite that exploited the inconsistencies inherent in some interpretations of Whig constitutional precept:

> The types riot was not merely the antic of a gang of boisterous youths but a measure of the extent to which Upper Canada did not possess what it was meant to possess: a constitution that was, in spirit if not in the letter, an 'image and transcript'of the English. It lacked such a constitution because the colonial administrative élite, whose duty it was to govern the colony in conformity with the precepts of the English constitution, had betrayed their trust as imperial agents by cultivating a political creed, and nurturing a political mood, that were incompatible with that duty.[84]

It can be seen, therefore, that much of what characterizes the new legal history is captured by Paul Romney's work. First, he depends to a great extent on an interdisciplinary understanding of the role of law in history. This is evident especially in his continued exploitation of the relationship between politics and law in his interpretation of the way in which law was used in Upper Canada to foster political power. Secondly, Romney's historical methodology, although mentioned only briefly above, is entirely sound. There can be little doubt that his "legal history" is first and foremost "history," in the sense contemplated by David Flaherty.[85] Finally, what I have referred to as Romney's radical functionalism is firmly in the tradition pioneered by Morton Horwitz and others. His interpretation of the part played by law in history is explicitly focused on the manipulative use of law by a favoured group so as to accomplish group goals. This is true, according to Romney's work, whether we consider actual

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[83] Romney, "From the Types Riot to the Rebellion," *supra* note 69, 137.

[84] *Ibid.*, 139.

[85] *Supra* note 38 and accompanying text.

legal doctrine and the operation of legal and administrative institutions, or whether we consider the more theoretical questions of legal and constitutional ideology.

(ii) Baker, Howes and Conservative Functionalism

If Romney's work can be closely identified with the new legal history described by Bell, Wright and others, and pioneered by Hurst, Horwitz and Risk, then it is likely that many of the same "progressive" elements can be found in the work of Blaine Baker and David Howes. First, there can be little question of the interdisciplinary character of their work. Both scholars tie their understanding of the historical role of law to political and social events that tend to frame their interpretations. In this, their work is not dissimilar to Romney's, sharing the fundamental recognition that law is dynamic in its social situation, and that the experience of law and the impact of law in everyday life is partly constitutive of a full picture of the law as an historical phenomenon. Secondly, both Baker and Howes share a commitment to a rigorous historical methodology, recognizing, it can only be assumed, that legal history must first of all be *history*, and must stand the test of good historical scholarship championed by Flaherty, Parker and Wright.[86] Thirdly, both Baker and Howes employ an instrumentalist interpretation of the role of law in history, similar in that to the approach taken by Romney to historical events. But the functionalism employed by Baker and Howes differs markedly from that of Romney. Their separate projects seem to converge in the same end, that is, to overcome the temptation to interpret élite activity relative to the employment of law as somehow conspiratorial and primarily

[86] By saying this, however, I do not mean to suggest that the strength of the work of Baker and Howes as *historians* of the law has never been questioned, although it is not my intention to do so here. In fact, Romney himself, as we shall see below, takes great exception to the suggestion that their work is methodologically sound. The point, however, is that the very debate over this issue is enough to underscore for us the importance of methodological rigour in defining the new legal history.

self-interested. Instead, they appear to want to defend élite activity through recognizing that that activity was motivated by a genuine belief in a particular constitutional and social order, the abandonment of which would lead to the degeneration of the community into anarchy. Élite activity seen in this light, they would suggest, makes it more and more difficult to condemn the Upper Canadian administration for policy decisions that, according to some interpretations, appear grounded in self-interest alone.

David Howes's recognition of law as a social phenomenon is revealed most clearly in his essay "Property, God and Nature in the Thought of Sir John Beverley Robinson."[87] It is in this piece that Howes establishes himself as an historian interested not simply in the evolution of legal doctrine, but rather in the policy considerations that direct how choices are made in the formulation of law. Yes, Howes argues, the law was an instrument of the administration, functioning so as to assist in the promotion of prescribed goals. But for Howes the really interesting aspect to the process by which this occurred is in the way in which policy choices were made prior to the development of law to be used to implement those goals.[88] The history of the law, then, is essentially political and social, tied inescapably to the attempt to govern by steering communities in particular policy directions through particular legal initiatives. While this approach to the history of law aligns Howes, to a certain extent, with the instrumentalism of Morton Horwitz, there is nothing in Howes's interpretation to suggest anything but the most sincere ideological inspiration for much of Upper Canadian law reform during the 1820's and 1830's.

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[87] David Howes, "Property, God and Nature in the Thought of Sir John Beverley Robinson" (1985), 30 *McGill Law Journal* 365.

[88] *Ibid.*, 383.

Legal reasoning, for Howes, is employed only after policy decisions are made, a perspective quite different from the one that might be had simply on the strength of reading case law, where policy concerns are oftentimes used merely to justify a pre-determined, essentially *legal*, result. For Howes, political and social policy is not simply a convenient notion by which we might justify decisions reached through abstract legal reasoning; rather, policy functions in history as the very inspiration for law in the first place. The law in history cannot be understood in any meaningful way, then, without first coming to terms with the historical conditions under which administrative choices were made. This defines Howes's interdisciplinarity, the idea that social and political history, the history not so much of statutes, cases and constitutions but instead of administrations and politics and programmes, actually function as the jumping off point for an inquiry into law as a dynamic historical phenomenon.

In a similar vein is the approach taken to the history of law by Blaine Baker. In a number of interesting and important articles,[89] Baker too allows that the law is a product of its time and place, impenetrable by anyone with a sense of history without first recognizing its historical contingency. Echoing David Bell's insight that the law in history must be understood as "historically contingent" rather than "doctrinally inevitable,"[90] Baker insists that the law cannot be described and explained without first acknowledging that it is part of a "cultural totality," as peculiar to its time as are the peculiar social, economic and political circumstances of its

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[89] Blaine Baker, "The Juvenile Advocate Society, 1821-1826: Self-Proclaimed Schoolroom for Upper Canada's Governing Class," [1985] *Canadian Historical Association Historical Papers* 74; Baker, "The Re-Constitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985), 3 *Law & History Review* 219; Baker, "Review of Patrick Brode's *Sir John Beverley Robinson: Bone and Sinew of the Compact*" (1987), 68 *Canadian Historical Review* 147; Baker, " 'So Elegant a Web;' Providential Order and the Rule of Secular Law in Early Nineteenth Century Upper Canada" (1988), 38 *University of Toronto Law Journal* 184.

[90] *Supra* note 28 and accompanying text.

emergence. This is an important insight for the new legal history of Upper Canada, and commands a distinct interdisciplinarity. Baker offers up an historicism that is equally available to explain the aspirations of the reform movement and the intransigence of the establishment, making the behaviour of both comprehensible only in terms of contemporary circumstances.[91] Therefore, legal historians must be cultural historians, must consider the wide array of political, social, economic and other factors that worked together to generate what Baker refers to as "legal culture."[92] Only by taking such an interdisciplinary understanding of the role of law in history to their work can legal historians develop anything approaching a comprehensive explanation for legal-historical change.

While the interdisciplinary character of Howes's and Baker's studies, and thus their contribution to the "new legal history" as sketched above, is likely beyond controversy, such is not the case with their methodology. It is their use of historical sources and their critical response to those sources that is brought into doubt in Romney's argument with certain of their most well respected work.[93] According to Romney, Baker and Howes are uncritical towards their sources; they interpret their texts without regard to the dialectic between social context and the employment of language. In addition, and perhaps more seriously, Romney suggests that their histories are founded on too slender a base of original sources.[94] These challenges are

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[91] Baker, "The Re-Constitution of Upper Canadian Legal Thought," *supra* note 89, 221 *et seq.*

[92] Baker, "The Juvenile Advocate Society," *supra* note 89, *passim.*

[93] Romney's identification of methodological issues arising in Howes's "Property, God and Nature," *supra* note 87 and Baker's "The Re-Constitution of Upper Canadian Legal Thought," *supra* note 89 is outlined in "Very Late Loyalist Fantasies," *supra* note 77, 119-120.

[94] Romney, "Very Late Loyalist Fantasies," *supra* note 77, 120.

crucial and important, but for our purposes it is not necessary to attempt to arbitrate the dispute or to resolve it in one way or another. It is enough that we recognize that this particular disagreement over the rigours of historical method is a disagreement that probably could not have arisen prior to the emergence of the new legal history as a distinct approach to the history of the law. It functions as an acknowledgement that strict historical method is important to a successful legal history, much in the way that Barry Wright suggested it must be if legal history is to mature and overcome its ahistorical origins.

More important to us, however, is the disagreement that emerges in the attempt to explain the motives of the legal and administrative élite in their use of law. While Romney is quite insistent that law was primarily a tool for the accomplishment of goals of political, social or economic self-interest, both Howes and Baker are more charitable toward the actions of the élite. For Baker especially, historians must resist the tendency to impose on the past our own ideological categories, and instead try to understand historical actors as they understood themselves. Approached in this way, the past emerges in a distinctly different light, and the historical explanation for the development of law takes on a distinctly different hue.

Baker interprets the legal élite in Upper Canada as possessing a well-defined self-image, a particular understanding of their role in maintaining an ordered society in difficult, often hostile circumstances. This understanding emerges most clearly in Baker's work on the "Juvenile Advocate Society."[95] The organization was a mid-1820's fraternity of law students dedicated to instilling in its members an awareness of and commitment to their place as heirs to an aristocratic tradition whose daunting responsibility was to maintain the hierarchical ordering of society that separates civilized living from anarchy. No matter that the Upper Canada of the

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[95] Baker, "The Juvenile Advocate Society," *supra* note 89.

1820's did not have an hereditary aristocratic class of the sort left behind in England, and no matter that land, another traditional measure of wealth and status, was available to virtually anyone prepared to commit to a life of hard work and hardship. The members of the Juvenile Advocate Society, in the tradition of members of the Upper Canadian legal élite who had come before, were nevertheless destined to rule the community as lawyers and judges, statesmen and leaders. Their entitlement was based on their high degree of literacy, their occupational or professional status, their refined habits of life. From this perspective, class distinctions were the command of Providence, and while the worldview of the legal élite might accommodate some notion of egalitarianism, it could only mean an equality of those within a particular class, and not as among those of different classes.[96]

To support his argument that the vision of the élite was wide enough to capture more than mere self-interest as the goals of policy making, law making and governance, Baker insists that their vision was shared by many members of Upper Canadian society outside of the ranks of the privileged.

> Reputed Tories, Whigs and Reformers alike, within and frequently without the legal profession, joined in early approval of this schema for a preliberal, pyramidal social mosaic topped in large measure by a class of legally trained "patriotic courtiers."[97]

In other words, the broad spectrum of community interests shared the understanding of social ordering put forward by the élite, and it was simply a matter of settling on those who were most worthy of shouldering the responsibility to assume leadership roles at the peak of the pyramid. Prominent members of the Upper Canadian community outside of the privileged circle of

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[96] *Ibid.*, 77-79.

[97] *Ibid.*, 77.

political influence shared this understanding of social ordering, too, and Baker mentions specifically Susanna Moodie, Catherine Parr Traill, Samuel Strickland and T.R. Preston, all members of Upper Canada's fledgling literary élite.[98] Despite the fact that the first three of these authors were siblings, and therefore likely to have been raised with similar outlooks on social life and the role of morality and providential mission in the way in which we carry out our respective stations in life, Baker makes his point that the idea of an hierarchical society, stratified for the purpose of accomplishing order and progress, was an idea shared across contemporary Upper Canadian circles, and is not to be dismissed simply as the opportunistic adoption of "Loyalist providentialism," as suggested by Romney.[99] In fact, despite his reference to various works of Moodie, Traill and the others to support his point, Baker fails to cite perhaps the strongest statement to emerge from the Upper Canadian literati on the divine ordination of a stratified society:

> That all men, morally speaking, are equal in the eyes of their Maker, appears to me a self-evident fact, though some may be called by His providence to rule, and others to serve. That the welfare of the most humble should be as dear to the country to which he belongs as the best educated and the most wealthy, seems but reasonable to a reflective mind, who looks upon man as a responsible and immortal creature; but, that *perfect equality* can exist in a world where the labour of man is required to procure the common necessaries of life – where the industry of one will create wealth, and the sloth of another induce poverty – we cannot believe.
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> Some master spirit will rule, and the masses will bow down to superior intellect, and the wealth and importance which such minds never fail to acquire. The laws must be enforced, and those to whom the charge of them is committed will naturally exercise authority, and demand respect.
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[98] *Ibid.*, 84-85.

[99] *Supra* note 83 and accompanying text.

> [E]quality of station is a dream – an error which is hourly contradicted by reality. As the world is at present constituted, such a state of things is impossible. The rich and the educated will never look upon the poor and ignorant as their equals; and the voice of the public, that is ever influenced by wealth and power, will bear them out in their decision.[100]

This perspective on the role of class distinction in maintaining an ordered society, put forward by Moodie in this quotation and shared, according to Baker, by many of her contemporaries, is offered up by Baker as justification for an interpretation of élite activity more sympathetic to their understanding of the purpose and obligation of government. Rather than self-interest as the motivating factor in law making, we have the responsibility that comes with birth and breeding. Instead of political agendas and personal vendettas as the sources of law reform, we have a *bona fide* belief in the "vertical mosaic ... as a matter of political and pedagogic exigency, [and] of providential decree."[101] In place of a society suffering under the oppressive rule of a privileged few, we find a society comprised of many classes and occupations, accepting of their station in life and supporting the entrenched position of the legal and administrative élite. Viewed from this alternative perspective, the motives of the powerful have more to do with achieving the common good than the good of the few, remembering, of course, the congruence between hierarchy and social well-being.

Baker believes that his interpretation of élite motives distances his history from that of more radical instrumentalists such as Romney. In speaking of the young lawyers of the Juvenile Advocate Society, Baker said "[p]erhaps most important, to the extent that one can reconstitute these lawyers' conceptions of what they were doing, such reconstructions promise to serve as

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[100] Susanna Moodie, *Life in the Clearings versus the Bush* (Toronto: McClelland & Stewart Inc., 1989), 331-333. First published in 1853. Emphasis in original.

[101] Baker, "The Juvenile Advocate Society," *supra* note 89, 100.

vital checks upon functional or quantitative descriptions of Upper Canadian law and society."[102] This is true, of course, if we consider merely the functionalism that ascribes to élite activity motives of self-interest and little else, a functionalism perhaps closest to the new historical roots from which much of recent historiography of Upper Canada emerged. But Baker's own interpretation remains a functionalist one, although perhaps of a more conservative variety. For Baker, law is nevertheless the tool of the élite, an instrument for the realization of a very well-defined vision of society, ordered and stable and supportive of the efforts of the ruling group to work toward enhancement of the common good as they, and many of their contemporaries, understood it. This theme permeates Baker's work. Arguably at least, it is because of the responsibilities that came with high office and burdensome position that the Upper Canadian élite clung to the ideology of king and constitution, that they structured (or attempted to structure) legal and political thought in such ways as to justify their own oligarchic rule as the only avenue to order in a precarious, disparate community.

This more conservative functionalism of Blaine Baker is dependent in large measure on a particular interpretation of Upper Canadian tory ideology. The toryism of the early nineteenth century, Baker argues, displayed a number of key elements that served to shape the way in which contemporary law developed. First, leaders saw British constitutional balance reflected in the stratification among social classes, essential to the achievement of a safe, regulated, co-operative community environment. Secondly, this environment was to be realized through a graduated social structure, a resistance to egalitarianism across the membership of different classes, and the promotion of strong civil authority and provincial infrastructure. Thirdly, the rule of the élite was legitimized through their intellect and merit, and their leadership was to instill in others a

desire for self-fulfillment and ultimately contentment.[103] Law and regulation was to serve as the instrument by which this particularly tory vision of Upper Canadian society was to be realized, at least in part, and, from the perspective of Attorney General Robinson, suggests Baker, "law should be understood as that which orders, reflects, and perpetuates a providentially mandated vertical mosaic."[104] And in his most direct confrontation with those who suggest a more self-interested manipulation of law and legal institutions as the motivation for much élite activity during the 1820's and 1830's, Baker writes:

> Assuming that all postures in the world are, in some measure, self-interested, it is not apparent that labelling the beliefs and actions of Upper Canada's legal-administrative aristocracy of the 1820's as self-serving reveals much about how its members conceived of themselves, how they understood the roles they were filling, what theories of order they embraced, or how they portrayed the common law and the judiciary's role in enforcing it.[105]

In other words, there is nothing much to be gained in our attempts to more fully understand our past by ascribing self-interested motives to Upper Canadian leadership. From Baker's perspective, this is trite. Only when we recognize the attempts of the élite to achieve a well ordered society, consistent with a particularly tory vision of the common good, do we make real progress in explaining their activities and their attitudes towards law and legal institutions.

Similarly, David Howes wants to defuse the notion that much of élite activity in the legal arena was conspiratorial and vindictive. This is especially clear in his consideration of Robinson's role in the "alien question," an issue, it will be remembered, to some extent written

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[102] *Ibid.*, 101.

[103] Baker, "The Re-Constitution of Upper Canadian Legal Thought," *supra* note 89, 256-257.

[104] Baker, "Review of Patrick Brode's *Sir John Beverley Robinson: Bone and Sinew of the Compact*," *supra* note 89, 148.

off by Romney as driven by political spite and personal ambition.[106] For Howes, the incident has a completely different tone, one that is not fully comprehensible in terms appropriate only for the "levellers' discourse" of reform.[107] In the language of the constitutionalists of the day, argues Howes, Robinson's handling of the alien question was perfectly consistent with constitutional principles, motivated not so much from a desire to resist the reform movement toward an egalitarianism that would threaten the entrenched position of Robinson and his colleagues, but rather from an insistence on the preservation of "proportionality" and hierarchy. Conspiracy and vindictiveness as explanations for events of the day ignore much of the discourse of constitutionalism to which Robinson and others subscribed.

This approach to élite activity shares much with that of Baker, and aligns both against the more radical instrumentalism of Paul Romney. If we try to understand the actions of Upper Canada's legal and administrative leaders on their own terms, argue Howes and Baker, then we at least allow for the possibility that genuine concern for the welfare of the emerging Upper Canadian community played some role in decision-making, and therefore some role in the way in which the law developed during the period. Robinson's investment in the Welland Canal Company, for example, can be explained by his genuine concern for the security of Upper Canada against a largely unpredictable neighbour to the south, rather than as an insider's simple, opportunistic attempt to profit.[108] At an early age, suggests Howes, Robinson was indoctrinated with his mentor Archdeacon John Strachan's understanding of statesmanship and the

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[105] Baker, "So Elegant a Web," *supra* note 89, 187.

[106] See *supra* note 75 and accompanying text.

[107] David Howes, "Review of Paul Romney's *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature, 1791-1899*" (1987), 79 *Ontario History* 278-279, at 279.

responsibilities of leadership, an understanding that influenced Robinson in much of what he did as Attorney General and Chief Justice. For Robinson, as for Strachan, good government was to be the product of "the public-minded virtue of a statesman,"[109] telling us that there was much more to Upper Canadian élite activity than the desire to maintain power for power's sake.

The contrast with Romney's work is perhaps clearest in Howes's consideration of the role played by providentialism in the thought of the élite generally, and Robinson in particular. Romney, of course, argued that the élite simply chose to cling to the "myth" of Loyalist providentialism so as to lend justification and credibility to their self-serving agenda.[110] For Howes, however, providentialism formed the ideological backdrop to a genuine belief in the "rule of virtuous men," an élite attachment to an hierarchical caste system to which lower classes must adhere to maintain stability.[111] The abolition of distinctions, a plank in the egalitarian's platform of liberal reform, simply held no interest for Robinson and, by implication, his colleagues. Instead, it was the preservation of these distinctions that guaranteed for Robinson the realization of his sincere wish for a stable, strong, content community. As a result, argues Howes, we find a wide difference between the functionalist's interpretation of the historical relationship between law and society, exemplified in the Horwitzian tradition of Paul Romney, and the contemporary view of historical actors themselves. Robinson genuinely conceived of

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[108] Howes, "Property, God and Nature," *supra* note 87, 391.

[109] *Ibid.*, 386.

[110] *Supra* note 83 and accompanying text.

[111] David Howes, "Review of Patrick Brode's *Sir John Beverley Robinson: Bone and Sinew of the Compact*, George Parkin Grant's *English-Speaking Justice*, and David Ricardo Williams's *Duff: A Life in the Law*" (1986), 35 *U.N.B. Law Journal* 231, at 235.

himself as "an instrument of Providence," and the historical recognition of that fact denies much of the criticism launched at élite activity by current historiography.[112]

(iii) Conclusion

It is easy to see, then, two major strands in recent histories of Upper Canadian law. Both the work of Paul Romney and that of Blaine Baker and David Howes exhibit that interdisciplinarity by which the new legal history is defined, at least in the focus on the inter-relationship among political, social, economic and legal issues. The work of each of these scholars, too, is founded in a strict historical methodology, although their relative success in this respect is the subject of some dispute. And all three authors depend to a large extent on the functionalism inherent in the Horwitzian tradition of legal-historical scholarship, a tendency to interpret the role of law in history by first considering its function as the tool of the legal and administrative élite.

The character of the instrumentalism employed by these authors differs widely, however, as has been seen above in the consideration of the motives of Upper Canada's ruling élite during the 1820's and 1830's. From Romney's perspective, the prime motivating factor in the élite's use of law was self-interest, while Baker and Howes tend to be more sympathetic towards the élite's desire to create and then maintain a stable, content, harmonious society on the shoulders of a strict hierarchical ordering. To straddle the divide between these two perspectives, we must turn to the work of Russell Smandych, especially his research into the development of the

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[112] Howes, "Property, God and Nature," *supra* note 87, 369.

Kingston penitentiary during the early 1830's[113] and his essay on the exclusion of the English poor law during the constitutional developments of the 1790's.[114]

On the one hand, we find Smandych aligning himself with Romney's view of élite motivation when he considers the possible explanations for the exclusion of the English poor law from application in Upper Canada during the 1790's. The decision of the first legislature of Upper Canada to adopt into the province the laws of England with respect to property and civil rights, with the exception of law relating to maintenance of the poor and bankruptcy, has fascinated a number of historians of Upper Canadian law.[115] For Smandych, it is significant that both the poor law and bankruptcy law were excluded by the legislature. Citing the work of J. C. Levy, Smandych relates that both of these frameworks had the rejection of individual responsibility at their core, and the legislature was making a statement on the need for less state obligation relative to the welfare of the poor and financially irresponsible.[116] Smandych is extremely cautious in his support of this position, suggesting that, because of a lack of reliable original sources, Levy's attempt to explain the rejection of the poor law in these terms is largely speculative. Yet, despite this caution, Levy's conclusions have a serious impact on Smandych's

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[113] Russell Smandych, "Tory Paternalism and the Politics of Penal Reform in Upper Canada, 1830-34: A 'New-Revisionist' Account of the Kingston Penitentiary" (1991), 12 *Criminal Justice History* 57. This article is also published as "Beware of the 'Evil American Monster': Upper Canadian Views on the Need for a Penitentiary, 1830-1834" (1991), 33 *Canadian Journal of Criminology* 125.

[114] Russell Smandych, "William Osgoode, John Graves Simcoe, and the Exclusion of the English Poor Law from Upper Canada," in Louis A. Knafla and Susan W. S. Binnie (eds.) *Law, Society, and the State: Essays in Modern Legal History* (Toronto: University of Toronto Press, 1995) 99.

[115] Smandych refers to a large number of articles on the problem and related issues of Upper Canadian legal history. See Smandych, "The Exclusion of the English Poor Law from Upper Canada," *supra* note 114, at 120-123, notes 2-13.

own interpretation of the event. Through careful analysis of legislative debates and papers, Smandych concludes that a strong argument can be made that the poor law was rejected for largely personal, economic reasons. While it is true, argues Smandych, that law-makers in early Upper Canada shared a vision of a well-ordered society, and sought to employ law so as to more certainly achieve this vision, there was little of "providential mission" in their decisions. Rather, he suggests, the legislative assembly collectively favoured the sort of government that would reduce the cost to the élite of supporting Upper Canada's less fortunate. This meant rejection of the poor law and rejection of a bankruptcy regime that allowed for compromise of the debts of insolvents, while at the same time keeping intact systems of patronage and place that enhanced the prospects of clique members. "Even the first putative 'Tory-Loyalist' legislators," Smandych writes, "did not hesitate to rely on the assembly to enact law that coincided with their own economic and personal interests."[117] Presumably, this included the resolve of the legislature to reject English poor law and bankruptcy rules, hiding all the while behind the rhetoric of individual responsibility and self-reliance.

So Paul Romney finds an ally in Russell Smandych, both scholars rejecting the idea of "providential mission" in favour of self-interest as the principal factor in the development of certain Upper Canadian law and legal institutions. On the other hand, however, in his work on the development of the Kingston penitentiary we find Smandych emphasizing the tory belief in a well-ordered society, and dwelling on the élite's paternalistic attempts to impose a particular institutional regime on Upper Canadian life. Smandych argues that the tory paternalism of the 1830's shared a great deal with the toryism of earlier decades, focussing on humane, enlightened

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[116] Smandych, "The Exclusion of the English Poor Law from Upper Canada," *supra* note 114, at 102.

leadership, the need for mildly coercive state institutions to foster an improved moral climate, and the softening of oppressive tax and criminal laws. It was from this tory tradition that the movement for development of the prison at Kingston emerged.[118] This interpretation of the motivation of the élite in legal and institutional reform shares little with the argument from self-interest championed by Romney and tacitly, if not explicitly, undertaken by Smandych in his work on the English poor law. In fact, it reflects very closely the views of Howes and Baker on the self-image of the ruling élite in Upper Canada, the genuine belief that legislators occupied a moral high ground to which lower classes ought to be initiated in the attempt to instill contentment, initiative and the desire for an honest, hard-working existence. This was the motive behind much law reform in Upper Canada, including the very significant reform of the penal system that came with construction of the Kingston penitentiary, a motive that worked hand in hand with emerging temperance societies and groups for the advancement of public morals.[119]

What are we to take from this apparent dichotomy in Smandych's work? Why is it that two historical explanations for the relationship between law and society can appear in the same body of work, one supporting the radical instrumentalism of Paul Romney and the other consistent with the more conservative, even sympathetic, construction of élite activity in Upper Canada inherent in the work of Blaine Baker and David Howes? The answer to these questions may lie in two different but related ideas. First, the very interdisciplinarity that characterizes the new legal history in the first place may tend to subtly distort the role of law in history. Secondly,

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[117] *Ibid.*, 118.

[118] Smandych, "Tory Paternalism and the Politics of Penal Reform," *supra* note 113, 64-66.

[119] *Ibid.*, 71.

much of the political activity of the period used as illustrative in recent historiography is open to a variety of interpretations, meaning that the possibility of a consistent response to Upper Canada's legal history is likely illusory. It is to a consideration of these possibilities that we now turn.

D. The Subordination of Law in the New Legal History

One of the difficulties inherent in the approach of the new legal historians to the history of the law of Upper Canada resides in the very interdisciplinarity that helps to define legal history as a genre in the post-Hurstian era. The functionalist approach to the role of law in history is really not in issue; the contest on *that* account, between various versions of instrumentalism, seems to be rather trivial in legal-historical contexts, a dispute over simple motives for law reform in their *political* context, rather than on the true nature of law's function in historical change. This dispute, though important in its own right, nevertheless tends to disguise the real difficulty with which legal historians must struggle, and that is the need to identify just what it is that ultimately concerns legal history. In other words, the ideological divide between the functionalism of Paul Romney and the functionalism of David Howes and Blaine Baker, straddled, apparently, in certain of the work of Russell Smandych, is actually about politics, not law. To a significant degree, for each of these scholars law is *merely* an instrument, secondary to political developments, a sideshow to the drama played out on the centre stage of politics. The consequence of allowing, with Barry Wright[120] and Graham Parker,[121] that legal history just might disappear as a separate, identifiable subject of historical inquiry, is that legal-historical concerns have been overrun by political-historical concerns,

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[120] *Supra* note 27 and accompanying text.

[121] *Supra* note 51 and accompanying text.

virtually completely, to the point where law is merely epiphenomenal in history. The real interest, it seems, lies in politics.

To acknowledge this difficulty is not to deny the validity of either Romney's interpretation of élite motives in political and legal activity, or Baker and Howes's focus on the ideological impetus for much of what happened during the 1820's and 1830's. In fact, it is to confirm the validity of *both* approaches, in the context of the historical events chosen by the authors to illustrate their theses on élite motivation. It is undeniable that much political activity, whether in Upper Canada or in other historical locales, is motivated by the selfish designs of the principal players, and law is often swept along as the instrument by which those designs are sometimes realized. There is no doubt that much of what motivates responsible persons in history comes from genuine ideological commitment, and of course law is the tool through which a great deal of that commitment is expressed. But much of the literature reviewed earlier in this Chapter focuses exclusively on political events of particularly high drama in the history of Upper Canada - the constitutional struggles of the early 1790's, the alien question of the early 1820's, the types riot of 1826, Mackenzie's role as first mayor of Toronto in 1834 and the political intrigue that connected that episode to earlier disturbances in the legislature. Each of these events, of course, had some connection to law, but because of their high political profile, their genesis in political tensions rather than in the actual practice of developing, promulgating and enforcing an evolving body of law in a relatively pristine legal environment, they may serve to distort our impressions of the historical role of law in shaping the emerging province.

To investigate the extent of this distortion, it is necessary to retreat, at least partially and on occasion, to a Hurstian interpretation of Upper Canadian legal history. Especially relevant in this respect is Hurst's focus on the environmental impetus for many legal initiatives during the

early nineteenth century, and on his suggestion of the passive role of law, manifested most clearly in the use of law in *response* to environmental threats and administrative challenges, rather than as the actual initiator of social change.[122] During the period from 1791 to 1841, the time during which Upper Canada functioned as a separate province, the legislature passed dozens and dozens of public statutes, several hundred in all, concerning everything from the organization of the court system to the development of provincial infrastructure to the establishment of early hospitals and prisons. In addition, the legislature enacted hundreds of private acts, almost all of which were concerned with the most mundane local or private concerns. Much of this legislative activity belies the argument that law-making in Upper Canada was predominantly an exercise in self-indulgence, and most of the statutes were passed not from some austere ideological perspective, but rather simply because of the perceived exigencies of colonial life. Virtually all statutes passed during the fifty years of Upper Canada's separate existence were passed because of basic administrative organizational imperatives, or because of what we can refer to as environmental imperatives, issues such as the lurking American threat, the crush of immigrants during the 1820's and 1830's, the need to encourage settlement and development of remote lands, the pressing responsibility to establish infrastructure to support the growing and industrious population. It is in these areas that the real history of the law in Upper Canada is revealed, rather than in a select few events of great *political* significance that, despite their importance to Upper Canada's history generally, offer little to the legal historian save the opportunity to miscast the way in which law contributed to the evolution of a recognizable Upper Canadian community. Yes, the functionalist's version of the role of law in history is largely accurate, at least when cast broadly and generically. But instead of reducing law to the role of

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[122] For an introduction to these issues, see *supra*, notes 54-57, and accompanying text.

handmaiden to political machination, a more comprehensive approach to the function of law in history cannot help but reveal the ways in which law performed an integral function, across the first decades of Upper Canada's existence, in establishing the conditions necessary for the development of the colony in the face of various administrative challenges and environmental threats.

Perhaps the prime example of the way in which the role of law in Upper Canadian history can be distorted by a too dogmatic devotion to one version or the other of the new legal history's instrumentalism lies in Russell Smandych's interpretation of the rejection of the poor law during the 1790's.[123] It is tempting, of course, to concur with Smandych in his conclusion that personal economic interests of members of the legislature were not set aside in favour of provisions that might lead to an enhancement of the public good generally through support of the poor. The inevitable impression left by such a conclusion, relative to the historical role of law at least, is that the law was simply a means to a very selfish end for the legislature, a tool that could be employed or not dependent on the indulgent whims of those in positions of authority. While there is little doubt that such a response to the events of the 1790's is likely justifiable on the strength of the evidence marshalled by Smandych and other historians of the period, it ignores the fact that, over the course of the following fifty years, the legislature of Upper Canada, despite the exclusion of the English poor law, passed no fewer than nine public statutes devoted to relief of the poor and destitute,[124] and fifteen private statutes to address particular problems of

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[123] *Supra* note 114 and accompanying text.

[124] See, for example, *An Act for the Maintenance of Persons Disabled, and the Widows and Children of such Persons as may be killed in His Majesty's Service*, 53 Geo. III, c. 4 (U.C.); *An Act to provide for the Education and Support of Orphan Children*, 39 Geo. III, c. 3 (U.C.); *An Act granting a sum of money for the relief of sick and destitute Emigrants at Prescott*, 2 Wm. IV, c. 34 (U.C.). There are many others; these are representative.

indigence.[125] The law played a fundamental role in realizing in Upper Canada an early humanitarian commitment to relief of the poor, and this role is distorted when we concentrate too completely on the politically charged but, in the overall context of the evolution of law for relief of the poor, relatively insignificant rejection of the English poor law.

It is true, too, that much of the argument advanced in support of one or the other instrumentalist interpretation of the role of law in Upper Canadian history is susceptible of the contrary interpretation as well, and this certainly gives one pause before accepting the proffered version without reservation. For example, in Paul Romney's interpretation of the political mood at the time of the types riot in 1826,[126] he takes great pains to point out how leading Reformers, including Mackenzie, criticized the behaviour of members of the administration, especially their aristocratic pretensions and the failure of leading lawyers to live up to the ideals of their profession. The implication is that the important critical response to the types riot was the Reform response, and that the administration, yet again, used its position to manipulate the legal consequences of the affair so as to neutralize that response and achieve their self-indulgent ends. But it is evident from Romney's own account that this political mood, and therefore the relationship of the various factions to the law and its utility, did not divide so neatly along party lines. In fact, both W.W. Baldwin and Robert Baldwin, themselves members of the élite and professional men (although at the time emerging as serious critics of the administration), were highly critical of the official response to the types riot, and based their criticism on grounds

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[125] *An Act granting relief to Catherine McLeod*, 56 Geo. III, c. 12 (U.C.) and *An Act granting a pension to Elizabeth Lawe*, 2 Geo. IV, c. 20 (U.C.) are representative.

[126] *Supra* notes 69, 83 and 84 and accompanying text.

similar to those raised by entrenched Reformers.[127] In other words, it is not accurate to say that there was an inherent opposition attack against the élitism of the administration and its manipulation of the law and legal process for selfish ends, all fuelled by the types riot. The Baldwins' response suggests that there was an actual belief in the virtue that accompanied office, and that this virtue had been betrayed in the types riot. This latter interpretation, of course, is perfectly consistent with the shade of legal-historical intrumentalism that colours the work of David Howes and Blaine Baker referred to above, and with which Romney takes such issue in his work.

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[127] Romney, "From the Types Riot to the Rebellion," *supra* note 69, 127 *et seq.* See also Michael S. Cross and Robert L. Fraser, "Robert Baldwin," and Robert L. Fraser, "William Warren Baldwin," in Fraser (ed.) *Provincial Justice: Upper Canadian Legal Portraits*, *supra* note 73, at 8 and 201 respectively. For a particularly enlightening discussion of the relationship between Robinson and the Baldwins, see Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997* (Toronto: University of Toronto Press, 1997), 71-78. It is especially interesting to note that, according to Moore's account of the Baldwins' response to Robinson's handling of the types riot, Robinson and the Baldwins agreed on many of the ideological foundations of political and legal power, but disagreed in one critical aspect:

> For Baldwin and Robinson, the great political struggle of Upper Canada could be reduced to a lawyers' debate on how to read Blackstone on the constitutional meaning of property. But the consequences were large. In Baldwin's reading of the law, limiting political power to chosen representatives of the Upper Canadian élite was, strictly speaking, unconstitutional. And the partiality that Baldwin felt Robinson had shown to members of the élite was indeed the outrage that the legislative committee had claimed. Baldwin's verdict in reply to Robinson's letter to the bar was as harsh as the committee's had been. "You fell far back from your duty," he wrote.

Moore, *The Law Society of Upper Canada*, 75-76. In other words, according to Moore's interpretation, Baldwin's criticism of Robinson's response to the types riot emerged not so much from indignation over the self-interested manipulation of the law and legal process that, according to Romney, underlay the basic Reform criticism of Robinson, but rather from a perceived affront to constitutional duty and responsibility.

In a similar vein is Romney's criticism of John Beverley Robinson's role in the alien question of the early 1820's.[128] Romney is very careful to point out to his reader how obviously ambiguous the law relative to the rights of post-Loyalist American immigrants was during the 1820's. According to Romney, conventional wisdom was that politics and law were not connected. Consistent with the rhetoric of constitutionalism and the precepts of the "rule of law," the law was independent of the temporal concerns of politics and politicians, at least so contemporaries were told by leading politicians such as Robinson; it was simply handed down in sanctified form through generations upon generations of free Englishmen. Maintaining this aspect of the rule of law mythology was important to the oligarchy, Romney argues, because it allowed its members to appear as though their reading of the law was above political tension when, in fact, it was done in such a way as to advance particular political and ultimately self-interested agendas. In this way, the élite avoided the scrutiny that would follow popular recognition of the interconnectedness of politics and law and the resulting temporality of law itself. But the law of "alien rights," Romney protests, was full of ambiguity, and it speaks volumes of Robinson's manipulative, opportunistic political character that he argued his position with such vehemence and apparent certainty so as to advance his own ulterior political motives.

Realistically, however, why should we fault Robinson for having an opinion and putting it forward in the best, most forceful way he could, if in fact he was putting it forward on behalf of a constituency that deserved representation and the right to be heard? After all, as every good lawyer knows, the best advocate always tries to put forward any particular position as beyond challenge, simply to give the appearance of strength to those who will ultimately decide the

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[128] *Supra* notes 70 and 74-76, and accompanying text.

point. From the perspective of *political* history, Robinson's role in the alien question may appear opportunistic and self-serving, but from the perspective of *legal* history, Robinson was simply living up to the principles of good advocacy, consistent with Howes and Baker's argument on the idealism of the élite. This admittedly simple conclusion is easily derived from the same evidence as Romney's insistence on something more sinister, leading one to the disturbing result that the evidence on which these conclusions appear to be based is really not that important for those conclusions after all.

The problem isolated here is largely one of interpretation, and it emerges with equal force in certain of Blaine Baker's work too. For example, to illustrate his argument that the early Bar's elitist vision of the "rule of virtuous men" was shared widely outside the privileged circle of lawyers, Baker quotes Archdeacon John Strachan, suggesting, it is assumed, that in Strachan we find an independent, objective opinion of the meritocracy in place in Upper Canada.[129] But surely it is beyond doubt that Archdeacon Strachan had his own self-interest to promote in holding out the Bar as gatekeepers of order and civility, based in large part on the role he played in providing the fundamental education and guidance for many of the Bar's leading members. It is misleading for Baker to suggest that Strachan's promotion of the lawyer class was motivated by a genuine concern for the advancement of Upper Canadian society, and not by the self-interest that forms the basis of Romney's critique of élite activity. In introducing Strachan's commentaries on the role of law and lawyers in shaping the ideal Upper Canadian community, Baker says this:

> Lay commentary of the early nineteenth century affirms the plausibility of the Law Society's grand plans to establish its admission and training programmes as portals to status and authority, and suggests that statements which might otherwise be downplayed as the self-interested, rhetorical and

[129] Baker, "The Juvenile Advocate Society," *supra* note 89, at 81.

> conventional exhortations of lawyers reflected sentiments with a currency beyond the legal profession.[130]

Unless Baker also reminds his reader that the quotations offered in support of this argument possibly have their foundation in the self-interest of their utterer, albeit a self-interest marginally different from that of the members of the Bar in whose favour the statements are offered, then he has failed to give his reader the most complete picture possible of the event under scrutiny.[131] In other words, this aspect of his work suffers from the same weakness as does Romney's, that is, it is capable of yielding both the conservative instrumentalist interpretation of the role of law in Upper Canadian history apparently offered up by Baker and Howes, and also the more radical version he finds in the work of Paul Romney and which he ultimately eschews.

Again, the difficulty is one of interpretation, rather than an obvious and deliberate attempt to mislead. The evidence relied on by historians is invariably capable of yielding more than one interpretation, and oftentimes these various interpretations are inconsistent with each other. Baker seems to contemplate this when he founds his own interpretation in the attempt to tease out of the evidence the "alternative standpoint of contemporary context or meaning."[132] Ostensibly, this is Baker's attempt to let the evidence speak for itself, and in turn this should lead

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[130] *Ibid.*

[131] Baker's evidence of wide social acceptance of the Bar's understanding of élite status and responsibility rests on Archdeacon Strachan's comments, but he also offers up the comments of Susanna Moodie, Catharine Parr Traill, Samuel Strickland and T.R. Preston as representative of Upper Canada's "general political orientation." As indicated above, however, the first three of these writers, all very active during the 1830's, were siblings and people of rather refined taste, meaning that their various opinions can hardly be indicative of the broad cast of sentiment among ordinary Upper Canadians. See *supra* notes 95-100 and accompanying text, and *ibid.*, 84-85, notes 29 and 30 and accompanying text.

[132] Baker, "The Juvenile Advocate Society," *supra* note 89, at 100.

us to a more objective history, free of the competing interpretive perspectives at play in Romney's, Baker's and Howes's work. But what Baker fails to recognize in this attempt is that there *is* no identifiable "contemporary context or meaning." Just as there are today as many interpretations of the evidence of history as there are historians, so too were there as many perspectives on contemporary Upper Canadian events as there were reflective participants and observers. Baker is never really precise about just how it is that we are to expose the "contemporary context or meaning" that is to form the basis of his objective history. Rather, he fails to recognize that the practice of history necessarily involves interpretation, since the past does not emerge, fully formed and uncontentious, from an attempted objective review of historical evidence.

It is at least partly because of the unavoidability of interpretation that Russell Smandych's conclusions can appear to support both the radical functionalist's and the conservative functionalist's perspectives on events in Upper Canadian history. Both, after all, are correct, at least insofar as they are supported on a defensible reading of the evidence of history. As David Howes suggests, "the history of the period 1791-1841 must be written from both points of view, the Aristotelian and the 'Diceyian,' not just one, if it is to count as history."[133] In other words, there is no single, correct, comprehensive perspective on the motivations behind the actions of the élite during the Upper Canadian period, whether we consider those motives from contemporary opinion or whether we depend on the various interpretations evident in recent historiography.

The history of the law by which the Upper Canadian administration responded to the cholera threats of the early 1830's assists us a great deal in sorting through these problems in the

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[133] Howes, "Review of *Mr. Attorney*," *supra* note 107, at 279.

nature of legal history in the post-Hurstian era, and in the problems of the philosophy of history, especially the problem of interpretation, that continue to plague the writing of history in late modernity. I want to bring the law of disease control forward to centre stage in this inquiry, in an attempt to overcome the subordination of law to politics that permeates much of the new legal history of Upper Canada. In doing this, it will be demonstrated through the particularly stark example of epidemic disease the way in which law was used as an instrument, but an instrument not principally for selfish political gain or for grand ideological imperatives, although elements of both will appear in the executive and legislative responses to the epidemics of 1832 and 1834. Rather, we will see the law as a defence to a particularly dangerous environmental threat, in much the same way as law was used throughout the Upper Canadian period to respond to problems of settlement, immigration, security from the American threat, and the development of colonial infrastructure to overcome these various problems. In this way, the legal response to the cholera epidemics will serve to confirm David Bell's position that the law in history must be understood as "historically contingent" rather than "doctrinally inevitable."[134] However, the contingency with which we are concerned is one driven as much or more by environmental pressures as by political expediency. This is the case, despite the fact that we will encounter in this inquiry evidence that will lead us to interpretations consistent with Paul Romney's argument from self-interest, and consistent with the argument from ideology represented in the work of Blaine Baker and David Howes. For we will see, in the way that "plagues bend history," that the law does indeed perform a unique role in its historical setting, functioning more as a mediator between environmental threat and human social development than as a simple tool for the accomplishment of political goals.

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[134] *Supra* note 28 and accompanying text.

CHAPTER THREE

THE EXECUTIVE AND MUNICIPAL LEGAL RESPONSE TO THE EPIDEMIC OF 1832

A. Introduction

While life-threatening disease was a fact of everyday life in Upper Canada throughout the period up to the 1830's, there is little doubt that the cholera threat of 1832 represented a unique challenge to decision-makers of the day. The disease made special demands on the resources at the command of the executive and local governments, consuming relatively vast amounts of capital at a time when capital was scarce at best. Political tensions, too, were generated by the approach of the disease and its ultimate arrival, testing in new and unforeseen ways the relationship between the executive and other branches of government, and between different levels of local administration. Socially, the crisis raised the possibility of renewed community solidarity at a time when political turmoil was beginning to threaten the very viability of Upper Canada as a distinct political body. And the medical professions endured difficult and divisive debates as a result of the arrival of cholera, arguing over its cause, prevention and cure, haggling over fees, struggling over authority in the administration of health care delivery.

The legal response to the epidemic was equally unique for Upper Canada, and equally tense. Legislative and regulatory initiatives different from anything seen before in the colony were commanded by cholera, and public discussion over the appropriate legal response reached bitter proportions. At issue was the very nature of the public good, played out in debates over

miasma and contagion, over immigration and protectionism, over political reform and the status quo. In the end, the epidemic provided the historical setting for the clear delineation of executive, legislative and municipal priorities. The episode confirmed that law and regulation at the municipal level represented the principal defense against threats to the public health emerging from circumstances extraneous to political self-interest and ideology.

In the executive response, however, we will find traces of the self-interest that characterize much in the employment of law by the legal and administrative élite of the day, at least according to Paul Romney's interpretation. The delays in initiating firm legal measures to protect the populace through what was arguably the best manner available, delays fashioned by the executive government and endured by the citizens at large, can most convincingly be explained by reference to John Colborne's commitment to continued immigration and the commercial and agricultural expansion that was thought to accompany it. Quarantine and related legal interventions were considered by many to be anathema to commercial interests, and, as we shall see, the debate over the advisability of one legal response or another occupied a great deal of space in editorial columns throughout 1832. In a sense, Colborne's delays, and ultimately his failure to act decisively despite much rhetoric to the contrary that emerged from his office during the summer, underscore his unwillingness to interfere with commercial expansion, itself an anxiously anticipated by-product of the Colonial Office policy on emigration. To the extent that it was Colborne's duty to see to the accomplishment of this policy, even, perhaps, at great risk to the public health, we find the manipulation of law and the legislative process for the fulfillment of personal political responsibility.

While this interpretation has much to commend it, supported both by logic and the preponderance of evidence that emerges from the historical record, it is far from certain that a

more sympathetic analysis of executive behaviour is unavailable to us. It is at least arguable, for example, that there were ideological imperatives at work in Colborne's refusal to call the Legislature to a special session so as to put legislation in place to support local authorities in their frontline battle with the disease. There is little to suggest duplicity in those who held that the public good might most certainly be enhanced by a strong, vibrant, growing agricultural and commercial sector, and there is much to suggest that Colborne clung to this belief in an apparently genuine interest in community well-being. In a sense, from this perspective at least, Colborne ought to be applauded for doggedly adhering to this vision, despite much vitriolic opinion to the contrary, despite an unprecedented crisis in Upper Canada's public health, and despite the examples of decisive legislative action emerging from neighbouring colonies. Here we see Colborne championing a sincerely held understanding of social welfare, and seeing to the employment of law in such a way as to ensure its accomplishment. In this is the commitment to duty and responsibility treated so sympathetically by Blaine Baker and David Howes.

But while the executive legal response to the epidemic of 1832 provides a convenient window on the debate between proponents of different versions of legal functionalism, perhaps belying a dogmatic insistence on either one by affirming their arguably equal plausibility, the municipal legal response finally provides for us the setting through which to attempt an understanding of law in history as it was most often employed. We will encounter municipal authorities struggling with enormous responsibility to design regulatory initiatives to defend themselves and their neighbours against the disease as it approached and eventually established itself in community after community. We will find ordinary struggles to establish legal authority in support of enforcement practices, struggles that, for the most part, could not be won during 1832. In pleas from throughout Upper Canada to the executive government, we will confront

apparently timeless debates over the efficient allocation of financial resources to accomplish public health goals through the deployment of law. And we will find various forms of law, from strict police practices to early sanitary regulations to simple persuasive pressure and appeals to individual responsibility for community welfare, all in service of the effort to protect the community from an environmental threat unprecedented in Upper Canada's history.

But nowhere in the record of the activities of municipal authorities will we find the self-interest that generates legal-historical interpretations such as those of Paul Romney. And there is very little of ideological commitment in the ways in which magistrates, Boards of Health and other civic authorities used legal instruments to influence behaviour and defend against cholera. Though the legal response of municipal authorities was not without serious tension and division, that response simply does not lend itself to explanation in a way similar to that developed by Howes and Baker. Rather, in the municipal response to the epidemic of 1832, we are provided with the opportunity to consider law almost completely freed from its historiographical subordination to politics and economics, and therefore to save a bit of legal history from being overwhelmed by other historical mandates.

It is difficult, of course, to separate neatly the executive legal response to the epidemic from the municipal response. The two are connected, inextricably, and the historical record must be read with that in mind. But despite that difficulty, in the next section of this Chapter I will consider the executive response to the approach of cholera during the period up to and including 20 June 1832, the date on which the Lieutenant Governor issued his Circular to Chairmen of the various District Quarter Sessions, requesting the formation of District Boards of Health.[135] This will be followed by a review of municipal activity from early in 1832 to 30 October, the last day

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[135] *Supra*, note 22.

before the Legislature was re-opened by Colborne. Then, in the final section, I will review executive activity during the period from 21 June to 30 October 1832, the period during which much of the conflict arose between the executive and municipal mandates for the use of law to protect the public from the crisis of epidemic cholera.

B. The Executive Legal Response, to 20 June 1832

(i) Introduction

It is in the period prior to 20 June 1832 that the issue of executive delays in responding to the threat of cholera crystallizes in the historical record. There are a number of possible explanations for those delays, all of which are supported in more or less convincing manner by the evidence. First, and perhaps least likely, is the possibility that the executive government was unaware of the seriousness of the threat posed by cholera. There was opinion extant in Upper Canada that the epidemic was simply the concoction of one political force or another, and it may be that Colborne was influenced by this debate enough to convince him that invasive and potentially disruptive regulation was not the most appropriate alternative. This explanation, as we shall see, is merely a possibility, denied by much of the evidence.

Secondly, the debate over the means by which cholera was transmitted had not yet been settled. "Contagionists" believed that the disease was passed directly from person to person, and consequently they insisted that quarantine was the only sensible regulatory response to prevent an epidemic. Much of the legal framework for the control of the importation and spread of disease in the United Kingdom and the British North American colonies outside of Upper Canada was founded on a cautious, contagionist perspective. "Anti-contagionists," or "miasmatists," dismissed the argument from contagion as old-fashioned, insisting instead that the disease was spread through noxious vapours in the air, or by putrid emanations from rotting

animal and vegetable matter. From the perspective of this argument, quarantine was simply a waste of time, an outmoded and unnecessary incursion into the lives of the sick that had proven ineffective time and time again. It may be that John Colborne was a committed anti-contagionist, and therefore believed that the regulatory regime in place in other jurisdictions was ill-advised. As we shall see in Section B(iii) of this Chapter, while the weight of evidence suggests that Upper Canadians were principally contagionist in their outlook on disease, and on cholera in particular, there is some evidence that Colborne was attracted to the anti-contagionist's insistence on miasma as the culprit in the transmission of the disease.

Thirdly, the fact that neighbouring colonies, and the State of New York, had protective measures in place may have given the executive government at York a false sense of security. After all, there was no direct connection between Upper Canada and Europe, and if the disease were to be brought to North America by ships from overseas it would first have to penetrate the defenses established by other jurisdictions. Why erect barriers along the St. Lawrence River when other governments had apparently done all that could be done, and when Upper Canada was certain to reap the benefits of its neighbours' efforts? While there is no direct evidence that Colborne adhered to this view, the explanation does have some logical, though not conclusive, appeal.

It is difficult to separate Colborne's possible commitment to anti-contagionism as a potential explanation for executive delays in responding to the cholera epidemic, from the final alternative explanation. Quite conveniently, the anti-contagionist's dismissal of quarantine and related measures supported Colborne's unequivocal commitment to continued high levels of immigration from the United Kingdom and Ireland. Immigration, in its turn, was considered essential to the commercial and agricultural expansion of the colony. If a legal initiative, such as

quarantine, were expected to interfere with the accomplishment of the administration's objectives in this regard, then an alternative would have to be found. This approach, as we shall see, may distinguish Upper Canada's executive response to the disease from the response in other jurisdictions. And, I want to suggest, it is this explanation for executive delay in using conventional legal instruments to respond to cholera that is the most convincing.

(ii) The Reality of the Cholera Threat

There can be little doubt that ordinary Upper Canadians were acutely aware of life-threatening disease throughout the period in question. Newspapers of the day constantly reported episodes of typhus, smallpox and yellow fever (all of which were considered very dangerous diseases), and regularly provided information and recommendations on prevention, treatment and cure. In York, the hospital struggled badly to cope with the large numbers of those admitted with one fever or another, and continually required additional funds to adequately address the medical emergencies of the day.

Very early in John Colborne's mandate as Lieutenant Governor of Upper Canada,[136] it was clear that both indigenous disease and disease imported from abroad through ordinary shipping and immigration posed a real and dangerous threat to the public health. Reports emerged from Lower Canada as early as January 1829 that "crowded ships from Europe" brought with them scores and scores of sufferers who "almost universally contracted a contagious fever," underscoring the House of Assembly's pleas for the means to construct a

[136] Colborne took up his duties at York in August 1828. See Alan Wilson, "John Colborne," in *Dictionary of Canadian Biography, Volume IX – 1861-1870* (Toronto: University of Toronto Press, 1976), 137.

hospital for the reception of immigrants landing at Québec.[137] In Upper Canada, officials of the York Hospital emphasized in their report for 1830 the importance of providing a publicly supported facility for the maintenance of the public health. The most pressing problem of that year seems to have been smallpox, and Dr. Widmer insisted on "...the great importance of such a means of preventing contagion as is furnished by a well regulated public infirmary."[138]

At the same time, the public was becoming more aware of medical advances in the treatment of infections and contagions, advances just beginning to have an impact on colonial life. The promise represented by vaccination against smallpox, for example, could only have raised hopes for relief from some of the ravages of disease. In York, newspapers assisted in disseminating information to promote the latest advances:

> Vaccination – We are requested to state that a medical gentleman will attend daily at the Hospital in this town, to vaccinate gratis the children of the poor, and that a quantity of matter for that purpose is now on hand. We advise them to embrace this favourable opportunity lest the arrival of emigrant families introduces so terrible a malady, and spread sickness and death amongst their children.[139]

Here we have early indications of a commitment to public health through fulfilling a civic obligation to the poor, although it is not clear whether the programme referred to in this article was funded by government or by charitable donations. In any event, however, it is clear that the

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[137] "Report from the House of Assembly of Lower Canada," *Colonial Advocate*, 1 January 1829, NLC.

[138] "Report of the York Hospital and Dispensary to the Lieutenant Governor for the Year 1830," *Colonial Advocate*, 10 February 1831, NLC.

[139] "Vaccination," *Canadian Freeman*, 26 May 1831, NLC. It is not certain that the "malady" referred to in this article is smallpox, but it is unlikely that it could be anything else, given the state of medical knowledge and treatment of various diseases at the time. See Edward S. Golub's narrative of the development of the smallpox vaccine in England during the eighteenth century, in *The Limits of Medicine: How Science Shapes Our Hope for the Cure* (Chicago: The University of Chicago Press, 1997), 114-120.

threat of smallpox being imported into Upper Canada through immigration was considered urgent enough to warrant the supply of free treatment to those who could not otherwise pay, and worrisome enough to compel the editor of the *Canadian Freeman* to plead with parents to take advantage of the opportunity.

Prior to the arrival of cholera in Upper Canada in 1832, the most immediate threat appears to have been typhus. In its submission to the House of Assembly of November 1831, the York Hospital and Dispensary reported on the alarming mortality and morbidity statistics accumulated since its last report:

> The number of patients admitted since last report has been 321 ... 1031 adults and children have been prescribed for at the Dispensary.
>
> The admissions of this year, as compared with the last, are more than double, owing to the great influx of Emigrants. The proportion of deaths will appear great, but many of the cases were admitted in a very advanced stage of illness, and several in an expiring condition.
>
> The prevailing complaints among the Emigrants has been Fever of the character denominated Typhus; this disease engendered in poverty and wretchedness, has happily been heretofore almost unknown in the Country. Of a malignant and protracted nature it proved baneful to the Attendants and expensive to the Establishment. The income of the Hospital, indeed, could not have met the urgent demand upon it for providing additional bedding, Nurses and nourishment; but the timely aid of large benevolent contributions, furnished the means of affording relief to every applicant. This judicious appropriation of Charity, thus materially contributed to preserve the Town from the Contagion that would otherwise have endangered it.[140]

In this report, the Hospital alerted the House of Assembly to a number of difficulties. First, dangerous disease was connected to the arrival of immigrants, bringing typhus to a community

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[140] "Annual Report of the York Hospital and Dispensary," TFR, *Journal of the House of Assembly of Upper Canada*, Session 1831-32, Sundry Documents, 17.

where typhus had been unknown previously.[141] Secondly, disease and poverty were related in the minds of the physicians at the hospital, raising the implication that an improvement in one's economic well-being might also improve one's physical health. Thirdly, the ability to respond effectively to problems of public health depended on an appropriate allocation of resources, and in the Upper Canada of the early 1830's, those resources were often raised through the charitable civic-mindedness of neighbours.

In the popular press, therefore, and in the stark reality of providing assistance to the sick, life-threatening disease was a fact of day-to-day existence. The public was well-educated, then, and the stage was set, for the reports throughout 1831 and into 1832 of the progress of cholera across Europe and finally into England. Reports of cholera began in coverage of the war between Russia and Poland. As early as June of 1831, the *Canadian Freeman* noted that cholera *morbus* was making "sad ravages" among members of both the Russian and Polish armies,[142] and in July the *Colonial Advocate* quoted the *London Globe* respecting the activities of English physicians working in Poland to help stem the spread of the disease among Russian prisoners.[143] To emphasize the possibility that cholera was a disease that knew no class boundaries, reports were published on the death of the Russian Commander in Chief in the Polish War, his heightened susceptibility to the disease, and therefore his eventual death, attributed in large part

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[141] Immigration reached a moderately high level in 1831, explaining the Hospital's reference to "the great influx of Emigrants." By 12 August, some 12,838 arrivals had been recorded at York, Newcastle District and "Head of the Lake." *Kingston Chronicle*, 20 August 1831, NLC.

[142] *Canadian Freeman*, 23 June 1831, NLC.

[143] "From the *London Globe*," *Colonial Advocate*, 7 July 1831, NLC.

to "excessive consumption of intoxicating liquors."[144] The papers chronicled the progress of the disease into western Europe[145] and watched as it emerged in Sweden, "where the strictest quarantine regulations both by sea and land" were adopted to prevent its approach.[146]

In a matter of six months, Upper Canadian newspapers had described the progress of the disease from the eastern frontiers of Poland into western Europe and north into Scandinavia. It was at the same time that articles began to appear in British papers on the ætiology of cholera and possible preventions and cures, the implication being that the United Kingdom ought to prepare itself for the possible importation of the disease from the continent. These articles were widely quoted in Upper Canadian journals. For example, the *Kingston Chronicle* quoted a lengthy letter to the editor of London's *The Morning Chronicle* from one Adam Neale, M.D. dated 6 June 1831, in which Dr. Neale gave a history of spasmodic cholera, drawing comparisons to ancient and medieval outbreaks. He blamed the disease on insects, and therefore argued that quarantine, no matter how strict, would not be enough to keep the disease from penetrating England.[147]

True to Dr. Neale's predictions (although not because of the reasons he gave!), cholera erupted in Sunderland, on the northeast coast of England, in October 1831, likely imported through ordinary shipping from north-central Europe. By January of 1832, Upper Canadian papers were full of fearful rumours and alarming stories of the devastation in England due to the

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[144] "Death of Field Marshall Count Diebitsch," *Colonial Advocate*, 11 August 1831, NLC.

[145] "Report from the *London Morning Herald* of 27 June 1831," *Colonial Advocate*, 18 August 1831, NLC.

[146] "From the *Washington Globe*," *Kingston Chronicle*, 3 December 1831, NLC.

[147] "From *The Morning Chronicle*," *Kingston Chronicle*, 1 October 1831, NLC.

disease. "We beg leave to direct the attention of our readers to the two first articles in this day's publication. We sincerely hope our fears as to the Cholera Morbus having reached England, are unfounded, but we feel a little alarmed by the reports."[148] This was the first public Upper Canadian report of the disease having appeared in England, and by the end of January the rumours related by the editor of the *Brockville Gazette* had been transformed into fact. Once the public had been advised of the difficulties experienced by the British with epidemic cholera, it was inevitable that speculation would begin on the likelihood of the disease being transported across the Atlantic. The *New York Commercial Advertiser* was quoted as suggesting that "it was only a matter of time."[149]

It is highly unlikely, probably inconceivable, that the executive government at York could be unaware of the dangers posed by epidemic cholera in early 1832, given the state of the public's knowledge, and given the apparently relentless progress of the disease across Europe and into England. Nevertheless, there were opinions quoted in the Upper Canadian press to the effect that the epidemic in England was a concoction. For example, the *Upper Canada Herald* quoted a letter from England "to a gentleman in Québec," published first in the *Old Québec Gazette*, in the following terms:

> As it is probable you may in Quebec hear exaggerated reports respecting the cholera morbus being in Sunderland, I will now give you a true account of it. The general opinion here, even among some of the Old Doctors, is that the young ones, being in want of patients and being more numerous than the old ones, they got a Board of Health established and the Quarantine Laws enforced. It is probable that there may have been a solitary instance of it or so, but if a person has either a head-ache, tooth-ache, or any other disease whatever, be it of itself of

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[148] *Brockville Gazette*, 5 January 1832, NLC.

[149] "From the *New York Commercial Advertiser*," *Brockville Recorder*, 26 January 1832, NLC.

> ever so slight a nature, tis sure of being reported cholera; in fact it affords a good subject for the satire and contempt of the whole town.[150]

Cynicism about the medical professions was not widespread, despite the tone of this piece. This is the only example available from the Upper Canadian press to this effect, and it seems unlikely that such comment could have had much effect on executive action. This is especially true, given other reports from England during February that the disease was spreading quickly through Ireland, that it had appeared in Newcastle where "it is now more fatal than at the outset,"[151] and that Sunderland itself had suffered 170 deaths in 495 cases diagnosed as cholera.[152]

At the same time, some in England argued that the epidemic was a plot to deflect the attention of the populace, especially the "poorer classes," away from the cause of political reform, and therefore the real threat to the public health was minimal. This was the position of William Cobbett, for example, and his propaganda on the matter was quoted in the *Colonial Advocate* in late February.[153] While there were, in all likelihood, Reformers in Upper Canada who sympathized with Cobbett's position, it is improbable to suppose that that position had any influence on the thinking of Upper Canada's leaders as the epidemic approached and preparations were considered. To give credit to Cobbett would be to discredit themselves.

Therefore, we are left with the picture of a dangerous disease progressing alarmingly quickly toward North America, a public well-acquainted with the possibilities inherent in widespread disease, a medical establishment already struggling with their mandate to provide

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[150] "From the *Old Québec Gazette*," *Upper Canada Herald*, 22 February 1832, NLC.

[151] *Canadian Freeman*, 9 February 1832, NLC.

[152] *Colonial Advocate*, 9 February 1832, NLC.

[153] *Colonial Advocate*, 23 February 1832, NLC.

appropriate health care to a swelling population, and very little credible opinion to the effect that the threat from cholera was anything but substantial. All of this tends to support the view that the executive government, too, must have been keenly aware of the danger. In fact, official communication to the office of the Lieutenant Governor confirms this to be true. For example, in January or February 1832 the Civil Secretary received copies of instructions on the prevention of cholera, issued by the commanding officer of the "Aberdeen Barracks," quoting information supplied to the commanding officer from the Central Board of Health in London.[154] In addition, as early as June of 1831 the Colonial Office had provided to Colborne instructions on the best means to prevent the introduction of cholera. These instructions included excerpts from the King's speech of 21 June, in which he related the sufferings of many populations in Europe, and in which he commanded that appropriate action be taken. Lord Goderich, Britain's Colonial Secretary of the day, warned Colborne that the disease was extremely dangerous, and suggested that "however severe the precautions may be, they must be taken as they would be taken against the plague."[155] And finally, of course, Colborne himself acknowledged the threat to Upper Canadian communities by acceding to the request of the Bishop of Québec to declare a day of public fasting, humiliation and prayer to be observed throughout the Province.[156]

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[154] PAC, November 1831, RG5, A1, Vol. 110, pp. 62610-62613. It is not clear the party from whom this correspondence was sent to the Civil Secretary, nor is it clear the date on which it was received. While it is filed with correspondence of November 1831 (the first entry being dated 22 November 1831), one of the entries in the material was made on 1 January 1832, meaning it must have been received in York sometime after that date.

[155] Goderich to Colborne, 30 June 1831, PAC, Upper Canada: Submissions to the Executive Council on State Matters, RG1, E3. This is an important communication from the Colonial Office to the executive government at York, and will be referred to again below.

[156] *Supra*, note 22. The Proclamation was issued on 26 April 1832, and the day was observed on 16 May.

Given all of the evidence, then, on the state of knowledge in Upper Canada generally, and on the specific information provided to the Lieutenant Governor's office prior to June of 1832, this first possibility, that the executive government at York was unaware of just how dangerous cholera might become, offers little in our attempt to explain why the administration was so slow to use its legislative and regulatory powers in anticipation of the arrival of the disease. The evidence is simply overwhelming that Upper Canada and the other North American colonies were in some jeopardy, and Colborne must have been acutely aware of the possibility that cholera would follow ordinary shipping routes to the west.

(iii) The Contagion / Anti-Contagion Debate

Medical opinion was seriously split on the causes of cholera, and on the ways in which it spread. An allegiance to one medical perspective or the other radically altered the way in which one understood the potential of law as a valuable regulatory force. "Contagionists" believed that the disease was communicated through direct, person-to-person contact. This was the conventional, conservative understanding of the nature of epidemic disease. It underlay the argument in favour of quarantine, the encirclement of towns, the isolation of the sick, and other standard regulatory measures employed in England and continental Europe for centuries, and it was entrenched in England's formal law in the early seventeenth century with the passage of King James's Act. "Anti-contagionists," on the other hand, considered the argument from contagion to be old-fashioned, suggesting instead that disease was spread through miasmatic emanations from the earth, or through noxious fumes in the air resulting from rotting animal and vegetable matter. For anti-contagionists, quarantine and related conventional legal responses to epidemic disease were misguided and futile. Disease was simply "in the air," and isolating the sick could serve no purpose in preventing the inhalation of infectious vapours by the well.

François Delaporte's consideration of the contest between contagionism and anti-contagionism is particularly telling for our purposes.[157] In France, according to Delaporte, "[t]he proponents of the infection [anti-contagion] theory, who believed that they represented the forces of liberalism, confronted the reactionary supporters of contagionism. The battle had to be waged on two fronts, one scientific, the other political, since the issue was freedom of commerce and of persons."[158] Contagionists, according to Delaporte's interpretation, were the conservative proponents of eighteenth century solutions to the problem of epidemic disease, proponents who had not yet come to terms with what were argued to be the more progressive ideas inherent in anti-contagionism. These ideas captured both the scientific appeal of an alternative to the stale notion of contagion, and the political appeal of a theory that paid deference to the emerging interest in theories of individual right and freedom, both in the commercial world and in the world of private endeavour. Quarantine, sensible only in the context of eighteenth century contagionism, violated both of these notions, making it attractive only to reactionary elements loyal to the principles of an earlier age. Delaporte insists, too, that considerable medical opinion was allied with progressive politics in denouncing contagionism, quoting one Magendie as representative of much of the medical community:

> The doctrine of contagion is prevalent in Europe, where it is producing the most unfortunate results by placing costly obstacles in the way of trade while increasing government expenditures for no motive that reason can avow.[159]

The important point here, it appears, is the question of rational motive for the imposition of quarantine. Absent clear evidence that quarantine was an effective, and therefore justifiable,

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[157] Delaporte, *Disease and Civilization*, *supra* note 7.

[158] *Ibid.*, 139-140.

[159] *Ibid.*, 142.

regulatory intervention in the enjoyment of private and commercial freedom, some other explanation for the loyalty of its proponents must be found. In France, at least, Delaporte suggests that "[t]he segregation measures were allegedly the work of a despotic government,"[160] and those who resisted that work did so in the effort "to abolish ancient constraints on human freedom in the name of benevolence, enlightenment, and liberalism."[161]

To the extent that Delaporte's argument is based on the belief that anti-contagionism was the accepted theory in the progressive medical community, he may have overstated his case, and therefore his conclusion. Generally, while anti-contagionism had attracted a considerable following among medical professionals, it was not widely accepted, and indeed important work was already underway in Europe that would eventually discredit miasmatists virtually completely. Jacob Henle, for example, in an extremely influential work published in 1840, included cholera in his list of diseases "spread through contagions,"[162] and dismissed anti-contagionism by saying:

> The miasma i.e. that which contaminates, arose thus as a concept, and up to our time, it has remained little more than a concept, since it has neither been perceptively demonstrable through any of the aids to our senses, nor do we know to which of the kingdoms of nature it belongs or whether it belongs at all to either of them. One would not be able to say anything further about this being, without departing entirely from the basis of empiricism...[163]

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[160] *Ibid.*

[161] *Ibid.*, 144.

[162] Jacob Henle, "On Miasmata and Contagia," George Rosen (trans.), (1938), 6 *Bulletin of the History of Medicine* 907, at 913. First published in 1840.

[163] *Ibid.*, 912-913.

Henle's purpose was to found his support for contagionism in empirical observation, thus enhancing its appeal in the eyes of contemporary science. At the same time, however, he served to contribute to arguments designed to overcome the suggestion that support for contagionism could only arise from ulterior, irrational, political motives. Edwin Ackernecht, cited by Delaporte in support of his interpretation of the contagion/anti-contagion debates of the early 1830's,[164] singles out Henle's work, however, as contributing to the triumph of contagionism over the arguments of anti-contagionists who enjoyed at most a temporary, albeit influential, flourish. For Ackerknecht, the argument from anti-contagionism was *primarily* political, founded not on any apparent sound medical foundation, but rather in the political upheaval of the late eighteenth century, when the early nineteenth century suspicion of authority and resistance to controls on the expression of individual freedom were engendered.

> [T]he vigor of [anti-contagionism] would remain largely unexplained, did we not realize the powerful social and political factors that animated this seemingly scientific discussion...Quarantines meant, to the rapidly growing class of merchants and industrialists, a source of losses, a limitation to expansion, a weapon of bureaucratic control that it was no longer willing to tolerate, and this class was quite naturally with its press and deputies, its material, moral, and political resources behind those who showed that the scientific foundations of quarantine were naught, and who anyhow were usually sons of this class. Contagionism would, through its associations with the old bureaucratic powers, be suspect to all liberals, trying to reduce state interference to a minimum. Anticontagionists were thus not simply scientists, they were reformers...[165]

In other words, the appeal of anticontagionism was grounded not so much in its denial of the unscientific foundations of contagionism, but rather in its appeal to progressive politics, and the

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[164] Delaporte, *supra* note 7, 145.

[165] Edwin H. Ackerknecht, "Anticontagionism Between 1821 and 1867" (1948), 22 *Bulletin of the History of Medicine* 562, at 567. In a similar vein is Margaret Pelling's suggestion that the views of some reformers in England were manipulated, concluding that "a false appearance was given of a climate of non- or anti-contagionism." Pelling, *Cholera, Fever and English Medicine*, *supra* note 2, 7.

research and publications of Jacob Henle and others served to restore the debate to the realm of the scientific.

It is possible that Lieutenant Governor Colborne resisted the temptation to use conventional legal and regulatory intervention in Upper Canada in anticipation of the cholera outbreak of 1832 because of a sincere commitment to anti-contagionism. There is little question that the debate among medical professionals was current among Upper Canadians, and the two sides were well represented in both the conservative and reform presses. In the *Colonial Advocate* of 26 April 1832, a lengthy letter from London was published, in which the two perspectives were given detailed treatment.[166] In the *Canadian Freeman* of 29 March 1832, the editor canvassed English opinion on the causes and communicability of disease, concentrating to some extent on the apparent lack of faith in the doctrine of contagion among many leading members of the English medical professions.[167] The *Brockville Recorder*, quoting acknowledged German experts, assured its readership that, despite the apparently violent spread of cholera across Europe and into England, "it is not of a contagious nature."[168] Respected American journals, too, were cited in support of the argument against contagion.[169] There is little doubt, then, that relatively current opinion on the alternative medical explanations for the spread of

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[166] *Colonial Advocate*, 26 April 1832, NLC.

[167] *Canadian Freeman*, 29 March 1832, NLC.

[168] *Brockville Recorder*, 9 February 1832, NLC.

[169] "From the *Philadelphia Journal of Health*," *Brockville Recorder*, 23 February 1832, NLC. A Dr. Brown was quoted as saying "commercial restrictions to be totally superfluous, as the disease is not communicable," and the Philadelphia paper went on to say that quarantine restrictions, "by throwing the working classes out of employment, and consequently of bread, they will, [Dr. Brown] alleges, fearfully aggravate the evil."

cholera was available to Colborne, and it is therefore possible that he was sympathetic to the anti-contagionist view.

In fact, this possibility is borne out by certain of the correspondence that emanated from Colborne's office during the early weeks of the emergency, albeit after 20 June. Despite the precautionary precedents available to him through the actions of the government at London and in the neighbouring colonies, Colborne insisted that the most expeditious way to respond to the crush of sick and indigent immigrants as they made their way up the St. Lawrence during the summer of 1832 was to disperse them as quickly and widely throughout the Province as possible. It would be foolhardy, he suggested, to confine large numbers of sick immigrants in cramped and unhealthy quarters; this would simply exacerbate their weakness, making them even more susceptible to miasma. In a letter from the Civil Secretary to one John Smyth of the Township of Bastard, Colborne's rejection of the call for a general quarantine of immigrants was relayed in the following terms:

> His Excellency desires me also to state that he has directed the agents for Emigrants stationed on the St. Lawrence to use every exertion to forward the Emigrants to York whence they will be immediately dispersed over the Upper Districts, and to observe that your suggestion of keeping the Emigrants together in quarantine till the Cholera may disappear from the Country is a very injudicious proposal; and he can only call on you to recollect that the prevailing disease has been felt only with severity in crowded and unventilated and dirty towns; and that the many cases which have occurred at Prescott and on the St. Lawrence may be attributed to the alarm and panic of the Inhabitants ...In a well regulated village there is no cause for alarm, and His Excellency trusts that you will lend your assistance in facilitating the conveyance of Emigrants through the Township in which you reside.[170]

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[170] Civil Secretary to Smyth, 6 July 1832, PAC, RG7, G16C, Vol. 26. This correspondence was issued shortly after 20 June 1832, but likely gives us a good indication of the Lieutenant Governor's thinking on the issue throughout the period prior to arrival of the disease at Prescott in mid-June. If it is true that the contagion/anti-contagion debate had both medical and political aspects, then we might expect the Lieutenant Governor to confront not only the need for a well-regulated village on medical grounds, but on the grounds of economic freedom and progress as well. This issue is considered in part (v) of this Section B, below.

The anti-contagionist elements of Colborne's response to the disease are obvious in this letter, in which he blames poor ventilation and panic for the extent of the epidemic, and in which he hints strongly at the need for regulations in the area of cleanliness and air circulation as the preferred alternative to quarantine.

But this interpretation of Colborne's reluctance to employ conventional regulatory intervention in an attempt to stem the spread of the disease is inconsistent with much of the other historical evidence. For example, Colborne had been advised by his superiors in London and Québec as early as 30 June 1831 on the contagious nature of the disease, and had been provided with specific instructions on the best means to prevent the introduction of the disease into Upper Canada.[171] Colonial Secretary Lord Goderich supplied Colborne with copies of the King's speech on the threat inherent in the possible importation of cholera, and cautioned Colborne on the "highly contagious nature" of the disease. Medical opinions, printed directions from the British House of Commons, recommendations on quarantine from respected English physicians, and the conclusion of the College of Physicians in England that the disease was in fact communicable - all of these were included with the Colonial Secretary's instructions.[172] Given that neighbouring colonies acceded to these instructions by enacting and implementing legislation consistent with their precautionary tone, it seems highly suspect to conclude that Colborne unilaterally decided to commit to the arguably more dangerous anti-contagionist position out of a genuine belief in its efficacy. The medical foundations of anti-contagionism simply do not appear sound enough to justify defying the advice of the Colonial Office and ignoring the precautions taken in neighbouring jurisdictions, unless there were collateral aspects to the anti-contagionist's perspective to lend additional credence to Colborne's position.

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[171] *Supra*, note 155.

[172] *Ibid.*

(iv) The Efforts of Neighbouring Jurisdictions

Another possible explanation for Colborne's reluctance to implement a general quarantine lies in the relative isolation of Upper Canada. During the 1830's, the Colony depended on either St. Lawrence River traffic for the transportation of immigrants and goods from the British Isles, or on the system of rivers and canals connecting New York City with the Niagara Peninsula. In both cases, by the spring of 1832 quarantine was already well established at the initial points of entry for immigrants, at Grosse Isle below the settlement at Québec, and in New York City itself. Arguably, then, if immigration restrictions were successful at all they would prevent the transmission of cholera to Upper Canada through Lower Canadian and American efforts. This seemed to be the attitude of Governor General Aylmer, who, in a message to the Legislative Council of Lower Canada on 3 February 1832, said: "The great influx of Emigrants into this Colony which (judging from the events of the past year) may be expected during the coming season, makes it necessary to adopt some precautionary measures calculated to avert the introduction of this dreadful malady into the Canadas."[173] The efforts in Lower Canada, then, might help to protect the *entire* country west of Grosse Isle. And, of course, the other colonies of British North America did not enjoy the same isolation from first contact with immigrant ships as did Upper Canada, and that helps to explain their submission to the point of view supportive of a general quarantine.

While at first this explanation has some logical appeal, it fails to withstand the recognition that the quarantine at Grosse Isle was an abject failure, not necessarily because of any weakness in the argument from contagion that provided the theoretical foundation for the

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[173] Aylmer's Message to the Legislative Council of Lower Canada, 3 February 1832, PAC, Governor General's Office, Miscellaneous Records, Governor General's Speech and Message Book, 1831-1833, RG7, G18, Vol. 43. For references to the protective regime in place in New York, see Nelson M. Blake, *A History of the Urban Water Supply Problem in the United States* (Syracuse: Syracuse University Press, 1956) 131, and Charles E. Rosenberg, *The Cholera Years: The United States in 1832, 1849, and 1866* (Chicago: The University of Chicago Press, 1987), especially Chapter One, "The Epidemic, 1832." The legislative regime in place in other British North American colonies is considered in some detail in Chapter Four, Section D below.

quarantine in the first instance, but rather from problems of administrative and legal practices, especially in the areas of compliance and enforcement. It was well known in Upper Canada that Lower Canadian authorities were having serious difficulty in ensuring compliance with quarantine regulation, and of course weakness in this first line of defence against cholera could only spell trouble for Upper Canadian communities lying just west of the border with Lower Canada.[174] The very real threat to Upper Canada was felt by the public throughout the spring of 1832, and was realized when cholera erupted at Prescott in mid-June. In view of these difficulties, it is unlikely that the Executive Government at York simply depended on the quarantine at Grosse Isle to protect Upper Canada from the epidemic.

In any event, Lieutenant Governor Colborne had considerable time to call the Colonial Legislature to York once it became obvious that the quarantine at Grosse Isle was inadequate to protect Upper Canada. This is the case, had he been interested at all in employing regulatory means consistent with the dominant medical view of the day, consistent with his instructions from the Colonial Office of 1831,[175] and consistent with initiatives in place in the other colonies of British North America. In fact, the Board of Health at York, struggling badly during the height of the epidemic to find sufficient funds to care for the sick, and to compel compliance with Board regulations that had no legislative foundation, actually petitioned Colborne to call the Legislature to session so as to remedy these deficiencies.

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[174] Upper Canadian newspapers devoted considerable space to reports from Québec and Montréal on inefficiencies in the operation of Boards of Health in those communities, and in enforcing the quarantine at Grosse Isle. From the *Montréal Gazette*, for example: "If we are asked why in Montréal this disease has been so fatal, we may with some safety reply, that the delay in the organization of the Board of Health, which prevented that complete purification of the city which is still wanted may be regarded as one; ... that the careless treatment of some cases ... have tended to swell the already large list of victims to this plague." *Colonial Advocate*, 28 June 1832, NLC. See also the discussion of the inefficiencies of the Grosse Isle quarantine station in Bilson, *A Darkened House: Cholera in Nineteenth Century Canada*, *supra* note 3, at 9 *et seq.*

[175] *Supra*, note 155.

> The Board cannot in justice to the public or itself, any longer delay in making known to Your Excellency its total inefficiency in carrying into effect any salutary regulations for the public good, not from any want of unanimity amongst its members, nor of concert on the part of the Magistracy of the district, but from the absence of any legal means to which it might resort to compel the observance of its ordinances and regulations.
>
> ...Thus without power and without funds the board is reluctantly compelled to address Your Excellency, praying Your Excellency (in the emergency in which this District and other parts of the Province are placed) will at as early a period as the Law will allow, summon the Legislature for the especial purpose of providing for the appointment of an efficient board with sufficient funds, and with power to act summarily and with promptness and decision, during the continuance of the dreadful malady which is now raging in this Province.[176]

In reply to this plea from the Board of Health of the most populous centre in the Province, the Lieutenant Governor simply wrote that he would consult the Executive Council on the matter, and that in the meantime the Board and the Magistrates ought to use their persuasive powers to promote voluntary compliance with their regulations.[177] The next day, the York Board of Health resigned *en masse*,[178] and the Legislature was not called to session until it was regularly scheduled to meet, at the end of October.

If Lieutenant Governor Colborne harboured any sincere belief in the advisability of quarantine as a good protective measure for Upper Canada, then he had ample time to react to weaknesses in enforcement at Grosse Isle by calling the Legislature to York to consider a strict regulatory response. This, of course, he refused to do, on the one hand underscoring the weakness of the argument that he simply relied on protective legal measures in place in neighbouring jurisdictions to give Upper Canada the protection it needed. On the other hand,

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[176] Baldwin to Colborne, 9 August 1832, PAC, August 1832, RG5, A1, Vol. 120, pp. 66646-66655.

[177] Civil Secretary to Baldwin, 10 August 1832, PAC, RG7, G16C, Vol. 27.

[178] Baldwin to Colborne, 11 August 1832, PAC, August 1832, RG5, A1, Vol. 120, pp. 66671-66672.

however, this refusal may support the argument that Colborne was a committed anti-contagionist, his reluctance to take any real, substantive steps toward a conventional legal framework being a natural extension of the argument that contagionism, and the seventeenth century regulatory regime that accompanied it, was the stuff of an earlier age. The difficulty with this conclusion, however, is that there was something of great value at risk as cholera approached in the spring of 1832. There were real lives at stake across Upper Canada, and the executive government had ultimate responsibility to act decisively in the preservation of the public health in the best way available. It is difficult to imagine a reliable central authority failing to adopt the most cautious approach available in such a situation. Caution was clearly captured in contagionism and quarantine, on medical grounds at least. But while there was risk in failing to respond to the emergency in a manner consistent with much conventional opinion on the ætiology and transmission of the disease, as neighbouring colonies had done already,[179] there was something to be lost in taking steps, too. It was this latter risk, I want to suggest, that ultimately convinced John Colborne to resist the temptation to use law in the accepted, contagionist way. And what this means is that the vision of the public good represented in the argument to protect the public health at all costs was abandoned in favour of a competing vision, one that had at its core the expansion of the commercial and agricultural sectors of the local economy through high levels of immigration.

(v) Immigration, Commerce and Quarantine in 1832

Given weaknesses in the argument that Colborne was a committed anti-contagionist on purely medical grounds, and in the possibility that he believed that quarantine at first points of entry would protect Upper Canada from the importation of cholera, an alternative explanation for

[179] This issue will be addressed below in Section D, Chapter Four.

his relative inaction in the face of the emergency must be found. Much of the historical evidence suggests that the threat posed by quarantine to continued high levels of immigration and commercial activity played a very significant role in Colborne's decision making. If the doctrine of anti-contagionism had any real effect on executive decision-making in Upper Canada during 1832, then it is likely that political aspects of the theory (as described by Delaporte and Ackerknecht[180]), rather than its questionable medical foundations, were the motivating factor. The vision of the public good advanced by those who felt that quarantine was the responsible way in which to respond to the disease, those who preferred to sacrifice something of individual liberty to protect the public health to the greatest extent possible, was challenged by an alternative vision, one advanced by those who equated public welfare with economic well-being, and the possibility of economic well-being with continued ambitious levels of immigration.

For example, the press quoted opinions from various sources on the urgency of continuing immigration at record levels. In the *Kingston Chronicle*, we find an excerpt from a pamphlet on emigration written by C. Sheriff, in which Sheriff encourages government to press on with capital works, the improvement of roads, bridges, canals, waterways, all so as to give immediate employment to the large numbers of labourers who formed the bulk of the emigrant group, and also so as to make the country more attractive for those "better classes to settle in the Colony that would otherwise leave it."[181] This position was later endorsed by the editor of the *Kingston Chronicle*, when he argued that, because of the natural richness of Upper Canada, emigrants of little education and means would be tempted to become dependent on the benevolence of the residents, rather than turning to profitable employment. The chances of this

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[180] *Supra*, notes 166-174 and accompanying text.

occurring are reduced, so the argument went, when large capital projects offer employment to all who need it.[182] Contemporary British opinion, too, reflected in certain of the travel literature that emerged during the period, recognized the need for continued high levels of immigration. Commenting on the contest between the United States and Upper Canada for British immigrants of industry and means, D.W.L. Earl referred to travelogues written by Henry John Boulton and others to conclude that, according to many observers, Upper Canada "needed men of ambition and enterprise, men with 'get up and go.'" According to Earl, "[a]lmost all writers on Canada stressed her need for professional people and skilled producers."[183] And the impact of high levels of immigration on many Upper Canadian industries was critical to the continued economic growth of the colony. The fledgling shipping industry, for example, enjoyed unprecedented expansion during the early 1830's, due in large part to the transportation demands raised during successive record immigrant seasons.[184]

To fully understand Colborne's dilemma, we must first recognize that it was the stated policy of the Colonial Office in London to encourage high levels of emigration to Canada and elsewhere, primarily to reduce the numbers of poor labourers in various parishes around the United Kingdom who depended to some extent on poor relief. English papers were widely quoted in Upper Canada, to the effect that destitute families in the United Kingdom were being

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[181] *Kingston Chronicle*, 2 July 1831, NLC.

[182] *Kingston Chronicle*, 9 July 1832, NLC.

[183] D.W.L. Earl, "British Views of Colonial Upper Canada, 1791-1841" (1961), 53 *Ontario History* 117, at 125.

[184] Douglas McCalla, *Planting the Province: The Economic History of Upper Canada, 1784-1870* (Toronto: University of Toronto Press for the Ontario Historical Studies Series, Government of Ontario, 1993), 119-120. See also Frank Mackey, *Steamboat Connections: Montreal to Upper Canada, 1816-1843* (Montréal & Kingston: McGill-Queen's University Press, 2000), *passim*.

offered inducements to emigrate to Canada. The *Bath Chronicle*, for example, was cited as saying that some families on poor relief in certain parishes were offered up to fifteen months' allotment, as much as an aggregate of £600 in the parish of Frome, if only they would emigrate.[185] The Lieutenant Governor felt the pressure of accommodating large numbers of destitute immigrants throughout 1831, and spent considerable energy in trying to devise ways to settle these people on productive lands without making too great a demand on the Treasury. In reporting to the Colonial Office at the end of the shipping season on the success of his various attempts at accommodation, Colborne said the following:

> More than thirty thousand of the Emigrants who arrived by Quebec this season are now, I imagine, in this Province; they are of a good description. Those which came here early in the summer, chiefly from Wiltshire and Yorkshire, were rapidly succeeded by others to such an extent that it became necessary to take measure for their removal. They are generally healthy young men with large families & altogether destitute. It appears very desirable to detain them in this Province, and that this first trial made for the purpose of relieving Parishes at home, should not prove a failure...

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[185] While £600 seems to be a large amount for the day, the *Kingston Chronicle* quoted the *Bath Chronicle* in the following terms:

> The parish of Frome has offered fifteen months pay to any poor family, now receiving parish relief, to assist them to emigrate to Upper Canada, provided the whole sum does not exceed £600. This amounts to double the sum granted last year, and will probably be increased by private subscription, and in compliance with this liberal offer from the parish authorities of that town, no less than 140 persons belonging to Frome are about to emigrate to Upper Canada...A great number of families are anxious to follow them from the same parish, but it has been found impossible to provide sufficient funds.

"From the *Bath Chronicle*," *Kingston Chronicle*, 19 May 1832, NLC. A great deal has been written about the encouragement of emigration from Frome County and other areas of the United Kingdom during the early 1830's. See, for example, Terry McDonald, "'Come to Canada While You Have A Chance:' A Cautionary Tale of English Emigrant Letters in Upper Canada" (1999), 91 *Ontario History* 111, and the many additional sources cited by McDonald.

> The experiment of this year of sending destitute Emigrants on land and giving them some assistance proves, I think, the system might be acted on by Parishes at home, that require relief by the removal of that part of their population which cannot be supported.[186]

Here we have unequivocal confirmation of the policy behind the British push for emigration to various overseas destinations, and some indication of the difficulties experienced by local authorities in struggling to make appropriate arrangements. But Colborne, despite his concern for the administrative burden, appears committed to accomplishing the Colonial Office's goals in this regard, while at the same time rather subtly suggesting that certain aspects of his programme for the relief of indigence might be applied successfully at home.

To further advance Colonial Office policy, a Commission of prominent men was established in London for the purpose of collecting and disseminating general information on the subject of emigration to British possessions,[187] and in Goderich's words, "... their chief object is to render their assistance for the emigration of such Persons, with their Families, as have been accustomed to earn their Subsistence by Manual Labour, such as Agriculturalists, Artizans, or Mechanics."[188] While both Aylmer[189] and Colborne complained about the numbers of indigent emigrants arriving in 1831, we see in Colborne's correspondence on the issue the first suggestion of a possible solution:

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[186] Colborne to Goderich, 24 November 1831, PAC, RG7, G12, Vol. 18.

[187] Circular, Goderich to Colborne, 1 August 1831, PAC, Governor General's Office: Despatches from the Colonial Office, RG7, G1.

[188] Goderich to Aylmer, 1 August 1831, PAC, RG7, G1, No. 53.

[189] Goderich to Aylmer, 3 August 1831, PAC, RG7, G1, No. 54, in which Goderich chastizes Aylmer for complaints about the state of emigrants on arrival at Québec contained in an earlier letter from Aylmer to Goderich.

> From the destitute state in which they arrived here, and the difficulty of forcing them into remote Townships from the Ports at which they disembarked, it is evident that a great burden will be thrown on industrious Settlers who can ill afford any disbursement, unless the local Government is authorized to direct the expenditure of the sums which may be collected for the temporary support of poor Emigrants. If they could be dispersed through the Province soon after their arrival they might readily find employment; but it is found impracticable to remove the numbers which reach Prescott and York.[190]

Wide and speedy dispersal, then, would serve the dual function of avoiding displeasure among established settlers while accommodating very large numbers, all the while in serving the ends of Colonial Office policy. Goderich agreed, and offered his opinion to both Aylmer and Colborne that some means must be found to deal with the very large numbers of immigrants, but that Colonial Office policy on the matter was not to be undermined. In a confidential circular to Aylmer of 10 September 1831, the contents of which were transmitted to Colborne under cover of the same date, Goderich said: "Legislation operating to check permanently present rate of emigration would be very objectionable. Question is not to be raised by Governor unless Legislature take initiative."[191] In other words, the Executive Governments at Québec and York were to take some initiative to make the crush of immigration more manageable for the Colonies, but that initiative was not to operate in a way detrimental to the overall thrust of emigration policy. For Goderich, and therefore necessarily for Colborne, the interests of the executive and the Legislature did not coalesce. The executive was interested in maintaining emigration to the colonies at all costs, and the Legislature, so Goderich assumed, was interested in saving the local population from unnecessary burdens.

When epidemic cholera became a real possibility with the arrival of news that it had begun to appear in England, the dilemma for decision-makers in the Colonies became even more

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[190] Colborne to Goderich, 5 September 1831, PAC, Governor General's Office, Letterbooks of Despatches to the Colonial Office, Upper Canada to Secretary of State, 1830-1833, RG7, G12, Vol. 18.

[191] Confidential Circular, Goderich to Aylmer, 10 September 1831, PAC, RG7, G1; Confidential Circular, Goderich to Colborne, 10 September 1831, PAC, RG7, G1.

acute. Not only was immigration considered to be the source of many of the most dangerous diseases for the colonists, but the legislative response that might be expected, trade restrictions and immigration restrictions similar in impact to those in place in the United Kingdom, were thought by many to be antithetical to commercial development. It was widely reported in the Upper Canadian press that immigration and trade restrictions in place in England were far more damaging to the public than cholera itself, and arguments such as these were used by many Upper Canadians to deny the value of legislation similar to that in place in Lower Canada.

Discussion of the issue began with the general circulation in Upper Canada during mid-March 1832 of regulations promulgated by London's Central Board of Health, regulations that imposed very strict immigration and trade restrictions similar to those enforced in England in the seventeenth and eighteenth centuries. Although some in Upper Canada believed that the Central Board's approach to quarantine reflected a genuine attempt to balance the demands of public health (demands which seemed to command a complete cessation of communication with infected communities) with the exigencies of the modern commercial world (some communication is inevitable and essential to commercial success),[192] others scoffed at the precautions. Many opinions from English papers were quoted in Upper Canada, to the effect that the Central Board's regulations were foolhardy and detrimental to overall public well-being. This position seemed to be supported by an Order-in-Council that issued from Whitehall on 18 February 1832 by which the operation of domestic quarantine was suspended. The public interest, apparently, was thought to suffer more by the interruption to trade and commerce than it did by the threat of the spread of the disease,[193] a triumph, apparently, for those advancing the cause of anti-contagionism on political grounds. London's *Morning Chronicle* was quoted in the following terms:

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[192] See the editorial to this effect in *Niagara Gleaner*, 31 March 1832, NLC.

[193] Quoted in *Upper Canada Herald*, 11 April 1832, NLC.

> Cholera and Commerce: The careful men in the city, who are constantly watching the 'signs of the times,' profess already to see plain indications of the mischief with which we are threatened, not by the cholera, but by the absurd measures which the belief of its existence here has given rise to. Money has become with these two days comparatively scarce, because merchants perceive that an extensive demand for it must shortly arise, from the mere circumstance that shipments of goods of all kinds for the continent have been generally suspended, and that the owners will be driven to provide payment for them, without any of the usual aid from foreign remittances.[194]

Medical opinions supporting the position that quarantine was unnecessary and damaging to commercial interests were quoted from England too, giving further credence to the argument that the public health was best served by a healthy trading sector. An article from the *London Courier*, for example, written by a doctor who believed that the disease apace in England was not cholera, "but something else, and whatever it is, it is not contagious in the least," was quoted in the *Upper Canada Herald*. In addition to his expertise in medical matters, this physician professed some strongly held opinions on the politics and economics of the epidemic:

> But altogether the epidemic is a mere bagatelle, and had not imagination magnified it through a most powerful lens of terror, while prevailing on the Continent, we should never have been frightened from our property, by an epidemic which will be recorded in history as a remarkable example of human credulity and unnecessary panic! The community, however, will smart for its cowardice, and the dire effects of commercial non-intercourse will prove a warning to Governments in respect to Boards of Health and Quarantine establishments.[195]

While opinion of this nature seems to have captured the attention of at least certain editors of Upper Canadian presses, others were not so sure that commercial interests deserved protection at the risk of the public health. In fact, quarantine was seen by some as the only sure means by which to protect the public against the dangerous side-effects of commercial activity.

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[194] *Ibid.*

[195] *Ibid.*

"In a commercial country like this which sustains such constant intercourse with countries where the disease is existing, such a code is of vast importance, for it is highly consoling to know that the most pestilential ships can be purified in a few days."[196]

A healthy trade and commerce, therefore, was either tonic or toxic, either the means to overcome the poverty that was seen by many as the source of much sickness and disease, or the very means by which disease was spread. Couple this dilemma with the responsibility to see to the accomplishment of Colonial Office policy on emigration, and colonial leadership was in a quandary indeed. The perplexities of the times were captured by Governor Aylmer in his message to the Legislative Council of Lower Canada of 3 February 1832:

> The Governor in Chief considered it to be highly necessary to call the attention of the Legislature to the subject of the disease termed Cholera Morbus which has been attended with fatal effects on the continent of Europe, and which...has found its way into England. The great influx of Emigrants into this Colony which...may be expected during the coming season, makes it necessary to adopt some precautionary measures calculated to avert the introduction of this dreadful malady into the Canadas; But in recommending this matter to the consideration of the Legislature, the Governor in Chief suggests to them the expediency of adopting such measures of precaution only, as are susceptible of being carried into full effect, and more especially it appears to him that the subjecting of Vessels arriving from England to a strict and protracted Quarantine...would inevitably be attended with the greatest injury to the Commercial Interests of the Colony, and to the Individuals to be affected by such Regulations...
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> . . .
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> After the best consideration which the Governor in Chief has been able to give to this subject, he cannot avoid coming to the conclusion that to attempt the strict enforcement of Quarantine Regulations at any point on the River St. Lawrence would be attended with certain loss & inconvenience, and would prove at the same time altogether ineffectual when applied to large numbers of persons arriving in the Colony within a limited period of time. In this vision of the case he considered that it would be more prudent merely to establish some strict measures of precaution such as imposing heavy penalties on the Masters of Vessels who should permit passengers to leave their Vessels without permission from the visiting Health Officer along with other measures of a similar tendency, which will naturally suggest themselves upon a careful consideration of the subject.

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[196] *Canadian Freeman*, 29 March 1832, NLC.

> Nevertheless the Governor in Chief submits the consideration of this subject with the utmost confidence to the Wisdom of the Legislature, and desires that they will be assured of his ready concurrence in any measure they may see fit to adopt, and of his Zealous Endeavours to give effect to the same when adopted.[197]

In apparently direct contravention of Goderich's instructions of 10 September 1831, in which the Colonial Secretary requested that the executive governments in Upper and Lower Canada not take any initiatives to stem the flow of immigrants along the river,[198] Aylmer alerted the Legislature of Lower Canada to the need for some sort of regulatory initiative that, in any very strict form, could only injure commercial and emigration policy interests. Aylmer was careful, of course, to soften his request for legislation by pleading for caution, but there is little doubt that he understood the responsibility to protect the public health that came with the governor's position. This he attempted to fulfill, even at the risk of offending other, perhaps equally pressing, demands.

In 1832, then, Lieutenant Governor Colborne was faced with apparently conflicting instructions from the Colonial Office. The first was designed to prevent the introduction of cholera through the imposition of a general quarantine of immigrants,[199] an approach that would necessarily involve legislative action that would stem, in part at least, the flow of immigrants along the St. Lawrence. The second, on the other hand, was designed to encourage and maintain high levels of immigration so as to support Colonial Office policy. The best way to accomplish the latter was to disburse immigrants as quickly and inexpensively as possible throughout the

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[197] Aylmer's Message to the Legislative Council of Lower Canada, 3 February 1832, PAC, RG7, G18, Vol. 43.

[198] *Supra*, note 188.

[199] This would be the instructions of 30 June 1831, first referred to at *supra* note 155, and then again at *supra* note 175 and accompanying text.

Colony, and, coincidentally, the same approach functioned nicely as an anti-contagionist's response to the local call for a general quarantine. At the same time, Colborne's policy of moving immigrants quickly through the Colony to their ultimate places of habitation and employment satisfied the calls for continued economic expansion and infrastructure development, expressed by pamphleteers such as C. Sheriff.[200] All of this was confirmed by Colborne in his speech to open the Colonial Legislature in November 1831:

> [T]he industry and capital gained by the recent extensive emigration to this Province [will not be taken advantage of] without establishing a system for ensuring the effectual repair of Roads and Bridges, and the improvement of the principal communications of the back Townships.[201]

This, Colborne hoped, would prepare Upper Canada for the expected arrival of great numbers of the agricultural classes from the United Kingdom, which would in turn lead to the prosperous opening up of the back country. And in his speech to close the Legislature in January 1832, he again confirmed his commitment to this policy, by saying:

> The extent and fertility of the unoccupied lands, will continue to attract to this Country large portions of the redundant Population of the Parent State. - I am, therefore, persuaded, that on your return to your respective Counties, your influence may be usefully exerted in organizing societies for the purpose of affording the information to Emigrants which they so much require, at the Ports where they first disembark, and facilitating their dispersion in the Districts in which they may readily obtain employment.[202]

Given the impetus to foster continued high levels of immigration, both to satisfy Colonial Office imperatives and to realize the continued commercial and agricultural development of Upper Canada, it is not surprising that Colborne resisted calls for a general quarantine that would detract from the realization of both of these goals. This is so, despite arguments to the contrary

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[200] *Supra*, note 181 and accompanying text.

[201] *Kingston Chronicle*, 26 November 1831, NLC.

[202] *Upper Canada Gazette, Extraordinary Issue*, 28 January 1832, NLC.

that commercial success brought with it exposure to the diseases prevalent among Upper Canada's trading partners. There is nothing in Colborne's activities prior to the arrival of the disease at Prescott in mid-June to suggest that he harboured anything like even the cautious commitment to the public health demonstrated by Governor Aylmer in his message to the Legislative Council of Lower Canada in February. Although early in the epidemic of 1832 Colborne did take some steps that, ostensibly at least, suggest a commitment to using legal and administrative measures to protect the public from the importation of the disease,[203] other events during the summer of 1832 suggest that Colborne's efforts were less than sincere in this respect. Those events will be reviewed below in Section D of this Chapter.

(vi) Summary

It is difficult to determine with certainty the motivation behind the Upper Canadian executive legal response to the threat of cholera in the days leading up to arrival of the disease at Prescott in mid-June. In short, the use of law by the executive government in anticipation of the arrival of the disease was limited to the Proclamation of 26 April 1832,[204] a well-intentioned measure, it is assumed, designed to solicit the mercies of God in the face of imminent danger. As a result of this vacuum in executive action, our exercise becomes an attempt to understand why the Lieutenant Governor resisted the opportunity to employ law to protect the public health which, after all, would be in keeping with the precedent for such action in neighbouring jurisdictions, consistent with the dominant medical understandings of the day, and favourable to a relatively well-informed community.

There can be little doubt that Colborne understood just how serious cholera could be. He had been informed of this by official communication from the Colonial Office a full year before

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[203] *Supra*, note 22.

the disease arrived in Upper Canada, yet apparently ignored the best advice England had to offer, copies of which were provided to him with the Colonial Secretary's correspondence. Besides, the popular journals of Upper Canada were replete with stories of the ravages of cholera from abroad, and other dangerous diseases had taxed the resources of the Province as late as the summer of 1831. Colborne could plead neither ignorance nor inexperience.

It is possible, of course, that Colborne considered and then accepted alternatives to conventional regulatory initiatives. The anti-contagionist approach to epidemic disease was one for which Colborne appeared to have some sympathy, especially in his insistence during the summer months on continuing to move immigrants along the St. Lawrence and further into districts to the west, ostensibly to avoid crowding them together in insalubrious air. A commitment to anti-contagionism as a medical doctrine meant doubt about the efficacy of quarantine, and this may have been the source of Colborne's reluctance to take decisive action. At the same time, however, Colborne had received specific instructions from the Colonial Office on the need to take firm protective measures, and his colleagues in neighbouring colonies throughout British North America had acted quickly in enacting legislation according to the best model available. It seems unlikely that Colborne would simply stand alone on this question, ignoring both the advice of the Colonial Office and the actions of his colonial counterparts, all on the strength of a medical position that was anything but certain. Caution, if nothing else, dictated that some carefully designed legal framework be employed, even of the tentative sort suggested to the Legislative Council of Lower Canada by Governor Aylmer.

Perhaps, of course, Upper Canada's isolation from first contact with immigrants from the British Isles might excuse executive inaction relative to protective legal measures. Both New

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[204] *Supra*, note 156.

York and Lower Canada had apparently strict legal regimes in place, and it is arguable that those two jurisdictions would serve as buffers between Upper Canada and the disease. But it became evident very quickly that there were difficulties in the enforcement and efficiency of quarantine, certainly in Lower Canada, and that the disease was creeping through the defenses established to protect "the Canadas." Even in the face of such evidence, however, the Lieutenant Governor refused to initiate legislative action.

There remains the possibility that Colborne felt caught by the obligation to see to the accomplishment of two separate, and in this case conflicting, obligations to the public welfare. There can be little doubt that he believed firmly in the Colonial Office policy on emigration from the British Isles to Upper Canada. As we shall see in Section D of this Chapter, at times his devotion to the success of this policy became a preoccupation, and over the summer of 1832 a great deal of executive energy was devoted to its success, in spite of the epidemic. To the extent that the commercial and agricultural expansion of the colony depended on the influx of immigrants, and to the extent that quarantine and related legal initiatives might be seen as detrimental to smooth commercial traffic and continued high levels of immigration, Colborne was forced to decide between the vision of the public good that emphasized health protection at virtually any cost, and the vision that depended on a healthy, growing economy for its realization. It appears as though he chose the latter.

C. The Municipal Legal Response, to 30 October 1832

(i) Introduction

The municipal legal response to the epidemic of 1832 began in earnest after the Chairmen of the various District Quarter Sessions received Lieutenant Governor Colborne's circular of 20 June. Because of its significance in signifying aspects of the executive commitment to cholera

prevention and in acting as the stimulus to action for many Districts across Upper Canada, the circular is worth quoting in its entirety.

> The contagious disease which has extended its ravages to Lower Canada, having appeared at Prescott in this Province: it becomes necessary to take immediate precautionary measures for arresting its progress, as far as human means may avail; I am therefore to acquaint you by command of the Lieutenant Governor, that His Excellency, in the full confidence that the Legislature will sanction the adoption of any measures which the present exigency may require, requests that you will convene the Magistrates of your district: and with their aid form a Board of Health. With the advice of the Executive Council, His Excellency directs that the Board shall assume the authority of enforcing such arrangements as a due regard to the preservation of Health may appear to require; and places at the disposal of the Magistrates in each district the sum of £500, to defray the expenses of disbursements that may become necessary for providing hospitals and medical attendance, and for making the arrangements that the Medical board of each district, to be formed at the request of the Board of Health, may suggest – I am also to state that the Chairman of Quarter Sessions of each district, will be furnished from the Government Office with any printed instructions or recommendations which it may be advisable to transmit, and to request that the Magistrates may be earnestly enjoined to forward regularly, such statements of their disbursements as will enable the Executive Government to account satisfactorily in detail for whatever monies they may find it necessary to expend.
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> The District of Otawa [sic], and the London district, are apparently but little exposed to the danger of infection, but His Excellency confides in the discretion of the Magistrates of those districts to make no unnecessary disbursements.[205]

As we shall see below, the municipal response to this Circular was swift, and reports were issued by many of the local authorities within a matter of days after the Circular was distributed. It is clear that the Lieutenant Governor acknowledged the danger inherent in the progress of the disease as far as Prescott, and recognized the need for some concerted action to avert a disaster. A fund to assist in local defenses was made available, and Colborne comforted the Magistrates by expressing his confidence that the Legislature would ultimately support whatever necessary means of defense might be adopted at the local level. Boards of Health were to be formed by the

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[205] *Supra*, note 22.

Magistrates, and the Boards of Health, in their turn, were to form Medical Boards. This was the structure Colborne suggested for combating the disease at the local level, to resist its progress "as far as human means may avail."

The Lieutenant Governor's circular imposed yet another layer on an already complicated system of local government in Upper Canada.[206] For the most part, administrative and judicial responsibility for the operation of each District in Upper Canada was vested in the District Magistrates, a group appointed by the executive and responsible to meet quarterly for the dispatch of District business. The magistrates had complete responsibility for District finances, having the power to levy taxes based on estimates of coming expenditure, to raise funds to pay the salaries of members of the legislature, and to borrow funds for the purpose of erecting certain public buildings, among them gaols and courthouses. Administrative responsibility extended to management of the many special needs of villages and towns, including fire fighting and prevention, police, market regulation and the paving and lighting of streets. Many local officials, including the District treasurer, the Clerk of the Peace, the Sheriff and the gaoler were subject to regulations prepared and promulgated by the District Magistrates.

During periods when the District Quarter Sessions were not meeting, local members of the magistracy, either singly or in pairs, exercised many of the powers otherwise vested in the Magistrates as a group. For example, local magistrates were responsible for issuing warrants by which the authority for holding town meetings was granted; town wardens could not engage

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[206] For the summary of local government that follows, I have relied on J.H. Aitchison, "The Development of Local Government in Upper Canada, 1783-1850" (unpublished Ph.D. Thesis, University of Toronto, 1953); Aitchison, "The Courts of Requests in Upper Canada" (1949), 41 *Ontario History* 125; Edith Firth, *The Town of York 1815-1834: A Further Collection of Documents of Early Toronto* (Toronto: The Champlain Society, 1966), especially Section G, "Local Government and Justice;" and Charles K. Talbot, *Justice in Early Ontario, 1791-1840* (Ottawa: Crimcare Publications, 1983).

apprentices without a warrant from the local magistrate; lesser officials of the township could not assume their office without first swearing an oath before the magistrate. Generally, the administrative machinery of local government could not function without the knowledge and approval of either the local magistrates or the District Quarter Sessions, and this responsibility carried with it significant power and influence in both the manner of making local decisions and in their substantive content.

Outside of the administrative function, the Magistrates exercised a broad judicial responsibility, too. Primarily, they adjudicated local matters, including the imposition of penalties for the infraction of district regulations and provincial statutes relating to local government. Additional duties in the law enforcement arena were vested in the sheriff (whose responsibilities included assembling juries, the apprehension of lawbreakers, the service of legal process, and other related tasks), the coroner, constables and gaoler. Each of these offices carried with it considerable responsibility for the maintenance of order and the administration of justice, while at the same time affording the opportunity to extract fees for attendances and services.

Finally, the grand jury performed the duty of making presentments to both the District Quarter Sessions and the circuit sittings of the Assize Court when it reached the local courthouse. The grand jury was empanelled by the sheriff, and the sheriff's discretion in this regard was often challenged by those who felt that the composition of the grand jury was not as representative of the local population as it ought to be. But in any case, the grand jury often made representations to the Quarter Sessions on a variety of matters coming within the jurisdiction of the Magistrates, and made recommendations to the Assize Court on matters falling

within executive or legislative authority. J. H. Aitchison summarizes the wide variety of presentments made by grand juries during Upper Canada's early history, mentioning nuisances, the state of emigration policy, the division of districts, the need for additional magistrates, and a host of others.[207]

It was in this complex system of local government that the Lieutenant Governor suggested the creation of Boards of Health by the Magistrates, and the subsequent creation of Medical Boards by the Boards of Health. Throughout the summer and into the early fall of 1832, municipal authorities struggled badly to fulfill the mandate thrust upon them by the Lieutenant Governor's circular. The principal difficulty was in convincing local populations of their authority, a difficulty that could have been overcome with prompt legislative action to give the Boards of Health a statutory mandate. But the legislation was not to be passed until the following winter, and the Boards of Health were forced in many cases to resort to simple moral suasion, to plead with many of their fellow citizens to comply with sanitary and other regulations promulgated by the Boards.

The Boards encountered serious problems with shipping interests, too. Many attempts at quarantine by local authorities were met with derision and contempt by the owners of vessels that sailed the St. Lawrence and the lakes, moving goods and immigrants along the shore. Again, without legislative backing the Boards of Health were virtually powerless to enforce their regulations, and in several cases the Masters of lake vessels took advantage of this impotence by defying local authorities in their attempt to police the ports. In these confrontations, the shippers

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[207] Aitchison, "The Development of Local Government in Upper Canada," *supra* note 206, 129-130.

were wise enough, as we shall see, to pit one level of government against another, and in doing so they exacerbated much of the tension that accompanied the arrival of the disease.

This is not to say, however, that the various District Boards of Health were totally ineffective. Some communities were actually completely isolated by the efforts of the Boards, blocking access to the towns by both land and water. The Boards also made great progress in many localities by enacting sanitary regulations on domestic cleanliness, burials, the operation of local hospitals and the condition of public areas. And for the most part, local populations co-operated with the efforts of the Boards. Despite many examples of resistance to these new regulatory incursions into private life, most people recognized the need to work together for the common good inherent in the protection of the public health. Perhaps typical in this respect was the response of Upper Canadians to Colborne's proclaimed day of fasting and humiliation:

> Wednesday last being the day appointed by proclamation as a day of general fast and humiliation, the same was observed here in a manner highly creditable to the religious character of the town; every church was crowded to excess by their respective congregations, and sermons calculated to inspire the hearers with that solemnity and awe which the occasion required, were delivered and impressed with peculiar energy and effect. Every shop was closed, every occupation discontinued, and a general tranquility prevailed, which rendered the day undistinguishable from the usual Sabbath.[208]

While most municipal legal responses to cholera took place after Colborne's circular of 20 June, several districts had begun planning for the disease earlier in 1832. In Kingston and York, especially, fairly sophisticated plans were in place prior to 20 June, local leadership showing the foresight that was perhaps lacking, for one reason or another, at the executive level. After 20 June, difficulties arose with the division of responsibility and the allocation of resources, with different levels of local administration vying for power and funds. Throughout the summer of 1832, however, there is little if anything to suggest that this struggle for control of

the municipal legal response to the disease was anything but altruistic, the contest seeming to be engaged primarily over the need to be certain that someone, at least, would do the most that could be done to stop the progress of the disease. Neither a self-interested manipulation of law and legal process, nor an impetus toward realization of a particular ideological vision of the public good, seems to be at work in the immediacy that was the local response to the epidemic. Rather, we see the use of law for the simplest and yet the most urgent of causes, the protection of the public health, in a local climate that had little time for reflection and debate.

(ii) The Municipal Legal Response, to 20 June 1832

As with much of the legal response to the epidemic of 1832, it is not possible to understand the regulatory action of municipal authorities without also considering their relationship to the question of immigration. The policy of the central authority on the best means through which to manage the staggering influx of immigrants from the British Isles over the course of 1831 and into 1832 placed special burdens on local populations, and the response of local authorities to these burdens was reflected in turn in their response to the threat of cholera. Throughout 1831, Lieutenant Governor Colborne struggled to find ways to accommodate the flood of immigrants, especially those of limited means and poor health, and he debated various alternatives with the Colonial Office. Whatever the executive government decided on this question, however, it is relatively clear from the evidence that funds emanating from York to support indigent immigrants were very difficult for local authorities to obtain, meaning that the humanitarian burden, for the most part, was thrust upon the ordinary established settler.

Colborne's policy was devised through a consideration of two broad alternatives. First, he felt that indigent immigrants ought to be employed first as assistants to established tradesmen

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[208] *Kingston Chronicle*, 19 May 1832, NLC.

and farmers, giving them time to accumulate a small amount of money that might be used to purchase provisions on which their families could survive while their farms were turned to production. This idea had the advantage of settling the immigrants quickly in or near population centres where employment could be had relatively easily, and where medical attention was more likely to be available. Secondly, Colborne reflected on the advantages of opening up the back townships quickly, and the best means to accomplish this was to transfer tracts of land to immigrant families immediately. This would force poor families into industrious efforts on their own behalf, clearing the land, building their homes and outbuildings, establishing their livestock, planting their first crops. In the end, Colborne's policy was a blend of these two alternatives, a blend dictated for the most part by the extraordinarily high numbers of indigent immigrants in 1831. In an early despatch to Colonial Secretary Goderich, Colborne wrote that "Many of the poorer class of Emigrants may procure work on the Canals, or on the Farms of the old Settlers, for some months by wandering about the Province," but he anticipated as well that there would not be enough work of this nature to meet the needs of the new arrivals. Consequently, he suggested to Goderich that large landholdings might be sold to immigrants on credit, to be paid back to the Crown in five or six years.[209]

Colborne immediately began to investigate the availability of large tracts of land through the office of the Commissioner of Crown Lands, and did so with the support of the Colonial Office.[210] The Township of Luther, for example, was directed to be reserved for immigrants expected to arrive from Glasgow, and the Commissioner was told "...that assistance is to be

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[209] Colborne to Goderich, 18 May 1831, PAC, RG7, G12, Vol.18.

[210] Civil Secretary to Commissioner of Crown Lands, 24 May 1831, PAC, RG7, G16C, Vol. 24.

afforded to them if they are found to be in a destitute state."[211] Over the course of the summer of 1831, many immigrants took advantage of the offer of a large tract of very cheap land, and settled in Luther and other townships in the hope of turning their industry into a home for their families. The difficulty, however, was that many of the new settlers were inexperienced in farming, and all were inexperienced in the climate and conditions of Upper Canada. This meant that the first season was especially difficult, labour being devoted to clearing the land and erecting temporary lodgings, with little in the way of savings or income with which to buy provisions to see the family through to the time when the farm might become productive.

The extent of the assistance offered by the executive government to indigent immigrants who took advantage of the programme to settle in the back townships during the summer of 1831 is not clear. At most, the government supplied these families with enough by way of provisions to get them through their first winter. In a letter to James Bethume of Cobourg, the Civil Secretary sought his advice on the best way in which to manage this problem, whether it would be better to assist the settlers with a minimal supply of provisions to help them establish themselves on the backland, or whether the concentration ought to be on finding employment for those in need.[212] But this letter was written at the end of the season, with winter approaching, and Colborne's equivocation on the subject over the course of the summer of 1831 had the potential to contribute to a great deal of confusion and hardship. In Peterboro', for example, the Lieutenant Governor had authorized the Commissioner of Crown Lands to arrange the conveyance into the township of large tracts of neighbouring lands, after which these lands were

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[211] Civil Secretary to Commissioner of Crown Lands, 6 July 1831, PAC, RG7, G16C, Vol. 24.

[212] Civil Secretary to Bethume, 14 October 1831, PAC, RG7, G16C, Vol. 24.

offered to emigrants. But many of the emigrants were without means to survive, meaning their welfare fell to the townsfolk. At a town meeting held in early September, one John Hall was appointed by the citizens to complain to Colborne that they were not equipped to assist so many newcomers as required assistance because of Colborne's settlement policy. In his reply, Colborne blamed the superintendent of the Peterboro' settlement project for misunderstanding his instructions, and assured the citizens of the town that the Lieutenant Governor would see to the grant of £3 per acre for each needy family, on the condition that they devote themselves to the development of the land, and that they secure some other means of support as well.[213]

In the end, however, Colborne denied the principal responsibility to support those families who settled the back townships through the executive's settlement policy of 1831. In many letters to local authorities, Colborne refused requests for assistance, simply denying that there were funds at his disposal with which he might alleviate the suffering that was bound to ensue over the fall and winter of 1831 and 1832. In July, Colborne wrote to Messrs. Jones and Whiting of Prescott, advising that "there are no means whatever at the command of the local Government for the support of Emigrants."[214] In the letter to James Bethume referred to above,[215] the Lieutenant Governor said that "Government, very properly, will authorize no money to be advanced to the Emigrants, but will undertake the management and expenditure of any adequate funds raised by individuals or collected by Parochial or other subscriptions to defray the expense of voluntary Emigration." And in perhaps his most pointed correspondence on the subject, prepared very late in the fall as winter approached, Colborne wrote the following:

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[213] Civil Secretary to Hall, 24 September 1831, PAC, RG7, G16C, Vol. 24.

[214] Civil Secretary to Jones and Whiting, 15 July 1831, PAC, RG7, G16C, Vol. 24.

[215] *Supra*, note 212.

> Mr. Billings was instructed to inform the settlers who were desirous of being located in Heytesbury that proceeded to that township ... that they must take with them a stock of provisions for the winter as His Excellency had not the means of affording them any assistance. The destitute settlers who were located in ... June and July and went to that Township on the condition of their receiving provisions in proportion to the acres cleared, His Excellency authorized should receive that assistance but he had now no means of providing a magazine for the consumption of other families during the winter.
>
> You will therefore have the goodness to give them notice to lay in their stock.
>
> The other settlers who have received their locations lately must be informed that they must provide for themselves.
>
> The Lieutenant Governor would be very glad to authorize any indulgences which might be an accommodation to the officers who have taken up their residence there, but if the present consumption of provisions be continued, the destitute settlers must suffer.[216]

Colborne's obstinate tone in this letter is predictable to a certain degree, given that the policy to try to settle as many of the new arrivals as quickly as possible on their own lands was largely of his own design, albeit with the preliminary sanction of the Colonial Office.[217] But Colborne did

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[216] Civil Secretary to Peter Robinson, 5 November 1831, PAC, RG7, G16C, Vol. 25.

[217] The approval of the Colonial Office to Colborne's attempt to settle the back townships through grants to indigent immigrants is suggested obliquely in the letter to the Commissioner of Crown Lands referred to at *supra*, note 210. I refer to this approval of Colborne's programme as "preliminary" because, by the late winter and spring of 1832 the Colonial Office had recognized its folly. To lessen the expectations of prospective emigrants during early 1832, England's Commissioners of Emigration published a notice to alert emigrants to the need for an accumulation of funds and knowledge before settling on the farmlands of Upper Canada. In part, the notice read as follows:

> Land used formerly to be granted gratuitously, but when it was taken by poor people they found that they had not the means of living during the interval necessary to raise their crops, and further that they know not enough of farming in the Colonies to make any progress. After all, therefore, they were obliged to work for wages, until they could learn a little of the way of farming in Canada. But now land is not disposed of except by sale. The produce of the Sales, although the price is very moderate, is likely to become a considerable fund, which can be turned to

admit his discomfort with the result in a letter to Cheeseman Moe, one of his emigrant agents along the St. Lawrence. "From the reports from your neighbourhood [Cornwall] the Lieutenant Governor is alarmed at having embarked in a plan which he thinks may not only fail altogether but occasion the greatest misery and distress."[218] This admission, however, did not temper Colborne's refusal to assist local authorities with the responsibility for destitute immigrant families, and as the fall of 1831 turned into the winter of 1832 the burden fell to local populations to avert a disaster among newly arrived families.

Given the humanitarian obligation placed on local populations by the executive government's immigrant settlement policy, and the lack of assistance flowing from the government at York to local authorities to meet that obligation, it is not surprising that several towns along the St. Lawrence acted unilaterally when the threat of cholera became real and imminent in the late spring of 1832. By this time, these towns had experienced one full season of thousands of immigrant families arriving at their ports, many destitute and suffering from disease and exhaustion after the long trip across the Atlantic and up the St. Lawrence. Placing them on backlands remote from the main population centres, in accordance with executive government policy, only exacerbated their already difficult circumstances. Apparently admitting

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> the benefit of the colonies and, therefore, of the Emigrants; while yet no hardship is inflicted on the poor Emigrant, who will work for wages just as he did before, and may after a while acquire land, if land be his object, by the savings which the high wages in these colonies enable him speedily to make.

The notice went on to warn emigrants that available lands were to be sold to the highest bidder, such that only the most well-off settler would be certain of securing a tract of land on arrival in Upper Canada. "Notice to Emigrants," 15 March 1832, PAC, Governor General's Office, Colonial Office Despatches referred to Executive Council, RG1, E4, Vol. 3.

[218] Civil Secretary to Moe, 14 October 1831, PAC, RG7, G16C, Vol. 24.

that it was too much to hope for decisive executive action in the prospect of renewed calamity, and recognizing too the potential for even more suffering should the threat of cholera be realized, many localities acted to appoint Boards of Health prior to receiving word of the Lieutenant Governor's circular to the Magistrates of 20 June. This was true in Belleville,[219] London District[220] and Port Hope,[221] for example.

Especially in the communication to the Civil Secretary from Thomas Benson of Port Hope, we find an early indication of the extent to which local communities relied on their own initiative and regulatory innovation to attempt to meet the urgency of the approaching disease. With no executive knowledge or approval, the citizens of Port Hope acted to put an administrative and legal structure in place to protect themselves from the threat to the public health, all of which was done, so Benson respectfully noted, "in anticipation of His Excellency's instructions." Decisions were made at a public meeting on 21 June, before arrival of Colborne's circular. It is not clear from Benson's correspondence whether the people of Port Hope acted out of a genuine belief that the power to act had previously been delegated to them, whether they sincerely felt that express authorization for their activites would certainly emanate from York before long, or whether they decided to act irrespective of the apparent lack of executive government involvement. In any event, however, the first order of business was the appointment

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[219] Magistrates of Belleville to Civil Secretary, 22 June 1832, PAC, May-June 1832, RG5, A1, Vols. 116-117, pp. 65779-65781.

[220] John B. Askin of Norfolk County, London District to Civil Secretary, 25 June 1832, PAC, May-June 1832, RG5, A1, Vols. 116-117, pp. 65843-65846.

[221] PAC, May-June 1832, RG5, A1, Vols. 116-117, Thomas Benson to Civil Secretary, 27 June 1832.

of a Board of Health for the town, followed by a resolution to establish a local cholera hospital to be paid for out of subscriptions from the Port Hope Emigrant Society.

The Board of Health's principal responsibility was to see to the establishment of the hospital, to procure and administer medicines, and to appoint a secretary to prepare daily reports of mortality and morbidity. A separate Commission was established to receive subscriptions for support of the Board's initiatives. It was resolved as well at the citizens' meeting to print and circulate a handbill on the symptoms and treatment of cholera. Benson included a copy of the handbill for Colborne's information, and, for the most part, it spoke directly to personal and domestic cleanliness. "...[T]he greatest attention sho'd be paid to personal cleanliness; houses sho'd be thoroughly whitewashed with lime; no heaps of manure or other filth allowed to remain near dwellings; and that where cellars are damp, quicklime be lightly strewed over them."[222]

For the most part, of course, these resolutions emerged in the form of recommendations, rather than more formal regulations, although the local effort in organizing an administrative mechanism and taking communal responsibility for neighbourhood health is significant. After all, there was no regulatory power in the "town meeting," and therefore no strict powers of enforcement and punishment. Without legislative backing, then, localities such as Port Hope were compelled to rely on the authoritative status of respected members of the community, and on feelings of solidarity, in their attempt to initiate the changes in behaviour thought to be conducive to defending against the disease.

Similar, but more extensive, attempts were made in Kingston to prepare the area for the arrival of cholera. As early as 9 May, Kingston papers were alerting the local population to the dangerous progress of cholera toward Upper Canada, and implored everyone in the town to do

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[222] *Ibid.*

their utmost to avoid the conditions thought to be most conducive to the disease. The suggestions were largely confined to issues of cleanliness and wholesome, moderate diet. Reference was also made to the possibility of formal legal intervention, highly recommended according to the editor of the *Upper Canada Herald*. "Whatever the magistracy might choose to do (and they have been considering the possibilities for some time past), the public ought to co-operate fully."[223]

The magistrates, however, failed to act quickly enough for the citizens of Kingston. A public meeting was held on 14 June 1832 at which a "Committee of Management" was appointed, and there is some opinion available to suggest that the meeting was held and the Committee appointed to compensate for the inaction of the magistrates. The *Upper Canada Herald* suggested that the Committee was struck specifically to deal with the magistrates on the question of the best means available to avert the disease, indicating at least obliquely that the townspeople were not completely satisfied with the progress of magisterial deliberations (if any). In a very pointed commentary, the otherwise conservative editor of the *Upper Canada Herald* put forward a programme of legal initiatives that, one would predict, would raise the ire of the equally conservative executive administration. In any debate over competing visions of the public good, there is little doubt where this editor stood.

> ...[W]hen a pestilence is at the door, it is foolish to stand about every little punctilio in law. The public safety may be regarded without outraging private feeling or private right. We would seriously ask, whether it would be better to risk a little infringement on public right, by directing the Steam-Boats crammed with passengers for the ports to pass Kingston, or to let them come to our wharves and run the chance of introducing a pestilence amongst us when it may be avoided by so doing.[224]

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[223] *Upper Canada Herald*, 9 May 1832, NLC.

[224] *Upper Canada Herald*, 20 June 1832, NLC.

While expressing sympathy for the condition of the emigrants who were subject to quarantine at Grosse Isle in Lower Canada, the editor nevertheless went on to say that "[t]here can be no necessity whatever under the present circumstances, for the steamboats and vessels bound above to call here, and such as are, should have a distant station appointed for them, which regulations we are informed are this day enforced."[225]

The editor of the *Upper Canada Herald* was referring to resolutions adopted by the citizens' meeting of 14 June. The meeting made an unequivocal commitment to using whatever means they had available to prevent the introduction of the disease and combat it should it arrive, and to enlist the assistance of every citizen in seeing to the success of those initiatives. It made this commitment on the strength of a recognition that the public health was a fundamental concern of every citizen, and that certain extraordinary measures might be justified on the basis of that concern. Their third resolution read as follows: "That as every individual is deeply interested in the preservation of the Public Health it is the bounden duty of all to combine cheerfully in such measures as may serve to arrest the spread of the disease at its very commencement and to mitigate the sufferings of its unfortunate victims."[226] There is no apparent concern here for the likely injuries to be suffered by shipping interests, nor is there any worry about official immigrant settlement policies. At the local level, away from the pressures of Colonial Office despatches and in the face of imminent danger from cholera, the townspeople of Kingston stated their commitment to public health above all else, underscoring the appeal of a

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[225] *Ibid.*

[226] Robert Cartwright to Civil Secretary, 14 June 1832, PAC, May-June 1832, RG5, A1, Vol. 117, pp. 65677-65682.

vision of the public good that spoke to community solidarity and the urgent need for co-operation and sacrifice. In part at least, municipal law was the expression of this solidarity, the tangible manifestation of feelings of mutual responsibility and defence. At this level, even the voices of the community who were otherwise supportive of the executive government, represented perhaps through the editor of the *Upper Canada Herald*, agreed that some sort of strict legal intervention was necessary so as to most certainly advance this vision of the public good.

The result was a form of quarantine, the first established in Upper Canada. It differed, however, from the quarantines in place at Grosse Isle and elsewhere in British North America in that it was put in place without the sanction of the Legislature, and without prior executive knowledge and approval. In addition, the meeting of 14 June recognized, at least implicitly, that the preservation of the public health was first and foremost a local responsibility, an obligation to be met by local initiative irrespective of the absence of legislative and executive assistance. The quarantine facility was established despite the lack of funds for its support, and despite the uncertainty of support from York for its establishment and maintenance. The fourth and fifth resolutions read as follows:

> 4th – That for the purpose of carrying into full effect the objects of [these resolutions], it will be absolutely necessary to provide a temporary shelter for the reception of those who may be attacked as well with a view for the careful separation of the diseased from the healthy as to afford to the former the most prompt and effectual means towards the promotion of their recovery and that the said building be provided under the direction and superintendence of the Medical Gentlemen of the Town.
>
> 5th Resolved – that a subscription be now opened for the purpose of providing a fund to defray the unavoidable expenses attending the necessary measures of precaution and relief.[227]

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[227] *Ibid.* The text of the resolutions was included as an attachment to Robert Cartwright's communication to the Civil Secretary of 14 June 1832.

Even in the choice of language for these resolutions we find an attempt to galvanize the local population around the urgent call for community solidarity. The temporary shelter is *absolutely* necessary, and the expenses to be incurred are *unavoidable*. In the first resolution, it is stated that the arrival of the disease at Grosse Isle offers *indubitable* proof that it will soon make its way upriver to Kingston.[228] Each citizen has a *bounden* duty, according to the second resolution, to co-operate in measures to combat the disease. In other words, there is no alternative to the initiatives to be undertaken, lending support to the opinion of the editor of the *Upper Canada Herald* that when the public health is jeopardized, when there is a threat to the realization of that vision of the public good that depends on community health, then competing interests must be sacrificed, and "punctilios in the law" must be cast aside.

The magistrates in Kingston did not take action until 18 June, but the regulations they designed are significant for their severe implications for shipping interests. First, no boat from below Kingston was to be allowed to enter the harbour until it had been boarded by the health officer, and no cargo was to be unloaded without the express permission of the secretary of the Board of Health. Violators, so the magistrates ordered, were to be prosecuted "to the full extent of the law." If any master of a vessel put his boat into the port with a sick or dead person on board, a fine of forty shillings was to be levied, and the master was to be responsible for burying any dead passenger or crewman on shore at least five miles from the town.[229] While it is not clear that these regulations were as strict as those called for by the editor of the *Upper Canada*

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[228] *Ibid.*

[229] *Kingston Chronicle*, 23 June 1832, NLC.

Herald in his editorial of 20 June,[230] there can be little doubt that the magistrates were making some effort to restrict access to the port of Kingston by lake vessels despite the disruption and loss to shipping interests, and confusion in the implementation of official immigration policy, that had to result. The environmental imperative raised by the approach of cholera, therefore, served to direct the use of law at the municipal level in a way inconsistent with what one might anticipate considering executive priorities, the latter serving to delay the implementation of anything like a strict regulatory framework, the former compelling the immediate implementation of protective measures.

To a significant extent, the decisions of the magistrates in Kingston were inconsistent with other regulatory activity promoted during the period, and it is likely that this inconsistency can only be explained by reference to the emergency presented by cholera. Much other local regulation, for example, has been interpreted as conducive to an enhanced commercial life, principally designed to serve the interests of the trading élite, rather than to interfere with the free movement of goods and passengers that could only result from the strict regulation of port traffic in the Kingston of 1832. This was especially true in the case of the regulation of the local market. In this respect, W. Thomas Matthews writes that:

> Municipal codes regulating the marketing process prospered in Upper Canada, not because they constituted an integral part of 'the moral economy of the poor', but rather because they helped to create an environment conducive to the pursuit of private profit. In addition to protecting butchers and grocers from the competition of unlicensed hucksters, they rationalized economic activity, concentrated trade and commerce in the town centres, and generally helped to promote the developmental strategy supported by the civic elite.[231]

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[230] *Supra*, note 224 and accompanying text.

[231] W. Thomas Matthews, "Local Government and the Regulation of the Public Market in Upper Canada, 1800-1860: The Moral Economy of the Poor?" (1987), 79 *Ontario History* 297, at 298. Footnote omitted.

According to Matthews, market regulation in Kingston and other major centres represented an early, focussed intervention in commercial activity, and "by and large, the business community welcomed this intervention...[T]he local leaders in the towns and cities of Upper Canada continued to regulate the market-place with the intention of creating a dynamic and orderly urban economy."[232] The imposition of severe port restrictions by the magistrates during the early weeks of the epidemic of 1832, then, could only have represented a deviation from this otherwise concerted effort in Kingston and elsewhere to promote the interests of the trading community, even at the expense of the freedom of competition that, arguably, underlay the idea of the market in the first place. The cholera response was exceptional both for its contradiction of other established local regulatory policy, and for its denial of the executive government's continued commitment to smooth and orderly shipping and immigration.

A similar experience developed in the Home District. Local authorities in York began planning for the immigration season of 1832 even earlier than did those of Kingston, although in the earliest records of this activity there is nothing to suggest clearly that the threat of cholera was the impetus. But, as suggested earlier in this section, the executive government's policy on immigration had a great deal of impact on the way in which local administrations prepared themselves for the summer of 1832, and immigration was closely linked to the proliferation of disease. In April 1832, the Medical Board at York wrote to the Lieutenant Governor, reminding him of the sorry state of immigrants on their arrival in Upper Canada, their general impecuniosity and their weakened condition. The Board complained that local medical practitioners were stretched to their limit as it was, and could not be expected to give freely of

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[232] *Ibid.*, 299. Footnote omitted.

their time as more and more immigrants arrived at York through the spring and into the summer. The solution, the Board argued, was the erection and maintenance of a hospital for immigrants, and funds were requested from Colborne for those purposes.[233] Colborne agreed, and in his reply said that "...with reference to the large proportion of Emigrants that will pass through York this season and the justifiable detention of many of them by sickness, His Excellency will sanction such expenses to be incurred in making arrangements in the Hospital for the accommodation of an increased number of patients, as you and the Board of Trustees may recommend."[234]

Later in the spring, concern spread beyond the medical community, as the local presses began to draw the community's attention to the dangers inherent in both the unregulated arrival of passengers at the port, and the unsanitary condition of the town. Already there had been some discussion, apparently, of the establishment of a routine for the inspection of boats arriving at the harbour of York. This plan had the support of the Lieutenant Governor, and he was convinced that the Masters of the vessels would co-operate.

> With reference to the report to the Medical Board respecting the Emigrants that disembarked last year in a state of disease and remained in York a considerable time before their cases were made known at the Hospital, the board has recommended that you should visit every vessel arriving at this Port for the purpose of ascertaining from the Master whether any sick persons are on board.
>
> I am therefore directed by the Lt. Governor to acquaint you that His Excellency sanctioned the arrangements proposed by the Medical Officers, and he is persuaded that the proprietors or Masters of Steam Vessels will give you all the assistance in their power to carry into effect their intentions, and that they will

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[233] York Medical Board to Colborne, 6 April 1832, PAC, March-April 1832, RG5, A1, Vol. 115, pp. 64791-64794.

[234] Civil Secretary to Dr. Widmar, 13 April 1832, PAC, RG7, G16C, Vol. 25.

> furnish you with a list of sick passengers, on your making known to them the recommendations of the Medical Board.[235]

Although there is no specific reference to cholera in the Lieutenant Governor's correspondence, it is fairly certain that the administration and the local Medical Board recognized the relationship between immigration and disease, realizing that some precautions had to be taken despite the likely initial resistance of shipping interests to these measures. After all, by this time, as discussed above, local presses and correspondence from England were replete with warnings about cholera and its progress, and the other British North American colonies had already enacted legislation to protect their populations. Given the apparent support of the executive government to the initiative of the York Medical Board, the overall reluctance of Colborne to interfere with the ordinary flow of people and goods along the St. Lawrence and the lakes becomes perhaps more puzzling. The answer can only be that the regulations proposed by the Board would not disrupt shipping *per se*; sick passengers would not be prevented from disembarking, but would simply be identified so as to more certainly allow for their committal to hospital, preventing them from wandering about the town and spreading their infection. In this case, the law can be understood as purely a defensive mechanism of the local authority, preventing the risk of the spread of disease while refraining from impinging on the freedoms of those who sailed the lakes for their livelihood. To this type of initiative, one justified by its public health focus but constituting minimal interference in trade, the Lieutenant Governor could not fail to give his support.

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[235] Civil Secretary to John King, 21 May 1832, PAC, RG7, G16C, Vol. 26. The Lieutenant Governor corresponded to similar effect with the Board of Health of the London District on 20 June 1832. See Edwin Seaborn, "The Asiatic Cholera in 1832 in the London District" (1937), 31 *Transactions of the Royal Society of Canada, Section II* 153, at 157.

The Home District Magistrates acted quickly to formalize the arrangements by which vessels would be inspected by the Medical Board's officer. At their meeting of 21 May, the Magistrates passed the following resolution:

> Ordered, That a letter be written by the Clerk of the Peace to the Masters of the several Steam Boats and Schooners frequenting the Harbor of York, recommending them in the name of the Magistrates, in Sessions Assembled, to afford to the Health Officer appointed to visit vessels entering the Harbor every information and facility it may be in their power to give, and which may the better enable him to ascertain the nature and description of any contagious disease which may be found to exist in any vessel so visited.[236]

There is nothing further than this on the subject in the records of the Home District Magistrates, meaning it is not immediately clear that their intention was simply to identify suspected carriers of contagious diseases for the purposes of confining them in facilities on shore. But, when we consider the earlier pleas of the Medical Board for assistance in the erection and maintenance of an "emigrant hospital," and the Lieutenant Governor's acknowledgement of the difficulties experienced at York during 1831 with sick immigrants wandering about the town without medical attention, it is relatively certain that the Magistrates intended to inspect vessels not for the purpose of preventing them from having passengers come ashore, but rather for the purpose of confining those passengers onshore. In any case, in this instance the law was employed by the local authority as a defensive mechanism, with the support of the executive government and without apparent interference in commercial transactions and immigration policy.

The editor of the *Canadian Freeman*, at least, felt that the local administrative concern for the health of the population ought to extend to more strict onshore sanitary regulation as well. In an editorial of 17 May, the attention of York's citizens was directed to the deplorable state of

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[236] Minutes of Meeting of 22 May 1832, TPL, Records, Clerk of Peace Office, Home District, Quarter Sessions Minutes, Vol. 7 (1831-1833), pp. 349-352.

the town, and the need for an enhanced regulatory framework to control the activities of those producing filthy, unhealthy conditions.

> We understand that the Medical Board have appointed a Health Officer for this Port. We do not know the exact duties of this officer, or whether his services will be confined altogether to the Port – but we think the Town is more in need of a health officer than the Port, as much sickness prevails at present, and the approach of warm weather is likely to increase the evil. – Therefore, the cleanliness of the town, or rather its filthiness, ought to engage the first attention of this officer. Stagnant pools of water, green as a leek, and emitting deadly exhalations, are to be met with in every corner of the town – yards and cellars send forth a stench already from rotten vegetables sufficient almost of itself to produce a plague – and the state of the bay, from which a large portion of the inhabitants are supplied with water, is horrible. We therefore hope that the Health Officer and Medical Board will put their heads together and see what is the best mode of remedying such nuisances by aid of the other authorities.[237]

The call to co-operation among local administrative and legal authorities was answered quickly by the Magistrates of the Home District, who resolved at their meeting of 17 May "[t]hat the Members of the Medical Board be requested to consider upon such rules, regulations and measures as they shall think best for securing the general health and cleanliness of the Town."[238] An agent was appointed to liaise with the Medical Board and to file regular reports with the Magistrates.

By 8 June 1832 the magistrates of the Home District began to put in place the regulatory framework that it was thought would best defend the people of the district from cholera and other disease. At first, regulations were rather benign; there were no penalties provided for non-compliance, and the duties of enforcement personnel were very loosely defined.

> Ordered, That the Street Surveyor be ordered to make the best contract he can to make the round of the Town for one month calling upon each householder and

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[237] *Canadian Freeman*, 17 May 1832, NLC.

[238] Minutes of Meeting of 22 May 1832, TPL, Records, Clerk of Peace Office, Home District, Quarter Sessions Minutes, Vol. 7 (1831-1833), pp. 349-352.

> offering to take away the filth from doors and yards; and whose further duty it shall be to keep a list of all those who shall make any difficulty or decline his services. Ordered, That the Street Surveyor be directed to throw down so much of the Bank along the Water's edge to cover the filth below it as may be necessary.[239]

This was the first attempt to address the sanitary condition of York, and it seemed to answer the earlier call to action in the *Canadian Freeman*. By this point, there was a recognition in the magistrates that regulations relative to the operation of the port would not be enough to guarantee the health of the local population, especially given that medical personnel were not vested with the authority to keep diseased passengers from coming ashore. The thinking was that the best preventative to the spreading of disease imported through normal shipping practices was a clean and sanitary domestic life, and the resolutions of 8 June were the first attempt to impose that life on the citizens of York.

By 14 June, rumours of cholera in Lower Canada were confirmed as fact by various Upper Canadian newspapers,[240] and shortly afterward the magistrates of the Home District and the Medical Board at York intensified their preparation for arrival of the disease in their community. On 18 June, the Medical Board continued its attempt to establish a special hospital for the reception of immigrants and others suffering from cholera, and made a final suggestion to the Lieutenant Governor that the existing hospital be devoted to this purpose. It had "lofty, commodious rooms," and was centrally located for ease of access by both cholera patients and

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[239] Minutes of Meeting of 8 June 1832, TPL, Records, Clerk of Peace Office, Home District, Quarter Sessions Minutes, Vol. 7 (1831-1833), pp. 355-356.

[240] The editor of the *Brockville Recorder*, for example, quoted a variety of sources from Lower Canada, and concluded both that immigration was responsible for introducing the disease, and that "[e]very possible precaution should therefore be taken to arrest its progress, by adopting the most approved procedure." *Brockville Recorder*, 14 June 1832, NLC.

medical personnel. Current and future patients of the ordinary kind were to be accommodated in temporary shelters on the hospital grounds.[241]

On the same day, the magistrates toughened the sanitary regulations introduced only ten days earlier. An elaborate system of inspections was imposed through dividing the town into nine districts, with four inspectors in each. The inspectors were to be sworn in as special constables, underscoring the severity of the threat and enhancing the credibility of the inspectors as law enforcement personnel. They were to be supervised by a district superintendent. Twice-weekly visits were directed to each and every premise in each district, to be followed by "Town Carts" intended to carry away "filth and dirt." The inspectors were to see that all dwellings and privies were limed as necessary, and those too poor to purchase the necessary supplies on their own account were to be provided with lime free of charge. Additional regulations were adopted to prevent late-night "tipling" [sic], to stop the practice of boatmen from unloading filth on the beaches, to ensure that proprietors of lodging houses kept clean bedding, to have residents fill up holes on their properties where water might accumulate and stagnate, and to have householders sweep and clean the foot path in front of their houses every morning. Invoking an appeal to the common good to deflect criticisms on the invasive nature of these regulations, the magistrates warned the residents that disobedience would draw prosecution:

> It is expected that the inhabitants will afford every facility to the inspectors in the execution of their duty and in the due inforcement of these regulations, which are adopted with a sole view to the general welfare. After this notice proceedings will be instituted and strictly followed up against all persons suffering the continuance of any nuisance on their premises, or placing such on the streets of the Town, or on the banks or beach in front of the same.[242]

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[241] Medical Board for York to Civil Secretary, 18 June 1832, PAC, May-June 1832, RG5, A1, Vol. 117, pp. 65717-65718.

[242] Minutes of Meeting of 18 June 1832, TPL, Records, Clerk of Peace Office, Home District, Quarter Sessions Minutes, Vol. 7 (1831-1833), pp. 357-362. The resolutions of

With the sanitary condition of the town under control by virtue of this new regulatory framework, the magistrates turned to a reconsideration of the regulations in force in the port facility. It will be remembered that the regime put in place in May in this respect had received the approval of the Lieutenant Governor, but the magistrates did not hesitate to strengthen the law when the arrival of cholera appeared imminent. Without gaining the sanction of the executive prior to taking action, the magistrates passed a series of measures that appear to give the medical officer in the port the power to deny a vessel the right to tie up in the harbour at York under certain circumstances. In this respect, these regulations mark a significant departure for the Home District magistrates from the earlier suggestion to simply identify the sick so as to facilitate their expeditious committal to hospital. They resolved as follows:

> That no Steam boat, vessel, or other craft from the Eastern part of the Lake shall be permitted to enter the Harbor of York until the health Officer, Dr. King, shall have visited and inspected them, with such assistants as he shall think proper.
>
> All such vessels and Steam boats and craft are required and commanded to come to, or anchor at a point not nearer to the Town than opposite the Commissariat wharf, for the purpose of such inspection by the health Officer.
>
> The Health Officer will determine by his certificate in writing whether the Steam boats, vessels and craft may approach the wharves, or have any communication with the Town.
>
> Without such certificate their state shall be reported upon by the health officer for further consideration and disposition; and against any Master of Steam boat, or

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the Quarter Sessions are quite vague respecting the status and authority of the special constables, and respecting the extent of their powers of entry and arrest. Primarily, the special constables served simply a reporting function, relaying information on violations to the District Superintendent. Otherwise, their only enforcement power seems to be contained in the resolution which stated that "The Inspectors of Districts will, as far as in their power, put a stop to any improper practices on or near the Bank by preventing boatmen, fishermen and others from depositing filth there." The extent of their power in this respect, however, is not clearly set forth.

> other vessel, neglecting or refusing to comply with these regulations the most strict and rigid proceedings will be immediately instituted.[243]

Although the magistrates did retain some discretion here in the ultimate decision as to how to deal with vessels deemed by the health officer to be unfit to tie up close to the town, there is little doubt that, from the perspective of those responsible for municipal law enactment and enforcement in the town of York, the prospects of the proprietors of lake vessels were to be secondary to the health of the townspeople. First and foremost in the minds of the magistrates was the public health, and if seeing to that concern meant inconvenience and loss for shipping interests, then that was the necessary consequence. Obviously, the magistrates were risking the disapproval of the Lieutenant Governor, but the regulations were promulgated nevertheless.

During this same meeting, the magistrates demonstrated the co-operation with other levels of administration in York that was called for by the editor of the *Canadian Freeman* as early as 17 May.[244] In a critical commitment of funds and other resources, the magistrates established the conditions under which the medical officer might perform his duties more efficiently, and under which the cholera hospital might operate more successfully. A boat and crew was provided for the use of Dr. King, and a matron was supplied to the cholera hospital, with her own servant, both to be supervised by the chief medical officer at the hospital, Dr. Turner. An apothecary was appointed to the hospital, and Dr. Turner was supplied with a letter of credit for medicines. To facilitate the transportation of patients to the hospital, the Clerk was

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[243] Minutes of Meeting of 20 June 1832, TPL, Records, Clerk of Peace Office, Home District, Quarter Sessions Minutes, Vol. 7 (1831-1833), pp. 363-364.

[244] *Supra*, note 235 and accompanying text.

directed to procure a "proper cart."[245] Again, with no executive direction or involvement at all, the magistrates had done their best to ensure that those primarily responsible for combating the disease had the best available facilities. When this is combined with enhanced sanitary regulations and port restrictions, it is fairly certain that the vision of the public good inherent in the call to protect the public health at all costs overrode other calls for commercial efficacy and immigration efficiency. At least, it would appear that this was the case while the arrival of the disease remained merely imminent, and while the executive government withstood the temptation to become involved.

(iii) The Municipal Legal Response, 20 June to 30 October 1832

Municipal preparations for the arrival of cholera intensified in the days following receipt by district magistrates of the Lieutenant Governor's circular of 20 June 1832. Those localities that had not yet taken steps to appoint Boards of Health did so virtually immediately upon receiving Colborne's circular, and those that had already put a local administration in place made adjustments to allow for Colborne's offer of financial aid. Ironically, however, the executive initiative embodied in the circular of 20 June created as much tension at the local level as it provided relief, confirming that the awful responsibility to combat the disease rested with municipal authorities. Without legislative backing, local administrators were vested with the duty to use the limited funds at their disposal to protect their fellow citizens, with medical opinion seriously divided on the appropriate regulatory response, with thousands upon thousands of immigrants expected in a matter of a few short weeks, and with recalcitrant shipowners and others expected to resist whatever regime could reasonably be put into place.

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[245] Minutes of Meeting of 20 June 1832, TPL, Records, Clerk of Peace Office, Home District, Quarter Sessions Minutes, Vol. 7 (1831-1833), pp. 363-364.

Initially, local authorities responded positively to the circular, and many moved very quickly to take advantage of the Lieutenant Governor's offer of financial assistance. The Clerk of the Peace in Hamilton, for example, advised in a letter to the Civil Secretary of 25 June 1832 that a Board of Health was appointed "immediately upon receiving advice to do so,"[246] and Niagara reported on 27 June that a Board of Health had been appointed and a temporary shelter erected for the reception of cholera patients.[247] Charles Elliott of Sandwich, Western District advised on 29 June that a Board had been established immediately upon receipt of the circular, and expressed particular concern over the plight of native peoples in his district.[248] Superficially at least, the response from the districts was swift and decisive.

But the responsibility was a daunting one indeed. As the disease established itself across Upper Canada in early July, authorities in the various settlements watched as neighbourhoods were destroyed and ordinary life broke down. In London, for example, desperation overtook the Board of Health, as medical assistance evaporated and available funds were spent.

> The Board of Health exceedingly regrets that their official duty requires them to report the alarming state in which the Town of London appear [sic] to be in this morning. We have not time to refer to our Report of the 18th inst....The Town has been evacuated by all the medical men...excepting Donnelly and Hennisson, we cannot expect any more from Donnelly and Hennisson is very ill and it is to be feared that he will give up before many hours. The time is alarming and the people is [sic] leaving the Town in every direction. The board now consists of but two members, owing to the removal of others to the Country.[249]

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[246] Robert Berrie to Civil Secretary, 25 June 1832, PAC, May-June 1832, RG5, A1, Vols. 116-117, pp. 65847-65849.

[247] J. Muirhead to Civil Secretary, 27 June 1832, PAC, May-June 1832, RG5, A1, Vols. 116-117, pp. 65872-65874.

[248] Charles Elliott to Civil Secretary, 29 June 1832, PAC, May-June 1832, RG5, A1, Vols. 116-117, pp. 65902-65904.

[249] Report of the London Board of Health, 24 July 1832, PAC, July 1832, RG5, A1, Vol. 118, pp. 66327-66329.

The helplessness and resignation is evident in this report, and it is clear that whatever steps local authorities took in London failed to stop the disease from establishing itself and generating panic and chaos.

In other communities, however, regulatory efforts apparently had more success. Nevertheless, even given that success, local decision-makers were subject to widespread criticism over their decisions, over the ways in which the funds available from the executive government were allocated and over the means used to address the problem of indigence among immigrants. In Belleville, for example, the town remained free of cholera until well into July, despite the fact that it lay directly on the shipping route for passengers and goods bound for York and the western districts from Lower Canada. For the most part, the freedom from disease was attributed to a very strict regulatory regime put in place after receipt of the Lieutenant Governor's circular. Among other measures, the magistrates stationed armed guards day and night on all roads leading into Belleville to prevent the entry of strangers into the community, and at the same time forbade all lake vessels from unloading passengers or goods of any description. Funds allocated by the Lieutenant Governor for cholera relief were applied to the construction of a hospital.[250] While the measures appear to have been successful at the end of June and early in July, the authorities in Belleville suffered very pointed criticism for their aggressiveness in fighting the disease. Samuel Wilmot wrote to the Lieutenant Governor that "the poor Emigrants after crossing the Atlantic must suffer for want of food or a place to shelter themselves from the inclemency of the weather." He went on to say:

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[250] Samuel Wilmot to Civil Secretary, 29 June 1832, PAC, May-June 1832, RG5, A1, Vols. 116-117, pp. 65905-65906.

> The magistrates of this place are erecting a large framed Hospital from the money sent by His Excellency the Lieutenant Governor for the relief of indigent and sick Emigrants arriving but as they are not allowed to approach this place, the Hospital will be required only to add appearance to this Village.
>
> I think, if temporary...buildings enclosed with boards to secure the Emigrants from the weather had been erected and the [funds] of His Excellency kept in case of an emergency to employ medical aid when required, would have been more creditable to the authorities of this place.[251]

Later, when the cholera crisis had subsided for the most part, the editor of the *Brockville Gazette* echoed Wilmot's criticisms, placing the blame for the inhumanity of the regulations squarely on the shoulders of Belleville's citizens.

> The other exhibition of selfishness and cowardice was made by the Belville [sic] people. – The Governor placed at their disposal £200 for the relief of the sick and destitute emigrants, with which these 'Philanthropists' built an hospital for themselves, and organized themselves into a species of civic guard to prevent the entrance into their village of any of the people for whom the assistance was designed, but it appears that they themselves even doubted their own prowess, for they applied to the Governor for a Sergeant and six men to keep out the poor, sick and friendless Emigrants who might seek work in their neighbourhood. – Shame! Shame! Shame![252]

The local administrators, it seems, could not appease both the demands for protective measures and the humanitarian concerns for fair treatment for immigrants. It is noteworthy, too, that the *Brockville Gazette* was ordinarily unabashed in its general support of the executive government, such that its endorsement of official immigration policy was not surprising. However, it is remarkable that the magistrates of Belleville would take such action in direct contravention of immigration policy promulgated by the body to which they owed their appointment. This is certainly inconsistent with the actions we might expect from a loyal magistracy, and therefore it serves to underscore the idea that the legal response to the epidemic of 1832 disturbs

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[251] *Ibid.*

[252] *Brockville Gazette*, 12 September 1832, NLC.

conventional interpretations of Upper Canadian legal history. In the case of the magistrates of Belleville at least, party allegiances did not function to overcome the perceived need to enact strict regulations to combat the disease and preserve public health, meaning that the vision of the public good embodied in the drive for continued high levels of immigration failed to convince those magistrates that public health concerns ought to be subordinated to other imperatives.

Despite the enormous responsibility thrust upon them by the Lieutenant Governor's circular and the approach of the disease, most communities quickly enacted regulations and solicited the assistance of everyone in seeing to the accomplishment of their objectives. Notwithstanding criticisms directed at magisterial activities in Belleville, other initiatives met with less resistance. In Perth, for example, widespread co-operation with official directives was noted. "The Report of the four Gentlemen appointed to carry into effect the Resolution of the Board with respect to the removal of all filth from the streets, and the cleaning and whitewashing of houses and cellars, is so far satisfactory that with very few exceptions, the inhabitants have evinced the utmost readiness to meet the wishes of the Board."[253] Although compliance with Board directives in Cobourg was strong early in the summer, the Board noted that as the disease abated the willingness of the public to comply with the regulations diminished as well. As late as 20 July, the Cobourg Board published an admonition to the citizens to continue their healthy practices of earlier in the month.[254]

While the circular of 20 June did generate activity in some communities, it caused a great deal of tension among different administrative bodies at the local level as well. This was

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[253] "Report of the Board of Health, Perth," *Brockville Recorder*, 19 July 1832, NLC.

[254] PAC, September 1832, RG5, A1, Vol. 121, pp. 67069-67070.

especially true in Port Hope, Kingston and Brockville, where difficulties over jurisdiction and the responsibility for overseeing the allotment of funds caused delays, confusion and confrontation. In Port Hope, prior to the receipt by local magistrates of the Lieutenant Governor's circular, the townspeople had held a public meeting in which they had nominated and then approved a community Board of Health. After receipt of the circular, the magistrates at Cobourg (with responsibility for Port Hope) appointed their own board, and subsequent appointments included some of the same members as the board at Port Hope. Those appointed the second time refused to act in that capacity, and confirmed their commitment to the first board which, after all, was nominated and approved democratically by the townspeople. The people of Port Hope wrote to the Lieutenant Governor, asking that a portion of the funds allowed for the magistrates' board at Cobourg be re-directed to the Port Hope board.[255] There is no evidence that the people of Port Hope ever received a reply to their request.[256]

The instructions to magistrates contained in the Lieutenant Governor's circular caused administrative difficulties and overlap in Kingston, too. It will be remembered that the citizens of Kingston had appointed a special committee to deal with the threat of cholera in mid-June, and that the magistrates had taken some regulatory action shortly afterward, just prior to receipt of the circular of 20 June.[257] The instructions from York did little to alleviate the contest over

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[255] Ward to Civil Secretary, 30 June 1832, PAC, May-June 1832, RG5, A1, Vols. 116-117, pp. 65922-65927.

[256] While the absence of a reply is not conclusive, it is likely that the Lieutenant Governor refused to interfere with the decisions of the magistrates at Cobourg on how funds were to be spent. This is certainly consistent with his response to the local board at St. Catherines when that board asked for his intervention in decision-making by the district board at Niagara, and with his limited involvement in debates over the allocation of funds in Brockville. See *infra* notes 269 and 334-337, and accompanying text.

[257] See *supra*, notes 223-229 and accompanying text.

jurisdiction and responsibility. Immediately upon receiving the circular, the Midland District magistrates met at Kingston to consider their alternatives. It was true that much of what the Lieutenant Governor expected from district magistrates had been accomplished with the initiatives already undertaken, but the magistrates had not yet appointed a general board of health in accordance with Colborne's request. However, rather than name such a special board, the magistrates constituted themselves a general board of health for the district, and followed that with instructions to magistrates in the several counties in the district to name puisne boards in their areas. The magistrates in outlying areas were given the responsibility to erect hospitals, employ medical personnel and purchase medicines, but expenditures would be honoured by the central board only after submission of vouchers. Discretion in the expenditure of moneys was to remain with the central board at Kingston.[258]

The magistrates followed this set of decisions with further regulations passed at meetings held on 21 and 22 June. For the most part, these orders expanded on the regulatory regime already in place pursuant to orders of 18 June,[259] adding several rules relative to behaviour in the town, as opposed to restrictions on access to the port facilities. For example, the magistrates made it the responsibility of the householder to see to the burial of cholera victims within twelve hours of death, under a penalty of £5 for neglect. The magistrates ordered that all pigs within the limits of the town were to be removed, again subject to a fine of £5 and destruction of the animals in the case of neglect. These quasi-criminal provisions were supplemented by various new administrative appointments and orders, meaning that by 23 June, the magistrates of the

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[258] Circular – Chairman of the Quarter Sessions, Midland District, 20 June 1832, PAC, May-June 1832, RG5, A1, Vol. 117, pp. 65735-65738.

[259] *Supra*, note 229 and accompanying text.

Midland District had a fairly sophisticated regulatory regime in place to police both the port and the town of Kingston.

At the same time, of course, the citizens of Kingston had appointed a Committee of Management to respond to the threat of cholera, and they had begun to enact regulations as early as 14 June.[260] The Lieutenant Governor's circular of 20 June did little to dampen the enthusiasm of the townspeople's committee. In direct defiance of the authority of the magistrates, the committee constituted itself the Central Board of Health by resolution dated 21 June, and followed that decision with a variety of enactments that overlapped those of the magistrates in virtually every respect.[261] The Committee appointed its own Health Officer, and directed him to enforce the Committee's regulations prohibiting the landing of any goods or passengers in Kingston port. Unloading was to take place from large lake vessels into smaller craft, so as to facilitate inspection by the Health Officer. In this respect, the Committee defied the magistrates' less onerous (although strict in their own right) restrictions on shipping interests in the port of Kingston, where the magistrates retained discretion to allow ships to dock in certain circumstances.[262] A number of other orders were passed as well, directing the way in which medicines were to be dispensed, providing for the transportation of cholera patients by cart to the hospital, and providing for the immediate admission to the hospital for all those appearing in need of treatment for cholera.

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[260] See *supra*, notes 223-228 and accompanying text.

[261] *Kingston Chronicle*, 23 June 1832, NLC.

[262] *Supra*, note 222 and accompanying text.

The competition for jurisdiction was virtually complete. The circular of 20 June gave the magistrates a clear advantage, in that the £500 allotment from the executive government would allow them more certainly to employ medical personnel, purchase medicines, and provide for inspections of lake vessels. But the Committee had its strengths, too. It had accumulated a source of funds through private subscription, and immediately transferred those moneys to the control of its treasurer for ready access.[263] In addition, the Committee had the advantage of being devoted completely to combating the disease in the best way it knew how, whereas the magistrates were occasionally preoccupied with other official duties, including but not limited to the struggle against the disease in counties of the Midland District lying outside of Kingston.

Perhaps the most serious contest over jurisdiction occurred in Brockville, where prior to 20 June the local Board of Police had begun preparations for arrival of the disease. By 9 June, some 25,700 immigrants had arrived at Brockville from downriver,[264] and on 16 June the Board of Police warned that the disease currently at Québec would almost certainly arrive in Brockville because of that heavy river traffic. To prepare, the Board "recommended and requested" that the physicians of the town form themselves into a Board of Health, and then make recommendations to the Board of Police as to appropriate precautionary measures. From a distinctly anti-contagionist perspective, physicians were asked for suggestions as to how the air of the town might be rendered pure and healthy. In the meantime, it was the order of the Board of Police that "all cellars shall be thoroughly cleansed of vegetable matter and water, and that the walls thereof

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[263] NLC, *Kingston Chronicle*, 23 June 1832.

[264] *Brockville Gazette*, 21 June 1832, NLC. While the number may seem large, during 1832 more immigrants arrived in British North America from the British Isles and Europe than in any other year during the period 1815 to 1865, with the exception of 1847. Some 51,185 immigrants landed at the port of Québec alone during 1832. See Charles M. Godfrey, *The Cholera Epidemics in Upper Canada, 1832-1866*, *supra* note 3, 12.

be forthwith whitewashed with good strong lime, and that all vegetable or animal putrid matter, or such as is likely to become putrid, and all other dirt or filth be removed within 24 hours after the promulgation of this order, from the premises of every inhabitant of the Town, under the penalty of thirty shillings, with costs."[265]

The Board of Police wasted little time in enacting further orders, particularly in connection with the operation of the port at Brockville. On 18 June, a series of measures was enacted to establish penalties for those who would unload cargo or passengers without first allowing inspections by a member of the Board of Health, and to prevent lake vessels from docking in the town without the appropriate approvals. Similar penalties were provided for those who would convey goods or passengers from Lower Canada into the town along one of the local roads, meaning that the Board of Police made an attempt to completely isolate Brockville in a manner similar to that employed in Belleville.[266] At the same time, the Board of Police established two separate facilities on islands in the St. Lawrence, the first below the town to serve as a receiving station, the second above the town to function as a cholera hospital for diseased immigrants.[267] On the following day, the Board of Police issued yet another order, this one apparently designed to underscore the severity of the threat, and to reinforce the idea that the full power and authority of the Board was to be brought to bear in the event of violation:

> It is ordered by the Board of Police that all and every boat, now lying attached to any wharf or to any part of the shore within the limits of the Town, and which have had on board, within four days past, or now have, on board any Emigrants or the baggage of any Emigrants, or any Goods, Wares and Merchandise from

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[265] *Brockville Recorder*, 21 June 1832, NLC.

[266] See *supra*, notes 250-252 and accompanying text.

[267] *Brockville Recorder*, 21 June 1832, NLC.

> Lower Canada, be instantly removed to the Island in the East Ward of the Town, or to some other place, out of the limits of the Town, upon notice given by any Member of the Board, the High Constable, or any other Constable or Officer under the Board, so to do; - And it is further ordered, that the owner or owners of any such Boat, as well as the Master or persons having charge thereof shall forfeit and pay the sum of thirty shillings for the first thirty minutes the same shall remain, after notice as aforesaid, and thirty shillings for every thirty minutes thereafter.[268]

As was the case in other communities, these strict regulations did not meet with the approval of everyone under the jurisdiction of the Board of Police. The president of the Board, Daniel Jones, was a moderate Tory,[269] but he was accused by the editor of the *Brockville Gazette*, an establishment paper, of manipulating the orders to satisfy his own business interests. Especially deplorable, according to this editor, was the treatment afforded to the crew of a boat engaged in transportation of immigrants and owned by Mr. Jones. The crew (there is no indication as to whether it was a local crew or not) was allowed to disembark and disperse throughout the town, while the immigrants under their charge were compelled to go to the "uninhabited" holding facility on an island in the river, in the cold and rain. Ironically, one of the crew became sick with cholera, while all of the immigrants remained healthy. The detention of these immigrants, according to the editor, was "illegal," and simply served to underscore the partisan manipulation of the Board of Police, and therefore its Board of Health, by Mr. Jones.[270]

Predictably, the Board of Police was outraged with the allotment of funds to the magistrates pursuant to the Lieutenant Governor's circular of 20 June. Daniel Jones responded

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[268] *Ibid.*

[269] For a discussion of the ambiguous political allegiances of the various members of the Jones family, see Elva M. Richards, "The Joneses of Brockville and the Family Compact" (1968), 60 *Ontario History* 169.

[270] *Brockville Gazette*, 21 June 1832,NLC.

immediately by writing to Colborne expressing his displeasure and earnestly requesting that the Board of Police be provided with funds to defray the considerable expenses it had already incurred.

> As His Excellency has been pleased to grant a sum of money for the attainment of an object that this Board has already partially accomplished and taken measures to carry into full and complete effect, we take the liberty of suggesting the propriety of His Excellency placing this fund at our disposal rather than that of the Magistrates of the District who have nothing to do with the internal Government of the Town.[271]

Jones was supported in this position by Alexander Morris and Henry Sherwood. Sherwood reminded the Lieutenant Governor that the Board of Police had already established a Board of Health, such that there was no need for the magistrates to do so, and that the Board had prepared a hospital for immigrants on an island in the river. Both of these initiatives, and others already undertaken, would have to be paid for out of an assessment of the townspeople, unless some other arrangement could be made. "His Excellency no doubt is acting from the most benevolent intentions, but since the establishment of a corporation here, the Magistrates have no authority to interfere within the limits of the Town, in any matter respecting its internal regulation; and in fact never possessed any power to prevent vessels landing or of inflicting any penalty for the non observance of such a regulation."[272]

The attempts of the Board of Police to gain control of funds allocated for combating the disease provoked derision among members of the local establishment supportive of the executive

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[271] Daniel Jones to Civil Secretary, 22 June 1832, PAC, May-June 1832, RG5, A1, Vols. 116-117, pp. 65773-65775.

[272] Morris and Sherwood to Civil Secretary, 22 June 1832, PAC, May-June 1832, RG5, A1, Vols. 116-117, pp. 65785-65790.

government. The editor of the *Brockville Gazette*, always quick to respond, chastised the Board in the following terms:

> Conceive, 'gentle reader,' if possible, a set of tinkers, cobblers, *et hoc genus*, claiming an importance greater than His Majesty's Bench of Magistrates, conceive the ephemeral creatures of mob favor, and in some instances, the base tools of a baser faction, arrogating to themselves the importance of the Magistracy...Faugh! The very idea is productive of Cholera![273]

The magistrates themselves, however, were not so quick to dismiss the efforts of the Board of Police, perhaps recognizing the enormity of the task of combating the disease, perhaps realizing that duplication of effort in arranging medical supplies and installations could not be helpful to the townspeople. James Jessup, clerk of the peace in Brockville, wrote to the Civil Secretary on 30 June, advising that a general board of health had been appointed by the magistrates immediately upon receipt of the circular of 20 June, but that the board so formed had "at the same time [given] their sanction to the Boards established in this place and Prescott and [invested] them with power and authority to enforce all such regulations as they might conceive necessary for the preservation of Health."[274]

Ultimately, of course, the difficulty experienced in Brockville was as much about the control of funds to combat the disease as it was about political and legal jurisdiction. Earlier in June, Alexander Morris had been provided with £200 directly by the Lieutenant Governor to assist in preparing for the arrival of cholera, and it was not clear whether or not this sum was included in the £500 allocated to the magistrates pursuant to the circular of 20 June. In his letter of 30 June, the clerk of the peace sought clarification of the issue, "as there appears to be a

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[273] *Brockville Gazette*, 5 July 1832, NLC.

[274] Jessup to Civil Secretary, 30 June 1832, PAC, May-June 1832, RG5, A1, Vols. 116-117, pp. 65931-65933.

difference of opinion among their Worships upon the subject."[275] The controversy led to delays in disbursement, and those delays led in turn to pleas from the community to resolve the differences quickly, for the sake of the town. Even the editor of the *Brockville Gazette*, in somewhat uncharacteristic tone, applauded the attempts of the Board of Police, and finished his editorial of 26 July by begging the administration for the release of the funds to *someone*, for the sake of the public health.[276] In a remarkably insipid reply to the correspondence of Henry Sherwood and the other representations from Brockville during this difficult period, the Lieutenant Governor simply acknowledged the efforts of everyone involved in trying to protect the community from cholera, and emphasized that he expected the magistrates to distribute funds to the various towns and townships in the Johnstown District in accordance with their requests and so as to most certainly preserve the health of the respective communities. As already noted, this policy of non-interference in the decisions of the magistrates on the distribution of funds was characteristic of much of Colborne's activity during the period.[277]

In York, at least during June and July, the relationship between the magistracy and the board of health was relatively uneventful. Controversy did not emerge until later in the summer, and that issue will be addressed below in Section D of this Chapter. As noted above,[278] the Home District magistrates had enacted regulations both on sanitary conditions in the town and on activities in the port prior to receipt of the circular of 20 June. The Lieutenant Governor's instructions served to intensify activity. Immediately, the magistrates appointed a Board of

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[275] *Ibid.*

[276] *Brockville Gazette*, 26 July 1832, NLC.

[277] See *supra*, note 256 and accompanying text.

[278] *Supra*, notes 235-239 and accompanying text.

Health, and instructed the Board to adopt "such necessary regulations as they shall deem proper."[279] The Board met on the same day as its appointment, and passed sweeping resolutions designed to protect the town from cholera. Perhaps most importantly, considering sanitary regulations at least, the Board of Health appointed each of the town inspectors (appointed to that post by the magistrates only days earlier) to serve as Health Wardens as well, requiring them to file reports on numbers of residents and the condition of sick residents, and to incur expenses in transporting patients to hospital. In addition, the Board of Health emphasized to the public the necessity of strictly complying with the earlier regulations of the magistrates, underscoring the co-operative atmosphere that prevailed early in their mandate.[280]

Throughout the last week of June, both the magistrates and the Board of Health continued to issue orders and regulations, with no apparent conflict and little if any overlap. For example, at their session of 22 June, after the appointment of the Board of Health, the magistrates issued an order governing the interment of bodies from the cholera hospital,[281] while the Board of Health resolved on 23 June that "the inhabitants be requested to cooperate with the exertions o' this board to prevent the spread of Malady, by burning before their houses or in their yards pitch, Tar, rosin, Turpentine, Sulphur, or any such other anti contagious combustibles at intervals during each day."[282] Other more comprehensive resolutions appear in draft form in the records

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[279] Minutes of Meeting of 21 June 1832, TPL, Records, Clerk of Peace Office, Home District, Quarter Sessions Minutes, Vol. 7 (1831-1833), p. 365.

[280] Printed Order for the Appointment of Board of Health at York, 21 June 1832, PAC, May-June 1832, RG5, A1, Vol. 117, pp. 65757-65758.

[281] Minutes of Meeting of 22 June 1832, TPL, Records, Clerk of Peace Office, Home District, Quarter Sessions Minutes, Vol. 7 (1831-1833), p. 366.

[282] Minutes of Board Meeting, 23 June 1832, TPL, S130, Toronto Papers, B34, p. 25.

of the Board of Health, undated but filed in sequence to suggest that they were prepared at the end of June or very early in July 1832. These drafts covered such issues as the appropriate bedding to use to prevent drafts during the night, the use of lime and other methods of fumigation, the proper procedure for taking a bath, and recommendations on the use of fresh vegetables ("onions or leeks ought only to be used – potatoes when ripe are harmless to a certain extent").[283]

By 27 June, cholera had made its appearance in the town. Still, however, the Board of Health was applauded for its efforts, even by those, including the editor of the *Colonial Advocate*, who might be expected to be skeptical of the initiatives of the magistrates and their hand-picked Board.

> Our board of health appears to be very vigilant, and our town inspectors are doing their duty with a very praise-worthy perseverance; therefore, if cleanliness and decorum can be considered any advantage as a preventive of the disease, (as we really hope it may), we think that its [cholera's] effects will be comparatively mild here.[284]

Despite the efforts of the Board, however, the magistrates took immediate action upon learning that the disease had arrived in York. By order dated 27 June they requested that the several inspectors in the town file with them full reports on the sanitary state of the premises in their jurisdiction, with statements naming those residents who refused or neglected to comply with the regulations on cleanliness and the instructions from the inspectors. The purpose, so the

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[283] Draft Notices to Townspeople, Board of Health, TPL, S130, Toronto Papers, B34, pp. 47-48.

[284] *Colonial Advocate*, 28 June 1832, NLC. The editor of the paper, of course, was William Lyon Mackenzie, the most outspoken advocate of reform politics in Upper Canada.

Magistrates ordered, was to prepare indictments in nuisance against the delinquent citizens.[285] The reports were filed as requested, and the matter was referred to the Grand Jury by the magistrates in their session of 2 July.[286] By 4 July, twenty-seven indictments for nuisance had been issued, and two residents had been convicted by a jury.[287] Special counsel was employed to conduct the prosecutions, and convictions continued to be registered throughout the summer.

The sole early difficulty in the administration of cholera regulations in York by the magistrates of the Home District and the Board of Health appointed by them concerned the operation of the cholera hospital itself. The controversy began with rumours that mismanagement at the hospital had led to one patient being buried alive, only to be rescued by her husband who had insisted on seeing the body one last time. Because the magistrates were concerned about the credibility of the hospital in a time of such urgency, they instructed the Grand Jury to investigate the rumour and the general management of the hospital. By 11 July, the Grand Jury reported that the rumour was unfounded, and that all personnel at the hospital "have discharged their very laborious and dangerous duty in a manner alike creditable to themselves and satisfactory to all who have witnessed their labors."[288]

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[285] Minutes of Meeting of 27 June 1832, TPL, Records, Clerk of Peace Office, Home District, Quarter Sessions Minutes, Vol. 7 (1831-1833), p. 367.

[286] Minutes of Meeting of 2 July 1832, TPL, Records, Clerk of Peace Office, Home District, Quarter Sessions Minutes, Vol. 7 (1831-1833), p. 370.

[287] TPL, Records, Clerk of Peace Office, Home District, Quarter Sessions Minutes, Vol. 7 (1831-1833), pp. 374-375.

[288] Report of the Grand Jury on the State of the Cholera Hospital, 11 July 1832, TPL, Records, Clerk of Peace Office, Home District, Quarter Sessions Minutes, Vol. 7 (1831-1833), pp. 385-387.

But concerns with the operation of the hospital continued, despite the findings of the Grand Jury. One John Carey wrote to the Lieutenant Governor on 14 July, complaining that the public was avoiding the cholera hospital at York because of the extraordinarily high rate of death there. The reason for the death rate, argued Carey, was that the patients had to be carted great distances from one end of the town to the other, and this aggravated their symptoms, making death more likely. Those who took sick, so the argument went, refrained from summoning a physician for fear of being transported to the hospital against their will. The solution, for Carey, was to establish a network of neighbourhood "receiving houses" throughout the town, temporary hospitals accessible quickly by everyone so that the long cart rides might be eliminated. And, he concluded, absolutely no one ought to be removed from their home without their consent.[289]

At the suggestion that the Board of Health was forcing compliance with its regulations over the objections of the very citizens the regulations were designed to protect, the Board reacted with the indignation one might expect in a tense, difficult period.

> The Board of Health, on the Subject of the letter of Mr. Carey ... respectfully beg leave to state, that in their opinion the Letter ... is undeserving of attention – with the assurance at the same time, that the Board have in no instance gone beyond a recommendation of any measures to the Inhabitants with a view to their comfort and convenience, and that they therefore are unwilling that it should be supposed, that they intended, or have on any occasion sanctioned the use of force, to ensure a compliance with those recommendations adopted solely with a view to the welfare of the persons afflicted.[290]

While the Board's denial of difficulties in administration of the hospital and in enforcement of their regulations was unequivocal, there is little doubt that the Board was on the defensive, especially given the fact that their superiors in the magistracy felt compelled to empanel a Grand

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[289] Carey to Colborne, 14 July 1832, PAC, July 1832, RG5, A1, Vol. 118, pp. 66214-66220.

[290] Minutes of Board Meeting, 17 July 1832, TPL, S130, Toronto Papers, B34, p. 21.

Jury to investigate allegations of mismanagement. To compound matters, the Board quite unexpectedly discontinued regular reporting of the incidence of cholera, raising the suspicions of many that the disease was spreading quickly out of control. The *Colonial Advocate*, earlier quite supportive of the efforts of the Board of Health, promptly withdrew its support:

> This dreadful scourge continues its ravages amongst us, without any perceptible diminution in the number of cases, so far as we are able to judge; though it must be confessed that from the negligence of our board of health they have ceased to afford any further information by reporting the cases under treatment and deaths which daily occur. But whether it originates in laziness or for fear of causing alarm in the country we cannot tell. If, however, the latter object has influenced them, we can assure them from the very best information that they have mistook the proper method of allaying excitement.
>
> The people in the country being now left solely under the management of exaggerated rumor without any criterion whereby to regulate their information, they have drawn the conclusion that the cases are so bad that they are unwilling to report them.[291]

Later in the same issue, the editor reported that the practice of regular reporting of mortality and morbidity statistics had resumed. But damage had nevertheless been done to the credibility of the York Board of Health, damage that eventually led it into a direct confrontation with the Lieutenant Governor. That confrontation will be described below in Section D of this Chapter.

Before moving to a consideration of the executive response to the epidemic after 20 June, I want to mention briefly the efforts of municipal authorities in the Western District. The Board of Health in that District was unique in confronting directly the possibility that cholera might arrive in Upper Canada through the United States, rather than through the more predictable route along the St. Lawrence. The Board began by appealing to the citizens' sense of community and obligation:

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[291] *Colonial Advocate*, 26 July 1832, NLC.

> All the inhabitants are earnestly called upon to aid in carrying these Regulations into effect. Where all are so vitally interested, it is hoped no person will be found so wanting in duty to himself, his family, or the community as to screen any offender; but that every one will give prompt information to the proper authorities of any violation of these Regulations.[292]

Following passage by the Western District magistrates of ordinary regulations establishing the Board's responsibility for the treatment and hospitalization of cholera patients and other administrative matters,[293] the Board of Health established strict regulations governing communication with the American side of the Detroit River:

> Resolved, that the Ferries from the American side of the Detroit River be restricted to one spot of entrance ... and that all canoes, boats, or other crafts in communication with Detroit be restricted to the three Ferries ... and that a Proclamation be issued by the President of the General Board of Health, forbidding boats, canoes, or other crafts landing on any part of the shores of the District, and that the inhabitants along the same be positively ordered to see this act put in force ... and that no person shall be permitted to cross the Detroit River after sun set or before sun rise, without a permit from the Board of Health ... It is also ordered that the Ferrymen shall be restricted not to cross strangers without a permit from the Board of Health, or from one of its members.[294]

These regulations are unique in Upper Canada's legal response to the epidemic of 1832. Despite the fact that each of the Districts along the St. Lawrence and the lakes was in constant communication with the United States, nowhere but in the Western District was the attempt made to isolate Upper Canadians from American contact. It should be noted, of course, that the Board of Health at Sandwich extended the ban on travel to include communication with the

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[292] Western District Board of Health to Civil Secretary, 4 July 1832, PAC, September 1832, RG5, A1, Vol. 121, unnumbered page following p. 67105.

[293] The regulations prepared by the Western District magistrates can be found at AO, RG22-0103-0-1, Courts of General Sessions of the Peace, Western District, Minutes, Meetings of 26, 27 and 28 June 1832.

[294] Sandwich Board of Health to Civil Secretary, 4 July 1832, PAC, September 1832, RG5, A1, Vol. 121, p. 67106.

London District on its eastern boundary as well, meaning that the attempt was being made to completely restrict access to the Western District along all routes.[295] Despite the impact the regulations must have had on ordinary commercial relations, there is no evidence of difficulty in enforcement in the Western District.

(iv) Summary

It is not accurate to suggest that the municipal legal response to the cholera epidemic of 1832 was entirely non-partisan. Especially in Brockville and Kingston, tensions between townspeople intent on asserting control over their local affairs on the one hand, and magistrates vested with the responsibility to oversee the official response to the disease on the other, sometimes boiled over into open contests over jurisdiction and funds. These tensions were perhaps exacerbated by the editors of the partisan press, sympathizers of reform denouncing executive interference in municipal matters, supporters of the administration decrying the presumption of those local leaders who would pretend to usurp the authority of the magistrates.

But when the totality of the historical evidence is considered, there is very little to suggest that either partisan politics or self-interest stood in the way of a concerted, communal effort to resist the ravages of the disease. In Brockville, where the disagreements over jurisdiction and funds had perhaps the most dangerous potential, even the conservative editor of the *Brockville Gazette* was compelled to acknowledge the value of the efforts of the Board of Police, and to plead that the stalemate over the allocation of funds be resolved in one way or another for the sake of the public health. The opportunity for solidarity among political rivals was not lost on this editor, who wrote in his column of 28 June:

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[295] *Ibid.* See also AO, RG22-0103-0-1, Courts of General Sessions of the Peace, Western District, Minutes, Meetings of 26, 27 and 28 June 1832.

> The fear of this disease has been attended with one very great advantage to this pleasant little town – it has united all persons by an anxious desire to alleviate the sufferings of the poor, and a determination that no exertion shall be wanting on their part to stay the dreadful malady. The Board of Police have come forward, determined to do good ... It may seem odd in us to say so, but 'honour to whom honour.'[296]

And, in their letter to the Lieutenant Governor of 30 June, the magistrates confirmed that they had ceded primary jurisdiction over the legal response to the epidemic to the Board of Health already established by the Board of Police, a tacit recognition of the value of co-operation in a time of particular anxiety.[297]

There is very little in the historical record to suggest how the disagreements over jurisdiction in Kingston were resolved. Local presses were unusually silent after the end of June. But several pieces of evidence suggest that the magistrates and the citizens' Board of Health did what they could to avoid conflict during the early weeks of the epidemic. There is one item of relevant correspondence in the files of the Civil Secretary submitted jointly by J. R. Forsyth (secretary of the Board of Health appointed by the citizens' public meeting) and James Nickalls (Clerk of the Peace).[298] The existence of this joint submission can only suggest that the two authorities were trying to work together to combat the disease in the most efficient way possible. On 4 July, J. W. Macaulay, Chairman of the Midland District Quarter Sessions, reported to the Civil Secretary on the efforts of the magistracy in preparing for and fighting the disease, and in that correspondence he made no mention of competition with the citizens' Board of Health over

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[296] *Brockville Gazette*, 28 June 1832, NLC.

[297] *Supra*, note 274 and accompanying text.

[298] Forsyth and Nickalls to Civil Secretary, 25 June 1832, PAC, May-June 1832, RG5, A1, Vol. 116-117, pp. 65820-65825.

either jurisdiction or funds.[299] Finally, the editor of the decidedly conservative *Upper Canada Herald* saw fit to publish regulations promulgated by the citizens' Board of Health in the issue of 8 August 1832, closing his comments as follows: "We trust the inhabitants of Kingston will cheerfully acquiesce in any recommendation that may proceed from the Board of Health, always remembering that it is for their own health and safety that sanitary regulations are enforced."[300] This evidence, considered together, likely demonstrates that the magistracy and the citizens' Board of Health decided to work together for the sake of the health of the town, burying their ideological differences at least for the time being. There is nothing in the historical record to suggest otherwise.

In York, even the acerbic reform-minded editor of the *Colonial Advocate* was compelled to support the activities of the Board of Health appointed by the magistrates, withdrawing his endorsement only when he determined that the Board's negligence, rather than its ideological orientation, stood in the way of a concerted effort in the public's interest. Mackenzie's support of official action is especially significant, given his reputation as the most outspoken critic of the administration in all of Upper Canada. Elsewhere, official policy on immigration and settlement was virtually ignored, even by the magistrates appointed by the Lieutenant Governor. In Belleville, the magistracy did not hesitate to enforce regulations designed to completely destroy intercourse with neighbouring districts, shutting both the harbour and the roads leading into the town. In the Western District, the Board of Health appointed by the magistrates closed all communication with districts to the east, in addition to stopping the flow of goods and

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[299] Macaulay to Civil Secretary, 4 July 1832, PAC, July 1832, RG5, A1, Vol. 118, pp. 66004-66010.

[300] *Upper Canada Herald*, 8 August 1832, NLC.

passengers across the Detroit River to and from Michigan. Such action was in direct conflict with the executive government's commitment to continue the movement of immigrants and goods along the St. Lawrence and into the western districts, the epidemic notwithstanding. Partisanship, it appears, had little to say about the way in which the municipal legal response to the epidemic unfolded.

D. The Executive Legal Response, 20 June to 30 October 1832

(i) Introduction

After 20 June 1832, Lieutenant Governor Colborne focused even more completely on management of the huge numbers of immigrants arriving every day in Upper Canada, and of course, this is to be expected. There was a large measure of inevitability to the problem; the Colonial Office continued to encourage emigration to the Canadas despite the dangerous spread of cholera, even relaxing certain precautionary shipping regulations so as to reduce interference in the business of transporting emigrants across the Atlantic. By Order in Council passed 28 March 1832, the British had provided that all vessels bound for the Americas with fifty passengers or more were to sail with a qualified surgeon on board, and a chest of medicine.[301] This was an early recognition of the dangerous potential in the policy that encouraged high levels of emigration to the colonies, and an attempt, futile as it turned out, to protect the colonies from importing cholera. However, within a few short weeks the Order in Council was rescinded, apparently on the representation of shipowners:

> An order has been received at Plymouth from the [General Board of Health at London], in consequence of a memorial from the general Shipowners' society, directing the officers of customs not to interfere with ships carrying less than 50 passengers to North America, and in all cases the necessity of carrying a surgeon throughout the voyage is rescinded, and a strict examination into the health of the

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[301] Referred to in *Upper Canada Herald*, 9 May 1832, NLC.

> passengers is directed to be made by a medical superintendent, previous to sailing. This indicates a decided disposition, on the part of government, to afford every possible facility and encouragement to emigration.[302]

The consequence, of course, was that the immigrant season of 1832 was expected to be at least as busy as the season of 1831, and it was the Lieutenant Governor's responsibility to ensure that the enormous numbers of new arrivals were dealt with quickly, fairly and in accordance with settlement policy developed over the previous eighteen months.

The association of cholera with the immigrant population served to hamper the realization of Colborne's policy goals, alarming established settlements and leading to some of the early strict regulation passed at the municipal level and reviewed in Section C of this Chapter. For that reason, the Lieutenant Governor did whatever he could through the summer of 1832 to facilitate the movement of immigrants along the St. Lawrence and into areas where settlement might be less intrusive to the resident population. To do that, of course, Colborne was compelled to allay fears in virtually every port community along the river and Lake Ontario, appeasing residents with assurances that the policy of quick dispersal of the new arrivals was the best way to combat the spread of cholera, and, in selected cases, providing additional funds to assist in managing the swelling numbers.

The Lieutenant Governor was convinced, it appears, that the programme established by the circular of 20 June was the best response to cholera available. This is so despite his failure to call the Legislature to York for the purpose of enacting legislation to give the Boards of Health a statutory mandate, and despite his failure to endorse anything like a general quarantine at points of entry to Upper Canada. In a letter to Charles Bankhead, the British Charge d'Affairs in Washington, Colborne said the following:

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[302] "From the *Plymouth Journal*," *Kingston Chronicle*, 9 June 1832, NLC.

> Every precautionary measure as far as human beings may avail has been adopted in this Province to arrest the further progress of the disease.
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> Each district has been supplied with funds to erect Hospitals and provide Medical Aid, and the magistrates have been directed to assume such authority as the present exigency may require to prevent the extension of this affliction.[303]

An identical letter was forwarded to James Buchanan, British Consul in New York.[304]

Given the legislative activity in other jurisdictions, however, it is relatively clear that, albeit perhaps unwittingly, Colborne was exaggerating the scope of his response to the epidemic. This is especially true, as we shall see in the balance of this section of this Chapter, when we consider the chorus of cries from various towns in the province about the inaccessibility of funds, the lack of legal authority in the Boards of Health, and the lacklustre support from Colborne in confrontations with shipping interests. There was much more that could have been done, at both the executive and legislative levels, to ease the regulatory burden placed on municipal authorities. However, the concentration on managing the problem of huge numbers of immigrants preoccupied the Lieutenant Governor during the summer of 1832, to the point where his responses to the various complaints of town officials inevitably reflected this focus first and foremost. As it turned out, given both the problem of immigration and the policy impetus, driven by the desire to develop the agricultural and commercial potential of the Colony, to continue the reception of large numbers of newcomers at virtually any cost, perhaps there was nothing additional that Colborne might have done to support those who championed public health as the most certain means to a happy, secure population. In that interpretation, his letters to Bankhead and Buchanan were more accurate than they might first appear.

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[303] Colborne to Bankhead, 22 June 1832, PAC, RG7, G16A, Vol. 2.

[304] Civil Secretary to James Buchanan, 23 June 1832, PAC, RG7, G16C, Vol. 26.

Historians of the cholera epidemics in Upper Canada are generally sympathetic to Colborne's position. Marian A. Patterson, for example, relied on various items of the Lieutenant Governor's correspondence to conclude that he "was anxious to alleviate [the] disaster,"[305] and, despite the legislative initiatives in the other colonies of British North America and the early establishment of a general Board of Health in London, called the recommendation to establish boards of health "an imaginative and constructive step."[306] Patterson was likely echoing the words of R. I. Harris, who wrote in an early unpublished essay that the "appointment of the Board of Health [at York] was an imaginative and constructive action on the part of Sir John Colborne."[307] Geoffrey Bilson noted that "Colborne had some success in providing funds and stimulating those local governments which had been slow to act," and that his legal and administrative response to the epidemic was given the approbation of the legislature which, upon meeting toward the end of 1832, "approved what he had done without political bitterness."[308]

As will be demonstrated in the parts of this Section to follow, these historical interpretations of executive action over the summer of 1832 are somewhat generous. Rather, I want to suggest that Colborne's response to the epidemic, and to the administrative bodies in place across Upper Canada to battle the disease, was trifling compared to the frequent cries for executive assistance. It is arguable, as will be seen from what follows in this Section, that the circular of 20 June was a perfunctory attempt to assert some leadership without assuming the

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[305] Marian A. Patterson, "The Cholera Epidemic of 1832 in York, Upper Canada," (1958-59) 46-47 *Bulletin of the Medical Library Association* 165, at 172.

[306] *Ibid.*, 174.

[307] R. I. Harris, "The Cholera Epidemic in York, Upper Canada, in 1832," TPL, unpublished and undated manuscript, 24.

[308] Geoffrey Bilson, *A Darkened House*, *supra* note 3, 64.

mantle of responsibility that necessarily accompanies it. Without legislative backing, or without at least an executive branch willing to intervene on their behalf, local boards of health were left impotent in the face of the proprietors of lake vessels intent on continuing their ordinary commercial activities on Upper Canada's waterways. Despite what Patterson interprets as Colborne's anxiety to "alleviate the disaster," he did virtually nothing to vest the required authority in local boards to allow them to confront the masters of steamboats with the full force of the law behind them. And, notwithstanding that the circular of 20 June committed £500 to the use of each district in combating the disease, the Lieutenant Governor failed to provide the means by which those funds might be drawn. This failure lead to emergencies in many communities and contradicts the argument that Colborne's recommendation to establish boards of health was "imaginative and constructive."

(ii) The Question of Legislative Authority

There is little question that the communities along the St. Lawrence River below Kingston were terrified of the prospects as cholera made its appearance in their towns and as the numbers of immigrants continued to grow as June and July progressed. The situation led to panic, especially in Prescott and area, and the citizens made representation to Colborne for relief. In the meantime, hundreds of immigrants were left on the banks of the river,[309] with no one willing to accommodate them onshore, and no funds available to assist them in their journey to the western districts. Colborne could do nothing but assure the residents that everything possible was being done to alleviate the situation.

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[309] "The Lt. Governor [has] just heard from the Medical Board at York that they have received a letter from Mr. ____ that the sick Emigrants are left on the banks of the St. Lawrence in the most deplorable condition ..." Civil Secretary to John Patton of Prescott, 30 June 1832, PAC, RG7, G16C, Vol. 26.

> [Colborne] has every reason to believe that the authorities at Prescott, and on the Banks of the river have exerted themselves from the commencement of the alarm created by the appearance on the St. Lawrence of the prevailing disease to facilitate the conveyance of Emigrants to York and the Western Districts, and His Excellency assures you that the panic had been confined to Batteaux-Men employed by the forwarders of Montreal, and to the Farmers residing on the St. Lawrence [below] Prescott. He trusts however that the alarm has subsided, and that you will find that a desire to receive Emigrants in this Province to alleviate their calamities and to procure them employment prevails generally in every District.[310]

Colborne neglected to mention, of course, the general prohibition on travel in place in Belleville and in the Western District, and neglected to mention too that he was compelled to continually remind his agents along the St. Lawrence to see to their duty to keep immigrants moving westward toward York. To his agent at Prescott, John Patton, Colborne wrote that he was to exert every effort to move immigrants along the river "without the long delay,"[311] and in a letter addressed jointly to Patton and Colborne's agent at Cornwall, Cheeseman Moe, Colborne said:

> [I]n consequence of the distress to which Emigrants have been exposed on their route [toward Prescott], that you will continue to forward to Cobourg and York all Emigrants that may have been detained in the Johnstown district and who will be forwarded to the Upper part of the Province, they will find every assistance that can be given to them at Cobourg and York in their search after employment in the Midland District and in the Home and Western Districts where they will be readily received.[312]

In a similar vein, Colborne wrote to J. W. Macaulay, Chairman of the Midland District Quarter Sessions, praising the magistrates for their good work, and reminding Macaulay to see that emigrants are hurried along the lake to York to be employed in the western districts, the panic

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[310] Civil Secretary to Forbes, 6 July 1832, PAC, RG7, G16C, Vol. 26.

[311] Civil Secretary to Patton, 6 July 1832, PAC, RG7, G16C, Vol. 26.

[312] Civil Secretary to Moe and Patton, 7 July 1832, PAC, RG7, G16C, Vol. 26.

and alarm of Prescott and region apparently not infecting the inhabitants of the upper parts of the Province.[313]

Colborne's difficulty in realizing his immigration and settlement policy had direct impact on the willingness of immigrants and others to submit to regulations promulgated by the boards of health which, after all, were established on Colborne's own recommendation earlier in June. This interference suggests strongly that the Lieutenant Governor's commitment was primarily to the success of his immigration initiative, and only secondarily to the success of the boards of health. In turn, these events indicate a possible explanation for Colborne's intransigence when questions of quarantine and legislation were raised over the course of the summer. In a further letter to his agents at Prescott and Cornwall, Colborne said:

> [I]t is reported, that Emigrants have been detained in the Eastern Districts in consequence of Police regulations established by the Board of Health; and I am to request that you will explain to Emigrants, that every assistance will be afforded to them, to enable them to reach their destination.[314]

The strict port regulations in place in Port Hope, Belleville, Kingston and Brockville notwithstanding, the Lieutenant Governor was intent on pushing the new arrivals along Lake Ontario towards York, even if that meant disguising the true state of the reception they would receive on arriving at various ports along the way.

It was in this context that the Lieutenant Governor rejected John Smyth's call for a general quarantine to ease the panic along the river and to increase the likelihood that the disease might be slowed in its progress.[315] In addition to concluding that Smyth's suggestion of

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[313] Civil Secretary to Macaulay, 7 July 1832, PAC, RG7, G16C, Vol. 26.

[314] Civil Secretary to Moe and Patton, 10 July 1832, PAC, RG7, G16C, Vol. 26.

[315] See *supra*, note 170 and accompanying text.

quarantine was a "very injudicious proposal," Colborne took the opportunity to deflect criticism of his inaction by reminding Smyth that it was the magistrates, rather than the executive, who had principal responsibility for the legal response to the epidemic!

> It is the duty of the Magistrates to make such arrangements in conjunction with the Inhabitants of every Township of the District as may appear to them necessary for the preservation of the health of the community and on application to them from the Boards of Health which you may form in your Townships, every assistance will be given to you from the funds placed at their disposal.[316]

Of course, strictly speaking the Lieutenant Governor was right; the only legal authority for responding to the epidemic was that contained in the circular of 20 June, vesting responsibility in the magistrates. But it is clear from Colborne's letter to Smyth that the latter was calling for a general quarantine, and it is equally clear that district magistrates had no power to adopt such a measure. Besides, as indicated above, Colborne was not interested in seeing to the enforcement of local regulations such as those in place in Port Hope and Kingston, if that meant delays and inconvenience for the immigrant arrivals. His correspondence to agents along the river attests quite clearly to that.

To accede to Smyth's request for a general quarantine would have necessitated legislation, and, of course, the legislature was not in session during the summer of 1832. Recognizing the urgency of the situation, and recognizing too that many boards of health were experiencing difficulty in seeing to the enforcement of their regulations, the call was raised from several quarters to summon the legislature to York to deal with the problem. Members of the public recognized the failings of the legal regime, as is evidenced by the following excerpt from a letter to the editor of the *Upper Canada Herald*, from "Q:"

> [A]s it is too well known that sickness of all descriptions is generally permanent in the Province, and particularly so among the poor emigrants, I would humbly

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[316] Civil Secretary to Smyth, 6 July 1832, PAC, RG7, G16C, Vol. 26.

> suggest that our Legislature should be called together not only with a view of ordering some solid and comfortable assistance to sick strangers, but also to enable the authorities of the country by some legislative enactment, to make more efficient regulation in future to prevent the introduction of disease among us.[317]

"Q" was not without allies in the attempt to bring the Lieutenant Governor to the realization that his steps in responding to cholera were something less than "every precautionary measure, as far as human means may avail." The Niagara Board of Health, in the throes of an emergency to be explored in depth below in part (iv) of this Section, pleaded with Colborne to assist them through an unequivocal statement of support for their efforts in controlling their harbour. Rather than legislation, the Niagara Board suggested an official Proclamation to buttress their regulations:

> It is with unfeigned regret that the undersigned members of the board of Health, appointed by the Magistrates in special Sessions assembled on the 25th ult, have to state for the information of ... the Lieutenant Governor that finding it at present impracticable to enforce the precautionary measures deemed necessary for the preservation of this district from the contagious disorder now prevailing in various parts of this Province, their acts will be absolutely nugatory, and the public health consequently much endangered, unless His Excellency will be pleased to issue his proclamation, commanding all persons to obey the Rules & Regulations adopted by the various Boards of Health for the Public Safety.[318]

In his reply, Colborne simply assured the Niagara Board that he was aware of their difficulties, and indicated that he would later provide instructions on the best means available to the Board to enforce their regulations. The Lieutenant Governor did not issue the requested Proclamation, and it is not clear from the correspondence the reasons on which he refused the request of the Board. The expectation would be that Colborne would want the Boards of Health appointed by his magistrates pursuant to the circular of 20 June to successfully enact and enforce such

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[317] *Upper Canada Herald*, 15 August 1832, NLC.

[318] Niagara Board of Health to Civil Secretary, 10 July 1832, PAC, July 1832, RG5, A1, Vol. 118, p. 66145.

regulations as might be necessary for the preservation of the public health. Again, however, consistent with his rejection of John Smyth's call for a general quarantine, Colborne failed to exercise the leadership that momentarily appeared through the circular, instead resisting the temptation to more fully ensure the success of his Boards of Health by exercising his executive authority.

The most difficult consequence of the executive government's failure to support the Boards of Health with legislation occurred in York, a problem introduced above in part (iv), Section B of this Chapter.[319] As indicated above, the York Board of Health blamed the lack of legislative support for its "total inefficiency" in carrying out its mandate to enact and enforce regulations for the public good. It referred to the "absence of any legal means to which it might resort to compel the observance of its ordinances and regulations," and concluded its letter to the Lieutenant Governor with an urgent appeal to summon the Legislature so as to grant the Board the "power to act summarily and with promptness and decision."[320] To support this appeal, the Board passed a series of resolutions that outlined in some detail the frustrations of the members of the Board. For example, in referring specifically to the enforcement of sanitary regulations passed by the Board earlier in the summer, the Board resolved as follows:

> That information hath been given to this board, that at the present time several nuisances, prejudicial to the health of the inhabitants, exist in various parts of the Town, not only in the yards and fields of certain individuals but also in their cellars and out offices, which nuisances neither this Board nor the Magistracy of

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[319] *Supra*, notes 176-178 and accompanying text.

[320] Salient parts of the letter of Dr. Baldwin, Chairman of the York Board of Health, to the Lieutenant Governor are reproduced above at note 176, and accompanying text.

> the District have power summarily to abate, nor hath any public body authority to punish the persons guilty thereof.[321]

It is not clear why the York Board felt that nuisances were a particular enforcement problem. After all, as noted above, prosecutions and convictions for nuisance continued throughout the summer, according to the records of the Home District Quarter Sessions.[322] It may be that the penalty of a fine did not serve to compel the offender to actually remove the nuisance, and the Board felt that there was no legal power vested in any local authority to "summarily abate" the nuisances it discovered on inspection. The difficulty, then, was in the ability to compel remedial action, as opposed to weakness in the power to levy a fine for non-compliance with regulation. But whatever the actual legal basis for their complaint of lack of appropriate authority, the members of the York Board of Health felt strongly enough about their predicament to resign as a group when the Lieutenant Governor refused to accede to their request to amend the situation through immediate legislative intervention.[323]

It is not completely accurate to suggest that Colborne's intransigence on the questions of quarantine and legislative support for the Boards of Health was without support among some members of the community. In fact, Colborne received support from some unlikely allies. For

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[321] This resolution is one of several passed by the York Board of Health at its meeting of 9 August 1832, copies of which were appended to Dr. Baldwin's letter to the Lieutenant Governor referred to at *supra* note 176. The resolutions were preserved in draft form at Board of Health, TPL, S130, Toronto Papers, B34, Draft Resolutions of Board, pp. 99-108.

[322] See *supra*, notes 285-287 and accompanying text.

[323] *Supra*, notes 177-178 and accompanying text. In his letter to Dr. Baldwin, the Lieutenant Governor actually hinted that he was contemplating legislation, but, as noted above, asked the Board to be patient. There were additional reasons for the Board's resignation, connected primarily with funding difficulties, and these reasons will be referred to in part (iii) of this Section.

example, William Lyon Mackenzie, critical of many decisions made by John Colborne during the latter's tenure as Lieutenant Governor, and silent on the rest, gave tacit approval to the decision to refrain from calling the legislature to session. Writing from England under date of 20 September 1832, Mackenzie said the following:

> I see a notice of a project to call the Assembly together, on pretence of the Cholera. The Cholera is bad enough; but unless some other object was desired, there would be no talk of a new Session now. What! Call people together to legislate in the very midst of infection or disease, in the most unhealthy season too! – and with £10,000 in the Privy Purse![324]

It is clear, of course, that Mackenzie was not so much offering support for Colborne's decision to refrain from calling the Legislature to York, but rather was taking the opportunity to challenge the motives of those who led the call for legislative intervention, and criticizing the reluctance of the executive to authorize additional expenditures from available funds. But nevertheless, he did raise the argument that it would be contrary to one of the accepted views of the appropriate medical response to cholera to "call people together ... in the very midst of infection," and for that reason his letter can be interpreted as supportive of Colborne's ultimate decision on the matter.

More conventional support for the Lieutenant Governor came from John Carey, the same person who alerted Colborne to possible difficulties in utilizing the cholera hospital at York to its best advantage.[325] Carey's letter to Colborne of 13 August is especially interesting, in that it criticizes the decision of the Board of Health at York to complain over lack of authority, suggesting that strict measures will be complied with by every citizen of York, given their interest in preserving family and community health.

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[324] *Colonial Advocate*, 15 November 1832, NLC.

[325] *Supra*, note 289 and accompanying text.

> Under a pretence of a want of funds and a want of power in the magistrates, the pestilence that ought to have been checked by the removal of filth weeks ago, has got master of us and, I fear, it will be some time before the inhabitants who have been lulled into a fatal security by the Board, will rally, and meet the pestilence like men determined to subdue it.
>
> In the circle of my acquaintance I know of no man that will not, at least for his own preservation & that of his family, unite in any measure for the good of the community, and it is all nonsense to associate the continuance and spread of the contagion to the conduct of the inhabitants or to the government.[326]

For Carey, it was a simple matter of leadership, not government interference or citizen disobedience. If the Board of Health and the magistrates were to take decisive and concerted action to eliminate the sources of disease, then the population would happily fall in behind them for the sake of their families and the health of the community. To condemn the citizens for their alleged recalcitrance, or to blame the executive for not taking a more interventionist role, is simply to abrogate the duty to fight the disease vested in the magistrates by the Lieutenant Governor.

However, these pockets of support for the Lieutenant Governor, and the whispers of discontent for the actions of those who would summon the Legislature to deal with the lack of legal authority in the Boards of Health, fail to explain with any certainty the reasons for Colborne's reluctance to intervene at the height of local frustration. If he were interested in ensuring that the Boards of Health created pursuant to his circular of 20 June functioned effectively and efficiently, in accordance with the spirit under which they were appointed by the local townspeople or the magistrates, then certainly a simple Proclamation, if not a full-fledged legislative session, would have demonstrated the requisite support. But his failure to answer the

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[326] Carey to Civil Secretary, 13 August 1832, PAC, August 1832, RG5, A1, Vol. 120, pp. 66689-66692.

calls for a more direct executive involvement in the front-line fight against the disease likely suggests that accomplishment of the aims of the circular of 20 June was not the Lieutenant Governor's principal priority during the summer of 1832.

(iii) Funding Difficulties

As we have seen, the York Board of Health resigned not just over a lack of legal power, but also over difficulties with the adequacy of funding for their activities. This was a problem that permeated virtually everything Boards of Health across Upper Canada did during the epidemic of 1832, and caused conflict between local boards and their superiors appointed by the magistrates, between general boards and the Lieutenant Governor, and, in York at least, between the magistrates and their own board. Throughout the very tense months of July and August 1832, Colborne was strangely silent on the question of funding for the Boards of Health, giving further evidence of his lack of commitment to the programme of resistance to cholera initiated by his circular of 20 June.

This is not to say that the executive government at York was without compassion for the plight of indigent immigrants during 1832. As early as January 1832, the government passed the statute that became known as the "Prescott Emigrant Bill,"[327] by which the sum of £250 was granted for the relief of sick and destitute emigrants arriving at Prescott. According to the statute, humanity directed that relief be afforded over and above what may arise from "Christian feelings and benevolence," and the statute provided for a special fund to be administered by trustees named for the purpose. In addition, prior to distributing the circular of 20 June, the

[327] 2 Wm. IV c. 34 (U.C.). This statute will be referred to in more detail in part B(ii) of Chapter Four below.

Lieutenant Governor granted an additional £500 to the Prescott Emigrant Society "to be employed in any way you shall think most beneficial to the community."[328]

These initiatives, of course, were intended to assist Colborne's agent at Prescott and others in that community in attending to the new arrivals during the summer of 1832, all in furtherance of Colborne's policy on immigrant accommodation and settlement. They were not specifically directed to cholera relief. In other words, in Prescott as in other towns across Upper Canada, prior to the circular of 20 June there were no funds specifically allocated to defending the communities against cholera. Obviously, the allotment of £500 to the magistrates of each district expressly for the purpose of fighting the disease was greeted with a great deal of appreciation,[329] but in the end this allotment caused as much frustration as it did relief.

The principal difficulty with the grant of £500 to the magistrates of each district was that the Lieutenant Governor failed to provide instructions on how the funds might be drawn. In letter after letter we find the frustrations of local boards of health in gaining access to funds. Complaints began with the Chairman of the Hallowell Board of Health writing to John Macaulay, Chairman of the Midland District Quarter Sessions, requesting that the general Board of Health at Kingston reimburse the Hallowell Board for some of its expenses. Macaulay replied that funds would only be authorised to be paid out to the local boards after the ordinary audit of public accounts. Of course, this would lead to delays, meaning that the Hallowell Board was compelled to attempt to raise the required funds by private subscription, and the President of the

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[328] Civil Secretary to Alpheus Jones, 19 June 1832, PAC, RG7, G16C, Vol. 26.

[329] "We beg leave to request that you will communicate to His Excellency, the deep sense we entertain of this most humane and benevolent act, and for which, His Excellency will be pleased to accept on behalf of ourselves, and the inhabitants of this Town, and County, our most grateful thanks ..." Magistrates of Belleville to Civil Secretary, PAC, May-June 1832, RG5, A1, Vols. 116-117, pp. 65779-65781.

Hallowell Board remarked that the question of an audit of necessary expenses was never mentioned during the initial excitement over the provision of the Lieutenant Governor's funding.[330]

The confusion in the Hallowell Board of Health was typical of the state of several boards in the Midland District. On 12 July, Macaulay wrote to the Civil Secretary, outlining the difficulty in some detail. Macaulay blamed Colborne directly for raising the expectation in the Bank of Upper Canada that accounts were not to be paid out of the amounts reserved for defending against cholera until the ordinary practice of an audit of those accounts were to take place, and that this had led to confusion and frustration in the boards at Hallowell, Kingston and Belleville.[331] This is so, despite the fact that Colborne's communications to the Bank of Upper Canada appear unequivocal enough. On 4 July, the Civil Secretary wrote to William Allan, President of the Bank of Upper Canada, in the following terms:

> I am directed by the Lt. Governor to request that you will have the goodness to make such advances to the Chairman of the Magistrates of each of the several Districts of this Province, on their respective orders, as they may require to enable them to comply with His Excellency's directions respecting the establishing of Hospitals and providing Medical Aid at the Ports where Emigrants disembark.
>
> His Excellency will direct Warrants to be issued for the sums which the Bank may advance on the amount being specified to this Office.[332]

It is not immediately clear that this correspondence relates to the fund established pursuant to the circular of 20 June, but it is difficult to suggest that the Civil Secretary was referring to some

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[330] Chairman of Hallowell Board of Health to Macaulay, 9 July 1832, PAC, July 1832, RG5, A1, Vol. 118, pp. 66139-66144.

[331] Macaulay to Civil Secretary, 12 July 1832, PAC, July 1832, RG5, A1, Vol. 118, pp. 66179-66183.

[332] Civil Secretary to Allan, 4 July 1832, PAC, RG7, G16C, Vol. 26.

other programme. If there is other correspondence to the Bank of Upper Canada on the matter, it has not survived. In any event, however, Macaulay's correspondence to the Lieutenant Governor's office certainly alerted Colborne to the difficulties being experienced at the local level in gaining access to funding, and made it incumbent on Colborne to intervene so as to ensure the accomplishment of the goals of the circular of 20 June. Macaulay wrote again to the Lieutenant Governor on 13 August, advising that the Board of Health had obtained as much money as it could by private subscription, and that he expected further appeals to the citizens to be futile. Some of the funds collected, he pointed out, had even been used to clean up nuisances on government land, and the patience of the citizens and members of the Board of Health was wearing thin.[333]

But Colborne did not intervene, and the complaints about both access to funds and the adequacy of the programme gained strength throughout the summer. The Board of Health at Brockville, for example, resolved that

> ...a large expense having been necessarily and unavoidably incurred in the erection and furnishing a temporary Cholera Hospital and providing medical aid and other attendance at this place, for which this Board have become responsible, under the full expectation of reimbursement, and no monies having as yet been placed by the Government in the Magistrates acting under them, subject to the control of this board, it is expedient that Harry Sherwood, ... one of the Members of the Board do forthwith proceed to York and make the necessary representation to His Excellency upon the Subject, in order that funds may be placed at the disposal of the board for the purpose of liquidating the expenses already incurred, and meeting the current expenses of the Hospital.[334]

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[333] Macaulay to Civil Secretary, PAC, August 1832, RG5, A1, Vol. 120, pp. 66675-66678.

[334] Resolution of the Brockville Board of Health, 14 July 1832, PAC, July 1832, RG5, A1, Vol. 118, pp. 66205-66206.

Still, the Lieutenant Governor failed to act. The clerk of the peace in Brockville wrote to the Civil Secretary on 16 July in much the same terms, complaining that none of the money promised to the district by Colborne had been received.[335] Colborne's only reply to these representations was a rather insipid letter to Henry Sherwood of 17 July, in which the Lieutenant Governor simply advised that he expected the magistrates to distribute the funds at their disposal so as to most certainly meet the needs of communities under their jurisdiction.[336] The actual problem of access to those funds was never addressed.

Even in the Western District, where the Board of Health at Sandwich did not hesitate to enact strict regulations for defending its communities, frustrations soon became evident over access to funds to assist in defraying the costs of fighting the epidemic. William Hands wrote an extremely acerbic letter to the Civil Secretary on 6 August, in which one can clearly sense Hands's exasperation at not being able to access funds quickly enough, and not being told how he might best expedite the matter. In apologizing for the informalities in his correspondence, Hands closed by saying that "I would humbly hope it might be overlooked and not be the means of retarding the payment of the Money, as your instructions do not exactly point out in what manner it was necessary for me to procure."[337] Again, the principal difficulty is the failure of the Lieutenant Governor to communicate clear instructions to the districts, and then his subsequent failure to respond to complaints as they were presented to him.

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[335] Jessup to Civil Secretary, 16 July 1832, PAC, July 1832, RG5, A1, Vol. 118, pp. 66234-66237.

[336] Civil Secretary to Sherwood, 17 July 1832, PAC, RG7, G16C, Vol. 26.

[337] Hands to Civil Secretary, 6 August 1832, PAC, August 1832, RG5, A1, Vol. 120, pp. 66617-66618.

In York, of course, the difficulty with access to funds led directly to resignation of the Board of Health in mid-August. Kingston's *Upper Canada Herald* sarcastically pointed out the incongruity of the situation, by arguing "[w]ho would believe that, in a town like York, where there are at least fifty persons, who might give as many pounds each, without the slightest inconvenience, a board established for the express purpose of protecting the lives of the inhabitants, should be suffered to languish, and ultimately die, for the want of a little money?"[338] The problem may have arisen through the distribution of the £500 fund by the magistrates of the Home District to the ward inspectors, rather than to the Board of Health. In its resolutions of 2 July, the magistrates resolved as follows:

> Ordered, That the five hundred pounds placed in the hands of the Chairman by the Executive Government for meeting the expenses incurred by the Cholera, be paid over to the Treasurer, who is to pay out the same in detail under the special authority of the several Gentlemen who Superintend the several Wards of the town; or on the order of any of the magistrates, countersigned by the Clerk of the peace, and which documents so presented shall be made out as much in detail as circumstances will reasonably admit.[339]

As the Chairman of the York Board of Health wrote on 9 August, "[t]he sum placed by [the Lieutenant Governor] at the disposal of the Magistrates of the district, the Board is given to understand is nearly exhausted, and that no further aid can be furnished by [the Lieutenant Governor,"[340] and, although it is far from certain, it may have been this resolution of the magistrates that placed the fund beyond the reach of the Board of Health.

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[338] *Upper Canada Herald*, 22 August 1832, NLC.

[339] Minutes of Meeting of 2 July 1832, TPL, Records, Clerk of Peace Office, Home District, Quarter Sessions Minutes, Vol. 7 (1831-1833), p. 370.

[340] Baldwin to Colborne, 9 August 1832, PAC, August 1832, RG5, A1, Vol. 120, pp. 66646-66655.

On the strength of the examples of frustration at the district level related thus far, it is arguable that the real difficulties arose through squabbles between the magistrates and the various boards, rather than through any inactivity of the Lieutenant Governor. This would certainly appear to be the case in the Midland District, and it is possibly true, too, in the Home District. But perhaps the most peculiar, and therefore the most telling, response to a plea for help from the districts came in correspondence between the St. Catherines Board of Health and the office of the Lieutenant Governor, and in this exchange we find the inexplicable rejection by Colborne of an apparently legitimate concern raised by a local board. The correspondence began on 17 July, when Rev. James Clarke, Chairman of the local Board of Health at St. Catherines, wrote to Colborne to advise him that cholera had broken out among workers on the Welland Canal, and that unless immediate aid were provided the workers were threatening to abandon the project. The St. Catherines Board, Clarke revealed, was without funds to assist.[341]

Colborne responded quickly, urging Clarke to apply to the district magistrates for assistance, concluding that he "... would regret exceedingly that the work now in progress on the Welland Canal should be discontinued, as he thinks such a measure would greatly augment the evil instead of diminishing it; and as, moreover, [he has] no funds at his disposal from which to extend assistance to the families of the persons who might thus be thrown out of employment."[342] This reply, of course, is relatively standard, a deflection of the inquiry to the district level, and a denial of the availability of funds in addition to the original £500 allotment. Within a matter of days, Clarke again wrote to the Lieutenant Governor, advising him that the

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[341] Clarke to Civil Secretary, 17 July 1832, PAC, July 1832, RG5, A1, Vol. 118, pp. 66253-66256.

[342] Civil Secretary to Clarke, 18 July 1832, PAC, RG7, G16C, Vol. 26.

district Board of Health at Niagara had earlier been dissolved, meaning that there was no administrative body to which the St. Catherines Board might apply for assistance. In the meantime, "many hundreds of paupers" were now under the care of his Board. Clarke enclosed an undated copy of his letter to the Niagara Board of Health, in which he pleaded that "[a]n increased allowance out of the General Fund is absolutely necessary to defray the expenses" of battling the disease, all of which were incurred, according to Clarke, on the advice of the Niagara Board itself. But because of the disbanding of the Niagara Board, Clarke's correspondence had gone unanswered, as a result of which he launched his appeal to the Lieutenant Governor.[343]

Quite inexplicably, the Lieutenant Governor refused Rev. Clarke's pleas for help. In the final correspondence on the matter, the Civil Secretary simply explained to Clarke that the Lieutenant Governor would not interfere in the decision by which the magistrates either paid or denied claims submitted to them by the various boards in their districts. That was a decision to be left to the discretion of the magistrates, and the £500 allotment ought to be enough, so the argument went, to see to the needs of every community.[344]

It is evident from this exchange that the source of the difficulty for the local and district boards in gaining access to the fund established to combat the epidemic did not lie simply in disputes over jurisdiction or other matters among the magistrates, the district boards and the local boards. In the case of the St. Catherines Board and the Niagara District Board of Health, the problem was clearly one of an administrative vacuum, created by the disbanding of the Niagara Board. But even then, the Lieutenant Governor refused to step in and assist in resolving the

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[343] Clarke to Civil Secretary, 24 July 1832, PAC, July 1832, RG5, A1, Vol. 118, pp. 66322-66326.

[344] Civil Secretary to Clarke, 26 July 1832, PAC, RG7, G16C, Vol. 26.

matter. It may be, as Colborne suggested in his letter of 18 July, that there were simply no funds available to help St. Catherines, but this possibility is belied by a number of other successful appeals to the Lieutenant Governor for funds. For example, Colborne offered additional funds to his agents John Patton of Prescott and Cheeseman Moe of Cornwall in his letter of 30 June 1832, funds to be dedicated to assisting in the transport of immigrants further up the St. Lawrence.[345] On 7 July, Colborne granted an additional £200 to the Emigrant Society for the Midland District, despite his complaint that more emigrants ought to be forwarded along from Kingston to Cobourg and York.[346] In still another gesture of support for the work of the "emigrant agents" along the St. Lawrence, Colborne granted a further £500 to John Patton of Prescott by his letter of 7 August.[347] And despite his stated unwillingness to interfere in the decisions of the magistrates as to the manner in which the initial £500 was to be spent, on 11 October we find Colborne appealing to the Chairman of the Quarter Sessions for the Gore District, Hamilton, in an attempt to secure remuneration for one Thomas Racy relative to his assistance in attending to sick immigrants during the summer.[348]

It is relatively clear, I want to suggest, that while the initial provision of £500 to the magistrates of each district to assist in fighting the epidemic may have been a sincere attempt to initiate "every precautionary measure, as far as human means may avail," the Lieutenant Governor lacked the basic commitment to that vision of the public good that had protection of

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[345] Civil Secretary to Patton and Moe, 30 June 1832, PAC, RG7, G16C, Vol. 26.

[346] Civil Secretary to Secretary to the Midland District Emigrant Society, 7 July 1832, PAC, RG7, G16C, Vol. 26.

[347] Civil Secretary to Patton, 7 August 1832, PAC, RG7, G16C, Vol. 27.

the public health at its core. Every single request for assistance sent from Boards of Health to the Lieutenant Governor's office over the course of the epidemic of 1832 was rejected. Each and every exceptional provision of funds during that same epidemic went in furtherance of the Lieutenant Governor's immigrant and settlement policies, to the point where Colborne's "emigrant agent" at Prescott, John Patton, actually had twice the resources of the Treasury at his personal command than did any of the several Districts of the Colony.

(iv) The Influence of Shipping Interests

Before moving on to consider the legislative response to the epidemic of 1832 in Chapter Four below, I want to briefly review the Lieutenant Governor's relationship to proprietors of steam vessels during the summer months. Colborne owed the possibility of success in his immigration policies to the efficiency of shipping interests; it was the steamboats and their masters and crews who sailed the St. Lawrence and Lake Ontario moving immigrant families along to their ports of ultimate destination who guaranteed that Colborne's designs in this respect might be realized. Very early in the epidemic, however, Colborne was informed that certain of the proprietors of steam vessels planned to discontinue their voyages during the prevalence of the disease, and Colborne moved swiftly to intervene so as to prevent a catastrophe, with thousands of immigrant families, many destitute and diseased, arriving at Cornwall and Prescott with no available means or method to continue their journeys westward. On 26 June 1832, the Lieutenant Governor circulated a notice to the masters of the "steampackets," and it read in part as follows:

> His Excellency ... requests that you will consider the interests of the Province at this crisis, and is of opinion that afflicted with the dreadful calamity as it is that

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[348] Civil Secretary to Chairman of Gore District Quarter Sessions, 11 October 1832, PAC, RG7, G16C, Vol. 27. The name of the recipient of Colborne's benefaction is unclear, but appears to be "Thomas Racy."

> you cannot render a greater service to the Colony than by directing your vessel to continue to run as usual, and by conveying such Emigrants as may arrive at Prescott, to York and the Western districts, in order that the healthy passengers may be dispersed, and those in bad health placed under the charge of the Medical boards established in each District.[349]

It is clear, of course, that the Lieutenant Governor had little choice in imploring the masters of the steamboats to continue plying their trade as usual. The alternative was unthinkable, raising the prospect of a public health catastrophe at the eastern edge of the Colony.

The only reply to this circular that has survived was submitted by a Captain Hugh Richardson, master of the steampacket "Canada," a man who would play a major role in perhaps the most controversial episode of the entire epidemic of 1832. In his letter to the Lieutenant Governor, Capt. Richardson pledged his support for Colborne's position, but in an odd bit of prescience, alluded to the possibility of confrontation with local authorities.

> I beg to assure His Excellency that as long as I can find seamen to navigate I shall continue my route; and that no precaution or expense shall be wanting on my part to render the vessel as cleanly and as healthy as circumstances will admit. At the same time I trust every facility will be afforded me by the authorities in all ports where I touch, to relieve the vessel of the sick should there be any...[350]

It will be remembered from Section C of this Chapter that certain of the ports along the St. Lawrence and Lake Ontario provided regulations to allow lake vessels to dock after being inspected by the local medical officer. In these cases, the sick would be removed to the cholera hospital, and the vessel could carry out its regular business otherwise. Some ports, however, took a more aggressive stance toward the immigrant vessels, prohibiting them from landing at

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[349] Circular to Masters of Steam Vessels, 26 June 1832, PAC, RG7, G16C, Vol. 26.

[350] Hugh Richardson to Civil Secretary, 25 June 1832, PAC, May-June 1832, RG5, A1, Vol. 116-117, pp. 65834-65835. Note that Richardson's reply to the circular is actually dated one day earlier than the circular itself. There is no explanation for this; there is no question that the circular is the subject of Richardson's correspondence, and the dates on both documents are fairly clearly written.

all.[351] Richardson was obviously concerned about the prospects of being able to continue to ply his trade in the ordinary fashion, worried about the possibility of running afoul of local regulations, despite the assurances of the Lieutenant Governor.

It was very shortly after this communication that the *Canada* experienced difficulty with the Board of Health port regulations at Niagara. The Niagara Board was insistent that the *Canada*, and its related vessel, the *Great Britain*, not dock in the harbour at Niagara. There were sick passengers aboard, and the regulations forbade the vessels from tying up in that circumstance. Capt. Richardson tried to alleviate the situation by sailing across the lake to Youngstown, New York, but, as it turned out, that only increased his embarrassment:

> I beg leave to enclose for the information of His Excellency ... an original document from Youngstown U.S. by which it will be seen that all communication with the American shore is cut off. The passengers from the *Canada* were not allowed to land yesterday, and the attempt today was equally repulsed.
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> With the example of Europe before them one would hardly think it possible that a document displaying such selfishness, such pusilanimousness of tone, such shrinking from the calamities of human nature, such extreme uncharitableness toward fellow beings, would emanate from any public authorities in these times of distress. As this stoppage of all intercourse must be looked upon as a public calamity our only hope is in the prospect that His Ex. will in his goodness think proper to remonstrate against the futility and inhumanity of this proceeding.[352]

There was little for Colborne to do with respect to the regulations in force in New York, but he could take some action respecting the regulations in force in Niagara. First, he instructed the York Board of Health to forward copies of its port regulations to the Board of Health at Niagara, hoping to gently persuade the latter of the wisdom of the former's actions. Dr. Baldwin,

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[351] See *supra*, notes 235 *et seq.*, and accompanying text, for a discussion of aspects of this issue.

[352] Hugh Richardson to Civil Secretary, 29 June 1832, PAC, May-June 1832, RG5, A1, Vols. 116-117, pp. 65907-65908.

chairman of the York Board, corresponded with the Chairman of the Niagara Board twice on 27 June, the first time simply sending a copy of the port regulations in effect in York,[353] and the second time exercising his persuasive powers in an attempt to convince the Niagara Board of the impropriety in denying the *Canada* and the *Great Britain* the right to tie up. The regulations in force in York, according to Baldwin, "have as yet been attended by [illegible] without giving unnecessary impediment to the business of society and especially the Transport of Emigrants and passengers." Baldwin then painted a very tranquil picture of success and co-operation among the various concerned parties in York:

> [I]t is to be observed that the steam boats ... from the Eastward still come to anchor or lie to opposite the ... wharf till the Health Officer visits them, which is very promptly done; and as yet no case has occurred requiring any detention...The Board of Health approve of the expeditious landing of the passengers and the prompt separation of the sick from the healthy. In the very few cases of Cholera brought on board vessels, the patients have been immediately taken from on board and sent to the Cholera Hospital where a Physician is appointed to this Special Charge.
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> Under this system thus organized the Board of Health hold their daily sittings; the Magistrates, health officer and all the Medical Gentlemen cordially cooperating in every respect for the public safety, endeavouring at [the same] time in carrying into effect their regulations to avoid as much as possible all obstruction to the ordinary occupations of society.[354]

Baldwin wrote to the Niagara Board in these terms on the direct instructions of the Civil Secretary, who expressed his concern that "some of the precautionary measures used at [Niagara]

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[353] Board of Health, Baldwin to Chairman of Niagara Board of Health, 27 June 1832, TPL, S130, Toronto Papers, B34, p. 9.

[354] Board of Health, Baldwin to Chairman of Niagara Board of Health, 27 June 1832, TPL, S130, Toronto Papers, B34, p. 52.

cannot fail of embarrassing the Masters of Steam Vessels and increasing the calamity which we are endeavouring to alleviate."[355]

The Niagara Board of Health had denied the *Canada* the right to tie up at its usual landing place because of the illness of a passenger on board. Capt. Richardson immediately wrote to the Board, challenging their legal authority to keep the *Canada* from completing its business.

> [W]hilst I am willing to heartily cooperate with and to afford every facility to your health officer to inspect the Canada and passengers at the Wharf at Niagara before landing, I equally beg to state with the greatest respect for the board, but with equal regard to the interests of the owners of the Canada, that knowing of no enactment either by law or by proclamation that can subject the Canada in the prosecution of the voyage from York to her customary place of landing at Niagara to one moment of detention or quarantine, I cannot submit to any arbitrary regulations of the board interfering with the business of my daily vocation, so uncalled for by existing circumstances, and so adverse to the practice and courtesy of the board of health at York.[356]

In Richardson's correspondence we find virtually all of the significant legal issues of the cholera epidemic of 1832 reduced to a single pointed paragraph. The Boards were in difficult circumstances, short of the legislative backing that would give them the legitimacy they sought; port regulations interfered with the ordinary occupations of the people who sailed the St. Lawrence and Lake Ontario for their livelihood; the customary flow of people and goods into the western districts was disrupted by regulations perceived by some to be overly onerous. As Richardson concluded, "if the timidity of the board of health at Niagara is to prevail, I must

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[355] Civil Secretary to Baldwin, 26 June 1832, PAC, RG7, G16C.

[356] Hugh Richardson to Niagara Board of Health, undated (appended to opinion of Attorney General Boulton), PAC, July 1832, RG5, A1, Vol. 118, pp. 66103-66135.

either change the route of the Canada or be forced to employ an alternative not inappropriate to my circumstances."[357]

The confrontation between Hugh Richardson's *Canada* and the Board of Health at Niagara ended in a brawl. The townspeople of Niagara and the crew of the *Canada* confronted each other on the evening of 7 July, and order was restored only after the crew of the *Great Britain*, standing by at dockside, joined the crew of the *Canada* in its fight. Geoffrey Bilson suggests that the Lieutenant Governor "came close to endorsing the mob action,"[358] but it is not clear, on the strength of the historical record, how Bilson came to that conclusion. In fact, the evidence seems to support the contrary interpretation. During the height of the crisis, from the last week of June through the first week of July, Colborne equivocated on the question, suggesting to the Niagara Board that it ought to be more understanding of the interests of shipowners. The secretary of the Niagara Board of Health wrote to Colborne on 4 July, seeking his assistance in enforcement of the regulations. Endorsed on the letter in the Civil Secretary's file is a note, unsigned, in which the author suggests that, because of government's ownership of the wharf at Niagara, there is no way for the Board of Health to prevent the *Canada's* landing. The note goes on to say that the only way for the Board to expect compliance with its regulations is through voluntary measures, agreement by those affected to be bound by the rules so as to ensure the health of the town.[359]

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[357] *Ibid.*

[358] Bilson, *A Darkened House: Cholera in Nineteenth Century Canada, supra* note 3, 55.

[359] Secretary of the Niagara Board of Health to Civil Secretary, 4 July 1832, PAC, July 1832, RG5, A1, vol. 118, pp. 66000-66003.

The identity of the author of this endorsement is not certain, of course. But it could only have been the Lieutenant Governor or the Civil Secretary, unless Colborne sought the opinion of the Attorney General prior to replying to the Niagara Board. It would be unusual, obviously, for the Attorney General to simply endorse his opinion in the margins of a citizen's correspondence, such that the endorsement must have been written inside the Lieutenant Governor's office. This conclusion is supported by Colborne's further correspondence to the Niagara Board of 4 July, in which he stated his unwillingness "to interfere with the precautionary measures adopted by the Niagara Board of Health," and in which he again recommended the practice of the York Board of Health in allowing sick passengers to be transported to the hospital on shore.[360] Later, on 11 July, the Lieutenant Governor again wrote to the Niagara Board, and this time was even more unsupportive of their regulations:

> I am to acquaint you that the Lt. Governor is aware that the Board of Health may encounter some difficulty in enforcing the precautionary regulations they have established for the public good. His excellency trusts however that the Magistrates and board of Health of Niagara will meet with no further opposition from the proprietors of Steam Vessels who is [sic] persuaded must see the necessity of cooperating cheerfully with the Board in carrying into execution arrangements which have created confidence among the Inhabitants of the adjoining Townships.
>
> I am also to observe that the proprietors will not submit to the inspection of the health Officer previously to the disembarkation of the passengers.[361]

While superficially this letter appears to offer words of encouragement to the Niagara Board in its struggle to enforce its regulations, the letter concludes with a warning that the "cheerful cooperation" to be expected from masters of steam vessels would only be forthcoming if passengers were allowed to disembark prior to inspection, effectively negating the attempt of the

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[360] Civil Secretary to McGill, 4 July 1832, PAC, RG7, G16C, Vol. 26.

[361] Civil Secretary to Muirhead, 11 July 1832, PAC, RG7, G16C, Vol. 26.

Board to keep the town free of diseased immigrants. Considered as a whole, the evidence can only support the conclusion that the Lieutenant Governor did not endorse the attempt of the Niagara Board to interfere with ordinary shipping at the head of Lake Ontario, and did not take legal steps to ensure that the boards created under his circular of 20 June operated as they should. It was in this context that the Niagara Board asked for a Proclamation of support, and in which the Lieutenant Governor refused.[362]

Bilson's suggestion that the Lieutenant Governor "came close to endorsing the mob action" can only be supported by reference to materials that emerge later in July, after the immediate crisis had passed. On 9 July, Attorney General Boulton had provided Colborne with his opinion on the affair at Niagara, and, perhaps surprisingly, Boulton supported that vision of the public good that gave first priority to protection of the public health, even at the expense of ordinary commercial traffic and the smooth flow of immigrants into the western districts, and concluded that the Niagara Board was within its powers, as agent of the Crown, to deny access to the wharf. Finally, on 17 July, Colborne wrote to the Secretary of the Niagara Board of Health, endorsing their attempts to keep Niagara free of disease.

> In reply to your letter of the 14th inst., I am directed by the Lt. Governor to transmit for the information of the Board of Health at Niagara, the accompanying extract of the attorney general's opinion, to state that, as the wharf at Niagara belongs to His Majesty's Government, persons may be prevented landing on it unless they comply with the restrictions necessary to preserve the health of the Town.[363]

For the most part, the Lieutenant Governor had failed the Board of Health at Niagara. At the time when the Board needed his help the most, Colborne equivocated, resisting the request for a Proclamation that would have demonstrated his support for the Board's authority at the

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[362] *Supra*, note 318 and accompanying text.

height of the crisis. Initially, and continuing until 17 July, Colborne focussed on convincing the Niagara Board of the efficacy of the regulations in place in York, rather than defending the Niagara Board to the masters of the vessels that approached the harbour. The implication is relatively clear, that the Lieutenant Governor was principally interested in seeing to the continued smooth operation of river and lake traffic, even at the expense of the credibility of the boards of health created under his very own directive.

(v) Summary

After issuing his circular of 20 June, Lieutenant Governor Colborne had the opportunity time and time again to support the efforts of his magistrates and boards of health in their struggles to protect the citizens in their jurisdictions, and to manage the disease once it arrived with full force. Despite the failure of the executive to introduce legislation prior to the arrival of the disease, Colborne acted quickly enough when an epidemic seemed inevitable by requesting the formation of boards of health and providing funding for their operation. But his activities over the summer of 1832 make the conclusion irresistible that the circular of 20 June was not prepared in the true spirit of protecting the citizens of Upper Canada against the threat of cholera, whatever the cost. Rather, the circular emerges from the historical record as a perfunctory gesture that was never intended to give municipal authorities the credibility, power and funding necessary to confront both the disease and the forces that would continue ordinary commercial activities and immigration policies, despite the epidemic.

Very early in the summer, it appeared that the boards of health were experiencing difficulty with their legal mandate, and calls were raised for the Lieutenant Governor to deal with

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[363] Civil Secretary to Secretary of Niagara Board of Health, 17 July 1832, PAC, RG7, G16C, Vol. 26.

the situation by calling the Legislature to York. This he refused to do. In addition, he denied the request for a general quarantine at ports of entry into Upper Canada, and refused to issue a Proclamation in support of the efforts of boards of health at Niagara and elsewhere. In other words, he had a number of opportunities to buttress the weak legal framework under which the boards of health tried to function, but in each and every case he failed to act.

As suggested above, the initial allotment of £500 to each of the districts for defending against cholera was greeted with a great deal of relief. However, the Lieutenant Governor's office failed to provide detailed instructions on how the funds were to be drawn, meaning that the excitement at the prospect of raising a hospital and hiring medical personnel quickly turned to frustration and confusion in many Upper Canadian communities. This was true throughout the Midland District, in the Western District, and even in York. Especially difficult for communities in the Midland District was the conclusion of the magistrates that funds could only be paid over to local boards of health after the conventional audit of public accounts, an exasperating conclusion that caused serious delays in funding for many. Colborne failed to correct this problem, despite John Macaulay's direct accusation that the confusion was the result of the Lieutenant Governor's actions. The experience of Rev. Clarke in St. Catherines attests further to the unwillingness of the Lieutenant Governor to involve himself in correcting a problem of funding that was beyond the power of the local board to overcome. All of this, again, underscores the idea that the circular of 20 June was prepared as much for the appearance of executive leadership as it was for a sincere hope that the local boards of health would do whatever they could, "as far as human beings may avail," to defend themselves and their neighbours against the epidemic.

The most likely explanation for this behaviour by the Lieutenant Governor lies in his continued commitment, throughout the summer of 1832, to the immigration and settlement policies developed over the course of 1831 and early 1832. This commitment is most readily demonstrated by Colborne's willingness to continue to fund emigrant societies and other programmes for immigrant relief, while at the same time refusing to allot additional funds for defense against cholera. At the same time, the experience of the Niagara Board of Health in its confrontation with the *Canada* and the *Great Britain* attests further to Colborne's support for those who functioned to continue progress toward the realization of his immigration policies. In a contest between a board of health, struggling with lack of legislative support and very limited funding, and the shipowners whose commercial interests were best met when the Lieutenant Governor's settlement policies were pursued, Colborne supported the shipowners. There is little question, it appears, that the Lieutenant Governor's allegiance to that vision of the public good that championed protection of the public health at any cost was subordinated, even in the midst of the most serious public health crisis in Upper Canada's history, to the immigration policies that would assist in the commercial and agricultural development of the colony.

E. Conclusion

In our attempt to discover the true nature of law's function in historical change, the executive and municipal legal responses to the Upper Canadian cholera epidemic of 1832 provide a sweeping example of the possibilities inherent in colonial law and legal process. If the motivations of the élite in the employment of law are integral to the new legal history of Upper Canada, as might be suggested by Paul Romney, Blaine Baker and David Howes, then the activities of Lieutenant Governor Colborne during the spring and summer of 1832 provide an

intriguing example from which to work. In Colborne's legal and administrative response to the epidemic, we find traces, at least, of the self-interest that characterizes the manipulation of law and legal process according to the more radical functionalist interpretation of the role of law in history. And quite clearly, from the perspective of the more conservative functionalist, the ideological foundations of Colborne's policy imperatives of the day had a profound impact on the way in which the Lieutenant Governor responded to various crises and lesser problems that emerged in the enactment and enforcement of municipal law during 1832.

But, in large measure, these approaches to the law that emerged from the urgency of the cholera epidemic fail to account for the vast body of municipal law developed by magistrates and boards of health to respond to the threat. The exigencies of colonial life were brought into sharp focus by the arrival of cholera, and local authorities responded with an endless stream of regulation that, for the most part at least, relied on a fairly distinct understanding of the public good as entwined with the public health. As a result of this commitment, colonists could look to the development of a local administrative structure designed to address matters of public health at the community level. As well, more or less comprehensive sanitary regulation emerged from the experience of the epidemic, citizens being subjected to the incursion of the local bureaucracy into matters that, previously, had been ones of private concern.

This is not to say, however, that the character of the law developed by local authorities did not have an ideological foundation. It did, of course, in its devotion to the public health, as opposed to some other central feature, as essential to the public good. But this ideological foundation for the development of law was not enough, prior to the arrival of cholera, to stimulate activity toward the reform of public health law. Rather, it took the external environmental threat of cholera to draw the law into the form it assumed over the course of 1832.

The reform of law was not driven by ideology; it was driven by disease, and drew on ideological sources only for its ultimate framework. Consequently, the political tensions over ideological contests, tensions that function for certain of the new legal historians as the stimulus for the development of law in history, are actually secondary to the environmental conditions under which lawmakers laboured. Viewed from this legal-historical perspective, it is not the law that is subordinate to politics in history; rather, it is politics that is subordinate to the contingencies of colonial life. From these contingencies emerged a reformed body of public health law at the municipal level, albeit reflecting a particular ideological orientation.

At the same time, however, when the complete historical record of Upper Canada's executive and municipal legal response to the epidemic of 1832 is considered, it appears fairly certain that Lieutenant Governor Colborne's reaction was almost completely ideologically motivated. While other explanations do present themselves for his delay in initiating a legislative framework to deal with the disease, both before the arrival of cholera and after it established itself, the most convincing is his devotion to the immigration and settlement policies initiated by the Colonial Office and adopted by Colborne over the course of 1831. There is simply little else to explain the way in which the executive office refrained from using legislation as it was used in other British North American colonies, and no other consistent explanation emerges for the relationship between the Lieutenant Governor and the municipal authorities during the summer. It is fair to say that Colborne's commitment to these policies of immigration and settlement was founded on a vision of the public good that was at times inconsistent with the view that the public health ought to be defended at all costs. That alternative executive vision, to some extent at least, focussed more completely on the commercial and agricultural development

of the colony as essential to the public good, rather than the strict protection of the public health *per se*.

But an exploration of the Lieutenant Governor's motivation tells us very little about the law in history, except to suggest that the law might fail to develop out of the ideological intransigence of those in authority. That in itself is a valuable historical lesson to learn, but it is inaccurate and incomplete to suggest that the law, therefore, is *merely* the consequence of ideological inclination. To do so is to ignore the very real impact that environmental conditions played in stimulating developments in the law of public health during the 1830's in Upper Canada. These developments took place irrespective of the motivations of the executive, and relied on ideological inspiration only secondarily to the environmental threat that served to generate the need for legal and regulatory innovation in the first instance.

CHAPTER FOUR

THE LEGISLATIVE RESPONSE TO THE EPIDEMIC OF 1832

A. Introduction

As the Upper Canadian cholera epidemic of 1832 subsided in late September and October, so too did the calls for executive and legislative action to assist local boards of health in fighting the disease. All that remained, for the most part, when the legislature was opened by the Lieutenant Governor on 31 October 1832, was to sort through the various claims for the reimbursement of expenses submitted for consideration by Boards of Health and a number of medical professionals. While this would prove to be a thorny question for the administration in certain respects, it did not dampen the collective relief felt by the citizens of Upper Canada. The disease had taken a terrible toll, of course, but communities had struggled bravely to defend themselves, and their continued spirit as the legislature opened was testament to their pluck and resolve.

It is human nature, apparently, to quickly consign disasters to the past, the optimistic belief being that the dreadful event will not recur and again catch the people unprepared. "I think the Thing a little too much forgotten among us," wrote Daniel Defoe in 1712, alarmed at the indifference of the English when, despite being threatened by the possibility of bubonic plague being imported from the continent, officials and ordinary citizens failed to recall and learn from the devastation of London's Great Plague of 1665.[364] So too did it appear that the

[364] Michael F. Shugrue (ed.) *Selected Poetry and Prose of Daniel Defoe* (New York: Holt, Rinehart and Winston, 1968), 151.

popular Upper Canadian response to the disappearance of cholera in the fall of 1832 was to quickly move on to other preoccupations, leaving the legislature to audit and pay accounts, and allowing local authorities to disband boards of health. After mid-September 1832, both the reform and conservative presses in Upper Canada were remarkably silent on issues emerging from the epidemic. Apart from a notice in the *Colonial Advocate* on the formation in York of "The Society for the Relief of the Widows and Orphans of the Township of York" left destitute by "the ravages of cholera,"[365] there is nothing but a piece in the *Brockville Recorder* of 18 October, in which the author argues in favour of prudently adopting the contagionist's perspective when considering the design of a comprehensive regulatory initiative.[366] Otherwise, newspapers were silent.

While the popular press appeared to abandon the cause of public health when cholera retreated in the fall, the colonial legislature took up the challenge of introducing legislation to protect Upper Canada from a recurrence of the disaster of 1832. Ultimately, this initiative took the form of two pieces of legislation. First, the statute of January 1832,[367] by which the legislature made special monetary allowance for destitute immigrants arriving at Prescott, was repeated in *An Act granting a sum of money for the relief of sick and destitute Emigrants at Prescott*, 3 Wm. IV c. 51 (U.C.), sent by the legislature for Royal Assent on 13 February 1833.[368]

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[365] *Colonial Advocate*, 4 October 1832, NLC.

[366] "Contagion," *Brockville Recorder*, 18 October 1832, NLC.

[367] 2 Wm. IV c. 34 (U.C.), referred to at *supra* note 124, and at *supra* note 327 and accompanying text.

[368] This statute will be referred to as the "Prescott Emigrants' Act" in the balance of this thesis. It was catalogued as chapter 51 in the Revised Statutes of Upper Canada

Secondly, the legislature answered the calls for special legislation relative to the constitution, authority and operation of local Boards of Health in the Boards of Health Act,[369] also sent for Royal Assent on 13 February. The former is significant for what it reveals of the administration's continuing preoccupation with matters of immigration and its attitude toward funding the cholera relief effort, and these issues will be addressed in Part B (ii) and Section C of this Chapter. The latter is significant for what it reveals of how responsibility for the protection of the public health was distributed in Upper Canada immediately following the epidemic of 1832, and for the relationship between the regulatory framework that emerged in Upper Canada and that in place in other colonies of British North America. These matters will be addressed in Part B (iii) and Section D of this Chapter.

Funds for the cholera relief effort continued to be scarce throughout the late fall of 1832 and into 1833. As we shall see, many Upper Canadian physicians were compelled to petition the Lieutenant Governor, pleading for assistance after their virtually total commitment to the fight against cholera during the previous summer. But it appears from the historical record that such pleas went unresolved for the most part, at the same time as legal initiatives for the continued encouragement and support of immigration and settlement policies, arguably a major contributor to the physicians' predicament in the first place, were crystallized in statutes such as the Prescott Emigrants' Act. Consideration of this issue brings into focus the festering Upper Canadian disenchantment with Lower Canada's tax on immigrants, a tax oddly supported by the Colonial Office as an encouragement to continued high levels of emigration from the British Isles. Again, as in the case of the executive's delays during 1832 in putting a conventional regulatory

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published in 1843, but is found as chapter 52 in the sessional volume of 1832-33. It is reproduced in Appendix 2 below.

framework in place to assist in the fight against cholera, the cause of immigration seemed to function as the impetus for much of the legislative response during the 1832-33 session, and ultimately it triumphed over the more mundane concerns of physicians impoverished by their exertions of the summer before.

To those who had raised the need for a comprehensive statutory initiative to support the Boards of Health during the summer of 1832, the Boards of Health Act must have been a profound disappointment. Relative to its counterparts in other colonies of British North America, it was weak in a number of respects. As we shall see, the statute was passed with no debate, both the lower and upper houses pushing it through at the last minute, just days before the legislature was prorogued. In questions of the guidelines given for the operation of local boards of health, the legislation was silent; when the controversial question of the control of shipping in the harbours along the St. Lawrence and the lakes was addressed, the Lieutenant Governor retained ultimate discretion; the issue of domestic quarantine was not addressed at all. In short, the Boards of Health Act is remarkable for its uniqueness among contemporary public health legislation in British North America, but for a uniqueness borne of superficiality rather than innovation.

B. Legislation of 1833

(i) The Existing Framework

To begin, it is helpful to consider the legislative framework in public health matters out of which the Prescott Emigrants' Act and the Boards of Health Act emerged. The Upper Canadian legislature had been fairly active in the area of public health during the early 1830's, especially in connection with provision for the insane and for the maintenance of the York

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[369] 3 Wm. IV c. 47 (U.C.), referred to at *supra* note 19.

Hospital and construction of the facility in Kingston. The legislature seemed to function from a fairly clear understanding of its responsibility for matters of public health, and demonstrated that responsibility through these initiatives. In addition, the legislature inherited from earlier sessions a fairly sophisticated regime relative to the regulation of the medical profession, again indicating a sensitivity among Upper Canadian policy makers for the relationship between law and the protection of community health. The Prescott Emigrants' Act and the Boards of Health Act are easily interpreted as augmenting this existing framework of public health protection, the former an acknowledgement of the special health requirements of a fragile immigrant community, the latter a recognition of the legislative responsibility for protection of the population as a whole from the dangerous diseases of the day. In a sense, the legislative activity of the1832-33 session simply built on an established foundation.

Regulation of the medical profession in Upper Canada began in August 1795, with the passage of 35 Geo. III c. 1 (U.C.). The statute was passed to alleviate the harm done by quackery, as unskilled and unlicenced practitioners wandered through Upper Canadian villages selling unproven remedies and administering questionable treatments. The statute established an examining board of surgeons with full power to grant licences for the practice of physic, surgery and midwifery. Exempted from the licencing provisions were those who had been granted diplomas from universities somewhere in the British dominions, those who served as surgeons or surgeon's mates in the British army or navy, and those selling patented medicines. The fines prescribed by this statute for those who would practice one of the medical professions, or sell or distribute medicines, in contravention of the Act, were relatively severe for the time, being £10 for each offence. Fines were recoverable either through a suit in debt, or by way of prosecution, and a portion of the fine recovered was to go to the informer.

By virtue of 46 Geo. III c. 2 (U.C.), passed 3 March 1806, the Act of 1795 was repealed, its provisions being "inexpedient in the present state of the Province." It was not until 1815 that the legislature passed a revised statute to regulate the medical professions, *An Act to Licence Practitioners in Physic and Surgery throughout this Province*, 55 Geo. III c. 10 (U.C.). This latter statute was identical in all substantive respects to the Act of 1795, except that the fine for practicing one of the regulated professions without a licence was increased to the substantial amount of £100, testament to the seriousness of the problem of quackery and the sense of responsibility exhibited by the legislature. Further, an additional exemption to the licencing provisions was provided for women practicing midwifery in the province.

Again, however, the initiative was found to be "impracticable," according to the statute of 1818, 59 Geo. III c. 13 (U.C.), by which it was repealed in its entirety. This last act, however, also provided for a revised licencing system, virtually identical to the one it replaced, but making some changes in administration of the licencing scheme, and providing a twelve month grace period for those who had been engaged in their profession prior to 1 January 1812. This latter provision, it seems clear, was designed to make special accommodation for those who had been engaged in the war with the United States.

Except for relatively minor adjustments in the times for sitting of the licencing board made by the statute of 1819, 59 Geo. III Sess. 2 c. 2 (U.C.), the Act of 1818 remained unamended until 1827, with the passage of 8 Geo. IV c. 3 (U.C.). In this last enactment, several changes were made to the exemptions from licensing. First, those previously exempted because of their receipt of a university diploma, and those licenced by the Royal College of Physicians or of Surgeons in London, were compelled to make application to be licenced by the Upper Canadian Board, proving their qualifications by producing the diploma or licence, and by

swearing an appropriate affidavit before a judge. Secondly, those previously exempted because of military service were required to demonstrate their qualifications in a manner similar to that prescribed for university graduates and those holding a licence from the London Board. Third, those claiming to have practiced in Upper Canada prior to 1812 were required to produce the affidavits of three or more licenced practitioners, attesting to the competence of the applicant. Again, we can see here the stiffening posture of the legislature toward incompetence in the practice of the various medical professions, when the simple grant of qualifications by institutions outside of Upper Canada was no longer considered sufficient, without further proof, to justify the grant of a licence. The punishment for practicing one of the regulated professions without a licence became a misdemeanor by virtue of this statute, the limitation period for prosecution being established as one year from the date of commission of the offence, and the penalty being set at six months imprisonment, or a fine of not more than £25.

This was the regulatory regime in place during the difficult summer of 1832, when physicians were called upon to serve as members of local boards of health and to commit much of their professional lives to treating sick and dying immigrants and local townspeople. No special licencing arrangements appear to have been made by the legislature either in anticipation of the epidemic of 1832, or in response to it, even given the severe shortage of physicians experienced by many areas of the Province, especially west of York. The Board of Health at London, for example, wrote to the Civil Secretary on 24 July, describing in poignant detail the panic among its citizens, and pleading with the Lieutenant Governor to assist by deploying

additional medical personnel to the area.[370] There is no evidence that this correspondence was ever acknowledged.

Nor did the increased distribution of unproven medicines and the promotion of unconventional treatments seem to encourage the legislature to respond to the crisis of 1832 with more strict licencing requirements and tougher penalties for non-licenced practitioners. Quackery flourished in Upper Canada during 1832, as it often does during times of epidemic disease.[371] The York Board of Health was compelled to publish warnings to the citizens about the inadvisability of many remedies promoted by unlicensed practitioners, urging that proper medical advice be sought in all appropriate cases.[372] The newspapers of the day reported a variety of extraordinary stories of miraculous cures and "Providential results," including tales of the famous mixture of charcoal, lard and maple sugar promoted by one Stephen Ayres. Ayres reportedly wandered about the countryside, followed by an "old brood mare" and two colts,

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[370] Report of the London Board of Health to the Civil Secretary, 24 July 1832, PAC, July 1832, RG5, A1, Vol. 118, pp. 66327-66329.

[371] In referring to conditions in London during the Great Plague of 1665, Daniel Defoe wrote of the common people:

> [T]hey ran to conjurers and witches, and all sorts of deceivers, to know what should become of them ... so they were as mad upon their running after quacks and mountebanks, and every practising old woman, for medicines and remedies; storing themselves with such multitudes of pills, potions, and preservatives, as they were called, that they not only spent their money, but even poisoned themselves beforehand, for fear of the poison of the infection, and prepared their bodies for the plague, instead of preserving them against it.

Daniel Defoe, *A Journal of the Plague Year* (London: J.M. Dent / Everyman, 1994), 27.

[372] Referred to by Marian A. Patterson, "The Cholera Epidemic of 1832 in York, Upper Canada," *supra* note 305, 177-178.

offering his prescription for free.[373] Therefore, while the appearance arises through a review of early attempts to regulate the medical professions that the Upper Canadian legislature considered the problem of a badly or insufficiently regulated medical profession as a serious matter for stern legal intervention, the particular problems of 1832 did not seem adequate to generate additional controls or stiffened sanctions.

While the legislature at York was apparently content with the regime in place for the licencing of the medical professions during the early 1830's, such was not the case when it came to allowances for the insane. A difficulty arose in the Home District during late 1829 and early 1830, by which insane destitute persons were housed in the District Gaol, there being no other facility available. District officials drew on the funds of the District to support these inmates during the time of their committal, apparently without legal authority to support their actions. The legislature wasted little time in giving the arrangement the sanction of law. By *An Act to authorise the Quarter Sessions of the Home District to provide for the relief of insane destitute persons in that District*, 11 Geo. IV c. 20 (U.C.), passed 6 March 1830,[374] those officials who had acted without legal authority were indemnified for their actions, and the situation was regularized for future accommodation of the destitute insane. The Grand Jury to be assembled at the next District Quarter Sessions was instructed by this statute to prepare a statement of the funds anticipated to be required in the ensuing year for the housing and maintenance of those in

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[373] *Colonial Advocate*, 5 July 1832, NLC. The mystery surrounding Ayres and his reputed success even captured the attention of Susanna Moodie, who quoted the excise officer at Montréal as saying that Ayres "... is not of the earth. Flesh and blood could never do what he has done, - the hand of God is in it." Susanna Moodie, *Roughing it in the Bush; or, Life in Canada* (Toronto: McLelland & Stewart Inc., 1989), 51-52.

[374] A short description of the difficulties encountered by Home District officials relative to housing and caring for the insane is given in the preamble to the legislation.

need in this respect, and the legislature provided the Grand Jury with the discretionary power to house them in the gaol or in some other establishment. This arrangement was to continue year over year, according to the Act. In addition, the Grand Jury was given investigatory powers to allow it to determine the true state of insane destitute persons in the district, presumably so as to enable adequate provision to be made and to protect those in need of assistance.

Initially, the regime established by this statute was to expire after two years. However, during the 1832-33 session, an amending statute was passed, 3 Wm. IV c. 46 (U.C.).[375] As was the case with the Prescott Emigrants' Act and the Boards of Health Act, this enactment was rushed through the legislative process very quickly, finally being sent for Royal Assent on the day of prorogation, 13 February 1833. In it, the original statute relative to the relief of insane destitute persons in the Home District was extended for an additional period of four years. More significantly, however, its provisions were made applicable in all Districts of the Province, granting the same powers to Grand Juries outside of York, and the same responsibilities with respect to housing and caring for those in need. There is nothing in the historical record to suggest that the summer of 1832 was a particularly difficult one for local authorities in attending to the needs of the insane, especially given the understandable preoccupation of those authorities with ministering to cholera victims. But the legislature did recognize through this enactment that they were the custodians of a public obligation to see to the humane treatment of those who were incapable of attending to their own needs, at least where that incapacity arose from circumstances beyond individual control. While probably not conclusive of the legislature's attitude toward the relationship between the employment of law and matters of public health, this

[375] In the Revised Statutes of Upper Canada published in 1843, this act is catalogued as chapter 46, while in the Sessional Volume of 1832-33 it is listed as chapter 45.

initiative does tell us something of the humanitarian concerns that we might expect to generate additional innovation in the regulatory regime.[376]

The final aspect of the law of public health in which the legislature of Upper Canada was engaged during the early 1830's relates to the maintenance and establishment of hospitals in the Province. Lieutenant Governor Colborne had lately dedicated the former legislative building at York to the needs of "[His] Majesty's sick, destitute, and unfortunate subjects, and emigrants, in [the] Province," for the purpose of delivering "medical and surgical assistance."[377] The Legislature responded quickly, in the session of 1829-30 voting the sum of £100 from unappropriated assessments to be held by the executive government in trust and to be applied "to

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[376] There continues to be opinion extant among historians that initiatives similar to these legislative attempts to house and care for the insane, and other related initiatives (including the establishment of the first prison in Upper Canada), were motivated more by a concern to alleviate the social problem represented by lunatics and criminal deviants than they were by a genuine interest in the welfare of those in need of assistance. See for example, Russell Smandych, "Tory Paternalism and the Politics of Penal Reform in Upper Canada, 1830-34: A 'New-revisionist' Account of the Kingston Penitentiary," *supra* note 114, and Rainer Baehre, "Imperial Authority and Colonial Officialdom of Upper Canada in the 1830s: The State, Crime, Lunacy, and Everyday Social Order," in Louis A. Knafla and Susan W.S. Binnie (eds.) *Law, Society, and the State: Essays in Modern Legal History* (Toronto: University of Toronto Press, 1995), 181. Be that as it may, the provisions of the statute of 1833 were extended for an additional four years in 1837 by 7 Wm. IV c. 29 (U.C.). Then, by virtue of 2 Vic. c. 11 (U.C.) passed in 1839, the legislature committed an additional assessment of the citizens of Upper Canada for the erection of an asylum for the insane. So as to prevent the abuse of the welfare of the state by those who might be impoverished but not suffering from mental illness, the legislature established a rigorous system by which those seeking admission to the institution might be judged as to their mental health by a panel of experts. See Clause VI of the Act of Victoria. This would be an odd requirement if the principal purpose of the legislation were to remove troublesome persons from the street, rather than to provide for the protection of the sick.

[377] *An Act to grant a sum of money to his Majesty in aid of the York hospital*, 11 Geo. IV c. 31 (U.C.), preamble.

the use and benefit" of the hospital at York.[378] In the session of 1830-31, the Legislature responded again, voting an additional appropriation of £100 on an identical trust.[379] According to the statute by which these funds were allotted, "the public hospital in the town of York has been found of great benefit and advantage, in affording medical and surgical assistance to many destitute and unfortunate emigrants and others."[380] During the session of 1831-32, the legislature increased to £150 what was taking on the appearance of an annual appropriation, saying that "the great utility of the Public Hospital of the Town of York has been further exemplified during the year past by the attention paid, and Medical and Surgical assistance afforded to destitute distressed Emigrants and others."[381] On the same day that this last allotment was made, the legislature voted £3000 for the erection of a hospital in Kingston, the amount to be paid in three annual installments of £1000.[382] These funds were said to be supplemental to funds raised by private subscription in Kingston and were appropriated at the request of the townspeople. The construction of the facility was to be overseen by a commission of three Kingston citizens, named in the statute. Finally, in the session of 1832-33, following the cholera epidemic of 1832, the annual allotment for the York Hospital was increased to £500, the legislature again pointing

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[378] *Ibid.*

[379] ***An Act to grant a sum of money to his Majesty, in aid of the York hospital***, 1 Wm. IV c. 24 (U.C.).

[380] *Ibid.*, preamble.

[381] ***An Act to grant a Sum of Money to His Majesty in aid of the York Hospital***, 2 Wm. IV c. 29 (U.C.), preamble.

[382] ***An Act granting to His Majesty a sum of Money in aid of the erection of an Hospital in or near the Town of Kingston***, 2 Wm. IV c. 28 (U.C.).

out the "great utility" of the institution in the "[m]edical and surgical assistance afforded to destitute distressed Emigrants and others."[383]

In the course of three years, then, the Upper Canadian legislature had appropriated a total of £3850 for the operation of the hospital at York, and for the construction of the facility at Kingston. In every case, excepting only the statute allotting funds for the erection of the hospital at Kingston, the problem of sick and destitute emigrants seems to have motivated legislative action, meaning that the burden of seeing to the comfort of those who continued to flood into Upper Canada in 1832, 1833 and after pursuant to the immigration and settlement policies of the executive government, fell unequivocally to the ordinary citizens. These initiatives, in manner similar to the legislative attempts to regulate the medical professions and to accommodate the destitute insane, demonstrate a commitment to a communitarian ideology that vests in the legislative authority the responsibility to superintend the welfare of the citizenry, and to see to the enhancement of the public health. In this respect, then, these early legal initiatives in the protection of the public health are consistent with a conservative functionalism perhaps typified in certain of the work of Blaine Baker and David Howes, denying the argument from self-interest that characterizes much of the radical functionalism of Paul Romney. But as we shall see in the sections of this Chapter to follow, the immediate legislative response to the cholera epidemic of 1832, embodied in the Prescott Emigrants' Act and the Boards of Health Act, is not so certainly characterized by its ideological origins in the responsibility of the legislative branch of government. Rather, as was the case with much executive activity during the spring and summer of 1832, we will find the law employed to assist in the accomplishment of goals that may have

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[383] *An Act granting to His Majesty a sum of Money in aid of the York Hospital and Dispensary*, 3 Wm. IV c. 52 (U.C.), preamble.

had very little to do with the protection of public health at all.

(ii) The Prescott Emigrants' Act

If it is true that the executive government at York was less interested in protection of the public health than it was in the encouragement of continued high levels of immigration to Upper Canada from the British Isles, as was suggested in Chapter III above, then we ought to find this inclination borne out in the government's priorities in both its legislative response and in its allocation of funds immediately following the epidemic of 1832. In the Prescott Emigrants' Act, we find a statute that, ostensibly at least, presented the opportunity to combine a focus on a successful immigration programme with a concern for the public health generally. After all, the connection between immigration and the prevalence of cholera was thought to be well established, by both contagionists and anti-contagionists. The situation at Prescott, being the first significant point of entry of immigrants to Upper Canada, provided the government with the opportunity to address both of its major policy concerns in these areas. Potentially, the legislative response might give a signal to prospective immigrants that all possible steps were being taken to make their arrival a safe and healthy one. At the same time, however, the possibility existed to provide comfort to established residents that the lessons learned from the cholera epidemic would serve to enhance executive awareness of the local problems attendant on caring for sick newcomers while at the same time resisting the importation and spread of difficult diseases. To a certain degree, the Boards of Health Act could fulfill the latter function, while the Prescott Emigrants' Act might address the former.

Oddly enough, however, the Prescott Emigrants' Act simply repeated, virtually word for word, the provisions of 2 Wm. IV c. 34 (U.C.), passed by the Colonial Legislature a year earlier, on 28 January 1832. In both statutes, the Legislature recited the fatigue and expense borne by

those enduring the sea voyage from Britain, and attributed their "sick and destitute state" to those causes. Both statutes suggested that some official public response to this situation was appropriate, over and above the response generated by the local population out of "Christian feelings and benevolence." In both cases, the statute provided for the appropriation of the sum of £250 from rates and duties collected but otherwise unappropriated, "to the Relief of such Emigrants from the Mother Country as may be found on their arrival at the Port of Prescott in this Province, during the ensuing season, to be sick and destitute of the means of subsistence." Both statutes provided for the appointment of a three person board of trustees to administer the fund and see to its appropriate expenditure, with the obligatory proviso that amounts expended would be honoured by the government on presentation of the necessary warrants and through the required passing of public accounts by the Treasury Commissioners.

The Prescott Emigrants' Act, identical in all substantive respects to its predecessor legislation, made no adjustments as a result of the cholera epidemic of 1832. The allotment of funds for the special needs of the people of Prescott did not change with the legislation of 1833. The lines of authority relative to the spending of funds and the approvals necessary in that respect remained unaltered. Nor did the Prescott Emigrants' Act affect the extent of local input and control in the way in which the community might respond to the crush of immigrants expected during the summer of 1833.

At the same time, and because it mirrored the act of 1832 so completely, it is unlikely that the Prescott Emigrants' Act could have ameliorated concerns about epidemic cholera that must have had an adverse impact on the emigrant community in the "Mother Country." If it were intended that the Act would provide a continuing level of comfort to prospective immigrants to Upper Canada, then one would expect that, when compared to the pre-cholera

regime of early 1832, additional funding or enhanced local authority would be in order. But immigration levels fell dramatically during the summer of 1833, and it is likely that the cholera experience of 1832 had a great deal to do with that result.[384] To the extent that the executive and legislative branches of government at York valued the contributions of recent immigrants and recognized their potential to contribute to the growth and prosperity of the colony, and given the dangerous impression left by the cholera epidemic, measures such as the Prescott Emigrants' Act ought to have provided the framework for an enhanced encouragement of that immigration. In fact, this result might have been predicted by reference to the speech of the Speaker of the Legislative Council, Sir John Beverley Robinson, in response to the Lieutenant Governor's speech to open the assembly in the fall of 1832:

> We concur with your Excellency in appreciating the beneficial influence arising from the capital and industry transferred to this Province, by the continued emigration from the Parent State, which by opening the fairest prospects to the Province, and increasing its general interests, will give peculiar importance to the deliberations of the present Session.
>
> We learn, with much satisfaction, that so great an increase of the population as one-fourth has taken place since the reports forwarded last Session, and that the occupation furnished to Emigrants, together with the extensive agricultural improvements and actual cultivation, afford promise of support and employment to such of our countrymen as have been induced to fix upon this part of the Empire for their future abode.

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[384] The total number of immigrants arriving at Québec from ports in the British Isles and Europe during 1832 has been estimated at 51,185, some 40,000 of whom made their way to York, while the total landing at Québec during 1833 was likely not greater than 21,407. See Charles M. Godfrey, *The Cholera Epidemics in Upper Canada, 1832-1866*, *supra* note 3, 37 and Appendix A. There was opinion extant in Upper Canada that the reduced levels of immigration to Upper Canada during 1833 were related directly to the threat of cholera. "The fear of encountering the Cholera has undoubtedly prevented hundreds of persons from emigrating to Canada this season, but nevertheless a goodly number of emigrants, of not only 'fair character and good principles,' but of wealth, have reached our shores." *Upper Canada Herald*, 14 August 1833, NLC.

> We feel with your Excellency the great importance of directing our attention to the consideration of the anticipated progressive increase of the emigrants that will annually flow to the Canadas, as a subject closely connected with the immediate prosperity of the Colony...[385]

It is relatively clear, then, that those in positions of authority in Upper Canada were excited about the prospects of continued high levels of immigration, and sensitive to the benefits that had been brought to the colony through the successes of the immigration policy of previous summers, including that of 1832. The failure to provide additional support for the immigration relief effort at Prescott through the Prescott Emigrants' Act becomes even more perplexing as a result, given the impact that the threat of cholera likely had on prospective immigrants.

It is possible that the apparently perfunctory reiteration of the provisions of 2 Wm. IV c. 34 (U.C.) in the terms of the Prescott Emigrants' Act tells us more of the attitude of the executive branch of government toward funding cholera relief, than it does of the attitude of the legislative branch toward funding suitable arrangements for immigrants. In fact, the Lieutenant Governor's reluctance to commit the resources of the Treasury toward reducing the effects of the epidemic is evident in a number of instances in which the pleas of medical practitioners from around Upper Canada were rebuffed by the Lieutenant Governor. Dr. James Grant of Glengarry, for example, petitioned Colborne in November of 1832, asking that the Lieutenant Governor honour his request for compensation for services rendered to cholera victims during the summer of 1832. This petition is particularly revealing for the suggestion by Grant that it was largely through the request of Colborne that such services were provided in the first place, especially for the benefit of the immigrant population.

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[385] Speech of the Speaker of the Legislative Council, *Upper Canada Gazette*, 29 November 1832, NLC.

> That your petitioner took the liberty of addressing a letter to your Excellency's Private Secretary some time ago, owing to the Board of Health's having declined to satisfy his attendance on emigrants and other persons in indigent circumstances in compliance with your Excellency's humane recommendation to that effect, during the prevalence of Cholera, but having received no answer, is the cause of his [now bringing this problem to Your Excellency].
>
> Whatever could have induced the Board of Health to single your Petitioner as undeserving of the compensation allowed by your Excellency and granted to others...?[386]

This inquiry went unanswered until 1 March 1833, at which time the Civil Secretary informed Dr. Grant that "...the sum granted to the Magistrates of each District during the prevalence of the Cholera was placed at their disposal, and that His Excellency knows of no fund from which you can be remunerated except from the sum granted to the Eastern District."[387] In the months that had intervened between Dr. Grant's inquiry and the Civil Secretary's response, the necessary bills by which the appropriation of funds to reimburse the Lieutenant Governor for the cholera expenses of 1832 had already passed through the legislative process,[388] meaning that Dr. Grant's request for compensation could not be met.

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[386] Grant to Colborne, 30 November 1832, PAC, November 1832, RG5, A1, Volume 123, pp. 68216-68218.

[387] Civil Secretary to Grant, 1 March 1833, PAC, RG7, G16C, Vol. 27.

[388] *An Act to provide for the re-payment of certain sums of money advanced by His Excellency the Lieutenant Governor in the year one thousand eight hundred and thirty-two, during the prevalence of the Asiatic Cholera*, 3 Wm. IV c. 53 (c.54 in the sessional volume) (U.C.), and *An Act granting to His Majesty a certain sum of money to enable His Majesty to defray certain charges incurred during the prevalence of the Cholera during the last Summer*, 3 Wm. IV c. 56 (c. 57 in the sessional volume) (U.C.), both passed by the legislature on 13 February 1833. The Select Committee on Cholera Accounts filed its report with the House of Assembly on 9 January 1833, despite the fact that the final audit of cholera accounts did not take place until after the filing of the report of the President of the Bank of Upper Canada on 21 January1833. See *infra*, note 406 and accompanying text. The Select Committee was very complimentary of the efforts of the Lieutenant Governor in acting quickly to alleviate the impact of the disease. They included a statement in their Report as follows:

Similar requests for assistance were made to the Lieutenant Governor by Dr. Noah Dickenson of Cornwall[389] and Dr. William Turner of York,[390] although there is no evidence in the records of the Executive Government to suggest that these inquiries were ever answered. The Lieutenant Governor did correspond with one Dr. Jessup, a medical practitioner in Prescott, although the initial inquiry from Jessup has not survived. Again, however, Colborne rejected Jessup's pleas for compensation in the following terms:

> With reference to your Memorial of the _ enclosing an account for "Medical attendance on Emigrants at Hospital and Sheds at Prescott from 15th June to 1st Oct – 1832" I am directed by the Lt. Governor to acquaint you that if Mr. Patton did not authorize or engage your attendance, you must apply to the Emigrant Society for remuneration.[391]

As with the rejection of Dr. Grant's request for funds, this response came after the money bills had passed through the legislative process, meaning that no allowance could be made for Jessup's needs. There is no evidence, however, as to whether Jessup's initial request for support was made before or after prorogation of the legislature.

> [Y]our Committee do not hesitate to declare, that in their opinion, the inhabitants of Upper Canada are deeply indebted to His Excellency the Lieutenant Governor, for the promptitude with which, on his own personal responsibility, and not from the public funds, he provided means to arrest the ravages of a disease, whose mysterious course and fatal effects, for a season, spread desolation and dismay throughout a large portion of the inhabited part of our happy Province.

See "Report of the Select Committee on Cholera Accounts," *Journal of the House of Assembly of Upper Canada*, Session 1832-33, Appendix, 206-207, TFR.

[389] Dickenson to Colborne, 30 November 1832, PAC, November 1832, RG5, A1, Volume 123, pp. 68172-68174.

[390] Turner to Colborne, 30 November 1832, PAC, November 1832, RG5, A1, Volume 123, pp. 68175-68180.

[391] Civil Secretary to Jessup, 26 February 1833, PAC, RG7, G16C, Volume 27.

Colborne did appear to retain some discretion in the way in which funds were allocated for the relief of medical professionals whose energies had been devoted to cholera relief during the summer of 1832. Despite his rejection of the claims of Grant and Jessup, and his apparent indifference to the requests of Dickenson and Turner, the Lieutenant Governor found a way to remunerate one Dr. King, an acquaintance of Peter Robinson, brother of Sir John Beverley Robinson. Although the portion of the Civil Secretary's letterbook in this respect is badly damaged, with many parts of the text illegible, its salient points are as follows:

> I am directed by the Lt. Governor to acquaint you, that the account furnished by Dr. King for the service which he performed during the prevalence of the disease of last season, was laid before the finance Committee of the House of Assembly under a [illegible] that the Legislature would have made provision for the discharge of the debt due to him, and that some circumstances have occurred since the prorogation of the Legislature which have occasioned a delay in settling his claims.
>
> His Excellency however requests that his thanks may be conveyed to Dr. King for his [illegible] attention in the discharge of the unpleasant duties which devolved on him last season; and that the sum which is due to him may be paid and included in the Emigration accounts of last year.[392]

Apparently, Dr. King's account was submitted in a timely fashion, but for reasons that appear neither in the Civil Secretary's records nor in the records of the House of Assembly, the account was not included in those to be paid from the official appropriation of funds. In any event, however, this incident does serve to demonstrate that physicians were not simply at the mercy of local magistrates and emigrant societies in seeking to have cholera accounts honoured, despite the tone contained in the Lieutenant Governor's correspondence to Drs. Grant and Jessup. Special accommodation might be made where circumstances warranted.

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[392] Civil Secretary to Peter Robinson, 15 March 1833, PAC, RG7, G16C, Volume 29.

We see in these incidents a fair degree of inconsistency in the behaviour of the executive government toward funding the cholera relief effort, an inconsistency introduced above in Chapter III relative to the apparent imbalance in funding for emigrant relief efforts along the St. Lawrence when compared to the funds available for cholera relief. This may in turn assist in explaining the failure of the legislature to supplement the existing immigrant relief legislation through enhanced funding under the Prescott Emigrants' Act. It is nonsensical to think that the Legislature could have anticipated that the immigrant relief effort in Prescott could perform its function adequately on the same legislative appropriation as had been granted in advance of 1832. Generally, the Upper Canadian administration expected high levels of immigration to be maintained in 1833,[393] reflecting or even surpassing the numbers of 1832, the highest to that point on record. Others in the community anticipated similar large numbers during 1833. As a result of the success of the administration's immigration policy, wrote the editor of the *Upper Canada Herald*, "[the] addition to the wealth of the country is exceedingly cheering, and we may reasonably anticipate that each succeeding year will be productive of the same happy effects."[394] Given the disaster of 1832, when the high incidence of sickness and poverty among immigrants landing at Prescott was alarming to most, and given that similar, even greater, numbers were expected during 1833, it is at least peculiar that the Legislature did not allow for a more extensive appropriation in the Prescott Emigrants' Act.

But the Lieutenant Governor, as we have seen, was extremely careful to avoid leaving the impression that the cholera epidemic had an injurious effect on the prospects for immigrants, and

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[393] See the speech of the Speaker of the Legislative Council, at *supra* note 385 and accompanying text.

[394] *Upper Canada Herald*, 31 October 1832, NLC.

on the continued expansion of the commercial and agricultural sectors of the colony. While he recognized the enormous effort put forward by Dr. King and others in fighting the disease, there was a reluctance to acknowledge that cholera initiated any sustained disruption in the accomplishment of the administration's goals. As a result, funding for cholera projects, after the initial allocation for the work of Boards of Health pursuant to the Circular of 20 June 1832,[395] was extremely difficult to obtain, as evidenced by, among other difficulties, the struggles of various local physicians to obtain compensation for their efforts. Therefore, despite the fact that equal or greater numbers of immigrants might be expected at Prescott during 1833, funding for addressing the particular needs of immigrants did not change in the terms of the Prescott Emigrants' Act. The status quo would be maintained, the cholera disaster would be forgotten, and, with some help from local "Christian feelings and benevolence," the legislature could see to the needs of sick and destitute arrivals with the same commitment as in 1832.

(iii) The Boards of Health Act

The second major initiative in the legislature's response to the epidemic of 1832 emerged in the Boards of Health Act which, together with the Prescott Emigrants' Act and the two money bills intended to defray the costs of fighting the disease,[396] was passed by the Upper Canadian Parliament on the day of prorogation, 13 February 1833. The Solicitor General actually gave the Legislature Notice of Motion on 4 December 1832 for leave to bring in the bill that would eventually become the Boards of Health Act, the intent being to seek leave to introduce the bill

[395] Referred to first at *supra*, note 22.

[396] Referred to at *supra*, note 388.

the next day.[397] This intention to bring in the bill so soon after resumption of House business in the fall of 1832 demonstrates the urgency with which the Legislature viewed its responsibility for responding to the epidemic, but quite inexplicably, the actual motion for leave to bring in the bill was not made until 23 January 1833, some 49 days after originally intended.[398] There is nothing in the records of the House of Assembly to indicate the reason for the delay. Another ten days would elapse before the bill received second reading,[399] and it was finally passed by the Lower House and sent to the Legislative Council on 5 February 1833.[400] On 7 February, Sir John Beverley Robinson, Speaker of the Legislative Council, advised Archibald MacLean, speaker of the House of Assembly, that the bill had passed the Upper House,[401] and, on 13 February 1833, the bill was sent to the Lieutenant Governor for final approval. Royal Assent was granted the same day.[402]

The need to respond quickly and decisively to the epidemic, once the Legislature was opened at the end of October, was evident both in the Solicitor General's Notice of Motion of 4 December 1832, but also in the speed with which the Legislature moved to sanction the actions

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[397] *Journal of the House of Assembly of Upper Canada*, Session 1832-3, Tuesday 4 December 1832, 46, TFR.

[398] *Journal of the House of Assembly of Upper Canada*, Session 1832-3, Wednesday 23 January 1833, 104, TFR.

[399] *Journal of the House of Assembly of Upper Canada*, Session 1832-3, Saturday 2 February 1833, 118, TFR.

[400] *Journal of the House of Assembly of Upper Canada*, Session 1832-3, Tuesday 5 February 1833, 121, TFR.

[401] *Journal of the House of Assembly of Upper Canada*, Session 1832-3, Thursday 7 February 1833, 127, TFR.

[402] *Journal of the House of Assembly of Upper Canada*, Session 1832-3, Wednesday 13 February 1833, 139, TFR.

of the executive undertaken without legislative backing during the previous summer. Both the Legislative Council and the House of Assembly provided endorsements of executive action in their speeches responding to the Speech from the Throne. Robinson noted in his text:

> The restoration of hope and confidence, caused by the almost total disappearance of the dreadful disease with which the Inhabitants of this Province were afflicted, calls for our humble gratitude to Divine Providence; the active measures adopted by the Executive Government, at the distressing period of its commencement, merit our entire approbation as the best means which the exigency afforded of arresting its ravages and preserving the public health.[403]

Perhaps a bit more cautious in their praise, yet still quite supportive of the use of executive authority in a time of crisis, are the words of the Speaker of the House of Assembly:

> Upon the sudden breaking out of any pestilence, previously unknown, and consequently not provided against, it of necessity becomes the duty of the Executive government to take such energetic measures, as shall appear to be best calculated for the protection of the people against its ravages, and we entertain the fullest assurance, that when we shall be informed of the arrangements made by your Excellency, for the preservation of the public health, they will be found such as to demand the entire approbation of this House.[404]

In both of these speeches, the Speakers were alluding to the question of the reimbursement of the executive authority for sums expended in funding the various boards of health, and in meeting extraordinary expenses during the prevalence of the disease during the previous summer. The endorsement of the Legislative Council was complete at this point, Robinson indicating approval of both the idea of executive intervention without legislative backing at the height of the crisis, and of the specific measures designed by the executive authority to carry that idea into effect. The House of Assembly, on the other hand, did indicate its support for the idea of independent

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[403] Speech of the Speaker of the Legislative Council, *supra* note 385.

[404] Speech of the Speaker of the House of Assembly, *Upper Canada Gazette*, 29 November 1832, NLC.

executive action, but reserved judgment on the specific measures until full details might be disclosed later in the legislative session. Eventually, of course, both Houses approved the expenditure by the executive authority of amounts deemed necessary to fund the Boards of Health and other expenses, repaying those sums through the money bills referred to above.[405]

The two money bills did not pass through the legislative process and receive Royal Assent until 13 February 1833, despite the recognition at the beginning of the session that the endorsement of executive action and the reimbursement of funds was a priority of both Houses. The delay might be explained by reference to the need to audit the accounts submitted by the Boards of Health of each of the Districts, and by the need to verify the expenditures incurred outside of the £500 allotment for each of those Boards. After all, the President of the Bank of Upper Canada did not submit final cholera accounts to the office of the Civil Secretary until 21 January 1833, and it is clear from the correspondence in this respect that the Lieutenant Governor wanted to ensure that the calculation of interest on funds advanced in the cholera relief effort be completed to a date as late in the legislative session as possible. This would avoid the need to return to the legislature with a relatively minor, supplemental account during the session of 1833-1834.[406]

But a similar explanation for delay in completing the legislative programme in response to the epidemic does not hold for the Boards of Health Act. In fact, the inactivity of the Legislature was not lost on Reform critics of the administration, who complained sardonically about the waste of time and taxpayers' money. In the previous session of 1831-1832, members

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[405] *Supra*, note 388.

[406] Rideout of the Bank of Upper Canada to Civil Secretary, 21 January 1833, PAC, January 1833, RG5, A1, Vol. 125, pp. 69130-69131.

of the administration had blamed William Lyon Mackenzie for disrupting the Legislature and slowing the progress of legislation, and a great deal of House business during December 1831 and January 1832 was devoted to the issues around one or another Mackenzie tactic in the legislative chamber. Early in February 1833, with Mackenzie in England, his temporary replacement as editor of the *Colonial Advocate* suggested sarcastically that the administration had no reasonable explanation for its inactivity, given that Mackenzie was not available to serve as scapegoat:

> Our representatives have been in session for upwards of three months, and one would suppose from the unusual length of the session that something of consequence must, ere this, have been accomplished; particularly when that troublesome little man Mr. Mackenzie was not here to disturb their sage deliberations. But, we shall be sadly mistaken if, on the prorogation, it does not turn out that there has been absolutely less done during the present than any former session of Parliament.[407]

Despite the inactivity of which the editor of the *Colonial Advocate* complained, the Solicitor General must have been ready to proceed with the bill to establish boards of health as early as 5 December 1832, at least according to his Notice of Motion of 4 December, and there does not appear to have been any reason why the bill was not introduced and debated in the ordinary course. Nothing extraordinary took place in the House of Assembly over the balance of December and into January 1833 to explain the delay.

To a certain extent, the long title of the bill is inappropriate. Entitled *An Act to establish Boards of Health, and to guard against the introduction of Malignant, Contagious and Infectious Diseases, in this Province*, the statute did very little to establish anything like the Boards of Health formed pursuant to the executive directive of 20 June 1832.[408] Rather, the statute

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[407] *Colonial Advocate*, 7 February 1833, NLC.

[408] First referred to at *supra*, note 22.

provided for the appointment of three or more health officers in each town in the Province, and in other necessary places. The idea of a permanent board to oversee local responses to the threat of epidemic disease seems to have been lost, despite the grand title of the bill, and despite the avowed purpose of the legislation, as revealed in its recitals, to "preserve the public health of the Province." The power of appointment of the health officers was reserved to the executive authority, "with the advice and consent of His Majesty's Executive Council," an extension of the general powers exercised by the Lieutenant Governor, his magistrates and closest advisers respecting the appointment of local officials.[409]

Rather than provide the health officers with broad administrative powers in situations where disease threatened their community, the statute vested those officers with limited police powers, effectively constituting them inspectors for the discovery of domestic conditions thought to be dangerous to the public health. This was a fairly intrusive innovation, unique at the time in Upper Canada. By clause II, the Boards of Health Act gave the health officers the power to inspect dwellings at any time during the day, and if they discovered what they considered to be conditions dangerous to the public health, they had the power to order the occupant to correct the problem by cleaning the premises and removing objectionable materials. In the case of resistance to their orders to clean up unhealthy premises, the health officers were given the power to call for the assistance of constables and peace officers, and then to re-enter the premises and perform the remedial action themselves. The penalties for non-compliance with the orders of the health officers were set forth in clause IV. For each offence, the penalty upon conviction

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[409] See the general discussion of the Lieutenant Governor's powers of appointment over local officials, as expressed through the District Magistrates, at *supra*, notes 206 and 207, and accompanying text.

was a fine of at least twenty shillings and at most £20, to be collected by seizure and sale of the offender's chattels.

The act is noteworthy for a number of features, not the least of which is the failure of the legislature to vest control of the response to the threat of epidemic disease in the local authorities. The health officers were to be appointed by the executive branch of government, and there is nothing in the statute to suggest that they were to be responsible to anyone but those to whom they owed their appointment. In addition, control over the only substantive matter covered in the legislation, apart from the inspection of dwelling houses, remained in the executive authority as well. By clause III, the Lieutenant Governor appropriated jurisdiction over the operation of the various ports along the St. Lawrence River and the lakes, all in the interest of the public health.

> And be it further enacted by the authority aforesaid, That it shall and may be lawful for the Governor, Lieutenant Governor, or Person Administering the Government of this Province, by and with the advice and consent of His Majesty's Executive Council, to make and declare such rules and regulations concerning the entry and departure of any Boats or Vessels at the different Ports or other places within this Province, and the landing or receiving Passengers and Cargoes on board the same, as shall be thought best calculated to preserve the public health.

The difficult confrontations between shippers and townspeople, especially as they occurred in Niagara[410] and Brockville[411] during 1832, were not to be repeated, apparently, as the Lieutenant Governor ensured that the development of regulations respecting shipping during times of epidemic disease would be in the sole discretion of the executive. Therefore, in two significant areas of responsibility, both the administrative control of the local response to the disease and the

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[410] *Supra*, notes 352-363 and accompanying text.

[411] *Supra*, notes 267-270 and accompanying text.

relationship between shippers and onshore authorities, the executive branch of government retained control in the event of a further outbreak of epidemic disease. Local government was excluded completely by the Boards of Health Act. Boards of Health comprised of local physicians were rendered redundant, and the want of regulatory power vested in those Boards of Health was ignored.

It is noteworthy as well that the Boards of Health Act was silent on the question of domestic quarantine. There is nothing in the powers of the health officers to be appointed pursuant to the Act to allow them to do anything respecting the control of disease once it had manifested itself. Their authority was limited to the abatement of the physical conditions thought to be conducive to the development of disease, in essence giving them the power to inspect for nuisance, and little more. While this was a relatively significant power in the hands of the health officers, it stopped short of the powers to be found in comparable legislation in other jurisdictions. None of the conventional powers contained in time-honoured quarantine legislation, including removing the sick from the well, isolating the immigrant sick in specially constructed hospitals, and cordoning off dwelling houses thought to be infected, were allowed for in the Boards of Health Act. This is highly unusual; as referred to above,[412] English legislation in this respect remained largely as it had been throughout the eighteenth century, with extensive local powers during times of epidemic disease, and some British North American colonies other than Upper Canada relied on English precedent for much of their health protection legislation.[413] The conclusion can only be that, when this omission in the Upper Canadian legislation is combined with the retention of control by the executive in matters of the

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[412] *Supra*, notes 10-13 and accompanying text.

[413] Comparative aspects of this issue will be explored below in Section D of this Chapter.

appointment of health officers and the relationship with shipping interests, the Boards of Health Act continued the half-hearted response of Upper Canada's leadership to the problem of epidemic disease, this time expressed through legislative, as opposed to executive, action.

In many locations, and despite the weaknesses in the legislation, the prospect of the appointment of health officers to confront townspeople whose dwellings were notorious for their unhealthy condition was greeted with some relief. In Bastard, a community on the Rideau Canal, the Board of Health of 1832 refused to act any further as the winter of 1833 turned into spring. In response to a request for action from one William Reston, the President of Bastard's 1832 Board calmly pointed out that the powers they assumed during the crisis of the previous summer were no longer tenable, and that the new legislation would have to be implemented before further remedial action might be carried out.

> In reply to your letter of yesterday's date, I will thank you to acquaint the Inhabitants residing in your neighbourhood that it would afford me much pleasure in complying with their request contained in your communication, did I possess the authority of doing so.
>
> An act having passed the last Session of Parliament investing His Excellency the Lieutenant Governor with power of appointing Boards of Health in the several Districts in the Province, it would be a most unaccountable interference in me, to attempt to remedy the evil you say exists in many parts of this Township.
>
> In assuming the Power of acting as one of the Board of Health last year, it was at a time when no Legislative enactment for that purpose existed, and when the country was in a general state of alarm.[414]

While the tone of this letter seems sarcastic, it is difficult to draw any firm conclusion that local authorities were embittered by the removal of their powers as assumed during the previous summer. This is the only correspondence of its type that has survived, in which members of

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[414] Col. Hartwell of Bastard Board of Health to William Reston, 4 April 1833, PAC, April 1833, RG5, A1, Vol. 128, pp. 70470-70474. Underlining in original.

Boards of Health from the summer of 1832 comment on the impact of the Boards of Health Act on their local duties and responsibilities. In any event, however, the citizens of Bastard felt strongly enough about the conditions in their Township to write to the Civil Secretary the day following the day on which Reston received this correspondence from Hartwell, asking that health officers be appointed pursuant to the new statute without delay.

> I am requested by quite a number of respectable Inhabitants of this Township to acquaint you that notwithstanding the great pains recently taken by Colonel Hartwell ... to guard as far as possible against the late epidemic there are several Families in this section so indifferent for the Health of themselves and their neighbours as to allow their Houses to again become unclean ...
>
> At the request of the inhabitants of this place I addressed a letter to Colonel Hartwell, President of the Board of Health for last year requesting he would cause the Filth etc. gathered this Winter around several little Huts & Houses in this town removed, and received the accompanying answer.
>
> You will lay the Inhabitants of Bastard under a great obligation by bringing this subject before His Excellency Sir John Colborne ... and beg of His Excellency in behalf of the inhabitants of this section to be pleased to appoint a Board of Health with as little delay as possible.[415]

Both Hartwell and Reston, it appears, relate the possibility of successful intervention in the conditions of certain of the dwellings in Bastard Township with proper legal authority, and, given the establishment of apparent authority in this respect in health officers to be appointed pursuant to the Boards of Health Act, felt that the intervention of the executive authority was necessary for a successful resolution to the matter.

While there is no evidence that health officers were ever appointed for the Township of Bastard pursuant to Reston's request in that respect, the Lieutenant Governor did move relatively quickly throughout the spring and summer of 1833 to see that health officers were established in

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[415] Reston to Civil Secretary, 5 April 1833, PAC, April 1833, RG5, A1, Vol. 128, pp. 70470-70474. The letter from Hartwell to Reston referred to at *ibid.* was appended to the correspondence to the Civil Secretary from Reston.

many communities in Upper Canada. Major centres were addressed first, with health officers in York, Niagara, Hamilton, Cobourg, Kingston, Brockville, Prescott, Cornwall and Bytown in place by mid-April.[416] Appointments followed for Gananoqui and St. Catherines,[417] and finally for Fort Erie, Gravelly Bay, Amherstburg and Sandwich.[418] A request from James Schofield of Smiths Falls, asking for the appointment of a board of health for that town, "there being quite a number of inhabitants residing therein besides Steam boats and other Crafts constantly passing through the Locks during the season," apparently went unacknowledged.[419]

Despite a paucity of records relative to the performance of the duties of these health officers during the summer of 1833, traces do survive to suggest that some of the problems of 1832 endured under the new Boards of Health Act. The Kingston health officers met for the first time on 25 April 1833, and promptly divided the town into six divisions, assigning responsibility for the divisions to various of their members.[420] But, as had been the case in 1832, the Kingston health officers found that funds to defray the costs of performing their duties were scarce in 1833. One of their number, H.C. Thomson, was delegated the task of petitioning the Lieutenant Governor for funds, and by letter dated 25 April 1833 he wrote the Civil Secretary asking for a grant of £100 to assist the Kingston appointees in carrying out their duties.[421] Endorsed on the

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[416] *Upper Canada Gazette*, 18 April 1833, NLC.

[417] *Upper Canada Gazette*, 16 May 1833, NLC.

[418] *Upper Canada Gazette*, 25 July 1833, NLC.

[419] Schofield to Civil Secretary, 3 May 1833, PAC, RG5, A1, Vol. 129, pp. 70986-70987.

[420] *Upper Canada Herald*, 1 May 1833, NLC.

[421] Thomson to Civil Secretary, 25 April 1833, PAC, April 1833, RG5, A1, Vol. 128, pp. 70779-70780.

copy of this letter in the Civil Secretary's files and initialed "J.C." is a note: "I do not find myself authorised to make any advance, under present circumstances." Colborne's rejection of Thomson's request for assistance was later confirmed in writing by the Civil Secretary.[422]

While funding proved to be a problem for the newly appointed health officers of Kingston, the appointees in York were confronted by a continuation of the criticism that followed the Board of Health relentlessly during the summer of 1832. One of the first proclamations of the new authorities was directed to the abatement of nuisances, and the editor of the *Canadian Freeman* was quick to challenge its adequacy and the legal powers of the health officers to enact regulations strong enough to deal with some of the most urgent problems in the town. In commenting especially on the condition of the burying-ground of the "English Church," the editor said the following:

> As the new Board of Health have issued their Proclamation respecting nuisances, we have published below the Act of last Session from which they derive their authority. The most dangerous nuisance, in York, in our opinion, is the burying-ground of the English Church. It is situated, in the first instance, where no cemetery ought to be, in the very centre of the town, and so crowded already, that they had to bury last year the cholera sufferers in a swampy corner where it is revolting to see remains of human beings deposited in mud and dirty water.[423]

After describing in some detail the extent to which the "cholera swamp" posed a danger to local townspeople, the editor went on to challenge the health officers to make this burying-ground their first priority:

> Is it not notorious that the late pestilence raged most in the neighbourhood of the cemetery in question in this town? And who can tell but the opening of one grave in it this summer may spread pestilence and death in York? We mean no disrespect to the pastor or the people to whom this burying-ground belongs – but

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[422] Civil Secretary to Thomson, 6 May 1833, PAC, RG7, G16C, Vol. 29.

[423] *Canadian Freeman*, 2 May 1833, NLC.

> we think that it ought to attract the first attention of the Board of Health, and that in the meantime, the cholera swamp in the north-east corner ought to be covered six inches deep with lime, not to be disturbed during the summer. Indeed we would like to see an Act of Parliament prohibiting grave-yards altogether in populous parts of towns and villages.[424]

In the result, the Boards of Health Act did little to address many of the problems that emerged from the experience of local authorities with the epidemic of 1832. First, in its very provisions we find the legislature failing to grant administrative authority to local officials. Health officers, who were vested with powers of inspection of dwelling houses but little else, had no overall local administrative function to perform, either in anticipation of the arrival of disease or in the event it were to establish itself in the community. Secondly, the difficult problem with shipping interests experienced by several Upper Canadian communities during 1832 was to be controlled by the executive authority, meaning that particular local conditions would not necessarily gain the priority they might deserve during critical moments in the progress of disease. Thirdly, and according to the rather sparse records that survive, it appears that the thorny issue of funding for local disease prevention continued to stifle a concerted local public health effort, at least in Kingston. And fourthly, at least some commentary suggested that additional legislative support was needed to ensure that the health officers were vested with the authority necessary to alleviate some of the more pressing local problems of sanitation. As we shall see in Section D of this Chapter below, each of these issues serve to distinguish the Upper Canadian legislative response to the epidemic of 1832 from the response in other British North American colonies, again raising the question of the sincerity of Upper Canada's leadership in the attempt to protect the public health.

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[424] *Ibid.*

C. The Continuing Question of Immigration

While the urgency of the legislative response to the cholera epidemic of 1832 seems to have been met by the Prescott Emigrants' Act, the Boards of Health Act and the money bills to restore those amounts initially spent in defending against the disease, the persistent question of immigration continued to occupy the thoughts and energies of Upper Canada's leadership throughout the legislative session of 1832-1833. Generally, the executive and the legislature remained committed to doing what had to be done to encourage high levels of immigration during the season of 1833, and this was reflected in the legislature's formal response to the Lower Canadian emigrant tax of 1832. The Upper Canadian legislative response to this issue will be referred to in detail later in this Section C, to demonstrate the extent to which the official position on immigration can be understood to transcend the more mundane problems of public health represented in the legislation designed to address those problems.

Not all the consequences of high levels of immigration were to be welcomed, however, and it was not all the members of Upper Canada's governing class who were enamoured of the changes in social life wrought by the new arrivals. The Annual Report of the York Hospital and Dispensary, filed with the House of Assembly, made especial note of the burden placed on the facility due to the impoverished and unhealthy condition in which many immigrants made their appearance at York during 1832, and it must be remembered that cholera patients among the immigrant population were treated at a cholera hospital separate from the York Hospital itself. The medical staff at the main hospital were spared the need to attend to those sick with cholera, but nevertheless found that the burden of dealing with the immigrant population stretched their capacity to an extreme.

> [S]ince the last annual report of the York General Hospital, the cases of disease for which relief has been sought at this Institution, have been wonderfully

> increased in number and importance, comparatively to what they have been any preceding year.
>
> The great increase in the Population of this Town and its Vicinity, and the misery and wretchedness of the lower classes of Emigrants (wanting the ordinary comforts, and most of them even the common necessaries of life) could not fail to disseminate amongst them disease in its various forms, and cause so many applications for relief; ... Typhus fever in its most malignant form, raged to a most alarming extent; many of the fatal cases above reported have been of this malady, brought into Hospital from the Steam boats, or from the confined and filthy parts of the Town, in its last stage, and when the cases were hopeless.[425]

In this report, the Hospital brought into focus one of the difficult side effects of very high levels of immigration, the need to respond with a commitment of personnel and other resources to manage both the immediate needs of the immigrant population and the needs of the established townspeople in their struggles with dangerous disease. The issue was entangled with concerns about sanitation in York and the impact of extreme poverty on living conditions in the town.

While the Hospital struggled to keep pace with the needs of both the immigrant and local populations, others in York were equally pressed to accommodate the changes that resulted from the swelling population. Perhaps clearest in this respect were Archdeacon John Strachan and former Chief Justice William Dummer Powell,[426] both well-respected members of Upper Canada's governing class, and both, one would expect, firmly behind the policy of the executive government in encouraging continued high levels of immigration. Archdeacon Strachan, at least,

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[425] "Annual Report of the York Hospital and Dispensary," *Journal of the House of Assembly of Upper Canada*, Session 1832-33, Sundry Documents, 81-82, TFR.

[426] Powell died in 1834, having been succeeded as Chief Justice by William Campbell in October 1825. See S. R. Mealing, "William Dummer Powell," in R. L. Fraser (ed.) *Provincial Justice: Upper Canadian Legal Portraits from the 'Dictionary of Canadian Biography'* (Toronto: University of Toronto Press for the Osgoode Society, 1992), 135. Although a very influential member of the administration, Powell was compelled to resign from the Executive Council in 1825, and his status in local affairs deteriorated markedly, according to Mealing, until his death in 1834.

was the President of The Society for the Relief of the Sick and Destitute of York and Vicinity, established for the expressed purpose of seeing to the adjustment by the community to much of the hardship experienced by new arrivals. The Society was especially active in assisting in the fight against cholera during the previous summer.[427] Despite these allegiances to the administration generally, and to the cause of cholera relief in the case of Strachan, the patience of these members of York's upper class wore thin when the reality of the immigration programme affected their lifestyle directly. Both Strachan and Powell lived in comfortable homes on Front Street along York's lakefront, and between their street and the water were erected a number of unsightly and inadequate sheds for the temporary housing of immigrants. Complaints were soon lodged with the Lieutenant Governor. In May 1833, both Strachan and Powell made representation to have the immigrant sheds removed. In a joint submission, they reported as follows:

> We have the honor to state for the information of His Excellency the Lieutenant Governor that the houses built under the Bank, in front of the Archdeacons and the Honorable Chief Justice Powells, are become a great nuisance to all the neighbourhood. They are receptacles for drunkenness and vice, and surrounded with every kind of filth. We have further to state that more houses of a similar description are now building, and if no impediment is thrown in the way the whole space under the Bank will be covered with the meanest sort of buildings, and render it impossible for decent people to walk in front of that part of the Town.
>
> We therefore beg leave most respectfully to request that His Excellency will have the goodness to direct that these buildings may be removed immediately, a measure no less necessary for the convenience than the health of the Town of York.[428]

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[427] *Colonial Advocate*, 4 October 1832, NLC.

[428] Strachan and Powell to Civil Secretary, 24 May 1833, PAC, May 1833, RG5, A1, Vol. 129, pp. 71380-71382.

In language even more unequivocal, Powell wrote a separate letter to the Civil Secretary, challenging the very legal basis on which the immigrant sheds were erected, and complaining that they violated a commitment that was made to him when he arrived in York to take up his official duties some years before. That commitment, he argued, was that no buildings would be built between his lands on Front Street in York and the lake, and that a wooden walkway would be constructed along that stretch of land for the benefit of the townsfolk, and so as to prevent further construction. Materials were even supplied for that purpose, he reminded the Civil Secretary, but were never used. Instead, in 1832 a shed was constructed for the shelter of immigrants, and it quickly became a nuisance to the neighbourhood until it was removed at the end of the season. At the time of his writing this letter, in early May of 1833, additional posts had been erected as the first step in the construction of a series of new immigrant sheds, all without legal authority, according to Powell, and all so as to reduce neighbouring property values immediately by as much as fifty per cent. Powell was not without his suggestion of an alternative:

> If it may be permitted to one so much interested to suggest a more general measure than the mere removal of the Nuisance it is humbly submitted that the sheds for reception of the Emigrants should be erected on the Peninsula in front of York uninhabited except by the Keeper of the Light House, and a Ferry established and supported by the Town or even Private Subscription to avoid the chance of Infection and the many evils of a Town Residence of the newly imported Paupers.[429]

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[429] Powell to Civil Secretary, 25 May 1833, PAC, May 1833, RG5, A1, Vol. 129, pp. 71383-71387. While Powell's career as Chief Justice of Upper Canada for several years ending in 1925, and as a member of the Executive Council, suggests that his allegiances to the administration and its policies were likely well established, it is by no means certain that he did not bear some animosity to certain members of Upper Canada's governing élite. As Mealing points out, "Powell's primary loyalty was always to the principles of English common law, not to the provincial administration of Upper Canada." Mealing, "William Dummer Powell," *supra* note 426 at 147.

While ostensibly Upper Canada's leadership encouraged continued high levels of immigration to carry forward the commercial and agricultural expansion of the colony, there were voices raised against at least certain of the consequences of such a policy. Of concern were the possibility of the importation and spread of disease from the temporary shelters, but also the general living conditions at the sheds apparent from the street above. At the same time as the resources of the York Hospital were stretched to unprecedented lengths, the sensibilities of some of the most prominent citizens of the town were offended by the presence of these incommodious immigrant sheds. The consequences of high levels of immigration, therefore, were not all to be applauded.

In addition, at least some concern was expressed about the political implications of the policy by which immigration from the British Isles continued to be encouraged. Much of this opinion arose in 1832, when immigration reached an unprecedented level, and when concern over the relationship between immigration and epidemic disease was beginning to catch the attention of many in Upper Canada. The allegation was made in reform presses that the Lieutenant Governor's insistence on encouraging immigration, in spite of the problems of disease and poverty associated with the success of that policy, was testament to his desire to increase the percentage of the local population that might be counted on by the administration to be loyal to the establishment's rule. The *Brockville Recorder*, for example, insisted that the immigration question was exploited by the administration for partisan purposes. While immigration remained generally a positive programme for Upper Canada, it could continue as such only so long as sufficient land was available to support the new arrivals, and so long as profitable employment was available for the large percentage of new arrivals who earned their livelihood through their own labour. Otherwise, the administration ought to be cautious about encouraging unbridled immigration, with little thought to the employment and health of the

newcomers. However, argued the editor of the *Brockville Recorder*, the administration continued to insist on the complete advantage to Upper Canada of maintaining the frenetic pace of immigration, the result being that the real purpose of such a programme could only be political. "The tools of power and venal presses" were behind uncontrolled immigration of all kinds, and behind allegations that those who promoted more caution in immigration policy were actually against sharing the wealth of Upper Canada's resources with the less fortunate immigrant. The reason for this misinterpretation of the motives of those who would resist the administration's immigration policy, according to the *Brockville Recorder*, was that the powerful members of Upper Canada's ruling class might "forward their own unhallowed purposes of riveting the abuses of the administration more firmly on a loyal and generous people."

> A certain party among us finding that their influence is in a measure annihilated among the old settlers of the country and their descendants, who have experienced the effects of their loving kindness, in way not very agreeable, as a last resort throw themselves on that class of our inhabitants who have recently settled in the country, whom they hope to deceive by mock professions of attachment and sympathy.[430]

In other words, the more emigrants from the Old Country that arrive, loyal to the existing regime for their opportunity, the easier it will be for that regime to continue its oppressive ways.

This allegation about the political motivations of Upper Canada's leadership in continuing high levels of immigration from the British Isles was never denied in the colony's Tory presses, but was actually confirmed later in 1833 by the editor of the *Niagara Gleaner*, a decidedly establishment paper. Perhaps because of the District's close proximity to the United States, some concern was expressed that immigration to the colony was the surest way to

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[430] *Brockville Recorder*, 29 March 1832, NLC.

maintain a steadfast, loyal population ready to defend the administration against those who would see it undermined by either French malcontents or American sympathizers:

> Should the tide of emigration be turned from the Canadas to the United States, the French Canadians in Lower, and the American Republicans in Upper Canada, will be equally well pleased: - both are alike averse to British principles of government, which would, no doubt, be strengthened by a number of well informed Britons arriving in the Provinces.[431]

In addition to the apparently genuine interest in the commercial and agricultural expansion of the colony, therefore, the continuation of Colborne's immigration initiative raised political debate and uncertainty, and perhaps exacerbated the contest between reformers and loyal Tories that, in the early 1830's, was beginning to be felt across Upper Canada.

The administration's immigration policy, therefore, was not without its detractors, its unwelcome side effects, and its political implications. Whether criticism arose from predictable sources, such as the editor of the *Brockville Recorder*, or from prominent members of the establishment whose comfortable lifestyle was threatened by the overwhelming needs of the immigrant population, there can be little question that the consequences of the success of Colborne's immigration policy were less than attractive to some segments of Upper Canada's population, and that certain resources of the colony were stretched beyond ordinary lengths. Nevertheless, the administration pressed on with initiatives to encourage continued high levels of immigration during 1833, and the predominant opinion emerging from a review of contemporary sources was that the administration deserved to be applauded for its efforts. This was so, even given the dangers presented during 1832 by the accepted association between immigration and the spread of disease. In large measure, many in Upper Canada remained optimistic that the

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[431] *Niagara Gleaner*, 29 June 1833, NLC.

capital and labour provided to the colony through a successful immigration programme would eventually pay for the dangers involved.

> Although the emigration from the Mother Country this year has been represented by the enemies of our provincial prosperity as a 'grievance,' the advantages which we are likely to derive from it are too manifest to be denied or concealed. Besides the vast numbers of industrious laborers and mechanics that have been added to our population, we are credibly informed that not less than seventy gentlemen, possessed of from one to five thousand pounds each in ready money, have become inhabitants of Upper Canada. This addition to the wealth of the country is exceedingly cheering, and we may reasonably anticipate that each succeeding year will be productive of the same happy effects. In truth Upper Canada promises to be, at a very early period, the richest and most flourishing portion of His Majesty's Colonial possessions.[432]

It is likely not coincidental that this editorial supportive of the administration was published on the day on which the Parliamentary session of 1832-1833 was opened by the Lieutenant Governor, a day on which the speeches of Colborne and John Beverley Robinson, Speaker of the Legislative Council, extolled the benefits of continued administrative and legislative support for the prevailing immigration policy.[433]

Despite the recognized connection between immigration and the epidemic of the summer before, the legislative branch of government continued to support the executive in its focus on high levels of immigration from the British Isles. It is certainly arguable that both the investment in the Colony to be gained through the immigration of relatively wealthy citizens, and the labour to be derived from those of less means, were motivating factors in the government's stand, and it is possible that an enhanced political solidarity was not without its appeal. The legislature's resolve in favour of continued high levels of immigration found expression in the report of the

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[432] *Upper Canada Herald*, 31 October 1832, NLC.

[433] Robinson's speech is referred to at *supra*, note 385 and accompanying text. For excerpts from Colborne's speech, see *Colonial Advocate*, 8 November 1832, NLC.

Select Committee on the Taxing of Emigrants by Lower Canada, chaired by Solicitor General C.A. Hagerman.[434] The Report was filed with the House of Assembly on 3 January 1833.

The tax on immigrants from the British Isles levied by the Legislature of Lower Canada had actually been originally suggested to Governor Aylmer by the Colonial Secretary, Lord Goderich, in the fall of 1831. Writing on 11 December 1831, Goderich remarked on the inconvenience to the people of Lower Canada resulting from the arrival of vessels from England and Ireland, badly overcrowded with sick and impoverished emigrants. To alleviate the situation, the Colonial Secretary argued against any positive legislative intervention in the standards to be observed by shipowners in carrying newcomers, suggesting instead that the Legislature of Lower Canada might impose a head tax, payable by the master of each vessel arriving at Québec, on each immigrant arriving from the British Isles. The tax would be modest, not more than one dollar for each passenger arriving with the support of the British government, but doubled in the case of passengers embarking on the journey without government support. This tax, argued the Colonial Secretary, would serve to control and direct the tide of emigration, secure the proper treatment of emigrants on their voyage, and establish a local fund to assist in the support of immigrant housing and hospitals in Québec. The purpose would be to regulate, not to restrict, the flow of immigrants to the Canadas.[435]

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[434] There is a note in the *Journal of the House of Assembly of Upper Canada*, Session 1832-33, 12 December 1832, TFR, to the following effect: "Mr. Merritt gives notice that he will, tomorrow, move for leave to bring in a bill, to encourage the Emigration of Foreigners into this Province." There is no record that Merrit's motion was ever tabled, nor that the proposed bill was ever introduced, meaning that Hagerman's committee report can be read as a complete statement of the position of the House of Assembly on the question of immigration during late 1832 and early 1833. The Report can be found at *Journal of the House of Assembly of Upper Canada*, Session 1832-33, Appendix, 202-203, TFR.

[435] Goderich to Aylmer, 11 December 1831, PAC, RG7, G1, circular.

Goderich's correspondence to this effect was received in the office of the Governor on 13 February 1832, and Aylmer wasted little time in making the appropriate recommendation to the Legislature of Lower Canada. In his message to the House of Assembly and the Legislative Council of 14 February 1832, Aylmer requested that the tax be established "in obedience to the Instructions of His Majesty's Government." The purpose of such a tax, Aylmer argued, was to create a fund for the medical care of immigrants, and to assist them in continuing the journey to their place of ultimate destination.[436] The Legislature of Lower Canada quickly complied with the Governor's request,[437] and the tax was in place before the busy immigration season of 1832 began.

Reaction in Upper Canada was swift and virtually unanimous in its condemnation of the "odious emigrant tax." First to respond was the editor of the *Upper Canada Herald*, who pointed out that the tax on immigrants worked as a tax on Upper Canadians too. Upper Canadians do not have access to the fund created by the tax, so the argument went, and so have the ultimate responsibility to look after the sick who, having had their levy paid by the ship's master on arrival at Québec, proceed to Upper Canada where they promptly fall ill. Upper Canada's private resources must then be tapped to relieve their sufferings. Besides, so the editor argued, the tax served to discriminate against British subjects arriving in a British territory, while

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[436] Aylmer's Message to the Legislative Council and House of Assembly of Lower Canada, 14 February 1832, PAC, RG7, G18, Vol. 43.

[437] *An Act to create a fund for defraying the expense of providing medical assistance for sick emigrants and of enabling indigent persons of that description to proceed to the places of their destination*, 2 Wm. IV, c. 17 (L.C.), passed by the Legislature on 25 February 1832.

foreign immigrants might land for free.[438] In similar tone is a letter of 24 March 1832 to the editor of the *Kingston Chronicle* signed by "An Upper Canadian," by which the author implored Lord Goderich to withdraw his support for the Lower Canadian tax, and in which the suggestion was made that Lieutenant Governor Colborne prepare a memorial to present to the King, explaining the many advantages of immigration to Upper Canada, and detailing the way in which the tax infringed on the colony's constitutional rights.[439] The Society for the Relief of the Sick and Destitute of York and its Vicinity decried the tax in a memorial to Lieutenant Governor Colborne, suggesting that the tax would retard emigration from the "Mother Country," emigration by which "the social relations of society [are] extended and improved, and the attachment and connexion with the parent state, cherished and perpetuated." According to this memorial, the emigrant tax was "unconstitutional and oppressive," and "calculated very materially to injure and retard the prosperity of Upper Canada." Colborne's reply to this communication was published simultaneously, and in it he confirmed that he would "lose no time drawing the attention of His Majesty's government" to the opinions of the Society.[440]

Despite the chorus of vociferous complaints about Lower Canada's emigrant tax, Lord Goderich stood firm in his support for the measure. When confronted with a memorial from the

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[438] *Upper Canada Herald*, 7 March 1832, NLC.

[439] "From an Upper Canadian," *Kingston Chronicle*, 24 March 1832, NLC. This letter was answered by "A.B.C." in a letter published in the *Kingston Chronicle*, 31 March 1832, NLC. A.B.C. suggested that the tax was fair, considering that the most serious problems associated with high levels of immigration were to be found in Lower Canada. The people of Lower Canada were to be commended, so the argument went, for healing and then sending on to Upper Canada so many recent arrivals, and all dependent, until imposition of the emigrant tax, on the charity of the local population. This is the only evidence I have encountered in Upper Canadian sources that Lower Canada's emigrant tax had any support west of Montréal.

[440] *Niagara Gleaner*, 5 May 1832.

Committee of Trade at Québec, denouncing the tax as an impediment to good trading relations. Goderich simply replied that the tax was intended to prevent abuses and furnish a means to relieve sick and destitute emigrants, and not to check emigration and trade at all.[441] After being informed by Colborne of the displeasure of The Society for the Relief of the Sick and Destitute of York and Vicinity, Goderich simply repeated his assurances that the tax would give Lower Canada's executive government some control over the shipping practices of those responsible for transporting the emigrant population, and would provide a means by which the urgent needs of the new arrivals might be alleviated.[442] This position did not soften throughout 1832 and 1833.[443]

It was in this context that Solicitor General Hagerman's Select Committee of the House of Assembly of Upper Canada was struck to inquire into the emigrant tax, and to make recommendations to the House of Assembly as to the most appropriate response. The terms of the Committee's Report could not be more unequivocal. As an appendix to the Report, the Committee included a draft address to the King, in which the arguments of Upper Canada against the tax were outlined. In essence, the address to the King described a number of technical legal

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[441] Goderich to Aylmer, 5 June 1832, PAC, RG7, G1, No. 113.

[442] Goderich to Colborne, 20 September 1832, PAC, RG7, G1, No. 94.

[443] See *Brockville Gazette*, 20 December 1832, NLC, in which Goderich is quoted as saying that the tax was designed to encourage, rather than discourage, continued high levels of emigration from Britain. The tax vests power in the executive government of Lower Canada "to enforce regulations to ensure due attention to the safety and comfort of emigrants on board the vessels in which they proceed to the place of their destination." According to the *Brockville Gazette*, these words of Lord Goderich were taken from his correspondence to the Lieutenant Governor on the memorial from The Society for the Relief of the Sick and Destitute of York and Vicinity, although that is not clear from the copy of Lord Goderich's correspondence preserved in PAC records and referred to at *supra* note 442.

arguments against the tax, including the fact that the legislation violated the obligation of the Imperial Parliament to refrain from levying a tax in the colonies except under exceptional circumstances. According to Hagerman's Committee, the tax was effectively a tax on Upper Canada, such that an indirect levy on the people of Upper Canada was being exacted contrary to the commitment of the Imperial Parliament referred to by the Committee. In addition, Upper Canada ought to share in the tax in the same way that it shared in duties on merchandise collected in Québec; there was no distinction in kind between ordinary import levies and the head tax on immigrants. More important for the Committee, however, was the fact that the tax functioned as control by the Legislature of Lower Canada over immigration to Upper Canada of citizens of Great Britain. It was incontrovertible, according to Hagerman's group, "[t]hat one Colony cannot exercise a power which implies a right to exclude from another Colony the fellow subjects of the same Sovereign, [and] we think [it] must be too clear to admit of much argument."[444] The Report went on to decry the humanitarian implications of the tax, suggesting that it further impoverished those who arrived at Québec with little means of support.

> With respect to those Emigrants whose means are so scanty that they are barely able to transport themselves to Québec, in their way to this Province, it is cruel o exact a sum which they can but too ill spare; and with respect to those Emigrants who are in more comfortable circumstances, and able to bear the charges of their voyage and of establishing themselves and their families in a new country, it is certainly not reasonable that a deduction should be made from their means, in particular to form a fund from which they neither require nor will receive any assistance, and which is applicable to the relief of distress which they have no hand in creating, and which certainly ought not to be so much a charge upon their benevolence, as upon the benevolence of those who have been many years settled in the country, and who are therefore more at ease in their circumstances.[445]

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[444] "Report of Select Committee on the Taxing of Emigrants by Lower Canada," *supra* note 434, at 203.

[445] *Ibid.*

There is no evidence in the records of the House of Assembly, nor in the surviving records of either the Lieutenant Governor or Governor Aylmer, of the way in which the Legislature finally dealt with the Report of the Select Committee. For present purposes, however, the Report demonstrates the implications of the question of immigration in Upper Canada in 1832 and after, primarily for the gravity of the consequences of a continued enhanced immigration. Political considerations in this respect were weighty; the social repercussions were the cause of much difficulty; the commercial and agricultural expansion of the colony was at stake; the very constitutional status of Upper Canada was apparently threatened by the interference of Lower Canada in the free and easy movement of immigrants along the St. Lawrence River. Every other consideration, including the preparation of legislation in response to the cholera crisis of 1832, must have shrunk in significance.

C. Comparative Analysis of the Boards of Health Act

(i) Introduction

The Boards of Health Act has attracted very little comment from both historians of Upper Canada's cholera epidemic of 1832, and historians of Upper Canadian law. This omission is somewhat surprising. The Act represented at least a first effort by the Legislature to provide the formal regulatory framework for the confrontation with dangerous disease, and that effort in turn can be interpreted as a response to the inadequacies of the *ad hoc* response to the epidemic of the previous summer. The call for legislative assistance for Boards of Health was answered in the Boards of Health Act, arguably at least, and for that reason alone the statute deserves careful scrutiny as to its success. As suggested in Section B, Part (iii) of this Chapter, local leaders welcomed the passage of the legislation, and it is quite clear from their response that they anticipated that legislative sanction for the activities of health officers in responding to the

conditions thought to be conducive to the development and spread of disease would be of great assistance in preventing a repeat of the events of 1832.

The commentary that does appear in histories of the cholera epidemic is generally supportive of the legislative initiative, at least mildly. Marian A. Patterson, for one, said that, with the passage of the statute, "[a] milestone in the history of Public Health in Upper Canada had been established,"[446] and, in certain respects, Patterson was right. The Boards of Health Act was the first of its kind in Upper Canada, the first to grant specific policing powers to officials relative to the inspection of private dwellings for unsanitary living conditions. The purpose, at least as it appears from the statute itself, was primarily to guard against dangers to the public health, rather than to protect the derelict homeowner from their own malfeasance. In that sense, the Boards of Health Act represents a relatively abrupt incursion by the state into the private domain of the ordinary citizen, sacrificing something of individual liberty for the sake of communal well-being.

Patterson went on to argue that "[t]he cholera epidemic had proved the existing form of municipal government, concentrating all powers in the hands of the Magistrates, inadequate for a rapidly growing community,"[447] and, again, she is correct as far as she goes. But if she means to suggest (and the argument is not developed at all in her paper) that because of these inadequacies, a more complete devolution of power resulted through the Boards of Health Act, by which local authorities might more fully control the response to unsanitary living conditions and the threat of epidemic disease, then it appears that she has overstated her position. The

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[446] Patterson, "The Cholera Epidemic of 1832 in York, Upper Canada," *supra* note 305, 183.

[447] *Ibid.*

Boards of Health Act did nothing to constitute autonomous or even partly independent local authorities for these purposes, instead reserving ultimate power over the local response in matters of public health to the executive authority, to be exercised through the control of port regulations and through the power of appointment of local health officers.

In Charles M. Godfrey's study of the cholera epidemics in Upper Canada,[448] the Boards of Health Act is mentioned only briefly. Godfrey did manage two relatively significant errors in his one paragraph description of the statute, indicating that it was passed on 3 February rather than 13 February 1833, and mistakenly adding the words "and For the Formation of Local Boards" to the end of the act's long title. While the former might be excused as a relatively minor slip (the bill that eventually became the Boards of Health Act received second reading in the House of Assembly on 2 February, third reading on 5 February and was passed by the Legislative Council on 7 February 1833, before being granted Royal Assent on 13 February),[449] the latter has greater implications. Nowhere in the records of the House of Assembly is the statute referred to by anything other than its final long title, *An Act to establish Boards of Health, and to guard against the introduction of Malignant, Contagious and Infectious Diseases, in this Province*, except for the occasional reference to the "Contagion Prevention Bill."[450] To add the words "and For the Formation of Local Boards" to the end of the long title is to leave an impression with the reader that some regulatory power was to be vested in local authorities pursuant to this statute, and that is simply not the case. Godfrey compounds this error by listing

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[448] Charles M. Godfrey, *The Cholera Epidemics in Upper Canada, 1832-1866*, *supra* note 3.

[449] *Supra*, notes 399-402 and accompanying text.

[450] The statute was referred to as the "Contagion Prevention Bill" when it was sent for Royal Assent on 13 February 1833. See *supra*, note 402.

"sanitary control, quarantining of vessels, and the levying of effective fines for violators" as new provisions in the statute,[451] whereas the control of port regulations was vested in the executive authority, and the effectiveness of the fines allowed for in the act is a conclusion not evident from any evidence cited in Godfrey's work.

Geoffrey Bilson, too, devoted very little space to the Boards of Health Act, saying simply of the Legislature that "[i]t also looked to the future and provided statutory powers for boards of health – any new epidemic would be met by bodies with some legal authority."[452] As in the case of Patterson's comment on the statute, this statement is true as far as it goes. The health officers appointed pursuant to the Boards of Health Act were vested with the powers of inspection and policing. But it is not accurate to suggest that the statute created administrative bodies that had the power to confront "any new epidemic." In fact, there is nothing in the Boards of Health Act at all to grant powers to local Boards to regulate the movement of people or goods through the various port facilities or to establish domestic quarantine. In the case of port controls, the executive retained regulatory authority; in the case of domestic quarantine, the statute was silent.

To more fully explore the issues raised by the Boards of Health Act, and by the short comments on the statute made by historians of the cholera epidemic of 1832, I want to compare its legislative provisions with the standard regulatory regime in place in England, and with the initiatives in place in Lower Canada, Nova Scotia, New Brunswick and Prince Edward Island. This will be done under three headings, being "Trade and Immigration Restrictions," "Domestic Quarantine," and "Executive Power and Local Authority." Although the results of this

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[451] Godfrey, *supra* note 3, at 41.

[452] Geoffrey Bilson, *A Darkened House: Cholera in Nineteenth-Century Canada*, *supra* note 3 at 64.

comparison will not yield completely unequivocal results, it is an important exercise in the attempt to more fully comprehend the Upper Canadian legal response to the epidemic of 1832. It will be my argument that the Boards of Health Act was comparatively weak in each of these three respects, belying the suggestion that the Upper Canadian legislative response to the epidemic of 1832 was as aggressive or as comprehensive as it ought to have been, given the regulatory framework in place in neighbouring British North American jurisdictions.

(ii) Trade and Immigration Restrictions

As indicated in Chapter One above,[453] the system of trade and immigration restrictions in place in England had been changed only marginally since the 1720's. By the terms of Queen Anne's Act and the various amending statutes passed during the eighteenth century, the sovereign retained the power to quarantine both cargo and people during times when the threat of the import of dangerous disease was a concern, and the powers reserved to the sovereign in this respect were severe and far reaching. In certain circumstances, vessels and their cargo might be ordered sunk offshore, and passengers and crew confined to ship-borne quarantine stations or onshore lazarettos. In any event, English legislation was quite detailed respecting the conditions under which these sovereign powers might be exercised, a recognition, it appears, of their extraordinary consequences.

The Boards of Health Act addressed the matter of trade and immigration restrictions only coincidentally. Clause III of the statute [quoted as well in Section B, Part (iii) above] read as follows:

> That it shall and may be lawful for the Governor, Lieutenant Governor, or Person Administering the Government of this Province, by and with the advice and consent of His Majesty's Executive Council, to make and declare such rules and

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[453] *Supra*, notes 10-13 and accompanying text.

> regulations concerning the entry and departure of any Boats or Vessels at the different Ports or other places within this Province, and the landing or receiving Passengers and Cargoes on board the same, as shall be though best calculated to preserve the public health.

It is difficult to comprehend exactly how this provision was intended to advance the state of public health law in Upper Canada. Obviously, the law making authority of the Colony had the power to control its own ports; in that respect, this Clause added nothing to existing law. The likely conclusion is that the provision removed ambiguity about ultimate control over shipping, eliminating any possibility that locally constituted groups (perhaps emerging from town meetings or other local efforts) might assert control over their harbours. If that is the case, then this Clause ought to be read more as a consolidation of executive authority than as a provision for protection of the public health.

The Clause differs from the precedent available in English legislation because of its obvious lack of detail on the manner in which the executive power relative to shipping might be implemented, and this difference separates the Boards of Health Act from the legislation in place in the other British North American colonies as well. In Lower Canada, the Act of 1795[454] made extensive provision for the conditions under which the executive power to compel ships to perform quarantine might be exercised. It began by reserving to the Governor or other person administering the Government the power to determine the need for quarantine, based on a discretionary judgment of the danger posed by the vessel dependent on the port from which it sailed. Any ship arriving from a port where, in the Governor's determination, there was a likelihood that a dangerous disease prevailed, was liable to remain anchored in the St. Lawrence River at such place and for such time as the Governor might direct. The Governor retained the

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[454] *Supra*, note 14.

expressed power to isolate crew, passengers and cargo, and to prevent ship-to-shore and ship-to-ship communication of any kind. This early statute also made provision for preventative inspections of ships arriving from unknown ports, or from ports where the extent of infection from dangerous disease was unknown to Lower Canadian authorities. These inspections might take the shape of formal interrogation of those in command of the ships, and include medical inspections of crew and passengers. Extensive policing powers were vested in those persons appointed by the Governor to enforce the quarantine, including specific powers to use such force as might be necessary to return escapees to the ship. Fines for violation of the quarantine orders were as much as £300.

In the Maritime colonies, similar extensive and detailed powers were provided by the various quarantine statutes in place prior to or in immediate anticipation of the cholera epidemic of 1832. Nova Scotia, for example, passed two statutes in April 1832 to deal with the problem of disease arriving at its ports.[455] In the first, the Lieutenant Governor was given the power to determine the likelihood that ships arriving at ports in the colony were carrying any one of a number of listed diseases, including cholera, based on the condition of the public health in their port of departure. In manner similar to the regime in force in Lower Canada and England, detailed provisions were enacted to direct the way in which cargo, passengers and crew might be isolated offshore, and to control communication with quarantined ships. Inspections were directed to be made by officials designated by the Lieutenant Governor, and by medical officers, to determine the length of quarantine and its satisfactory completion. Regulations were also provided as to the hoisting of signals by infected ships, and the information to be relayed from ship to shore through harbour pilots. Extensive detail was set out in this first statute respecting a

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[455] *Supra*, note 16.

number of administrative and organizational issues, including the relative authority of harbour pilots, medical officers, and other officials charged with carrying out the orders of the Lieutenant Governor under the statute. In a final statement of the significance of the regulatory regime instituted pursuant to the act, the legislature granted medical officers statutory immunity from civil suit for anything done by those officers pursuant to the powers granted to them under the statute. The second statute was a less detailed provision, providing for a general quarantine of vessels until inspected by a designated health officer and provided with a certificate of clearance.

Provisions in Prince Edward Island's quarantine statute were largely the same as those in the statutes of Lower Canada and Nova Scotia, although not so detailed and extensive as the latter. The statute for Prince Edward Island[456] was likewise passed in immediate anticipation of the arrival of cholera in the spring of 1832, and it provided for a strict quarantine of all vessels arriving in ports on the Island carrying immigrant passengers. Discretion in the executive authority was removed in the case of passenger ships, although the Lieutenant Governor did retain the discretion to determine the extent to which quarantine was applicable to other vessels, dependent, as was customary, on the health conditions of their port of departure. Inspections were directed to be done by port medical officers, and based on the results of those inspections, the Lieutenant Governor might order a quarantine of longer than the obligatory three days. Again, ship-to-shore and ship-to-ship communication was forbidden, and special signals were prescribed to be hoisted by infected ships. The penalties for breach of the various provisions of the statute were more modest than in the Lower Canadian statute, ranging from £5 to £20.

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[456] *Supra*, note 18.

The statutory regime in place in New Brunswick was considerably more complicated than in other British North American colonies, primarily because the legislature enacted different statutes to control the entrance of ships into the various ports around the colony.[457] Separate statutes were provided for the City of Saint John, for the counties of Charlotte and Northumberland on the south and east coasts of the colony respectively, and for the counties of Westmorland, Kent and Gloucester, all on the eastern shore. To summarize, New Brunswick imposed a system of quarantine for passengers, crew and cargo on vessels arriving from infected ports, but gave extensive power to local justices of the peace to determine the length and manner of quarantine, and to local medical officers to carry out the inspections necessary to support the decisions of the justices. In this respect, New Brunswick's statutes are unique among contemporary British North American statutes, and are distinguishable from the precedents in place in England on those same grounds. Otherwise, the New Brunswick regulatory framework was similar to that in place in Nova Scotia and Prince Edward Island, including the provision for hoisting special signals by infected ships, and the appointment of medical officers in each port to act in collaboration with other port officials. The penalties provided in New Brunswick's legislation were of similar severity to those in place in Lower Canada, ranging from a minimum of £20 to a maximum of £200.

On the issue of immigration and trade restrictions, then, it is not difficult to distinguish the Boards of Health Act from the statutes in place in England and the other jurisdictions of British North America. Not only was Upper Canada unique in failing to enact legislation to deal with the threat of the importation of dangerous disease prior to the arrival of cholera in 1832, but

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[457] See the list of the various statutes in place in New Brunswick at *supra*, notes 15 and 17.

its eventual provision for controlling shipping relative to both goods and people was vague and uncertain in its terms, relative to the provisions in place elsewhere. While the reservation to the executive authority of some discretion in the management of the harbours aligned the Boards of Health Act with statutes in all neighbouring jurisdictions except New Brunswick, the failure to provide detailed provisions on the performance of quarantine, the penalties for failure to comply with public health directives, and the role of the various medical and other officers appointed for the ports, sets the Boards of Health Act apart from all related legislation on the same matters. On a comparative basis, the Boards of Health Act failed to live up to the standard of contemporary public health legislation in this respect.

(iii) Domestic Quarantine

As indicated above,[458] the Boards of Health Act of Upper Canada made no provision for domestic quarantine. The powers of the health officers appointed pursuant to the statute were limited to inspection for unsanitary conditions, and did not extend to any special powers during the prevalence of epidemic disease. When compared to the regime in place in England, the Boards of Health Act was remarkable in this respect. King James's Act and the various proclamations and ordinances in place in England over the course of the seventeenth and eighteenth centuries vested power to manage epidemic disease squarely with local officials, either the judiciary or civic authorities, and left the design and implementation of domestic quarantine to the discretion of those officials. It is noteworthy that the Boards of Health Act ignored this issue, especially given the various struggles endured by local Boards of Health in

[458] See *supra*, notes 412-413 and accompanying text, for a brief comparison to the English legislation in this respect.

Upper Canada during 1832 to establish legal authority for their activities and to compel compliance with their various directives.

Certain of the other colonies of British North America left little doubt about the responsibility for domestic quarantine. In Lower Canada, the Act of 1832[459] established an elaborate Board of Health at Québec, consisting of the Senior Justice of the Peace, fifteen other members to be appointed by the Governor, and all clergymen as members *ex officio*. This Board was vested with wide discretionary powers, similar to those provided for health officers in the Boards of Health Act respecting inspections for sanitary offences, but otherwise much more extensive. Included in these additional powers, according to Clause IV of the Act of 1832, was the power "[t]o cause every Avenue, Street, Alley or other Passage whatsoever to be fenced up or otherwise enclosed, if they shall think the public safety to require it, and to adopt suitable measures for preventing all persons from going to any part of the City or Banlieu so enclosed." In this provision we find reflected certain of the powers contained in French regulations concerning the *cordon sanitaire*, in which cities or sections of cities might be isolated so as to contain a suspected outbreak of dangerous disease.[460] But it was reminiscent too of many of the local powers of domestic quarantine in place in England since the days of James I.[461] In addition to this authority, the Board of Health established pursuant to Lower Canada's Act of 1832 had the following power according to Clause XII:

> And be it further enacted by the authority aforesaid, that the Board of Health or the Chairman thereof or either of the Commissioners of Health shall have power to send to either of the Hospitals established in the District of Québec (except the

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[459] *Supra*, note 14.

[460] For a brief description of French regulation in this respect, see François Delaporte, *Disease and Civilization: The Cholera in Paris, 1832*, *supra* note 7 at 9.

[461] See *supra*, notes 10-13 and accompanying text.

> Hôtel Dieu and the General Hospital) all persons in the Port, City or Banlieu of Québec, but not resident therein, who may be sick of any malignant or contagious disease.

This provision, admittedly limited in scope to the quarantine of non-resident sufferers of disease, allowed the Board of Health to isolate those suspected of carrying dangerous disease. When combined with the provision respecting *cordon sanitaire*, Clause XII established a system of domestic quarantine very similar to the English model.

In Nova Scotia, the first of the two statutes enacted in the spring of 1832 provided specific powers of domestic quarantine, although these powers were vested in the executive authority, as opposed to a local board. By Clause VI of this statute, the legislature provided that "... in case of any infectious disease or distemper appearing or breaking out in this Province, [the Governor, Lieutenant Governor or Commander in Chief, or in his absence, the Governor in Council shall have the authority] to make such orders and give such directions, in order to cut off all communication between any persons infected with any such disease or distemper, and the rest of His Majesty's subjects, as shall appear to [him or them] to be necessary and expedient for that purpose." This executive power was in addition to the powers of health wardens appointed pursuant to the second of Nova Scotia's statutes, by which many of the duties of health officers found in Upper Canada's Boards of Health Act were repeated.

While there is nothing in the statutes of Prince Edward Island and New Brunswick prior to 1833 to provide either executive or local authority for domestic quarantine, precedent did exist for these powers in England, Lower Canada and Nova Scotia. However, because an allowance for domestic quarantine was not universally made, it is difficult to draw any firm conclusions about the failure of Upper Canada's legislators to make provision in this respect. The omission remains curious, however, given the difficulties experienced by many communities in Upper

Canada during the epidemic of 1832 in attempting to convince sick residents to remove themselves to the cholera hospitals. In the end, perhaps the most that can be said is that, when statutes in Upper Canada, Prince Edward Island and New Brunswick are considered together, a trend away from the centuries old regime in place in England was evident in British North America, a trend that finally recognized what many argued was the inhumanity of domestic quarantine.[462]

(iv) Executive Power and Local Authority

The Boards of Health Act made no provision for management of the problem of epidemic disease at the local level. The statute is easily interpreted as an initiative in the consolidation of executive power, overcoming the attempts at control of the local response that emerged in the early days of the epidemic in June of 1832. As described in Chapter III above, many communities acted unilaterally when cholera threatened,[463] and struggles for jurisdiction among locally constituted boards of health, boards appointed by the magistrates and, in Brockville, the Board of Police, continued throughout the summer. In the Boards of Health Act, however, this contest was overcome by vesting the power of inspection and policing in health officers appointed directly by the executive authority, and by consolidating power over the regulation of port facilities in the Lieutenant Governor. There was no mention made of specific powers, including domestic quarantine, that might be used in the event of an immediate threat from epidemic disease, and there was nothing at all in the statute to provide directly for local power and authority.

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[462] See Thomas Cock, *Hygiene, or a Discourse Upon Air*, *supra* note 13, and many other like denunciations of domestic quarantine practices.

[463] *Supra*, notes 219-221 and 224-225 and accompanying text.

In England, the regulatory regime in place for as long as two hundred years had provided for local control of municipal conditions in times of epidemic. The domestic quarantine regime was placed directly in the hands of local civic and judicial authorities, with the power to design regulations tailored around local conditions. Co-incident with this regulatory authority, the power was granted to appoint a number of lesser officials, including "Searchers, Watchmen, Examiners, Keepers, and Buriers," the beginning of a local network of administration and enforcement officials with extensive policing powers to be used to manage the local response to disease. King James's Act also provided wide taxing powers in municipal authorities, allowing for special local levies to assist in fighting disease. In addition, civic officials were given the power to conscript local residents to assist in collecting these special taxes and conducting searches for the assets of delinquent taxpayers, an extraordinary power that must have caused some discomfort among neighbours. It is notable, too, that the statute specifically provided for co-operative efforts by adjacent communities in the initiation of various measures, further extending the nature of local autonomy during times of emergency. There was very little change of substance in this regime throughout the seventeenth and eighteenth centuries.[464]

Much of the legislative activity around organizing the response to epidemic disease in British North America followed this decentralized model of regulatory control. The Board of Health established pursuant to Lower Canada's statute of 1832 had sweeping powers, although the members owed their appointment to the executive authority. These powers included the freedom to appoint many subordinate officials, including health wardens and others for the purpose of carrying into effect Board rules and regulations. In addition to powers similar to the

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[464] See Charles F. Mullett, "A Century of English Quarantine (1709-1825)," and J.C. McDonald, "The History of Quarantine in Britain During the 19th Century," both *supra* note 12.

powers of inspection and remediation granted to health officers in Upper Canada pursuant to the Boards of Health Act, and the power of sequestration similar to the *cordon sanitaire* (referred to above), the Board of Health at Québec had the authority to import medical supplies necessary to assist in the fight against cholera.

Lower Canada's statute of 1832 provided still another level of local administration through the appointment by the executive authority of two local physicians and one health commissioner, to form a Board of Health Commissioners for the purpose of visiting the sick. Significantly, however, the Health Commissioners were to file their reports with the Board of Health, and were to perform such other duties as the Board of Health might direct. In other words, control over their activities remained in local hands. Even the expense claims of the Health Commissioners were not to be honoured without the countersignature of the Chairman of the Board of Health. In connection with policing the harbour in the interests of the public health, the health officer designated to inspect vessels was to file his reports with both the executive and the Board of Health, and was to take whatever instructions respecting additional duties arising from those reports as the Board might direct. Again, there is a recognition implicit in these provisions of the value of local input into the cause of public health protection. Such recognition was conspicuous by its absence from Upper Canada's Boards of Health Act.

The transfer of jurisdiction to local authorities from the executive government was not so clearly set out in Nova Scotia's health protection statutes passed in early 1832. In the second of the two statutes [2 Wm. IV c.14 (N.S.)], the following appears in Clause IV respecting the creation of Boards of Health, and their potential regulatory autonomy:

> ...it shall be lawful for the Governor ... to establish and appoint in any place or places a Board of Health for carrying into effect and enforcing the rules, regulations and directions, in any such order to be made by the Governor in council or His Majesty's Council contained; and also to prescribe and direct the

> particular duties and modes of proceeding to be executed or observed by such ... Boards of Health, and to authorise and empower them or any of them to make, establish and cause to be observed, any rules and regulations which may be found necessary to preserve the Public Health, and to render effectual all measures of precaution against the introduction or spreading of such infectious disease or diseases...

This provision creates a double layer of regulatory responsibility, reserving to the executive authority the power to prescribe the duties of Boards of Health and the manner of carrying out those duties, but providing as well for the possibility that the Boards themselves would have jurisdiction over certain aspects of the response to dangerous disease. Even this provision, uncertain in its effect as it is, holds a great deal more potential for local autonomy in the response to epidemic disease than did Upper Canada's Boards of Health Act. At least, in the Nova Scotia statute the possibility of local control of the public health mandate was contemplated.

In New Brunswick, virtually complete regulatory autonomy in matters of disease prevention was provided for local justices of the peace in each county across the colony.[465] This power was first established in 1799, with the statute 39 Geo. III c. 8 (N.B.), in which it was provided:

> That it shall and may be lawful for the Justices of the Peace in the respective Counties at their General Sessions, or at any Special Session to be called for the purpose, to make such further rules and regulations in aid of the present Act, for the better preventing the Importation or spreading of such Infectious Distempers, with such pains and penalties not exceeding Ten Pounds, for each and every offence, against such rules and regulations as to them may seem meet.

While it is obvious that the Justices of the Peace owed their appointments to the executive, in manner similar to the manner in which the health officers under Upper Canada's Boards of Health Act were not completely independent of the central authority, yet there is an absolute

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[465] Boards of Health were not established in New Brunswick until 1833, with the passage of 3 Wm. IV c. 28 (N.B.).

transfer of regulatory power to the Justices under this early New Brunswick statute, something that did not appear in even muted language in Upper Canada's act. This relative autonomy for Justices of the Peace continued in the Act of 1822 [3 Geo. IV c. 8 (N.B.)], in which they were provided with the authority to appoint lesser health officers, who, according to this enactment, had "full power and authority to execute all and every matter and thing needful and necessary to be done, touching and concerning the performing of quarantine, and the carrying [sic] the several provisions contained in this Act..." Powers of appointment were extended by the statute of 1831, 1 Wm. IV c. 40 (N.B.), in which Justices of the Peace were vested with the responsibility to see to the inspection of vessels through their own appointed physicians, and by which they were empowered to direct constables to enforce police regulations governing the movement of people and goods from ship to shore. Again, the transfer of regulatory authority from the executive government to the local level, in this case justices of the peace, was virtually complete in New Brunswick, demonstrating a recognition of the value of local input and control in matters of public health.

While there is nothing comparable in Prince Edward Island,[466] that omission might be explained by the size of the colony, local authority having more significance in diverse settings spread across a large territory. But in Lower Canada, New Brunswick, and, to a somewhat lesser extent, Nova Scotia, the executive government saw fit to transfer through legislation a great deal of regulatory authority from the central power to the local level. This transfer took the form of

[466] There is a provision in 2 Wm. IV c. 13 (P.E.I.) to allow for the appointment by the Lieutenant Governor of persons in outlying communities to direct ships arriving at their harbours to perform quarantine in the same manner as they might in Charlottetown, but that is the extent of the transfer of authority to municipal authorities.

powers of appointment, powers of regulation, and powers of enforcement, including policing powers. Nothing of the sort was allowed for in Upper Canada's Boards of Health Act.

(v) Summary

Commentators on the cholera epidemic of 1832 in Upper Canada make very little mention of the Boards of Health Act, and that remains somewhat surprising. However, considered in its entirety, it did very little to advance the cause of public health in the colony, functioning perhaps more as a consolidation of executive power than as a measure truly put in place to assist in the fight against epidemic disease. In two of its principal measures, the executive re-established control of crucial areas of responsibility relative to the public health and the control of the spread of disease. First, it exerted authority in the area of sanitation, providing for the appointment of health officers whose role was limited to inspection and remedial action. There was no power in these officials to assert any regulatory initiative, and there was no requirement that they report to local officials. In this way, it appears that the attempt by local groups to direct the regulatory response to the epidemic of 1832 had been undermined through the legislative establishment of health officers who reported directly to the executive authority. Secondly, the often difficult issue of the relationship of local government to shipping interests during times of disease was resolved through the executive government re-asserting control over the regulation of harbours. It appears that the situations in Brockville and Niagara of the summer before would not be repeated should cholera return. In a sense, Marian A. Patterson was right when she suggested that the Boards of Health Act was a "milestone" in the history of public health in Upper Canada. There had never been a statute to like effect before this one. But it fell far short of the demands made for a legislative initiative to grant local boards of health the legal

strength they needed to effectively deal with the threat of epidemic disease. This must have made the statute a great disappointment to many.

The inadequacies of the Boards of Health Act are even more apparent when it is considered alongside measures in place in England and in the other colonies of British North America. This is true when we consider the statute from the perspective of trade and immigration restrictions and on the question of executive power and local authority. It is also true, although to a lesser extent, relative to the question of domestic quarantine. On each of these matters, the Boards of Health Act failed to live up to the standard of contemporary public health legislation. For that reason alone Upper Canada's formal legal response must be considered to have been ill-conceived and perfunctory. Other jurisdictions did not hesitate to enact detailed, strict rules with respect to the manner in which ships sailing from infected ports might be managed, apparently little concerned with the consequences for shipping interests, but highly concerned with the implications for the public health of their respective citizens. There is nothing nearly so detailed nor unequivocal in the Boards of Health Act. In each of these other jurisdictions (with the exception of Prince Edward Island), there was a remarkable transfer of regulatory power to local authority, a recognition, one must conclude, of the value of local knowledge and the ability of local interests to respond to dangerous disease in a manner best suited to local populations. There is nothing of the kind in the Boards of Health Act, and, in fact, the statute appears to consolidate regulatory responsibility for the response to epidemic disease in the executive level of government. Finally, both England and two of the other British North American colonies made special provision for local control of domestic quarantine, whereas Upper Canada's Boards of Health Act is silent on the matter. While this omission may be indicative of nothing more than a trend away from an arguably outmoded response to disease, it

at least underscores the extent to which the Boards of Health Act failed to live up to its promise as a statute that would allow local communities to confront the next appearance of cholera more prepared than they were in the summer of 1832.

D. Conclusion

To judge from the experience of Upper Canada following the emergency of the cholera epidemic of 1832, it is human nature to quickly move on to other concerns when a crisis in public health is met, endured and then overcome. During the fall of that year, and into the winter of 1833, very little commentary emerges from a review of contemporary sources, suggesting that, perhaps, "the Thing [was] a little too much forgotten."[467] But the legislative branch of Upper Canada's government recognized its responsibility to respond to the epidemic with measures to answer the earlier calls for legal intervention, and to prepare the population for the possibility that the epidemic would be repeated in the summer of 1833.

In certain respects, the acknowledgement of this responsibility is not inconsistent with the initiatives of Upper Canada's legislature on other matters of public health. By 1832, a fairly sophisticated framework was in place for the regulation of the medical profession. This, it can be argued, reflects a real commitment by Upper Canadian lawmakers to maintain control over the practice of medicine in the interests of communal health and well-being. This same commitment can be seen in legislation relative to humanitarian support for the desititute insane, and in the emerging trend toward state-financed hospitals. During this period, the first of these institutions were conceived, dedicated and built at York and Kingston with the encouragement and support of both the executive and the legislative branches of government.

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[467] Daniel Defoe, referred to at *supra* note 364 and accompanying text.

One would anticipate that, when the House of Assembly considered responding to the most significant public health crisis to that point in Upper Canada's history, it would do so out of the same communitarian commitment to the public welfare that it exhibited in these other public health initiatives. At the beginning of the session of 1832-33, the speeches of the Lieutenant Governor, the Speaker of the Legislative Council and the Speaker of the House of Assembly each directed some consideration to the repercussions from the disease, and as early as the first week of December 1832, the Solicitor General gave Notice of Motion to introduce the bill that would eventually become the Boards of Health Act. In some respects, of course, the Legislature did move quickly, certainly in the way that it supported executive action taken at the height of the crisis during June of 1832, and in the way that it honoured the expenses of the Districts initially appropriated by the Lieutenant Governor.

But this apparent commitment to the superintendence of the public health appears to have been lost when the Prescott Emigrants' Act and the Boards of Health Act were prepared and enacted. The ideological impetus for their promulgation is more murky; their connection to a particular vision of the public good, manifested in government's custodial role in protecting the public health, is not so clear as it was in the case of earlier initiatives. In the case of the Prescott Emigrants' Act, the legislature failed to learn from the experience of the summer before, routinely re-enacting the statute of the previous session with no allowance for changed expectations as a result of cholera. Despite its avowed purpose to see to the needs of sick and destitute immigrants arriving at Prescott, the legislature's failure to confront the alteration in the demands of public health suggests that the statute may have been more about the appearance of order and stability than it was about benevolence. For the Lieutenant Governor's immigration policy to continue as it had in the previous year, it was important that the impact of the cholera

epidemic be diminished in the eyes of the potential immigrant. There was no better way to accomplish this than to maintain the *status quo* in matters related to the Upper Canadian preparations for the season of 1833, and one of the ways to do that was to continue unaffected the policy of the previous summer. In this, the legislative response to the epidemic reinforced the Lieutenant Governor's dedication to the immigration programme.

Confirmation of this effective co-operation is found in the Report of the Select Committee on the Taxing of Emigrants by Lower Canada, filed in the House of Assembly on 3 January 1833. Here we have unequivocal condemnation of the policy of Lower Canada in taxing British immigrants to the Canadas, a position not unexpected, of course, given the virtually unanimous Upper Canadian rejection of the tax as unfair both to Upper Canada's constitutional status, and to the immigrants themselves. But while the Select Committee's conclusions are not uncharacteristic of the administration's approach to the question of immigration, they do serve to underscore the difficulty that would have been experienced in the Legislature through the introduction of any regulatory initiative, including a modified Prescott Emigrants' Act, that might be interpreted as a discouragement to the prospective immigrant.

The Boards of Health Act can only be described as anomalous in the context of contemporary public health legislation. In answering the calls of the previous summer for a regulatory regime to buttress the authority of local boards of health during periods when a crisis of public health called for emergency measures, the Legislature was confronted with an opportunity to extend its previous commitment to custodial responsibility in the area of public health. To assist it in this respect, it could look to several precedents in other jurisdictions. Our review of legislation in place in England, Lower Canada, Nova Scotia, New Brunswick and Prince Edward Island tells us that each of these jurisdictions accepted that responsibility by

placing wide ranging regulations at the disposal of the executive government and local officials. Extensive in their detail, these statutes covered everything from the regulation of shipping in colonial ports, to the delegation of authority to justices of the peace, medical officers and boards, to the purchase of necessary medicines, to the establishment of quarantine. Implicit in these initiatives, I want to suggest, is the idea that local authorities were well positioned to answer problems of public health emerging with the appearance of epidemic disease. The notion is consistent with the communitarian focus on public health underlying many earlier initiatives in Upper Canada.

But Upper Canada's Boards of Health Act failed to advance the development of public health law in the colony, despite the fact that it was the first statute of its kind in the colony's history. It ignored the idea that local leaders might be better positioned than the executive to manage local crises in public health, failing to grant any power at all to municipal bodies. Rather, the executive government retained effective control over all named aspects of disease control, including the inspection of local dwelling houses and the all-important question of the relationship between the towns and villages and the shippers who frequented their ports. On reflection, it is difficult to conceive of ways in which the Boards of Health Act actually made progress in the law of public health in Upper Canada, except to state that it functioned as a consolidation of power in the central authority when other jurisdictions seemed to prefer the reverse.

As we shall see in Chapter Five below, many of the same difficulties of administration and legal authority emerged in the battle with the epidemic of 1834, and it can only be concluded that weaknesses in the regulatory regime emerging from the legislative session of 1832-33 greatly contributed to those difficulties. Consequently, we will find that the public health

statutes emerging during the session of 1833-34, and then again in 1834-35, effected considerable change in the lines of authority and responsibility during times of epidemic disease. In that sense, the epidemic of 1834 will be seen to "bend history" in its contribution to the establishment of local control over the legal response to epidemic disease.

CHAPTER FIVE

LEGAL PREPARATIONS FOR AND RESPONSE TO THE EPIDEMIC OF 1834

A. Introduction

To the great relief of both the government and the general population of Upper Canada, the summer of 1833 passed without a return of cholera. Newspapers were relatively quiet about the disease, as they had been through the late fall of 1832 and the winter of 1833, commenting only sporadically on various outbreaks of cholera in Europe and the Americas during the months of April through November. According to accounts in the Upper Canadian presses, cholera was present in Cuba in early April,[468] and in May there were many reports of the progress of the disease in Ireland.[469] By mid-May, accounts began to appear of the return of cholera to the southern and central United States.[470] The advance of the disease from Mexico to New Orleans, and then up the Mississippi River and along the Ohio River, was attributed to "the actions of sun and rain upon accumulated filth."[471] By early fall, reports of the presence of the

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[468] *Canadian Correspondent*, 13 April, 20 April and 4 May 1833, NLC.

[469] *Canadian Freeman*, 16 May 1833, NLC; *Colonial Advocate*, 16 May 1833, NLC.

[470] *Canadian Correspondent*, 18 May 1833, NLC. See also short but alarming accounts of the progress of cholera in the southern United States in *Canadian Correspondent*, 1 June and 15 June 1833, NLC.

[471] *Colonial Advocate*, 6 June 1833, NLC. See also *Canadian Correspondent*, 25 May 1833 NLC for an account of cholera at New Orleans, and *Colonial Advocate*, 11 July 1833 NLC for additional detail on the extent of the cholera outbreak in the United States.

disease in centres of continental Europe began to surface,[472] but by early November the *Canadian Correspondent* was happy to report the official announcement of the disappearance of the disease from London.[473]

While the presses were relatively quiet about the extent of cholera difficulties in Europe and the Americas during 1833, this is not to say that the Upper Canadian public was not apprehensive about the possibility of cholera's return. Editorials continued to comment on the state of public sanitation in Upper Canada, warning readers about the likelihood of a return of the disease unless changes were made in the way in which filth and waste were managed. The *Upper Canada Herald*, for example, quoted a long article from the Philadelphia Board of Health in which the board warned its constituents that cholera was bound to arise again during 1833 unless "all filth and wretchedness" were first removed from the city. The editors of the paper quoted the board with approval when it sought the assistance of citizens in disclosing the existence of any nuisances that might have gone undetected and unattended during the outbreak of 1832.[474] At the same time, the *Brockville Recorder* published a long treatise on the causes, prevention and treatment of cholera, keeping in the public consciousness the issues of cleanliness and vigilance before the disease.[475]

Public apprehensions were fuelled by occasional rumours that cholera had reappeared in Lower Canada. In mid-June, the *Upper Canada Herald* was compelled to publish a reassuring

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[472] For example, the *Canadian Correspondent* of 5 October 1833, NLC, provided extensive coverage of the progress of the disease in Belgium.

[473] *Canadian Correspondent*, 2 November 1833, NLC.

[474] *Upper Canada Herald*, 17 April 1833, NLC.

[475] "Treatise on Cholera," signed by J. Stratford, surgeon, *Brockville Recorder*, 16 May 1833, NLC.

piece to quell speculation about cholera at Grosse Isle, saying reports to that effect were "wholly unfounded."[476] By the end of June, the *Colonial Advocate* was pleased to relate that there were no reports of cholera at Québec or Grosse Isle, and that "all alarm [at Québec] had completely subsided."[477] At the same time, the Upper Canadian public was praised for its diligence in keeping its communities in a relatively clean and wholesome state, and this was thought to have made a great deal of difference in preventing the return of cholera during the summer of 1833. The *Colonial Advocate* reported that "the public health in York and environs is better than ever at this time of year."[478] Then, to underscore its optimism, the paper referred to a piece quoted from the *Québec Mercury*, and denied that cholera was the cause of the quarantine of the vessel *Brutus* at Grosse Isle following its loss of twenty passengers to illness during its Atlantic crossing.[479]

Despite the rumours and apprehensions, however, many in Upper Canada were optimistic that the improving health of the Colony, combined with an expected busy immigrant season, would make for a happy, prosperous summer. In Kingston, the *Chronicle & Gazette* connected good health with prosperity in the following terms:

> It is a pleasing satisfaction to us to be able to repeat the assertion of *Neilson's Gazette*, "that the health of this city and neighbourhood continues good." Travellers from the United States and Upper Canada are coming in upon us now in good earnest, and each day's steamboat adds a fresh stock from "the old country." The hotels are full, and it is not unusual for strangers to make attempts

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[476] *Upper Canada Herald*, 12 June 1833, NLC.

[477] *Colonial Advocate*, 27 June 1833, NLC.

[478] *Colonial Advocate*, 25 July 1833, NLC.

[479] *Colonial Advocate*, 1 August 1833, NLC.

> at three doors before they can find a landlord who has a bed to spare. We hope to hear of more accommodations being provided.[480]

While the buoyancy of this report is clear, however, immigration to Upper Canada during the season of 1833 was not what the editor of the *Chronicle & Gazette* and others might have hoped. It was reported in the same edition of the paper that the number of immigrants arriving at Kingston to 6 July was only 6051, compared to 24,612 during the same period in 1832.[481] The editor blamed the cholera panic of the previous year for the decrease, and expressed his hope that correspondence issued from Upper Canada to Great Britain would praise the prospects of the Colony and leave the tragedy of the epidemic behind. Prospective immigrants of "means and industry" would thereby have their interest in emigration re-kindled, and the impact of the cholera epidemic would be overcome. These sentiments were echoed by the editor of the *Upper Canada Herald* later in the summer.[482]

Other reasons for the decline in immigration were canvassed in the press, too. One writer blamed the Lower Canada "emigrant tax" for reduced numbers during 1833, saying that this was a factor far more important than the cholera panic in discouraging emigration from England.[483] The editor of the *Niagara Gleaner* attributed the poor immigrant season to the agitations of William Lyon Mackenzie, arguing that Mackenzie suggested to prospective emigrants that the

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[480] *Chronicle & Gazette*, 6 July 1833, NLC.

[481] *Ibid.* The actual numbers are difficult to reconcile. For example, see the *Brockville Gazette* of 21 June 1832, referred to at *supra* note 264, where it was reported that 25,700 immigrants had arrived at Brockville by 9 June 1832. Such discrepancies, however, are relatively minor, and there is no reason to doubt the general accuracy and reliability of either this report from the *Chronicle & Gazette*, or the earlier one from the *Brockville Gazette*. See also the references at *supra*, note 384.

[482] *Upper Canada Herald*, 14 August 1833, NLC.

[483] *Chronicle & Gazette*, 20 July 1833, NLC.

United States was more prosperous and stable politically than Upper Canada, and that immigrants could avoid Lower Canada's head tax on arrivals from the United Kingdom by proceeding directly to the United States.[484]

While the number of immigrants was down substantially in 1833, the official interpretation of the benefits of the programme to encourage new settlers was unwavering in its support. On opening the Legislature in November, the Lieutenant Governor continued to speak to the benefits of maintaining high levels of immigration, especially respecting the influx of capital, the impact on local trade, and the advantages to the United Kingdom in reducing its "redundant population."

> Although the recent Emigration has not proved so extensive as you were led to anticipate from the number of Settlers located last year, yet the country cannot but derive essential benefit from the property invested by the Emigrants of this season, which far exceeds the capital transferred to the Province during any corresponding period.
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> The information you have acquired of the statistical changes rapidly taking place, and of the energy displayed by the inhabitants of several Districts in profiting by Lakes and Rivers to improve their communications, enables you to judge correctly of the capacity and actual resources of the Colony; and I am persuaded that you will concur with me in the opinion, that were they sufficiently known and appreciated, the parent State would be encouraged to regard this fertile Country as an asylum for a large portion of her present redundant population, and to adopt an extensive system of Emigration; which with prudent regulations, could not fail to ameliorate the condition of the labouring classes, promote the welfare of the Province, and increase her own commercial prosperity.[485]

Reform presses in Upper Canada were strangely silent about the Lieutenant Governor's speech. None of the *Brockville Recorder*, the *Canadian Correspondent*, or the *Colonial Advocate*, all well known for their antagonistic relationship with the administration, reported anything to take

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[484] *Niagara Gleaner*, 29 June 1833, NLC.

[485] *Chronicle & Gazette*, 23 November 1833, NLC.

issue with the Lieutenant Governor's effusive optimism about the immigration programme. The Tory press, however, immediately applauded the efforts of the administration. Commenting on the opening of the House of Assembly, the editor of the *Upper Canada Herald* relied on the Lieutenant Governor's speech to argue that "[t]his shews that the Emigrants of this year are of a wealthier class than on former occasions, and may therefore be expected to diffuse increasing intelligence, enterprise, and prosperity through the Province."[486] The *Chronicle & Gazette*, too, supported the executive's efforts:

> Why does this session of the legislature hold so much promise? One of the reasons is the immense addition to the population, the intelligence, wealth and enterprize which this country has received, and is daily receiving, and the impulse which these alone, without the aid of legislation, have given to the country's prosperity.[487]

There was no mention in the speeches to open the legislative session, nor in the responses to those speeches contained in the various newspapers of Upper Canada, either to cholera or to its impact on levels of immigration during 1833 and its absence during the previous summer. Apart from a letter of reminder from the Attorney General to the Civil Secretary that the Boards of Health Act, limited as it was in duration, would expire at the end of the current legislative session,[488] the problems of public health associated with the cholera epidemic of 1832 seem to have been forgotten, at least from the perspective of the executive and legislative branches of government.

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[486] *Upper Canada Herald*, 27 November 1833, NLC.

[487] *Chronicle & Gazette*, 30 November 1833.

[488] Jameson to Civil Secretary, 14 November 1833, PAC, November 1833, RG5, A1, Vol. 135, pp. 74175-74177.

It is not surprising, therefore, that very little legislative activity related to matters of public health was initiated during the session of 1833-1834. In fact, the only relevant statute in this respect was the City of Toronto Act, passed by the Legislature on 6 March 1834.[489] This statute delegated certain powers otherwise contained in the Boards of Health Act to the municipal council established by the City of Toronto Act, and also vested in the council various relevant regulatory responsibilities through the power to make by-laws in the areas of sanitation and related matters. In Section C of this Chapter, the implementation of these regulatory responsibilities by the first municipal council of the City of Toronto in advance of and during the cholera outbreak of 1834 will be considered in some detail.

The epidemic of 1834 represented the first major test of the Boards of Health Act, and its operation will be reviewed in Section D of this Chapter. Many of the problems associated with the administration's response to the epidemic of 1832 arose again in 1834, especially with respect to contests over funding and jurisdiction. It will be seen that these difficulties, together with continuing debate over the merits of high levels of immigration, contributed to an important amendment to the Boards of Health Act in the legislative session of 1834-1835, by which the statute was brought closer in effect to the statutes in place in neighbouring colonies. The argument will be made that this amendment, however incomplete relative to the other British North American initiatives referred to in Chapter Four, Section D above, functions as proof of at least tacit recognition by the administration of the weaknesses of its first legislative attempt to protect the public health.

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[489] The City of Toronto Act was first referred to at *supra*, note 24. Relevant excerpts are reproduced in Appendix 3 below.

But as was the case with the design and employment of law and legal institutions during the crisis of 1832, everything done by the executive, the legislature and municipal authorities was done under the uncertainty of medical opinion on the causes of cholera, the method by which it was spread, and its prevention. Debates in Upper Canada between contagionists and anti-contagionists continued throughout the summer and early fall of 1834, and, of course, were not resolved to any real extent prior to the disease abating in September. To fully appreciate the difficulties associated with the design and implementation of law during this second serious outbreak of cholera, it is necessary to re-visit these debates as they appeared in 1834. We will then move on to review the way in which officials responsible for protection of the public health used available regulatory means to meet that responsibility.

B. The Continuing Contagion/Anti-Contagion Debate

Commentary on the causes, spread and prevention of cholera published in the Upper Canadian press during 1834 was much more political in its content than it had been in 1832. The analysis of François Delaporte, Edwin Ackerknecht and others[490] on the motivation for much of the debate around theories of disease therefore has even more relevance for us in considering the state of knowledge of the public and decision-makers during the second cholera outbreak. The political content of the debate, for Delaporte and Ackerknecht at least, was centred on the contagionists' allegiance to the traditional ideology of the eighteenth century. The contagionist would defend the interference in private endeavour through quarantine and related regulatory initiatives by reference to the general welfare represented in an enhanced public health. Anti-contagionist opinion, on the other hand, was associated with a progressive politics. From this perspective, the argument from contagion was simply a ruse of powerful reactionaries to justify

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[490] See generally Chapter Three, Section B(iii) above.

interference with the expression of individual freedom and the enjoyment of privacy. The rights and freedoms on which the anti-contagionists based their arguments were often expressed through a new and vigourous entrepreneurship that, in the midst of the industrial revolution, was thought to hold great promise for general progress. When commercial successes were combined with an emerging infatuation with principles of early nineteenth century liberalism, spawned by the successes of the revolutions of the late eighteenth century, the argument of anti-contagionists had a great deal of momentum indeed.

As suggested in Chapter Three, Section B(iii) above, the historical judgment of the success of the anti-contagionist argument may be overstated. Nevertheless, in Upper Canada a great deal of public opinion was committed to the idea that quarantine and related regulatory measures were futile and inhumane. At the same time, more cautious observers felt that quarantine caused such little interference in the enjoyment of ordinary life that the promise of its success was far superior to the threat posed by its implementation. And hovering over this largely political debate was the indecision of a medical community that might be relied on to place the debate on a more sound scientific footing. In any case, confusion and frustration ruled the day.

The fact that members of the medical community were undecided about the ætiology of the disease can be demonstrated by reference to the correspondence of Dr. J. Stratford to the editor of the *Brockville Recorder*. As noted above,[491] Dr. Stratford published a long treatise on cholera in the 16 May 1833 edition of the paper, in which he canvassed the various explanations for the causes and transmission of cholera without deciding with any degree of certainty whether

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[491] *Supra*, note 475 and accompanying text.

the disease was contagious or not. As the epidemic of 1834 abated in Upper Canada in late September, Dr. Stratford again published his observations, suggesting that a recent case of cholera behaved differently than the *epidemic* cholera, and was not communicated to other patients sharing the same rooms. His conclusion, as a result of this case, was that this particular strain of the disease could not be considered contagious, and "that there may be something in the air in these Provinces which is favorable to the production of mere ordinary cholera."[492] The tentative conclusion, it appears, is that there is merit in the arguments of both the contagionists and the anti-contagionists, the former being correct respecting epidemic cholera, the latter showing a better understanding of "mere ordinary cholera."

Dr. Thomas Rolph of Ancaster showed similar equivocation. In a letter to the Civil Secretary in August 1834, Dr. Rolph related the appearance of cholera in the town to the visit of a wandering troop of "wild beasts." The actual medical connection between the beasts and the disease, however, is not made explicit. At the same time, he insisted that the Civil Secretary outline for him the extent of the powers of the local Board of Health in compelling local residents "to purify their habitations, cleanse their outbuildings and remove nuisances," all in furtherance, it is supposed, of the anti-contagionist's mission to remove the sources of noxious vapours.[493] Dr. Rolph's commitment to anti-contagionism is confirmed, it appears, in his letter to the Civil Secretary later in August, though his confusion of terminology may have given an erroneous impression to the casual reader. In this letter, he reports that "[the Board of Health has] had every house in the village thoroughly purified, every nuisance removed, and every thing

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[492] *Brockville Recorder*, 19 September 1834, NLC.

[493] Dr. Thomas Rolph to Civil Secretary, 1 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78429-78431.

calculated to propagate contagion destroyed."[494] The inconsistency in these letters lends further evidence to the indecision current in the Upper Canadian medical community.

This indecision likely had some influence on the behaviour of decision-makers responsible for the design and implementation of the regulatory response to the disease in 1834. In some cases, administrators resorted to measures that can only be described as born of desperation, and medical opinion on the efficacy of one measure or another was, as has been seen, largely inconclusive. In Kingston, for example, the editor of the *Upper Canada Herald* blamed the reappearance of cholera on the extreme heat in mid-July, together with the imprudence of people in drinking large amounts of cold water and in eating unripe fruits and cucumbers.[495] Because there had been only isolated cases of cholera in Kingston to this point in the summer of 1834, the editor claimed that the disease was not *infectious*. By this he could only have been confusing the two explanations for the spread of the disease. Either the editor meant to suggest that the disease was not *contagious* (since it was isolated to a few cases) or it was not *miasmatic*, the literal meaning of the term "infectious" at the time. If the editor meant that the disease was not miasmatic, then it is difficult to explain the focus on the weather as a cause of the disease. But in any event, he related as well the proposed solution of the local Board of Health:

> Mr. Nicholl has addressed us a note requesting the Magistrates to employ Musicians to perambulate the town in rotation, playing 'merry and stirring tunes' day and night till the present malady is removed. Mr. N. states that this plan was tried in several towns in the North of England with great success. Undoubtedly a state of fear and alarm predisposes for the disease, and lively music has a cheering

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[494] Rolph to Civil Secretary, 9 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78579-78580.

[495] *Upper Canada Herald*, 30 July 1834, NLC.

> effect, but Mr. Nicholl's remedy would seem to many persons as treating the subject with too great levity.[496]

Again, we can see in this editorial, and in the description of one of the measures proposed by the Board of Health, just how confused and desperate many in Upper Canada were as the disease progressed through the summer and early fall of 1834.

Probably the only relatively contemporary and unequivocal medical opinion at large in Upper Canada on the nature of cholera is contained in Dr. Elam Stimson's fairly well-known *The Cholera Beacon*, published in May 1835.[497] Dr. Stimson was a confirmed anti-contagionist, and in his treatise he did not hestitate to state his position with conviction.

> It is supposed that covering a vast extent of country – perhaps surrounding the world, an impure state of the atmosphere exists, tending to produce Cholera. This may be called *general infection*. In certain situations local causes operate to increase this contaminated state of the atmosphere – and this may be called *local infection*. To the union of these we apply the term *Epidemic influence*. Of the cause of the general infection we pretend to know nothing – but it would seem that the local infection is the product of heat and humidity, holding in solution a quantity of miasma or exhalations of decaying animal or vegetable matter. Hence we find Cholera has prevailed most in the vicinity of great water courses, and in low and marshy situations.[498]

Stimson gave detailed descriptions of the eruption of cholera at Galt in late July 1834, and at Hamilton and Dundas after the first week of August. He attributed the outbreak at Galt "to the highly vitiated, or imperfectly oxygenated air, produced by the numerous and sweltering crowd under the canvass" attending the performance by "Showmen with a Menagerie," offering this

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[496] *Ibid.*

[497] Elam Stimson, *The Cholera Beacon, being a Treatise on the Epidemic Cholera as it Appeared in Upper Canada, 1832-4* (Dundas: G.H. Hackstaff, 1835).

[498] *Ibid.*, 5. Italics in original.

evidence as proof of the argument from miasma.[499] He concluded this early part of his treatise by denying the possibility that cholera could be transmitted from person to person:

> A *contagious* disease we would define as one that is produced by a specific virus or morbid matter, that has either by contact or in the form of sweat – vapour from the breath – or some other excretion from the body, eminated [sic] from the sick of that disease, and which is capable of producing the same disease in another person. According to this definition, *Cholera is not contagious.*[500]

However, while Stimson's opinion appears certain on the relationship between the spread of cholera and the presence of miasma, there does not seem to be any evidence in the historical record that his views, or any of comparable conviction, were published in Upper Canada prior to the end of 1834. As a consequence, administrators were left to weigh the relative strengths of contagionism and anti-contagionism without a clear statement from the local medical community of the scientific foundations of either perspective.

The political aspects of the debate between contagionists and anti-contagionists revealed a great deal more certainty about the manner by which the disease was transmitted than did the published opinions of the medical profession. The stage was set for this debate by local presses, as they continued to plead with the public for strict regimens of cleanliness and sanitation. In the *Advocate* (the successor to William Lyon Mackenzie's *Colonial Advocate*), early reports quoted Québec sources to admonish residents to do all within their power to prevent the reappearance of the disease. "The Cholera was expected last spring; by a kind providence, our own exertions, and strict Quarantine at Grosse Isle, we escaped. This year, we neglect the most important means of prevention – those depending upon ourselves alone."[501] Both quarantine and self-help

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[499] *Ibid.*, 7-9.

[500] *Ibid*, 8. Italics in original.

[501] "From the *Québec Gazette*," *The Advocate*, 29 May 1834, NLC.

are referred to here, such that *The Advocate*, at this point in 1834 at least, was not prepared to take a clear stand on the relative strengths of the two principal approaches to the disease.

In the meantime, rumours again began to surface on the existence of cholera in Lower Canada. As had been the case in 1833, the press did its best to downplay those rumours. Perhaps representative is the report of the *Brockville Recorder* about the possibility of cholera in Montréal, "chiefly among emigrants." In reliance on eye-witness accounts from returning American tourists, however, the editor of the paper denied the truth of those allegations.[502] To similar effect was the early report of Kingston's *Chronicle & Gazette*.

> "We are happy to state, by the arrival of the Lower Canada Mail this morning, that the unpleasant rumour of the week, that the cholera was at Grosse Isle, is incorrect. Up to the 26th May, no case of cholera had occurred either on shore or afloat at that station, although several vessels had been detained by reason of their having sickness on board."[503]

The *Kingston Spectator* confirmed these denials by quoting the *Montréal Gazette*, saying "the season is the healthiest in years, and that there is no cause for alarm."[504] The rumours had impact in Bytown as well, for example, where the Board of Health was compelled to write the Civil Secretary in mid-July, advising that their investigation of the state of the town's health disclosed no cause for concern. The Board resolved to publish its findings in newspapers in both Montréal and Kingston, so as to alleviate worry among the population.[505]

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[502] *Brockville Recorder*, 25 July 1834, NLC.

[503] *Chronicle & Gazette*, 31 May 1834, NLC.

[504] "From the *Montréal Gazette*," *Kingston Spectator*, 24 July 1834, NLC.

[505] Board of Health at Bytown to Civil Secretary, 18 July 1834, PAC, July 1834, RG5, A1, Vol. 143, pp. 78133-78135.

Through a report in the *Brockville Recorder*, cholera was finally confirmed to have reappeared in Upper Canada on 1 August 1834,[506] and with this report the debate between contagionists and anti-contagionists began again in earnest. Much of the discussion centred on the merits of the argument from miasma, but there were some in Upper Canada who believed that cholera was contagious, and that therefore the isolation of the sick from the well was the best precaution available. The editor of the *Brockville Recorder*, for example, related the story of how the disease had invaded Merrickville as a consequence of the delay in that village of a barge towed by a steamboat. On the trip from Bytown to Merrickville fifteen deaths had occurred, and because the group was waylaid in Merrickville, the disease spread into the settlement, causing two deaths from cholera and eight other non-fatal cases. This situation, according to the editor, proved the contagious nature of the disease.[507]

The editor of the *Upper Canada Herald*, meanwhile, also supported the argument from contagion, suggesting that two principal indicators confirmed the unreliability of the anti-contagionist position. First, the disease followed the same course in 1834 as it had in 1832, progressing along the great shipping lanes and rarely moving in the opposite direction. This indicated that the movement of people and goods, rather than either a "general infection" or a "local infection," had something to do with the movement of the disease. Secondly, the general state of the public's health, and the sanitary condition of the cities and towns of Upper Canada, was much improved compared to 1832, a situation that would not prevail if the atmosphere itself were somehow corrupt. The result could only be that the disease was contagious, brought to

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[506] *Brockville Recorder*, 1 August 1834, NLC.

[507] *Brockville Recorder*, 5 September 1834, NLC.

Upper Canada by those proceeding along the St. Lawrence River and the lakes in the ordinary course of the movement of people and goods.[508]

From the contagionist's perspective, the political potential inherent in the debate between contagionists and anti-contagionists was introduced in an unsigned letter to the editor of the *Canadian Correspondent* in early September 1834. The entire anti-contagionist argument, according to this correspondent, was concocted so as to support the trading community in its insistence that the ordinary movement of people and goods not be disrupted by quarantine and related measures. "The East India Company and the great Merchants whose interests were injured by the quarantine restrictions, hired a host of reviewers, editors, and pamphleteers, to write the people into the belief that the disease was not contagious, and of course, that the quarantine laws imposed useless and vexatious restrictions on commerce." The writer then goes on to ridicule those in York who, "despite all evidence and argument to the contrary," cling to this invented position.[509] In a related editorial in Kingston's *Chronicle & Gazette*, the writer connected the encouragement of immigration to the prospects for commercial success, by asking rhetorically "[i]s the unwary stranger to be entrapped into an infected atmosphere, to serve the purpose of trade?" The editor then concluded by saying that the Lower Canadian press was complicit in this conspiracy by failing to report accurately on the state of the public health in Lower Canada.[510]

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[508] *Upper Canada Herald*, 10 September 1834, NLC.

[509] *Canadian Correspondent*, 6 September 1834.

[510] *Chronicle & Gazette*, 2 August 1834. This editor, like others who took part in the debate over the most appropriate regulatory initiative during the summer of 1834, seems to have used the term "atmosphere" rather loosely. The editorial appears designed to criticize those who would sacrifice something of the public health in favour of maintaining strong immigration and trade. The accepted regulatory measure from this perspective would be quarantine. But in using the

While some opinion was relatively supportive of the regulatory regimen that would follow the success of the contagionist's argument, much Upper Canadian comment insisted that quarantine and related measures were misguided and futile. Writing to the *Kingston Spectator*, "The Public Safety" described the situation like this:

> It appears the Cholera, during its present dreadful visitation, has exhibited more of an *infectious* character than in 1832 ... I fear the mortality in this way is mainly attributable to the absence of those precautionary measures which were successfully employed before. At the last period of our calamity, the habitations of the deceased were purified by Chloride of lime, whitewashing, fumigation etc.; ... now, however, we fear, no such important precautions are taken. The bodies of the dead are allowed to increase the disease.
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> If, as is now generally admitted, the Cholera is propagated through the medium of the atmosphere, it becomes the solemn and imperious duty of the gentlemen of the Board of Health, and all our inhabitants to use every agent that may remove the infection or miasma, the breathing of which is followed by so much danger and death. Precaution of this kind has been lamentably neglected.[511]

In addition to pieces such as this from local commentators, the presses published apparently learned comment from foreign sources. *The Advocate*, for example, printed an article called "Cholera in India," in which one Colonel Tod set out detailed arguments for the non-contagious nature of the disease. In the same issue, individual precautions recommended by the Board of Health in London, England were set out, and among them were recommendations to abstain from strong drink and to attend to personal cleanliness.[512]

Perhaps the most vehement local denunciation of quarantine and related measures came from "The Stranger's Friend," a correspondent to the editor of Kingston's *Chronicle & Gazette*.

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term "atmosphere," it sounds as though the editor is concerned with miasma, and that would align him with the anti-contagionist argument he is condemning.

[511] "The Public Safety," *Kingston Spectator*, 7 August 1834, NLC.

[512] *The Advocate*, 14 August 1834, NLC.

In the first of two published letters from this writer, we find an expression of regret that most of the paper's readers seem to be contagionists. The success of their opinion, born more out of fear than medical science according to the author, had a terribly debilitating effect on those most in need of sympathy and compassion. The writer cited several examples of how quarantine had failed over the course of the years, including at Kingston in 1832, when the disease abated, so the argument went, only after quarantine was lifted. Already in 1834, the disease was retreating without the necessity of quarantine ever being instituted. "The disease exists in a state of the Atmosphere, and appears wherever God pleases," wrote The Stranger's Friend, and consequently there was no ground for associating the arrival of cholera with the arrival of immigrants. Instead, the disease likely emanated from the lake; when the wind blew onshore, the disease increased, while when the wind blew offshore, the disease abated, at least according to this writer. The following language is typical:

> So far from the Board of Health, having deserved censure, for not enforcing quarantine against Emigrants, they deserve lasting praise, for their manly humanity.
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> When the disease was here, in 1832, the living had no pleasure of Life. A good deal of horror prevailed in the community, and in some instances, Man became to Man a fellow brute!
>
> On the present occasion, the socialities and the humanities of life, were and are maintained, and the manly resolution was and is operative, 'rather to die like men, than live like brutes!'
>
> This will be a more consoling reflection when the calamity shall have passed away, than if we had 'thrust out a loaf to the emigrant, on the end of a pitch fork!'[513]

It is not perfectly clear in this correspondence whether the writer believes that quarantine is ineffective, or simply inhumane. But it is clear that it is ill-advised, certainly when the treatment

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[513] "The Stranger's Friend," *Chronicle & Gazette*, 23 August 1834, NLC.

of immigrants during quarantine fails to maintain the "humanities of life." The possibility is left open, then, of a humane quarantine, and this possibility is raised again in the second letter to appear from "The Stranger's Friend." In this correspondence, the writer comments on the state of the quarantine facility at Grosse Isle, and admits to the possibility that there is potential for good in a properly constructed, properly managed receiving station for emigrants below Québec. But then, The Stranger's Friend outlines his suspicions about the political motivation for quarantine, saying that there exists in Upper Canada a party that wants to discourage immigration because more new British arrivals lessen that party's potential to sway the public against the administration at York. Anything that could be done to discourage emigration from Britain would be attempted by this party, suggested this letter, and at least implicitly The Stranger's Friend connected Lower Canada's emigrant tax to this same problem.[514]

The quarantine station at Grosse Isle was subject to a great deal of criticism during 1834, and the comments of The Stranger's Friend are typical. They were echoed by the editor of *The Advocate*, who concluded bluntly that the facility did more to spread the disease than it did to stem it. In quoting the *Montréal Courier*, *The Advocate* advised as follows:

> We mentioned yesterday that a proclamation of his Excellency the governor was expected at Quebec, ordering some important changes in the Quarantine Establishment at Grosse Isle. From the frightful dissemination of the malady throughout the two Provinces, the Quarantine at Grosse Isle may be considered worse than a total failure, and, if the reported remodelling of the system be not unfounded, such also appears to be the opinion of the Executive. From some details that have reached us we are inclined to look upon the Station, as at present constituted, rather in the light of a nursery to, than a barrier against disease.[515]

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[514] *Chronicle & Gazette*, 23 August 1834, NLC.

[515] "From the *Montréal Courier*," *The Advocate*, 28 August 1834, NLC.

While The Stranger's Friend and others condemned the operation of the quarantine station at Grosse Isle, most commentators did recognize that disease and immigration were connected. Even the editor of *The Advocate*, whose comments on the operation at Grosse Isle might lead one to conclude that he doubted the utility of quarantine in any form, was forced to conclude that "[cholera] evidently follows in the track of the emigrant who half famished from a miserable passenger ship is most susceptible of disease."[516] The only solution, then, would be to put a stop to the Lieutenant Governor's immigration programme, or institute an efficient, effective quarantine. This conclusion had the advantage of caution on its side, meaning that, since medical opinion was anything but conclusive on the means by which the disease was transmitted, the institution of quarantine, if it had any chance of success at all, ought to be considered very carefully. There was a great deal of support for this position during the epidemic of 1834. The editor of the *Upper Canada Herald*, for example, in direct response to the arguments of The Stranger's Friend, tried to balance an humanitarian concern for the destitute immigrant with a desire to ensure protection of the public health:

> [T]he strictest precautions for our safety are perfectly compatible with the exercise of all kindness and humanity to destitute emigrants. Indeed not less as an act of mercy to them than as an act of justice to the inhabitants of the provinces, must the most effectual measures be adopted to exclude the cholera in future. How many emigrants have left their friends and country only to find a ready grave in a distant land, leaving their bereaved orphans dependent on the benevolence of strangers. To prevent, if we can, suffering in others is a duty only secondary to our own preservation. A man may do every thing that is requisite to avert a direful calamity without being inhospitable and inhuman – without being a 'brute.'[517]

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[516] *The Advocate*, 28 August 1834, NLC.

[517] *Upper Canada Herald*, 27 August 1834, NLC.

These comments were echoed by the editor of the *Canadian Correspondent* who, while admitting that he did not know and did not have the competence to determine whether cholera was contagious or not, nevertheless preached caution to his readers on the most appropriate regulatory response to the disease. At least implicitly, he suggested that whatever disruption might result to private commercial interests and to the public commercial good as a result, quarantine was the wise alternative. "We are however of opinion, that the people should act on the supposition of contagion, even when its evidence does not exceed a probability, and that the Legislature of the Country, acting on the same supposition, should take the earliest opportunity to prevent a recurrence amongst us, of so direful malady, as far as may be done by humane and proper enactments."[518]

The editor of the *Canadian Correspondent* garnered some sympathy in his appeal for more strict regulatory controls on immigration and the movement of the sick. In a very thoughtful letter to the same editor, "A Friend to Knowledge" put forward the position that whether quarantine and sanitation laws are effective or not, the public must be educated as to the best means of preventing the disease, and on the best means of treating it once it appears. The writer did admit that there was no way to be sure whether or not the disease was checked by efficient sanitary regulations, or by the careful and orderly habits of the people, and some of this equivocation came through in comments on the advisability of various legal alternatives.

> Better regulations to prevent the crowding of passengers, and providing for them more comfortable accommodation, are required on the grounds of humanity. A proper and strict quarantine may be extremely useful. Imperfect as it probably was at Grosse Isle, it has probably done good this year, by retarding the breaking out of the disease. Hospitals are necessary at all times for sick strangers. Sanitary regulations – particularly by enforcing the cleanliness of the towns and dwellings, and the purification of houses and effects where sickness has prevailed – may be useful; or they may be pernicious, as it was alleged they were in 1832. It is

[518] *Canadian Correspondent*, 6 September 1834, NLC.

> knowledge that it wanted, or, at least, full conviction of our ignorance of some of the most essential points. The errors of the people on this subject must be particularly fatal; for, after all they are the best guardians in such cases of their own safety. Without their care and exertions, the ordinary vicissitudes of the seasons would, alone be sufficient to destroy them; no regulations nor power could save them.[519]

This letter draws together much of the doubt and confusion that prevailed in Upper Canada during the summer of 1834, as to the cause, prevention and transmission of cholera, and consequently on the best regulatory response to the disease. While there were some observers who felt strongly that the argument from miasma was the invention of the commercial classes, others felt that quarantine was championed by those who would discourage immigration for the sake of political gain. The success of one argument or the other would direct the regulatory response, as it had in 1832.

Throughout this debate, the executive government at York was silent. Only one communication issued from the Lieutenant Governor's office on the contagion/anti-contagion debate, and it was written before cholera was confirmed to have appeared at Brockville in early August. Archibald McLean had written to Colborne on 21 July about the possibility of cholera appearing at Cornwall before the end of the immigrant season, and in his reply Colborne gave the assurances we might predict from someone who, according to the best evidence available from the epidemic of 1832, was certainly not convinced of the efficacy of quarantine. The letter to McLean is a masterful deflection of the concern about immigration. Colborne advised McLean that both Montréal and Québec, the first points of entry for immigrants, were generally healthy and relatively disease free. Instead, suggested Colborne, the local authorities in Cornwall ought to concern themselves with the large numbers of labourers gathering in the town to begin work on the improvement of the St. Lawrence. It was through such a gathering of so

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[519] "A Friend to Knowledge," *Canadian Correspondent*, 27 September 1834, NLC.

many people in a small area during the hot summer months that the people of Upper Canada ran the risk of fostering the spread of disease. In other words, immigration was not to be feared, and there would be nothing to be gained from a quarantine facility except the risk of creating the best conditions for the emergence of the very disease it was intended to stop.[520]

In the result, then, there was no resolution of the debate around contagionism and anti-contagionism, and consequently there could be no firm decisions on the most advantageous regulatory regime to follow. Medical opinion was split and inconclusive. Both sides of the argument found favour with popular opinion, and influential editors of local newspapers did not agree among themselves. Many officials responsible for the design and implementation of regulation at the local level were confused, and they worried about the threat that cholera posed to their citizens, given the uncertainty. In the meantime, the only communication from the office of the Lieutenant Governor dismissed the possibility that immigration posed a threat to the public health of Upper Canada, and consequently no support for quarantine and related measures could be expected from York. It was in this atmosphere, then, that the first municipal council in the City of Toronto assumed its duties in 1834. And it was with this uncertainty that local officials attempted to live up to their responsibilities under the Boards of Health Act.

C. Health Measures in the City of Toronto, 1834

(i) The City of Toronto Act

The City of Toronto Act[521] was passed by the Legislature at York on 6 March 1834, and it was immediately published in local newspapers.[522] The statute was intended to address the

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[520] Civil Secretary to Archibald McLean, 25 July 1834, PAC, RG7, G16C, Vol. 31.

[521] The City of Toronto Act is first referred to at *supra*, note 24, and relevant portions are reproduced in Appendix 3 below.

question of the expanding population of the Town of York, and to provide a more efficient system of government and policing for the community. The new City was divided into five wards, and the Council would be made up of two aldermen and two councillors from each. The mayor was to be elected by the Council from among its number. The first municipal elections were held on 27 March 1834, and the citizens of the City returned a majority of aldermen and councillors sympathetic to the cause of reform. Included in this number were both William Lyon Mackenzie and the moderate reformer Dr. John Rolph. At the first meeting of Council, Mackenzie was elected mayor, and Rolph, unhappy that he had been passed over by the Council, refused to be sworn in as Alderman for St. Patrick's Ward. His position on Council was ultimately filled in a by-election on 24 April 1834.[523] Mackenzie resigned as editor of *The Advocate* in early April.[524]

Many of the early responsibilities of the first Council were met through the enactment of a series of by-laws during the initial three months of the Council's mandate, and these by-laws will be considered below in Section C(ii) of this Chapter. The Council's attempt to act on these

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[522] See, for example, *The Advocate*, 29 March 1834.

[523] "Journal of the Common Council of the City of Toronto," City Council Minutes 1834, CTA. Many books and articles chronicle the early administration of the City of Toronto, including the tension between Mackenzie and Rolph that had been building for some time and then climaxed with Mackenzie's success in being elected the first mayor. See, for example, F.H. Armstrong, "William Lyon Mackenzie, First Mayor of Toronto: A Study of a Critic in Power" (1967), 48 *Canadian Historical Review* 309; John Muggeridge, "John Rolph – A Reluctant Rebel" (1959), 51 *Ontario History* 217; Paul Romney, "William Lyon Mackenzie as Mayor of Toronto" (1975), 56 *Canadian Historical Review* 416; Romney, "A Struggle for Authority: Toronto Society and Politics in 1834," in Victor L. Russell (ed.) *Forging a Consensus: Historical Essays on Toronto* (Toronto: University of Toronto Press for the Toronto Sesquicentennial Board, 1984), 9; and W.D. LeSueur, *William Lyon Mackenzie: A Reinterpretation* (Toronto: The Macmillan Company of Canada Limited, 1979), especially Chapter Thirteen, "The Combat Deepens: Mackenzie, First Mayor of Toronto." There are many additional treatments of this period in Toronto's history.

by-laws during the cholera epidemic of 1834 was met with a number of administrative challenges and difficulties, and these matters will be reviewed below in Section C(iii) of this Chapter. The City of Toronto Act contained the statutory framework under which these by-laws were passed and under which the attempt to enforce them was conducted.

Council's general law-making powers were contained in Section XXII of the statute. As is typical with statutes by which law-making authority is delegated from one legislative body to another, Section XXII is long and detailed, specifying the power to make laws in connection with virtually anything imaginable that might affect the lives of the citizens of the City. The legislature provided a general power as well, vesting in the Council the authority "to make all laws as may be necessary and proper for carrying into execution the powers hereby vested or hereafter to be vested in the said Corporation, or in any department or office thereof, for the peace, welfare, safety and good government, of the said City and the Liberties thereof, as they may from time to time deem expedient, such laws not being repugnant to this Act or the general laws of the Province." The powers of the Council were therefore both comprehensive and independent of supervision by any other legislative body.

There were a number of specific powers granted by Section XXII that had direct implications for the cause of public health. These specific powers gave the Council the mandate to protect the people of Toronto from a variety of threats and, given the contemporary confusion surrounding the causes and means of transmission of disease, they were required to be as inclusive as possible. Provided to the Council was the power to make by-laws relative to the making, repairing and cleaning of streets and sewers, thereby addressing issues that had posed many problems for municipal leaders during the health crisis of 1832. Related to the power to

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[524] *The Advocate*, 17 April 1834, NLC.

build and maintain sewers was the power to provide "good and wholesome water to the ...City" and to "prevent the waste of water." The Council therefore had complete control over the central public health issue inside the municipality, that is, the supply of clean water and the disposal of waste. Control over livestock was given to the Council, too, and this had direct implications for the state of cleanliness of the City. There was also a general power in the City "to abate and cause to be removed any nuisances" within the City. Through this power the City would be entitled to enforce by-laws prohibiting the accumulation of refuse on private lands, for example, and respecting general conditions relevant to the City's health. To supplement these specific powers was the more comprehensive power "to provide for the health of the ... City and the Liberties thereof," in effect vesting complete responsibility for the public health of the citizens of Toronto in the Municipal Council.

The provisions of Section XXII also had implications for the various health care professions, and for monitoring the effects of disease among the population. Allowance was made in the Section for the imposition of a responsibility on physicians and others to prepare and return bills of mortality. The bills themselves would be in a form required by the Council, and the Council was empowered to impose penalties for the failure to comply with preparation and filing requirements. Related to this responsibility was the power in the Council to regulate the burial of the dead, an issue that had caused some consternation during the height of the epidemic of 1832. The obligation to police the City was vested in the Council too, and the police would be the authority that would ultimately assume the duty to see to the enforcement of many of the by-laws related to public health.

The other section of the City of Toronto Act with relevance for our purposes is Section LXXI, respecting the appointment of a Board of Health. It is clear from this Section that a Board

of Health appointed by the Council was to be made up of members of Council, without representation from outside. This meant that, conceivably, the Board of Health could be composed completely of aldermen and councillors without medical training. It was assumed by this Section that the Mayor would be ultimately responsible for the enforcement of by-laws relative to the public health; the mandate of the Board of Health was first and foremost directed toward supporting the Mayor in this respect. In addition, the Board was to assist the Mayor in preventing "the introduction and spreading of infectious and pestilential diseases" in the City.

Section LXXI functioned as a delegation to the Council of the Lieutenant Governor's power to appoint Boards of Health pursuant to the Boards of Health Act. But the delegation was limited to the powers of appointment; the power and authority of the Board to be appointed under Section LXXI, on one reading at least, was limited to that contained in the Boards of Health Act. As discussed in Chapter Four, Sections B(iii) and D above, those powers and authorities were severely limited, meaning it is not at all clear that the Board of Health to be appointed for the new City of Toronto would have any powers other than those contained in Section II of the Boards of Health Act. That latter provision vested powers of inspection in local Boards of Health, the power to order the abatement of nuisances, the power to enlist the services of constables to assist in enforcement, and nothing further. This reading of Section LXXI, however, seems to contradict the initial suggestion in the Section that the Board of Health appointed for the City was to assist the Mayor in enforcing the by-laws of the City relating to protection of the public health. We have already seen that Council's powers in this respect extended to everything from cattle to sewers to the burial of the dead. This would be a mandate for the City's Board of Health that would be much more sweeping than that vested in Boards of Health pursuant to Section II of the Boards of Health Act. If this latter reading is correct, then it

is not at all clear why the additional provision in Section LXXI of the City of Toronto Act, referring to the powers of appointees under the Boards of Health Act, was included at all. On this second reading, it appears to be superfluous.

This was the statutory framework, then, under which the first Council of the City of Toronto assumed its responsibility for protection of the public health of the City in the spring of 1834. The memory of the cholera epidemic of 1832 was still very fresh, and as we shall see, the Council moved very quickly to put by-laws in place to meet its responsibilities.

(ii) Municipal By-Laws

Among the initial nine by-laws passed by the City's first Council, three were directly related to matters of public health, a testament to the impact that the cholera crisis had made on local decision-makers. All were specifically authorized by either Section XXII or Section LXXI of the City of Toronto Act. Momentum in matters of public health was maintained through articles in the local newspapers that continued to point out the dangerous progression of cholera in the United States and overseas. In *The Advocate*, for example, we find the following:

> *The Courier* notices several cases of that terrible complaint the Cholera as having lately occurred at or near New Orleans and on the Ohio. In several places in Ireland it is also committing great havock [sic]. An efficient board of health, a careful health officer, and great attention to the cleanliness of the city during the summer on the part of the citizens and of the municipal authorities may do much to prevent the importation and spread of contagious diseases. The proposed ordinance for a board of health ought to receive an early consideration.[525]

By-law #4, *An Act Concerning Nuisances and the Good Government of the City*,[526] was passed by Council on 30 May 1834.[527] There is nothing in the Minutes of the Council meetings

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[525] *The Advocate*, 22 May 1834, NLC.

[526] By-law #4 is reproduced in Appendix 4 below.

to suggest any debate or controversy. Prior to its passage, By-law #4 was widely published in Toronto newspapers, the intention being to give citizens a chance to comment on its provisions. The *Canadian Correspondent* reported as follows: "We insert, in this Number the contemplated bill concerning Nuisances ... They have not as yet passed the City Council, but we conceive it due to our fellow citizens, that they should be afforded an opportunity to pronounce their judgment upon them, and petition against them, if considered necessary before they pass into a law."[528] It is not clear from these comments whether the paper considered the proposed by-law to be ill-advised, or whether it was simply fulfilling a perceived civic duty to alert its readers to legal developments at City Council. Otherwise, By-law #4 was passed into law without debate in the public arena, and the official version appeared in the *Upper Canada Gazette* on 12 June.[529]

By-law #4 was essentially penal in nature. The entire Section I of the By-law, containing twenty specific sets of prohibited activities, was framed in terms of quasi-criminal behaviour, establishing "guilt" and imposing penalties for specified acts, and enlisting the support of the constabulary in enforcement. Many of these prohibitions were directed at protecting the public health. For example, in Clause 3 of Section I we find a penalty of ten shillings for throwing or depositing "dung, manure or filth of any description whatsoever, in the front of the city upon the sand, beach, or in the water in the harbour." In Clause 5, the Council addressed the continuing problem of huts or shanties along the lakefront, an issue that had caused some consternation in

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[527] "Journal of the Common Council of the City of Toronto," City Council Minutes 30 May 1834, CTA.

[528] *Canadian Correspondent*, 17 May 1834, NLC.

[529] *Upper Canada Gazette*, 12 June 1834, NLC.

1833,[530] and that would arise again during the early months of this first Council's mandate.[531] In Clauses 6 and 10 of Section I, Council established regulations on the dumping of offensive materials. The former established a penalty of five shillings for depositing anything on vacant lots or in the streets, and the latter imposed the significant fine of one pound five shillings for allowing the accumulation of "any garbage of fish or any other offensive, putrid or unwholesome substance," whether in public places or on the private lot, house or outbuildings of the offender. In Section III we find the attempt to control swine in the City, followed in Section IV by procedures for the disposal of swine seized under the provisions of Section III.

In all of these provisions, we find the City using its powers as established under the City of Toronto Act to impose regulations in service of an enhanced public health. The common good, it must be assumed, took precedence in the minds of the decision-makers over the private rights and freedoms of citizens that, because of these by-laws, were relegated to secondary importance. Included here were the freedom to enjoy one's property in the manner of one's own choosing, and the right to privacy that might be invaded by constables in the employ of the City. These rights were to be sacrificed, in part at least, should conditions prevail that suggested a threat to the welfare of the community as a whole.

There are two additional provisions in By-law #4 that deserve mention. Both are somewhat incongruous. The first is contained in Clause 7 of Section I, in which physicians administering the smallpox vaccine were made subject to the very significant penalty of five pounds for each inoculation completed. A penalty of two pounds ten shillings was provided for

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[530] See *supra*, notes 426-429 and accompanying text, for a discussion of aspects of this problem arising during the spring season, 1833.

[531] See below, Section C(iii) of this Chapter.

every "person suffering himself, his wife, child, apprentice or servant to be inoculated." This prohibition is surprising and inexplicable, given the very positive support given to a programme of inoculation by charitable organizations and the *Canadian Freeman* as late as May of 1831.[532] There is nothing in the minutes of Council meetings, nor in local newspapers, to explain the rationale for this provision. The second difficulty in By-law #4 is in Clause 13 of Section I. There, the Council purported to prohibit the loading and unloading of cargo from vessels in the harbour on the Sabbath. Because Section III of the Boards of Health Act specifically reserved the power to the Lieutenant Governor to regulate the "landing or receiving ... Cargoes on board" boats "at the different Ports or other places within this Province," and because the City of Toronto Act did not specifically delegate this power to the City Council, it is likely that Section I, Clause 13 of By-law #4 was *ultra vires* the City.

By-law #8 was entitled *An Act to Establish a Board of Health*.[533] Notice of Motion of its introduction was first given by Alderman Thomas Carfrae on 26 May 1834,[534] the intention being to introduce the bill in draft form the next day. However, the minutes of 27 May are silent on the matter. Alderman Carfrae next raised the question of a Board of Health during the meeting of 29 May, in which he moved for the appointment of a five member Board, including the Mayor.[535] The motion was obviously premature; the bill itself had not yet been introduced for debate. Eventually, the bill was introduced at the Council meeting of Saturday 31 May, at

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[532] See *supra*, note 139 and accompanying text.

[533] By-law #8 is reproduced in Appendix 5 below.

[534] "Journal of the Common Council of the City of Toronto," City Council Minutes 26 May 1834, CTA.

[535] "Journal of the Common Council of the City of Toronto," City Council Minutes 29 May 1834, CTA.

which time Council went into Committee to consider its provisions in detail. The Committee reported back to Council that the bill was satisfactory without the necessity of amendments, and it was resolved to read the bill a third time "tomorrow" (a Sunday).[536] The bill is not mentioned further in the City Council Minutes until Friday 6 June, at which time the bill was put to the question, but did not pass. Instead, the Council resolved to send the bill back to Committee. The Committee met immediately to consider the bill, and reported back to the Council, suggesting some amendments. The bill, with the amendments, was then passed by Council at its meeting of 9 June 1834.[537] There is nothing in either the Council minutes or the newspaper accounts of the passage of By-law #8 to explain any of the initial delay in its introduction, the premature attempt to appoint members to the Board, and the difficulties in securing final approval of the Council. We can assume some controversy around the bill, but the details of that controversy have been lost. By-law #8 was published in the *Upper Canada Gazette* on 12 June 1834.[538]

There are a number of important provisions contained in By-law #8. The most significant were those respecting the establishment and powers of the Board of Health. The Board was to be appointed annually, composed of four members of the Council and the Mayor. Generally, it was to have powers to enforce the laws of the City Council and the Province "providing against infectious and pestilential diseases." More specifically, under Section II the Board was required to make "diligent inquiry with respect to all nuisances ... which they may

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[536] "Journal of the Common Council of the City of Toronto," City Council Minutes 31 May 1834, CTA.

[537] "Journal of the Common Council of the City of Toronto," City Council Minutes 6 June and 9 June 1834, CTA.

[538] *Upper Canada Gazette*, 12 June 1834, NLC.

deem obnoxious to the Health and lives of its Inhabitants," and to impose penalties of between five shillings and five pounds for breach of relevant regulations. It is not clear how the penalties to be imposed by the Board pursuant to this provision relate to the penalties to be imposed for the same offences under By-law #4; the penalty under By-law #8 would appear to be a duplication.

Perhaps most important for our purposes are the provisions of Sections III and IV. Here, we find the City Council vesting in the Board of Health the power to establish a system of domestic quarantine not unlike that allowed for in England pursuant to the various statutes referred to above in Chapter One.[539] Read together, Sections III and IV allow the Board of Health to establish lazarettos, employ physicians and other attendants, purchase medicines and prescribe treatment. The Board was also given wide discretion to make such rules and regulations relative to the operation of quarantine as it deemed fit, in any situation where an "epidemical" disease had established itself in the City, or "upon a probable approach" of such a disease. In addition, the Board could order the forcible removal of any person or thing within the City that was determined to be "infected or tainted" with "pestilential matter." The places to which such persons or things might be removed were to be determined by the Board, consistent with the best interests of the City as a whole. Again, these provisions were penal in their nature, allowing for penalties of up to two pounds ten shillings for each breach of the Board's orders, and imposing the duty of enforcement on the High Bailiff and the City Inspector. In effect, through these provisions in By-law #8, the City Council overcame the failure of the Legislature to provide for the establishment of domestic quarantine through the efforts of local Boards of Health under the Boards of Health Act. At the same time, however, in reading these parts of By-law #8, it must be remembered that there was nothing in the City of Toronto Act, nor was there

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[539] See *supra*, notes 10-13 and accompanying text.

anything in the By-law itself, to ensure that expert medical personnel would be part of the Board. This means that, potentially at least, ultimate responsibility for the operation of domestic quarantine and the establishment of regulations respecting treatment and the general response to epidemic disease fell to lay members of City Council.

Additional powers were vested in the Board of Health, too, some of which seem to duplicate provisions in By-law #4. For example, keepers of boarding houses, hotels and other places of public lodging were required to make morbidity reports, and physicians were directed to file mortality and morbidity reports in the manner prescribed by the Board. The Board was also given the power to enter and examine any premises within the City, and to order the improvement of those buildings, the removal of all nuisances and the elimination of all stagnant waters. These powers are not dissimilar to those contained in By-law #4. In addition, the By-law provided a variety of additional prohibitions and penalties related, for example, to the manner of dealing with human corpses, animal carcasses, and the waste products of butchering operations. By these it was intended, it is assumed, to give the Board of Health the widest possible mandate to act in accordance with the public's best interest in matters of health.

The combined effect of By-law #4 and By-law #8 was that City Council addressed both sides of the debate between contagionists and anti-contagionists. In By-law #4, the City regulated those matters thought to contribute to "putrid emanations" from the earth, including rotting animal and vegetable matter, stagnant waters, and refuse of all varieties. Some of these concerns were addressed in By-law #8 as well. By virtue of the quarantine provisions of By-law #8, the Board of Health was given authority to rely on the contagionist's argument to separate the sick from the well. The confusion that reigned in the medical community did not appear to

have any effect on the ability of the Council to institute the most comprehensive public health protection system they could devise, and, most importantly for our purposes, the political aspects of the debate seem to have been ignored.

On 19 June, Council passed By-law #9, entitled *An Act for Regulating, Paving, Cleaning, and Repairing the Streets and Roads, and for Constructing Common Sewers.*[540] According to *The Advocate* of 29 May 1834, a "Report on Roads, Streets, Sewers, Drains, etc." was tabled at a "recent Council meeting," but there is nothing in either the Council minutes or its background papers to confirm *The Advocate's* report.[541] The bill was originally introduced at the meeting of 6 June, and Council immediately went into Committee to consider its provisions, but there is no explanation in the minutes of subsequent meetings to explain why another two weeks passed before the By-law was finally passed. It was published in the *Upper Canada Gazette* on 26 June.[542]

Much of By-law #9 is taken up with the establishment of the office of Street Surveyor, with outlining the duties of that office, and with regulating the use of the public roads within the City. Actually, the By-law is inaccurately named, since it does not contain provisions for the construction of sewers at all. There are important clauses, however, regulating the freedom of the owners of buildings to connect to the common sewers, and here we see the City Council

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[540] "Journal of the Common Council of the City of Toronto," City Council Minutes 19 June 1834, CTA. By-law #9 is reproduced in Appendix 6 below. The date of passage of By-law #9 was erroneously reported as 13 June 1834 by *The Advocate*, 26 June 1834, NLC.

[541] *The Advocate*, 29 May 1834, NLC. Minutes of some of the very early sessions of City Council, including those for the meetings of 16, 17 and 18 April 1834, have been lost, and that may explain the difficulty in substantiating *The Advocate's* report. See "Journal of the Common Council of the City of Toronto," City Council Minutes, April and May 1834, CTA. However, there is nothing of relevance in City Council background papers, either. See CTA, RG1 B1, City Council Background Papers, Box 1 (April 1834-April 1835).

making some attempt to control the way in which waste material was to be disposed of in the City. Connections to the common sewer could only be done with the permission of the Street Surveyor, on the penalty of two pounds ten shillings. The type of construction of drains leading into the common sewers was specified too, and these provisions generally provided for stable, reliable drains of brick or stone, with iron or copper grates across their outlets. The By-law even prescribed the maximum distance between the bars of those grates, and gave power to the Street Surveyor to make further regulations respecting details on connection to the common sewers. By Section XXI, it was made clear that any connection to the common sewer was to be for the purpose of the disposal of ordinary waste water only; there was a specific prohibition against connection for the purpose of disposing of the contents of "any privy or Water Closet."

The Street Surveyor was responsible for the performance of a number of other duties that had implications for the public health. For example, in Section XXX cartmen were to be employed to remove all "manure, rubbish and dirt" from public areas in the City. By virtue of Section XXXII, the cartmen were to visit every street at least once each day during the months of May, June, July, August and September, and to receive "all vegetables, ashes, offal, or garbage which shall be delivered at such cart." The penalty for breach of this latter provision was stated to be "five shillings for every neglect or refusal." However, it is not clear whether that fine applied to a breach by the Street Surveyor of the obligation to see to the performance by the cartmen of their rounds, to a neglect by the cartmen to complete their rounds, or to the refusal of householders to deliver their garbage to the cartmen as they passed by.

From a review of these early by-laws of the City of Toronto, it seems certain that the first Council took its public health responsibilities very seriously indeed. While there are occasional

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[542] *Upper Canada Gazette*, 26 June 1834.

anomalies in the by-laws, for the most part they are comprehensive and clearly written, indicating a sincere commitment to living up to the mandate imposed on the Council by virtue of the City of Toronto Act. The by-laws strike a balance between the arguments of contagionists and anti-contagionists. Ordinary provisions for the control of nuisances were likely appropriate in any event, given the constant complaints in the presses about the deplorable condition of the City. At the same time, they answered the argument that miasma was to be blamed for the eruption and spread of dangerous diseases, including cholera. In the meantime, should an "epidemical" disease appear or threaten to appear, then the Board of Health had the power to respond with domestic quarantine, and the Council would support their decision through the assistance of the constabulary in enforcement of the Board's orders. Finally, the City began the process of establishing a means for the control of waste water that would ultimately lead to the institution of a municipal sewer system. The stage was then set for the City to respond to cholera as it again threatened the population during the late summer and early fall of 1834.

(iii) Administrative Challenges

Rumours that cholera had returned to Toronto began to appear in late July 1834, and newspaper reports on the state of the City's health continued throughout August and September. The first alarm was raised by the *Canadian Correspondent*. It reassured its readers that there was "no prevailing sickness, and the general health of the city is good," despite the fact that the City's weekly bill of mortality showed the number of deaths in the previous week to be "unusually great."[543] The first confirmation of the return of the disease was published by *The Advocate*, and it included a plea for calm, a reminder about the necessity of increased attendance

[543] *Canadian Correspondent*, 26 July 1834, NLC.

to "keeping all premises sweet," and praise for humanitarian efforts in treating the ill.[544] On 2 August, the *Canadian Correspondent*, in a tone somewhat apologetic for having to report the extent of the disease, related that "... Cholera has again made its appearance in this City, and ... many valuable lives have already fallen victim to its malignity. If we could anticipate any possible good from concealment, we should not be among the first to make this announcement..."[545]

Estimates of the severity of the epidemic of 1834 in Toronto vary. Geoffrey Bilson, for example, relied on the *Canadian Courant* to conclude that there were 158 deaths from cholera in the City during the period 3 August to 7 September.[546] *The Advocate*, however, reported the extent of the disease as follows:

> We announced last week that the burials in this City during the week ending 10th August were 125; on the seven days ending with last Sunday they were 147. Previous to these returns 70 deaths had occurred commencing with the 30th of July, of which 40 had been reported to the Board of Health as of Cholera – giving 342 deaths in 19 days out of a population of 6000 persons; for it may be fairly estimated that at least 4000 persons have left the city.[547]

There are several difficulties with *The Advocate's* reporting here. First, in citing the number of burials, the writer does not discriminate between cholera deaths and deaths from other causes. For the week ending 10 August, for example, the *Canadian Courant* recorded a mere five deaths from cholera according to Bilson's summary, rather than 125. For the week ending 17 August, the *Canadian Courant* reported 29 deaths, *The Advocate* 147. Secondly, according to Bilson the

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[544] *The Advocate*, 31 July 1834, NLC.

[545] *Canadian Correspondent*, 2 August 1834, NLC.

[546] Bilson, *A Darkened House: Cholera in Nineteenth-Century Canada*, *supra* note 3, Table 3, 181.

[547] *The Advocate*, 21 August 1834, NLC.

Canadian Courant did not report any deaths from cholera prior to 3 August, while *The Advocate* reports 40. Thirdly, *The Advocate* may have had political motivation in overstating the extent of the disease, taking the opportunity to criticize those who had the means to flee the City. According to Charles M. Godfrey, a larger number of people had left the City as the disease approached than had done so in 1832, and as a consequence the relief effort was hampered by a lack of personnel.[548] *The Advocate* ridiculed this behaviour, saying "so far as our recollection goes, not one of the officers of the government died of cholera either in 1832 or 1834; their superior means, the ease and comfort in which they live, the little connexion they have with the citizens, tend to keep them secure from contagion."[549]

Despite the problems in reconciling the various reports of the extent of the epidemic, it is clear that cholera presented a serious threat to the citizens of Toronto as August and September progressed. In *A History of the Toronto General Hospital*, published by C. K. Clarke in 1913, the author stated that "[e]very twentieth inhabitant was swept away by this visitation."[550] This would be a five per cent mortality rate, comparable in severity to the worst experiences of the epidemic of 1832.[551] Clarke's conclusion would tend to support the statistics related by *The Advocate*, based on the remaining population of 6000, as opposed to the ordinary population of 10,000. In any event, however, by 4 September *The Advocate* could report that "cholera has all

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[548] Charles M. Godfrey, *The Cholera Epidemics in Upper Canada, 1832-1866*, *supra* note 3, 44.

[549] *The Advocate*, 21 August 1834, NLC.

[550] Quoted in Godfrey, *The Cholera Epidemics in Upper Canada, 1832-1866*, *supra* note 3, 44.

[551] *Supra*, notes 6-9 and accompanying text.

but left the city," although the writer complained about the inaccuracy of bills of mortality due to the failure of the sexton at the general burying ground to file his returns on time.[552]

Immediately prior to and during the epidemic of 1834, the new City Council experienced two significant administrative problems that underscored the difficulties inherent in implementing its statutory mandate. Both related directly to jurisdictional questions arising out of the City of Toronto Act and the by-laws passed by the Council pursuant to that Act, and both had direct implications for matters of public health. First, the Council continued to struggle with the presence of huts along the lakefront. Secondly, the squabbling that generated so much difficulty for the Board of Health in the Town of York during 1832[553] re-surfaced during 1834, despite the Board's apparently clear authority under the City of Toronto Act and By-law #8.

As related above, [554] the problems with construction of temporary lodgings along the lakefront had arisen first in 1833, when some members of York's élite complained about the interference the huts created in the enjoyment of the beach and walkways by the citizens, and the danger they posed to the general health of the community. It is relatively certain that, either by virtue of the specific law-making powers granted to the City under Section XXII of the City of Toronto Act, or through the general powers contained in that Section, Council had the authority to regulate the construction of buildings on the beach. At the beginning of the Section, the power is given to regulate in relation to the wharves, docks, slips and shores of the City, although this power does not specifically provide for the control of construction in that respect. Later,

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[552] *The Advocate*, 4 September 1834, NLC.

[553] This issue is reviewed at *supra*, notes 176-178 and accompanying text, and at *supra*, notes 319-326 and accompanying text.

[554] *Supra*, notes 426-429 and accompanying text.

Section XXII allows for regulation to prevent encumbrances of the public wharves, docks and slips, although the shores are not mentioned here. As well, this latter power appears to be limited to the prevention of encumbrances by "wheel-barrows, carts, carriages, lumber, stone, or other materials whatsoever," meaning that it is not certain that a hut or shanty would constitute an encumbrance for this purpose. Still later in the Section, a more general power is given to regulate wharves and quays, which is followed by the authority "to prevent all obstructions in the bay, harbour or river, near or opposite to any dock, wharf or slip." Relevant as well is the wide power to abate and remove nuisances, and to provide for the health of the City generally. Finally, City Council was given discretion to regulate "for the peace, welfare, safety and good government" of the City, although the law-making powers created by Section XXII could only be exercised in a manner "not being repugnant to ... the general laws of the Province." Therefore, while the various specific law-making powers established by Section XXII may be a bit ambiguous as to the authority of the City to control construction on the beach, the general powers appear to be wide enough to allow for such regulation, so long as there was no interference with the general law.

The difficulty with huts along the lakefront attracted the attention of Council almost immediately upon its taking office. Correspondence exchanged between the Mayor and the Civil Secretary on the matter early in May, and the Civil Secretary finally wrote to Mackenzie on 8 May. In that letter, it was suggested that the power of the Council to deal with the issue depended on the title under which those claiming ownership of the huts had acted. The matter might be a simple one of permissions or licences, or it might be more complicated.[555] This letter

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[555] Civil Secretary to Mackenzie, 8 May 1834, CTA, RG1 B1, City Council Background Papers, Box 1 (April 1834-April 1835).

was followed by the opinion of the Attorney General, Robert S. Jameson, who admitted that the huts were occupied for "immoral purposes." Despite this, however, Jameson considered that the City had no power to "abate this evil," whatever the tenure of the squatters might be. Instead, the City could only proceed "by the general course which the law has furnished." Jameson gives no suggestion as to what that "general course" might be.[556]

The Lieutenant Governor's office became involved again on 16 May, writing to the Mayor to request that the municipal police officers prepare a report describing the huts and shanties such that the Commissioner of Crown Lands and the Trustees of the Public Grounds "may be requested to take measures for their immediate removal."[557] This letter was followed almost immediately by a further opinion of Attorney General Jameson, in which Jameson outlined that the Trustees ought to proceed against the squatters in ejectment if the huts were on Trustees' land, and that proceedings ought to be commenced in the King's name if Crown lands were involved.[558] There is no evidence in either the records of the City Council or in copies of correspondence maintained by the Civil Secretary that either of these communications was ever answered.

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[556] Jameson to Civil Secretary, 14 May 1834, PAC, May 1834, RG5, A1, Vol. 141, pp. 77057-77058. This opinion is also recorded under date of 14 May 1834 at CTA, RG1 B1, City Council Background Papers, Box 1 (April 1834-April 1835). In this latter record, however, the Attorney General is quoted as saying that the City can only proceed "by the general causes which the law has prescribed," rather than "by the general course which the law has furnished." There is no obvious reason for the discrepancy.

[557] Civil Secretary to Mackenzie, 16 May 1834, CTA, RG1 B1, City Council Background Papers, Box 1 (April 1834-April 1835).

[558] Opinion of Attorney General Robert S. Jameson, 27 May 1834, CTA, RG1 B1, City Council Background Papers, Box 1 (April 1834-April 1835).

Despite the challenge to the City's jurisdiction in the matter of construction along the beachfront, the Council wasted no time in confronting the issue in By-law #4, passed in final form on 30 May 1834. Clause 5 of Section I of the By-law imposed the duty on the High Bailiff to prevent the erection of huts and shanties on the beach and public grounds adjoining the beach, and to cause the immediate removal of existing structures. There is no evidence in the records of the City Council to suggest that the High Bailiff actually acted on this mandate, but neither is there evidence that proceedings were ever commenced in accordance with the Attorney General's opinion. In any case, the City ignored the advice of the Civil Secretary and the Attorney General on the question of jurisdiction, and in By-law #4 it asserted the authority it felt it possessed pursuant to Section XXII of the City of Toronto Act.

The tension manifested in this dispute between City Council and the office of the Lieutenant Governor is predictable to a certain degree. The Council was decidedly reform in its outlook on provincial politics, and Mackenzie had caused a great deal of difficulty for the administration during the legislative session of 1833-1834.[559] As well, it cannot be forgotten that the shanties along the lakefront were erected there primarily to house the swelling immigrant population on a temporary basis. Despite Jameson's comment that "immoral purposes" were behind the construction of the huts, it was typical of the Lieutenant Governor to deflect criticism away from the unwanted side effects of his immigration policy. This he had consistently done when the question of the connection between immigration and disease had been broached, and it

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[559] Mackenzie's difficulties with taking his seat in the House of Assembly during this session of the Legislature have been chronicled by many historians. See, for example, LeSueur, *William Lyon Mackenzie: A Reinterpretation*, *supra* note 523, 216 *et seq*. See also Dunham, *Political Unrest in Upper Canada, 1815-1836*, *supra* note 26 at 135, where Dunham argues that the tension between Mackenzie and the administration during the 1833-1834 legislative session was typical of "the most discreditable chapter in the history of the Upper Canadian legislature."

was evident as well in the failure of the Lieutenant Governor's office to deal with the problem of immigrant huts when it was raised by Archdeacon Strachan and former Chief Justice Powell in 1833.[560]

Perhaps of greater urgency, however, was the second problem City Council faced in its early attempts to establish its authority and enforce its by-laws. As has been seen, by 9 June 1834 the Council had By-law #8 in place, respecting the appointment and duties of the Board of Health, and the first Board was appointed by Council virtually immediately. From the minutes of the Council meeting of 26 June, it is evident that the Board had already begun carrying out its duty to inspect premises in the City; the composition of the "visiting committee" of the Board was reviewed at that time, and additional members added.[561] The Board's authority in matters of the health of the City was at least obliquely confirmed through correspondence issued by the Lieutenant Governor in late July.[562] In this letter, Colborne indicated that the building constructed in 1832 as a cholera hospital was to be transferred to the Board of Health from the Crown, a recognition, it would appear, of the Board's jurisdiction.

But, when cholera presented itself as a problem to the Board at the end of July, the chronic shortage of funds in such matters again posed a threat. The Chair of the Board of Health petitioned the Lieutenant Governor, asking for help in meeting extraordinary expenses to be incurred in fighting the disease and in preparing a cholera hospital in the building to the rear of the structure currently used for the reception of immigrants. Dr. Morrison advised that twelve

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[560] See *supra*, notes 426-429 and accompanying text.

[561] CTA, "Journal of the Common Council of the City of Toronto," City Council Minutes 26 June 1834.

[562] Civil Secretary to Dr. Widmer, 24 July 1834, PAC, RG7, G16C, Vol. 31.

fatal cases had occurred within the last few days, and that the victims were "mainly emigrants."[563] If the Board were to accept its jurisdiction based on the City's statutory mandate, independent of executive or legislative supervision, then it was likely that connecting the Board's shortage of funds to the immigration question was the only way to invoke the administration's responsibility. By virtue of the City of Toronto Act, as we have seen, matters of public health were specifically delegated to the City by virtue of Sections XXII and LXXI. To meet the resulting responsibilities, Section XXII specifically provided powers for the raising of revenues, as follows:

> ... to impose and provide for the raising, levying and collecting, annually, by a tax on the real and personal property in the said City and the Liberties thereof, in addition to the rates and assessments payable to the general funds of the Home district, a sum of money, the better to enable them to carry fully into effect the powers hereby vested in them.

In other words, consistent with the independent jurisdiction vested in the City under the City of Toronto Act, the Council ought to have exercised its taxing power to raise funds sufficient to allow the Board of Health to carry out its mandate properly. Instead, however, the Chair of the Board approached the executive authority, complaining that the extraordinary requirement for funds stemmed from the demands of the immigrant population, and responsibility for immigrants continued to lie with the Province.

The Civil Secretary's response was immediate, and did accommodate the Board's request to some extent. A small sum was provided, together with a warning that no further funds were available to help in meeting the Board's responsibilities. The Civil Secretary also gave advice on how the Board ought to proceed, encroaching to some small extent on the Board's independence.

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[563] Morrison to Civil Secretary, 29 July 1834, PAC, July 1834, RG5, A1, Vol. 143, pp. 78377-78382.

> Having laid before the Lt. Governor your report of this date, I am directed to acquaint you that from your statement it appears incumbent on the mayor and Corporation to take immediate measures for preparing the Building which has been given over to the Board of Health for Cholera Patients and for providing for them from the funds at their disposal.
>
> I am also to mention that His Excellency will authorize £50 to be placed at the disposal of the Board of Health on account of the expense which may be incurred in providing for the reception of Emigrants' but that His Excellency has no funds under his control from which he can render the Board further assistance.[564]

This letter functions as a reminder, therefore, that the City had its own means of raising revenue, that the Province had already made a significant contribution by transferring control of the cholera hospital, and that the Corporation ought to live up to its responsibilities by taking steps to receive and treat cholera victims. But for the grant of £50, then, Morrison's approach to Colborne was rebuffed.

Over the next few days, concern about the competence of the Board of Health increased in the office of the Lieutenant Governor, although it is not perfectly clear from the historical record as to the source of this concern. Initially, the Civil Secretary indicated that complaints were coming from senior personnel at the cholera hospital.

> I am also to state that the Surgeon of the Cholera Hospital has reported, that he has in vain applied for many articles of comfort which are necessary for the patients under his charge, His Excellency wishes to be informed whether the Board of Health can supply them or not, in order that a course may be adopted to render the Hospital fit in every respect for the reception of Patients.[565]

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[564] Civil Secretary to Morrison, 29 July 1834, PAC, RG7, G16C, Vol. 31. It should be noted that a correspondent to *The Advocate* misrepresented the Lieutenant Governor's reply, in the following terms: "The Lieut. Governor would not advance one farthing towards meeting the unavoidable costs although the legislature readily guaranteed all the monies he had advanced for any purpose heretofore." "Communicate," *The Advocate*, 31 July 1834, NLC.

[565] Civil Secretary to Morrison, 7 August 1834, PAC, RG7, G16C, Vol. 31.

As might be expected, municipal authorities did not react favourably to this correspondence. A number of letters were exchanged between Alderman James Lesslie (who had assumed duties as Chair of the Board of Health following Dr. Morrison's earlier resignation) and the office of the Lieutenant Governor. In the first of these, Lesslie reported that the cholera hospital was being managed appropriately, and that all necessary supplies were on hand to treat the sick. In addition, he advised Colborne that the tax assessment of the inhabitants of the City had been doubled since passage of the City of Toronto Act, and that the Council felt that an additional assessment would place too great a burden on the poorer classes in the City. Besides, argued Lesslie, the District Magistrates, on relinquishing control of the municipal taxing power, left as much as £400 in unpaid arrears. Lesslie outlined a number of additional difficulties in enforcement of the City's taxing power, and closed his letter by asking the Lieutenant Governor for an additional grant of £500 to meet the crisis of cholera. He assured Colborne that the Board would be scrupulous in its accounting for the funds, and that all necessary reports would be made to the Legislature so as to ensure Colborne's ultimate reimbursement.[566]

The Lieutenant Governor's response to this letter was remarkable. The Civil Secretary confirmed that the Lieutenant Governor would agree to become responsible for all the expenses of the cholera hospital, on the condition that the operation of the facility be placed under the control of four physicians of Colborne's choosing.[567] In effect, this was an attempt by the executive to usurp the statutory authority of the City of Toronto and the Board of Health appointed pursuant to Section LXXI of the City of Toronto Act and By-law #8. This letter was

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[566] Alderman James Lesslie to Civil Secretary, 9 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78596-78599.

[567] Civil Secretary to Lesslie, 9 August 1834, PAC, RG7, G16C, Vol. 31.

immediately leaked to the press, and the editor of the *Canadian Correspondent* complained of the Lieutenant Governor's stance as follows:

> We have just received information from a source which may be relied on, that Sir John Colborne's offer of monies to the Board of Health for the relief of destitute Cholera patients was conceived in such terms as to render it impossible for the members thereof to accept of it without submitting to what they collectively and individually conceived to be an uncalled-for and unmerited indignity. Thus has his Excellency's *benevolence* evaporated into downright humbug.[568]

The indignity would be the acknowledgment that the reform Council's appointed Board of Health was not competent to perform its prescribed duties during the first major test of its abilities. This would reflect badly, of course, on both the members of the Board and on Council as a whole. It will be remembered that the Board was entirely composed of City Councillors and Aldermen, plus the Mayor, such that there was very little distinction to be drawn between the efforts of the Board of Health and the general efforts of the Council.

Lesslie immediately prepared a response, and it is worth quoting in its entirety.

> It is the duty of this board to fulfill the trust reposed in it by the Act of the Legislature and by the citizens in watching over the Public health and in supervising the expenditure of any public money in the custody of the Government which it may be found necessary to apply for, more especially under such an extraordinary visitation as the present.
>
> If it be intended by your letter to convey the imputation that this board is unfit and unworthy to exercise the trust reposed in it by the City, and it may be so construed, I cannot allow a moment to elapse without denying the charge. As the Surgeon of the Hospital has stated that he is not the author of the aspersion on the Board conveyed by your letter of the 7th instant, I beg you [to] inform me who the busy person was that carried the tale to His Excellency on that occasion. On a former application to His Excellency for aid the reply was that he had not the means at his disposal, now however it is admitted by your letter that he has the means at his disposal, but implied (apparently) that unless the board shall trust its own inefficiency and consent that a part of the public Revenue should be placed under the control of another board not of the people's but of His Excellency's nomination he will not assist the Citizens.

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[568] *Canadian Correspondent*, 9 August 1834, NLC. Italics in original.

> If this is not the true meaning of your ambiguous communication of this day the members of the board are unable to understand it.
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> By the Resolution of the Board, this day conveyed to His Excellency, the Medical control of the Hospital – not the funds – is ordered to be placed under the four Doctors named by His Excellency ... for such a period as the Board shall think fit. And I am requested to ask ... whether His Excellency will agree to or refuse its proposition for aid without any condition save that of rendering a full and satisfactory account of the expenditure.
>
> If embarrassed by provisions conveying a personal reflection on the character of its members, the Board will with its diminished means continue nevertheless to fulfill to the best of its ability the important trust reposed in it by the Citizens, leaving the public to judge how far His Excellency has shown a reasonable desire to cooperate with the municipal authorities for the general good in a time of great public calamity.[569]

Much of the tension between the executive and municipal levels of government is captured by this vehement denunciation of Colborne's attitude toward the efforts of the Council and, by extension, his disrespect for the inhabitants of the City. Every aspect of Colborne's involvement in the difficulties attendant on addressing the cholera problem, not the least of which was the question of the division of jurisdiction between the Province on the one hand and the City on the other, is challenged by Lesslie. The letter is a total rejection of Colborne's "benevolence."

The situation in Toronto was obviously at a critical point. Deaths from cholera were increasing, and as reviewed above, many influential people were leaving the City to take refuge in the country, away from what were thought to be the sources of disease. Possibly because of the increasing crisis, the Lieutenant Governor proposed a solution to the impasse in his letter to Lesslie of 11 August 1834. In this correspondence, Colborne explained that the surgeon in charge at the cholera hospital, one Dr. Sheward, had complained to both Archdeacon Strachan and the Lieutenant Governor that he was unable to purchase necessaries for the treatment of his

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[569] Lesslie to Civil Secretary, 9 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78570-78574.

patients. He had also complained, according to Colborne, that the nurses on staff at the hospital were incapable of performing their duties. As a result, Colborne had recommended the appointment of four physicians to supervise medical operations at the hospital, "without the interference of any Civil Authority." The letter concluded by revealing that the Lieutenant Governor would place at the disposal of the supervising medical personnel, or the Board of Health, the sum of £250 or such other sums as the physicians might require.[570]

Lesslie continued to investigate the source of the Lieutenant Governor's lack of confidence in the abilities of the Board, and was finally able to determine to his satisfaction that the information on which Colborne had originally relied could not have issued from the hospital's surgeon. Dr. Sheward, on being confronted by Lesslie, denied having provided damning information to the Lieutenant Governor. In his reply to the Civil Secretary's letter of 11 August, Lesslie wrote: "It is true that the Arrangements were then imperfect, as they necessarily must have been, under the Circumstances in which they were made; but no charge of neglect, or of the absence of an anxious desire to meet the Wishes of the Gentlemen in attendance upon the sick, could, with any truth have been designed to be conveyed to His Excellency through Archdeacon Strachan." But in the end, Lesslie accepted Colborne's proposed compromise,[571] and the President of the Bank of Upper Canada was advised to make the sum of £250 available for maintenance of the cholera hospital.[572]

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[570] Civil Secretary to Lesslie, 11 August 1834, PAC, RG7, G16C, Vol. 31.

[571] Lesslie to Civil Secretary, 11 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78606-78611.

[572] Civil Secretary to President, Bank of Upper Canada, 12 August 1834, PAC, RG7, G16C, Vol. 31.

Geoffrey Bilson's interpretation of the relationship between Toronto's Board of Health and the Lieutenant Governor during the cholera crisis of 1834 is highly critical of the Board's efforts, suggesting that the Board was more interested in political manoeuvrings than it was in attending to the needs of the sick. In the end, Bilson credits Colborne for whatever success was enjoyed in Toronto in the fight against the disease.[573] It is true that Colborne finally assisted the Board with a grant of funds, and did propose the compromise that allowed the Board to escape the embarrassment of having the Lieutenant Governor's nominees take responsibility for medical matters at the hospital. But this interpretation is insensitive to the jurisdictional question that emerges from the legal framework in which the Board was established. In addition, it neglects the argument that Colborne was perhaps more interested in seeing to the accomplishment of his immigration policy than the reform members of City Council were in their own political goals. As we have seen, many of Colborne's decisions during the epidemic of 1832 were likely driven by his commitment to the success of his immigration programme, and this commitment had a great deal to do with the way in which the law developed and was applied. It is at least arguable that the question of immigration was motivating Colborne's decisions during the summer of 1834, too. The uncertainty over the lakefront shanties, both during 1833 and 1834, is consistent with Colborne's repeated deflection of criticism away from the unwanted social consequences of high levels of immigration. As well, the problem with the operation of the cholera hospital was first raised by Dr. Morrison as a problem of immigration, and it would be in keeping with Colborne's response to criticism in this respect that he would generate a different source of concern to capture the public's attention. Besides, the evidence on which he relied to challenge

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[573] Bilson, *A Darkened House: Cholera in Nineteenth-Century Canada*, *supra* note 3, 85-89. Bilson says at 89 that "What was done to help the city was largely done by Sir John Colborne."

the Board's competence was at best suspect, and was denied by Dr. Sheward within a matter of days.

It cannot be denied, of course, that political tensions were high in both municipal and provincial politics during 1833 and 1834, but it is unlikely that Toronto's response to the cholera epidemic of 1834 can be reduced to a question of simple factionalism. The difficulties experienced are as easily explained by reference to the attempt of the City to assert its statutory mandate, expressed through the by-laws reviewed above and the tribunals and officers appointed to carry that mandate into effect. While the difficulties with implementing By-law #8 may have had something to do with political animosity between the Council and the executive level of government, there is no denying that the City was expressing the law-making authority delegated to it by virtue of a statute passed by the Legislature. This was the same Legislature that had caused so much trouble for Mackenzie during the 1833-1834 session, and that had suffered so much embarrassment at his hands, but had yet seen fit to create the City of Toronto with the sweeping law-making powers contained in Sections XXII and LXXI of the City of Toronto Act. The suggestion that the struggles between Colborne and the City Council over the operation of the cholera hospital emerged primarily from Colborne's resistance to the political designs of members of Council leads to the unlikely conclusion that Colborne, perhaps unwittingly, was actually undermining the operation of a statute passed by his own Legislative Council only months before. The alternative conclusion is that the Lieutenant Governor was attempting to demonstrate the weakness of high profile members of the reform movement in Toronto, hoping for a more loyal Council in the next elections. But if Bilson is correct in underscoring Colborne's devotion to the cholera relief effort in Toronto, then this alternative, too, is

unconvincing. Both conclusions are probably untenable, for they ignore the legal and institutional framework in which those struggles took place.

It is not surprising that the Council would so jealously protect its independence, as much out of a sense of responsibility as from a commitment to a partisan position. This is especially likely during the cholera epidemic, the first real test of the Council's competence, and particularly poignant evidence of this position is contained in Alderman Lesslie's letters to the Lieutenant Governor at the height of the crisis. When this situation is combined with Colborne's continued refusal to accept criticism of his immigration programme, then it appears even less likely that the tensions in Toronto during August 1834 were simply partisan politics at play.

D. The Boards of Health Act in Operation

(i) Funding Difficulties

The tensions in the relationship between Toronto's Board of Health and the Lieutenant Governor's office were not unique. The epidemic of 1834 provided the first real test of the operation of the Boards of Health Act as well as the City of Toronto Act and relevant by-laws, and, as was the case in Toronto, many of the same problems emerged as in 1832, despite the new legislative framework for addressing the disease.

The first difficulty of consequence was the persistent question of funding the efforts of local Boards of Health. In fact, some of the accounts arising from the epidemic of 1832, and from attending to immigrants during the summer of 1833, had not been paid as late as the winter and spring of 1834. In January, Thomas McQueen petitioned the Lieutenant Governor seeking remuneration for services rendered at the cholera hospital in Brockville and to immigrants during the 1833 season. According to his correspondence, he worked at the hospital without pay during the epidemic of 1832 at the request of the health officer, and attended immigrants the next year at

the request of the representative on matters of the welfare of the poor appointed by the local Board of Health.[574] His account amounted to £74.10.6, and there is no record of his correspondence being answered. Later in the spring, the Civil Secretary answered a similar complaint raised by one John W. Leonard of Toronto. Leonard had asked for the Lieutenant Governor's assistance in collecting his account arising from services rendered during the epidemic of 1832 in York, but the Civil Secretary brusquely advised him to exercise his remedies in a court of law if he could get no satisfaction from the district magistrates of the day. The district magistrates, of course, had exhausted their allotment of funds long ago, and the cholera hospital itself had been transferred to the City of Toronto, leaving Leonard with virtually no remedy of any real potential.[575]

These lingering funding problems were irritating enough, but the real difficulties reminiscent of 1832 arose in July 1834, even before cholera was again confirmed in Upper Canada. Perhaps symptomatic of the pressure felt by Boards of Health across Upper Canada was the experience of the Board in Brockville. It is true that Brockville was one of the first Upper Canadian ports of entry for immigrants, and for that reason it may have assumed even greater responsibility for public health than many other boards. But Cornwall, Prescott, Kingston and communities west of Brockville on Lake Ontario managed a great deal of river and lake traffic too, and their problems in dealing with that traffic must have been similar in kind, if not exactly in scope.

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[574] McQueen to Colborne, 3 January 1834, PAC, January 1834, RG5, A1, Vol. 137, pp. 74806-74811.

[575] Civil Secretary to Leonard, 5 May 1834, PAC, RG7, G16C, Vol. 31.

Brockville's Board of Health raised the alarm about a lack of funds as early as 17 July, when the president of the Board wrote to the Civil Secretary in the following terms:

> The Board of Health for the town of Brockville beg leave to represent to your Excellency, that there are a number of indigent Emigrants now residing in the said Town who have arrived during the present season, many of whom are labouring under serious diseases and entirely unable to support themselves.
>
> There are now two cases of Typhus fever among them, one within the limits of the town, and the other in its immediate vicinity. The attention of the Board was called the other day to the state of the inmates of a building which has been used, and still continues to be used, as a Shelter for distressed Emigrants whereupon the Board immediately requested some of the Medical Men of the Town to visit them and to report their condition. They have done so and if any case is calculated to incite pity and alarm, it is theirs.
>
> There are upwards of eleven persons labouring under violent fevers which it is apprehended by the Medical Men who visited them (one of whom is a member of this Board) will become contagious. They have no beds to lie upon – one almost in a state of nakedness, and entirely destitute of the most ordinary necessaries of life. In one or two instances, the Father and Mother and three or four children are all lying together unable to assist each other.[576]

It must be remembered that this letter was written before the presence of cholera was confirmed, meaning that the conditions endured by the immigrants described here can be understood as ordinary during particularly heavy periods of immigration. The writer is obviously very concerned and sympathetic with the plight of the new families, and also very wary about the possibility that contagious fevers will be introduced into Brockville and area. The letter continued as follows:

> If this distress and misery were confined only to a few, this Board would not trouble Your Excellency with any representation upon the subject but, from the local situation of Brockville, and from the circumstance, that all indigent Emigrants, who are forwarded from Montreal by the bounty of the Lower Canada societies, are brought here – the number of sick and poor is continually increasing. The Board feel that the Inhabitants of the Town have a great burden thrown upon them to support the ordinary sick and poor; they therefore beg leave

[576] President, Brockville Board of Health to Civil Secretary, 17 July 1834, PAC, July 1834, RG5, A1, Vol. 143, pp. 78108-78112.

> to request that your Excellency will place a sum of money at their disposal, to enable them to procure medical and other attendance for those who are labouring under diseases which are contagious, and which, in the opinion of medical men, are likely to become so. The Board have already taken every precaution in their power, in seeing that the Town is properly cleansed, and have directed their attention particularly to the building above alluded to, in doing which they have incurred some expence.[577]

The Lieutenant Governor's immigration policy was continuing to cause difficulties at the municipal level, and the Brockville Board struggled badly to satisfy the needs of immigrants forwarded to Upper Canada through the assistance of immigrant societies in Lower Canada. Peter McGill wrote to the Civil Secretary on 18 July, saying in reference to Montréal that "...the City Corporation, and other public bodies, are subscribing, and borrowing money, for the purpose of forwarding all the destitute Emigrants on to your Province, and I regret to say, that the number of such, this season is very considerable."[578] The Lieutenant Governor supported this effort in Lower Canada despite the appeals of local Boards of Health, such as the one from Brockville. Colborne answered McGill's correspondence on 23 July. In this letter, the Civil Secretary advised "...by the direction of the Lt. Governor, that with reference to the arrangements for the reception of Emigrants and for directing them to the Districts where they may find employment, you may continue to encourage any number of Emigrants arriving at Montreal during the season to pursue their journey to the Upper Province."[579]

It is difficult to conceive of the thinking that must have prompted correspondence of this nature, given the dire conditions described only a week before by the Brockville Board of

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[577] *Ibid.*

[578] Peter McGill to Civil Secretary, 18 July 1834, PAC, July 1834, RG5, A1, Vol. 143, pp. 78153-78157.

[579] Civil Secretary to McGill, 23 July 1834, PAC, RG7, G16C, Vol. 31.

Health. Colborne's commitment to continued high levels of immigration, clung to by him apparently whatever the cost and risk to local Upper Canadian communities, must have been intractable, perhaps even reckless. This conclusion is supported by the recognition that, during the time between the receipt by the Civil Secretary of the correspondence from the Brockville Board of Health of 17 July, and the reply to McGill of 23 July, cholera had been confirmed in Montréal, and Colborne had been advised of this by Boards of Health and others in Brockville, Cornwall and Bytown. In fact, in McGill's own letter to Colborne of 18 July referred to above, McGill had warned the Lieutenant Governor that at least 750 destitute women and children could be expected at Prescott within days, and had concluded by advising:

> The great number of individuals that will thus be thrust into Prescott who will be unable to proceed farther without pecuniary aid far beyond the reasonable contributions of that Village may render it expedient that the Government of Upper Canada as well for the comfort of the Emigrant as for the safety of the inhabitants should adopt such measures as the urgent importance of the circumstances demand in order that these poor people may reach their places of destination without burthening to an insufferable degree the resident population along the line of their route.[580]

The Board of Health for Brockville wrote to Colborne again on 19 July, to advise that the situation in that town had deteriorated to the point that the members of the Board had taken it upon themselves to open the cholera hospital, trusting that they would be reimbursed by government in due course. Funding was a difficult dilemma for this Board, but the urgency of the situation, given the imminent arrival of cholera and the continual arrival of destitute immigrants sent on from Lower Canada, made action unavoidable.

> Under these circumstances, and under the firm conviction that the Inhabitants here are about to experience the dreadful effects of this disease again, the board have determined to take upon themselves to open the Hospital; in doing which they intend to observe the strictest economy, and trust that any expense which they

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[580] McGill to Civil Secretary, 18 July 1834, PAC, July 1834, RG5, A1, Vol. 143, pp. 78153-78157.

> may incur, in what they consider a conscientious discharge of their duty, will be reimbursed by the Government. The Board beg to request that they may receive an answer to this, as well as to their former application, as soon as convenient, as in the event of His Excellency declining to place them in possession of funds, they must desist from their undertaking.[581]

Within a matter of days, the Civil Secretary received a letter from authorities in Cornwall advising that cholera could be expected in their town on boats from Montréal at any time. The writer warned that there was no building in Cornwall available for the reception of patients, and that there was no possibility of raising the necessary funds by public subscription. A plea was made for sufficient funds to allow the Board of Health to erect a hospital and maintain it till the next session of the Legislature could vote reimbursement for the Lieutenant Governor's outlay.[582] Then, the President of the Brockville Poor Relief Society wrote to the Civil Secretary, asking for government assistance to relieve the lot of immigrants arriving at Brockville on a daily basis. This correspondence confirmed what the Lieutenant Governor must have already known, that many of these new arrivals were sick and destitute, with no means to continue their journey westward and nothing on which to support themselves during their stay in Brockville. The writer described the shocking conditions resulting from housing these families in abandoned storehouses along the lakefront, and raised the strong suspicion that the crowded conditions contributed to the development and spread of disease.[583] Finally, Colborne received a petition from "magistrates and others" in Bytown, in which they too sought financial aid for the hospital

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[581] Brockville Board of Health to Colborne, 19 July 1834, PAC, July 1834, RG5, A1, Vol. 143, pp. 78184-78189.

[582] A. MacLean of Cornwall to Civil Secretary, 21 July 1834, PAC, July 1834, RG5, A1, Vol. 143, pp. 78196-78198.

[583] President of the Brockville Poor Relief Society to Civil Secretary, 24 July 1834, PAC, July 1834, RG5, A1, Vol. 143, pp. 78307-78309.

in their community. Again, concern was expressed about the imminent arrival of cholera, and the admission was made that "...[we] will not have the facilities available to deal with another epidemic."[584]

Given these various pleas for help as cholera again approached Upper Canada, it is relatively clear that the legislative framework for protecting Upper Canadians from the importation of dangerous disease, established through the passage of the Boards of Health Act in 1833, was inadequate. Boards of Health had been established in many communities, it is true, but their effectiveness was in serious jeopardy without some financial support to re-open hospitals, employ medical personnel, purchase medicines, and generally attend to the needs of the sick. The situation had not changed in any substantive way since the epidemic of 1832. The crisis was exacerbated, it appears, by the Lieutenant Governor's continued dogged support for his immigration policies. There seems little question that the conditions in the communities along the St. Lawrence River and Lake Ontario east of Toronto were deplorable and very dangerous, yet nothing in the legal mechanisms designed in response to the epidemic of 1832 seemed to allow local Boards of Health the financial ability to address those conditions. The funding problems of 1832 were simply repeated.

The Lieutenant Governor did respond to these various pleas for help as the summer of 1834 progressed. He began by instructing his "agent for emigrants" at Prescott to assist the Board of Health at Brockville in opening its cholera hospital "so as to relieve the apprehension" there, but there is nothing in the correspondence to address the question of funding that effort.[585]

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[584] " Petition from the undersigned Magistrates and Others at Bytown" to the Lieutenant Governor, 25 July 1834, PAC, July 1834, RG5, A1, Vol. 143, pp. 78340-78343.

[585] Civil Secretary to Brockville Board of Health, 22 July 1834, PAC, RG7, G16C, Vol. 31.

Similar instructions were given to emigrant agents in Kingston and Bytown although, again, there is no mention in this material as to the issue of funding the operation of the hospitals.[586] The advice given to Boards of Health in this respect was vague, designed once again to "reduce apprehension" among local populations.

In the meantime, the inadequacies of the legal framework for responding to the disease were pointed out by officials in Kingston. J.S. Cartwright wrote to the Civil Secretary on 30 July, advising that the members of the Board of Health were compelled to personally guarantee the repayment of funds necessary for the local response to the disease. "The Board of Health being without funds considered it absolutely necessary that the Hospital should be opened and the Members individually became responsible for £100 which they borrowed conceiving that His Excellency would make good from funds at his disposal such outlay as may be unavoidable under the present circumstances."[587] Shortly thereafter, the respected John Macaulay wrote a remarkable letter to the Civil Secretary in which he pointed out a number of jurisdictional difficulties arising by virtue of the appointment of the Board of Health in Kingston. On the question of funding, Macaulay reported that he had personally loaned the Board of Health the funds it needed to continue its relief effort, and that the money would have to be repaid with interest by the members of the Board unless either the Lieutenant Governor or the Legislature agreed to reimburse him. He concluded by making a recommendation for what must have seemed to be the obvious solution to the problems of funding the Boards of Health. "Government should also have a disposable fund at its command to aid the Boards of Health in

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[586] Civil Secretary to Chairmen of Boards of Health for Kingston, Brockville, Prescott and Bytown, and to the Mayor of Toronto, PAC, RG7, G16C, Vol. 31.

[587] J.S. Cartwright to Civil Secretary, 30 July 1834, PAC, July 1834, RG5, A1, Vol. 143, pp. 78397-78398.

cleansing the larger towns, supplying the poor with [illegible] free of charge, purchasing coffins, etc."[588]

The Lieutenant Governor did respond to these complaints and apprehensions by providing £100 for the Boards of Health in each of Kingston, Brockville, Prescott and Bytown.[589] It is consistent with Colborne's focus on the immigration effort, and his refusal to allow the threat of cholera to dampen the enthusiasm for immigration, that these funds were provided first and foremost "to assist in the preparations for receiving emigrants." His focus on immigration, perhaps to the detriment of the cholera relief effort, was not lost on critical observers of his administration. In commenting on his initial allocation of £50 to the Board of Health at Toronto,[590] for example, *The Advocate* remarked wryly that "Sir John Colborne has sent the Board of Health £50 out of the £30,000 next egg of casual and territorial revenue, for the destitute immigrants. – For the Cholera he will advance nothing at all."

Not all communities in Upper Canada fared as well as Kingston, Brockville, Prescott and Bytown in their attempts to secure funds to resist cholera. River Trent, a community near the lakeside towns of Port Hope and Cobourg but not itself directly responsible for the reception of immigrants as they proceeded westward to Toronto, requested assistance in early August. A.H. Meyers of River Trent wrote the Civil Secretary, advising that townspeople had appointed a Board of Health pending the Lieutenant Governor's approval, and seeking financial aid in setting

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[588] John Macaulay to Civil Secretary, 4 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78457-78460.

[589] Civil Secretary to Chairmen of the Boards of Health of Kingston, Brockville, Prescott and Bytown, 2 August 1834, PAC, RG7, G16C, Vol. 31.

[590] *Supra*, note 564 and accompanying text.

up a hospital and meeting other extraordinary expenses associated with the arrival of cholera.[591] The Civil Secretary replied confirming the appointment of the citizens' committee as a Board of Health under the Boards of Health Act, but then turned down the request for financial assistance, claiming a lack of funds.[592] This refusal came only four days after the grant of funds to Kingston, Prescott, Brockville and Bytown, meaning that funds were in fact available for distribution. It appears that the only conclusion consistent with the evidence is that funding was available for the fulfillment of the immigration programme, but not for the cause of cholera relief, serving to justify the criticism of the Lieutenant Governor appearing in *The Advocate*. The Board of Health of River Trent wrote a desperate response to Colborne's rejection of their funding request, claiming that there were no moneys available for beds, bedding, medicine and other necessaries for cholera relief.[593] There is nothing in the Civil Secretary's letterbooks to suggest that this letter was ever answered.

The other administrative difficulty with funding the cholera relief effort was in the manner by which funds allotted to the Boards of Health might be drawn. This was a problem during the crisis of 1832,[594] and it continued during the summer of 1834. In early August, the Kingston Board of Health complained about the failure of the Lieutenant Governor to give

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[591] A.H. Meyers of River Trent to Civil Secretary, 5 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78482-78484.

[592] Civil Secretary to members of the River Trent Board of Health, 6 August 1834, PAC, RG7, G16C, Vol. 31.

[593] A.H. Meyers to Civil Secretary, 9 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78564-78565.

[594] See *supra*, notes 330-337 and accompanying text.

instructions on gaining access to their £100 grant.[595] Similar frustrations were expressed by Boards of Health in Brockville,[596] Hamilton[597] and Niagara.[598] Funding difficulties persisted, then, even when the Lieutenant Governor felt that it was appropriate to support the efforts of local boards. Again, the legal initiatives taken during and after the epidemic of 1832 had not resulted in increased efficiency for Boards of Health, whether in establishing their entitlement to funding assistance, or in gaining access to funds once committed.

By mid-August, the pressure for some comprehensive programme of assistance began to be felt by the executive government, and the Lieutenant Governor responded with a general circular to ease the panic and frustration among local Boards of Health.

> I am directed by the Lt. Governor to acquaint you that from the general prevalence of the Cholera in the Province and the peculiar difficulties which many townships in your neighbourhood may experience in procuring Medical aid, His excellency will place at the disposal of every Board of Health, in the Province such sum as the Members of the Board may consider indisputably necessary, to enable Medical attendance to be afforded to persons who have no means of

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[595] John Kirby of Kingston Board of Health to Civil Secretary, 7 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78531-78533.

[596] Henry Sherwood of Brockville Board of Health to Civil Secretary, 9 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78561-78563.

[597] Secretary of Hamilton Board of Health to Civil Secretary, 12 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78664-78667. Oddly enough, there does not seem to have been an allocation of funds for the Hamilton Board of Health until after the Civil Secretary received this letter of complaint about problems of access to those funds. See Civil Secretary to Secretary, Hamilton Board of Health, 15 August 1834, PAC, RG7, G16C, Vol. 31, in which the Board was offered the sum of £50, "should it be required." Underlining in original.

[598] Niagara Board of Health to Civil Secretary, 8 September 1834, PAC, September 1834, RG5, A1, Vol. 145, pp. 79253-79254. An indefinite amount of money had been promised to the Niagara Board of Health in the Lieutenant Governor's correspondence of 15 August 1834, PAC, RG7, G16C, Vol. 31.

> procuring it, and to Towns or Villages in which the disease may appear to render the Aid of the Board requisite.[599]

By this time, of course, the disease was firmly established in Upper Canada, and a full month had passed since cholera was confirmed in Montréal and Brockville. It had also been a full month since the alarming stories of problems in managing the sick and destitute immigrant population had been transmitted to the Lieutenant Governor. Much of the tension that resulted from this combination of environmental pressure and frustrated human compassion might have been relieved had there been a more systematic, efficient regime in place to confront the re-emergence of cholera. Despite the legal innovations of 1832 and 1833, the possibilities inherent in that reformed law were left unrealized, at least with respect to the allocation of funds to see to its implementation.

(ii) Jurisdictional Difficulties

Relative to the problems with funding related above, the uncertainty respecting the jurisdiction of the Boards of Health was rather minor. However, in a couple of circumstances the legal framework emerging from the crisis of 1832 was exposed for its shortcomings. The inability of local Boards of Health to act without executive sanction and the vagueness of their mandate generally under the Boards of Health Act may have caused delay in responding to the return of cholera. As well, the requirement in the Boards of Health Act that the executive government alone had the power to regulate traffic in the ports of the St. Lawrence River and the lakes made for some awkwardness in asserting the Board's apparent authority to shipping interests. In both of these issues, the Lieutenant Governor's commitment to the immigration

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[599] Circular, Civil Secretary to Chairmen of Boards of Health, 18 August 1834, PAC, RG7, G16C, Vol. 31.

programme again seemed to interfere with the execution by the Boards of Health of their statutory mandate.

The Lieutenant Governor had a difficult time relinquishing control of the immigration question, despite the fact that opinion was virtually unanimous in connecting immigration and the arrival of cholera. Requests for assistance that emanated from the Boards of Health relative to matters of public health were translated by Colborne into a plea for help in managing the immigration problem. This allowed him to assume control of the situation, rather than simply empowering Boards of Health, whether through a grant of funds or otherwise, to more effectively carry out their duty to protect the public. Colborne's "emigrant agents" along the St. Lawrence were given explicit instructions respecting the best means for keeping the immigrant population moving westward along the river and Lake Ontario. A.B. Hawke, the Lieutenant Governor's adviser on immigration, corresponded with John Patton, the emigrant agent at Prescott, with orders to convey sick and destitute immigrants to hospitals, and to house them there at government expense. Those who were unable to find employment in and around Prescott were to be forwarded further up the river.[600] Similar instructions were forwarded to emigrant agents at Kingston, Brockville and Bytown.[601] By virtually ignoring the problem of cholera, by focussing instead on the reception of immigrants, and by instructing his agents in the various port towns to manage those immigrants in particular ways, Colborne neutralized the Boards of Health in their attempt to fulfill their mandate.

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[600] Hawke to Patton, 23 July 1834, PAC, RG7, G16C, Vol. 31.

[601] Civil Secretary to Chairmen of the Boards of Health in Kingston, Brockville, Prescott and Bytown, and the Mayor of Toronto, 23 July 1834, PAC, RG7, G16C, Vol. 31.

The Boards of Health Act, vague at best in outlining the authority of the Boards of Health, was rendered practically meaningless through Colborne's approach to the problem of the relationship between immigration and cholera. When the Board of Health of Brockville, following a particularly acrimonious meeting, requested clarification of its authority respecting diseased immigrants, the Civil Secretary simply assured the Board that the high numbers of immigrants would be attended to by the emigrant agent at Prescott, saying that "...Mr. Patton ... has received instructions to visit Brockville, from time to time, and provide conveyance for any families who may be in distressed circumstances."[602] The Board of Health received nothing from the Lieutenant Governor to allow it to fulfill its responsibility to the public, instead being left idle as Colborne's agent simply did what he could to keep immigrants moving to the west.

This awkwardness in the relationship between the mandate of the Boards of Health respecting matters of public welfare, and the continuing responsibility of the executive authority for management of the immigration programme, was summarized very bluntly by John Macaulay of Kingston in a letter to the Civil Secretary of 4 August. In this correspondence, Macaulay pointed out the futility in the Boards of Health Act, so long as the problem of immigration were allowed to overwhelm local efforts.

> [U]ntil the Imperial Government shall adopt measures for its protection by prohibiting emigration from infected districts of the United Kingdom or by some other enactment, I suppose the expediency of continuing the law appointing Boards of Health will be considered at the next meeting of the Legislature.[603]

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[602] Civil Secretary to President, Brockville Board of Health, 31 July 1834, PAC, RG7, G16C, Vol. 31.

[603] Macaulay to Civil Secretary, 4 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78457-78460.

Macaulay then doubled his criticism of the Boards of Health Act by pointing out the indeterminacy of its provisions. If the statute were to be continued beyond its expiry date, then

> ... I hope it will be determined to authorise the Boards to destroy all green fruit, cucumbers, lettuce, radishes offered for sale in the market during the prevalence of Cholera, for that seems the only way to prevent the thoughtless multitude from devouring those pernicious articles of food, & courting destruction.[604]

In other words, the Boards of Health Act was rendered impotent by two separate inadequacies, its lack of capacity to deal with the overwhelming numbers of immigrants during particularly busy seasons, and its failure to provide the Boards of Health with specific powers to regulate dangerous activities in their territories.

The impotence of which Macaulay complained was reflected as well by confusion in some areas over the extent of the legal authority of Boards of Health, and over the authority under which a board might be established. For example, Dr. Thomas Rolph of Ancaster reported to the Civil Secretary that townspeople had appointed a Board of Health, with Rolph as its President, and Rolph had gone so far as to allow the establishment of a hospital on his farm. This board, of course, had no legal authority at all without executive approval, according to the Boards of Health Act. But Rolph was not seeking executive confirmation of the constitution of the local board, as one might anticipate. Rather, he wanted clarification as to the extent of its powers:

> We should be thankful to receive any instruction for our guidance & direction, as to the extent of authority the law would assure us, in compelling people to purify their habitations, cleanse their [illegible] and removing nuisances. In most cases the people readily acquiesce in the propriety of these measures, but in cases of obstinacy, we should wish to be enabled to deal in a very summary way.[605]

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[604] *Ibid.*

[605] Rolph to Civil Secretary, 1 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78429-78431.

Rolph's letter serves to demonstrate the level of confusion about the framework established pursuant to the Boards of Health Act, both in the manner of appointment of Boards of Health, and in the extent of their powers. This confusion was shared by the people of Oakville, for example, who appointed their own board at a village meeting on 2 August. The Board then wrote the Civil Secretary, advising that it had been empowered by the villagers "to enter on and inspect houses, outhouses and other buildings, and ... to adopt any measures ... prudent and essential for the health of the village or the purchase of necessary medicines. ... [It shall be the duty of Board members] to recommend to the occupier of any house in the village to cleanse and fumigate their house, outhouse and whitewash the same with lime."[606] The power to inspect houses was specifically provided for in the Boards of Health Act, but the rest of these duties were not, underscoring again the uncertainty surrounding the actual operation of the law during the crisis.

Townspeople may have been frustrated with delays in appointing local Boards of Health. A flurry of appointments had been made by the Lieutenant Governor during 1833, shortly after passage of the statute,[607] but very little had been done in this respect in 1834, prior to the return of cholera. As had been the case in 1832, many towns were left without an appropriate administrative structure in place prior to the situation becoming critical, despite the apparently facilitative purposes of the Boards of Health Act. This poor planning on the part of the executive may have led to frustrations at the local level. Colborne responded to Rolph's correspondence

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[606] Oakville Board of Health to Civil Secretary, 2 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78992-78996.

[607] See *supra*, notes 416-419 and accompanying text.

by appointing a Board of Health for that community on 4 August 1834,[608] but for some reason the appointments for Oakville were not made until 29 August, almost four weeks after the village meeting.[609]

Similar confusion over jurisdiction prevailed relative to Hamilton, although in this case the confusion was in the Lieutenant Governor's office. A Board of Health had been appointed in Hamilton in April 1833,[610] but during the early days of the cholera crisis of 1834, the Civil Secretary wrote to the Board of Police for Hamilton, the elected municipal government, seeking its assistance in the fight against the disease. John Law, President of the Board of Police, wrote back to the Civil Secretary, politely pointing out the error:

> As our power as a Board of Police is confined to the town, and the assessments raised from the Town are marked by our Charter of Incorporation to certain definite purposes, of which this does not happen to be one, we can merely lament that we have it not in our power to act up to the full extent of what we could wish to see done.[611]

Then, Law went on to suggest that the problem of destitute immigrants was a very real one for Hamilton, and that perhaps the Lieutenant Governor might facilitate a programme for their relief.

> This is the place where the Tide of Emigration may be said to break, and many cases of suffering frequently come under our eyes where we can only regret our inability to relieve. But insofar as we possibly can, we shall heartily cooperate and assist in giving effect to any humane endeavour which His Excellency or His Government may suggest for preventing or alleviating as far as possible the sufferings of indigent strangers.[612]

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[608] *Upper Canada Gazette*, 7 August 1834, NLC.

[609] *Upper Canada Gazette*, 4 September 1834, NLC.

[610] *Supra*, note 416.

[611] John Law, President of the Board of Police of Hamilton, to Civil Secretary, 5 August 1834, PAC, August 1834, RG5, A1, Vol. 144, pp. 78478-78481.

[612] *Ibid.*

The correspondence from the Civil Secretary that prompted this response has not survived. However, Colborne wasted little time in providing assistance to the Hamilton Board of Police, sending it a grant of £50 on 7 August to assist with the reception of sick emigrants.[613] It is noteworthy, of course, that this grant was made to assist with the immigration programme, but otherwise was unconditional. The Board of Health for Hamilton, meanwhile, was provided with a similar grant of £50 for the cholera relief effort, "should it be required,"[614] again underscoring Colborne's preoccupation with immigration and, arguably, his attempt to downplay the problems of public health.

The other jurisdictional difficulty during the epidemic of 1834 related to control of harbour traffic. The power to make regulations respecting the visits of boats and their loading and unloading of cargo and passengers resided with the executive government pursuant to the Boards of Health Act. This was an attempt, it seems clear, to avoid the confrontations between shippers and local authorities that had plagued the enforcement of law during 1832.[615] However, the Lieutenant Governor neglected to take decisive steps in this respect during 1834, causing some consternation among local officials along the St. Lawrence and Lake Ontario.

The Board of Health at Kingston acted first, passing their own set of port regulations and then asking Colborne to confirm their enforceability. The regulations had three principal components. First, the Board decided that no vessel was to land passengers within the town of Kingston without the permission of the Board of Health. Secondly, any vessel arriving at

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[613] Civil Secretary to John Law, 7 August 1834, PAC, RG7, G16C, Vol. 31.

[614] Civil Secretary to Secretary, Hamilton Board of Health, 15 August 1834, PAC, RG7, G16C, Vol. 31. Underlining in original.

[615] See the discussion of this issue in Section B(iii) of Chapter Four above.

Kingston from points east was to anchor outside of the harbour and remain there until the Board of Health directed otherwise. Thirdly, such other related regulations as the Executive Council might deem wise and expedient were to be put in place immediately.[616] On the same day, the Lieutenant Governor received a similar request from the Board of Health at Brockville, in the following terms:

> The Board beg leave also to request, that they may be favoured with any regulations that may be made by the Governor in Council concerning the entry and departure of boats or vessels as they feel that a great necessity exists, at this place, for something of the kind. In the meantime, the board will endeavour to supply the want of such regulations, by acts of their own.[617]

These letters were received in the Lieutenant Governor's office at the height of apprehension about the condition of immigrants arriving from Lower Canada, and during the period when rumours about cholera were circulating widely. The Civil Secretary had already received a copy of correspondence sent to the Board of Health at Bytown from the commander of the *Shannon*, advising the Board that, since cholera had been confirmed in Montréal and therefore was to be expected in Bytown, the commander would comply with all rules of the Board relative to "... all reasonable things, so thus their commands shall not induce unnecessary delay in the regular trips of the *Shannon*."[618] This correspondence is filed in the Civil Secretary's materials co-incident with the communication from the Kingston Board of Health, and before the letter from Brockville, meaning that the executive government was aware that the situation was growing critical in communities east of Toronto.

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[616] Kingston Board of Health to Colborne, 19 July 1834, PAC, RG1, E3, Vol. 16, pp. 88-89.

[617] Brockville Board of Health to Colborne, 19 July 1834, PAC, July 1834, RG5, A1, Vol. 143, pp. 78184-78189.

[618] Thomas Kains, Commander of the *Shannon*, to Secretary, Board of Health for Bytown, 19 July 1834, PAC, July 1834, RG5, A1, Vol. 143, pp. 78178-78179.

There is no evidence that the request of the Brockville Board of Health was ever answered, but a letter of reply was addressed to John Cartwright of Kingston on 22 July. In this correspondence, the Civil Secretary was pleased to

> ... transmit to you the accompanying copy of a report of the Executive Council from which you will perceive that the resolutions of the Board of Health of Kingston and your letter of the 19th inst. have been under the consideration of the Council; and to acquaint you that should it appear necessary from the progress of disease to adopt such active measures for the preservation of the health of Kingston and the Ports on the St. Lawrence, His Excellency will not fail to forward to you further instructions.
>
> The Agent for Emigrants will receive orders to visit all vessels from the Eastward of Kingston, and to make such arrangements for the reception of Emigrants in a bad state of health as ... cases may require.[619]

By this time, of course, the Executive Council was aware of the deteriorating conditions along the St. Lawrence and Lake Ontario, and had received the letter from Peter McGill, Colborne's correspondent at Montréal, begging the Lieutenant Governor to take immediate steps to protect both the immigrant population and residents along the shipping route.[620] Given this information, and given the advice from Bytown that shippers actually expected regulations to be put in place by which river traffic would be monitored, it is impossible to explain the grounds on which the Executive Council might refuse the request for assistance from Kingston, and ignore the request from Brockville.

But that is exactly what happened. The report of the Executive Council on which Colborne relied in his response to the request of the Kingston Board of Health was written by Archdeacon John Strachan, and signed as well by two other executive councillors, Peter Robinson and George H. Markland. The text of this report is remarkable:

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[619] Civil Secretary to Cartwright, 22 July 1834, PAC, RG7, G16C, Vol. 31.

[620] See *supra*, note 580 and accompanying text.

> The Council having had before them certain Resolutions passed at Kingston by the Board of Health relative to the necessity of making Rules and Regulations for the landing of passengers etc. in order to prevent any extension of Asiatic Cholera should it prevail during the present Season. Concur in the utility of such resolutions should circumstances require any restrictions, but they are constrained to express their opinion that no real necessity does at present exist and they fear that the tendency of such promulgation would be to excite apprehension and interrupt intercourse thro' the Country without a corresponding advantage, as experience has proved that no precaution can prevent the extension of the disease if once introduced into the Province. They therefore, while acknowledging the vigilance of the Board of Health for the Town of Kingston, forbear from recommending any other measures than such as have been placed within their power by the Act passed the 3rd Year Wm. 4th, Chap. 48.[621]

It is beyond any reasonable doubt that the Executive Council had sufficient information on which to conclude that conditions along the St. Lawrence had already deteriorated to the point where some preventive action ought to have taken place. There was a great deal of advice in this respect received by the office of the Lieutenant Governor in the days prior to the preparation of the Executive Council's report. In addition, the pleas received from Brockville, Kingston and Peter McGill were directed toward establishing some protections for the resident population in the hope that cholera could be turned away before it established itself. The Executive Council, however, commented on the uselessness of port restrictions for the period *after* the disease arrived. Finally, the focus in the report on the interruption of ordinary intercourse that port regulations would create suggests a continuing commitment to shipping interests that, by some accounts at least, had interfered with the cholera relief effort of 1832.

The Boards of Health Act did not operate effectively during the epidemic of 1834. In addition to the problem of a chronic shortage of funds for the efficient functioning of the Boards of Health, there were continuing problems of jurisdiction that the statute seemed to highlight

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[621] Executive Council to Colborne, 21 July 1834, PAC, RG1, E3, Vol. 16, pp. 91-93. The statutory reference is to the Boards of Health Act.

rather than relieve. Some Boards of Health were unclear as to the extent of their powers, and some communities felt compelled to appoint Boards even in advance of executive involvement. The Lieutenant Governor's office, too, may have been confused over the functioning of the administrative framework established by the Boards of Health Act, as shown by correspondence exchanged with the Hamilton Board of Police. Finally, the provision in the statute by which regulatory power relative to shipping was reserved to the executive authority did not relieve the pressure felt by local Boards of Health faced with yet another approach of a dangerous disease. In fact, their pleas in this respect were ignored, for the most part at least, and shipping was allowed to continue during the epidemic with very little interference from local authorities. Over all of this confusion and ineptitude hung the executive government's immigration policy which, from all the evidence and from the Lieutenant Governor's perspective, would be successful whether cholera threatened Upper Canada or not.

(iii) Legislative Change

By mid-September, cholera had again retreated from Upper Canada, and life returned to normal. The Lieutenant Governor quickly proclaimed a day of public thanksgiving for Thursday, 30 October 1834, "thanking God for having removed the heavy Judgments which our manifold provocations have most justly deserved, and for beseeching God still to continue to us his mercies, favor, and protection."[622] As was the case in 1832, most people in Upper Canada strictly observed the occasion, although the threat of penalty for non-observance may have had some coercive effect.

Calls had already been raised to reform the Boards of Health Act. It was shown to be inadequate by the experiences of cholera in 1834, and it was felt that changes would contribute

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[622] *Upper Canada Gazette*, 9 October 1834, NLC.

to a more efficient system of health protection. Commentators were not reluctant to point out the connection between high levels of immigration and the proliferation of disease, and decried the fact that the legislative response to the epidemic of 1832 had proven impotent in the face of the government's continued preoccupation with immigration. Throughout the early summer of 1834, Colborne had denied that the busy immigration season posed a threat to the health of Upper Canada, and had downplayed the dangers of cholera. He wrote to Archibald McLean of Cornwall at the end of July, as follows:

> [F]rom the reports received from Quebec & Montreal, there does not appear to be any apprehension as to the state of health of those Towns – there have been several bad cases of Cholera in different parts of the Province but the disease is considered by the Medical Men not to be epidemic...
>
> Should any circumstance occur which may call for the interference of the Executive Government respecting the state of health of your district, His Excellency will promptly adopt such measures as may appear expedient.[623]

There can be little doubt as to the severity of the epidemic, and the disruption to ordinary life that was caused by the disease. By very early in August, cholera had established itself as far west as Gore District, where its effects were described as follows:

> We have been visited (in Dumfries) with the noisome pestilence (the Cholera) that walketh in darkness and wasteth at noonday. It began to send forth its arrows of death last Tuesday, and within thirty hours there were thirty deaths within this vicinity. There have been several cases every day since, and every one proved mortal except one. The scene it exhibited was awful indeed; here you could see men digging graves and burying their dead in the night, by torches and fires built in the grave-yard, and every few minutes hear the clattering of horses feet – a messenger despatched in haste for a Physician or something for the sick.[624]

Despite the warnings from observers such as Archibald McLean, and despite the woeful reports from Dumfries and elsewhere, the Lieutenant Governor did very little during the outbreak

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[623] Civil Secretary to Archibald McLean, 25 July 1834, PAC, RG7, G16C, Vol. 31.

[624] "From Gore Township," *The Advocate*, 7 August 1834, NLC.

of 1834, except provide occasional funds for the reception of immigrants and finally for the efforts of Boards of Health. This relative lack of involvement may have had something to do with the calls for legislative reform as the summer progressed. The most insistent of these was made in the *Upper Canada Herald*, a paper ordinarily known for its sympathy for the administration at York, but yet highly critical of the legal framework for responding to epidemic disease during the summer of 1834. The editor of the *Upper Canada Herald* was especially concerned about the failure to address the relationship between immigration and disease. His comments provide an interesting perspective on the tension between that vision of the public good that would see increased immigration as the vehicle to enhanced prosperity, and the version that would protect the public health at virtually any cost.

> As the disease was unquestionably introduced into the country by the Emigrants, it becomes a matter of imperious necessity so to regulate emigration as to prevent our being again visited with this desolating pestilence. It were better to live the life of hermits in the woods than to witness a repetition of the harrowing scenes through which we have just passed.
>
> If every possible precaution is not taken to ensure our safety in future, the sooner all who can leave the towns ... do so the better; - for all confidence will be withered, all industry and enterprise paralysed, and all peace and prosperity destroyed ... Friendly as we are to emigration, it must be so conducted as to be a benefit – not a curse, to Canada.[625]

This editor recognizes that a high level of immigration is both a blessing and a curse for Upper Canada, raising the possibility of increased commercial activity, but at the same time threatening commercial prosperity through the introduction of devastating, disruptive disease. But true to its sympathies for the government in Toronto, the *Upper Canada Herald* did not go so far as to criticize Colborne's immigration initiatives, instead directing the attack against the imperial government in London. The editor asked the imperial parliament to bar emigration from infected

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[625] *Upper Canada Herald*, 20 August 1834, NLC.

ports, to limit the number of passengers on each vessel to a number based on the vessel's size, and to have each ship well supplied with medicines, if not with a medical attendant. In the only recommendation to the colonial government, the editor argued that "[t]he Quarantine establishment at Grosse Isle must be placed on a much more efficient footing. Quarantine should also be established at Montreal, Prescott, Kingston, and Toronto; so that, if the disease did unhappily break out, it might be stopped in its course, and not be transmitted through the entire extent of both Provinces, as at present." He concluded by insisting that "[t]his subject must no longer be left to the rapacity of ship brokers and the ignorance of emigrants. The Government must take it up; their character and honour, and the prosperity of the Colonies are involved in the matter."[626]

The *Upper Canada Herald* was likely correct to point out that shipowners were reaping huge profits at the expense of the emigrant. This would explain many of the tensions between masters of vessels and local authorities that emerged during 1832, and would also explain the eagerness that the master of the *Shannon* showed in communications with the Bytown Board of Health. Compliance with regulations was assured, so long as the rules did not interfere with the ordinary trips of the vessel. But the editor was likely in error when he suggested that the government was not involved in the immigration programme, for its activities during the period 1832 to 1834 were such as to ensure the best possible conditions for the continuation of the river and lake traffic, despite the threats posed by cholera. Quarantine was not instituted in Upper Canada, and both the Boards of Health Act and the executive government's reluctance to regulate traffic in the ports prevented local Boards of Health from exercising any sort of control

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[626] *Ibid.*

over shipping. So, while it is true that there was no direct government involvement to control immigration, there was at least indirect executive facilitation of the shipowners' "rapacity."

As had been the case with the Lieutenant Governor's appropriations for the cholera relief effort following the epidemic of 1832, the Legislature again voted reimbursement for his outlays following the crisis of 1834. On 16 April 1835, *An Act to make good certain monies advanced by His Excellency to defray the expenses incurred by the Cholera in 1834*, 5 Wm. IV c. 32 (U.C.) was passed. Its recital read: "Whereas His Excellency Sir John Colborne did, during the year one thousand eight hundred and thirty-four, advance upon his own responsibility, the sum of Two Thousand One Hundred and Fifty Pounds, to enable the different Boards of Health in the several Districts of this Province to mitigate, as far as lay in their power, the sufferings of its Inhabitants, occasioned by the Asiatic Cholera." The extent to which this allotment of funds succeeded in the mitigation of the disease is questionable, of course, but whether additional funds would have made for greater success is not known. As suggested above in Chapter Four, Section D, it is likely that the legal framework established following the epidemic of 1832 was as much an impediment to the efforts of Boards of Health as the shortage of funds.

The Boards of Health Act was eventually replaced, but not in the manner suggested by the editor of the *Upper Canada Herald*. In the session of 1834-1835, the Legislature passed *An Act to promote the public health, and to guard against infectious diseases in this Province*, 5 Wm. IV c. 10 (U.C.). It too was passed on 16 April 1835. This statute was identical in all respects to the Boards of Health Act, except in one major aspect, to be referred to below. It was limited in duration to one year, but was extended for a further year in 1837 by *An Act to continue for a limited time an Act intituled, "An Act to promote the public health, and to guard against infectious diseases in this Province,"* 7 Wm. IV c. 26 (U.C.). Ultimately it was made perpetual

by *An Act to continue and make perpetual an Act passed in the fifth year of the reign of King William the Fourth, intituled, "An Act to promote the public health, and to guard against infectious diseases in this Province,"* 2 Vic. c. 21 (U.C.), passed on 11 May 1839.

The statute of 1835 did make one significant change in the legal framework established under the Boards of Health Act, and it is likely that this change recognized something of the difficulty experienced by local Boards of Health in implementing measures to see to the accomplishment of their responsibilities. The change was effected through the addition of Clause VI. Otherwise, the new Act was identical to the former one. Clause VI read as follows:

> That in all cases in which disease of a malignant and fatal character shall be discovered to exist in any dwelling-house, or out-house temporarily occupied as a dwelling, in any City, Town or Village, within this Province, which said dwelling-house or out-house shall be situated in an unhealthy or crowded part of said City, Town or Village, or be in a neglected and filthy state, or inhabited by too many persons, it shall and may be lawful to and for the Board of Health of such City, Town or Village, or a majority thereof, in the exercise of a sound discretion, and at the proper costs and charges of the said Board of Health, to compel the inhabitants of any such dwelling-house or out-house to remove therefrom, and to place them in sheds or tents, or other good shelter, in some more salubrious situation, until measures can be taken, by and under the direction and at the costs and charges of the said Board of Health, for the immediate cleansing, ventilation, purification and disinfection, of the said dwelling-house or out-house: Provided always, and be it understood, that this provision shall apply and relate to all dwelling-houses and out-houses situated within one mile of any City, Town or Village, in this Province.

At first glance, this Clause seems to add a limited power of domestic quarantine to the authority of local Boards of Health, and if that first impression were accurate then the new statute would have addressed one of the major omissions in the Boards of Health Act. But the Clause is too ambiguous to make that conclusion certain. The Board was given the power to remove persons from houses in which malignant or fatal diseases were found, but did not have the subsequent authority to separate the sick from the well. Further, the power was granted to have the infected house cleaned and purified, but there was no power to prevent the sick from returning to the

house after that process was completed. Finally, there is a recognition in the Clause that overcrowding in a dwelling posed a threat to the health of the inhabitants, but there is nothing in the remedial part of the Clause to allow the Board of Health to address that problem. It is likely that overcrowding was considered dangerous not because of the simple proximity of one person to another, but because larger numbers produced greater filth. The Clause does provide for extended invasive powers in the Board of Health, when compared to the provisions of the original Boards of Health Act, but only in allowing the Board to remove persons from their dwellings during the fumigation process. There is nothing in this Clause, then, to recognize the possibility that a malignant or fatal disease might be contagious, that is, passed from person to person. Instead, the argument from miasma seems to have prevailed, the belief being that disease rose up from filthy conditions and could be eliminated through the control of those conditions. Quarantine, the best known legal mechanism for dealing with the problem of contagious diseases, was again overlooked.

E. Conclusion

While the epidemic of 1834 was shorter in duration than the epidemic of 1832, there is little question that it made a similar impact on the lives of ordinary Upper Canadians. The *Canadian Correspondent* reported a five per cent death rate in Toronto during the second epidemic, and that compared in severity to, perhaps even surpassed, the mortality rate of two years earlier. Again, as was always the case with cholera, observers were shocked by the consequences of the disease:

> The Cholera has, blessed be God, disappeared from amongst us after satiating itself with almost 500 victims in our small community. It spared neither age nor sex; - it preyed alike upon the virtuous and profligate; - it triumphed in the prostration of youthful vigour and loveliness; - it cut off in the maturity of their talents and usefulness men [sic] whose virtues would dignify and genius embellish our common nature, and pronounced even on the day of its departure in

> a voice that will long be remembered, 'Man is like to a thing of vanity, - his days pass away as a shadow.'[627]

The epidemic of 1834 did not stimulate anything like the innovation in law and regulation that was experienced during and immediately after the crisis of 1832. Instead, the second epidemic proved to be a testing ground for the framework established by the executive and legislative branches of government during the legislative sessions of 1832-1833 and, allowing for the City of Toronto Act, 1833-1834. As has been seen, the continuing debate over the manner in which disease was prevented, spread and treated had not been resolved by the summer of 1834, and for that reason it is likely unrealistic to expect that firm legal measures based on the conclusions of medical science would be implemented. But, from some perspectives at least, regulations based on the argument from contagion were the cautious, if not foolproof, response to the threat of disease, and ought to have been in place simply out of the possibility, however slim, that they might work. Nothing of the sort, however, was considered by those in authority during the epidemic of 1834, according to the historical record.

It was in the new City of Toronto that the urgency attendant on the protection of the public health was made most manifest. Among the very first acts of the first City Council was a series of by-laws designed to contribute to improved sanitary conditions, a better management of waste and other nuisances, and an enhanced bureaucracy to monitor questions of the public health. All of this was made possible through the delegation by the colonial legislature of sweeping law-making powers to the City Council. As we have seen, however, the actual implementation of the laws resulting from the exercise of those powers was not without its tensions, so severe, in fact, that they threatened to undermine the very purposes for which the laws were passed in the first instance. Matters in Toronto proceeded to the point where, in early

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[627] *Canadian Correspondent*, 6 September 1834, NLC.

August 1834, the possibility of a concerted response to cholera was in serious jeopardy, and the possibility would have been lost completely but for an eleventh hour compromise between the office of the Lieutenant Governor and representatives of the City Council.

Because of the administrative challenges facing the City of Toronto in implementing its public health protection regulations, many of the same problems recurred during 1834 as had been suffered in York during 1832. The difficulty reduced to a question of adequate funding, primarily for the operation of the cholera hospital. Aspects of this problem, however, drew into question the competence of Toronto's new municipal leaders, and it is in the treatment of this issue that the possible political content of the dispute emerges. It is true that the attempt to implement the early by-laws of the City of Toronto was likely hampered to some extent by political animosity between the executive government and the reform-dominated Council, but it is not at all clear that the problem can be reduced to that question alone. From a different perspective, the contest was primarily one of legal jurisdiction in which the Council had a very valid point. The technical legal question gave responsibility to the Council for responding to matters of pubic health, but its job was made extremely difficult, if not impossible, by its inability to control the numbers of immigrants arriving in Toronto's harbour week after week during the height of the epidemic. Immigration, of course, was the responsibility of the executive and legislative branches of government, such that the Council's effectiveness in responding to cholera was undermined not so much by its own incompetence as by its inability to confront the perceived source of the public health problem directly.

Questions of funding and jurisdiction disrupted the local efforts to fight the disease in areas outside of Toronto, too. In this respect, very little had changed since the panic of 1832, despite the apparent improvement in the legal framework within which the public health

response was to take place. Consistent with the Lieutenant Governor's attitude toward the disease that emerges from the record of 1832, Colborne tended to focus on questions of immigration during 1834, at least initially allowing an allotment of funds for the relief of immigrants while denying the need for specific cholera prevention programmes. This is reflected both in his response to individual requests for assistance, and in his reliance on the advice of the Executive Council in refusing to promulgate regulations for the control of shipping. While the direct evidence on this point is sparse, it is consistent with the evidence emerging from the epidemic of 1832 that the Lieutenant Governor considered any programme that might retard the flow of immigrants along the ordinary shipping route to be detrimental to the overall economic well-being of Upper Canada. And to the extent that the argument from contagion had any persuasive force at all, the only conclusion must be that the Lieutenant Governor was reckless as to the immediate public health requirements of the Colony. There is simply no other equally plausible argument to explain his continued preoccupation with immigration, and his continued refusal to recognize the danger inherent in the importation of disease.

Our overarching concern with the attempt to understand the political content of colonial law and legal institutions, therefore, is assisted to some extent by the events of 1834. There is very little, if anything at all, to explain the legal preparations for and response to the epidemic of 1834 by reference to the self-interest of decision-makers in Upper Canada. But as was the case in 1832, much of what motivated the actions of the executive government in the design and implementation of law can be explained by reference to a conservative functionalism that sees law in service of economic and political imperatives in history. This is the necessary interpretation of the Lieutenant Governor's focus on immigration. On the one hand, he was intent on the political aspects of the issue. The Colonial Office, to whom Colborne answered and

from whom he received his instructions, continued to encourage high levels of immigration to British North America during 1834, and ultimately Colborne was responsible for seeing to the creation and maintenance of conditions that would assist in the accomplishment of that objective. The failure to use law in creative ways to resist the importation of cholera, then, can be understood as at least passive political support for the emigration initiative of the Colonial Office. At the same time, as we have seen, some commentators in Upper Canada suggested that the real reason behind the push for more and more immigrants from the United Kingdom and Ireland was to buttress the establishment resistance to the cause of reform. This suggestion, if true, is obviously highly politically charged.

On the other hand, Upper Canada continued to clamour for the increased labour and investment that came with immigration, and the economic need in this respect is most clearly illustrated by reference to the Lieutenant Governor's speech to open the Legislature at the beginning of the session of 1833-1834. Many observers supported the executive's efforts in this respect, and applauded the results, even in a fairly disappointing immigration season such as that of 1833. Any regulatory initiative that would threaten the accomplishment of the colony's objectives in this respect, including laws of quarantine and other regulations respecting shipping, were to be discouraged. The result was the paucity of effective executive measures during the crisis of 1834.

While the activities of the Lieutenant Governor might be explained by reference to political and economic imperatives, the local legal response to cholera contains little evidence of similar motivations. If our history of public health law is limited to initiatives of the executive government, then the legal-historical argument from a conservative functionalism has some significance. But if we widen our inquiry to include the more mundane rules and regulations

promulgated by municipal authorities, then an alternative explanation for the development of law and legal institutions must be found. There is simply very little evidence that local initiatives were motivated by anything other than the environmental demands that were made on Upper Canadian communities through the arrival of cholera. In 1834, there is nothing to suggest that this situation had changed much, if at all, from the conditions of 1832. This is especially the case in the City of Toronto. Despite the suggestions of Geoffrey Bilson that the first City Council's difficulties in implementing its public health law regime were politically based, the evidence indicates that the legal jurisdictional dispute had as much, if not more, to do with the Council's struggles than did political tensions with the Lieutenant Governor. The jurisdictional question arose out of the simple attempt of the Council to fulfill its responsibilities, once the external threat of cholera appeared.

Outside of Toronto, local authorities again struggled to protect the public health through regulatory means, and there is nothing in the evidence to suggest that this struggle was motivated by anything but the environmental exigencies of the situation. Our understanding of this effort is probably best advanced by reference to the continuing problem of funding the cholera relief effort, and to the confusion and frustration that emerged around the scope of the Boards of Health Act. Eventually, of course, the statute was replaced with one that extended the jurisdiction of local Boards of Health in a major respect, but it is difficult to conceive of the ways in which that replacement statute might have addressed many of the fundamental legal problems with which local Boards of Health struggled. And, except to the extent that the executive government may have prevented the development of local law through its immigration policy and its legislative framework, any argument that municipal law developed out of political or economic imperatives simply has no support on the historical record.

CHAPTER SIX – CONCLUSION

The arrival of cholera in Upper Canada in 1832, and its return in 1834, provided a unique challenge to lawmakers in the colony. Never before had the administration been faced with a public health crisis of such severity, and never before had Upper Canada's settlers confronted an enemy so mysterious and so lethal. Because of these conditions, the executive government at York (and later Toronto) was compelled to make decisions about the deployment of law and legal mechanisms that would have immediate impact on the lives of thousands of colonists. The tension must have been severe, and the pressure felt by decision-makers at all levels of Upper Canadian society must have been enormous. Even in early 1832, cholera was generally known to be a very dangerous disease indeed, and the progress of the problem into Western Europe and the British Isles was alarming. It was not unrealistic to expect that cholera would appear very quickly in British North America, and, as we have seen, several warnings in this respect were issued, both publicly through local presses, and privately in communications from the Colonial Office to administrators in the colonies. Despite the apprehensions and warnings, however, Upper Canada was almost completely unprepared for the epidemic of 1832, and only marginally better prepared for the outbreak two years later. Because of this unpreparedness in a tense and critical situation that, on the best reading of the evidence, must have been foreseen, the history of the legal response to cholera offers us a particularly telling example of the relationship between law and other historical phenomena in Upper Canada.

There is a type of reciprocity in legal history. The law assumes a particular shape because of the impact of a wide variety of phenomena (be they political, economic, social, intellectual, or cultural) on the processes by which law comes into being. In turn, law itself has

an effect on those extra-legal phenomena, making a contribution to the way we perceive those other processes when we make inquiries of history. For this reason, we cannot approach a full understanding of a particular set of historical circumstances without some understanding of contemporary law. Yet, at the same time, our comprehension of law as an historical phenomenon is incomplete unless we also try to immerse ourselves in the entire historical circumstances relevant to the production of law. Because of this reciprocity, we must attempt an understanding of the political, economic and other conditions out of which Upper Canada's legal response to the cholera epidemics was fashioned, while trying at the same time to identify the extent to which that legal response had impact on the way Upper Canadians lived their lives.

This is not to say, however, that the law of disease control in the early 1830's was merely an aspect of politics or economics, a phenomenon strictly secondary to larger questions of political or economic history. It is true that law is related to both politics and economics, and enjoys an exchange of influences without which both law on the one hand, and politics (or economics) on the other, would not look at all as they appear to us when we ask questions of history. Nevertheless, this does not mean that law can only be understood as a secondary characteristic of something else, whether politics or economics or intellectual life. The same is also true of other historical phenomena, including politics and economics, but also literature and family life and ideas. None can be understood in isolation from the complete historical circumstances out of which they emerged, yet none can be considered as merely epiphenomenal. The essence of the idea of the reciprocal influence of historical phenomena is that a complete understanding of any evidence in history cannot be approached without the broadest possible sensitivity to the entire range of contemporary historical circumstances.

As a result, it is dangerous to attempt to explain the law in history as if it might be understood simply by reference to élite motivations for the production of law. Any interpretation and explanation dependent on such an understanding must necessarily be flawed, based as it is on a failure to allow for the reciprocal influences of a range of historical phenomena on the way the law appears at any particular moment. If there is a weakness in much of the new legal history of Upper Canada, then this is it. The tendency to reduce law to the role of tool for the fulfillment of ruling class aspirations simply fails to account for the complexity of circumstances out of which our impressions of history ought to be formed. This is so, despite the fact that much of what is said in the historiography of Upper Canada's law is likely true, in some limited sense. In large measure, what law seems to be in Upper Canada's history depends on our understanding of élite motivations; there is no denying that, and the validity of this approach is established quite convincingly through much of the literature reviewed above in Chapter Two. But that is not to say that the law is *merely* an expression of political or economic self-interest, whether self-interest of the kind that sees personal gain accrue through the manipulation of law in particular ways, or of the sort that tends to the accomplishment of the goals of some firmly held idea about the right organization of society. To do so is to belittle the very real mutual exchange among various historical phenomena, including law, politics, economics and a host of other things, and the consequential contribution that each of these phenomena makes to a more complete understanding of particular historical events.

The problem thus identified is exacerbated by our tendency to be seduced by events of particularly high political drama in our attempt to develop historical explanation. The types riot, the alien question, the very difficult mayoralty of William Lyon Mackenzie in Toronto, the rejection of the English poor law by Upper Canada's first legislature – all of these events were

very highly politically charged, and it is quite legitimate to interpret them as principally driven by the motivations of those who played significant roles in the way in which the events unfolded. The difficulty arises, and the tendency to overlook law as a dynamic historical phenomenon in its own right occurs, when the historian, relying on good inductive reasoning, attempts to draw broad conclusions about the nature of Upper Canadian law based on these highly charged events. After all, these are events that contain a measure of *political* content disproportionate to the everyday experience of law in social life. There is no other way to explain how two historians of the accomplishments of Paul Romney and Blaine Baker can come to such radically different conclusions on the essential nature of the types riot.

Their interpretations are so distant from each other as to be almost humourous. From Romney's perspective, the types riot seemed to "involve an offence against the rule of law as it pertained to relations between the individual and the state,"[628] an important and grand conclusion about the political temper of the times. According to Baker, the types riot was simply an "embarrassing public antic."[629] To the former, we have a dark symbol of reactionary power; to the latter, we have an evening frolic. Their judgments, it seems, are coloured by the intensity of the political nature of the event, by the extent to which the major players had exposed their reputations, by the attractiveness of the scandal through which the episode's aftermath was expressed. If one is interested in the law as a tool of conspiracy and intrigue, then the types riot is a stark example of political might gone awry and the law once more abused. If one is concerned with demonstrating the administration's commitment to some higher purpose, and

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[628] Romney, "From the Types Riot to the Rebellion: Elite Ideology, Anti-legal Sentiment, Political Violence, and the Rule of Law," *supra* note 69, 132.

[629] Baker, "The Juvenile Advocate Society, 1821-1826: Self-Proclaimed Schoolroom for Upper Canada's Governing Class," *supra* note 89, 92.

with the employment of law in seeing to the accomplishment of that purpose, then the types riot can be explained away as a simple and relatively harmless misinterpretation of the "rule of virtuous men." In the result, we have two irreconcilable interpretations.

The conclusion must be that, as *legal* historians, both Romney and Baker are correct, to some extent at least. This confusing result ensues when we consider their studies as works of legal, as opposed to political, history. The political aspects of their inquiries can be left for others to interpret, but the legal aspects of what they have done speak volumes about the complexity of the law as an historical phenomenon. If we are to consider the law as a mere instrument of politics, whether politics of particularly selfish or particularly idealistic varieties, then it is likely that the law will be misrepresented in the interpretation of highly charged political events. This is so, because the subordination of law to politics in the writing of history tends to disguise the fact that law itself results from the influences of a multitude of historical forces, including but not limited to politics. Once this fact of history is recognized and given due weight, then the more attractive conclusion is that law is neither simply the tool for the accomplishment of self-interest, nor is it merely the expression of idealism. Often it is partly one and partly the other, and often it is predominantly neither.

In this thesis, I have tried to test this criticism of aspects of Upper Canada's new legal history by putting law first in my inquiries into the legal response to the cholera epidemics of 1832 and 1834. In effect, this means that an attempt has been made to raise law above the position it often occupies in historical writing, that is, as a mere vehicle for the expression of political or economic power. But to do this is not to abandon the framework of the new legal history altogether. Rather, this approach remains consistent with a progressive, critical legal history, at least as it was envisioned in some of the early literature on the subject. In "Towards a

New Canadian Legal History," for example, Barry Wright maintained that "[f]ew would deny that legal historians must start with the law and work outwards."[630] This is so, despite the fact that the author recognized that, through the exploration of the potential inherent in the new legal history as he had envisioned it, there was great risk that legal history would cease to exist as a separate, recognizable disciplinary location. It seems that practitioners of the new legal history have embraced the critical possibilities emerging from the emancipation of legal history from its conventional antecedents, while at the same time bringing to reality Wright's prediction about the disappearance of the discipline in the end. The result is the subordination of law in the new legal history, a result nevertheless inconsistent with "starting with the law, and working outwards."

The validity of this criticism depends to a great extent on the inclination of legal historians to focus on highly dramatic political events, and, at first glance, this thesis is open to a similar challenge. After all, nothing could be more dramatic than the sweep of cholera through Upper Canada in 1832 and 1834. It was a public health crisis of unprecedented severity, and it generated an impact across the political and economic spectrum from one end of the colony to the other. But the distinction between the cholera emergency and many of the political events explored by much of the legal history of Upper Canada is that cholera invaded the lives of virtually every resident of the colony, immediately and profoundly. This is evident from the poignant accounts we have considered from newspapers all along the St. Lawrence River and the lakes. No one was spared the crisis. If the disease did not have direct impact by claiming a family member, then it claimed a neighbour or a local leader. Each and every community along the shipping routes and inland suffered the strain resulting from the conspiracy of disease,

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[630] Wright, "Towards a New Canadian Legal History," *supra* note 27, 362.

poverty and a burgeoning immigrant population. Cholera had a remarkable leveling effect – it did not discriminate among its potential casualties; it did not spare any community the stress of preparing, defending, fighting and treating; no one escaped the pain of mourning and burying. For this reason, the cholera crisis of the early 1830's, dramatic as it was, provides better territory for the exploration of the nature of law and lawmaking in Upper Canada than do the politically charged events referred to in much recent legal historiography. It gives us insight into executive and legislative processes by which law was developed and important decisions were made. But it also allows us an opening to explore the relationship between law and life in remote corners of Upper Canadian society, away from the political intrigue of the Family Compact and its detractors. This is especially the case when we consider what we have referred to as the municipal legal response to the disease, the frontline, local attempt to employ law in protecting the community from this very dangerous but largely misunderstood enemy.

It appears ironic that, in our review of the executive and legislative responses to the cholera epidemics, much of what we have concluded suggests a strong political or economic motive in the design and delivery of law. This is especially the case when we reviewed executive activity in Chapter Three, and again in Chapter Five. It is fairly certain that much of what motivated Lieutenant Governor Colborne in the early days of the cholera crisis of 1832, and then throughout the period to the end of 1834, was his commitment to the immigration programme of the Colonial Office. This was an economic imperative for the United Kingdom, and it had a tremendous economic impact in Upper Canada. As we have seen, politicians and many commentators in local presses, for the most part at least, welcomed the arrival of thousands of immigrants with as much spirit as could be mustered, and there were sound economic reasons

for doing so. Immigration represented a fresh influx of labour, and, at certain times, an investment of capital that was sorely needed.

This focus on the immigration programme appears to have had a direct impact on the way in which the executive government conceived of the legal response to the threat and reality of cholera, and this is an explanation founded most certainly in the historical relationship between law and economics. While there are other explanations available, none is quite so satisfactory in explaining the inertia that characterized the legal response to the disease at the executive level. There is evidence, of course, to suggest a sincere concern in the executive for the local fight against the disease as it made its way along the shipping routes in the summer of 1832. The most significant of this evidence is the Circular of 20 June 1832, by which the sum of £500 was committed by the executive to each of the Districts to assist in preparing for the disease. But this evidence is not sufficient to overcome the sense that the executive supported the cholera resistance effort only so long as it did not interfere with the ordinary flow of people and goods along the St. Lawrence and the lakes. There is no evidence whatsoever that the Lieutenant Governor supported even a temporary halt to the immigration programme, nor that he contemplated for even a moment supporting legal measures that might be interpreted as difficult for commercial interests. In fact, the evidence suggests the contrary. Throughout the period under consideration, the Lieutenant Governor discouraged legal measures that were consistent with much medical opinion of the times, and that might have reflected the caution appearing in legislation from neighbouring colonies. He continually sang the praises of the immigration effort, pushing for still greater numbers even after the relationship between immigration and the devastation of cholera was firmly established to just about everyone's satisfaction. There can be little doubt that the possibility of an efficacious employment of law to defend local populations

against cholera suffered because of the Lieutenant Governor's concern for the economic implications of the immigration programme.

At the same time, we have seen traces of a political motive in the way in which the executive interfered in the development of appropriate law. There is necessarily a great deal of speculation involved in the interpretation of much of this evidence, but some contemporary commentators argued that the administration was especially interested in increasing the percentage of the population with unwavering support for the existing regime. The immigration programme, it was alleged, would serve this purpose, and therein lay the reason for the dogged, perhaps fatal, commitment to the cause of immigration, even at the height of the cholera emergency. At the same time, the lingering threat from the Americans had its political persuasiveness. This is the case, whether that threat was conceived of as military, or whether it was the more subtle appeal of republican ideals. These threats could be resisted more thoroughly, it was supposed, when the population was buttressed by recently arrived, loyal British subjects. For all of these essentially political reasons, any legal mechanisms to be designed for the fight against cholera could not be such as to interfere with the immigration programme. The political consequences could be severe.

The appearance of irony is extended when we consider the legislative response to the disease. Of course, the legislature was largely at the command of the executive; this was ensured through the control of the legislative council by the executive branch of government. The economic and political motivations for a relatively passive executive response to epidemic cholera found their conventional legal expression in the Boards of Health Act. This statute was flawed in a number of key respects, especially when its provisions are compared to statutes of like purpose in neighbouring colonies of British North America. In fact, it had very little impact

on the ability of local officials to respond to the disease at all. Its function seems to have been to *limit* local authority, rather than to supply Boards of Health with the legal backing they needed to design regulations with some force and effect. The prickly problem of the control of local ports was reserved to the executive, and the "health officers" to be appointed pursuant to the statute had only limited powers. The question of domestic quarantine was not introduced at all. When the Boards of Health Act was replaced by the statute of early 1835, the police powers of the Boards of Health were extended to some degree, but the major weaknesses of the original Boards of Health Act were not addressed. In the result, then, we have a legislative regime that functioned as a consolidation of executive power, rather than as a distribution of authority to those vested with the immediate responsibility for grappling with problems of public health. As a consequence, the attempt to realize the economic and political imperatives of the executive was not interfered with through the need to respond to the cholera epidemics with decisive legal initiatives. Rather, the executive and legislative branches of government maintained the appearance of humanitarian concern for the problems of local populations in fighting the disease, and at the same time escaped the need to enact law that would detract from the achievement of political and economic imperatives.

The large component of economic and political factors in the executive and legislative responses to the cholera epidemics is ironic because it seems to deny the very argument advanced in this thesis, that law ought not to be considered merely as a secondary characteristic of something else. It seems to confirm the focus taken to legal history by scholars such as Paul Romney and Blaine Baker, that the greatest insight into Upper Canadian history lies through an investigation of political questions, with law serving as a convenient example of how politics dominated Upper Canadian development. This irony, however, is only superficial, because it is

admitted that the history of law is in fact connected to the history of politics and economics, often in clear and convincing ways, and often so as to lead to the impression that law is nothing more than one of a number of tools for the realization of élite goals. If our inquiry into the legal response to the cholera epidemics were to stop with executive and legislative action or inaction, then such a conclusion might be all that could be achieved. But that would ignore the complexity of law, and would ignore the idea that progress toward a full picture of the function of law in history cannot be realized without a concomitant sensitivity to the varieties of human experience and endeavour that serve to contribute to law in its most complete sense.

It is for this reason that the municipal legal response to the cholera epidemics of 1832 and 1834 is so important. Here we find a relatively pure expression of law, far removed from the economics of immigration and the profits of the shipping industry, relatively distant from the political insecurity of Upper Canada's ruling élite. Local leaders were confronted with an environmental threat unlike anything they had encountered before, and they responded with regulations designed to resist that threat in the best way they could imagine. This is evident in the attempts of the people of Niagara to thwart the efforts of the masters of the *Canada* and the *Great Britain*. It is evident as well in the remarkable attempts of the people of Kingston to establish a system of quarantine early in the epidemic of 1832, without legislative backing and without executive support. We see the people of Belleville using very strict regulatory measures to isolate their community virtually completely during the summer of 1832, and suffering the criticisms of many other Upper Canadians as a result. In these cases and many others, and despite the serious problems with authority, law was designed, promulgated and enforced at the local level with a view first to the protection of public health. The extent of economic and political content of municipal law was so minor as to be almost insignificant, belying the

impression gained from the review of the executive and legislative response that the law assumed the shape it did because of economic and political imperatives. Instead, we find environmental, humanitarian, medical and other influences on the way in which municipal law emerged, pushing the argument from politics and economics to the back of the line.

Of course, it would be inconsistent to suggest that politics and economics had no effect whatsoever in the development of the municipal legal response to the epidemics. Such a suggestion would suffer from the same weakness as the argument that the executive and legislative responses were *completely* driven by political and economic concerns. No, it is admitted that there were economic influences at work, especially in the continuing struggle over funding the local attempt to enforce regulations in the fight against cholera. In a sense, the problem of funding prevented municipal authorities from responding to the disease with the most comprehensive regulatory framework that could be designed. At the same time, political considerations did have impact on the enactment and enforcement of local law. By way of example, this is likely the best explanation for the tension over funding that emerged in the contests between the locally elected Brockville Board of Police and the appointed District Magistrates. It is also an attractive explanation for the continued impotence of local authorities in dealing with shipping interests during the epidemic of 1834, given the reluctance of the executive government to relinquish that power through the provisions of the Boards of Health Act. So, while political and economic concerns did have an impact in how local law was designed and enforced, it is nevertheless true that, in situation after situation we have encountered at the local level, other concerns served to dominate the ultimate shape and impact of law.

In the end, then, it is true that "plagues bend history." It is admitted that the approach to Upper Canada's legal history that would privilege political intrigue is attractive in certain situations. This is especially the case when we consider dramatic examples of élite behaviour, but also, to some more limited extent, when we consider the reluctance of the executive to respond to a public health threat with swift, decisive legal measures. Economic motives are important, too, and do have an impact on the way in which law is designed and enforced. Sometimes these motives are primarily self-interested, and sometimes they are developed with the best interests of the community as a whole in mind. But the history that is written with these explanations as a focus, to the exclusion of explanations that would allow for a wider range of influences on the shape of law in history, is largely denied by the plague that was cholera in the 1830's. Our consideration of the emergencies of 1832 and 1834 has forced us to reconsider the very nature of law, to investigate its function in Upper Canadian history in a more balanced way, and to conclude that there is much to be gained from the attempt to overcome the subordination of law in the new legal history.

APPENDIX ONE

THE BOARDS OF HEALTH ACT

Transcribed from 3 Wm. IV c. 47 (U.C.) (c. 48 in sessional volume)

AN ACT to establish Boards of Health, and to guard against the introduction of Malignant, Contagious and Infectious Diseases, in this Province

To guard against the introduction of Malignant, Contagious and Infectious Diseases, and for the preservation of the public health of the Province; - *Be it enacted* by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Aritain [sic], entitled "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's Reign, entitled 'An Act for making more effectual provision for the Government of the Province of Quebec, in North America,' and to make further provision for the Government of the said Province," and by the authority of the same, That it shall and may be lawful for the Governor, Lieutenant Governor, or Person Administering the Government of this Province, by and with the advice and consent of His Majesty's Executive Council, from time to time, to appoint three or more persons in each and every town in this Province, and in such other places as may be deemed necessary, to act as Health Officers within the limits of the town or place for which they shall be so appointed.

II. *And be it further enacted by the authority aforesaid*, That it shall and may be lawful for such Health Officers, or any two of them, as often as they shall think necessary, in the day time to enter into and upon the premises of the persons resident within the limits of the town or place for which they shall have been so appointed, and to examine the same; and if upon such examination it shall be found that the said premises are in an unclean or filthy state, or that any matter or thing exists thereon, which in their opinion may endanger the public health, it shall and may be lawful for such Health Officers, or any two of them, to order and direct the proprietor or occupant of such premises to cleanse the same, and to remove whatsoever shall or may be found thereon, which, in the opinion of the said Health Officers, or any two of them, may endanger the public health; and in case the proprietor or occupier of any such premises, shall neglect or refuse to obey the orders and directions of such Health Officers, or any two of them, it shall and may be lawful for the said Health Officers, or any two of them, to call to their assistance all Constables and Peace Officers, and such other persons as they may think fit, and to enter on the said premises and cleanse the same, and remove therefrom, and destroy whatsoever in their opinion it may be necessary to remove or destroy, for the preservation of the public health.

III. *And be it further enacted by the authority aforesaid*, That it shall and may be lawful for the Governor, Lieutenant Governor, or Person Administering the Government of this Province, by and with the advice and consent of His Majesty's Executive Council, to make and declare such rules and regulations concerning the entry and departure of any Boats or Vessels at the different Ports or other places within this Province, and the

landing or receiving Passengers and Cargoes on board the same, as shall be thought best calculated to preserve the public health.

IV. *And be it further enacted by the authority aforesaid*, That if any person or persons shall wilfully disobey or resist any lawful order of the Health Officers duly appointed under and by virtue of this Act, or of any two of them, or shall wilfully violate any rule or regulation made and declared by the Governor, Lieutenant Governor, or Person Administering the Government of this Province, by and with the advice of His Majesty's Executive Council, in pursuance of the power in him vested by this Act, or shall wilfully resist or obstruct the said Health Officers in the execution of their duties, such person or persons, on being convicted of such wilful disobedience, or violation of such rules and regulations, or of resistance to the said Health Officers, before two or more of His Majesty's Justices of the Peace for the District where such offender or offenders reside, shall forfeit and pay a fine not less than Twenty Shillings, nor more than Twenty Pounds, which said fine shall and may be levied and collected by seizure and sale of such offender or offenders Goods and Chattels, under and by virtue of a Warrant issued under the Hand and Seal of the Justices before whom such offender or offenders shall or may have been convicted, and shall be paid into the hands of His Majesty's Receiver General, to and for the public uses of this Province, and be accounted for through the Lords Commissioners of His Majesty's Treasury for the time being, in such manner and form as His Majesty shall be pleased to direct.

V. *And be it further enacted by the authority aforesaid*, That this Act shall be and continue in force for one year, and from thence to the end of the then next ensuing Session of the Provincial Parliament, and no longer.

APPENDIX TWO

THE PRESCOTT EMIGRANTS' ACT

Transcribed from 3 Wm. IV c. 51 (U.C.) (c. 52 in sessional volume)

AN ACT granting a Sum of Money for the relief of sick and destitute Emigrants at Prescott

MOST GRACIOUS SOVEREIGN:

WHEREAS among the great and annually increasing influx of Emigration from the Mother Country to this Province, many persons are found on their arrival at the Port of Prescott, in consequence of fatigue and expense incident to so long a voyage, in a sickly and Destitute state; *and whereas* humanity directs that some Relief should be afforded to persons of this description over and above what may arise from the Christian feelings and benevolence of the people residing at that place of general disembarkation: May it please Your Majesty that it may be enacted, *And be it enacted* by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, entitled "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's Reign, entitled 'An Act for making more effectual provision for the Government of the Province of Quebec in North America, and to make further provision for the Government of the said Province,'" and by the authority of the same, That out of the Rates and Duties now

raised, levied and collected, or which may be hereafter raised, levied and collected, and unappropriated, there be granted to Your Majesty the sum of Two Hundred and Fifty Pounds; which said sum of Two Hundred and Fifty Pounds shall be appropriated and applied to the Relief of such Emigrants from the Mother Country as may be found on their arrival at the Port of Prescott in this Province, during the ensuing season, to be Sick, and Destitute of the means of Subsistence.

II. *And be it further enacted by the authority aforesaid*, That the sum hereby granted as aforesaid shall be paid in discharge of any Warrant or Warrants issued by the Governor, Lieutenant Governor, or Person Administering the Government of this Province for the time being, in favour of the Trustees appointed by this Act, to relieve the distresses of such Sick and Destitute Emigrants as aforesaid; and shall be accounted for to His Majesty, through the Lords Commissioners of His Treasury, in such manner as His Majesty, His Heirs and Successors, shall be graciously pleased to direct.

III. *And be it further enacted by the authority aforesaid*, That the Reverend Robert Boyd, the Reverend Philander Smith, and Stephen Miles, shall be Trustees for the Purposes of this Act, and shall render an account in detail of the expenditure of all monies coming into their hands by virtue thereof to the Governor, Lieutenant Governor, or Person administering the Government aforesaid, on or before the fisst [sic] day of December next, to be laid before the Legislature at its next Session.

APPENDIX THREE

THE CITY OF TORONTO ACT

(excerpts only)

Transcribed from 4 Wm. IV c. 23 (U.C.)

AN ACT to extend the limits of the Town of York;

to erect the said Town into a City;

and to incorporate it under the name of the City of Toronto

WHEREAS from the rapid increase of the population, commerce and wealth of the Town of York, a more efficient system of police and municipal government than that now established has become obviously necessary: *And whereas* none appears so likely to attain effectually the objects desired as the erection thereof into a City and the incorporation of the inhabitants, and vesting in them the power to elect a Mayor, Aldermen and Common Councilmen, and other officers, for the management of the affairs of the said City, and the levying of such moderate taxes as may be found necessary for improvements and other public purposes: . . .

. . .

XXI. *And be it further enacted by the authority aforesaid*, That every Legislative Act of the said City be expressed to be enacted by the Mayor, Aldermen and Commonalty of the City of Toronto, in Common Council assembled.

XXII. *And be it further enacted by the authority aforesaid*, That the said City of Toronto shall by its Representatives, in whom the Legislative power of the City shall be vested as

herein-before mentioned, have full power and authority from time to time, to make, revise, alter, amend, administer and enforce, such laws as they may deem proper for making, gravelling, flagging, paving, pitching, levelling, raising, repairing, mending, lighting, macadamizing and cleaning any of the streets, squares, alleys, lanes, walks, side-walks, cross-walks, roads, highways, bridges, public wharves, docks, slips, shores and sewers, now laid out or erected, or hereafter to be laid out or erected, within the limits of the said City or the Liberties thereof; to regulate or restrain cattle, horses, sheep, goats, swine and other animals, geese or other poultry, from running at large within the limits of the said City or the Liberties thereof; and to prevent and regulate the running at large of dogs, and to impose a reasonable tax upon the owners or possessors thereof; to regulate or prevent the encumbering or injuring of the streets, squares, lanes, walks, side-walks, cross-walks, roads, highways, bridges, public wharves, docks and slips, with any wheel-barrows, carts, carriages, lumber, stone, or other materials whatsoever; to regulate or prevent the selling or vending by retail in the public highways, any meat, vegetables, fruit, cakes, cider, beer or other beverage whatsoever; to prevent the sale of any strong or intoxicating drink to any child, apprentice or servant, without the consent of his, her or their, legal protector; to prevent the immoderate riding or driving horses or other cattle in any of the public highways of the said City or the Liberties thereof; to prevent the leading, riding or driving, horses or other cattle upon the side-walks of the streets or other improper places; to regulate wharves and quays; to prevent all obstructions in the bay, harbour or river, near or opposite to any dock, wharf or slip; to regulate or prevent the fishing with nets or seines, the use of fishing lights, or the erection or use of weirs for eels or other fish; to prevent or regulate bathing and swimming in and about the docks,

wharves, slips and shores, within the limits of the said City or the Liberties thereof; to suppress tippling houses, and restrain persons from keeping the same; to enforce the due observance of the Sabbath; to regulate the licensing of, or to prevent the exhibition of wax figures, wild animals, mountebanks, and all other shows exhibited by common showmen; to prevent the excessive beating or other inhuman treatment of horses, cattle or other beasts, in the public highways; to regulate or suppress all billiard tables; and to regulate all theatres kept for profit; stills kept for the purpose of distilling spirituous liquors for sale; auctioneers, butchers, cartmen and cartage; hawkers and pedlers [sic]; all persons exhibiting for gain or profit any puppet-show, wire-dance, circus-riding, or any other idle acts or feats which common showmen, mountebanks, circus-riders or jugglers usually practice or perform, and to limit the number, and to provide for the proper licensing of the same; to regulate and prevent the firing off guns, pistols and other fire-arms, and to prevent the firing of squibs and crackers; to regulate and prevent the erection of slaughter-houses and tanneries; to abate and cause to be removed any nuisances within the limits of the said City or the Liberties thereof; to regulate inns, taverns, ale-houses, victualling-houses, and all houses where fruit, oysters, clams, victuals or spirituous liquors, or any other manufactured beverage may be sold, to be eaten or drunk therein, and all other places for the reception and entertainment of the public, and to limit the number of them, and provide for the proper licensing of the same; to regulate the place and manner of selling and weighing hay; and the selling pickled and other fish; to restrain and regulate the purchase of country produce, butchers' meat and fish, by persons called runners or hucksters; to regulate the measuring or weighing of coal, cordwood and other fuel, salt and lime, exposed for sale in any part of the said City or the Liberties thereof; to

regulate the assize and price of bread, and to provide for the seizure and forfeiture of bread baked contrary thereto; to regulate the vending of meat, vegetables and fruit; to regulate the present market; to regulate and enforce the erection of party walls; to provide for the permanent improvement of the said City and the Liberties thereof, in all matters whatsoever, as well ornamental as useful; to enforce the sweeping and cleaning of chimneys, and to regulate the dimensions of chimneys hereafter to be built, so as to admit chimney sweeps to sweep and clean the same; and to regulate and license chimney sweeps; to establish and regulate one or more fire companies; to regulate and require the safe constructing of deposites [sic] for ashes, and to regulate the manner of depositing and keeping ashes at the time they are taken from fire-places; to regulate, remove or prevent, the construction or erection of any fire-place, hearth, chimney, stove, stove-pipe, oven, boiler, kettle or apparatus, used in any house, building, manufactory or business, which may be dangerous in causing or promoting fires; to regulate the keeping and transporting of gunpowder, or other combustible or dangerous materials, and the use of lights and candles in livery or other stables; to regulate or prevent the carrying on of manufactories dangerous in causing or promoting fire; to regulate the conduct of the inhabitants at fires; to provide for the keeping of fire buckets, ladders and fire-hooks, and the making them a part of the real property to which they are attached; to erect, preserve and regulate, public cisterns and other conveniences, for the stopping or preventing fires; to provide for the preservation of property exposed at fires, and to prevent goods and other effects from being purloined thereat; to adopt and establish all such other regulations for the prevention and suppression of fires, and the pulling down of adjacent houses, for such purpose as they may deem necessary or expedient; to establish, and also

to regulate and provide for the superintending of the same, an alms-house or alms-houses, or other place or places for the relief of the poor, that may at any time or in any way be established or erected in the said City or the Liberties thereof; to erect and establish, and also to regulate and provide for the proper keeping of any gaol, bridewell or house of correction, that may hereafter be erected or established in and for the said City and the Liberties thereof; to regulate management, and provide for the security of the public property of the said City; to provide for the health of the said City and the Liberties thereof; to establish and regulate a City watch, and prescribe the powers of the watchmen; to license and appoint by warrant, under the common seal of the said City, or otherwise, such and so many inferior officers, other than those already mentioned in this Act, as shall from time to time be found necessary or convenient to enforce and execute such by-laws and regulations as may hereafter be made by the said Corporation or Common Council, and to displace all or any of them, and put others in their room, and to add to or diminish the number of them or any of them, as often as the said Common Council of the said City shall think fit; to establish and regulate one or more pounds; to direct the returning and keeping bills of mortality, and to impose penalties on physicians, sextons and others, for default in the premises; to regulate the police of the said City and the Liberties thereof, and to prevent the waste of water; to regulate the burial of the dead; to regulate the bonds, recognizances or other securities, to be given by all municipal officers for the faithful discharge of their duties, and the amount for which the same shall be taken; to inflict reasonable penalties and fines for the refusing to serve in any municipal office when duly elected or appointed thereto, and for the infringement of any and every law of the said City' to regulate the time and place of holding elections for all

municipal officers, and to make provision for a register of electors or voters for Aldermen, Common Councilmen, and other elective officers of the said City; *to impose and provide for the raising, levying and collecting, annually, by a tax on the real and personal property in the said City and the Liberties thereof, in addition to the rates and assessments payable to the general funds of the Home District, a sum of money, the better to enable them to Carry fully into effect the powers hereby vested in them:* Provided, *that such additional tax shall never exceed in any one year four pence in the pound upon the assessed value of the property lying and being within the limits of the said City, or two pence in the pound upon the assessed value of the property lying and being within the limits of the Liberties of the said City, as now settled by the general assessment laws of this Province, the property lying and being within the limits of the said City being always assessed as Town property, and that lying and being within the Liberties thereof as County property*; to require the road labour of the said City and the Liberties thereof, required or to be required under the general road laws of the Province, to be commuted for money, and such money paid into the hands of the Chamberlain of the said City, to be at the disposal of the said City for the purpose of improving the public highways of the said City and the Liberties thereof; and generally to make all such laws as may be necessary and proper for carrying into execution the powers hereby vested or hereafter to be vested in the said Corporation, or in any department or office thereof, for the peace, welfare, safety and good government, of the said City and the Liberties thereof, as they may from time to time deem expedient, such laws not being repugnant to this Act or the general laws of the Province: *Provided always*, that no person shall be subject to be fined more than five pounds, or to be imprisoned more than thirty days, for the breach of any

by-law or regulation of the said City: *And provided also*, that no person shall be compelled to pay a greater fine than ten pounds for refusing to serve in any municipal office when duly elected or appointed thereto.

. . .

LXXXI. *And be it further enacted by the authority aforesaid*, That it shall be lawful for the said Common Council from time to time to appoint so many of the members thereof as shall be thought necessary to form a Board of Health, to aid and assist the Mayor of the said City to carry into effect the provisions of the statutes which now are or may be passed to preserve the health of the said City, and to prevent the introduction and spreading of infectious and pestilential diseases in the same; and the said Board, in conjunction with the Mayor, shall have the like powers and authority for the purposes aforesaid, as are vested in Boards of Health, established under the provisions of an Act passed in the third year of His present Majesty's reign, intituled, "An Act to establish Boards of Health, and to guard against the introduction of malignant, contagious and infectious diseases in this Province."

APPENDIX FOUR

CITY OF TORONTO BY-LAW #4

Transcribed from a microfilmed copy of the original
maintained by the City of Toronto Archives, City Hall, Toronto

AN ACT concerning Nuisances and the

good Government of the City

BE IT ENACTED by the Mayor, Aldermen and Commonalty of the City of Toronto in Common Council assembled:

SECTION I

That any person who shall be guilty of any of the offences hereinafter numbered shall be subject to the penalties hereinafter prescribed, to wit:

1. Any person who shall, on Sunday do any servile Work or Sales, works of piety, charity and necessity excepted, or buy or sell, or show forth, or expose for sale, any goods, wares or merchandize, or any other thing shall forfeit a sum not less than five shillings, nor exceeding fifteen shillings for each offence in the discretion of the Magistrates convicting but it shall be lawful to sell milk until nine o'clock in the morning, and after four o'clock in the afternoon and the constables are especially enjoined to carry this law into effect.

2. Any Person who shall drive any carriage, or sit upon any horse or other beast harnessed thereto, in order to drive the same, unless he shall have strong reins or lines fastened to the bridles of the beasts, and hold in his hands sufficient to guide them and to restrain them from running, galloping or going immoderately through any of the streets,

lanes or alleys, and any person driving any such carriage, or riding upon any horse, mare or gelding, or who shall cause, permit or suffer the beast or beasts he shall ride, use or drive, to go on a gallop, or other immoderate gait, and any person having the care of any carriage, horse, mare or gelding who shall watch or stand by or near the same and shall not sufficiently secure such beast from running or going on a gallop or other immoderate gait; and any proprietor or possessor of any horse, mare or gelding, who shall suffer or permit the same to run at large in any of the streets, lanes or alleys or shall suffer the same to stand in any street, lane or alley without being sufficiently secured or tied to prevent its running away, shall severally, in each and every of the foregoing cases, forfeit a sum not exceeding ten shillings, and not less than three shillings and nine pence in the discretion of the Magistrate convicting; and it shall be lawful for any person to stop any horse, mare or gelding running at large or going on a gallop, or other immoderate gait until the mayor or some alderman may be informed thereof so that any such mayor or alderman may cause such horse, mare or gelding and the carriage (if any) to which the same may be attached to be detained, and kept at the expence of the offender, until such penalty and expenses be paid with costs, or until the offender can be secured and dealt with according to law.

3. It shall not be lawful for any person to throw or deposit, or cause to be thrown or deposited any dung, manure or filth of any description whatsoever, in the front of the city upon the sand, beach, or in the water in the harbour, under a penalty of ten shillings for each offence.

4. It shall not be lawful for any person to take away any of the gravel, sand, or earth forming the beach in front of the City under a penalty of ten shillings for each offence.

5. It shall be the duty of the High Bailiff to prevent the erection of any huts, or shanties on the beach or public grounds adjoining within the bounds of the said City and liberties, and to cause all such huts or shanties to be instantly removed.

6. No person shall hereafter empty any straw-bed or throw other substances upon vacant lots, streets lanes or alleys, or throw ashes, or other refuse of coal in any of the streets, lanes, or alleys under the penalty of five shillings for each and every offence.

7. Any physician or other person inoculating for the small pox shall forfeit five pounds for each inoculation; and any person suffering himself, his wife, child, apprentice or servant to be inoculated shall forfeit two pounds ten shillings for every such inoculation.

8. Any person vending or dispensing of any goods or other articles, at cards, dice, billiards, bagatelle boards, shuffle boards, E.O. Table, pharo-bank or any other unlawful game, or setting up the same to be raffled or played for, and any person guilty of raffling or playing in his own house or dwelling or otherwise for money, liquor or other articles, and any person keeping a billiard table, shuffle board, E.O. Table, pharo-bank, or any other unlawful game, for hire or reward, or where money or liquor, or other articles shall in any way be played for; and if any person shall keep or have in his possession any billiard table, shuffle board, E.O. Table, pharo-bank, or any unlawful instrument or device for gaming, and shall permit any apprentice, minor or servant to play at any or either of the said tables or devices, whether for hire or reward or not, shall in either and every case be liable to a forfeiture of four pounds, and if such offender shall be a Tavern-Keeper the Penalty shall be five pounds. And it shall be lawful for the mayor, or any Alderman after the first Conviction, and any person in aid of him to enter into any House

or other building, lot or yard and to suppress, destroy or remove any gaming tables or instruments, or devices for gaming, and if any person shall hinder or obstruct him in the execution of his duty he shall forfeit five pounds.

9. No person shall for his gain, lucre or living keep any common house, alley or place of bowling, [illegible], tennis, nine pins or any other unlawful game, now or hereafter to be invented, on pain of forfeiting two pounds for each day he shall keep the same, upon conviction thereof.

10. Any person who shall leave any garbage of fish, or any other offensive, putrid or unwholesome substance, on the pier or any of the bridges, wharves or slips of this city or who shall permit any stagnant water, or any filthy, putrid or unwholesome substance to remain on his lot, or in his house, or other building, or in or upon any sloop or other vessel to the annoyance of any other person, after notice from an alderman to remove, fill up, destroy, or abate the same, in such reasonable time and manner as he shall direct shall forfeit one pound five shillings; and a like penalty shall be inflicted on any person who shall cause any filthy, putrid, or unwholesome substance to be placed in any street, lane or alley, and shall neglect removing or abating the same after such notice as aforesaid; and any alderman with any person in aid of him, after such notice, and either before or after prosecution, may enter into or upon any sloop or vessel, or into any lot, house or building, and remove or abate such nuisance in such manner as he shall judge best at the expense of the offender, to be recovered by action of debt from such offender, with costs; and if any person shall hinder or obstruct such Alderman, or any person in aid of him, in the execution of this duty he shall forfeit five pounds.

11. Any person digging, taking or carrying away any earth or sand from any of the streets, lanes or alleys, or from the public squares, or from any of the lots belonging to the mayor, aldermen or commonalty of this city except in pursuance of some law or on resolution of the common council, or by virtue of some order of a magistrate for the removal of nuisances or obstructions, shall forfeit five shillings for every such offence.

12. Any person bathing or swimming along or near the piers, wharves or shores of the said city, at any time between the hour of six in the morning, and the hour of eight in the evening shall forfeit ten shillings for every such offence. Provided however that nothing in this Section shall be taken to prevent any person from bathing in the lake, in any part west of the line of Peter Street before the hour of seven o'clock in the morning.

13. No steam boat or other vessel sailing on the lake shall receive any freight or discharge any part of the cargo on the Sabbath day at or near any of the Wharves of this city except the baggage of passengers, nor shall any bell be rung in the manner of a fire bell on any day or night except in cases of fire under a penalty of five pounds for each offence.

14. Any person who shall wilfully and wantonly injure, deface, or tarnish any house, porch, stoop, door, gate, well, or pump, fence, tree or any useful or ornamental public or private work or improvement, or any post standing in the street either by daubing or besmearing the same, or any part thereof with paint, mud, tar, oil or grease, or by throwing stones, or in any other manner whatever, or who shall aid or assist therein shall forfeit and pay the sum of one pound five shillings.

15. No person shall place any casks, wood, stone, plank, boards, or other article in any street or on any side walk, so as to incommode or obstruct the free passage or use

thereof, on pain of forfeiting for each offence five shillings. And any alderman may cause the same to be removed at the expence of the offender; nor shall any person under a like penalty back-drive or lead any horse, cart, or waggon over any such side walk, or use, ride or drive any sled or sleigh thereon, unless it be in crossing the same to go in any yard or lot.

16. No person shall place or cause to be placed any stone, lumber or any other materials for building whatever, on any side-walk or pavement, nor shall any person be allowed to occupy more than half of the street and in case of two Buildings being erected opposite to each other, at the same time, not more than one third of the Street with any such materials, and then only during the time which may be indispensably necessary for erecting the Buildings for which such materials are designed under a penalty of twenty five shillings on conviction before any City Magistrate; and any Alderman may cause the same to be removed at the expence of the Offenders to be recovered by articles of debt; Provided always that no lumber or other materials deposited on the roads for building, shall be so placed as to obstruct the passage of water in the gutters or surface drains.

17. No person shall suffer any carriage without horses to remain or stand in any street or lane for more than one hour without a written permission from the mayor or one of the aldermen, under the penalty of five shillings for each offence.

18. No person shall at any time fasten any horse or horses to any porch, or in such way as that the reins or lines shall prove an obstruction in the free use of the side-walk upon pain of forfeiting five shillings for each offence; and the person in whose possession or use such horse or horses shall then be, shall be deemed the offender, unless he shall prove the contrary to the satisfaction of the magistrates before whom he shall be brought.

19. No person shall cast or throw any Ball of snow or ice in any of the public streets of the city under a penalty of five shillings for each offence.

20. If any person shall sell any goods, wares, merchandise, liquors or other effects whatsoever as being of a certain weight or measure, and the same shall prove defective, and not according to law and the course or usage of trade, such seller, besides being answerable to the party grieved, shall pay for each offence one pound five shillings.

SECTION II

Any person who shall during any Holiday erect or cause to be erected any Tent, booth, or stall within the limits of the city for the purpose of vending or disposing of any spirituous liquors, beer, mead or cyder, or any kind of meats, cakes, or fruit, and any person who shall during the time aforesaid, collect in numbers in any street, lot or other place for the purpose of gaming, dancing, or other amusement, shall forfeit one pound five shillings for every offence.

SECTION III

No swine shall be permitted to run or be at large in any of the streets, or any of the side walks in this city, and if any swine shall be so found running or being at large, the owner or owners thereof shall forfeit, and pay for each and every such swine, the sum of five shillings to be recovered in the name of the mayor, alderman and commonalty of the city.

SECTION IV

It shall be the duty of the High Bailiff to employ persons to take and convey all swine found running or being at large contrary to the above section, to the public pound there to detain the swine for six days, and in case no person shall appear to claim the same within the time aforesaid, and pay such fine, and all reasonable charges for conveying and

keeping such swine, then and in such case at the expiration of the said six days the pound-master shall sell such swine at public auction after giving three days public notice in writing of such sale in at least three public places in this city; and after deducting such fine and all the charges aforesaid, the surplus (if any) shall be paid over to the owner or owners of such swine if satisfactory evidence in proof that such claimant or claimants was or were the owner or owners thereof. Provided such claim shall be made in three months after such sale, and if no such claim shall be made within the time aforesaid, then the net proceeds of such sale shall be appropriated by the Council to the support of the poor of this City.

SECTION V

In case any minor or servant shall incur any penalty under this or any law of the Common Council, then and in such case the Father, Mother or Guardian, or the Master or Mistress of any such minor or servant shall be held liable for every such penalty, and in case a minor or servant, shall be guilty of any offence, then the penalty incurred may be recovered in the first instance either against his father, mother, guardian, master, or mistress; or against such minor or servant: but in case proceedings to judgment shall have been had against any such minor or servant and such judgment shall not have been immediately paid, then and in such case, it shall be lawful to sue for, and recover the penalty incurred from the father, mother, guardian, master or mistress of such offender, and that no proceedings or judgment against any father, mother, master or mistress, shall prevent or affect any proceedings, judgment or execution against the servant or minor. Provided there shall be but one satisfaction for any one offence.

SECTION VI

It shall not be lawful for any person or persons to have or draw a seine in the Bay for the purpose of catching fish, in any part of the beach in front of the City, under a penalty of ten shillings for each offence. Provided that this clause shall not be so construed as to prevent any person from fishing with a Seine or otherwise, on any part of the beach east or south of the Don River, on any part of the Peninsula opposite to the City, or any part of the beach west of the Old Kings Wharf.

Common Council Chamber

Toronto, May 30th, 1834

[sgd] Wm. L. Mackenzie

Mayor

APPENDIX FIVE

CITY OF TORONTO BY-LAW #8

Transcribed from a microfilmed copy of the original
maintained by the City of Toronto Archives, City Hall, Toronto

AN ACT to Establish a Board of Health

BE IT ENACTED by the Mayor, Aldermen and Commonalty of the City of Toronto in Common Council assembled:

SECTION I

That a Board of Health shall be annually appointed by the Common Council to consist of the Mayor and four members of the Council, which Board shall have authority to enforce the Laws of this Province, providing against infectious and pestilential diseases, and for that purpose shall assemble at such time and place and as often as they may judge necessary to superintend and direct the execution of all such Laws of the Province, and of the Common Council as now are or may hereafter be passed providing against the said Diseases, or which relate to the public Health of the City; to be by them exercised in such manner as in their judgment and discretion may best promote the important object for which the said Board is instituted; and any three members of the Board shall be a Quorum to transact Business.

SECTION II

The said Board of Health shall make diligent enquiry with respect to all nuisances which may exist in this City, which they may deem obnoxious to the Health, and lives of its inhabitants, and shall have full power to order the removal of the same at their discretion,

under a penalty to be levied from the offender of any sum between five shillings and five pounds for every refusal of any person in complying with such order.

SECTION III

The said Board during the existence of any Epidemical disease, or upon a probable approach shall have power at the public expense to open Lazarettos, or such other place or places as they shall deem proper, for the accommodation of the sick, and to make such Rules and Regulations, for their admission, reception and treatment, as they may think proper, hereby authorising such board to employ such and so many Physicians and Nurses, and to procure such nourishment, food and Necessaries, for the use of the Sick so admitted, as well as for the use of the Sick of this City, as they may deem just.

SECTION IV

The said board shall have Power, in their discretion to remove or order the removal of all persons and things within the said City infected by or tainted with pestilential matter, to such place or places as may in their opinion best conduce to the preservation of the Health of the City; and in order to enforce a prompt and punctual compliance with the said order, all offenders in the premises shall respectively be subject to a penalty of Two pounds ten shillings for each offence. And further, it shall be the duty of the High Bailiff and of the City Inspector to observe such Instructions as may be given them respectively by the said Board touching the duties enjoined upon them.

SECTION V

It shall and may be lawful for the Board of Health from time to time and for such period and at such time and place as they shall think fit, to require the Keepers of all public houses, hotels, taverns, and boarding houses, to make reports of persons sick, or diseased,

and also to require all Physicians to report the number of persons sick, and attended by them, and the number of persons deceased who have been attended by them during the prevalence of any infectious disease or Epidemic; and such other Regulations as the Board may deem proper for the preservation of the public Health, not inconsistent with the Laws of this Province; and every person who shall neglect or refuse to comply with the provisions hereof, and the Regulations so established, shall be subject to a penalty of Two pounds ten shillings.

SECTION VI

It shall be lawful for the said Board to direct some suitable person or persons by them to be authorised for the purpose, to enter in the day time and examine into any Building of any kind, cellar, Lot of Ground, alley, sink, vault or privy which they may have reason to believe are foul, damp, sunken or ill constructed, and may direct the cleansing, altering and amending the same, and the removal of all nuisances, in and about the said Premises; and the City Superintendent shall from time to time report to the Mayor, Alderman or Board of Health all such Buildings, Cellars, Lots, Alleys, sinks, vaults or privies, public or private Docks and Slips as may in his judgment require to be elevated, altered or amended for the Security of the Health of the City.

SECTION VII

It shall be lawful for the said Board of Health to direct any stagnant waters to be drained off or removed from any Lot, or out of any Street; and if any owner or possessor of ground on which such stagnant water may be, shall omit to obey the directions of the Board with regard to its removal or draining off, such offender shall pay a penalty of Two pounds ten shillings; and the said Board shall have authority at their election to enforce

and put in execution the direction so given, at the expense of the offender to be recovered as a penalty, provided it do not exceed Five pounds.

SECTION VIII

It shall be lawful for the said Board to prohibit the use of such Vats, pits, or pools of standing water, whether from Tanners, Skinners, Dyers or other persons, as they may deem dangerous to the public Health, and if any orders given by them in the premises shall be disobeyed, the offender shall forfeit Two pounds for each offence.

SECTION IX

No person shall occupy or use any Street, Lane or Alley, or any public Square or avenue of the Said City, or erect any Booth or Platform therein for the purpose of buying, opening or exposing for Sale, any Fish, Provisions or goods of any kind, without the permission of the Common Council, under the penalty of five shillings for every day this provision shall be violated; but no single Recovery shall exceed one pound five shillings.

SECTION X

No person shall inter any Corpse in any Cemetry [sic] or other place in the said City, unless in vaults or Graves at least six feet deep, and without removing, disturbing or exposing any other dead body or Coffin, under the penalty of One pound five shillings.

SECTION XI

Every Butcher or other person immediately after killing any Beeves, Calves, Sheep, Hogs, or other Cattle shall destroy the offals, Garbage and other offensive and useless parts thereof, or convey the same unto some place where the same shall not be injurious or offensive to the Inhabitants, under the penalty of One pound five shillings for every offence.

SECTION XII

No person shall cast or leave exposed the dead carcass of any Horse, Cow, Hog, Dog or other Animal in any Street, Lane, Alley, Yard, or Lot within this City, under the penalty of Two pounds for every offence.

SECTION XIII

Whenever any putrid or unsound Beef, Pork, Fish, Hides or Skins of any kind, or any other putrid or unsound substance, shall be found in any part of the City, it shall be the duty of the City Superintendent and of the Police Constables to cause the same to be destroyed or be disposed of in such other manner as may be equally secure, as it regards the Public Health; and if any person shall resist the City Superintendent or Constables, or either of them in the execution of the Duties hereby imposed, or shall disturb, hinder or molest them therein, such offender shall forfeit the penalty of Two pounds ten shillings.

SECTION XIIII [sic]

No tub shall be removed from any privy or necessary house within the City, except between the hours of eleven at night, and three in the morning, from the first day of May to the first day of October under the penalty of Two pounds ten shillings for each offence; nor shall any person under the like penalty empty, cast or lay the contents of any tub or privy in any Slip or Dock, or in any Street, Lane or Alley or on any public property.

Common Council Chamber

Toronto, June 9th, 1834

(sgd) Wm. L. Mackenzie

Mayor

APPENDIX SIX

CITY OF TORONTO BY-LAW #9

Transcribed from a microfilmed copy of the original
maintained by the City of Toronto Archives, City Hall, Toronto

AN ACT For regulating, paving, cleaning, and repairing the Streets and Roads, and for constructing Common Sewers

BE IT ENACTED by the Mayor, Aldermen and Commonalty of the City of Toronto in Common Council assembled:

SECTION I

There shall be appointed by the Common Council a discreet and proper person to superintend and direct the Street Surveyor's Department who shall be known and called the Street Surveyor.

SECTION II

The said Street Surveyor shall before entering upon the duties of his office take and subscribe an oath or affirmation well and faithfully to perform the duties of his said office.

SECTION III

The said Street Surveyor shall before entering upon the execution of his office give bond with sufficient sureties to be approved by the Common Council in the penal sum of Two Hundred pounds, conditioned for the faithful performance of the duties of his office.

SECTION IV

The said Street Surveyor shall be the overseer of the roads or Highways in the City and Liberties of Toronto, and it shall be his duty to regulate and keep the same in repair.

SECTION V

It shall be the duty of the said Street Surveyor to advertise for Estimates, and to contract for Wells, pumps, and sewers, paving and repairing Streets, for the construction of roads, for the building and repairing Wharves and piers, and in all cases where Expenditures connected with the Street Surveyor's department are authorized by the Common Council, except cases requiring slight repairs.

SECTION VI

It shall be the duty of the said Street Surveyor to submit all Estimates received by him to the Common Council previous to closing any Contracts.

SECTION VII

It shall be the duty of the said Street Surveyor to enquire into the subject matter of all applications to the Common Council in relation to regulating, paving or otherwise improving the Streets, Roads or Wharves in the City of Toronto and to report to the Common Council the particular state of the circumstances of each case and if necessary a survey or plan of the Improvements thereby intended.

SECTION VIII

It shall be the duty of the said Street Surveyor to attend to the due Execution of all the ordinances of the Common Council for the regulating, digging, filling, paving or repairing Streets, Roads, Wharves or Common Sewers, and to report to the Clerk of the Common Council all offenders against any or either of the provisions of this Act.

SECTION IX

It shall be the duty of the said Street Surveyor to take a general charge of viewing and determining from time to time whether any and what Improvements or repairs are necessary and can be made to any of the Streets or Roads in the City of Toronto and report to the Common Council, together with the best mode of doing the same.

SECTION X

It shall be the duty of the said Street Surveyor to attend to and direct the execution of such Matters and things as are particularly committed to the Aldermen or Councilmen of the respective Wards, regarding Streets and Walks, to order the removal of all timber, goods and other things with which any of the Streets, Wharves or piers, may be encumbered, under the like penalties, as if directed by the Aldermen or Councilmen of the Ward.

SECTION XI

It shall be the duty of the said Street Surveyor to attend to the surveying of Lots about to be built upon and to present and report for the Clerk of the Common Council, all Encroachments on the Streets or Roads in the City of Toronto.

SECTION XII

Any Citizen or number of Citizens shall be allowed to pave the street opposite to his or their property, where the same shall extend from the Intersection of another, provided the same be done in conformity to the regulations of the Common Council.

SECTION XIII

In all Streets in the City of Toronto of the width of forty feet and upwards which are paved, or shall hereafter be paved or repaired, each of the side walks, or foot walks between the lines of the Streets and Kennels shall be of the following width, that is to say:

1st: In all Streets forty feet wide, Seven feet

2nd: In all Streets fifty feet wide, Eight feet

3rd: In all Streets sixty feet wide, Eleven feet

4th: In all Streets seventy feet wide, Eleven feet

5th: In all Streets eighty feet wide, Twelve feet

6th: In all Streets above eighty feet wide and not exceeding one hundred feet, Fifteen feet

7th: In all Streets of more than one hundred feet, Twenty feet and no more.

SECTION XIV

In all Streets less than forty feet in width such proportion thereof as may be directed by the Street Surveyor shall be used and flagged for side walks or foot paths.

SECTION XV

No Street the width whereof is less than sixty feet shall hereafter be accepted by the Common Council as a public Street or Highway.

SECTION XVI

The Road Committee shall examine the state of the Roads, Streets, Avenues and Highways at least once in every month, and give the Street Surveyor any and such Information as they may think necessary and proper relative to the regulating and keeping the same in repair.

SECTION XVII

No person shall obstruct the walks laid across the public Streets, or at the head of the public slips, in the City of Toronto by placing or stopping his Horse, Cart or other Carriage upon or across any of the side walks or by placing or putting any other obstruction or things across or on the same, under the penalty of ten shillings.

SECTION XVIII

No person or persons of the City of Toronto whether Agent, Owner, or Employer shall suffer or permit any Cask, bale, bundle, box, crate, or any other goods, wares or merchandize, or any boards, planks, posts or other timber, or anything whatever, to be raised from any Streets on the outside of any building into any loft, store or Room, or to be lowered from the same on the outside of any building by means of any rope, pulley,

tackle or windlass under the penalty of two pounds ten shillings to be recovered by an action of debt from such person, agent, owner or Employer.

SECTION XIX

No person shall make or construct or cause or permit or procure to be made or constructed any drain or Sewer from any Cellar, yard or other place leading into any of the Common Sewers of the City of Toronto without the Written permission of the Street Surveyor under the penalty of two pounds ten shillings.

SECTION XX

All drains leading into any of the Common Sewers in the City shall be made of brick or stone with an Iron or Copper Grate across the outlet of such drain or Sewer at its junction with the common or main Sewer, the bars of which shall not be more than half an inch apart and made in such other manner as the Street Surveyor shall direct under the penalty of two pounds ten shillings for each offence. And the Owner or occupant of any premises from which such drain shall lead shall forfeit and pay the further penalty of ten shillings for each day such drain or sewer shall remain after notice from the Street Surveyor to such owner or occupant to remove the same.

SECTION XXI

No person shall construct or make use of any drain or sewer leading into any of the public common Sewers of the City of Toronto for the purpose of carrying off the contents of any privy or Water Closet, nor shall communications from distilleries using Grain whether ground or otherwise in the process of distribution be in any case permitted to communicate with the public Sewers, under the penalty of twenty shillings for each offence, and five shillings for each day such communication is permitted to continue.

SECTION XXII

A just and reasonable compensation for the use of any sink or drain shall be paid by any person who shall be authorized to use the same.

SECTION XXIII

It shall be the duty of the chamberlain every Saturday evening to pay the Wages of each labourer or overseer employed in any day work on the [illegible] by the Corporation. Each labourer shall bring to the Chamberlain a ticket shewing the Work he has done during the week signed by the Overseer, which ticket shall not be transferrable.

SECTION XXIV

No person shall erect any awnings made of cloth in any Street in this City unless the same shall be at least seven feet elevation from the side walk, nor shall any one be permitted to erect them of wood, and if any person shall erect any awning contrary hereto he shall forfeit the sum of ten shillings and for every day he shall continue the same after notice to have the same taken down he shall forfeit the sum of two shillings and six pence.

SECTION XXV

Every Inhabitant or possessor of any house or other building or the owner or possessor of any lot or lots of Ground fronting any Street or lane shall at his own proper charge and expense, or at the Expense of the person whose tenant he is, well and sufficiently keep and maintain in good repair the side walk in front of his house or lot at such times and in such manner as shall from time to time be directed by the Street Surveyor under the direction of the Common Council, the Mayor or any Alderman of the Ward in which such Inhabitant shall reside, and if any such Inhabitants, Owner or possessor shall refuse, neglect or delay to keep and maintain in good repair the side walk contrary to such

direction as aforesaid he shall for every such offence forfeit the sum of two pounds ten shillings.

SECTION XXVI

Any person who shall injure or tear up any pavement or side walk or any part thereof without due authority or who shall hinder or obstruct the making or repairing any pavement or side walk which is or may be making or repairing under any law or resolution of the Common Council, or who shall hinder or obstruct any person employed by the Common Council or by the Street Surveyor or persons employed by him in making or repairing such pavement or side walk, shall for every such offence forfeit the sum of two pounds ten shillings.

SECTION XXVII

Whenever application shall be made by Petition or otherwise to the Common Council for the purpose of making an estimate and assessment for the patching, paving, altering or mending any Street or for the making or laying out of any drain or common Sewer, or for the raising, reducing or levelling or fencing in any vacant lot or lots adjoining each other or whenever any resolution shall be offered in said Common Council for bringing in a law for either of the above purposes it shall be the duty of the Clerk of the Common Council to cause public notice to be given daily for five days in one or more of the Newspapers printed in this City of such application or resolution, and any objections to the same must be reduced to writing and returned to the said Clerk of the Common Council previous to the expiration of such notice and in no case shall a Street, lane or alley be paved until a good and sufficient drain or common Sewer shall be laid through the same.

SECTION XXVIII

Whenever the Street Surveyor shall have completed any Estimate or assessment directed by law for any of the purposes mentioned in the preceding section he shall give notice daily for two weeks in one or more of the Newspapers printed in this City of such Estimate and assessment having been completed, and that the same is open for Inspection at his office, and at the expiration of such notice he shall return such estimate and assessment to the Common Council for their consideration.

SECTION XXIX

The following form of an ordinance shall be sufficient in cases where assessments are necessary to be made, to wit: -

[Section XXIX then set forth a standard form of ordinance]

SECTION XXX

It shall be the duty of the Street Surveyor to employ Cartmen to remove all the manure, rubbish and dirt from the Streets, Wharves and piers in the City of Toronto and to report to the Clerk of the Council all infractions of the Laws and ordinances of the City relating to the Sweeping and cleaning of Streets, Wharves and piers, and removing garbage and ashes.

SECTION XXXI

It shall be the duty of the Street Surveyor to superintend and direct the several Street Inspectors in their duties of causing the Streets to be swept and cleansed and the dirt and Garbage, Rubbish and ashes to be removed.

SECTION XXXII

It shall be the duty of the Street Surveyor, from the first day of May to the first day of November, in every year to cause a cart to pass once in every day except Sundays through all the Streets in the City, and the drivers of such Carts shall give notice of their

approach by ringing a hand-bell and shall receive all vegetables, ashes, offal, or garbage which shall be delivered at such carts under a penalty of twenty five shillings for every neglect or refusal.

SECTION XXXIII

It shall be the duty of every owner or occupant of a house or shop within the City of Toronto to water and sweep the pavement or side walk in front of his dwelling or store before eight in the morning from the first day of May to the first day of October and before nine during the rest of the year. The penalty for each neglect of this Regulation shall be five shillings.

SECTION XXXIV

The owner or occupant or person having charge of each Inhabited House or other building in the City of Toronto shall within the first four hours after every fall of Snow or hail or rain which shall freeze on the side walks, and in the Gutters, cause the same to be removed entirely off the side walks, and to the breadth of one foot out of the Gutter opposite each House or building, under the penalty of five shillings for each such neglect; to be paid by the said owner, occupant or person having charge severally and respectively.

SECTION XXXV

In case the Ice or snow shall be so congested that it cannot be removed without injury to the side walks or pavement the owner, occupant or person having charge of any building as aforesaid shall within the first four hours after every fall thereof cause the side walks opposite his, her or their premises to be strewed with ashes or sand, under a penalty of five shillings to be paid by the owner or occupant or person having charge thereof severally and respectively.

SECTION XXXVI

In case the owner, occupant or person having charge of any House, lot building or land shall neglect to comply with any of the provisions of the previous sections of this Act it shall be the duty of the Street Inspector of the Ward in which such premises are situated to cause the same to be done.

(sgd) Wm. L. Mackenzie

Mayor

Common Council Chambers

Thursday, June 19th, 1834

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(g) City of Toronto

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