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Duff: A Life in the Law

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Duff: A Life in the Law. By David Ricardo Williams. Vancouver: UBC Press, 1984. Pp. xiii, 311. Price: $34.95.

According to Donald G. Creighton wrote, "History is not made by inanimate forces and human automatons: it is made by living men and women . . . which can best be understood by that insight into character . . . which is one of the great attributes of literary art."[1] The form of that literary art is the biography, a synthesis of an individual's life, activities, ideas, attitudes and character, placed within an historical context. The biographer must look beyond the public perception into the private life of his subject in hopes of better understanding and explaining his character and actions. That is what David R. Williams has set out to do in his biography of one of Canada's most noted jurists, Sir Lyman Poore Duff. Through the assistance of the Canada Council and Osgoode Society, Williams, lawyer, historian and writer-in-residence in the Faculty of Law at the University of Victoria, has made a valuable contribution to legal-historical scholarship in Canada.

When preparing a biographical study of Sir Guy Carleton, A. L. Burt concluded, "Tradition made Carleton divine; research made him human."[2] So it is with this first and much overdue biography of Canada's longest serving Chief Justice. Tradition has portrayed him as a "grim," "godlike personage whose pronouncements came down as if graven on stone."[3] Williams' research reveals a human being tormented by alcoholism, indebtedness, impotence and the demands of judicial impartiality. This book is not an excuse for romantic hero worshipping. It is, rather, a matter of fact portrayal of a very public figure, warts and all. Through detailed research and documentation based on the vast public and more limited private papers of Duff as well as private papers of prime ministers, letters, memoirs, interviews, court decisions and royal

1. Carl Berger, *The Writing of Canadian History,* (Toronto: Oxford University Press, 1976) at 220.
2. *id.* at 219.
3. D. R. Williams, *Duff: A Life in the Law,* (Vancouver: UBC Press, 1984) at 166.

commission reports, Williams presents the reader with a study of Sir Lyman Poore Duff, the strong, conservative jurist and the frail, liberal private man, his "legalistic side" and his "literary humanistic side."[4] The story is enhanced by sixteen pages of photos and an excellent detailed index.

While at times the style is disjointed and the text burdened with case-related material, on the whole, Williams has successfully achieved that difficult balance between legalistic writing for legal audiences and narrative writing for lay audiences. Legal audiences will appreciate the details given regarding some cases like those of the *I'm Alone* and the famous *Persons* case. Lay audiences will appreciate the restrained detail of the cases derived from R. B. Bennett's "new deal" legislation or the *Reciprocal Insurers* case. Although further editing might have smoothed out the textual flow, removed some irrelevant details and developed a more clear theme, Williams has produced a readable biography with a minimum of legal terms. Where necessary he has provided simple, clear explanations. The narrative is spiced with intriguing tidbits of information about such things as the use of wigs in British Columbia and enjoys some visually descriptive passages. The reader also feels that the author as a lawyer, understands the relationship between bench and bar, the demands and responsibilities placed on those positions. There is an appreciation for the legal environment which helps the reader comprehend how Duff developed into a leading jurist in a short period of time during the decades that witnessed Canada's emergence as an independent, increasingly urbanized nation.

Born in Meaford, Ontario in January 1865, Lyman Poore Duff was a precocious, confident youngster who called himself a "bully." He read widely even as a child and at age thirteen decided to pursue a legal career. While at University College, Toronto, he often attended police and chancery courts. He also catered to his political interests through debating and participating in the Young Liberal Club.

Called to the Ontario Bar in 1893 and the British Columbia Bar in 1895, Duff quickly made a name for himself as a meticulous barrister, possessing a phenominal memory, great energy, mastery of the law and power to dominate witnesses

4. *id.* at 278.

under cross-examination. In later years he expected much the same from counsel appearing before him.

His was a truly "meteoric rise to prominence," within the British Columbia "band of brothers."[5] Although Williams does not explicitly develop or explain the reasons for this success, he does point to Duff's keen mind and to specific cases which gained him a reputation as a barrister knowledgeable in mining, property and constitutional law. At the same time, Duff was actively working for the provincial Liberal Association becoming President in 1902. His political connections undoubtedly figured in his rise to the bench and could have been more fully explored by Williams.

After just ten years in practice, Duff crossed "the river of Lethe" separating the bench from the bar, to sit on the Supreme Court of British Columbia. The fact that he had served as junior counsel on the Canadian contingent, appearing before the Alaska Boundary tribunal, brought him before the public eye and contributed to his elevation.

Duff had little impact on the B.C. court if only because he was quickly appointed to the Supreme Court of Canada in 1906. Nevertheless, his early decisions revealed a conservative, literal judicial character which remained throughout his career. David Williams outlines the criteria for a "sound jurist" but unfortunately does not expand or develop these requirements in direct realtion to Duff's career. He does reveal though, that while Duff was humourless in court, he was unquestionably knowledgeable of the law. And, if "judgments reveal men," then Duff's dispassionate, "antiseptic" judgments noted for "elaborate syntax" reveal much about the judge who rarely changed his mind. looked to the words for the policy of the legislature, was guided by the rule of precedent and wrote complex decisions designed for lawyers and posterity, not for the edification of the litigants.

Duff, as Williams illustrates, was a man of contrasts and contradictions. Although a firm believer in capital punishment for premeditated murder, he was so sensitive as to be physically ill after passing a death sentence. Although fluently bilingual, a student of Quebec civil law and a believer in the two founding nation compact duality of the Canadian Constitution, he was

5. *id.* at 25.

despised by many French Canadians because of his role as central appeal judge under the 1916 Military Service Act. Although a lifelong Liberal and close friend of Mackenzie King, he was denied the Chief Justiceship in 1924 partly because his political sympathies were suspect. Duff always stressed the importance of judicial impartiality, yet in 1941 he fell victim to political partiality when as chairman of the parliamentary inquiry into the Hong Kong expedition, he absolved the King government and military of any responsibility, apparently having made up his mind before hearing all the evidence.

Lyman Poore Duff was not a man of the people. He was a social and intellectual elitist who enjoyed the prestige of office, cherished British laws, traditions and the monarchy and regarded his ceremonial opening of Parliament in 1931 as one of the highlights of his life along with meetings with Kings Edward VIII and George VI. He greatly valued his position as Imperial Privy Councillor, appointed in 1919, and his nomination as an Honourary Bencher of Gray's Inn. He knew his place on the other side of the bench and hob-nobbed with the cream of political and legal society, Lord Haldane, the Earl of Birkenhead, Lord Curzon, Felix Frankfurter, Franklin Roosevelt, R. B. Bennett, and Mackenzie King.

Duff's view of the Canadian Constitution did not change with his elevation to Chief Justice of Canada in 1933. As Williams concludes, "Duff was a judicial technocrat, not a judge of broad sweep and vision."[6] He believed his role was to interpret the law as it was worded, not to make new law. Here again the author does not develop an interpretative theme. While Williams' stated purpose was to give an understanding of how the court system operates in Canada and how judges do their work, he does so through a chronicling of events and cases rather than through an interpretative framework. Nevertheless, the clues are there. Clearly Duff's contribution to the Canadian judicial system and the law was "his entrenchment of earlier London rulings,"[7] by the Privy Council which viewed the British North America Act as a federal compact of equal self-governing units.

6. *id.* at 277.
7. *id.* at 77.

Duff has often been criticized as a reactionary whose narrow conservative interpretations prevented the court from being a catalyst for social reform. Williams does not deny that side of Duff's career. He was a literalist and a compact federalist and together those factors determined his constitutional interpretations regardless of social climate. Duff helped, to perpetuate discrimination against Orientals, Blacks and women by his decisions in such famous cases as *Quon-Wing v. The King,* (1914), the *Henrietta Muir Edwards* v. *The King* (1928) and *Christie* v. *York* (1940). In 1932 Duff agreed that the B.C. Government could issue logging permits denying employment to Orientals. In 1946 he upheld the wartime deportation of Japanese nationals. Williams does not excuse these decisions. Rather he reminds the reader that Duff's decisions must be put in the light of contemporary attitudes of the majority, especially the social elite, and stresses Duff's belief in what he regarded was his role as an interpreter of the law.

Perhaps what are more interesting are those cases which, although not developed, reveal Duff's more human qualities. He often demonstrated special concern for the rights of the accused such as in his ruling that an accused pleading insanity as a defence need not prove it beyond a reasonable doubt but only through a preponderence of evidence. He also showed concern for illegitimate children, orphans and common law wives. In 1936 he dissented claiming R. B. Bennett's Employment and Social Insurance Act was constitutional under the federal powers of taxation and public debt. He could strain the word, for as Williams suggests, "his innate liberalism may have guided his pen."[8] The following year Duff won the praise of the media when he ruled that Alberta's Accurate News and Information Act was unconstitutional as "it interferred with the exercise of the right of public discussion."[9] It would appear that Duff was not so much a social reactionary as a judicial literalist; thus, in spite of his decision that women were not "persons," constitutionally free to sit in the Senate, he was sympathetic to the female argument and Canada's first female senator, Cairinne Wilson, was a close personal friend.

8. *id.* at 187.
9. *id.* at 198.

David Williams does not fall into the tempting trap of apologizing for Duff's refusal to be a judicial activist or reformer. He does not whitewash Duff's position on the Hong Kong affair. But he does stray into the area of unqualified and unproven assumptions. For example, he says that Duff believed in "the essential goodness of men,"[10] without definition or specific example. He suggests that the reason for more cases coming before the courts after World War One was the increase in crime due to urbanization of Canadian society. This oversimplification that "the growth of cities fostered crime,"[11] has been questioned by social historians and criminologists who suggest that while crime may have increased, the more important factors were the improvements in law enforcement and detection. He tells the reader that Duff quickly gained a reputation in the area of mining law but provides little evidence, perhaps because it is difficult to find records of such cases and arguments.

Duff: A Life in the Law is a treasure trove of information for historians, politicians and lawyers. Duff played a central role in so many key events, conscription, prohibition, social reform, to name a few, that material is included which relates to social, political, economic, as well as legal aspects of Canadian life. Students of Canadian history would be well advised to refer to this work for information on the Alaska Boundary decision, rum-running cases such as the *I'm Alone,* Bennett's "New Deal" legislation, the Hong Kong affair, and conscription. Also hidden within the book are excellent accounts of behind-the-scenes patronage seeking by potential judges and attempts by politicians to receive special concessions and privileges. Duff spoke volumes when he told Lord Haldane, "You can have very little idea of the liberties some Canadian ministers will allow themselves in influencing judges."[12]

In spite of some stylistic weaknesses, general assumptions, and lack of thematic development, David Williams' biography of Sir Lyman Poore Duff fulfills the requirements of a good biography. It will be enjoyed by lawyer and layman alike as it turns the "grim" senior jurist into a "living" man. Only the most critical reader will be concerned by the weaknesses.

10. *id.* at 73.
11. *id.* at 72.
12. *id.* at 215.

Lawyers and historians will wish that Williams had been more explicit and interpretative in explaining in what ways Duff's career reveals how Canadian high courts work, how judges do their work and what strengths and weaknesses there are in the judicial system then and now. That was his stated purpose but he falls somewhat short. Lay readers, however, will gain a good feel for the times and for Duff, the appearance and the reality, his outward accomplishments and inner torments, the judicial technocrat and the "human being wracked by inner torments... who left a mark on the judicial history of Canada that has yet to be matched," if only because of his judicial longevity.[13]

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13. *id.* at 129-130.

The Northwest Passage: Arctic Straits. By Donat Pharand in association with Leonard H. Legault. Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1984. Pp xxii, 199. Price: US $44.00.

This study, being the seventh volume of the *International Straits of the World* series and written by a distinguished alumnus of this Law School, is designed primarily for the non-Canadian or Arctic-specialist. Past volumes have covered such straits as Malacca and Singapore, the Northeast Arctic, Baltic, Gibraltar and Hormuz and each provide a discussion of the geography, uses and politics regarding the particular strait, as well as, a discussion of the significant legal issues that arise.

The goal of this book follows that of its predecessors — to discuss the past and potential uses of the Northwest Passage as a corridor for navigation and to look at the issues of international law that relate to the Passage. The details the travails of the northern explorers first opened the Arctic waters, the successful navigations of the Passage made in this Century, the environmental and strategic concerns about use of the Northwest Passage, the potential for hydrocarbon and mining development, and the possible impacts of all such activities on the Inuit. One distinction between this strait and most others is the presence of ice. Some of the peculiarities that arise because of this are discussed while others are not. For example, there is no explanation of what the difference is between a class 10 icebreaker and a class 6 or 7 and why that is important.

The author's preface indicates that this work was originally to be coauthored by Dr. Pharand and Leonard Legault, Q.C. Mr. Legault, Legal Adviser to the Canadian Department of External Affairs, was unable to contribute to the book with the result that Dr. Pharand is the author and Mr. Legault acknowledged on the title page as an associate. Given Mr. Legault's senior position with the Canadian Government, assumptions could be made that this book accurately reflects the position of the Canadian Government on the sensitive issues relating to Canadian Arctic sovereignty.

The author gives three chapters to the principal legal issues regarding the Northwest Passage. From the Canadian perspective the key question is the extent to which Canadian jurisdiction applies to the waters of the Northwest Passage.

Dr. Pharand does not deal with the Canadian claim that the waters of the Northwest Passage are historic internal waters and hence under the complete jurisdiction of Canada. This Canadian claim to the waters a historic internal waters, however, is evaluated in a manuscript written by Dr. Pharand and to be published in 1985 or 1986 entitled "The Waters of the Canadian Arctic Archipelago in International Law." In this text he concludes "that Canada would not succeed in establishing that the waters of the Canadian Arctic Archipelago are historic internal waters." The author does point out the possibility that by drawing straight baselines according to the 1951 *Anglo-Norwegian Fisheries Case,* a decision of the International Court of Justice, the waters thereby enclosed would become the exclusive sovereignty of Canada. Although raising this point there is little discussion about this possibility and the counterarguments that could be raised. In the *Anglo-Norwegian Case* Norway's ability to acquire complete sovereignty of the waters landward of the straight baselines drawn along the coastal island fringe was a result of its historic use of those waters. The criteria for baseline drawing in the 1951 case has been superceded in customary international law by the 1958 Convention on the Territorial Sea and Contiguous Zone and the 1982 United Nations Convention on the Law of the Sea (the LOS Convention) both of which indicate that waters enclosed by straight baselines allow for the continued right of innocent passage for foreign ships. In the above mentioned manuscript on the waters of the arctic archipelago, Dr. Pharand does discuss the possible use of historic consolidation of title as showing historic use of waters landward of straight baselines which might aid Canada in meeting one of these objections. Although not detailing his view on the possibility of the waters of the Northwest Passage being internal waters and under the complete jurisdiction of Canada, the author proceeds assuming that such a claim would not be substantiated.

It has long been Dr. Pharand's view that the Northwest Passage is not a "strait used for international navigation" and thus does not entitle foreign-flag vessels a right of nonsuspendable innocent passage pursuant to the 1958 Territorial Sea Convention or transit passage as outlined in the 1982 LOS Convention. This is a conclusion not accepted by the potential major non-Canadian user of the Northwest Passage, the United

States. The author does indicate that the Passage might be elevated to an international strait if non-Canadian traffic were to increase substantially in the Northwest Passage. He suggests a number of measures that could be taken by Canada to prevent the Northwest Passage from becoming an international strait. Actions suggested include: the drawing of straight baselines around the Arctic archipelago; increasing the presence of Canadian vessels in the Arctic; establishing and enforcing a vessel transit management system to control shipping in the Passage;(1) and entering into user agreements with states using the Northwest Passage.

In examining the extent to which Canadian jurisdiction applies in the Northwest Passage reference must be made to the 1982 LOS Convention provisions regarding the regime of straits and right of innocent passage. The 1982 LOS Convention has not yet come into force and probably will not for several years. Canada is a signatory to the Treaty but has not yet made a decision whether to ratify. More importantly, the United States has rejected the LOS Convention and, in fact, has worked actively against the Convention. The rejection of the Treaty by the United States raises important questions about the applicability of the LOS Convention to a non-party(2) and the status of the provisions of the LOS Convention in customary international law. It is the view of the United States that the provisions on straits in the LOS Convention which ensure a right of transit passage through straits used for international navigation enclosed by 12-n. mile territorial seas (similar to a right of passage through high seas) have either emerged as a norm of customary international law or are so worded in the LOS Convention to clearly be for the benefit of parties and nonparties alike. This is a position vehemently rejected by many of the negotiators who participated in the drafting of the LOS Convention.

Another United States position that may arise from its nonacceptance on the 1982 LOS Convention is U.S. non-

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1. See generally Cynthia Lamson and David L. VanderZwaag, eds. *Transit Management in the Northwest Passage: Problems and Prospects* (Cambridge: Cambridge University Press, forthcoming).
2. See luke T. Lee, *The Law of the Sea Convention and Third States,* (1983), 77 *American Journal of International Law* 541-568.

recognition of the extension of 12-n. mile territorial seas in international straits where previously there had been unimpeded traffic because of the existence of high seas. One route through the Northwest Passage using the M'Clure Strait would allow a vessel to navigate through the Passage without coming within a 3-n. mile territorial sea. In 1969 the *Manhattan* attempted to use this route but it got caught in the heavy ice of the M'Clure Strait and had to use a much narrower waterway. Dr. Pharand makes note of this issue but provides very little commentary. He does not deal at all with the difficulties that arise from Canadian or American nonacceptance of the 1982 LOS Convention. The unstated view seems to be that the Canadian-American positions on the multilateral LOS Convention are incidental to legal realities in the Northwest Passage, that applicability of the LOS Convention in the Passage is a bilateral issue for the two countries to resolve, and that the issues are not important since the key Arctic provision in the LOS Convention is already customary international law.

The most startling aspect of this book is the treatment given the 1970 Arctic Waters Pollution Prevention Act of Canada and Article 234 of the 1982 LOS Convention, the ice-covered waters provision. The Arctic Waters legislation and the extension of the territorial sea from 3 to 12-n. miles were designed to give Canada national jurisdiction over the waters of the Arctic and to ensure that the vessels using the waters met strict construction, manning and equipment requirements designed to mitigate against environmental disaster. These actions were necessitated by the U.S.-sponsored voyage of the *Manhattan* through the Northwest Passage which was perceived by Canada as a challenge to its sovereignty over the waters of the Passage. The United States protested the legislation which it viewed as breaching international law. Canada went on a campaign during the 1970s to gather international support for its Arctic Waters legislation. at the United Nations Conference on the Law of the Sea, Canada succeeded in having a special provision, article 234, inserted in the LOS Convention which, it argues, provides international justification for its Arctic waters legislation.

Article 234 allows coastal states bordering ice-covered waters to prescribe and enforce laws for the protection of the marine

environment that are more stringent than internationally accepted standards.

> Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of the ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment would cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine enviroment based on the best available scientific evidence.

It is Dr. Pharand's opinion that the Arctic Waters legislation is in conformity with the wording of Article 234, that Article 234 would allow Canada to enforce special standards on vessels utilizing the Northwest Passage regardless of the legal regime applicable to the waters of the Passage, and that Canada may now take such action since article 234 is already part of customary international law. With the exception of the second proposition, which is dependent on the third proposition, these opinions are expressed without elaborate critical evaluation.

Dr. Pharand does not scrutinize the Arctic Waters legislation or Article 234. One such evaluation raises real doubts as to the extent that Article 234 either supports the Arctic Waters legislation or could be usefully used by Canada to protect the marine environment of the Arctic.[3] Legislative implementation of Article 234 might necessitate substantial alterations in the Arctic Waters legislation. A rigorous textual analysis of the wording of the provision gives rise to numerous serious ambiguities.

The author's opinion that Article 234 has emerged as part of customary international law is based on the lack of protest from the United States (since 1970) and other interested states to the Arctic Waters legislation and the "consensus" reached

3. D.M. McRae and D.J. Goundrey, *Environmental Jurisdiction in Arctic Waters: The Extent of Article 234*, (1982), 16 University of British Columbia Law Review 197-228 and see Ted L. McDorman, *National legislation and Convention obligations: Canadian vessel-source pollution law*, (1983), 7 *Marine Policy* 302, at 308.

on the provision during the negotiation of the LOS Convention. This "consensus" has been described as being "an attempt to appease Canada and its intense commitment to its Arctic Waters Pollution Prevention Act."[4] The LOS Convention is not yet in force, Canada has not ratified the Treaty, and the United States has openly rejected the Treaty. The general U.S. position on the non-deep seabed provisions of the LOS Convention has been to make general statements that they are all part of customary international law and then proceed to reinterpret the provisions to fit the U.S. perspective. In short, one should be suspect of broad acceptance by the United States of provisions of the LOS Convention and equally suspicious of silence on certain provisions. Admittedly, the United States has not specifically "faulted" Article 234 and there do exist some indications that the provision has or will be accepted by the United States as part of customary international law.[5] The comments of former Canadian Ambassador to the Law of the Sea Conference Alan Beesley made in 1983 are of interest:

> . . . I would hesitate, for example, to say that the Arctic exception, the ice-covered waters provision, is already existing international law. However, I am relieved to hear others say it is, and I will take that into account.[6]

The elevation of Article 234 to customary international law would be very convenient for Canada. It would remove one of the major reasons for ratifying the LOS Convention since the controversial Arctic Waters legislation could arguably be supported by Article 234. This posture may look like Canadian opportunism since there are now some indications that Canada may not ratify the LOS Convention despite being one of the major beneficiaries of the Treaty. It also gives rise to the "pick and choose"

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4. R. Michael M'Gonigle and Mark W. Zacher, *Pollution, Politics, and International*
Law (Berkeley: University of California Press, 1979), at 247.

5. See Kurt M. Shusterich, "International Jurisdictional Issues in the Arctic Ocean," in William E. Westermeyer and Kurt M. Shusterich, eds. *United States Arctic Interests: The 1980s and 1990s* (New York: Springer-Verlag, 1984), at 254 and Brian Hoyle, "The United States Government Perspective" in Lawrence Juda, ed. *The United States Without the Law of the Sea Treaty: Opportunities and Costs* (Wakefield, Rhode Island: Times Press, 1983), at 135.

6. J. Alan Beesley, "Comment" in Juda, note 5, *supra,* at 141.

arguments that have been used against the United States as being contrary to the "package deal" understanding that led to the completion of the LOS Convention, suggestions of bad faith in negotiations, and the willingness of certain states to accept those parts of the Treaty it likes and reject those parts it does not like. Such criticism of the U.S. rejection-policy has been expressed, for example, by Ambassador Beesley.

The foremost world authority on the international law of the sea in the Arctic has provided us with his views on the crucial issues of navigational rights and Canadian jurisdiction in the Northwest Passage. This alone makes this volume of interest. It is with impatience that we now look forward to Dr. Pharand's next offering "The Waters of the Canadian Arctic Archipelago in International Law."

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