

THE FOUR COURTS OF SIR LYMAN DUFF

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I. *Introduction.*

Sir Lyman Poore Duff is the dominating figure in the Supreme Court of Canada's first hundred years. He sat on the court for more than one-third of those years, in the middle period, from 1906 to 1944, participating in nearly 2,000 judgments — and throughout that tenure he was commonly regarded as the court's most able judge. Appointed at forty-one, Duff has been the youngest person ever to have been elevated to the court. Twice his appointment was extended by special Acts of Parliament beyond the mandatory retirement age of seventy-five, a recognition never accorded to any other Canadian judge. From 1933, he sat as Chief Justice, having twice previously — in 1918 and 1924 — almost succeeded to that post, although on those occasions he was not the senior judge.

During World War I, when Borden considered resigning over the conscription issue and recommending to the Governor General that an impartial national figure be called upon to form a government, the person foremost in his mind was Duff, although Sir Lyman had never been elected to public office. After Borden had found that he had the support to continue himself, Duff was invited to join the Cabinet but declined. Mackenzie King considered recommending Duff for appointment as the first Canadian Governor General.

Duff undertook several inquiries of national interest for the federal government, of particular significance being the 1931-32 Royal Commission on Transportation, of which he was chairman, and the 1942 investigation into the sending of Canadian troops to Hong Kong, in which he was the sole commissioner. From 1919 until 1946, Duff participated in forty-four reported decisions of the Judicial Committee of the Privy Council, giving the Committee's collective opinion on eight occasions. Men such as Haldane, Birkenhead and Simon treated him as an equal professionally, and as a friend.

What made Duff so outstanding a personage? One does not easily get this impression from reading his judgments. These

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contain little exposition of judicial philosophy or, in constitutional cases, of the social, economic and political issues. He made little contribution to the jurisprudence of the great areas of the common law, contract, tort and property law. He wrote very well, but not inventively. In short, he was not a Justice Oliver Wendell Holmes or a Lord Denning. Was he a great judge then? And, if so, what distinguished him from his colleagues? Certainly he was regarded as having an unmatched legal mind — exceptional analytical powers and understanding of legal theory. He was a prodigious reader, of matter of every kind, and had a memory that was almost unique. He was a man of energy and force of character. He understood the world around him. But he appears to have perceived his judicial role in traditional terms — as an applier of the law rather than as a maker. It may be that his internal make-up suited him for that traditional role. He was very conscious of the fact that the Judicial Committee of the Privy Council was a superior court and had a great admiration for the abilities of some of its members. There is no evidence that he rebelled against that situation.

It is not the purpose of this article to attempt an analysis of Sir Lyman's contribution to Canadian jurisprudence. Rather, it is to provide some background about Sir Lyman, and a few details about his colleagues, so that we can have an idea of what kind of a person he was, how it was that he arrived on the court, and became and stayed on as Chief Justice.¹ Information does not abound. Sir Lyman kept no diary and left virtually no correspondence. One has to make the most of what one can find.² Most of the excerpts from diaries and correspondence referred to in this article have not been published before. The information is given in the context of the tenures of the four Chief Justices who presided while Duff was on the Supreme Court. The four were Sir Charles Fitzpatrick (1906-1918), Sir Louis Henry Davies (1918-1924), Francis Alexander Anglin (1924-1933) and Duff himself (1933-1944). It will help to measure the man, however, if we first examine something of his life and background prior to his appointment.

¹ Considering the space limitations for this article, it would be impossible to discuss Duff's contribution to Canadian jurisprudence adequately, in addition to providing the biographical background. As to his contribution in the constitutional field, see, for example, G. Le Dain, *Sir Lyman Duff and the Constitution* (1974), 12 *Osgoode Hall L.J.* 261.

² The author has been gathering material for a biography of Sir Lyman for the past twelve years. As to the difficulties involved and where the information has come from, see R. Gosse, *Random Thoughts of a Would-be Judicial Biographer* (1969), 19 *U. of T. L.J.* 597.

II. *Getting There.*

On June 6th, 1796 Charles Duff was born in Perth, Scotland. Charles became a stone-carver and, like many Scots of his time, emigrated to escape poverty and build a better life.³ He went, first of all, south to England where he found employment in the restoration work at Newstead Abbey, which had been the country seat of the Byron family — nine miles north of Nottingham on the edge of Sherwood forest. In 1830, he married Ann Linley, who appears to have been the daughter of a local artisan, and by her had four children. The second child, another Charles, was born in the nearby village of Papplewick. By the late 1840's good employment for a stone-carver was hard to secure and the father decided that Canada held better prospects. At the age of fifty-two, with two of his sons, one being Charles, he came to Ontario and settled on a small bush farm in Haldimand County. Two years later the father died there, and the following year Ann died in England.

The son Charles went to study theology at Union College in Schenectady, New York and was ordained as a Congregationalist minister in Toronto in 1862. Over the years he became prominent and much-beloved in his Church. At one time he was the chairman of the Congregational Union of Ontario and Quebec. He wrote a good deal, was a leader in the temperance movement, and took his politics, as a Liberal, seriously. His first congregation was at Meaford on Georgian Bay. It was here he met and married Isabella Johnson, the American-born daughter of an Irish lawyer, who had emigrated to the United States but later settled on a farm near Bolton, north of Toronto, becoming in due course a justice of the peace. Although her father was not a Roman Catholic, Isabella and her mother were. But she gave up Catholicism to marry Charles Duff. A strong personality, described as having "great executive ability", Isabella was considered the intellectual in the family. She read avidly, and encouraged her children to read, with the emphasis on Shakespeare. Isabella and Charles had two sons and then two daughters. The second son — Lyman Poore Duff — was born at Meaford on January 7th, 1865. This line of the Duff family came to an end with these four children. Lyman was the only one of the four to marry, and his marriage was a childless one.

Lyman was brought up in a necessarily frugal but literate home. And home was where his father happened to have his

³ The biographical background contained in this part of the article has been drawn from a myriad of sources. It would be impractical to footnote them all.

congregation. When Lyman was two, the family moved to Liverpool, Nova Scotia. It was a long winter's trip. Lyman became ill during the journey and came close to dying. After eight years in Nova Scotia, the Duffs returned to Ontario, to the little hamlet of Speedside, between Fergus and Guelph. Here they lived while Lyman completed his schooling. For some reason, he was sent away when he was twelve to attend high school in Hamilton, where he lived with an uncle. He did most of his high school there, but finished at St. Catherine's Collegiate in 1881, at the age of sixteen, a year earlier than most students. He was a hard worker, took a leading part in the debating and literary societies, as he did later at University, and was thought to have exceptional potential.

The summer of 1881 saw Duff write his University of Toronto entrance examinations. Among others writing was a Gordon Hunter, from Brantford, who was to become Duff's closest friend at college and later lure him to British Columbia to practise law. Duff scored a first class (second out of the 153 who passed) in mathematics, but had only third classes in his other subjects, classics, English, history and geography. Hunter won the Prince of Wales scholarship, finishing second overall. On the whole, Hunter was the brighter student — or at least he received the higher marks — winning the Lorne gold medal for top student in both the second and third years of the four-year Arts programme. In his first year, Duff had a first in mathematics, but thirds in classics, English and French. In second year, he topped his courses in mental science and logic, in which there were thirty-nine and fifty-five students respectively, but again obtained a third class in classics. The following year, Lyman took second year French and was required to repeat it. He got a third class in history, but firsts in mental and moral sciences, and in civil polity. Sometime before or early in his final year Duff became ill and dropped out of the university. Two years later, in 1887, he was granted his Bachelor of Arts degree *aegrotat* with honours.

In the interval, he taught mathematics at the Collegiate in Barrie, fifty miles north of Toronto. There he was elected first vice-president of the school's Literary and Musical Society. These societies were the intellectual and social centres of schools and universities in those days. Duff was always in the forefront of the debates, which were usually reported in the press, where his delivery was described as "clever", "lucid", or given with "his usual force and directness". The *Varsity* had noted⁴ that, at a

⁴ December 9th, 1882.

poetry reading at the University College Literary and Scientific Society during Lyman's second year: "In spite of a certain ungracefulness of gesture, Mr. Duff is very successful as a reader."

Also at Barrie, the short (sometimes at school he had been referred to as "little Duff") and wiry Lyman played half-back on the championship football team. One of his fellow-players, the fullback, said of him "L.P. sure knew how to give and take knocks — football was no parlour game to him".

It may be that, while Duff was teaching at Barrie, he decided on law, or it may have been earlier. A number of his university friends, including Gordon Hunter, were headed in that direction. In any event, with his savings from teaching to finance him, he returned to the University of Toronto and took the long route to qualification at the bar. Instead of enrolling at Osgoode Hall immediately, Duff took the three-year LL.B. course at the university. Only a handful of prospective lawyers took the university law degree first, but those that did so undoubtedly entered the legal profession with a much better understanding of legal theory than those only taking the practice-oriented Osgoode Hall programme. This may help to explain why Duff later had such a superior grasp of legal principles. Duff finished at the top of his law class in all three years and one year was the only student in the entire LL.B. programme (there being fifty students altogether) to have a first-class standing. At the end of 1888, Duff was admitted as a student-at-law by the Law Society of Upper Canada. Five years later, on November 20th, 1893, when he was almost twenty-nine, he was called to the bar of Ontario.

Meanwhile (since 1890) he had been articling in the office of a Fergus lawyer, Neil Malcolm Munro. As a student Duff appeared before the Voters' List Court in Fergus, representing the interests of the Liberal party and, shortly before he was called to the bar, he learned the hazards of litigation. There had been a lawsuit over a farm and one of the litigants, who apparently thought he had been needlessly persecuted by lawyers, accosted Duff on the street "striking him down, cutting his nose, breaking a tooth, and doing other bodily injury". The assailant, a farmer's son, was charged with assault, refused bail, and, after spending a week in jail, was fined \$20.00, and required to give a bond that he would commit no further offences against Duff.

After his call, Duff joined Munro in some kind of partnership arrangement (under the name of Munro & Duff). This arrangement did not last long. Gordon Hunter, who by then had been practising for several years in Victoria, British Columbia, descended on Duff one day and convinced him that a rosy future

awaited him in the Far West. On April 30th, 1894 Duff left Fergus for Victoria.

Hunter had been doing remarkably well out in British Columbia's capital city, which was then the legal centre of the young province. He had served as Crown Solicitor and shortly after Duff's arrival went into partnership with Theodore Davie, the provincial Premier. Davie, however, became Chief Justice the following February, and when Duff, after writing the local examinations, was called to the British Columbia bar a month later — on March 12th, 1895 — Hunter and he went into partnership, under the firm name of Hunter & Duff — at 21 Bastion Street.

Duff was now thirty. Apart from the five months in Fergus, he had yet to practise law. But he was well qualified to begin, and quickly established himself as a counsel to be reckoned with, specializing in civil litigation, which abounded in this frontier community with very English customs. The two newspapers, *The Colonist* and *The Times*, reported court news in some depth and Duff's name frequently appeared in their columns. Early in 1897, Hunter and Duff split up. Perhaps they were too much alike, having similar professional interests, talents and ambitions. Hunter was a drinker, as was Duff, and there may just have been too much conviviality for a sound business partnership. Perhaps it was simply a question of opportunity for Duff, since he immediately joined the busy commercial law firm of Bodwell & Irving. The cases Duff became involved in grew in significance, important government work coming his way from time to time. He took silk, which had something to do with merit at the bar in those days, at the end of 1900, along with Gordon Hunter.

The climax of his career as a lawyer came with his selection (although it was a last-minute selection) from the British Columbia bar by the federal government to be junior counsel before the Alaska Boundary Tribunal in London, in 1903. The Tribunal was set up to determine the Canadian-American boundary where the north coast of British Columbia meets the Alaska Panhandle. None of the other counsel, on the Canadian side, were from British Columbia. Duff's fellow juniors included Frederick Wade, a Manitoba lawyer who had been practising in the Yukon, Aimé Geoffrion of Montreal, and John Simon (later Lord Chancellor) of the English bar. His appointment was made at the suggestion of Senator William Templeman to Clifford Sifton,⁵

⁵ Copy of a letter offering appointment, from Sifton to Duff, dated July 29th, 1903, Sifton Papers, PAC, vol. 274. Sifton wrote: "In the early part of the winter Senator Templeman brought your name before

the federal Minister of the Interior, who was in charge of preparing the Canadian position. Senator Templeman was the publisher of the *Victoria Times*, and before his appointment to the Senate, had been a defeated Liberal candidate for the House of Commons in the 1896 general election. He had run in Victoria, which had failed to send other than Conservatives to Ottawa since entering Confederation. Laurier had brought Templeman into the Cabinet as a Minister without portfolio in 1902, which had meant that Templeman took over the distribution of federal patronage in British Columbia from Sifton, who had had charge of general patronage for the West. The timing was propitious for Duff.

Duff himself had been an active Liberal partisan. In 1898 he was elected president of the Victoria Young Liberal Association. Four years later he was president of the senior association. His name had been mentioned by the *Colonist*⁶ as a probable Liberal candidate in the 1900 general election, but he did not contest the nomination. He spoke frequently at Liberal meetings and was a staunch supporter of Senator Templeman, who reciprocated.

During the summer of 1903, Mr. Justice Walkem (who had twice been Premier of the province) resigned from the Supreme Court of British Columbia. There was a heated contest for the vacancy. Sifton and Charles Fitzpatrick, the Minister of Justice, had more or less promised the next vacancy to a protégé of Sifton's, the Yukon lawyer Frederick Wade, who had with Duff been a junior counsel before the Alaska Boundary Tribunal and who at this time was not even a member of the British Columbia bar.⁷ But since that promise had been made to Wade, Templeman

me requesting that an arrangement should be made whereby you should be retained as Counsel in connection with the Alaskan Boundary matter, and I, after some discussion, intimated to him that we would find a place for you if he thought it advisable. . . ." Duff was informed that: "It will be necessary for you to leave without any delay, go straight to England and remain there until after the argument. . . ."

⁶ August 23rd, 1900, p. 8. Victoria was a two-seat constituency. The other potential Liberal candidate mentioned was George Riley. The *Colonist* was not that enthusiastic about Grit Duff, saying: "He is comparatively well known, fairly popular and considered to possess a fair amount of ability." Neither Duff nor Riley, according to the *Colonist* "are looked upon as men calculated to put up a winning fight against such stalwarts as Messrs. Prior and Earle [the two Conservative incumbents] who have served Victoria faithfully and well".

⁷ Copies of letters from Sifton to Templeman, dated September 23rd, 1904 and Sifton to R. G. Macpherson, dated October 4th, 1904, Sifton Papers, PAC, vol. 261. Wade was called to the British Columbia bar afterwards, on April 5th, 1904, and practised in Vancouver.

had taken over British Columbia patronage. Templeman wanted Duff. Aulay Morrison, the Liberal member of Parliament for New Westminster, was pestering Laurier for the position as he thought he would lose his seat in the next election. The Vancouver lawyers wanted a judge who would reside in their city. Letters and cables flurried across the continent. Rumours were rife and were carried in the press. In mid-October, the Conservative *Colonist* announced in a page-one story that Duff had been appointed, thoroughly approving: "Of sterling integrity, of brilliant parts, endowed with great energy and untiring industry, Mr. Duff will doubtless be as satisfactory on the Bench as he has been successful at the Bar."⁸ But the appointment was by no means settled.⁹ Morrison was marshalling political support, and Templeman wavered.¹⁰ However, in early February the Senator wrote to the Prime Minister:¹¹

Personally I have always inclined to Duff. In every respect he is the ablest and best man for the position. There are of course many applicants and our friends the members have their own views in regard to each, but all of them I think would approve of Duff's qualifications. Our difficulty is about Morrison who was eager to get the position when he left here for Ottawa. . . .

Templeman asked Laurier to make the appointment quickly, informing him that the Chief Justice had called on him the previous day urging that an appointment be made at once as there was a serious congestion of court business. (The Chief Justice was none other than Gordon Hunter, who had gone to the Bench two years earlier.) On February 11th, Laurier wrote Templeman:¹²

My impression is that, at this moment, the best thing would be to appoint Duff. I had however, an interview yesterday with our friend Morrison which, I am sorry to say, was not altogether to my satisfaction. Though, on the whole Morrison was not unreasonable, he feels

⁸ October 16th, 1903.

⁹ A letter from Templeman to Laurier, dated October 28th, Laurier Papers, PAC, vol. 288, reads: "The question of appointing a successor to Walkem, B.C. Supreme Court is to remain in abeyance for the present. There are a large number of applicants including Morrison and Duff, and were a choice made before an election we would have trouble. I have assured all the B.C. members that nothing will be done at present and with this they are satisfied." Duff avoided, at least for a time, the embarrassment this kind of publicity brings. He was in London at the Alaska Boundary Tribunal hearings when the *Colonist* published its story, and he did not return to Victoria until late November.

¹⁰ Letter from Templeman to Laurier, dated December 14th, 1903, Laurier Papers, PAC, 79907.

¹¹ Letter dated February 2nd, 1904, Laurier Papers, PAC, 81904-5.

¹² Copy letter, dated February 11th, 1904, Laurier Papers, PAC, 82249.

very much disappointed that he cannot get an immediate appointment. I pointed out to him however, that it would be extremely unreasonable at present to have a bye-election. . . . My suggestion to him was that we might very well make an appointment for the existing vacancy, and reserve to him the succession of Mr. Justice Drake who, I understand is willing, at an early date to take his pension. . . .

Three days later the *Colonist* ran a story saying that it was a matter of common knowledge that Duff had the refusal of the appointment, but that he was expected to decline preferring to run as a Liberal candidate in the next federal election.¹³ At the end of February, however, Duff's appointment was formally announced in Ottawa. It was understood that he would take up residence in Vancouver, although this was not made a formal condition of his appointment.¹⁴ The Duffs, however, did not move from the lovely home that they had built on Rockland Avenue in Victoria.

Duff had married, in 1898, Elizabeth Eleanor Bird, a thirty-seven-year-old school teacher, whom he had met when he was teaching at Barrie twelve years earlier. She was one of the four daughters of Henry Bird, the Barrie Municipal Clerk. The courtship, if it can be called that, was carried on by correspondence and he, at least, seems to have had little idea of the kind of woman who would have made him a good wife. "Lizzie" was five years older than he was, and was a rather ordinary person, with little intellect. There was not much companionship in their marriage, and they had no children. While she may have done her best to do those things that were then expected by society from the wife of a successful lawyer or judge, Duff treated her at times with impatience. With the drinking problem that he developed, life for her must have been unhappy. Duff did have guilt feelings. Many years later, after thirty years of marriage and not long before his wife died, the Duffs were in London and received a dinner invitation from an old friend.¹⁵ Mrs. Duff was ill at the hotel and Duff declined, saying that he should stay with her: "It is the least I can do — I've given her a pretty hard time."

Duff was sworn in as a member of the Supreme Court of British Columbia on September 27th, 1904. Until his appoint-

¹³ February 14th, 1904.

¹⁴ Telegram sent in code from Templeman to Laurier, February 22nd, 1904, Laurier Papers, PAC, 82785. It read: "Appoint Lyman P. Duff at once. He will reside at Vancouver but do not make that condition in Commission as Morrison if appointed will reside there." Morrison did get the next appointment.

¹⁵ The old friend was Senator J. W. de B. Farris, of Vancouver, who gave the writer this anecdote in an interview.

ment to the Supreme Court of Canada two years later, he spent much of his time on circuit.

III. *The Fitzpatrick Court.*

In 1906, the Supreme Court consisted, as it had from the time of its establishment, of a Chief Justice and five puisne judges. Two judges were required to be from Quebec and there was no mandatory retirement age.¹⁶

Sir Charles Fitzpatrick became Chief Justice on June 4th, 1906, just less than four months before Duff joined the court. Fitzpatrick was then fifty-two, and moved directly from Minister of Justice in the Laurier Cabinet into the Chief Justiceship. He had had a remarkably successful career both as a criminal lawyer in Quebec, having been chief counsel for Louis Riel in 1885, and as a politician. Sitting as a Liberal, first in the Quebec Legislative Assembly from 1890 to 1896, and then in the House of Commons from 1896 to 1906, he was Laurier's Solicitor General from 1896 to 1902 when he became Minister of Justice. He played a considerable role in the settlement of the Manitoba School question.¹⁷

The senior member of the court, with a tenure of thirteen years, was the Scottish-born Robert Sedgwick, then fifty-eight, who had established himself as a leading Halifax lawyer before becoming federal Deputy Minister of Justice in 1886, a post he held until his appointment to the Supreme Court in 1893. A Conservative, he had once run for election to the Nova Scotia legislature, but had been defeated. As Deputy Minister he had argued before the Privy Council on behalf of the federal government. The second senior man, and at seventy the second oldest, was Désiré Girouard. He had represented the Quebec constituency of Jacques Cartier in the House of Commons, as a Conservative, from 1878 to 1885, when he was appointed to the Supreme Court. He was twice offered posts in the federal Cabinet by Sir John A. Macdonald, but declined on both occasions. He publicly opposed his party with respect to the execution of Sir Louis Riel. He was the author of a number of legal treatises.

Louis Henry Davies, sixty-one, had been Premier of Prince Edward Island from 1876 to 1879 and then had sat as a Liberal in the House of Commons for nineteen years, serving during the

¹⁶ Supreme Court Act, R.S.C., 1906, c. 139, ss 4 and 6.

¹⁷ Most of the information in this article on the various judges of the court (other than Duff) has been drawn from brief biographical notes compiled by the offices of the court, the obituary stories in the *Toronto Globe and Mail* (and its predecessor the *Globe*), and general sources of Canadian biographical material.

last five as Minister of Marine and Fisheries in the Laurier administration. He left that Cabinet post to go to the Supreme Court in 1901. After graduating from Prince of Wales College in Charlottetown, he had gone to London and studied law at the Inner Temple. He was called to the English bar at the age of twenty-one, before returning to Prince Edward Island.

John Idington, who was sixty-five but whose tenure would outlast that of all the others, had been an Ontario lawyer who arrived on the Supreme Court a little more than a year before Fitzpatrick. He had first gone to the Exchequer Division of the Ontario High Court of Justice on March 15th, 1904. Prior to that appointment he had practised law for forty years in Stratford. James Maclellan was the junior member of the court, having been appointed on October 5th, 1905 and was, at seventy-three, the oldest. He had for seventeen years been a member of the Ontario Court of Appeal to which, although an active Liberal, he had been appointed by the Conservative government of Sir John A. Macdonald, who had openly expressed admiration for Maclellan's abilities. He had been an extremely successful counsel in Toronto, becoming in 1860 a partner of Sir Oliver Mowat, Liberal Premier of Ontario from 1872 to 1896, and was himself a Liberal member of the House of Commons from 1874 to 1875.

Sedgwick died two months after Fitzpatrick became Chief Justice. Eight weeks later Duff was appointed to take Sedgwick's place. Duff was the twenty-first judge to be appointed to the court, but only the second from west of Ontario.¹⁸ As yet, the author has found no written evidence as to why Duff was selected or as to who were his competitors for the position, although there is a good deal of material with respect to his appointment to the Supreme Court of British Columbia two years earlier. His great supporter Senator William Templeman, however, had meanwhile acquired additional clout in the Laurier Cabinet. Just six months before Duff's appointment, Laurier had promoted Templeman to Minister of Inland Revenue. Templeman had then resigned his seat in the Senate and, winning a by-election in Victoria, entered the House of Commons.

Maclellan resigned in 1909, to be replaced by Francis Alexander Anglin, an Ontario High Court judge, who was then forty-three, being three months younger than Duff. He had graduated at the top of his class in law school and went into

¹⁸ Albert Clements Killam, Chief Justice of Manitoba, was the first, in 1903. He resigned in 1905 to become the first Chief Commissioner of the Board of Railway Commissioners for Canada.

civil practice in Toronto. He had a judicial temperament, rather than that of a practitioner, and had accepted an appointment as Clerk of the Surrogate Court of Ontario in 1896. He had been elevated to the Exchequer Division of the Ontario High Court in 1904 on the same day that Idington had joined that court. Unlike MacLennan, Anglin was a Roman Catholic and his appointment meant that the court was evenly divided on a religious basis between Catholic (Fitzpatrick, Girouard, and Anglin) and Protestant (Davies, Idington, and Duff).

In 1911, Girouard died as a result of injuries suffered in a sleighing accident. The vacancy was taken by Louis Philippe Brodeur, the forty-eight-year-old son of one of the rebels who fought with Papineau in 1837. The new judge had had a rapid success as a young lawyer at the Quebec bar. He had been elected as a Liberal at the age of twenty-nine to the House of Commons, where he had sat for twenty years, until his appointment to the Supreme Court. He had been appointed Minister of Inland Revenue in the Laurier Cabinet in 1904 and Minister of Marine and Fisheries in 1906. In 1907 and 1911, he had represented Canada at Imperial Conferences, and in 1910 he had introduced the legislation which established the Canadian navy.

After his appointment to the court, Duff appears to have maintained his interest in the political life of the country. In August 1910 he wrote what must be considered a rather strange letter, under the hand of a Supreme Court judge, to the newly-appointed Minister of Labour, Mackenzie King. King had just successfully acted as a conciliator in a dispute between the Grand Trunk and the unions representing its employees. The president of the railway, C. M. Hayes, had in the eyes of some, taken an outlandish position.¹⁹ Duff wrote:²⁰

My dear King,

Just a line to congratulate you upon the success of your efforts in settling the strike. I quite appreciate the position of the Co. from *their point of view* in declining to accede to the principle of a *definitive* arbitration although the methods of Mr. Hayes were certainly rather suggestive of those of the proverbial "pettifogging attorney". On the other hand it would have been almost a disastrous blow to the cause of industrial conciliation had the moral force of the community as represented by you failed to bring about an adjustment. This as representing the moral socially progressive forces of the community as affecting this relation of capital and labour — I am quite convinced — that you are — [unreadable word] to be congratulated. The per-

¹⁹ R. MacGregor Dawson, William Lyon Mackenzie King, A Political Biography, 1874-1923 (1958), pp. 209-211.

²⁰ An undated letter. King Papers, PAC, 12706.

sonal triumph is none the less gratifying to your friends—I must add that the support from the press has not been what I should have expected.

Yours very sincerely,
“Lyman P. Duff”

King acknowledged the letter politely, apologizing for his delay in replying and adding “I also had hoped that I might see you personally”.²¹

During the period of the Fitzpatrick court, Duff was almost drawn from the bench into political life on a number of occasions. But when an answer was called for, it was negative. Perhaps he realized that he was more suited for judicial life. Perhaps he was reluctant to enter into the risky business of politics, with its continual strife and lack of security. It would have meant finding a seat in the House of Commons, probably from British Columbia, with which he had severed connection. While he had been an active Liberal before he went on the bench, he had never run for public office. The first occasion when Duff almost entered politics was in 1907, when Sir Clifford Sifton was negotiating with Laurier over his re-entry into the federal Cabinet. Sifton was willing to come back provided he could bring some able young Liberals with him to strengthen the Cabinet.²² Unbeknown to Duff, his name was put forward to Laurier by Sifton.²³ However, Laurier was too committed to his Cabinet colleagues and the proposed reorganization did not take place.

It was in 1917, however, that he had a concrete offer to join the Cabinet. More than that, there had been a possibility that he might have been called upon to be Prime Minister. During the summer of 1917 the conscription issue inflamed the country, with French and English Canada deeply divided. With a general election in the offing, Borden negotiated with the Liberals with a view to forming a coalition government to promote national unity. Duff's name was first mentioned as a possible coalition representative from British Columbia, then as a possible replacement for the Prime Minister himself, who was being urged to resign by the Liberal coalitionists. Once Borden found his own leadership had the overwhelming support of his own party, Duff was offered

²¹ Copy of letter, dated August 15th, 1910, King Papers, PAC, 12708.

²² J. W. Dafoe, Clifford Sifton in Relation to His Times (1931), pp. 332-335.

²³ Duff, in interview with Grant Dexter, published in the Winnipeg Free Press Evening Bulletin, March 20th, 1933.

a Cabinet post. The following are excerpts from the Prime Minister's diary:²⁴

- June 14: During afternoon discussed political situation with Reid and Meighen. Hanna, Rowell and Preston for Ont. Duff for B.C. . . .
- June 16: [After mentioning Duff's name again, along with others, in a discussion with a potential coalitionist]. . . . Afterwards discussed with Doherty proposals for reconstruction. He says C.J. distrusts Duff and thinks he is intriguing against government.

Who was C.J.? Very probably Chief Justice Fitzpatrick. What grounds, if any, had he for making such a statement? One can only speculate. Perhaps Duff had spoken with Laurier or some other leading Liberals. Fitzpatrick himself was a political intriguer of distinction and may have had some motive of his own for saying what he did to Doherty. Reid, Meighen and Doherty were members of the Borden Cabinet. Further excerpts from the diaries:

- July 5: Meighen and I decided to speak to Duff after seeing Sifton.
- Aug. 10: Last evening discussed with Meighen my idea of advising Gov. Gen. to call on Duff to form Union Government. He was fiercely opposed, saying it would ruin us.
- Aug. 11: Discussed today with Reid the summoning of Duff. He is very sharply opposed and thinks it would be fatal.
- Aug. 13: Sifton came between 1 and 2 and says there is objection to Wood and Crerar to enter government under my leadership. Says Duff cannot come and thinks we should have Sir W. Meredith. Saw Foster, Meighen and Reid all of whom think we have had enough talk of changed leaders.
- Aug. 15: Attended His Ex. and reported to him that Meredith and Duff had been spoken of as leaders.
- Aug. 27: Telegram from Calder, Crerar, Hudson and Sifton that change of leadership is essential. Telegram suggests Foster, Duff, Beck or Mulock. Decided to call caucus tomorrow.

The Conservative caucus met on August 29th. Borden offered to resign the leadership, but the caucus gave him a unanimous heart-warming endorsement. From that moment Borden had no thought of giving up as Prime Minister and his efforts were directed to reconstructing his government in a coalition with the Western Liberals. In mid-October, the new "Union Government" Cabinet was announced. It included nine Liberals. Duff had turned down

²⁴ The Borden Diaries, PAC, are subject to restricted access. The excerpts in this article are published with the kind permission of Henry Borden, Q.C., of Toronto.

the opportunity to be on that list. Borden had done his best to get him. The diaries relate:

- Aug. 31: In evening long conference with Duff who said he would like Tilley to come in. Spoke in highest terms of Tilley's character and ability. Told him I would consider.
- Sept. 1: Discussed Tilley with Meighen and told Duff to send for him and consult with him as to entering government. Played golf with Duff and beat him badly.
- Sept. 3: In afternoon heard from Duff that Tilley had arrived but would not come up into government and therefore he [Duff] could not come. Sent for Tilley and discussed it with him at length telling him it was his duty to enlist in public life for the rest of the war and that his actions would create a profound impression. Told Reid also to see him and impress him with duty of service. Reid saw Tilley in evening but evidently did not produce much impression. Very cool weather today.
- Sept. 6: Duff and Tilley evidently have no idea of entering the Government. They lack the spirit which prompted our young men to cross the seas and go over the parapet.

Tilley — William Norman Tilley — was a leader of the Toronto bar, regarded as a constitutional expert, three years younger than Duff, and he and Duff were mutual admirers and supporters. If only there were tape-recordings of the conversations that must have taken place between Duff and Tilley! Whatever the reason,²⁵ Duff had once and for all decided against entering political life. Nevertheless after Laurier died in early 1919, Duff's name was mentioned in the press as a possible successor to the Liberal leadership.²⁶ It is unlikely that he took this suggestion seriously. Certainly he had no power base from which to be a contender and his name was not put forward at the leadership convention in August, which was narrowly won by Mackenzie King. Duff had gone to London some weeks earlier to be sworn in as a member of the Imperial Privy Council.

Perhaps the most distasteful role, and that which placed him under the greatest stress, was that of Central Appeal Judge

²⁵ There is an undated letter from Duff to Borden in the Borden Papers, PAC, 40379 which states: "The newspapers this morning so definitely connect my name with proposals relating to reconstruction of the ministry that I think it is my right to say to you that it is all without my knowledge and that for a score of reasons the suggestions involving my name would not from my point of view be open to serious discussion." Presumably this letter was written before Borden spoke to Duff, probably sometime in July or August. For further detail on this period see Robert Laird Borden: His Memoirs, edited by Henry Borden (1938).

²⁶ As referred to in the newspaper article by Grant Dexter, *op. cit.*, footnote 23.

under Borden's 1917 conscription legislation.²⁷ The statute, which was bitterly opposed in Quebec, provided for certain exemptions from service. These included categories where it would be in the national interest for a man to continue the work in which he was habitually engaged, or for which he had special qualifications, or for him to continue with his education or training. Other exceptions were serious hardship owing to his exceptional financial or business obligations or domestic position, ill health or infirmity, and conscientious objection on religious grounds.²⁸ Men seeking exemptions applied to a local tribunal for a certificate of exemption. There were provincial appeal tribunals manned by judges drawn from the provincial courts of record. From these an appeal might lie to the Central Appeal Judge, who was to be one of the judges of the Supreme Court of Canada.²⁹ This unpleasant duty was imposed by Borden on Duff. French Canadians seeking exemptions generally received sympathetic treatment from the Quebec tribunals. In many cases where certificates had been granted by local tribunals and confirmed by the provincial appeal tribunal, the government would appeal to the Central Appeal Judge, who had no alternative but to reverse the decisions of the tribunals below if he was to be consistent in dealing with exemptions across Canada. Not only was the legislation under heavy attack in the French Canadian press, but Duff came under criticism as well. *Le Devoir*, for example, under the editorship of Henri Bourassa, carried daily stories about the exemption process. The paper quoted one Quebec judge, who had remarked at a hearing for exemption by a farmer's two sons, in response to a request from the sons' counsel to cite the jurisprudence:³⁰

Oh! il n'y a pas de jurisprudence, ici, dit le juge. Tous les vents passent par cette Cour, et ils viennent tous d'Ottawa. En tout cas, j'exempte ces deux cultivateurs, et le juge Duff fera ce qu'il voudra.

The Minister of Justice, C.J. Doherty, like Fitzpatrick an Irish Catholic from Quebec, apparently wished that Duff would be a little more flexible, and it seems he tried, unsuccessfully, to influence him. Borden recorded in his diary for March 9th, 1918:

Then to office for conference with Doherty who took 30 minutes to dilate upon his differences with Judge Duff and Moss which I promised to look into.

By the end of March there was rioting in Quebec and the office containing the conscription records was destroyed. Chief Justice

²⁷ The Military Service Act, 1917, S.C., 1917, c. 19.

²⁸ S. 11.

²⁹ Ss 6-10.

³⁰ *Le Devoir*, April 10th, 1918, p. 3.

Fitzpatrick, who liked to keep his hand in at political matters, informed the Minister of Justice that German agents from New York were suspected of organizing the riots. Borden noted, however, "I take no stock in this". The Cabinet considered suppressing *Le Devoir*, but the Minister of Justice was dubious and urged hesitation on the ground of possible outbreaks.³¹

Whatever may have been Duff's susceptibility to drink prior to this time, it seems that the pressure now made him resort to alcohol for solace. The Chief Justice wrote Edward W. Beatty, then Vice President and General Counsel for the Canadian Pacific Railway, on August 18th, 1918:³²

I hear that Duff has broken down under the strain. Do you know where he is?

Is this the reason why Duff missed out on the Chief Justiceship when Fitzpatrick resigned two months later? It was this kind of behaviour which apparently lost him the position in 1924 and almost again in 1933.

Fitzpatrick resigned as Chief Justice on October 21st, 1918 to become Lieutenant-Governor of Quebec. The resignation created two problems for the Prime Minister: who should be made Chief Justice and who should be appointed to the Supreme Court? Davies was then the senior judge on the court, but Duff had his supporters in the Cabinet, presumably among the Western Liberals in the Union government. While the Chief Justiceship, at least, is generally considered to be within the gift of whoever is Prime Minister, his recommendation of Davies was not accepted easily by his Cabinet colleagues. Sir Robert Borden commented in his diary:

October 21st, 1918:

Much discussion [in council] as to appointments to Supreme Court. I carried Davies by a narrow majority.

Two days later he wrote:

Duff evidently disappointed at not being promoted to Chief Justiceship.

And on October 30th:

Yesterday . . . interesting interview with Duff. Told him I would recommend him for P.C.

The appointment to the Judicial Committee came through on the following New Year's Honours' List. For the time being Duff had to be content with second prize. He was the only puisne judge of the Supreme Court to receive such an appointment.

³¹ Borden Diaries, March 31st — April 9th, 1918.

³² Copy of letter, Fitzpatrick Papers, PAC, vol. 17.

IV. *The Davies Court.*

Borden had to find a puisne judge from Quebec. On October 21st, when the Cabinet had decided the Chief Justiceship, there also had been discussion about the vacant position on the court. Sir Robert recorded:

Strong opposition to Pelletier much debate as to appointing Lafleur. Finally decided on further consideration.

"Pelletier" was probably Louis Philippe Pelletier who had served as Borden's Postmaster-General from 1911 to 1914, retiring from that office because of ill-health and accepting an appointment on the Quebec Superior Court. He died in 1921 — sixty-two years old.

Eugene Lafleur, a Montreal lawyer, was then commonly recognized as the leading counsel in Canada. He had also taught international law at McGill and written a book on the conflicts of laws. Lafleur had the disadvantage of being a Protestant French-Canadian from Quebec, at a time when it was politically important for the required two judges from that province to be Roman Catholic. The next day, October 22nd, Borden had a conference with his Minister of Justice about the vacancy and noted:

Tilley and Wood urge Lafleur. I said to Doherty we might increase to 7 and appoint Lafleur.

On October 23rd, the Cabinet decided upon Pierre Basil Mignault, a sixty-four-year-old legal scholar, who had practised at the Montreal bar.³³ It was not until 1927 that a seventh judge was added to the Supreme Court.

The Davies court therefore began with, in addition to Sir Louis himself, Idington, Duff, Anglin, Brodeur and Mignault. In the six years that Sir Louis was Chief Justice there was only one change in its membership.

Brodeur resigned in October 1923, and succeeded Fitzpatrick as Lieutenant-Governor of Quebec. He died one month after assuming his new office. The vacancy created by Brodeur's resignation was filled by Arthur Cyrille Albert Malouin, a sixty-six-year-old who for the past eighteen years had been a Quebec Superior Court judge. Malouin may be noted for having the shortest tenure on the Supreme Court — eight months, resigning two weeks after Anglin became Chief Justice. Apparently he was a sick man, although he lived for twelve more years, dying

³³ For biographical detail regarding Mignault, see A. Marin, *l'Honorable Pierre-Basile Mignault* (1946).

suddenly in Florida in 1936. Prior to his appointment to the Quebec bench, he had served as a Crown prosecutor for the District of Quebec and sat in the House of Commons as a Liberal from 1898 to 1905.

The Davies court was deplorably weak in its final year. Three of the six judges were not able to function properly owing to illness or old age, or both. Malouin had become ill shortly after his appointment. Idington was almost eighty-three and his mind was not what it had been, and Sir Louis was seventy-nine and a sick man.

Sir Louis had, in fact, been trying to resign for some time, but had been unable to negotiate with the Government what in his view was a satisfactory pension. On September 20th, 1923 he wrote the Prime Minister:³⁴

I have, of course, no intention at present of resigning from my position here in the Supreme Court, unless I can first be assured that my annuity on retirement would be the full amount of my present salary, \$15,000. . . .

His medical situation must have been serious because the Minister of Justice, Sir Lomer Gouin, sent the following note to the Prime Minister some two months later, on December 8th:³⁵

Will you please not overlook the question of the Supreme Court, and as soon as possible see the Chief Justice who, it is reported to me, is no longer in a position to perform his duties.

Sir Louis died in office on May 1st, 1924.

Four and a half months went by before Anglin was named to succeed Davies as Chief Justice. Mackenzie King pleaded with Eugene Lafleur to take the appointment. Duff again had strong support. Other names were considered. John S. Ewart, a retired Ottawa lawyer, well known as a legal writer and speaker, who was a kind of informal adviser to Mackenzie King, suggested Sir Robert Borden.³⁶

The very day of Davies' death, the Prime Minister had discussed the matter with his Cabinet:³⁷

At Council today I brought up question of a successor, suggested Sir Wm. Mulock, but members of Council were rightly against him because of his years—now 80—too old for apptmt. on Supreme Court Bench—Lapointe wants Newcombe, (Dep Min of Justice). I opposed strongly because of his being a Tory through life. It wd. make

³⁴ King Papers, PAC, 72224.

³⁵ King Papers, PAC, 73319.

³⁶ In a letter dated May 6th, 1924. King Papers, PAC, 84490.

³⁷ King Diaries, PAC.

our friends very much annoyed, and there are plenty of good men in our own ranks. It is a difficult matter to decide: the Bench all over Canada is very weak. . . .

Lapointe was Mackenzie King's new Minister of Justice, and for many years was to be the Quebec spokesman for the Liberal administrations. He was said³⁸ to have opposed Duff's appointment on the ground that it would cost the Liberals votes in Quebec (there being a general election in the offing), Duff having been unpopular in that province as a result of the role he played as Central Appeal Judge under Borden's 1917 conscription legislation. Mulock, whose name is also mentioned in the above excerpt, was the Chief Justice of Ontario. He had been the first federal Minister of Labour, under Laurier, and had brought Mackenzie King to Ottawa in 1900 to organize his new department and serve as his Deputy Minister.

Mackenzie King and Mulock attended the funeral together, the former noting in his diary about Sir William:³⁹

He wd. like to be made Chief Justice but told not to embarrass myself for him, it wd. only be to round off his career—I told him his years were too many seeing we were going to try to pension judges at 70 or 75—he is older than Sir Louis was—He understands the situation. Was most affectionate and kindly.

The next day Mackenzie King lunched at Government House with the Governor General, Lord Byng. Afterwards, walking in Rockcliffe, they discussed the position of the Supreme Court:⁴⁰

His Ex. hopes we won't appoint Duff—spoke of his being intoxicated day of State Dinner and Opening. . . .

On May 5th, the matter was again discussed in Cabinet:⁴¹

Attended meeting of Council at noon discussed apptmt. of Chief Justice and got Council to agree to Lafleur being offered the position anew, the Maritime provinces men agreeing to let their chance for nominee pass if Lafleur would accept. Quebec to wait re her further nomination. Ont. to let chance go by—I sent for Mr. Lafleur at 5 and talked with him in my office, the tears came into his eyes as I spoke to him of the confidence of the Govt. and the bar in his ability and of our desire to have him fill the position to strengthen the bench and uphold Br. conception of justice—he spoke of not being indifferent to a desire to be of public service, but of getting on in years, that what the Supreme Court needed was younger men. I agreed except as regards the Chief Justice who must be of authority and experienced in his profession. I spoke of his going to Imp. Privy Council to take

³⁸ This ground was given me by Senator J. W. de B. Farris, who was then, as well as later, an influential Liberal from British Columbia.

³⁹ King Diaries, PAC, May 3rd, 1924.

⁴⁰ *Ibid.*, May 4th, 1924.

⁴¹ *Ibid.*, May 5th, 1924.

part with Law Lords there. He promised to reconsider, but did not give me any assurance. The Imp. P.C. may be the means of securing him.

On May 11th, Mackenzie King asked the Governor General to see Lafleur and urge him to accept. Lafleur was then only sixty-eight.

The matter seems to have been left in abeyance throughout the summer, perhaps because there were two important Quebec by-elections called for September 2nd. Meanwhile there was some correspondence. On July 1st, Mackenzie King had a letter from the Chief Justice of Ontario, Sir William Mulock, who had heard about the possibility of Newcombe's appointment. (It is not clear whether Newcombe was being considered for the Chief Justiceship at this point or only as a puisne judge of the court.) Mulock wrote, pointing out that Newcombe had very slight experience at the bar:⁴²

I trust the rumour is without foundation . . . his experience has not I think fitted him to review Judges' decisions. . . .

The Minister of National Defence, E. M. Macdonald, wrote the Prime Minister on August 28th:⁴³

. . . it is a desirable thing, in view of his seniority, that Judge Idington be promoted to the position of Chief. I understand he would be willing to retire very shortly afterwards, and this would enable us to get over the difficulty which we are all aware exists as to the competition for the place among the present Judges. In regard to the vacancy, the position must go to the Maritime Provinces, and both Mr. Fielding and I are agreed that Newcombe is the best man for the place. . . .

From Edinburgh, came a five-page personal letter from J. H. Spence, a Toronto counsel who had been attending an overseas meeting of the Canadian bar in London. Spence wrote:⁴⁴

I wanted to say to you that Mr. Justice Duff has certainly made a position for himself. He seems to be considered very highly by every one and recognized by all to be a strong able man. He certainly seems a credit to Canada. How would he do for a Chief Justice. . . .

Peter C. Larkin, the Canadian High Commissioner in London was in Toronto and had lunch with Tilley, who told Larkin that he hoped Duff would be appointed. Larkin in a letter to the Prime Minister, dated August 29th, said he had asked Tilley if it had

⁴² Letter dated July 1st, 1924, King Papers, PAC, 89618-89626.

⁴³ King Papers, PAC, 88308.

⁴⁴ Letter dated August 4th, 1924, King Papers, PAC, 93186-90.

not been reported that Duff had a weakness and that Tilley had replied that:⁴⁵

... he thought that he [Duff] had no such weakness as would disqualify him for the position, and that he was so eminently superior to anyone else in sight that his appointment was necessary if the Supreme Court was ever to attain such a standing as would justify the stopping of appeals to the Privy Council, for which there was no excuse other than the weakness of the Bench in the Supreme Court.

Mackenzie King replied to Larkin on September 6th:⁴⁶

The Chief Justiceship of the Supreme Court is continuing to cause me a good deal of concern. I was aware of the interest of Tilley in the appointment. Sometime when you are again talking with Tilley, I wish you would endeavour to discover just how sound a Liberal he is and how friendly to the present Administration. I am inclined to think that C.P.R. influence has not been without its effect upon him.

On September 8th, Mackenzie King made a final appeal to Lafleur in a letter imploring him to accept:⁴⁷

You are the one man in Canada who can meet what today is our country's most imperative need. . . .

He even offered to go to Montreal to discuss the matter with Lafleur if there was any hope that he would accept. Again Lafleur declined:⁴⁸

... it is not by appointing men who are nearing the 70 mark that you will really strengthen it. . . .

The decision was finally made on September 12th. Anglin was to be appointed. King wrote in his diary:

Council meeting again during afternoon, time largely taken up in discussing appointments. I have tried very hard to secure Lafleur as Chief Justice, but in vain. It leaves the choice between Duff & Anglin, the former is probably the abler but is dissipated, gets off on sprees for weeks at a time. Was intoxicated at last opening of prlt. & at Sir Louis Davies' funeral. I regard him too as a bit of a sychophant [*sic*] where the Tories are concerned & more or less the favourite with the big interests. Anglin is narrow, has not a pleasant manner, is very vain, but industrious, steady and honest, a true liberal at heart. Both are personal friends. I imagine the bar as a whole prefer Duff. Some do not know his habits. I think I am doing the right thing in appointing Anglin. Lapointe wishes to appoint Newcombe, the dep. min. He will

⁴⁵ Letter dated August 29th, 1924, King Papers, PAC, 87345.

⁴⁶ Copy of letter, King Papers, PAC, 87374-8.

⁴⁷ Copy of letter, dated September 8th, 1924, King Papers, PAC, 86521.

⁴⁸ Letter dated September 9th, 1924 to King, King Papers, PAC, 86522-22A.

lose a good man, & our friends will not like it, but it will please the Tories & will offset not appointing Duff. It will, too, be a good apptmt. Lapointe tells me Malouin is ill & ready to resign, he is prepared to nominate Rinfret, a young promising man, this will strengthen the bench materially. Iddington [sic] will be disappointed not being made C.J. but he is 86 & senile. Sir Wm. Mulock will be disappointed but he is over 80 & Iddington [sic] could not be passed over for him. It wd. leave us the job to do over again a year hence. While I wish we could have secured Lafleur & I do not altogether like appointing Anglin because of the feeling of the bar against him, I nevertheless think in the interests of justice and the dignity of the bench, his appointment is preferable to any other all circumstances considered.

King called at the Anglins and gave them the news. Anglin informed King that:⁴⁹

. . . he hoped the Govt. wd. have no cause to regret the choice, he thought Duff wd. be loyal.

King told Anglin about the other appointments, and that he had tried to get Lafleur. Anglin replied that he thought Rinfret would be excellent, but made no comment about Newcombe. Anglin added that everyone would have been well satisfied if Lafleur had accepted.

Meanwhile Lapointe had told King that Newcombe had thought he was going to be made Chief Justice!

V. *The Anglin Court.*

The Anglin court began with the Chief Justice, Iddington, Duff, Mignault, Malouin and Newcombe. Edmund Leslie Newcombe, like Davies a Maritimer (but from Nova Scotia) filled the vacancy on the bench, caused by the death of the Chief Justice. Newcombe, then sixty-five, had for thirty-one years been federal Deputy Minister of Justice, having been appointed to that post at the age of thirty-four by the Conservative government of Sir John Thompson, a fellow Nova Scotian. He was regarded as an expert on constitutional matters and in the drafting of statutes. Although he had lived in Ottawa for thirty years, the appointment was considered as being one from the Maritime provinces. His place has subsequently been filled by Maritimers. Almost immediately Thibaudeau Rinfret replaced the ailing Malouin. The forty-five-year-old Rinfret had been appointed two years earlier to the Quebec Superior Court. Prior to that he had for some twenty years practised in St. Jerome and Montreal. For ten years he had been a part-time law teacher at McGill, lecturing in comparative law and the law of public utilities.

⁴⁹ King Diaries, PAC, September 15th, 1924.

It was during this period, in 1926, that Duff's wife died, and life seems to have become rather miserable. John Stevenson, the Ottawa correspondent of the London *Times* and an old friend, wrote a mutual acquaintance:⁵⁰

Poor old Judge Duff has just lost his wife and is very forlorn. I see a good deal of him and he was telling me the other day that he was sick of Ottawa and would like to go away somewhere even if only for a weekend but he had no one to go with and did not want to land in a strange place all alone. He has always gone to England for years to sit on the P.C. but Anglin has now collared the job . . . it would be a real kindness if you asked him down for a weekend. You might point out to Polly that he is a widower and a very charming one, beloved by all who know him, fairly well off, the boon companion of august personages like Lords Haldane, Birkenhead and Dunedin and not a fanatical prohibitionist.

Despite the efforts of his friends, Duff never remarried. Later, his two sisters, Emma and Annie, came to live with him in Ottawa.

On March 31st, 1927 the Supreme Court was expanded by providing for six, instead of five, puisne judges. In addition, mandatory retirement at seventy-five, to apply to existing as well as future appointments, was established.⁵¹ The only judge the new retirement age immediately caught was Idington, who was then eighty-six. The legislation therefore created two vacancies. The new place was given to a Westerner, John Henderson Lamont, who had become the first Attorney General of Saskatchewan, when that province came into existence in 1905. The previous year he had been elected, as a Liberal, to the House of Commons, but resigned to switch to provincial politics. He sat in the Saskatchewan Legislature from 1905 to 1907, when he was appointed a judge of the Saskatchewan Supreme Court. In 1918, he had been elevated to the Saskatchewan Court of Appeal. Lamont had practised law in Toronto for six years before he moved West in 1899 and established a practice in Prince Albert.

Since Lamont's appointment, it has been traditional to have two judges from west of Ontario sit on the court, that is, the places held by Duff and Lamont have gone to Westerners.

Robert Smith, a sixty-seven-year-old former Cornwall lawyer succeeded to the retired Idington's place. Appointed to the Ontario High Court in 1922, Smith had gone to the Ontario Court of Appeal the following year. He had represented the riding of Stormont, as a Liberal, in the House of Commons from 1908 to 1911.

⁵⁰ Hume Wrong. Letter dated August 1st, 1926, Wrong Papers, PAC.

⁵¹ An Act to amend the Supreme Court Act, S.C., 1927, c. 38.

Since the introduction of the compulsory retirement age of seventy-five, eight judges have died in office, seven have resigned or retired early, and eight have sat until their seventy-fifth birthday. Duff retired at seventy-nine.

Mignault retired at the end of September 1929, and was replaced by Lawrence Arthur DuMoulin Cannon, a fifty-two-year-old judge from the King's Bench Court in Quebec. Cannon had practised law in Quebec City, served on the city council there from 1908 to 1916, when he was elected as a Liberal to the provincial legislature, sitting as a member for two terms. Cannon had good judicial connections in his family. His father, Lawrence John Cannon, had been a Quebec Superior Court judge. His brother, Lucien Cannon, a former Solicitor General of Canada, also became a judge of the Quebec Court of King's Bench. His father-in-law was Sir Charles Fitzpatrick. Later his son Charles was to become a Quebec Superior Court judge.

Newcombe died at the end of 1931. His replacement was Oswald Smith Crocket, who was elevated from the New Brunswick Supreme Court. The sixty-four-year-old Crocket had been appointed to that court by the Conservative administration of Sir Robert Borden in 1913. At that time, Crocket was sitting as a Conservative member of the House of Commons, to which he had first been elected in 1904. Now he was elevated to the Supreme Court by a fellow native and Conservative from New Brunswick, Prime Minister Richard Bedford Bennett. The "Maritime" seat had opened up at just the right time for the new judge.

Chief Justice Anglin struggled with a serious illness during the last two years of his tenure, and on many occasions had to absent himself from the court. He finally resigned on February 28th, 1933. Two days later he died.

Now was Duff's last chance. He had eighteen years seniority on the court over the next most senior judge, Rinfret. In fact, Duff had been on the Supreme Court for longer than the combined tenures of all five of his remaining colleagues. But would Bennett appoint him Chief Justice? Duff was now sixty-eight, and he himself had recently had a serious illness. He still had his drinking problem. Although an admirer of Duff's abilities, Bennett, a teetotaler, had his doubts. Apparently he was convinced by his brother-in-law, William Duncan Herridge, a well-known Ottawa lawyer and the Canadian government's representative in Washington. It has been said that Duff's appointment was contingent on his giving a promise (obtained through Herridge) to quit drinking, supported by an undated letter of resignation to

Bennett for possible use should the promise be broken.⁵² Such a letter, if it had been written, would raise an interesting question in respect of judicial tenure. No such letter could be found by the writer among the Bennett papers. But the following three letters from Duff to Bennett are among those papers. All are dated January 10th, 1933, less than two months before Anglin's resignation and death. These letters are in long-hand and were written from Duff's residence at 435 Daly Avenue, Ottawa. The first and second letters were marked "Personal".⁵³

My dear Bennett:

I am taking advantage of the privilege of friendship to address you thus because this letter is strictly personal, in the sense that it is not official.

I have been trying to formulate my personal out in view of the present situation of the Supreme Court. That situation visibly demands from everybody having any responsibility in relation to it the gravest consideration not only, but every reasonable effort to improve it; and it has seemed to me—I have been thinking of it for some time—that I ought to ask you, in explicit terms, to consider myself in your hands entirely, to dispose of as you think best with the view of securing the governing desideratum. If now or at a later time I can facilitate an improvement by resigning, I am anxious to take that course. If to remain as puisne judge would be better I desire to do that.

Without reserve, I should like you to know that, whatever your view may be, I shall not only be ready to act in accordance with it, I shall most gladly, most happily, cooperate in the fullest degree to attain the desired result.

I do not think further elaboration would be useful. I am confident you will have no doubt of the unaffected sincerity of what I am saying.

In making this communication "personal" I do not intend to indicate more than its non-official character. It is of course in yr. hands to use as you think fit. Please do not trouble to acknowledge it.

With kindest regards,

Yours most sincerely,
L. P. Duff

My dear Bennett:

As complementary to my letter of this date I am enclosing a formal resignation which I put in your hands to act upon as you think best, now or hereafter.

I am convinced that there is no impropriety in this, as the sole purpose of it is to enable you to act without further discussion upon

⁵² The writer was told this by two independent sources, John Stevenson, the Ottawa correspondent from the Times who was an old and intimate friend of Duff (see his letter regarding Duff having become a lonely widower, *supra*) and Rod Finlayson, one-time private secretary to Bennett. Both Stevenson and Finlayson are now dead.

⁵³ These letters were in the Bennett Papers, at the University of New Brunswick, Fredericton. I wish to acknowledge the assistance of Richard Wilbur in locating them.

any view you may form as to what will best serve the public interest. It differs *toto caelo* from the case of a device to serve the political convenience of a government or the personal convenience of one of its members.

Yours most sincerely,
L. P. Duff

The Rt. Hon. Prime Minister
Ottawa
Sir:

I beg herewith to tender my resignation from the office of Justice of the Supreme Court of Canada.

I have the honour to be, Sir,
Your most obedient servant,
L. P. Duff

Whatever assurances, if any, Bennett received from Duff, he decided in his favour, and Duff became Chief Justice on March 17th, 1933.

Did Mackenzie King have any thoughts about the appointment, since it was he who had decided against Duff's promotion in 1924? His diary says nothing about the appointment, once it was made. But two days *before* the appointment, King had one of his dreams (visions). The diary for March 15th records:⁵⁴

A kind Providence has been watching over me today, and throughout the debate on the Railway measure. Just before waking I dreamt I was sitting at a table talking with dear father. I was asking his assistance in revising something, each time he looked in the direction of Judge Duff who seemed to be the Chief Justice and who was the only other person I could see, and said to ask him. I seemed to be a little put out at father always referring to the Chief Justice in this way as I felt he knew better himself. . . .

VI. *The Duff Court.*

Sir Lyman, Rinfret, Lamont, Smith, Cannon, Crocket and Hughes constituted the Duff court in its initial stage. Frank Joseph Hughes, a forty-nine-year-old Toronto lawyer, who had acted as a Crown Attorney from time to time, was appointed to the vacant seat, on the same day Duff was made Chief Justice. Both Hughes' appointment and Duff's promotion were applauded by the *Toronto Globe*.⁵⁵ Like Anglin, Hughes was a Roman Catholic, as was his successor Patrick Kerwin, that is, from 1909 until 1963, one of the Ontario judges was of that denomination. With the elevation of Emmett Matthew Hall, who was also a Roman Catholic, from Saskatchewan in 1962, this Ontario tradition, if it ever had been one, was discontinued.

⁵⁴ King Diaries, PAC.

⁵⁵ March 20th, 1933, p. 4.

Smith reached retirement age at the end of 1933. He was replaced by Henry Hague Davis, forty-nine, who had been appointed to the Ontario Court of Appeal two years earlier. A gold medalist in political science at the University of Toronto, he had taken a master of arts degree before studying law. He had practised in Toronto. Davis was not appointed until January 31st, 1935, the vacancy having remained open for more than a year.

Meanwhile Lyman became Sir Lyman. Duff was knighted — a Knight Grand Cross of the Order of St. Michael and St. George — at the beginning of 1934, when the Empire-minded Bennett re-instituted titular honours for Canadians. Lesser knighthoods went to Dr. Frederick Banting, the discoverer of insulin, Ernest MacMillan, the composer and conductor, and Chief Justice Tellier of the Quebec Court of Appeal.

Hughes found the Supreme Court and Ottawa not to be his milieu, and resigned after two years. He was replaced by forty-five-year-old Patrick Kerwin, a former Guelph lawyer, who had been appointed to the Ontario High Court in 1932. Kerwin was the last of the Bennett appointments (the others having been Crocket, Hughes and Davis).

In March of the following year, 1936, Lamont, whose health had been failing for some time, died at the age of seventy. His place was taken by Albert Blellock Hudson, a sixty-year-old lawyer from Manitoba, who some twenty years earlier had served a short term as Attorney General of that province. He had also been elected, as an Independent Liberal, to the House of Commons in the general election of 1921.

There were two more appointments to come in the Duff period. Robert Taschereau, at the age of forty-three, was appointed when Cannon died at the end of 1939. Taschereau came from a family remarkable for its capacity to attain high legal office. His grandfather, Jean Thomas Taschereau, had been one of the first members of the Supreme Court, and his grand-uncle, Henri Elzear Taschereau, had been Chief Justice. His father, Louis Alexandre, had been Attorney General of Quebec for fifteen years. Robert Taschereau himself had been elected three times (in 1930, 1931 and 1935), as a Liberal, to the Quebec Legislature, although he never held office in the provincial cabinet. He practised in Quebec City (in his father's firm), and became a leader of the bar in his district. For nine years prior to his appointment, he taught criminal law at Laval.

Finally, with the retirement of Crocket at the age of seventy-five, in April 1943, Ivan Clelland Rand was appointed.⁵⁶ While their terms overlapped for only eight months, Duff seemed to find in Rand a kindred spirit and was probably more attached to him than he had ever been to any of his other twenty colleagues on the court. Rand was then fifty-eight. It seems a pity that Providence (as Mackenzie King would say) had not allowed them to join forces twenty years earlier. The intellectual vitality of such a combination could perhaps have been the making of the court.

In the meantime Duff would have reached the mandatory retirement age of seventy-five on January 7th, 1940. But Parliament twice extended his term, on the first occasion for three years and on the second for one. It is in the parliamentary debates that took place on these two occasions that the best measure of the regard Duff had achieved in the minds of his fellow Canadians can be found. The two men chiefly responsible for the first extension were Mackenzie King, the Prime Minister, and Ernest Lapointe, the Minister of Justice. These were the same two men, holding the same offices, who had decided against Duff for Chief Justice in 1924. On March 9th, 1939 King recorded:

Discussed with Lapointe position of Supreme Court, Duff's time being up in January. Four of the judges are anything but well. Court very weak. He could think of no one suitable being appointed Chief Justice, or from B.C. to take Duff's place on the Supreme Court Bench. I agreed to having Duff's term extended a year if he were agreeable. Should Crockett pass away, I told Lapointe I was sure Ralston would accept an appointment, and Lapointe agreed he would be the best and would make a good Chief Justice later.

Colonel J. L. Ralston, a Nova Scotian who had been Minister of National Defence in the King administration prior to 1930, was then practising law in Montreal. When war broke out later in 1939, King brought Ralston back to Ottawa to serve in the Cabinet again, first as Minister of Finance and then as Minister of National Defence. He resigned from the latter post in 1944 over the conscription issue. Meanwhile King asked Duff whether he would be willing to serve an extended term: "I told him it was simply because the Court and the country needed him in the position of Chief Justice." Duff agreed to stay on.

On April 11th, 1939 Lapointe introduced in the House of Commons a bill to extend the Chief Justice's term for three years

⁵⁶ For biographical detail regarding Rand, see the article by Marshall Pollock in this issue, at p. 519.

and it was read for a first time.⁵⁷ After a second reading, without debate, on April 24th, the House went into committee to discuss the bill and Lapointe explained:⁵⁸

. . . I may say that the present Chief Justice of Canada, as members of the committee know, is a great jurist, one of the finest legal minds in the British Commonwealth, and the equal of any legal mind in the world. He has made a reputation not only in Canada but even when he sits as a member of his majesty's privy council. Apart from that, he is an eminent gentleman enjoying the confidence of Canadians throughout the land. . . .

The bill was enthusiastically endorsed by the Leader of the Opposition, R. J. Manion, the only other speaker.⁵⁹ Without further debate, the committee agreed to the bill and reported, the House then giving it third reading — all on the same day. The course of the bill through the Senate was not quite so smooth. Although no Senator voiced any criticism of Sir Lyman, some were concerned about the precedent that would be created. The first to raise this point was Sir Allen Aylesworth, who had been the Minister of Justice responsible for Duff's appointment to the Supreme Court in 1906. While he did not oppose the bill, he thought allowing governments to decide which judges deserved extensions would "be a most dangerous encroachment upon that highly important principle, independence of the Bench".⁶⁰ A few Senators did vote against the bill, mainly on the ground of principle. One Liberal Senator, however, had a practical reason. The Hon. William Duff — no relation to Sir Lyman — said:⁶¹

Here is another point. In three years' time a Tory Government may be in power, and the Liberal Government will lose the opportunity of appointing the new Chief Justice. I am too much a partisan to agree to that contingency.

Perhaps Mackenzie King had sufficient confidence in divine Providence to know that such an contingency did not exist. He won the general election the following year with ease.

It was during the initial period of this extended term that Duff almost became the first Canadian Governor General of our country. Lord Tweedsmuir died on February 11th, 1940, two weeks after Mackenzie King had announced that there would be a general election. Duff was sworn in as Administrator of Canada immediately and acted in that capacity until Tweedsmuir's

⁵⁷ House of Commons Debates, April 11th, 1939, p. 2657.

⁵⁸ P. 3104.

⁵⁹ Pp. 3104-3105.

⁶⁰ Senate Debates, April 26th, p. 229.

⁶¹ P. 234.

successor, the Earl of Athlone, arrived in Ottawa at the end of June. Mackenzie King had not wished the appointment of a new Governor General to be made until the general election was over. Election day was March 26th and Mackenzie King swept the country, winning 184 seats out of a possible 245. Two days later the Cabinet approved Mackenzie King's choice, Athlone. The next day the Prime Minister discussed the appointment with his Minister of Justice, Lapointe:⁶²

I read to him the King's message to me, and told him of what I had done. He thought it was all for the best. He spoke of the appointment of a Canadian later on. I told him that had Chief Justice Duff been married, I would have recommended his appointment right now. That, if Lapointe wanted the job when the Athlones had left, he could have it. Clearly, there is no Canadian on the horizon that could fill the position at the moment.

On April 4th, the bachelor Prime Minister noted:⁶³

I told Judge Duff, at the High Commissioner's luncheon on Tuesday, that if he had been younger and were not needed for the Supreme Court, (and, I might have added, if he had a wife still living) I would have been prepared to recommend him as G.G. This I gladly would have done. It would have been an admirable choice of a Canadian to fill the office. The obvious Canadian for that post has not yet come to the fore.

It was twelve years later when the first Canadian, Vincent Massey, a widower like Duff, was made Governor General. Duff was, however, the first Canadian to open Parliament and to read the Speech from the Throne. This he did in the capacity of Administrator on two occasions, on March 12th, 1931 and May 16th, 1940. On the first of these occasions, Duff acted in the interval between the departure of Lord Willingdon, who had left to become Viceroy of India, and the arrival of his successor, the Earl of Bessborough. Presumably Anglin, who was then Chief Justice, was not well enough to undertake the task.

Towards the end of his three-year extension Sir Lyman unfortunately became involved in a national political controversy — the Hong Kong inquiry. At the request of the British Government, Canada had sent two battalions to assist in the garrisoning of Hong Kong in the fall of 1941. Three weeks after the Canadian troops arrived in the colony, Japan entered the war and by Christmas Day, when Hong Kong fell, 300 of the 2000 Canadian soldiers were dead, 500 were wounded and the rest were prisoners of war. Charges were made that the Canadian units were ill-trained and ill-equipped and there was a public

⁶² King Diaries, PAC, March 29th, 1940.

⁶³ King Diaries, PAC, April 4th, 1940.

demand for an investigation. Leading the outcry was Colonel George Drew, the Conservative Leader of the Opposition in the Ontario Legislature. On January 22nd, less than a month after the fall of Hong Kong, Mackenzie King bowed to public pressure and announced there would be an inquiry.⁶⁴ King called on Duff and urged him, in the name of duty, to take it on. Duff, to the government's relief, acquiesced:⁶⁵ he was appointed sole Commissioner on February 12th. Since it was a wartime hearing concerning military matters, Duff held the hearings *in camera* and his report, which vindicated the government, contained only extracts from the evidence heard. As soon as the report was tabled in early June in the House of Commons,⁶⁶ Drew (who had been appointed a Commission counsel on the nomination of the Conservatives) denounced Duff in a formal statement to the press, in which he charged that Sir Lyman had withheld "blood-curdling" facts from the public.⁶⁷ Duff was caught in the cross-fire between Drew and the Mackenzie King government. The Tory press was in a furor and the battle raged in the national limelight. On the instructions of the Minister of Justice, then Louis St. Laurent, Drew was charged under regulation 39B of the Defence of Canada Regulations with making statements likely to be to the detriment of recruiting.⁶⁸ Debate in the House of Commons was made difficult by the rule that prohibits attacks on those holding judicial office.⁶⁹ Government members claimed that the criticisms of Duff offended the rule. The opposition said the attacks were against Duff in his capacity as a royal commissioner and not as a judge. Duff was very upset by these attacks, and with Drew, but he was not entitled to defend himself. Whether his report was a whitewash will be considered on another occasion. Perhaps he felt it would be bad for national morale to come down on the government. In any event Mackenzie King had no cause to grumble with Sir Lyman. The *Toronto Globe and Mail*, in a leading editorial written on Duff's death thirteen years later, said that the inquiry "... involved him in a political controversy which he no doubt regretted; and which to some extent shadowed an otherwise illustrious life".⁷⁰

⁶⁴ House of Commons Debates, January 22nd, 1942, pp. 4-5.

⁶⁵ King Diaries, PAC, February 4th, 6th, 1942.

⁶⁶ Report on the Canadian Expeditionary Force to the Crown Colony of Hong Kong, June 4th, 1942.

⁶⁷ See the *Toronto Globe and Mail*, June 6th, 1942, p. 1.

⁶⁸ See the *Toronto Globe and Mail*, June 25th, 1942, p. 1.

⁶⁹ See Beauchesne's *Parliamentary Rules and Forms* (3rd ed., 1943), rules 246(j) and 253.

⁷⁰ *Toronto Globe and Mail*, April 27th, 1955, p. 6, in a leading editorial written on Duff's death.

The second extension of his term that Parliament gave Sir Lyman turned out to be more contentious, and came *after* his already-extended term had expired. When the expiration occurred, Parliament was not sitting, nor had it been for some months. It seems the Government had not decided on the Chief Justiceship when the 1942 Session concluded at the end of July. (If it had decided on Duff, the time to bring up the extension in Parliament would hardly have been when the debate on the Hong Kong inquiry was at its height.) Sometime in early October King appears to have broached Duff about a further extension, although he noted at this time the Chief Justice "looks a good deal frailer".⁷¹ For October 23rd, the King diary records:⁷²

. . . Chief Justice Duff came to speak about his term. He appreciated my having asked him to continue another year and my readiness to introduce a Bill for that purpose. He said, in thinking it over, he felt the understanding was so definite that he should only continue for another year that he did not think he ought to accept. I told him I regarded the extension as meaning we were glad to have him continue at this time of war, it would help all of us if he did, and I did not think the public would view the time limit as a factor, as long as he was capable of performing the duties of Chief Justice and able to do so. He agreed to talk the matter over with his colleagues, and expressed a readiness to continue, if we were quite certain it was desirable for him to do so. He spoke about my Toronto speech and emphasis placed on consequence of a stalemate. He had not seen the argument presented so strongly and forcibly before. He was making use of it in something he is preparing.

Two weeks later Ralston expressed the view to King that:⁷³

. . . it would be letting the Chief Justice down; looking as though we were giving in to our opponents not to renew his appointment for the duration. Also it would be losing so much in the way of valuable services at a time of war.

King agreed: "That is my own feeling and I shall so represent it to St. Laurent."

Three weeks after Duff's extended term ended, on January 29th, 1943, the day after the new Session of Parliament opened, the Minister of Justice, Louis St. Laurent, introduced a bill in the Commons to add an additional year to the three-year extension.⁷⁴ This time the Conservatives, led by the Hon. R. B. Hanson, were more critical, some voting against the bill along with the C.C.F. and Social Credit. Again there was virtually no criticism of Sir Lyman, although two members, one of them being T. C.

⁷¹ King Diaries, PAC, October 7th, 1942.

⁷² *Ibid.*, October 23rd, 1942.

⁷³ *Ibid.*, November 9th, 1942.

⁷⁴ House of Commons Debates, January 29th, 1943, p. 21.

Douglas, expressed dissatisfaction with the manner in which Duff had dealt with their testimony at the Hong Kong inquiry.⁷⁵ Those opposed generally felt that a younger man should be appointed. Douglas remarked that "a man who has reached this time of life has neither the virility nor the power of mental concentration to deal with very complex matters".⁷⁶ To the contrary, another member concluded the debate with the following:⁷⁷

Some three months ago I was engaged in a case before the Supreme Court which lasted part of two weeks, and I want to say to the house that the keenness of intellect of the chief justice is not in the slightest degree impaired by his advanced age, which has been commented upon. I think I can put it this way: he is outstanding, a man of rare intellectual and ripe experience, with a high sense of honour and integrity, and perhaps above all these qualifications as judge he is a man of great kindness of heart and of full understanding of human nature.

To the suggestion that the court might be strengthened by the appointment of a younger person, St. Laurent had stated:⁷⁸

I am sure the hon. member and all other hon. members agree that this generation in Canada knows no greater jurist than the present chief justice. No one at this time is better qualified than he is to fill the office, and the placing of any other Canadian jurist in his seat would not in any way strengthen the court.

On the second reading vote, the House divided 139-40 in favour.⁷⁹ Conservatives voting against included Howard Green, Grote Stirling, Thomas Church, Gordon Graydon, and William Earl Rowe. Diefenbaker was absent from the House when that vote was taken, and did not speak during the debate.

On February 4th the bill was rushed through the Senate. By agreement the Senate rules were suspended, and the bill given all three readings on that day.⁸⁰ There was only mild opposition. Senator John T. Haig, the Conservative spokesman, opposed the further extension on the ground that seventy-five should be the limit for any man, however able, but he was not prepared to ask for a division on the vote.⁸¹ Sir Lyman's namesake, William Duff, who had opposed the first extension, supported the bill and even suggested that the new extension be increased to two years.⁸² The

⁷⁵ February 2nd, 1943, pp. 65, 69-70.

⁷⁶ P. 70.

⁷⁷ Arthur Slaght, p. 74.

⁷⁸ P. 66.

⁷⁹ See p. 67.

⁸⁰ Senate Debates, February 4th, 1943, p. 33.

⁸¹ P. 34.

⁸² P. 37.

bill was given Royal Assent the following day, February 5th. News of the bill had meanwhile reached the retired but enobled Richard Bedford Bennett at his Surrey estate in England. The bitter and lonely Viscount (who, it will be recalled, appointed Duff Chief Justice in 1933) fired off an angry telegram to R. B. Hanson, the Conservative House leader, urging him to ask Mackenzie King if the reason he gave for refusing to appoint Duff Chief Justice "in 1929 [sic] have not since been greatly intensified". Bennett also complained that Duff described himself as a Liberal in *Who's Who*, which he thought was "unusual and inconsistent with discharge of judicial duties".⁸³ The telegram arrived after the House had dealt with the bill, but Hanson passed it on to Senator Haig, who made a reference in his speech to the fact that King had not appointed Duff Chief Justice in 1924 and that Duff's biographical sketch described him as a Liberal. He then went on to say that Bennett (presumably despite the Liberal label) thought so much of Sir Lyman that he promoted him to the Chief Justiceship:⁸⁴

By so doing, Mr. Bennett re-established a precedent which I believe should be observed in future, that when a vacancy occurs the senior judge of the Court should become Chief Justice.

The Viscount had been looking for action, not back-handed compliments. He cabled Senator Haig:⁸⁵

If reports of recent judicial legislation are accurate Canada has no Chief Justice and there is vacancy on the Supreme Court Bench. . . . Retroactive legislation cannot continue him in an office he ceased to hold before legislation passed. He can only become Chief by appointment under Judges Act and one of special enabling Statutes dealing with age. Suggest if reports as indicated public interest requires immediate action as Court constituted with Duff as Chief illegal and decisions invalid.

Haig replied that he thought the legislation took care of the matter raised by Bennett.⁸⁶ Bennett was still not satisfied. He answered:⁸⁷

. . . I really consider that the most iniquitous legislation that was ever passed by any Parliament within the British Empire. The fact is that Duff has been made Chief Justice by a Statute after he had

⁸³ See letter to Bennett from R. B. Hanson, dated February 5th, 1943, acknowledging and quoting a night letter which he had received from Bennett the previous day. Bennett Papers, *op. cit.*, footnote 53.

⁸⁴ Senate Debates, February 5th, 1943, pp. 35-36.

⁸⁵ Draft cable, apparently sent March 23rd, 1943. Bennett Papers, Notable Persons file, *op. cit.*, footnote 53.

⁸⁶ Letter Haig to Bennett, dated March 29th, 1943. Bennett Papers, *op. cit.*, *ibid.*

⁸⁷ Copy letter Bennett to Haig, May 31st, 1943. Bennett Papers, *op. cit.*, *ibid.*

ceased to be a Judge. It has caused a very great feeling of disgust amongst Judges and others in this country that we had a man who was willing to be legislated into a job which by law he had vacated because the Statute was not passed until he became an ex-Judge.

He added another reason for his disquiet:

I am not interested, except that after reading a report that he made in the Hong Kong case, I realize that he is no longer fit for judicial duties. . . .

And ended on a fighting note:

. . . If I had been in Parliament there would have been a very long struggle. . . .

With the opposition that had been generated to the second extension, it may be that Duff considered declining the renewal, or resigning once the legislation had been passed, but there is no evidence that he did so. He was not a quitter by nature. And to have quit at that point might have embarrassed the King government which had pressed the legislation through Parliament. King had thought the actions of the Progressive Conservatives "toward Duff will cost them dearly in the end among their following in the legal profession". He noted:⁸⁸

What I am now most afraid of is that Duff, himself, will not agree to continue on the Bench. I told St. Laurent we should see to it that he does not give in to the echoes of the Toronto gang, Meighen, Drew et al, and their attack of last year.

Once the legislation was passed, the rest of 1943 seemed to slip by uneventfully for Sir Lyman and on January 7th, 1944 — his seventy-ninth birthday — he finally retired. The evening before, the Governor General gave a dinner in his honour. The Prime Minister, who was present, described the end of the evening and some of his own thoughts about Duff:⁸⁹

The party broke up a little after 11. I drove the Chief Justice and Miss Duff [Sir Lyman's sister] home. They had a car but he seemed pleased to accept my invitation. As we drove from G.H. door, it was a beautiful moonlight night, ground covered with snow. The Chief Justice began to exclaim what a nice evening it had been, and then drew back a little as if he did not wish to say too much. He is exceedingly modest. A little earlier in the evening, he had shown me a letter he had in his pocket from the King, a very nicely written letter appreciative of his services. He drew attention to the fact that the King had also spoken of the Queen in the matter. . . .

⁸⁸ King Diaries, PAC, February 2nd, 1943.

⁸⁹ King Diaries, PAC, January 6th, 1944.

Mackenzie King went on:

. . . I have become very fond of Duff and he equally I think warmly reciprocates the feelings that we shared quite strongly when he and I first came to Ottawa. The appointment of Anglin as Chief Justice after we came into office inevitably made difficulties at the time but he has never alluded to it in any way and understood, I think, very fully the situation.

Four days later Rinfret was sworn in as Chief Justice. At the ceremony, Duff spoke to Mackenzie King about having the King's letter to him published, the *Toronto Star* having asked him for it. The Prime Minister recorded:⁹⁰

. . . I am perfectly sure on Duff's part it is not due to any vanity but simply feeling it was a great compliment to the country as well that the King should have written him as he did. I have no doubt he feels too the attack that was made on him by Drew. . . . After the ceremony, I drove Sir Lyman . . . home. We had a pleasant talk together. . . . His last words at the door were about the letter to the King, saying that I would appreciate it was not any vanity on his part.

He concluded:

The truth is Duff is very humble minded and the most unpretentious of men. A very fine character and a very splendid judge.

VII. *Conclusion.*

The Duff era was over.

And Duff era it had been. For nearly forty years, Sir Lyman's presence had provided qualities without which the court would have been a very pedestrian institution. Weakened from time to time by judges who were ill or whose mental faculties had deteriorated, the court's performance in its middle period was unimpressive. Not that most of Duff's colleagues were not able men when they were appointed. On the whole, they were among the best that were available. Perhaps the court simply suffered from those peculiar Canadian attributes — lack of intellectual aggression and imagination in matters of substance, and lack of elegance in matters of form. It is better not to contemplate what the court's record would have been had Sir Lyman not been there.

For the eleven years following his retirement Sir Lyman lived quietly in Ottawa, save for a summer visit to London in 1946 when he sat on the Judicial Committee of the Privy Council for the last time.

On April 26th, 1955, his life came to an end.

⁹⁰ King Diaries, PAC, January 10th, 1944.