

Book Reviews

Duff: A Life in the Law, by David Ricardo Williams. Vancouver: University of British Columbia Press, 1984.

Duff: A Life in the Law is a valuable addition to the small but growing scholarship dealing with Canadian judicial biography. The book traces the life and career of Sir Lyman Poore Duff, successively lawyer in Fergus, Ontario, and in Victoria; judge of the British Columbia Supreme Court (1903-06), judge of the Supreme Court of Canada (1906-44) and its chief justice (1933-44). In 1919 Duff was also appointed a member of the Judicial Committee of the Privy Council, where he recurrently heard Canadian appeals until 1946.

Williams does a difficult job well in reconstructing the personal traits of his elusive subject. Duff often teetered on the edge of alcoholism, was sexually impotent, reserved and lonely, financially reckless and a toady — off the bench — to those in political power. For all his problems, though, Duff was a powerful and excellent judge, dominating the Canadian Supreme Court through most of his tenure, striving for impartiality, learned in his profession and able in his judgements to communicate succinctly a complex analysis of legal text. Williams makes interesting what might have been an arid account and presents a wealth of new facts, based on careful research in printed and manuscript sources and judicious use of oral evidence from persons who knew the chief justice well. Those wishing to understand more about the Alaska Boundary dispute, in which Duff served as counsel, the exemption appeal process during the conscription crisis of the First World War or the procedures followed in the Supreme Court and Judicial Committee will be rewarded. The writing seldom flags; it is often spiced by evocative human detail — Duff's rival, Chief Justice Anglin, leaving a calling card with nothing written on it after the funeral of Lyman's wife — and by humour — in

the recounting, for example, of Toronto's great "Stork Derby" and the litigation this baby boom generated.

The dozens of decisions treated are described in terms which may be understood by laymen as well as lawyers or students of constitutional history. Some, however, would seem to require amplification. In dealing with the *Marriage Reference* (1912), for example, Williams omits mention that Duff and his colleagues laid down the important principle that religiously mixed marriages in Quebec could be celebrated before a Protestant minister. Nor does the author explain the reversal in 1937 of the *Radio Case* (1932, JCPC) or the significance of Duff's important judgement in the *Alberta Press Case* (1938, SCC). Williams' analysis of the decisions does provide a useful case study of a self-professed literalist who thought sufficient answers were to be found in the text. Ironically, Duff often had recourse to non-textual sources: Hudson's Bay Company papers to show "Indian" included "Eskimo" prior to Confederation and *Hansard* to demonstrate that insurance was not deemed a federal matter in 1868, to cite but two examples. Another irony, not given emphasis by the author, is that Duff believed Lord Watson's decisions decentralizing Confederation had arisen from a strict interpretation of the text of the British North America Act. A contrast to the approach of John Idington, Duff's colleague on the court, might have been useful, for the former often based his judgements on appeals to very general legal or political principles.

A great strength of the book is the theme, kept constantly before the reader, of the relationship between politics and the judiciary. Duff served on four royal commissions while a judge. The last time (1942) was a one-man inquiry into the dispatch of troops to Hong Kong. It featured consultations between Duff and Prime Minister King, an obvious white-wash of the government decided before all the evidence and arguments had been presented, an extended term for Duff and attacks on the chief justice in the political arena. Williams makes the lesson clear. There are also little gems in the book such as R. B. Bennett sending his secretary, during the hearings on the New Deal legislation, to explain to Duff the former government's legislative program. There is a great deal of valuable material on judicial appointments, including Duff's as chief justice in 1933. The treatment of Anglin's appointment as chief justice over Duff in 1924 is really superb. Using the King diaries, other manuscripts and oral evidence, Williams tells a fascinating story of intrigue, recounts King's uncharitable characterization of the contenders — Duff was partial

to the “big interests” and a lukewarm Liberal who was “a sychopant [*sic*] where the Tories are concerned” — and makes a strong case that Duff was rejected principally because of his unpopularity in Quebec arising from his hard-line enforcement of conscription as central appeal judge.

The book offers many interesting insights into the values held by Duff. We see him as reverent imperialist who had many revealing things to say about retaining appeals to the Judicial Committee. Williams makes no bones about Duff’s insensitivity to racial and sexual equality, while properly noting such an attitude was then commonplace on the bench. On the Supreme Court, Duff upheld (1914) a Saskatchewan statute prohibiting the employment of white women by orientals (which Idington found to be “but a piece . . . of the mode of thought which begot . . . slavery”), held that British Columbia had power to exclude orientals from work on crown lands (1922), and decided against a black who had been refused service, on racial grounds, in a Montreal tavern (1940). As a member of the Judicial Committee Duff influenced the decision in the *Japanese Canadian Deportation Case*, which went further, even, than the Supreme Court in upholding the government’s power to deport by order-in-council (1946). In an uncharacteristically illogical judgement, Duff tortuously concluded that women were not “persons” under the British North America Act (1928). Williams was understandably hard put to find patterns in Duff’s judgements on civil and criminal law, but did point out tendencies to favour abandoned women and to protect the accused, particularly with regard to statements made by them or by their dying victims. The author also provided much material from which one can tentatively extrapolate a pro-business bias, but unfortunately he does not attempt to link it to judicial decisions. The well-known predisposition of Duff for provincial rights is illustrated in abundance. We find him referring to Confederation as a “Compact” in a 1913 judgement, approving the idea that constitutional amendment required the consent of all the provinces (1925) and writing a host of decisions restricting federal legislative authority or enhancing that of the provinces.

The major weakness in the book is the failure to analyze Duff’s provincialism in the context of the judicial decisions from the 1880s. Williams makes it clear, by quoting extensively from a fascinating letter written by his subject in 1925, that Duff had internalized the Judicial

Committee's approach to Canadian federalism. But whence did the values arise? The letter contains passages strongly reminiscent of Lord Haldane's many eulogies of Lord Watson. Did Duff's attitude spring principally from Watson's leading decisions — especially the *Local Prohibition Case* (1896), which he constantly cited — or the views of Haldane, with whom he had worked so closely in the Judicial Committee? Or did it derive from the provincial rights theory, articulated in legal dress by such Ontario Liberals as Edward Blake, Oliver Mowat and David Mills in the 1880s and 1890s, when Duff was a law student in Toronto and beginning practitioner in Fergus? More generally, was Duff a captive judge on a captive court under the Judicial Committee, or did he and his colleagues significantly contribute to constitutional law prior to World War II?

The reader learns little of Duff's progressive narrowing of that category of federal trade and commerce power described by the Judicial Committee in *Parsons* (1881) as a "general regulation of trade affecting the whole Dominion" or of any influence this narrowing may have had on the Judicial Committee. Again, there is little analysis of Duff's consistent rejection of Lord Watson's dimensions doctrine (*Local Prohibition Case*, 1896), according to which Parliament, exceptionally, could "encroach" on provincial jurisdiction in legislating under "Peace, Order, and good Government." Williams does claim that Duff's judgement in the *Board of Commerce Case* (1920) stimulated Lord Haldane's famous emergency test, but the author does not adduce satisfactory proof in the text. In the *Natural Products Marketing Reference* (1936), Duff contended at length that Watson had required not only national dimensions to the legislative problem but something more, which the chief justice took to mean an emergency. The Judicial Committee adopted Duff's analysis of Watson as the "locus classicus of the law on this point", which would hopefully prevent further disputes (*ILO Reference*, 1937). It is not clear from the book whether Duff's judgement directly influenced the Judicial Committee in reaching its New Deal decisions or merely provided a convenient rationale to support a desired return to Haldane. Nor can one readily accept the author's judgement (p. 253) that "the significant rulings on the Canadian constitution by the Privy Council, and by Duff, remain essentially unchanged". In particular the Supreme Court decisions since *Johannesson* (1952) have seen an abandonment of the emergency doctrine and a striking revival of the dimensions doctrine.

Having said that, I repeat that *Duff: A Life in the Law* is a worthy addition to judicial biography — indeed, to Canadian legal history in general.

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Growing Up British in British Columbia: Boys in Private School, by Jean Barman. Vancouver: University of British Columbia Press. Pp. 284; illus. \$29.95.

The social history of British Columbia is less and less a well-kept secret. A daunting and dubious emphasis on the thoughts and activities of major figures is finally giving way to an awareness of broader contextual developments. Researchers are looking behind official perceptions and pronouncements to view patterns of actual experience throughout the social structure. The early results of this research indicate a need for substantial revision of what have been considered definitive studies. Exciting debates are now taking shape about issues thought until recently to be well understood.

Nonetheless, the bulk of writing about British Columbia's history remains very traditional, despite the appearance of a few excellent books and a variety of stimulating journal articles. Only in undergraduate and graduate theses is a new approach becoming significant. Jean Barman's study began as a dissertation in the University of British Columbia's History of Education department, which during the past fifteen years has been a significant force in promoting fresh perspectives on the province's history. As social historians have discovered in other settings, schooling provides an excellent prism through which researchers can view a wide variety of historical processes. In this case, Barman examines the approximately sixty non-Catholic private boys' schools which enrolled up to 7,500 students between 1900 and 1950. Barman shows that these schools emerged at the turn of the century, flourished in the 1920s, and then never recovered from the downturn of the Depression. She argues that private schools must be understood in terms of cultural attachment and ambition. In this argument, an estimated 24,000 economically secure British immigrants, a colonial legacy of private elite education, and a late-Victorian British model of boys' schools all combined to produce a context within which elite schooling for young males became a significant