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# *The Supreme Court of Canada and Judicial Legitimacy: The Rise and Fall of Chief Justice Lyman Poore Duff*

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R. Blake Brown\*

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Legal institutions often seek to achieve legitimacy through connections to prominent members of the legal profession. Sir Lyman Poore Duff, a member of the Supreme Court of Canada from 1906 to 1944, was heralded as one of the greatest jurists in Canada's legal history during the 1930s and 1940s. His reputation helped engender confidence in and provide legitimacy to the Supreme Court of Canada.

During the Court's period of transition leading up to the end of appeals to the Judicial Committee of the Privy Council in 1949, Duff emerged as a justice thought capable of leading an independent Court. Although arguably only an adequate jurist, Duff's educational, ethnic, class, and religious background were of the kind required of an authoritative legal figure during this period. Through his work, Duff simultaneously symbolized Canada's independence and its imperial ties to English law. Allusions to British justice and English legal traditions instilled confidence that an independent Supreme Court would be capable of adjudicating cases concerning Canada's Constitution after the elimination of Privy Council appeals. Duff thus served to link the former Dominion of the British Empire and the new and independent Canada of the future.

Although his final day as Chief Justice was said to mark a "milestone in the legal history of Canada", Duff's stature in the Canadian legal community declined significantly after World War II. As the Court's focus on federalism issues gave way to an emphasis on "rights-protection," Duff's influence as a jurist faded into the shadows of legal history.

Les institutions légales cherchent souvent à obtenir leur légitimité en côtoyant d'importantes personnalités de la profession juridique. Sir Lyman Poore Duff, membre de la Cour suprême du Canada de 1906 à 1944, a été désigné comme l'un des plus grands juristes de l'histoire juridique du Canada des années trente et quarante. Sa réputation a aidé à engendrer la confiance dans la Cour suprême du Canada et lui donner sa légitimité.

Pendant la période de transition de la Cour menant à la fin des appels au Comité Judiciaire du Conseil Privé en 1949, Duff se révéla être un juge capable de diriger une cour indépendante. Bien que l'on puisse soutenir que Duff n'est qu'un juriste adéquat, son éducation et ses acquis ethnique, religieux et des différends de classes étaient de ceux exigés d'un personnage d'autorité juridique de l'époque. Par son travail, Duff a symbolisé à la fois l'indépendance du Canada mais aussi les liens impériaux avec le droit anglais. Des allusions à la justice britannique et aux traditions légales anglaises ont inspiré la confiance qu'une cour suprême indépendante serait capable de juger des causes concernant la Constitution du Canada, et ce, même après l'élimination des appels au Conseil Privé. Duff a ainsi servi de lien entre l'ancien domaine de l'Empire britannique et le Canada nouveau et indépendant.

Même si l'on dit de ses derniers jours en tant que juge en Chef qu'ils font figure de «jalons dans l'histoire légale du Canada», l'importance de Duff dans la communauté légale a considérablement décliné après la Deuxième Guerre Mondiale. Alors que la Cour accordait une importance particulière à la protection des droits, l'influence de Duff, juriste, s'évanouissait dans les ombres de l'histoire juridique.

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\* B.A. (Acadia), M.A. (York), LL.B. (Toronto), M.A. (Toronto), Ph.D Candidate (Dalhousie). This paper was revised during the author's tenure as a Visiting Researcher at Harvard Law School in 2000-2001. The author gratefully acknowledges the financial support of the Social Sciences and Humanities Research Council of Canada and the Izaak Walton Killam Trust. For their support and insightful comments, thanks are owed to John Saywell, Ian Bushnell, Shirley Tillotson, Jennifer Llewellyn, Viv Nelles, R.C.B. Risk, Philip Girard, and the students in York University's 1998-1999 graduate history course on Public Memory and Popular Culture. An earlier version of this paper was presented at the Department of History Graduate-Faculty Seminar Series at Dalhousie University.

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*Great figures make history no less by the myths we create about them than by their actual contributions to the content and spirit of our intellectual life.<sup>1</sup>*

## Introduction

Perhaps no profession makes a greater use of history and traditions than the legal community. Robes, wigs, ritualized courtroom procedures, and ancient Latin terms have established the majesty of the court to the common citizen, and validated law courts through a demonstration of antiquity.<sup>2</sup> Legal institutions also gain legitimacy through connections to symbolically important members of the legal profession. The Supreme Court of the United States, for example, claims “founding fathers” such as Justices John Marshall and Oliver Wendell Holmes. Marshall’s reign as Chief Justice from 1801 to 1835 established the U.S. Supreme Court’s reputation and role in judicial review. The U.S. Court’s early membership had been bedeviled “by uncertainties about their own status in the young American polity.”<sup>3</sup> Marshall, however, ended this uncertainty. He has been portrayed as an ardent defender of the American constitution who “invented American constitutional law”<sup>4</sup> and enunciated principles that preserved individual liberties protected by the Constitution by strengthening the judiciary’s power over the legislative branch of government.<sup>5</sup> The perception of Holmes as a “great” judge stemmed from culturally and intellectually fortuitous circumstances in which Progressive legal scholars in the first half of the twentieth century wished to further the type of anti-formalist views attributed to Holmes.<sup>6</sup> As G. Edward White tells us, “Progressives considered Holmes’s exposure of the deficiencies of abstract judicial reasoning and his tolerance for the programs of legislative majorities to be

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<sup>1</sup> D. Rosenberg, *The Hidden Holmes: His Theory of Torts in History* (Cambridge, Mass.: Harvard University Press, 1995) at 169.

<sup>2</sup> For a classic account of how the majestic appearance of courts helped validate eighteenth-century English criminal law, see D. Hay, “Property, Authority and the Criminal Law” in D. Hay *et al.*, eds., *Albion’s Fatal Tree: Crime and Society in Eighteenth Century England* (London: A. Lane, 1975) 17 at 26-31.

<sup>3</sup> R.G. McCloskey, *The American Supreme Court*, 2d ed. (Chicago: University of Chicago Press, 1994) at 35.

<sup>4</sup> C.F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence, Kan.: University Press of Kansas, 1996) at 212.

<sup>5</sup> See F.N. Stites, *John Marshall: Defender of the Constitution* (Toronto: Little, Brown & Co., 1981).

<sup>6</sup> See G.E. White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993) at 354-77; D.A. Hollinger, “The ‘Tough-Minded’ Justice, Jewish Intellectuals, and the Making of an American Icon” in R.W. Gordon, ed., *The Legacy of Oliver Wendell Holmes, Jr.* (Stanford: Stanford University Press, 1992) 216.

manifestations of judicial statesmanship of the highest order.”<sup>7</sup> Justices such as Marshall and Holmes represented American legal, social, and cultural ideals, and, in so doing, validated the U.S. Supreme Court and established the authority of its decisions.

Though its history is much shorter than that of its American counterpart, the Supreme Court of Canada has also had justices who helped establish its legitimacy.<sup>8</sup> Foremost among them is Sir Lyman Poore Duff, a member of the Supreme Court from 1906 to 1944, whom the Canadian legal community celebrated during the 1930s and early 1940s as the greatest jurist in Canada’s history. Duff’s role in lending credibility to the Court may at first appear anachronistic given that the Court was already fifty-five years old in 1930. As Canada’s imperial ties to Britain weakened, however, the end of appeals to the Judicial Committee of the Privy Council (“Privy Council”) became plausible, and the Court came closer to independence. The “modern” Supreme Court needed a “great” figure. Just as the U.S. Supreme Court required a symbolic figure following its break with England, so too did the Canadian Supreme Court as the end of Privy Council appeals neared.

This article will explore Duff’s role in legitimating the Supreme Court of Canada during the period of transition leading to the end of Privy Council appeals in 1949. My purpose is not to present a biography of Duff (which has been done before),<sup>9</sup> nor

<sup>7</sup> G.E. White, “The Rise and Fall of Justice Holmes” (1971) 39 U. Chi. L. Rev. 51 at 59 [hereinafter White, “Justice Holmes”]. White, however, indicates that the perception that Holmes supported Progressive goals relied on a particular interpretation of Holmes’ judicial thought. By the early 1930s, Holmes

stood on the threshold of deification. ... To observers of progressive persuasion his sense of the impermanency of ideas and intellectual axioms became “realism” or “sociological jurisprudence”; his willingness to defer to the wishes of those holding positions of political power became a belief in social experimentation; his tendency to believe that social upheavals were infrequent and that words alone rarely threatened the fabric of society became a faith in free speech; his general indifference to social problems and political issues became enlightened judicial self-restraint. He lacked only a historical vindication of his attitudes toward judicial decision making and political arrangements—which, after 1931, he received.

(*Ibid.* at 61.)

<sup>8</sup> By “legitimacy” I mean something akin to “credibility”. Thus, “judicial legitimacy” refers to the belief by the public and legal profession that the judiciary is capable, learned, and attentive to the task of judging. By legitimacy I do not intend to raise general philosophical questions concerned with the rule of law. Such questions may include whether a judge in a particular case made an illegitimate decision by stepping beyond the court’s jurisdiction and into, for instance, the political realm, or whether the very idea of judicial review is legitimate.

<sup>9</sup> A British Columbia lawyer, David Ricardo Williams, building upon the research of Richard Gosse, published two articles and a biography of Duff. R. Gosse, “The Four Courts of Sir Lyman Duff” (1975) 53 Can. Bar Rev. 482 [hereinafter Gosse, “Four Courts”]; R. Gosse, “Random Thoughts of a Would-be Judicial Biographer” (1969) 19 U.T.L.J. 597; D.R. Williams, *Duff: A Life in the Law*

to attack Duff's reputation, but to understand Duff's role in the Supreme Court's institutional history, and the reasons why his reputation grew in the 1930s and early 1940s. My project here is similar to that undertaken by G. Edward White, who, in his study of the changing image of Oliver Wendell Holmes, Jr., sought to "emphasize the complexity of the process by which the reputation of a judge is established."<sup>10</sup> This article argues that Duff's short-lived fame in the 1930s and 1940s resulted from the increasing likelihood of the abolition of appeals from the Supreme Court of Canada to the Privy Council. To overcome the traditionally poor reputation of the Court, the Canadian legal community required a justice who appeared capable of leading an independent Supreme Court. Duff, though arguably only an adequate jurist, served as a legitimating figure for the Court during the 1930s and early 1940s owing to his educational, ethnic, class, and religious background. Commentators also emphasized his

(Vancouver: University of British Columbia Press, 1984) [hereinafter Williams, *Duff*]; D.R. Williams, "Begbie & Duff JJ." (1985) 43 *Advocate* 749; D.R. Williams, "The Political Career of Sir Lyman Poore Duff" (1984) 6 *Supreme Court L.R.* 414. W.K. Campbell was a personal assistant and friend of Duff in his later years who published his memories of Duff. W.K. Campbell, "The Right Honourable Sir Lyman Poore Duff, P.C., G.C.M.G.: The Man as I Knew Him" (1974) 12 *Osgoode Hall L.J.* 243.

Other justices of the Canadian Supreme Court have also published short pieces based upon their recollections of Duff. See I. Rand, "Rt. Hon. Sir Lyman Poore Duff, G.C.M.G., 1865-1955" (1955) 33 *Can. Bar Rev.* 1113; T. Rinfret, "Sir Lyman Duff" (1955) 2 *U.B.C. Legal Notes* 337.

There have also been several attempts to unpack Duff's judicial philosophy. Articles by Lionel H. Schipper, Richard Gold, and a future justice of the Supreme Court, Gerald LeDain, dissect Duff's judicial reasoning. Their concern is not with Duff the man, but with the intellectual coherence of his judicial decisions. L.H. Schipper, "The Influence of Duff C.J.C. on the Trade and Commerce Power" (1956) 14 *U.T. Fac. L. Rev.* 1; R. Gold, "Sir Lyman Duff and the Fork in the Road" (1988) 46 *U.T. Fac. L. Rev.* 424; G. LeDain, "Sir Lyman Duff and the Constitution" (1974) 12 *Osgoode Hall L.J.* 261.

Collectively, these efforts adequately chronicle Duff's career and judicial approach but fail to interrogate why he became a symbol of the Canadian legal profession during the 1930s.

<sup>10</sup> White, "Justice Holmes", *supra* note 7 at 55. See also G.E. White, "The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations" (1995) 70 *N.Y.U. L. Rev.* 576. In his study of Benjamin Cardozo, Richard Posner undertook a similar task. R.A. Posner, *Cardozo: A Study in Reputation* (Chicago: University of Chicago Press, 1990) at 58-69. He characterizes this type of study as "the sociology of reputation", the task of which is to examine the "nature of reputation and how it is affected by merit, exploitation, accident, and politics." R.A. Posner, "Judicial Biography" (1995) 70 *N.Y.U. L. Rev.* 502 at 520, n. 53.

Analyses of judicial reputations are somewhat uncommon; studies of the reputations of artistic figures are more numerous. See e.g. R.E. Kapsis, "Reputation Building and the Film Art World: The Case of Alfred Hitchcock" (1989) 30 *Soc. Q.* 15; G.E. Land & K. Lang, "Recognition and Renown: The Survival of Artistic Reputation" (1988) 94 *Am. J. Soc.* 79; J. Rodden, *The Politics of Literary Reputation: The Making of and Claiming of 'St. George' Orwell* (New York: Oxford University Press, 1989); G. Taylor, *Reinventing Shakespeare: A Cultural History, From the Restoration to the Present* (New York: Weidenfeld & Nicolson, 1989); J. Tompkins, "Masterpiece Theater: The Politics of Hawthorne's Literary Reputation" (1984) 36 *Am. Q.* 617.

connections to the traditions of British justice, but, in addition, took pains to portray Duff as a loyal Canadian, whose long judicial tenure, work on royal commissions, and perceived expertise in constitutional law ensured that Canada and its constitution would be in good hands if Privy Council appeals ended.<sup>11</sup> This article supports these conclusions through a four-part discussion that establishes the need for a legitimating judicial figure in Canada during the 1930s; provides a short biography of Duff; suggests which personal, professional, and jurisprudential factors permitted Duff to provide credibility to the Supreme Court; and, finally, explores why Duff's stature in the Canadian legal community declined after World War II.

## I. The Supreme Court's Need for a Legitimizing Figure

In explaining why Duff became an important judicial figure for the Canadian Supreme Court during the 1930s, it is first necessary to have a basic understanding of the history of the Court, its changing role in Canadian society, and the emerging trends in constitutional and legal analysis that by the 1930s strengthened the movement to end appeals to the Privy Council.

The *British North America Act, 1867* ("BNA Act") gave the Dominion government responsibility for creating a "General Court of Appeal for Canada",<sup>12</sup> and an 1875 act of Parliament established such a court.<sup>13</sup> The original Court consisted of six justices. Lacking its own accommodations, the Court operated from rooms in the Parliament buildings for its first five years. In 1882 the Supreme Court moved into a re-

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<sup>11</sup> Canadian legal historians have explored the topic of judicial legitimacy in Canada in other contexts. Philip Girard investigated the Supreme Court of Nova Scotia's quest for legitimacy in the period between 1850 and 1920. He argues that the establishment of responsible government in 1848 demystified the colony's judiciary and laid bare the political patronage behind many appointments by vesting the responsibility for choosing judges from the imperial government to the colonial. The restoration of the court's image employed three strategies: "[A] greater insistence on the professional attainments of aspirant judges and a slow suppression of the more obvious manifestations of patronage; the creation of an 'official' history for the court and its judges; and an emphasis on imperial linkages in the form of knighthoods, lifestyle, and imagery." P. Girard, "The Supreme Court of Nova Scotia, Responsible Government, and the Quest for Legitimacy, 1850-1920" (1994) 17 Dal. L.J. 430 at 435-36. These tools of legitimation, particularly the first and third, also appear in the descriptions of Duff during the 1930s, though Canada in 1935 was a different place than Nova Scotia at the beginning of the twentieth century, and these social, political, and cultural differences were reflected in the particular efforts to strengthen the reputation of the Supreme Court of Canada.

<sup>12</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 101.

<sup>13</sup> *Supreme and Exchequer Court Act*, S.C. 1875, c. 11. See I. Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 14 [hereinafter Bushnell, *Captive Court*].

furnished building formerly used as a stable and workshop,<sup>14</sup> remaining in this location until moving into the present Supreme Court building in 1946. The Supreme Court, however, was not a highly respected institution during the late nineteenth and early twentieth centuries. The legal community held the Court in low esteem for at least four reasons. First, the Court was unable to select which cases it would hear. For example, if a civil dispute involved a sum of money above a predetermined amount, the justices, unlike today, were required to hear the dispute, regardless of whether the case raised new or contentious legal issues. Second, the “Supreme” Court was generally not the last court of appeal for Canadians.<sup>15</sup> Litigants dissatisfied with its decision could appeal to the Privy Council in London, a body composed of English judges and a select number of jurists from across the British Empire. Third, Canadian lawyers did not respect the Supreme Court because many litigants could appeal cases directly from provincial appellate courts to the Privy Council, thus by-passing the Supreme Court and removing one expensive level of litigation.<sup>16</sup> Last, the Court was often criticized for the poor quality of its membership. This critique stemmed from the perception that English legal training was superior to Canadian, and from the reluctance that many of Canada’s leading lawyers expressed to nominations for appointment to the Court because of its comparatively poor salary and the sense that the Court was weak and ineffectual.<sup>17</sup>

Articles in Canada’s legal journals indicate the lack of respect given to Canada’s highest court in the 1920s. Writers often focused on the Court’s inability to attract the

<sup>14</sup> According to J.G. Snell and F. Vaughan, the “building’s origins were a source of denigration of the Court over the next fifty years and more.” J.G. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press for the Osgoode Society, 1985) at 49.

<sup>15</sup> In 1888 Parliament abolished appeals to the Privy Council in criminal cases by *An Act Further to Amend the Law Respecting Procedure in Criminal Cases*, S.C. 1888, c. 43, s. 1. However, the Privy Council struck down this legislation in 1926, reasoning that the Canadian Parliament did not have the authority to interfere with the Privy Council’s jurisdiction to hear appeals from Canada. *Nadan v. The King*, [1926] A.C. 482, [1926] 2 D.L.R. 177, [1926] 1 W.W.R. 801 (P.C.). Following the *Statute of Westminster, 1931* (U.K.), 22 Geo. V, c. 4, reprinted in R.S.C. 1985, App. II, No. 27, the Canadian government re-enacted the limitation on appeals to the Privy Council in criminal cases; this legislation was then upheld by the Privy Council in *British Coal Corporation v. The King*, [1935] A.C. 500, [1935] 3 D.L.R. 401, [1935] 2 W.W.R. 564. For discussions of these developments, see D. Gibson, “Development of Federal Legal and Judicial Institutions in Canada” (1996) 23 Man. L.J. 450 at 480-83 [hereinafter Gibson, “Development of Institutions”]; J.D. Krikorian, “British Imperial Politics and Judicial Independence: The Judicial Committee’s Decision in the Canadian Case *Nadan v. The King*” (2000) 33 Can. J. Pol. Sci. 291.

<sup>16</sup> Of the 667 appeals that went to the Privy Council from Canada, 253 had been heard by the Supreme Court and 414 came directly from the provincial courts of appeal. P. McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Co., 2000) at 9.

<sup>17</sup> Snell & Vaughan, *supra* note 14 at 23-24.

best legal minds. In 1920, for example, the *Canada Law Journal* argued that if "Canada were ready to induce the best talent of the various Bars to accept judicial positions" then

there might be much strength in the contention that we should have our final Court of Appeal in Canada, and the right of appeal to the Judicial Committee confined to constitutional cases. It is significant, however, that the Supreme Court of Canada (with very few notable exceptions in respect to some of the Judges), has for years been so unsatisfactory that, in the result, an appeal is chiefly taken to that tribunal when, by reason of the amount involved, it cannot be taken to the Judicial Committee.<sup>18</sup>

Critics of the Court also believed that Canadian legal training was not comparable to English legal education, resulting in poor quality Canadian jurists.<sup>19</sup> Appeals to the Privy Council should remain, the *Canada Law Journal* wrote in 1921, because Canada "cannot expect to turn out men who are the equals of those whose university training rounded out by the traditions of the English Bench and Bar incline [them] to master and solve their problems."<sup>20</sup> The political patronage underlying many judicial appointments was also cause for criticism.<sup>21</sup> Thus, judges "have not, in many cases, been chosen for eminent legal ability, but because they had a political claim on the party that has for the time the appointing power reposed on it."<sup>22</sup> A.C. Galt, a justice of the Manitoba Court of King's Bench, concluded that the Court's poor quality was reflected by the Privy Council's having overturned twenty Supreme Court decisions in the ten years prior to 1921.<sup>23</sup>

Most Canadian lawyers were unconcerned about the perceived weakness of the Court during the late nineteenth and early twentieth centuries. The imperial ties to Britain placated concerns—why was a strong Supreme Court necessary when Canadians could appeal to the Privy Council, one of the greatest judicial bodies in the empire? The Privy Council, the Lieutenant-Governor of Saskatchewan suggested in 1923, was "the outstanding court in the world as to the territory and population over

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<sup>18</sup> "The Judicial Committee of the Privy Council" (1920) 56 Can. L.J. 216 at 216.

<sup>19</sup> A.C. Cairns, "The Judicial Committee and Its Critics" (1971) 4 Can. J. Pol. Sci. 301 at 344, n. 169.

<sup>20</sup> "Privy Council Appeals" (1921) 57 Can. L.J. 164 at 165.

<sup>21</sup> Of the forty justices appointed before 1949, twenty-two had been politicians. On the role of patronage in the selection of Supreme Court justices, see P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 113-16; J. Simpson, *Spoils of Power: The Politics of Patronage* (Toronto: Collins, 1988) at 305. On the Canadian tradition of patronage in judicial appointments, see generally W.H. Angus, "Judicial Selection in Canada—The Historical Perspective" (1967) 4 Can. Legal Stud. 220; G.T. Stewart, "Political Patronage under Macdonald and Laurier, 1878-1911" (1980) 10 Am. Rev. Can. Stud. 3 at 8-9.

<sup>22</sup> "Appeals to the Privy Council" (1920) 40 Can. L.T. 259 at 260.

<sup>23</sup> A.C. Galt, "Appeals to the Privy Council" (1921) 41 Can. L.T. 168 at 170.

which it has jurisdiction, the systems of law which it expounds and the selection it has of judges.<sup>24</sup> Unlike the U.S. Supreme Court, which quickly established itself out of necessity following the American War of Independence, the Canadian Supreme Court remained limited by its colonial tether. Rather than attempt to create an independent Canadian jurisprudence, Canadian lawyers and judges demonstrated considerable faith in the value of British legal practices, institutions, and judicial reasoning. This adherence to imperial legal traditions—that is, to ‘British justice’—was important. As Greg Marquis suggests, any historical “study of Canadian attitudes towards the law and the uses of the legal system must begin with the English cultural heritage, particularly the powerful view of British institutions as the bulwark of liberty.”<sup>25</sup>

The praise heaped upon Lord Richard Haldane during the 1920s is indicative of the extent to which English Canadians accepted the idea of British justice and the role of the Privy Council. During this period, Canada’s lawyers considered Haldane to be the British Empire’s greatest expert on Canadian constitutional law. After his appointment to the Privy Council, Haldane wrote several famous decisions, including *Board of Commerce*,<sup>26</sup> *Fort Frances*,<sup>27</sup> and *Snider*.<sup>28</sup> These decisions became touchstones for critics of the Privy Council during the 1930s,<sup>29</sup> but in the preceding decade most Canadian legal professionals held Haldane in high esteem. For example, soon after Haldane’s death in 1928, W.P.M. Kennedy of the University of Toronto recalled Haldane’s “high conception of duty” and “old-world courtesy”.<sup>30</sup> “There is little necessity for readers of this Review to write anything of the great legal qualifications of the late Lord Haldane,” Kennedy surmised, because Haldane’s “position” as lawyer and jurist is secure with the ages—among the outstanding of the profession.<sup>31</sup>

Canadian legal professionals were also relatively unconcerned about the quality of the Supreme Court prior to the late 1920s because most Canadian lawyers approved of the Privy Council’s approach to Canadian constitutional cases. The politicians who drafted the *BNA Act* divided legislative responsibility between the Dominion and provincial governments. As the ultimate court of appeal for Canadian cases, the Privy Council determined whether the Dominion or provincial governments pos-

<sup>24</sup> H.W. Newlands, “Appeals to the Privy Council” (1923) 1 Can. Bar Rev. 814 at 814.

<sup>25</sup> G. Marquis, “Doing Justice to ‘British Justice’: Law, Ideology and Canadian Historiography” in W.W. Pue & B. Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 43 at 45.

<sup>26</sup> *Re Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, 60 D.L.R. 513, [1922] 1 W.W.R. 20 (P.C.).

<sup>27</sup> *Fort Frances Pulp and Paper v. Manitoba Free Press*, [1923] A.C. 695, [1923] 3 D.L.R. 629 (P.C.).

<sup>28</sup> *Toronto Electric Commissioner v. Snider*, [1925] A.C. 396, [1925] 2 D.L.R. 5 (P.C.).

<sup>29</sup> See below, text accompanying notes 99–101.

<sup>30</sup> W.P.M. Kennedy, “Lord Haldane—A Personal Note” (1928) 6 Can. Bar Rev. 567 at 569.

<sup>31</sup> *Ibid.* at 567.

sessed the legal right to legislate on a particular issue under the *BNA Act*. Politicians driven by nationalistic concerns occasionally attempted to establish the Supreme Court as Canada's last court of appeal,<sup>32</sup> but for the most part the legal community was unsupportive of these attempts and accepted the Privy Council's role as the ultimate interpreter of the division of powers.<sup>33</sup>

It is generally agreed that formalist methods of legal reasoning affected the interpretation of the *BNA Act* during the late nineteenth and early twentieth centuries. Well into the nineteenth century, Canadian lawyers and judges were more concerned with the effects of decisions than with the creation of a scientific, logical set of legal doctrines.<sup>34</sup> Legal formalist principles replaced this tendency during the late nineteenth and early twentieth centuries. Legal formalism was marked by a strong belief that law was composed of scientific legal rules that could be discovered by a careful study and application of legal principles; that legal rules could best be discerned and applied by a close examination of existing decided cases; that legal documents such as legislation and contracts spoke for themselves, such that a judge could determine their meaning by simply looking for the "plain meaning" of the words; that sharp distinctions could be drawn between, for example, "law" and "policy"; and that judges could impartially hear the case before them, having no concern for the policy implications of their rulings. Decisions were to be made by the application of scientific legal doctrines, not by attempts to adjudicate cases in consideration of the policy of legal outcomes. As Thomas C. Grey has concluded, legal formalism was characterized by the "aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order. A few basic top-level categories and principles formed a conceptually ordered system above a large number of bottom-level rules," and the "rules themselves were, ideally, the holdings of established precedents, which

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<sup>32</sup> Snell & Vaughan, *supra* note 14 at 178ff.

<sup>33</sup> Articles published in the *Canada Law Journal* and the *Canada Law Times* during the 1920s indicate the legal profession's positive view of Privy Council appeals. See e.g. "The Judicial Committee of the Privy Council" (1920) 56 Can. L.J. 89; "Appeals to the Judicial Committee of the Privy Council" (1920) 56 Can. L.J. 171; "The Judicial Committee of the Privy Council" (1920) 56 Can. L.J. 216; "Privy Council Appeals" (1921) 57 Can. L.J. 164; "Appeals to the Privy Council" (1922) 58 Can. L.J. 82; "Appeals to the Privy Council" (1922) 58 Can. L.J. 133; "Appeals to the Privy Council" (1920) 40 Can. L.T. 259; "Ontario and the Privy Council" (1920) 40 Can. L.T. 449; "Privy Council Appeals" (1921) 41 Can. L.T. 83; "Privy Council Appeals" (1921) 41 Can. L.T. 161.

<sup>34</sup> See generally G.B. Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 L. & Hist. Rev. 219. See also P. Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (Toronto: University of Toronto Press, 1984); B.J. Hibbitts, "Progress and Principle: The Legal Thought of Sir John Beverley Robinson" (1989) 34 McGill L.J. 454; B. Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Montreal: Osgoode Society and McGill-Queen's University Press, 1994).

upon analysis could be seen to be derivable from the principles.”<sup>35</sup> In this way of understanding the law, judges avoided discussing policy and legislative intent, and instead suggested that their decisions stemmed from value-free analytical deduction from generalized premises.<sup>36</sup>

Several Canadian legal historians have described the effects of this way of thinking about the law on the determination of federalism cases. R.C.B. Risk, for example, suggests that the legislative spheres of the Dominion and the provinces were judicially interpreted as completely separate to ensure that judges did not overtly consider the policy implications of their decisions.<sup>37</sup> Moreover, since the *BNA Act* was said to speak for itself, Canadian judges became reluctant to consider the intentions of those who wrote the constitution. Bernard Hibbitts has summarized the effect of this jurisprudential trend in terms of the *BNA Act*:

On the level of federalism, jurisdictional boundaries between the two principal levels of government were to be strictly enforced so as to preserve the necessary degree of constitutional “balance.” In this context it became clear that judges were not to concern themselves with actual legislative intent above and beyond the statutory language used to express it. They were not to have regard to the general aims of the legislator or to the social consequences of particular interpretations. They were, in sum, to separate considerations of law and policy and keep them separate.<sup>38</sup>

The practical result of this form of legal analysis was that, beginning in the late nineteenth century, the Privy Council increasingly prevented the Dominion from enacting legislation that infringed on provincial legislative jurisdictions.<sup>39</sup>

For a time, this constraint on the Dominion government seemed not to have objectionable policy implications. In particular, provincial jurisdiction in social welfare

<sup>35</sup> T.C. Grey, “Langdell’s Orthodoxy” (1983) 45 U. Pitt. L. Rev. 1 at 11.

<sup>36</sup> On formalism, see generally M.J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977); P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979); T.C. Grey, “Modern American Legal Thought” (1996) 106 Yale L.J. 493.

<sup>37</sup> R.C.B. Risk, “Canadian Courts Under the Influence” (1990) 40 U.T.L.J. 687 at 689 [hereinafter Risk, “Canadian Courts”]. On the effects of formalism in Canada in this period, see also R.C.B. Risk, “Constitutional Scholarship in the Late-Nineteenth Century: Making Federalism Work” (1996) 46 U.T.L.J. 427; R.C.B. Risk, “A.H.F. Lefroy: Common Law Thought in Late Nineteenth-Century Canada: On Burying One’s Grandfather” (1991) 41 U.T.L.J. 307; R.C.B. Risk, “Constitutional Thought in the Late Nineteenth Century” (1991) 20 Man. L.J. 196; R.C.B. Risk, “John Skirving Ewart: The Legal Thought” (1987) 37 U.T.L.J. 335; K. Roach, “The Administrative Law Scholarship of D.M. Gordon” (1989) 34 McGill L.J. 1.

<sup>38</sup> B.J. Hibbitts, “A Bridle for Leviathan: The Supreme Court and the Board of Commerce” (1989) 21 Ottawa L.R. 65 at 104-05.

<sup>39</sup> Risk, “Canadian Courts”, *supra* note 37.

matters was not threatened so long as relative economic stability and pre-Keynsian economic policies meant that the Dominion government did not frequently attempt to initiate its own social programs.

Politicians driven by nationalistic concerns occasionally attempted to establish the Supreme Court as Canada's last court of appeal,<sup>40</sup> but for the most part the legal community was unsupportive of these attempts. Despite some concerns about the increasing limitations on the Dominion's ability to legislate, most legal commentators accepted the Privy Council's interpretation of the division of powers.<sup>41</sup>

The problems with a formalist interpretation of the constitution, however, became fully apparent after the onset of the Great Depression. Many Canadians believed that the Dominion government was better suited than the provinces to combat the Depression—that economic and social problems should be addressed on a national scale through the creation of new government initiatives and spending programs.<sup>42</sup> The formalist constitutional decisions of the Privy Council, however, granted the Dominion little power to inject the Canadian economy with a government stimulant because most broad-based initiatives would infringe on the jurisdiction of the provincial legislatures. Criticism of this trend gradually grew through the 1930s and was fully realized when the Privy Council found almost all of Prime Minister R.B. Bennett's "New Deal" legislation unconstitutional in 1937.<sup>43</sup> While the Privy Council upheld a federal act that sought to assist the ravaged prairie agricultural industry, it struck down legislation that created new labour regulations, established a system of unemployment insurance, devised an industry competition policy, and created a method of marketing natural products.<sup>44</sup> As will be shown, these decisions became the focal point for many

<sup>40</sup> Snell & Vaughan, *supra* note 14 at 144, 182-85.

<sup>41</sup> See generally the articles cited *supra* note 33.

<sup>42</sup> R. Simeon & I. Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990) at 75; J.L. Granatstein, *The Ottawa Men: The Civil Service Mandarins, 1935-1957* (Toronto: Oxford University Press, 1982) at 273; R. Bothwell, I. Drummond & J. English, *Canada, 1900-1945* (Toronto: University of Toronto Press, 1987) at 262.

<sup>43</sup> *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326, [1937] 1 D.L.R. 673, [1937] 1 W.W.R. 299 (P.C.) [hereinafter *Marketing Reference* cited to A.C.]; *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 355, [1937] 1 D.L.R. 684, [1937] 1 W.W.R. 312 (P.C.); *British Columbia (A.G.) v. Canada (A.G.)*, [1937] A.C. 368, [1937] 1 D.L.R. 688, [1937] 1 W.W.R. 317 (P.C.); *British Columbia (A.G.) v. Canada (A.G.)*, [1937] A.C. 377, [1937] 1 D.L.R. 691 (P.C.); *British Columbia (A.G.) v. Canada (A.G.)*, [1937] A.C. 391, [1937] 1 D.L.R. 695, [1937] 1 W.W.R. 320 (P.C.); *Ontario (A.G.) v. Canada (A.G.)*, [1937] A.C. 405, [1937] 1 D.L.R. 702, [1937] 1 W.W.R. 333 (P.C.). For further analysis of the holdings in these cases, see W.H. McConnell, "The Judicial Review of Prime Minister Bennett's 'New Deal'" (1968) 6 Osgoode Hall L.J. 39 [hereinafter McConnell, "Bennett's 'New Deal'"].

<sup>44</sup> *The Farmers' Creditors Arrangement Act, 1934*, S.C. 1934, c. 53; *The Natural Product Marketing Act, 1934*, S.C. 1934, c. 57; *The Limitation of Hours of Work Act*, S.C. 1935, c. 63; *The Weekly Rest in Industrial Undertakings Act*, S.C. 1935, c. 14; *The Minimum Wages Act*, S.C. 1935, c. 44; *The Em-*

commentators in the 1930s,<sup>45</sup> including critics of formalist legal analysis and the Privy Council.

The social and economic crisis of the 1930s began to affect how Canadian lawyers thought about the Supreme Court, the Privy Council, and conservative (*i.e.* formalist) modes of legal analysis. The inability of the Dominion to legislate effectively led a greater number of Canadian politicians, intellectuals, and lawyers to call for the end of Privy Council appeals.<sup>46</sup> In a 1937 radio address, from which the *Winnipeg Free Press* and *Bench and Bar* subsequently published excerpts, University of Manitoba president (and former Dalhousie law professor) Sidney Smith declared, “It does appear that we cannot expect from the Privy Council an interpretation of the constitution that will enable the Dominion to take over some of the social services and the regulation of industrial activities which the provincial legislatures, with insufficient revenue, are unable to undertake.” The Privy Council’s New Deal decisions, Smith concluded, were “characterized by a narrow legalism.”<sup>47</sup> Some Canadian lawyers began to suggest that if the Supreme Court became Canada’s last court of appeal, then the judicial interpretation of the *BNA Act* would be more attuned to the needs of Canada in the Depression. Traditionally, many Canadian legal professionals believed that if the Privy Council’s judges knew little about Canada, then the Privy Council would not make decisions with regard to the nation’s political affairs.<sup>48</sup> Imbued with formalist ideas, legal commentators in the early twentieth century, according to Alan Cairns, believed that “the great virtue of the Privy Council was its impartiality, a product of its distance from the scene of the controversies it adjudicated, and, unlike the Supreme Court, its absence of any direct link with either level of the governments whose interests clashed in the court room.”<sup>49</sup>

By the 1930s, however, Canadian legal academics were criticizing the Privy Council’s perceived ignorance of Canadian conditions. These critics formed part of a Canadian legal realist movement, a group of Canadian legal academics who, like their

*ployment and Social Insurance Act*, S.C. 1935, c. 38; *The Dominion Trade and Industry Commission Act*, 1935, S.C. 1935, c. 59.

<sup>45</sup> Cairns, *supra* note 19 at 325-26; P. Romney, *Getting it Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999) at 169-80.

<sup>46</sup> D. Owsram, *The Government Generation: Canadian Intellectuals and the State, 1900-1945* (Toronto: University of Toronto Press, 1986) at 221-53; P.H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen’s Printer, 1969) at 33 [hereinafter Russell, *Supreme Court*].

<sup>47</sup> S.E. Smith, “Privy Council Decisions” (1937) 7:5 *Bench & Bar* 4 at 5.

<sup>48</sup> See e.g. “Appeal to the Privy Council” (1921) 57 *Can. L.J.* 98; “Privy Council Appeals” (1921) 57 *Can. L.J.* 164.

<sup>49</sup> Cairns, *supra* note 19 at 318.

American counterparts, recognized that judicial decisions were inherently political.<sup>50</sup> Dalhousie's Vincent MacDonald and McGill's Frank Scott were among the most prominent Canadian legal scholars to criticize the Privy Council. In his 1935 discussion of the Privy Council's decision in *British Coal Corporation v. The King*, MacDonald asserted that constitutional interpretation "allows, and even requires" that

regard be had to the general *policy* of the instrument and the occasional disregard of the intention of the draftsmen or the sense in which they used the words they wrote. This is peculiarly so today when the frame of circumstances to which the Act applies has undergone, and is undergoing, radical and rapid alteration.<sup>51</sup>

In the same year, MacDonald asked legislative reformers to consider how far the remoteness of the Privy Council "has made for impartiality, and how far it has made for a warping of the constitution due to ignorance of Canadian conditions."<sup>52</sup> MacDonald claimed in 1937 that so far "as our constitution is to be affected by judicial decisions motivated by policy and conceived expediency it is arguable (if indeed, not demonstrable) that its development will best be directed by a Canadian court familiar with Canadian conditions, needs and modes of thought."<sup>53</sup> Scott's criticisms of the Privy Council also implicitly argued that the judiciary should consider local policy needs. "To imagine that we shall ever get consistent and reasonable judgments from such a casually selected and untrained court [*i.e.* the Privy Council] is merely silly" Scott suggested in 1937, and thus, "[t]o continue using it under the circumstances is costly sentimentality. The Privy Council is and always will be a thoroughly unsatisfactory court of appeal for Canada in constitutional matters; its members are too remote, too

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<sup>50</sup> R.C.B. Risk, "The Many Minds of W.P.M. Kennedy" (1998) 48 U.T.L.J. 353 at 369-70. For further discussion of this movement, see R.B. Brown, "The Canadian Legal Realists and Administrative Law Scholarship, 1930-1941" (2000) 19 Dal. J. Leg. Stud. 36; R.B. Brown, "Realism, Federalism, and Statutory Interpretation during the 1930s: The Significance of *Home Oil Distributors v. A.G. (B.C.)*" (2001) 59 U.T. Fac. L. Rev. 1 [hereinafter Brown, "Realism"]; R.B. Brown, "Cecil A. Wright and the Foundations of Canadian Tort Law Scholarship" (2001) 64 Sask. L. Rev. 169; R.C.B. Risk, "Here Be Cold and Tygers: A Map of Statutory Interpretation in Canada in the 1920s and 1930s" (2000) 63 Sask. L. Rev. 194; R.C.B. Risk, "The Scholars and the Constitution: P.O.G.G. and the Privy Council" (1996) 23 Man. L.J. 496; R.C.B. Risk, "Volume 1 of the Journal: A Tribute and a Belated Review" (1987) 37 U.T.L.J. 193; R.C.B. Risk, "John Willis—A Tribute" (1984) 9 Dal. L.J. 521; J.E. Bickenbach & C.I. Kyer, "The Harvardization of Caesar Wright" (1983) 33 U.T.L.J. 162; D. Réaume, "The Judicial Philosophy of Bora Laskin" (1985) 35 U.T.L.J. 438.

<sup>51</sup> V.C. MacDonald, "British Coal Corporation and Others v. The King: Three Comments" (1935) 13 Can. Bar Rev. 615 at 633 [emphasis in original].

<sup>52</sup> V.C. MacDonald, "Judicial Interpretation of the Canadian Constitution" (1935-36) 1 U.T.L.J. 260 at 284-85.

<sup>53</sup> V.C. MacDonald, "The Canadian Constitution Seventy Years After" (1937) 15 Can. Bar Rev. 401 at 427.

little trained in our law, too casually selected, and have too short a tenure.”<sup>54</sup> By establishing that the Privy Council had little knowledge of Canadian conditions, Scott thus countered the traditional view that English legal education created judges better suited to hearing federalism cases from Canada.

The poor reputation of the Supreme Court, however, undoubtedly still gave pause to legal critics urging the elimination of Privy Council appeals. This problem had been noted earlier. In 1927, Charles Cahan, a Montreal Member of Parliament, advocated an independent Supreme Court, but admitted, “We must give to our own Supreme court a higher standing, and create greater confidence in its decisions on the part of the people of this country before we can abrogate the right of appeal to the Privy Council.”<sup>55</sup> For advocates of ending Privy Council appeals, it was imperative to improve the Supreme Court’s image. As will be shown, Lyman Poore Duff served as a major symbol in this transformation of the Court’s reputation. Supreme Court historian Ian Bushnell hints at Duff’s role: “There was a need for a judicial hero at this time and one was being created.”<sup>56</sup> The remainder of this article unpacks how Duff served as a symbolic figure in the legitimization of the Supreme Court in its ascendancy to a final court of appeal.

## II. Lyman Poore Duff (1865-1955)

Duff was born in Ontario in 1865, the son of a Congregationalist minister of Scottish and English ancestry.<sup>57</sup> He was active in debating societies at the University of Toronto while pursuing Bachelor of Arts and Bachelor of Laws degrees. Upon graduation Duff articulated in Fergus, Ontario, and in 1894 Duff moved to Victoria, British Columbia, where he became involved in the Liberal party and married. In the small legal community of Victoria, Duff quickly gained prominence as a highly competent, though uncharismatic, lawyer. An important addition to Duff’s curriculum vitae came in 1903 when he was appointed a junior counsel for Canada in the Alaska boundary dispute proceedings.

Appointed to the British Columbia Supreme Court in 1903, Duff had only three years of judicial experience prior to his promotion to the Supreme Court of Canada in 1906 at the youthful age of forty-one. Duff took an active role in the social life of Ottawa, though he did not match this social rigour with judicial stardom, composing relatively few judgments during his first eight years on the Court.<sup>58</sup> Through the 1920s

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<sup>54</sup> F.R. Scott, “The Consequences of the Privy Council Decisions” (1937) 15 Can. Bar Rev. 485 at 494 [footnotes omitted].

<sup>55</sup> *House of Commons Debates* (9 March 1927) at 1055.

<sup>56</sup> Bushnell, *Captive Court*, *supra* note 13 at 256.

<sup>57</sup> For the biographical information that follows, see generally Williams, *Duff*, *supra* note 9 at 47-48.

<sup>58</sup> *Ibid.* at 67.

and 1930s, however, Duff wrote more judgments, particularly in the area of constitutional law. In 1918, Duff received an appointment to the Privy Council. It had been a tradition for the British government to award the Chief Justice of Canada with a seat on the Privy Council, but Duff was an exception to this practice as he was the first puisne justice of the Supreme Court to be so appointed. This did not mean that Duff gave up his work on the Supreme Court; rather, Duff sat at the Privy Council when not involved in the work of the Supreme Court, typically for approximately two months per year.<sup>59</sup>

Duff also served on several commissions during his years at the Court. In 1916, the Dominion government appointed Duff and the Chief Justice of Ontario, Sir William Meredith, to the royal commission responsible for investigating a World War I munitions procurement scheme. Duff subsequently became involved in the First World War conscription crisis. Appointed the Central Appeal Judge under *The Military Service Act, 1917*,<sup>60</sup> Duff determined the success of appeals for exclusion from the draft. In 1926, he became chair of the commission responsible for dividing the assets between the newly formed United Church of Canada and the Presbyterian congregations that had voted against amalgamation. Duff then played a prominent role in the Royal Commission to Inquire into Railways and Transportation in Canada (1931-2).<sup>61</sup> This commission investigated the problems of transportation in Canada, inquiring as to whether the Canadian Pacific Railway and Canadian National Railway should combine. In his final role as a commissioner, Duff investigated the failed Canadian military expedition to Hong Kong, ultimately absolving the King government of any wrongdoing.

Duff received a number of personal accolades and awards following World War I. The University of Toronto conferred on Duff the first of his nine honorary doctorates in 1922, and he became the first Canadian-born citizen to open Parliament when the Governor General was unavailable in 1931. While the position of Chief Justice of the Supreme Court traditionally went to the most senior justice, in 1924 Mackenzie King passed over Duff, partly out of concern with Duff's drinking habits. The Dominion government finally named Duff Chief Justice of Canada in 1933, despite continued concerns with his fragile physical health, which was aggravated by his drinking.<sup>62</sup> A knighthood followed, bestowed in 1934. In 1940, the King government extended Duff's term three years past the mandatory retirement age of seventy-five, and King issued a further one-year extension in 1943. Duff finally retired from the Supreme

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<sup>59</sup> *Ibid.* at 98-100.

<sup>60</sup> S.C. 1917, c. 19.

<sup>61</sup> See *Royal Commission to Inquire into Railways and Transportation in Canada (1931-2)* (Ottawa: King's Printer, 1932) (Chairman: Lyman P. Duff).

<sup>62</sup> Snell & Vaughan, *supra* note 14 at 146.

Court in 1944, after an unprecedented thirty-eight years on the Court, eleven as Chief Justice.

### III. Requirements Necessary to Legitimate the Court

The remainder of this article explores how portrayals of Duff that highlighted these personal characteristics and professional experiences were used to legitimate the modern Supreme Court. Writers portrayed Duff in less than heroic terms during the 1920s, but in the following decade descriptions of Duff changed in tone and content. A typical description of Duff during the 1920s can be found in a 1924 *Toronto Daily Star* article that focused on Duff's Liberal Party connections more than his judicial role. The *Star* noted that "Judge Duff might still be practicing law if he had not been an ardent Liberal."<sup>63</sup> If Duff was to help validate the modern Court, however, this image had to be altered—political partisans do not make for wise, impartial judges. In the 1930s, discussions of Duff's political involvements decreased markedly. To demonstrate Duff's competency, writers emphasized instead particular aspects of his personal and professional life. Duff's personal characteristics, including his class, race, gender, and religion, provided the necessary pedigree for a symbol of the modern, respectable Supreme Court. In addition, legal writers used Duff's professional capacities—including his work in commissions, at the Privy Council, and on the Supreme Court—as evidence of his, and the Court's, competency. In stressing these characteristics, Duff's image would transcend the old Court, and his reputation provided a foundation for the establishment of an independent Canadian appellate judiciary.

#### A. Personal Characteristics

For the legal community to believe that any single justice could ensure the Supreme Court's competency, it was necessary for such a justice to possess the right social background. Educational attainments were thus an important qualification. Well into the twentieth century, the Law Society of Upper Canada did not require lawyers to possess a university degree; rather, the Law Society determined membership to the bar using a 'guild-like' education at Osgoode Hall in which students partook in moots to develop advocacy skills, drafted legal documents, and watched experienced lawyers ply their trade in Toronto courtrooms.<sup>64</sup> As a result of this system, only half of the

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<sup>63</sup> "The Spotlight: Justice Duff" *Toronto Daily Star* (23 June 1924). See also *Saturday Night* (27 May 1916) 4, which reported that one of Canada's major political parties was "looking to Mr. Justice Duff as its rising hope, and talks of pulling him off the bench and making him Premier of Canada when the time comes."

<sup>64</sup> G.B. Baker, "Legal Education in Upper Canada, 1785-1889: The Law Society as Educator" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: University of Toronto Press, 1983) 49; C.I. Kyer & J.E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, the Benchers,*

lawyers in Ontario during the 1920s invested the extra time and expense necessary to attain a university degree.<sup>65</sup>

Duff's university degrees thus strengthened his claim to respectability. Duff completed Bachelor of Arts and Bachelor of Laws degrees at the University of Toronto between 1881 and 1889, an impressive level of education for a lawyer in this period. Even without the family connections to ensure he would move into a well-established Upper Canadian law firm, Duff was able, by means of his education, to pass through the permeable boundary between the middle and upper classes. As Paul Axelrod concludes, late-nineteenth-century university-educated Canadians "were well positioned for occupational and community roles that promised social prestige and relative security."<sup>66</sup> In this regard, the role of educational attainments in Canada was similar to England where, according to Eric Hobsbawm, education became "the most convenient and universal criterion for determining social stratification."<sup>67</sup> Duff's education not only gave him class respectability, but allowed commentators to emphasize his mental abilities, substantiating claims that the Supreme Court could safeguard the administration of justice if the government ended Privy Council appeals. Celebrating Chief Justice Duff's well-rounded scholarly achievement, one biographical article wrote:

One of the by-products of his thorough education is a knowledge of the higher mathematics, to which he devoted much study at University and with which he has kept closely in touch by reading almost all the eminent masters on the subject, thus strengthening and developing his genius for logic which displays itself in all his judgments. It is not too much to say that Mr. Justice Duff stands among the very first minds in Canada in the subject of mathematics. Political economy is also a hobby with him.<sup>68</sup>

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and *Legal Education in Ontario, 1923-1957* (Toronto: University of Toronto Press, 1987) at 3-36; J.P.S. McLaren, "The History of Legal Education in Common Law Canada" in R. Matas & D.J. McCawley, eds., *Legal Education in Canada* (Montreal: Federation of Law Societies of Canada, 1987) 111; R.D. Gidney & W.P.J. Millar, *Professional Gentlemen: The Professions in Nineteenth-Century Ontario* (Toronto: University of Toronto Press, 1994) at 70-84, 368-75.

<sup>65</sup> C. Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997* (Toronto: University of Toronto Press, 1997) at 196.

<sup>66</sup> P. Axelrod, *The Promise of Schooling: Education in Canada, 1800-1914* (Toronto: University of Toronto Press, 1997) at 88.

<sup>67</sup> E. Hobsbawm, "Mass-Producing Traditions: Europe, 1870-1914" in E. Hobsbawm & T. Ranger, eds., *The Invention of Tradition* (New York: Cambridge University Press, 1983) 263 at 293.

<sup>68</sup> "Supreme Court of Canada Judges: Rt. Hon. Lyman Poore Duff P.C., K.C." (1932) 1 *Fortnightly L.J.* 285 at 285-86 [hereinafter "Supreme Court of Canada Judges"].

Commentators also claimed that Duff was one of the few people to understand Einstein's theory of relativity.<sup>69</sup>

Duff's esteemed place on the Court was also tied to his ethnicity, race, gender, and religion. As a white, Protestant man of English and Scottish decent, Duff possessed the key requirements for entry to the upper reaches of the legal profession. Women of course faced substantial obstacles in the legal profession well into the twentieth century,<sup>70</sup> and it was not until Bertha Wilson's appointment in 1982 that a woman sat on the Supreme Court.<sup>71</sup> There has never been a Native Supreme Court justice, or a justice of African descent. Bora Laskin became the first Jewish person on the Court, when Pierre Trudeau appointed him in 1970.<sup>72</sup> Laskin's ascension represented a triumph over decades of anti-Semitism.<sup>73</sup> Roman Catholics had been appointed to the Supreme Court since its inception, but explicit geographic distribution rules governed the division of seats on the Court between French and English Canada, as did implicit religious distribution guidelines.<sup>74</sup> There were, therefore, few Catholics appointed from provinces other than Quebec. If Duff had been Catholic, his appointment from British Columbia would have been very unlikely. The *Fortnightly Law Journal* made specific mention of Duff's religious background, noting that Duff's religion placed him in a line of great legal minds: "Like the brilliant Osler family in Canada, and Sir John Simon in England, Mr. Justice Duff is the product of the parsonage."<sup>75</sup> Having the correct gender, religion, and ethnicity, Duff could appear representative of British legal traditions.

### B. Professional Characteristics

While Duff's personal characteristics were important factors in allowing him to lend credibility to the modern Supreme Court, his high-profile official positions also

<sup>69</sup> "Retired Chief Justice of Canada Passes Age 90" *Ottawa Citizen* (26 April 1955) 4; Campbell, *supra* note 9 at 250.

<sup>70</sup> Moore, *supra* note 65 at 202-03.

<sup>71</sup> On Wilson's appointment, see E. Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001) at 124-29.

<sup>72</sup> Snell & Vaughan, *supra* note 14 at 218.

<sup>73</sup> Moore, *supra* note 65 at 199-200.

<sup>74</sup> Gibson, "Development of Institutions", *supra* note 15 at 491; G. Adams & P.J. Cavalluzzo, "The Supreme Court of Canada: A Biographical Study" (1969) 7 *Osgoode Hall L.J.* 61; Russell, *Supreme Court*, *supra* note 46.

<sup>75</sup> "Supreme Court of Canada Judges", *supra* note 68 at 285. For other references relating to Duff's religious background, see e.g. "The Right Honourable Lyman Poore Duff, P.C." (1933) 3:4 *Bench & Bar* 1 [hereinafter "The Right Honourable"]; "Chief Justice Reaches Seventy" (1935) 5:2 *Bench & Bar* 1; "Sir Lyman P. Duff, P.C., C.J.C., Presides for the Last Time" (1943) 13 *Fortnightly L.J.* 145 [hereinafter "Presides for the Last Time"]. Note that Duff was raised a Congregationalist, but in the 1920s he joined the Church of England.

gave confidence to those concerned about the Court's quality. Duff's long judicial service, tenure as Chief Justice, experience on commissions, and perceived knowledge of the Canadian Constitution supported the perception that the Court was in good hands.

### 1. Duff and British Justice

In discussions of Duff's work, commentators stressed two seemingly contradictory themes: Duff was an imperial tie to English law, and, at the same time, a symbol of Canadian independence. Allusions to British justice and English legal traditions helped validate the Court by guaranteeing that an independent Supreme Court would not abuse the law after the elimination of Privy Council appeals. Just as Carl Berger has found that Canadian imperialists "regarded history as the repository of enduring and valuable principles" and that Canadian development had to "proceed in harmony with these principles,"<sup>76</sup> Canadian lawyers supported the Supreme Court's development, so long as it remained under the influence of English legal traditions. At the same time, discussions of Duff's work experience also emphasized his admirable service to Canada, raising more than a hint of Canadian nationalism in the process. That the Supreme Court had to represent both imperial ties and Canadian nationalism was evident in the comments of the federal Minister of Justice at the laying of the foundation for a new Supreme Court building in 1939. "Our Judiciary and our Bar are greatly and justly honored, and will remain the protagonists of British ideals, of British traditions and of British Justice," the Minister began, and the "massive architecture of this new temple of supreme judicial authority, symbolizing the strength of the bonds existing between Canadians and their institutions, will add to the beauty of our national Capital."<sup>77</sup>

Canadian legal professionals firmly established Duff's tie to British justice by pointing to his work on the Privy Council. Having sat with some of the Privy Coun-

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<sup>76</sup> C. Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism, 1867-1914* (Toronto: University of Toronto Press, 1970) at 109.

<sup>77</sup> "Reply of the Right Honourable Minister of Justice to the Speech of Her Majesty at the Laying of Foundation Stone of the New Supreme Court of Canada," May 1939, National Archives of Canada, MG 30, E46, vol. 3, File: Labour-Lovett. The attempt to improve the image of the Supreme Court during the 1930s required a new building for the Court. The building used since 1882 was in poor condition, and its size and appearance did not reflect the power and responsibility the Court would possess after the end of Privy Council appeals. In "Supreme Court Building Living Disgrace to Canada" (1936) 6:4 *Bench & Bar* 1 at 1, 4, the "shocking condition of the building used by the Supreme Court of Canada" was noted. According to the journal, "prompt and effective action is absolutely necessary if the self-respect of law-abiding Canadians is to be maintained." On the symbolism of courthouses in Canada, see M. MacRae with A. Adamson, *Cornerstones of Order: Courthouses and Town Halls of Ontario, 1784-1914* (Toronto: Clarke Irwin, 1983).

cil's finest judges, Duff's reputation was intertwined with English legal traditions. Duff thus offered continuity between the older Dominion of the Empire and the new, independent Canada of the future. In 1929, the *Canadian Bar Review* took notice of a comment about Duff in the English legal periodical, *The Solicitors' Journal*, and proudly repeated it: "Mr. Justice Duff's distinction as a great judge has been recognised very markedly by the frequency with which he has come over to this country to assist in the disposal of appeals from Canada."<sup>78</sup> The *Fortnightly Law Journal* emphasized Duff's connection to the empire in pointing out that Duff had attended the sittings of "that august tribunal on numerous occasions" and had "written opinions for that body which are classics in English legal literature."<sup>79</sup> Duff's touted competency led the *Bench and Bar* to declare in 1933 that Duff "fulfills the highest traditions of British justice."<sup>80</sup> At the bestowment of an honorary degree on Duff in 1935 by Dalhousie University, Vincent MacDonald, Dean of Dalhousie Law School and vocal critic of the Privy Council, noted that all the recipients receiving honorary degrees had "maintained zealously the honour of their profession and the proud traditions of British Justice."<sup>81</sup> In regard to Duff, MacDonald stated that as "a member of the Judicial Committee of the Privy Council he has made great and enduring contributions to the development of the law within the Empire; and he has earned the respect of his colleagues in that great tribunal."<sup>82</sup> At Duff's retirement ceremony in 1944, Aimé Geoffrion noted that Duff raised the Canadian representatives on the Privy Council to "a position of equality with any other member."<sup>83</sup> Somewhat ironically, then, Duff's place on the Privy Council increased Canadians' confidence in their own judiciary prior to ending appeals.<sup>84</sup>

## 2. Duff and Canadian Nationalism

Canadian lawyers grounded Duff's allegiance to Canada in his work on various commissions and the Supreme Court. While Duff's work on commissions during the

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<sup>78</sup> "A Great Canadian Judge" (1929) 7 Can. Bar Rev. 395 at 395.

<sup>79</sup> "Supreme Court of Canada Judges", *supra* note 68 at 285.

<sup>80</sup> "The Right Honourable", *supra* note 75 at 3.

<sup>81</sup> "Dalhousie University Bestows Honors" (1936) 6:9 Bench & Bar 5 at 5.

<sup>82</sup> *Ibid.* at 7.

<sup>83</sup> "Farewell Ceremony for Sir Lyman Poore Duff, P.C., G.C.M.G." (1944) 22 Can. Bar Rev. 1 at 3 [hereinafter "Farewell Ceremony"].

<sup>84</sup> The emphasis on Duff as a symbol of British justice, however, did not come at the complete expense of French Canadian legal traditions. In his 1936 speech, Vincent MacDonald complimented Duff's ability in both common law and civil law: "In his thirty years as member of our highest national court he has revealed himself as a master of the two ways of legal thinking represented by the common law of England and the civil law of Quebec; and his judgments have been equally acceptable to the adherents of both systems of jurisprudence." "Dalhousie University Bestows Honors", *supra* note 81 at 7.

1930s was occasionally the subject of criticism,<sup>85</sup> commentators generally lauded him in patriotic terms. In 1933, Mr. Justice Rinfret claimed that Duff's judicial and commission work represented "the invaluable services rendered to his country."<sup>86</sup> Years later, the *Fortnightly Law Journal* said that Duff "had his share ... of extra-judicial work on important Commissions and Boards that have made great contribution to the progress of Canada."<sup>87</sup> Authors consistently mentioned Duff's minor involvement in the Alaskan boundary dispute, conjuring up the memories of Lord Alverstone siding with American negotiators.<sup>88</sup> English Canadian legal literature patriotically described Duff's work in the World War I conscription crisis. The *Fortnightly Law Journal* claimed that the

public services rendered by Mr. Justice Duff—always without honorarium or reward of any kind in his own country—have been numerous and outstanding. The work he performed while occupying the position of Central Appeal Judge, during the trying years of 1916 to 1918, was so extensive, exacting and onerous that it can never be fully appreciated, except possibly by those who were immediately associated with him. He alone had the power to decide the fateful question of exemption or non-exemption from military service in those hectic days.<sup>89</sup>

Commentators also pointed to Duff's extended term as Chief Justice during the dark days of World War II as proof of his allegiance to Canada, suggesting that Duff had, finally, retired "to well earned rest from the labours that he has so unstintingly given in the service of Canada and his chosen profession."<sup>90</sup> Thus, even though Duff was said to possess the learning of the great British judges, Canadian lawyers often discussed his work in nationalistic terms.

<sup>85</sup> See e.g. J.L. McDougall, "The Report of the Duff Commission" (1935) 1 *Can. J. Econ. & Pol. Sci.* 77.

<sup>86</sup> "The Chief Justice of Canada" (1933) 11 *Can. Bar Rev.* 274 at 274.

<sup>87</sup> "Canada's Greatest Lawyer and Jurist" (1943-44) 13 *Fortnightly L.J.* 145.

<sup>88</sup> The commission responsible for settling the boundary between Alaska and Canada was composed of three representatives from the United States, two from Canada, and one, Lord Alverstone, from Britain. Canadians charged that Lord Alverstone sided with the American negotiators so that Britain could improve its relations with the United States. "Supreme Court of Canada Judges", *supra* note 68 at 285; "The New Chief Justice of Canada: Rt. Hon. Lyman Poore Duff, P.C." (1932-33) 2 *Fortnightly L.J.* 295; "The Chief Justice of Canada", *supra* note 86 at 274; "Chief Justice Reaches Seventy", *supra* note 75; "The Right Honourable", *supra* note 75 at 3; "Farewell Ceremony", *supra* note 83 at 3-4.

<sup>89</sup> "Supreme Court of Canada Judges", *ibid.*

<sup>90</sup> "Presides for the Last Time", *supra* note 75 at 145. See also "Sir Lyman Duff's Extended Term and Other Hopeful Signs" (1938-39) 8 *Fortnightly L.J.* 274; "Chief Justice Duff Stays for Another Year" (1942-43) 12 *Fortnightly L.J.* 178; "The Rt. Hon. Sir Lyman Poore Duff, P.C." (1943-44) 13 *Fortnightly L.J.* 151.

### 3. Duff's Perceived Constitutional Expertise

Duff's involvement and perceived talent in constitutional cases also enabled him to lend credibility to the Supreme Court. Duff wrote judgments in many of the Supreme Court's constitutional decisions in the 1920s and 1930s. In doing so, he employed a formalist method of analysis,<sup>91</sup> such that it was not uncommon for Duff to write "mechanical-looking" judgments.<sup>92</sup> This formalist approach meant that his judgments rarely expressed his personal views on legal issues or discussed policy concerns.<sup>93</sup> For Duff, the application of rules drawn from legal precedents determined substantive outcomes—the common law was key.<sup>94</sup> Duff also employed a conservative form of statutory interpretation. In a 1935 Supreme Court judgment, he detailed how judges should interpret statutes:

The judicial function in considering and applying statutes is one of interpretation and interpretation alone. The duty of the court in every case is loyally to endeavour to ascertain the intention of the legislature; and to ascertain that intention by reading and interpreting the language which the legislature itself has selected for the purpose of expressing it.<sup>95</sup>

As Bushnell explains, "With his emphasis on language, Duff could ignore other clues, no matter how strong, from the legal or social context that could give meaning to words that were not absolutely clear."<sup>96</sup> Although legal critics increasingly challenged this method of analysis as the 1930s progressed, during the 1920s and 1930s Duff's formalism and narrow interpretation of the *BNA Act* dominated the Court. The government continued to appoint justices with jurisprudential views similar to Duff's throughout this period, and thus Duff's "leadership" of the Court during the 1920s and 1930s can partly be explained as a result of his membership on a Supreme Court whose justices were supportive of his formalistic approach to the law.

Duff's method of legal analysis, however, caused a difficult dilemma for advocates of an independent Supreme Court. Canadian legal realists attacked the Privy Council's formalism in their bid for an independent Court. While critics like Vincent MacDonald and Frank Scott attacked the Privy Council for failing to take judicial notice of policy considerations, authors in Canada's law journals praised Duff, despite

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<sup>91</sup> B.J. Hibbits, "A Change of Mind: The Supreme Court and the Board of Railway Commissioners, 1903-1929" (1991) 41 U.T.L.J. 60 at 94.

<sup>92</sup> I. Bushnell, *The Federal Court of Canada: A History, 1875-1992* (Toronto: University of Toronto Press, 1997) at 106.

<sup>93</sup> Williams, *Duff*, *supra* note 9 at 277-78.

<sup>94</sup> "It seems no very extravagant claim to say that no single force, not even Parliament itself, has exercised a deeper influence on the temper of the British people than the common law." L.P. Duff, "The Common Law Judge and Lawyer" (1933) 11 Can. Bar Rev. 521 at 527.

<sup>95</sup> *R. v. Dubois*, [1935] S.C.R. 378 at 381, [1935] 3 D.L.R. 209.

<sup>96</sup> *Supra* note 92 at 116.

his general unwillingness to support increased Dominion government powers. Canadian legal scholars in the 1930s and early 1940s rarely commented that Duff employed a judicial approach very similar to that typically used by the Privy Council. As will be shown, Canadian legal academics after World War II criticized Duff precisely on this basis.<sup>97</sup> The question then arises as to how and why Duff escaped criticism before 1945. At least two explanations seem plausible. First, in the most famous constitutional cases of the 1930s, the New Deal references, Duff uncharacteristically found the Dominion's legislation *intra vires* in three of the six references. Critics of the Supreme Court's New Deal decisions were thus more likely to focus on Justice Cannon, who found all of the Dominion's legislation invalid, or Justice Rinfret, who held in all but one reference that the central government overstepped its constitutional jurisdiction.<sup>98</sup>

Second, legal scholars during the 1930s gave most of their attention to the Privy Council's decisions. Given the ultimate authority of the Privy Council, the failure fully to dissect Duff's reasoning in Supreme Court decisions should not be that surprising. In particular, critics of formalism focused their attacks on Lord Haldane, who wrote several important division of powers decisions in the 1920s. While many Canadian lawyers celebrated Haldane in the 1920s, by the 1930s they accused him of corrupting the original meaning of the *BNA Act*.<sup>99</sup> René Richard, for example, argued in 1940 that Lord Haldane's decisions prevented the "statutes of the Dominion from being or becoming superior to those of the provinces,"<sup>100</sup> while H.S. Patterson wrote in the *Alberta Law Quarterly* that "Lord Haldane was [a] great statesman, a great administrator and a very considerable philosopher; but it was in his hands that the constitution was twisted until the aims of the Fathers [of Confederation] were in jeopardy and efficient government rendered almost impossible."<sup>101</sup> The attacks on Haldane thus

<sup>97</sup> See below, text accompanying notes 133-36.

<sup>98</sup> *Reference Re Criminal Code (Canada) Section 498A*, [1936] S.C.R. 363, [1936] 3 D.L.R. 593, aff'd [1937] A.C. 368, [1937] 1 D.L.R. 688 (P.C.); *Reference Re Dominion Trade and Industry Commission Act*, [1936] S.C.R. 379, [1936] 3 D.L.R. 607; *Reference Re Farmers' Creditors Arrangement Act*, [1936] S.C.R. 384, [1936] 3 D.L.R. 610, aff'd [1937] A.C. 391, [1937] 1 D.L.R. 695 (P.C.); *Reference Re Natural Products Marketing Act*, [1936] S.C.R. 398, [1936] 3 D.L.R. 622, aff'd [1937], A.C. 377, [1937] 1 D.L.R. 691 (P.C.); *Reference Re Employment and Social Insurance Act*, [1936] S.C.R. 427, [1936] 3 D.L.R. 644, aff'd [1937] A.C. 355, [1937] 1 D.L.R. 684 (P.C.); *Reference Re Weekly Rest in Industrial Undertakings Act*, [1936] S.C.R. 461, [1936] 3 D.L.R. 673.

<sup>99</sup> Cairns, *supra* note 19 at 301, 313.

<sup>100</sup> E.R. Richard, "Peace, Order and Good Government" (1940) 18 Can. Bar Rev. 243 at 259.

<sup>101</sup> H.S. Patterson, "The British North America Act" (1934-36) 1 Alberta L.Q. 227 at 230. See also W.P.M. Kennedy, "The British North America Act: Past and Future" (1937) 15 Can. Bar Rev. 393 at 396-97. It is also possible that Duff softened his legal formalist approach toward the end of the 1930s. See Brown, "Realism", *supra* note 50 at 21, n. 112; Gold, *supra* note 9.

drew attention away from Duff's equally formalistic interpretation of the Canadian Constitution at the Supreme Court.

Duff's perceived expertise in constitutional law therefore still made him a candidate to ground the competency of the modern Court. In its 1937 decision in the *Natural Products Marketing Act* reference,<sup>102</sup> the Privy Council explained that it had no reason to write more on the question because, in his earlier Supreme Court judgment, Duff had addressed the issue "with such force and clarity" that the "few pages of the Chief Justice's judgment will, it is to be hoped, form the locus classicus of the law on this point and preclude further disputes."<sup>103</sup> This was high praise, and Canadian legal journals quickly noted the Privy Council's view. The *Fortnightly Law Journal*, for instance, commented:

The first point that must strike anyone reading the judgments is the high opinion held by the Privy Council of Chief Justice Duff's ability as a constitutional authority. On one point—the question of national emergency justifying a resort to the Dominion residuary power—they term his judgment a *locus classicus* that forever settles the law.<sup>104</sup>

"The tribute thus paid him," the journal continued, "more than confirms the general opinion that the Chief Justice ranks among the greatest of Canadian constitutional authorities of all time and must materially add to the prestige of his Court."<sup>105</sup> By the time of his retirement in 1944, Duff's reputation in constitutional matters was at its height. According to one commentator, "Nowhere in the great fund of legal erud[i]tion that he has at all times demonstrated has his voice spoken with greater authority and more profundity of understanding than in the solution of the constitutional problems that have come before his Court."<sup>106</sup>

These comments typified the Canadian legal profession's willingness to applaud Duff's judicial work during the 1930s and early 1940s. "Mr. Justice Duff has a keen analytical mind, as evidenced by his judgments, which are most lucid and eminently logical," the *Fortnightly Law Journal* asserted, and when

he has felt it necessary to dissent from the other members of the Supreme Court—and it has happened occasionally—it has frequently turned out that his judgments have been upheld by the Judicial Committee. If the Bar of Canada were polled from ocean to ocean, there would undoubtedly be an outstanding verdict in his favour as the possessor of Canada's keenest legal mind.<sup>107</sup>

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<sup>102</sup> *Marketing Reference*, *supra* note 43.

<sup>103</sup> *Ibid.* at 353.

<sup>104</sup> "A Great Chief Justice" (1936-37) 6 *Fortnightly L.J.* 225 at 225.

<sup>105</sup> *Ibid.*

<sup>106</sup> "Presides for the Last Time", *supra* note 75 at 145.

<sup>107</sup> "Supreme Court of Canada Judges", *supra* note 68 at 285.

If the government ended appeals to the Privy Council, it was believed that Duff's strength in constitutional cases would ensure that the Supreme Court would be up to the task as the final arbiter of appeals. As the *Bench and Bar* noted, Canada was "indeed fortunate in having as its Chief Justice so tried a jurist, so eminent a scholar and a gentleman,"<sup>108</sup> while prominent lawyer Philippe Brais told Duff in 1944 that a "very full measure of credit is due to you for the standing of Canadian justice to-day. Deep and sincere thanks are owed to you for the confidence and stability which it has assured and will assure to Canada."<sup>109</sup> On the day of Duff's retirement, the *Fortnightly Law Journal* enunciated the role of Duff's reputation in changing dominant perceptions of the Supreme Court and helping to end Privy Council appeals: "To say that he has made the Court what it is to-day is a gross understatement."<sup>110</sup> "It is no exaggeration," the journal continued, "to say he raised the Supreme Court of Canada from the level of mediocrity to a Court of such quality that had all its members had half his judicial attainment, opposition to abolition of appeals to the Privy Council would have been impossible."<sup>111</sup>

Descriptions of Duff's legal abilities bore little resemblance to the characterizations of the weak jurists said to sit on the Supreme Court during the 1920s and before. For example, one law journal wrote that "a former Lord High Chancellor of England once said that he would put Mr. Justice Duff's legal acumen on a par with that of either Mr. Justice Holmes or Mr. Justice Brandeis of the United States Supreme Court—which is high praise indeed."<sup>112</sup> The popular press took note of the praise heaped on Duff, and suggested that he possessed the greatest attributes of the English legal system. The *Ottawa Journal* claimed that the

nearest approach to the English tradition is Lyman Poore Duff, the Supreme Court's new Chief Justice. Student and scholar, master of many things other than the law, he is the most versatile and arresting figure the Canadian bench has known since Confederation.

To-day, by common consent, he is one of the Empire's great Judges. His record on the Supreme Court has been a procession of triumphs. There has not been a great legal decision within a quarter of a century with which his name has not been associated.<sup>113</sup>

A 1936 *Maclean's Magazine* article drew public attention to the Supreme Court, and in so doing reiterated praise for the talents of Duff, including his educational attain-

<sup>108</sup> "The Right Honourable", *supra* note 75 at 3.

<sup>109</sup> "Farewell Ceremony", *supra* note 83 at 2.

<sup>110</sup> "Presides for the Last Time", *supra* note 75 at 145.

<sup>111</sup> *Ibid.*

<sup>112</sup> "Supreme Court of Canada Judges", *supra* note 68 at 285.

<sup>113</sup> *Ottawa Journal* (21 May 1933), quoted in "The Chief Justice of Canada", *supra* note 86 at 276.

ments, religious background, and reputation as “the most brilliant judge who has ever sat on the Bench in Canada.”<sup>114</sup>

#### 4. If Not Duff?

It is worthwhile inquiring why Duff, and not another member, became the legitimating symbol of the Supreme Court. The Court’s composition during the 1930s helps explain the attention Duff received. The Supreme Court had seven seats during this period.

MEMBERSHIP OF THE SUPREME COURT OF CANADA, 1932-1939

1932 (appointed)	1933	1934	1935	1936	1937	1938	1939 (retired)
Duff (1906)	Duff	Duff	Duff	Duff	Duff	Duff	Duff (1944)
Anglin (1909)	*Hughes	Hughes	*Kerwin	Kerwin	Kerwin	Kerwin	Kerwin (1963)
Rinfret (1924)	Rinfret (1954)						
Lamont (1927)	Lamont	Lamont	Lamont	Lamont	*Hudson	Hudson	Hudson (1947)
Smith (1927)	Smith	Smith	*Davis	Davis	Davis	Davis	Davis (1944)
Cannon (1930)	Cannon	Cannon	Cannon	Cannon	Cannon	Cannon	Cannon (1939)
Crocket (1932)	Crocket (1943)						

Robert Smith, Frank Hughes, and John Lamont had short, undistinguished careers on the Supreme Court. Justice Anglin was highly respected, serving as Chief Justice from 1924 to 1933, but his death in 1933 meant that he could not be the judicial figure Canadians needed during the 1930s. The government appointed Justices Patrick Kerwin, Albert Hudson, and Henry Hague Davis in the mid-1930s, but their inexperience on the Supreme Court prevented high praise. Though sitting somewhat earlier, Justices Oswald Crocket and Arthur Cannon also suffered from their relative newness to the Court. Perhaps more determinative, however, was that each had less than ideal characteristics. Cannon was a Roman Catholic from Quebec, had limited judicial experience prior to his appointment, and, while a successful lawyer, had not held any high-profile extra-judicial positions, such as Duff’s in the Alaskan boundary question. Moreover, Cannon’s health suffered while on the court, and he took extended leaves

<sup>114</sup> M. Macbeth & L.T. White, “The Seven Justices of the Red Robes: A Quick Sketch of Canada’s Supreme Court” *Maclean’s Magazine* (1 April 1936) 26 at 46. In time, commentators began to speak of Duff not only as a symbol of the Supreme Court’s quality, but also as an architect of the modern Canadian nation. The *Ottawa Journal* claimed that Duff “made the administration of justice a constructive exercise in statesmanship.” “Sir Lyman Duff” *Ottawa Journal* (26 April 1955).

of absence in 1936, 1937, and 1939.<sup>115</sup> Crocket's tenure on the Court lasted from 1932 to 1943, but his record was also undistinguished.<sup>116</sup>

The only member of the Supreme Court other than Duff who was a viable candidate for the symbolic role was Thibaudeau Rinfret.<sup>117</sup> A member of the Supreme Court since 1924, Rinfret possessed Bachelor of Arts and Bachelor of Laws degrees. He was a highly competent practitioner, had taught law at McGill University, and, as a frequent visitor to the Canadian Club, possessed the combination of legal training, social graces, and judicial competency necessary to be called Canada's greatest judge. Like Cannon, however, Rinfret was limited by his ethnicity and religion. A French Roman Catholic from Quebec, Rinfret could not symbolize English legal traditions for the Supreme Court during its transition.

Did anyone question the underlying motivation for the praise heaped upon Duff? In an insightful April 1933 article, the *Fortnightly Law Journal* explicitly argued that proponents of ending Privy Council appeals were overstating the quality of the Supreme Court's membership. "We have heard a lot recently about proposals to abolish appeals to the Privy Council ...". Such proposals

are not put forward with any legal advantage in view but merely for political purposes by those whose highest aim in life is to cut Canada out from the Empire. *But the proponents of this so-called reform use subtle arguments to cloak their ultimate purposes, and not the least subtle or least cogent of those arguments is the present strength of the Supreme Court of Canada.*<sup>118</sup>

Even though the *Fortnightly Law Journal* questioned the motivation behind the praise of Duff, it also lauded his talents. The journal argued that the strength of the Supreme Court reflected the strength of its membership, but unless the court "has as leader a man of high legal attainment it is not likely that the full strength of its individual members will be achieved."<sup>119</sup> Duff was deemed to fulfill these lofty requirements: "We have grown used to expecting great things from the Supreme Court of Canada, and with Chief Justice Duff to lead the Court we know we shall not be disappointed."<sup>120</sup>

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<sup>115</sup> Snell & Vaughan, *supra* note 14 at 132-33, 150.

<sup>116</sup> *Ibid.* at 147-48.

<sup>117</sup> On Rinfret's background, see *ibid.* at 125.

<sup>118</sup> "Fortnightly Notes: The New Chief Justice of Canada" (1932-33) 2 *Fortnightly L.J.* 285 at 285 [emphasis added].

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

## Conclusion

In the late 1930s, Charles Cahan, the Tory Member of Parliament from Montreal who in 1928 had publicly lamented that the poor quality of the Supreme Court prevented the abrogation of appeals, attacked the Privy Council's interpretation of the *BNA Act* and demanded the end of appeals. Like many Canadian legal scholars, Cahan believed that the Privy Council had deliberately attempted to alter the true meaning of the Canadian Constitution. He concluded that members of the Privy Council were "personally ignorant" of Canada yet arrogated "to themselves a prescience and clairvoyance which entitles them to substitute their political judgments, and even their personal preferences, for the deliberate legislative enactments of the elected representatives of the people who sit in the parliament of Canada."<sup>121</sup> Cahan introduced a bill in 1939 to abolish appeals, and, after the bill received considerable support in Parliament, the Minister of Justice, Ernest Lapointe, referred it to the Supreme Court, thus affording the Court an opportunity to adjudicate its own pre-eminence. The Court found that it was within the Dominion government's authority to end appeals to the Privy Council unilaterally without the approval of the provinces.<sup>122</sup> The government postponed the implementation of the legislation until after the Second World War, and after an unsuccessful appeal to the Privy Council of the Supreme Court's decision.<sup>123</sup> Finally, in 1949 the Liberal government enacted legislation establishing that new litigation could not be appealed to the Privy Council.<sup>124</sup> Duff retired from the Court in 1944, and his last day as Chief Justice was heralded as a "milestone in the legal history of Canada."<sup>125</sup> The legal community marked his retirement with speeches describing his greatness. In 1947 the Supreme Court unveiled a bust of Duff in the foyer of the new Supreme Court building, and more eloquent words marked his death in 1955.<sup>126</sup>

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<sup>121</sup> *House of Commons Debates* (8 April 1938) at 2151.

<sup>122</sup> *Reference Re An Act to Amend the Supreme Court Act*, [1940] S.C.R. 49, [1940] 1 D.L.R. 289, aff'd [1947] A.C. 127, [1947] 1 D.L.R. 801 (P.C.) [hereinafter *Supreme Court Act Reference* cited to S.C.R.].

<sup>123</sup> *Canada (A.G.) v. Ontario (A.G.)*, [1947] A.C. 127, [1947] 1 D.L.R. 801 (P.C.).

<sup>124</sup> The act held that the Supreme Court "shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada" and that its decisions "shall, in all cases, be final and conclusive." *An Act to amend the Supreme Court Act*, S.C. 1949, c. 37, s. 3.

<sup>125</sup> "Presides for the Last Time", *supra* note 75 at 145.

<sup>126</sup> Rand, *supra* note 9; Rinfret, *supra* note 9. It is difficult to determine Duff's views about Privy Council appeals and whether he appreciated his own place in the development of an independent Supreme Court. Duff rarely commented on the value of the Privy Council and the role of the Supreme Court, but two occasions deserve attention. In May 1925, Duff delivered a speech to the annual dinner of the Ontario Bar Association in which he explained the origins of the Privy Council and its great value to the British empire. He lauded several of the men who had served on the council, suggesting that the Privy Council's responsibilities had "been exercised, as a rule, by men who, on account of

The praise of Duff reflected Canadian social, economic, and legal conditions during the 1930s. Duff received scant publicity during his first two decades on the Court, but in their attempts to combat the Supreme Court's perceived inadequacies, Canadian legal professionals argued that the Court possessed a great judge, who by his membership made possible the elimination of Privy Council appeals. Duff had the necessary characteristics to validate the modern Supreme Court: he was the longest-serving member of the Court; he possessed the right educational attainments; he had a long tenure as Chief Justice; he was a white Protestant male; he had loyally served Canada on government commissions; and he had strong ties to English courts. Duff therefore became a symbol during the Court's transition period in the 1930s.<sup>127</sup>

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their character, on account of their learning, on account of their professional eminence, on account of their political experience, have been qualified for that duty in a unique degree." The Privy Council had the weighty responsibility of interpreting the Canadian Constitution, and, Duff concluded, it would "be many a long year before we shall bring ourselves to abandon entirely the privilege of invoking the aid of the Judicial Committee in the determination of justiciable disputes—especially in the region of constitutional law." Duff did not close the door on the possibility of ending appeals, however, for "the time may arrive when the people of this country will conclude that this responsibility, the burden of which has been so long and so generously borne by others, should, in great degree at all events, be assumed by ourselves." L.P. Duff, "The Privy Council" (1925) 3 Can. Bar Rev. 273 at 275-76, 279.

Duff again commented on Privy Council appeals when the Supreme Court evaluated the legislation referred to it by Ernest LaPointe. Six justices considered whether the Dominion government had the constitutional authority to abolish appeals. Each justice wrote a judgment, with four finding the legislation *intra vires* the Dominion government, and two determining that such an act would be *ultra vires*. Duff wrote one of the four majority judgments, and, characteristically, focused on the narrow constitutional issues raised by the case, rather than the wisdom of ending appeals. He concluded that Privy Council appeals were not within the subject matter assigned to the provinces by the *BNA Act* and that the *Statute of Westminster, 1931*, *supra* note 15, had removed the obstacles that had "prevented the Parliament of Canada giving full effect to legislation for objects within its power affecting the appeal to His Majesty in Council." *Supreme Court Act Reference*, *supra* note 122 at 69-70.

<sup>127</sup> While it is beyond the scope of this paper, the developments of the 1930s tempt one to consider how modern legal practitioners portray the members of the Supreme Court. For example, did the Canadian legal profession require another legitimating figure during the patriation of the Constitution and entrenchment of the *Canadian Charter of Rights and Freedoms* (part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*])? If so, and even without the benefit of much historical hindsight the answer appears to be yes, how did members of the bench and bar reconcile the institutionalization of a rights-protecting document more attuned to American, as opposed to English, legal traditions? What role did Bora Laskin and Brian Dickson play in this transformation? W.H. McConnell has recently hinted at Brian Dickson's role in legitimating the Court during the 1980s. Dickson's "appointment as chief justice in 1984 coincided with the inception of the adjudication of Charter claims, an exciting time in Canadian law," and the "legal and general public seemed to regard him as both the ablest and most sympathetic 'helmsman' for inaugurating this new legal era, with all its challenges and problems." W.H. McConnell, *William R. McIntyre: Paladin of the Common Law* (Montreal: McGill-Queen's University Press, 2000) at 66. See also P. Calamai, "The Media and the Court's Public Accountability" in D.J. Guth, ed., *Brian Dickson at*

Given Duff's importance for the Supreme Court in the 1930s and early 1940s, it is worth inquiring how Duff has been remembered since World War II. While Canadian legal historians have given considerable attention to Duff, they have generally failed adequately to interrogate the reasons for his fame. Duff has been called a "master of trenchant and incisive English," who "wrote his opinions in a style which bears comparison with Holmes or Birkenhead."<sup>128</sup> A former assistant of Duff, Kenneth Campbell, argued that Duff was "frequently ranked as the equal of Justices Holmes and Brandeis of the United States Supreme Court,"<sup>129</sup> and Gerald LeDain asserted that Duff "is generally considered to have been one of Canada's greatest judges."<sup>130</sup> The lack of critical commentary regarding Duff may partly be a result of the slow development of Canadian legal history, which prior to 1980 was generally an underdeveloped field of study. The founding in 1979 of the Osgoode Society for Canadian Legal History, however, led to demonstrations that Canada had a noteworthy legal history. In 1984, the Osgoode Society helped publish David R. Williams' biography of Duff. Williams argued that Duff stood "apart from his contemporaries", and was "a colossus by comparison" to the mediocre members of the Court during the 1930s.<sup>131</sup> By publishing this biography, the Osgoode Society seemed to indicate that the Supreme Court had a valuable institutional history and that Canada had a legal history worthy of study. Thus, just as Duff served as a symbol for the Supreme Court during the 1930s, in the 1980s he became a legitimating figure for the Osgoode Society—a historical actor permitting the Society to substantiate the value of further study.

Despite the attention given to Duff by legal historians, Canadian lawyers seem increasingly unaware of the former chief justice. This trend is best explained by the shift in dominant legal topics and attitudes about the law. For example, the discourse of "British justice" rapidly declined in importance in English Canada after World War II.<sup>132</sup> As a result, Duff's reputation, intertwined as it was with imperial imagery, lost much of its resonance. Today's Supreme Court is less concerned about federalism issues; instead, "rights-protecting" justices such as Brian Dickson and Antonio Lamer

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*the Supreme Court of Canada, 1973-1990* (Winnipeg: Canadian Legal History Project, 1998) 289; T. Anderson, "A Tribute of Affection and Admiration" in R. Penner, ed., *The Dickson Legacy* (Winnipeg: Legal Research Institute, 1992) 297 at 304.

<sup>128</sup> McConnell, "Bennett's 'New Deal'", *supra* note 43 at 51.

<sup>129</sup> Campbell, *supra* note 9 at 243. Richard Gosse, on the other hand, hedged his praise in 1975. According to Gosse, Duff was the "dominating figure in the Supreme Court of Canada's first hundred years," but also noted that Duff "was not a Justice Oliver Wendell Holmes or a Lord Denning." Gosse, "Four Courts", *supra* note 9 at 482, 483. Ian Bushnell has written the best existing critique of Duff. See Bushnell, *Captive Court*, *supra* note 13 at 265-66.

<sup>130</sup> LeDain, *supra* note 9 at 261.

<sup>131</sup> Williams, *Duff*, *supra* note 9 at 275.

<sup>132</sup> For example, Canadian debates over the death penalty between the 1930s and 1950s witnessed the declining discourse of British justice. See C. Strange, "The Undercurrents of Penal Culture: Punishment of the Body in Mid-Twentieth-Century Canada" (2001) 19 L. & Hist. Rev. 343.

have gained notoriety in interpreting the *Charter*. Meanwhile, Duff has drifted into the shadows of legal history.<sup>133</sup> Unlike Oliver Wendell Holmes and John Marshall in the United States, Duff's esteemed place in the Canadian legal community's consciousness was far from guaranteed. Canadian writers lauded Duff during the 1930s, but in doing so failed to discuss his formalistic approach to the law or his tendency to limit the Dominion government's power to legislate. Once an independent Supreme Court was secured, lawyers and legal academics critiqued Duff's legal formalism and its effect on Canadian federalism. Osgoode Hall law professor Bora Laskin attacked Duff's decisions, arguing that Duff used circular reasoning and hid his policy-laden decisions behind the doctrine of *stare decisis*.<sup>134</sup> Duff, critiqued Laskin, had articulated constitutional principles "which rejected social and economic considerations."<sup>135</sup> In Laskin's extensive writing on the Canadian Constitution after World War II, according to R.C.B. Risk, "Haldane was the major villain, Duff his willing collaborator."<sup>136</sup> Laskin was not alone in criticizing Duff. Lionel Schipper wrote in 1956 that throughout Duff's judgments it was

apparent that he has given certain factors very little consideration in formulating his decisions. ... In constitutional cases, not only are the actual facts of the case significant but the surrounding social, economic and political facts are equally significant. A shift in these latter factors is as important in deciding a case as any other change in the facts. It is this consideration that Chief Justice Duff ignored.<sup>137</sup>

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<sup>133</sup> This is very well borne out by Peter McCormick's recent study of the Supreme Court. McCormick examined the number of times the Supreme Court cited other Supreme Court justices between 1949 and 1999. In the period between 1949 and 1963, the Supreme Court cited Duff far more than any other justice: 447 times compared to 274 citations to Rinfret, the second most cited judge. In the period from 1963 to 1984, the Supreme Court continued to cite Duff often, though several other justices, including John Robert Cartwright and Ronald Martland, were cited about as often (the Court cited Duff 372 times, Cartwright 373 times, and Martland 371 times). However, from 1984 to 1999 the Supreme Court rarely cited Duff, instead looking to Dickson and Lamer most often (1836 and 1517 citations, respectively). McCormick, *supra* note 16 at 26, 48, 73, 98, 119, 141.

<sup>134</sup> B. Laskin, "Peace, Order and Good Government' Re-Examined" (1947) 25 Can. Bar Rev. 1054 at 1069-70.

<sup>135</sup> B. Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 Can. Bar Rev. 1038 at 1068.

<sup>136</sup> R.C.B. Risk, "On The Road To Oz: Common Law Scholarship About Federalism After World War Two" (2001) 51 U.T.L.J. 143 at 150.

<sup>137</sup> Schipper, *supra* note 9 at 11.

Critics have also pointed to Duff's alcoholism, his alleged partiality in the Hong Kong inquiry, and the Supreme Court's racist judgments regarding Canadians of Chinese and African descent during his tenure.<sup>138</sup>

What makes a great justice has therefore changed. Duff, celebrated in the 1930s because of his imperial ties, his class, ethnicity, gender, and judicial experience, has faded in the legal profession's memory. The modern Supreme Court no longer requires a symbol that does not stand for current jurisprudential and societal views.

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<sup>138</sup> See e.g. J.W.St.G. Walker, *'Race,' Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Toronto: Osgoode Society, 1997) at 103-04; C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) at 52-55.