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THE RIGHT HONOURABLE SIR LYMAN POORE DUFF, P.C., G.C.M.G.: THE MAN AS I KNEW HIM

By W. KENNETH CAMPBELL*

“There were Giants in the earth in those days . . . ”
Genesis Ch. 6, Verse 4

Almost ten years ago the Right Honourable Thibaudeau Rinfret began a brief memoir of the man whom he succeeded as Chief Justice of Canada with the question, “Is it too late to write about Sir Lyman Duff?”¹ The question becomes increasingly more relevant; it has been almost twenty years since Sir Lyman passed away. He was then in his ninety-first year and had out-lived most of his contemporaries. People who remember his years on the Bench are by now themselves old men. Inevitably, the younger members of the Bar lose sight of the man and his achievements. Yet Sir Lyman Duff was one of Canada’s greatest jurists; in his own time he was frequently ranked as the equal of Justices Holmes and Brandeis of the United States Supreme Court.² Perhaps a further word of reminiscence will help to keep his memory green.³

I should make my own position clear at the outset. I am not going to sail under false colours. I have no university education, let alone a qualification to practice law. However, for more than thirty-two years I was private secretary to six successive Chief Justices of Canada and, in addition, I was Executive Secretary to the Court for the last eight years of my career. My work at the Court began under Sir Lyman Duff and I had the privilege of being his close companion throughout the years of his retirement. This, then, is a labour of love. It is done in humility but also with a sense of pride because I have nothing but the happiest memories of a great Canadian who, for fifteen years, was my mentor, guide, philosopher and unforgettable friend.

I first met Sir Lyman (then Mr. Justice Duff) several years before I went to work for him as his private secretary. The meeting came about during the final days of The Royal Commission to Inquire into Railways

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¹ T. Rinfret, *Sir Lyman Duff* (1956), 2 U.B.C. Legal Notes 337.

² See *Supreme Court of Canada Judges: Rt. Hon. Lyman Poore Duff, P.C., K.C.* (1932), 1 Fortnightly L. J. 285.

³ Relatively little has been written about Sir Lyman Duff. The best biographical sketch can be found in R. Gosse, *Random Thoughts of a Would-Be Judicial Biographer* (1969), 19 U. of T. L. J. 597. Upon his death some of Sir Lyman’s closest friends (Mr. Justice Rand, M. Grattan O’Leary, and Lord Wright) published tributes to him; see, *Rt. Hon. Sir Lyman Poore Duff, G.C.M.G., 1865-1955* (1955), 33 Can. Bar. Rev. 1113. I played a role in the arrangement of the latter publication and cannot hope to improve upon the sentiments expressed therein.

and Transportation in Canada — 1931-1932, popularly known as the Duff Commission. I had been engaged to do some of the verbatim shorthand reporting of the Commission's proceedings. I was never able to convince myself that I was a competent reporter and naturally I was apprehensive that my work would not be satisfactory. During the latter days of the Commission my skills were severely tested. Evidence was given by the two most highly placed officers of the C.N.R. and C.P.R. The Cabinet Minister responsible for the railways was present for at least part of the time when these officers were on the stand. These sessions concerned issues of considerable delicacy and, as I recall, the final day's hearing was held *in camera*. At the conclusion of that memorable day the Secretary of the Commission, Mr. Arthur Moxon, K.C., asked me to surrender my notebooks and not to transcribe any of the evidence. I thought this very strange, because normally I would have started at once to transcribe my notes. I realized that only the extreme importance of the evidence and its confidentiality could account for the request.

A little later, Mr. Moxon informed me that I was to present myself at a certain suite at the Chateau Laurier Hotel at eight o'clock that evening. When I arrived at the suite I was shown into a room where all of the members of the Commission were seated around a large table. Mr. Moxon handed me my notebook and asked me to read the day's evidence. I did the best I could, but I hesitated and stammered at times, and it was a blessed relief when I was finished and excused. I considered my efforts something of a failure, but while I sat in the adjoining room pondering my fate I was told that Mr. Justice Duff would like to see me. I was escorted to a room at the end of the hall, and Mr. Justice Duff invited me in. Before I had a chance to apologize for the inept manner in which I had read my notes, Mr. Justice Duff said, "Young man, the reason I sent for you was to tell you that you did a fine job in the circumstances." I expressed my thanks and left the room almost overcome with exhilaration. That short meeting impressed upon me that there was another side to this rather formidable jurist. He was also a gentleman, kindly and unusually considerate. Perhaps not too many people knew this side of his character. Later, my years of intimate association with him confirmed the accuracy of my first impression.

I did not see Sir Lyman again until May, 1940. He was then Chief Justice of Canada. The Deputy Minister of Justice at the time was a friend of mine and he told me that Sir Lyman's private secretary had been granted sick leave for some months. He suggested that I might be a suitable replacement. Since I had, by then, been a Court Reporter and Registrar on the Canadian Pension Commission, had been Acting Registrar of the Pension Appeal Board, and was secretary of the Committee for the Rehabilitation of War Veterans, I was more confident of my abilities than I had been in 1932. I had no hesitation in saying that I would be honoured to work for Sir Lyman. Mr. James Smellie, K.C., the Registrar of the Court, and a great friend of Sir Lyman's ushered me into Sir Lyman's Chambers in the old courthouse. Of course, Sir Lyman did not remember me as the nervous young man of 1932, and it was sometime later before I revealed to him our previous association. He was very gracious once again, and said, "We will get along splendidly." As it turned out, Sir Lyman's former secretary was unable

to return to his position and that meeting was the beginning of our long friendship.

I mentioned that Sir Lyman's Chambers were in the old courthouse. This was an old stone building situated at the western edge of Parliament Hill. It was built in the style of the original Parliament Buildings and had been used as a carriage house for the members of Parliament. Barristers sometimes alleged that the smell of oats and horses still lingered in the corridors on warm afternoons. Their imaginations may have betrayed them. The Supreme Court of Canada moved into the building as a "temporary" measure in 1876. By the time I joined Sir Lyman, the new Supreme Court of Canada building, one block to the west, was under construction. The Court moved into the new building in 1946. Ten years later, the old building was torn down and the site was made into a parking lot. I share the view of one distinguished historian that this was a dreadful mistake. A part of Parliament Hill which carried with it seventy years of judicial history was irretrievably lost when the wreckers took over.

A word about Sir Lyman may be in order. He was not a tall man. I think he stood five feet, eight inches and weighed about one hundred and seventy-five pounds. He was, of course, about seventy-five years old when I took the position as his secretary. He carried his years well though, and could easily have been mistaken for a much younger man. He dressed in sober, well-cut, English suits, and was fastidious about his linen. He might change his shirt once or twice a day. Though he was not large, he had broad shoulders and a strong face. Gowned and presiding in the courtroom he was an impressive figure, and dressed in his Windsor uniform, one was instantly aware of his presence.

My association with Sir Lyman began at what was almost the end of his long and extraordinary career. He was born in Meaford, Ontario, in 1865. His father was a Congregationalist minister.⁴ He took his Bachelor of Arts degree (with first-class honours) at the University of Toronto in 1887. The degree itself demonstrated the surprising breadth of his intellect; his studies were in Mathematics and Metaphysics.⁵ After graduation he taught at Barrie Collegiate while studying for the Bar. He took some courses at the law school at Osgoode Hall and was called to the Bar of Ontario in 1893. In the same year he married Elizabeth Eleanor Bird, of Barrie. He practiced in Fergus, Ontario, for the following two years.⁶ Very little can be found with regard to Sir Lyman's life as a struggling young barrister. At least one anecdote has been preserved, however. It is said that while he was in practice in Fergus, a local farmer came to Mr. Duff for some advice on a line fence dispute. Mr. Duff's services had already been engaged on behalf of the other party in the matter but he was happy to recommend to the farmer that Mr. James Muir, who practiced law just across the street, be retained. Indeed, he offered to

⁴ Gosse, *supra*, note 3 at 598.

⁵ *Retired Chief Justice of Canada Passes Age 90*, The Ottawa Citizen, April 26, 1955, Page 4, Column 1. The *Fortnightly Law Journal* recorded that Sir Lyman was a gold medalist in both classics and mathematics. *Supra*, note 2.

⁶ Most of the foregoing details are found *supra*, note 2.

give the farmer a note of introduction to his colleague. The note was in Latin, and read as follows: "Duos anseres habemus: ego alteram carpam, tu alteram carpe." The farmer carried the note to Mr. Muir and was warmly received. Perhaps from an excess of caution he decided to retain the note and see for himself what had been done between these gentlemen of the law. The farmer took the note to the local high school principal, who was pleased to construe it. "We have two geese:", read the note, "I pluck the one, you pluck the other." It is said that the neighbours found it possible to resolve their dispute without further resort to the processes of the law.⁷

After a short time in Fergus, Sir Lyman moved to British Columbia and was called to the Bar of that province in 1895.⁸ His years in British Columbia were highly successful. At a later date he was to tell a British Columbia audience that:

Here [in British Columbia] I acquired in that only effectual school — the school of actual practice in the Courts — my first knowledge of the juridical art.⁹

In 1895 he was made a Queen's Counsel. Perhaps the most significant event of the early part of Sir Lyman's career was his participation in the Alaska Boundary arbitration. He was sent to England in 1903 (along with Edward Blake, Christopher Robinson, and Aimé Geoffrion) to assist in the presentation of the Canadian position with regard to the boundary between Alaska and British Columbia. The month spent in London may have been politically invidious (the arbitration did not favour Canada) but they cemented a number of friendships which Sir Lyman treasured for the rest of his life. One young barrister with the British Delegation was John Simon, later Sir John Simon, Lord Chancellor of England; his Canadian colleague, Aimé Geoffrion, became probably Sir Lyman's closest friend. Reminiscing on this time, in later years, Sir Lyman told the following story:

There is a mountain peak in British Columbia of which none of you has ever heard, that bears the proud Norman name of "Geoffrion." There is another mountain peak that bears the name of "Wade" named after our old and dear friend, Fred Wade, who practiced law for many years in Winnipeg, Vancouver, Dawson, and later was for many years the distinguished Agent for British Columbia in London. There is another peak also which bears the humble name of "Duff." These geographical distinctions we owe to the geographers, who were charged with the duty of surveying the boundary line between British Columbia and Alaska pursuant to the direction of the award of the arbitrators. With the geographers, both Americans and Canadians, concerned with arbitration we spent some, I am afraid I must admit many happy convivial hours, and the official baptism of these peaks that I have mentioned was a felicitous tribute to the social acceptability of my two friends and myself.¹⁰

The affection which Sir Lyman felt for this time of his life was shared by others. Aimé Geoffrion also spoke of the experience.

For a few months we laboured to defend the northwest boundaries and frontier of Canada — not very hard labour. It was most interesting and most pleasant work — not too hard, as I said — and considering our earning powers in those

⁷ *Miscellany* (1970), IV The Law Society Gazette 66.

⁸ *Supra*, note 5.

⁹ L. Duff, *British Columbia: A Retrospect* (1938), 16 Can. Bar. Rev. 524.

¹⁰ *Id.* at 526.

days, it was quite remunerative. However, the result of that association for me was a friendship that has lasted forty years, and of which I have always been very proud. I have been able to know [Sir Lyman Duff] not only as a public man but as a private individual. I admire him in the one capacity, I like him in the other.¹¹

Sir Lyman's career prior to the boundary dispute had been a distinguished one. His services in London probably brought him to the attention of various government members. In any event, in 1904, soon after he returned from England, he was appointed to the Supreme Court of British Columbia. He was very young to have attained so high an office; he would have been thirty-nine at the time. Two years later, on September 27, 1906, he was translated to the Bench of the Supreme Court of Canada. Thus began a career of service to that Court that lasted over thirty-seven years — a record which is not likely to be challenged by any future appointee.

In point of fact, Sir Lyman did not confine his energies to the Supreme Court of Canada. In the years 1916 to 1918 he occupied the position of Central Appeal Judge under the *Military Service Act*. The Central Appeals Court was set up to determine matters relating to conscription and claims of exemption from military service. In these years Duff was even considered as a potential Prime Minister. When Prime Minister Borden faced a crisis over the conscription issue he considered resigning and recommending to the Governor-General that a government of national unity be appointed. Sir Lyman, who had never run for office either federally or provincially, was his choice to lead such a government.¹² I believe that Sir Lyman gave active consideration to a proposal of this sort and suggested that W. N. Tilley, one of the leading counsel in Toronto at the time, join him as a member of the proposed cabinet. When Tilley rejected the idea, Sir Lyman took the matter no further.

Shortly after the war, in 1919, Sir Lyman was made a member of His Majesty's Privy Council and was invited to sit on the Judicial Committee of the Privy Council in London on overseas, Dominion, and Colonial Appeals. This appointment was undoubtedly in recognition of the extraordinary gifts Sir Lyman had already displayed; he was the only Puisne Judge of the Supreme Court to be so honoured. Sir Lyman sat with the Judicial Committee on an annual basis throughout his period on the Supreme Court of Canada, and even after his retirement. The only interruption in his service on the Judicial Committee came as a result of World War II. There is no doubt that he was regarded with esteem by his British colleagues nor that he valued his trips to England and his opportunities of renewing old acquaintances immensely. His British Brethren even made him an Honourary Bencher of Gray's Inn.

From time to time Sir Lyman was called upon to perform duties outside of the judicial sphere. He acted on a number of government inquiries. As I

¹¹ *Farewell Ceremony for Sir Lyman Poore Duff, P.C., G.C.M.G. Chief Justice of the Supreme Court of Canada, Ottawa, Canada, December 15, 1943* (1944), 22 Can. Bar. Rev. 1 at 4.

¹² Gosse, *supra*, note 3 at 598.

have mentioned, I first met Sir Lyman in his position as Chairman of the 1931-32 Royal Commission on Transportation. He also served on a number of other inquiries. I believe that Sir Lyman looked upon these tasks as being part of the natural responsibilities of a person vested with high public office. He refused to accept honoraria for these tasks even though they added substantially to his workload.¹³

One of Sir Lyman's extra-judicial tasks is of special interest. Sir Lyman had the honour of being the first Canadian to officially open the Parliament of Canada; indeed, he performed this duty on two occasions. On January 16th, 1931, Governor General Lord Wellington retired and departed for England. Sir Lyman (then Duff, J.) was appointed Administrator of the Government of Canada and he continued to act in that capacity until the Earl of Bessborough assumed office on April 4th, 1931. On March 12th, 1931, Sir Lyman, resplendent in his Windsor uniform, read the Speech from the Throne for the first time. This distinction fell to Sir Lyman for the second time almost ten years later. When Governor General Lord Tweedsmuir died on February 11th, 1940, Sir Lyman was made Administrator and on May 16th of that year he again opened Parliament. Sir Lyman continued to act as Administrator until Governor General Lord Athlone assumed office on June 21st, 1940.¹⁴

Sir Lyman's private life in these years may not have reflected the unbroken series of triumphs that he achieved in his public life. In 1924, Sir Louis Henry Davies, the Chief Justice, died. At that time, Justice Idington (who was appointed in 1905) was the senior member of the Bench and Sir Lyman was the next most senior. Prime Minister Mackenzie King passed over both of these men to appoint Mr. Justice Anglin as the new Chief Justice. The convention that the most senior member of the Bench would become Chief Justice was well-established, and Justice Anglin's selection may well have come as an unpleasant shock to Sir Lyman. There was not, at this time, any retirement age for the members of the bench, and Mr. Justice Anglin was one month younger than Sir Lyman. The possibility that Sir Lyman would survive Justice Anglin and cap his career with the Chief Justiceship may have seemed rather remote. (A half century elapsed before this tradition was again broken: on December 28, 1973, Mr. Justice Bora Laskin became the second junior member of the Bench to be appointed Chief Justice.) Sir Lyman suffered an additional blow with the death of his wife in 1926. The marriage had been childless and Sir Lyman was left to resume the life of a bachelor.¹⁵

Sir Lyman eventually succeeded Anglin as Chief Justice when the latter died in 1933. In the New Year's Honours list of 1934, King George V made him a Knight Grand Cross of the Order of St. Michael and St. George. Sir

¹³ *Id.*

¹⁴ Parliament has been opened by an administrator on only two other occasions. On May 16th, 1963, Chief Justice Taschereau opened Parliament during the illness of Governor General Vanier and on September 30th, 1974 Chief Justice Laskin performed a similar function while Governor General Leger was ill.

¹⁵ Gosse suggests that Sir Lyman's marriage was "barren in many ways". He gives no indication of how he arrived at this conclusion. Sir Lyman never mentioned his married life to me. See Gosse, *supra*, note 3 at 599.

Ernest MacMillan and Sir Fredrick Banting were similarly honoured at the same time.

Sir Lyman was a prodigious worker. His habits were regular, and it was a joy to work with him. Daily, when the Court was sitting I would go to his home at 488 Wilbrod Street at 8:30 a.m. I would be invited to have breakfast or a cup of tea with him; Sir Lyman never drank coffee. At 9:30 a.m. a Red Line Taxi would call for us. (Sir Lyman never owned an automobile and he never used any taxi company other than Red Line.) When the taxi arrived I would pick up a load of books with which Sir Lyman had been working and we would be off to the Court. There would be administrative matters to attend to and at 10:15, if Sir Lyman was sitting, his messenger would robe him. He would then go to the Conference Room and meet the other Members of the Bench for the day's proceedings. They would then take their places and begin the hearings. At 1 o'clock the taxi would again call to take Sir Lyman home for lunch. After the Court rose in the afternoon, Sir Lyman would disrobe and spend the next hour studying the case which the Court was hearing, or preparing himself for the next appeal.

When the hearings at the Court finished, Sir Lyman would begin working on his judgments. His work pattern would, of course, change at this time. Two or three evenings each week, and usually every Sunday morning, Sir Lyman would ask if it would be convenient for me to go to his house because he wanted to work on some judgments. A fire would be blazing in the fireplace and Sir Lyman would be sitting in his easy chair. He would explain in detail what his decision was going to be in the appeal that he was studying and the reasoning which led him to the decision. I am sure that those instructive hours were equivalent to several years attendance at a university law school. They certainly provided an unusual sort of education. I recall one time when a difficult patent case was under consideration. My own experience with science and mathematics was limited and I told Sir Lyman that I would never be able to understand the point in dispute. Sir Lyman refused to take me at my word and, with pencil and pad, laid out the problem with a precision and clarity that I still marvel at. This, and many other similar instances, demonstrated not only the breadth of his mind but also the fact that he would have made a great teacher. Certainly, the guidance which he gave me in my times with him prepared me for the years ahead and made my tasks much easier than they would otherwise have been.

Sunday mornings would be devoted to work from 10:30 to 12:30, and then we would have lunch. Sir Lyman's dictation would then have to be typed. I would go to the office and do up the typescript and then return it to Sir Lyman. People often said that I ought not to have been asked to do this overtime work. I always replied that these hours with Sir Lyman were a stimulating education and could not in any manner be considered work.

After working for an hour or two in our evening sessions, Sir Lyman would ask the maid to bring in some tea and sandwiches. Then we would just chat until about 11 o'clock. He would tell me about his experiences with the leaders of the Bench and Bar and with the political figures which he had known over a period of more than half a century.

Sir Lyman's friendships were deep and wide-ranging. I have already mentioned the regard in which he and Aimé Geoffrion held each other after their months together in England. Sir Lyman was one of the members of a small Ottawa fraternity known as the Fortnightly Dining Out Club. They were an informally associated group of distinguished and erudite men who valued each other for their conversation and conviviality. They would meet every two weeks for a dinner at the Ottawa Country Club. A different member would act as host for each meeting, and that member was allowed to bring along one guest. The membership was by no means confined to people with legal training — that would not have suited Sir Lyman's far reaching tastes at all. Among the other "diners out" were Norman Robertson of the Department of External Affairs; Dr. C. J. MacKenzie one time president of the National Research Council and later president of the Atomic Energy Board of Canada; M. Grattan O'Leary (now Senator), the Editor of the Ottawa Journal; John Stevenson, a correspondent for the London Times; Francis Hardy, the Parliamentary Librarian; and Duncan Campbell Scott, the poet. O. M. Biggar, K.C., a prominent Ottawa lawyer, was also a member and when Mr. Justice Rand was appointed to the Supreme Court of Canada he was initiated into the fellowship by Sir Lyman. The conversations at these gatherings might touch on almost any topic. Sir John Cockcroft, at the time the most learned scientist and powerful figure on atomic energy in Britain, was a guest one evening. He found himself quizzed deeply and expertly by Sir Lyman who had followed the development of nuclear physics and atomic energy for a number of years and had read every book he could find on the subject. It was often said that Sir Lyman was one of the few people in the world who actually understood Einstein's theories on relativity and the nature of energy.¹⁶ Sir John was but one of the many erudite guests of the Fortnightly Dining Out Club. However, I think it appropriate to record that in 1951 he was Joint Winner of the Nobel Prize for Physics. The morning after these meetings Sir Lyman would often say to me, "Great night last night, Campbell. Great night."

Sir Lyman valued all of his friendships very highly. At the end of his career on the bench he made the following comment:

It has been said that Lethe rolls between the Bench and the Bar, to quote a famous judge. In my case, as in his, the stream has been an exceedingly narrow one. I was, I think, when I became a judge in 1904 not at all conscious of any attenuation of the friendship which united me with my professional brethren. Since coming to Ottawa I have been the mark of so many friendly manifestations that I can truly say now I have never regarded the members of the profession in any other light than that which shines upon one's friends.¹⁷

Sir Lyman's skill in conversation must have been, at least in part, a product of his reading. He was an omnivorous reader. He loved the classics, biographies, and political and military histories. Sir Lyman relied heavily on his friend, Francis Hardy for these books, and Mr. Hardy once showed Grattan O'Leary the list of books which Sir Lyman had borrowed from the

¹⁶ *Retired Chief Justice of Canada Passes Age 90*, The Ottawa Citizen, April 26, 1955, Page 4, Column 1.

¹⁷ *Supra*, note 11 at 8.

Parliamentary Library. Mr. O'Leary was astonished at Sir Lyman's curiosity and at his ability to find the time to read as much as he did.

During the years that he was Chief Justice, the while travelling to England for sittings of the Judicial Committee of the Privy Council, Sir Lyman must have been immersed in the law. Yet during this period he was finding time to read books such as these: Trotsky's *Problems of Life*, Morris' *Beethoven*, Oman's *Studies in the Napoleonic Wars*, Duncan's *Essentials of Astronomy*, Hauwitz's *Physical State of the Upper Atmosphere*, Hammond's *Gladstone and the Irish Nation*, Low's *Political History of England*, Lecky's *Nationalism in Europe*, Barnes' *Scientific Theory and Religion*, Asquith's *Occasional Addresses*. Scientific Research and Discoveries interested him constantly. Thus, in 1936, almost a decade before an atomic bomb fell upon Hiroshima, he was reading Gamow's *Atomic Energy*, and in the same year he took out of the library Montgomery's *The Story Behind Great Medical Discoveries*, Epstein's *Miracles from Microbes*, Slotter's *New Science of Surgery*, and Conant's *On Understanding Science*.¹⁸

Fortunately for me, Sir Lyman let me have all the books he had borrowed from the Parliamentary Library before they were returned. In our evening discussions we had many opportunities to talk about the things he was reading.

Mr. Justice Rinfret, Sir Lyman's successor as Chief Justice, told another story with regard to Sir Lyman's love of books.

While he was Chief Justice, Sir Lyman was taken seriously ill. During the three months he was confined at the Victoria Hospital in Montreal he was kept secluded and nobody — not even his colleagues on the Bench — was allowed to see him. When, at last, word was conveyed to us that one of us would be given permission to visit him, I was delegated on account of the fact I was from Montreal. When I entered his room in the hospital, I found the walls lined with books — Sir Lyman was a great reader. They were books of all kinds: religion, philosophy, mathematics, natural sciences, history, fiction, detective stories, and so on, and law, naturally. But the reason I refer to that visit is that ninety percent of the books were French.¹⁹

As a judge, Sir Lyman was patient and considerate. At the time of his retirement Mr. E. Phillipe Brais, K.C. spoke on behalf of the Canadian Bar Association and made the following observation:

No case has ever suffered here through the inexperience of its pleader. No pleader has ever appeared here who has not been afforded full opportunity, indeed who has not been patiently guided and helped, to make a full demonstration of his case. The gratitude of those lawyers could never be voiced.²⁰

While Sir Lyman had pursued his career on the Bench his friend Aimé Geoffrion had become a leader of the Bar in Canada and was recognized as one of the finest legal minds in the Commonwealth. Sir Lyman insisted on presiding in each appeal in which Mr. Geoffrion appeared because he found the argument put forward by his old friend to be stimulating and exacting. On one memorable occasion the Court rose for lunch in the course of Mr. Geoffrion's presentation. When the Court reconvened Sir Lyman said:

Mr. Geoffrion, just before we adjourned for luncheon, you had about convinced

¹⁸ G. O'Leary, *supra*, note 3 at 1119.

¹⁹ *Supra*, note 1 at 337, 338.

²⁰ *Supra*, note 11 at 2-3.

me that there was merit in the points you were making. However, I gave the matter considerable thought while I was having lunch and I would like to hear you further on the last particular point you were making before we adjourned.

Without a moment's hesitation, Mr. Geoffrion said:

My Lord, I will be happy to do so and endeavour to restore you to the good health you were in before you suffered that unfortunate attack of indigestion.

One other, somewhat less edifying, incident sticks in my memory. In 1943 Sir Lyman presided over a special sitting of the Court which had been convened to hear an application for habeas corpus affecting an inmate in a mental hospital in St. John, New Brunswick. An eminent lawyer from Quebec had been engaged to argue for the applicant. When the Court rose for lunch at one o'clock the lawyer, who had been appearing regularly before the Court for a number of years, realized that his case was going to be dismissed. He became rather distressed. At two-thirty, when the Court resumed the hearing, Sir Lyman delivered an oral judgment stating that it was the opinion of all the members of the court that habeas corpus did not lie and that the application should be dismissed. The lawyer immediately jumped to his feet and began to protest and state that he would appeal to the foot of the throne. Sir Lyman told him that that was his right and then asked him to sit down. Unfortunately, the lawyer continued to protest in a vehement fashion and finally Sir Lyman said, "send for the constable." With that, the lawyer hurled the seats (which were rather like church pews) in the court room and rushed down Wellington Street with his gown flapping in the wind. Sir Lyman was, of course, upset by this unfortunate incident but was unwilling to have it impair the career of the lawyer. He asked me to communicate with the gentleman and assure him that his actions would be forgiven if he would write a letter of apology to the Court. The letter was never received and the man never appeared before the Court for the remainder of the time Sir Lyman was Chief Justice.

As Chief Justice Sir Lyman got along very well with all but one of his colleagues. Mr. Justice Crocket who had been appointed from New Brunswick in 1932, sometimes felt that Sir Lyman condescended to him. He thought that Sir Lyman lectured him in conferences and treated him as a student-at-law. I do not know what actually happened, but it was quite apparent that there was a clash of opinions and ideas. At this time there were only seven men on the Supreme Court of Canada and all of his other colleagues held Sir Lyman in the highest regard. He was particularly close to Davis, J. and Rinfret, J. He also developed a very warm relationship with Rand J. It was a great misfortune that Rand, J. was not appointed to the Bench until April of 1943 and was therefore only able to sit with Sir Lyman for less than a year.

Sir Lyman tried to persuade his colleagues to follow the practice employed in the Privy Council and have a short conference each day after the Court rose. He thought that this would shorten the work of the Court because it could be pointed out to Counsel, if the Court had agreed at the conference, that it would not be necessary to hear further arguments on certain points, or that it would not be necessary to continue with the point being made. At the same time, when each appeal had been concluded, some Judge could

be assigned to write the majority judgment. In this way the work load of each member of the Court might be lessened. Of course, where there were different opinions the writing of dissent judgments would be arranged between the dissenting Judges.

Sir Lyman's own judicial approach was, I believe, quite conservative. With his classical training, deep interest in literature, and affection for Britain and its institutions, he was an almost mid-Victorian figure. In the course of argument he did not like to entertain authorities drawn from United States sources, and he held British precedents in very high regard. He would not have ever thought that members of the court were "right" or "left" of centre. His approach, and I believe that it can be said that this was the approach of the Court generally, was legalistic and empirical rather than abstract. He would state a simple fact, "Justice must be done in the Supreme Court of Canada".

As I mentioned previously, Sir Lyman was appointed to the Privy Council in 1919 and sat on the Judicial Committee regularly thereafter. This experience undoubtedly had a profound effect on his views. In 1925 he made a speech on the Privy Council to the annual dinner of the Canadian Bar Association. His affection for the institution is obvious.

I have said that the jurisdiction exercised by [the Judicial Committee of the Privy Council] is unique in its range. In its scope it embraces the legal interests of one fifth of the human race. It is concerned with almost every known system of jurisprudence, and with juridical institutions of every type, and with every kind of dispute. In the course of a single year, the ancient legal institutions of Hindus and Mahometans, the political institutions of great modern states like Canada and Australia, are the subject of its deliverances. Yes, and the customs, just taking form as organized law of some African peoples only now emerging into a rudimentary civilization.²¹

Sir Lyman was not, however, without a strong feeling for the development of Canadian laws and institutions. Even in those years he was ready to contemplate the termination of appeals to Britain.

[I]n a country with a constitution such as ours, perhaps the weightiest of all responsibilities of judicature, is that of interpreting and applying the provisions of the organic statute touching the distribution of legislative and executive power. The duty of finally determining such questions is one which the people of this country have not borne upon their shoulders. We have looked to the Mother country to provide for the discharge of that great responsibility. We have looked to them, and by our desire they have made provision for the discharge of that duty, and for that purpose we have had the services, as I have said, of a tribunal supremely equipped for the task — equipped for it in unexampled degree. It will, I am convinced, 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. But 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. When that time comes, be it soon or late, I am confident that we shall act in a manner not unbecoming a great people, that we shall not be unmindful of the great, disinterested services of which we have been beneficiaries.²²

²¹ L. Duff, *The Privy Council* (1925), 3 Can. Bar. Rev. 273 at 277-278.

²² *Id.* at 278-279.

It is indicative of the breadth of Sir Lyman's career that the time for abolishing appeals to the Privy Council arrived within his lifetime. In 1939 the question of whether the Federal Bill entitled *An Act to Amend the Supreme Court Act* was *intra vires* of the parliament of Canada was referred to the Supreme Court.²³ Sir Lyman led the Court at the hearing and his friend Mr. Geoffrion headed the battery of lawyers who argued for the validity of the Bill on behalf of the Attorney General of Canada. Sir Lyman always considered his judgment for upholding the validity of the Bill to be one of his best pieces of work. The case was itself appealed to the Privy Council and the decision of the Supreme Court was there upheld.²⁴

Even as Chief Justice, Sir Lyman continued to discharge public duties outside of his judicial obligations. At one point he was considered as a possible Governor General of Canada. In March of 1940 Prime Minister Mackenzie King, who was then debating who should be the next Governor-General, told his friend Ernest Lapointe, "that had Chief Justice Duff been married, I would have recommended his appointment right now."²⁵ Sir Lyman knew nothing about this matter, although had he known he might have been amused by the bachelor Prime Minister's scruples. Certainly, being a widower did not prevent the appointment of Vincent Massey as the first Canadian-born Governor-General.

One of Sir Lyman's public duties caused him considerable embarrassment and could even be said to have cast a pall over his life in retirement. In late 1941 Canada, in response to a request from Britain, dispatched some Canadian troops to Hong Kong. The understanding at the time was that the troops would act as a garrison force and would not be involved in active fighting. Hence, they were not fully equipped for battle. Unfortunately, very shortly after the men landed, the Japanese attacked Hong Kong and the Canadian contingent was taken prisoner with an enormous loss of life. Questions were raised in Parliament with regard to the dispatch of the troops and especially with regard to their training and equipment. Mackenzie King found that the only way to meet the criticism raised was to appoint a Royal Commission of Investigation. King wanted Sir Lyman to serve as the Commissioner and visited him to discuss the matter. The Prime Minister recorded that Sir Lyman said, "he would want to talk with his doctor who would probably tell him he was foolish to take on anything of the kind, but if his conscience told him he should, would say it was alright [sic]." King was "immensely relieved" when Sir Lyman said that he could accept an appointment as a one-man Royal Commission.²⁶ Having regard to the need for secrecy in military matters in war time the Commission was held *in camera*. The opposition parties in the House of Commons were, however, allowed

²³ *In the Matter of a Reference as to the Legislative Competence of the Parliament of Canada to Enact Bill No. 9 of the Fourth Session, Eighteenth Parliament of Canada Entitled "An Act to Amend The Supreme Court Act"*, [1940] S.C.R. 49.

²⁴ *Attorney General for Ontario v. Attorney General for Canada*, [1947] A.C. 127 (P.C.).

²⁵ J. Pickersgill, *The Mackenzie King Record*, (Toronto: U. of T. Press, 1960) Vol. 1, at 74.

²⁶ *Id.* at 353.

representation by counsel. Colonel George Drew, a prominent Ontario Conservative, was appointed as Conservative Party counsel. After a lengthy hearing, at which I served as secretary, Chief Justice Duff delivered his report on June 4th. I am certain that the report, which completely exonerated the government from any blame in the unfortunate affair, represented Sir Lyman's unbiased appreciation of all of the evidence presented to him. It did not, however, meet with general approval. In July, Colonel Drew wrote Mackenzie King a very strong letter indicating his disapproval of the report and attacking the Chief Justice. King felt obliged to communicate the contents of the letter to Sir Lyman, and Sir Lyman was, quite understandably, greatly upset. He spoke of Colonel Drew's behaviour as being "the worst he had ever known."²⁷ King looked upon Drew's actions as being motivated by the basest of political instincts²⁸ and I dare say Sir Lyman shared this opinion. Colonel Drew allowed the contents of his letter to come to the attention of the press. Sir Lyman, of course, found himself in a particularly difficult position. He was being publicly and directly attacked but could not, as Chief Justice of Canada, say anything in his own defence. The controversy was a bitter one and did not die down quickly. It surfaced again in 1948 when a letter by General Maltby, the officer who commanded the British Forces in Hong Kong at the time of the Japanese attack was published. Questions were raised on the matter in the British House of Commons and Colonel Drew's letter of criticism, which had not been previously made public, was published in the *Ottawa Citizen*.²⁹

Sir Lyman felt the sting of his public embarrassment for the rest of his life. He took the position that henceforth Judges should not be asked to sit on Royal Commissions, particularly those which might have political overtones. He was not vindictive though. Despite Colonel Drew's attack on him, Sir Lyman sent a telegram to him many years later when he was seriously ill in hospital, wishing him a speedy and complete recovery.

On January 7th, 1944, Sir Lyman retired from the Supreme Court. He was then seventy-nine years old. By this time the retirement age for judges had been fixed at seventy-five. Sir Lyman, however, had had his term of office extended twice, once for three years and once more for one year. A farewell ceremony was held at the Supreme Court on December 15th, 1943. It was a touching and impressive scene. The Canadian Bar Association paid tribute to Sir Lyman's prominent position among our jurists, and his old friend, Aimé Geoffrion spoke. Sir Lyman replied with a few words that made a lasting impression on everyone present.³⁰

Even in retirement, Sir Lyman did not put aside completely his public duties. As I mentioned earlier the Second World War had prevented Sir Lyman from making his annual visits to Britain to sit on the Judicial Committee of the Privy Council. In 1946, however, Prime Minister Mackenzie

²⁷ *Id.* at 404.

²⁸ *Id.* at 405.

²⁹ *Id.* Vol. 4, at 243.

³⁰ See *supra*, note 11 at 6-10.

King requested that Sir Lyman make yet another trip to London to sit on a series of cases that had been forwarded from Canada. Sir Lyman agreed on the stipulation that I should accompany him as his secretary. I had been acting as secretary to the Royal Commission on Espionage in Canada (the Gouzenko affair) but the Commissioners (Taschereau and Kellock J.J.) readily excused me as the hearings were about to be concluded and most of the report had been completed. Sir Lyman was particularly looking forward to his duties in London since Mr. Geoffrion had been retained by the Federal Government to argue some of the appeals. Unfortunately, Mr. Geoffrion passed away just before he was ready to depart for London. The letter of sympathy which Sir Lyman wrote to Madame Geoffrion was one of the most touching I have ever read.

Sir Lyman and I sailed from New York on the Queen Mary. By coincidence, one of the passengers aboard was his friend, Lord Wright of the Privy Council. The crossing was enjoyable and Sir Lyman, who had a particular fondness for the ocean, was in fine spirits when we arrived at the Dorchester in London. His many colleagues welcomed him, and his old friend of Alaska Boundary Commission days, Lord Simon, had him out to his home on weekends. Sir Lyman sat daily and I accompanied him to the room where the Judicial Committee sat. The informal manner in which the Privy Council hearings were conducted made a lasting impression on me. The members of the Committee were in lounge suits but the barristers were gowned and wigged. A distinguished group of Canadian counsel appeared at the time. Included among them were the Hon. J. W. de B. Farris, K.C., Mr. Hugh O'Donnell, K.C., Mr. L. Forsythe, K.C., and Mr. W. R. Jackett, later to become Chief Justice of the Federal Court of Canada.

Our passage for the return from Britain was booked aboard the Aquitania which sailed from Southampton. For that voyage this old lady of the seas was commissioned as a "bride ship". Aboard there were hundreds of young girls who had married Canadian soldiers during the war. Many of them had small babies with them. Sir Lyman gave up a suite that had been reserved for him so as to permit more young brides to make the voyage. We were fortunate in having a number of distinguished scientists as passengers with us. Sir Lyman particularly enjoyed the company of Dr. C. J. MacKenzie, one of his cronies in the Fortnightly Dining Out Club. Dr. J. B. Collip of the University of Western Ontario was also on board and we spent many hours in pleasant conversation with both of these men.

Shortly after our return to Canada, Sir Lyman said that he was having difficulties with his landlord and wanted to move. He asked me to find a suitable home for him and his sister, Miss Annie Duff, who had lived with him since 1930. After the death of his wife, Sir Lyman had for a short while engaged the services of a cook and household staff. The arrangement did not work out well and so his sister became chatelaine of the household. I called some realtors and looked about and finally found a house at 259 Clemow Avenue which I thought would be suitable. I described the house to Sir Lyman and he said, "Buy it." I asked him if he did not want to see it first and he said, "No — if you think it will suit us, that will be enough." I arranged the purchase, and the first time that he and his sister saw the

house was the day they moved in. Fortunately for me, they liked their new home and they spent the remainder of their lives there.

Even at an advanced age, Sir Lyman remained active. He made weekly trips to the Parliamentary Library to borrow books and chat with his friend, Francis Hardy. He enjoyed going for drives. I would call for Sir Lyman two or three times each week and we would go for long motor trips in the countryside around Ottawa. In 1948 we made a somewhat longer trip to Montreal to attend the Annual Meeting of the Canadian Bar Association. Sir Lyman was then eighty-three years of age. I called for him after one of the many dinners he attended and when we were back in the hotel room I asked him how things had gone. Evidently the evening had not been successful. "Everything", he said in a weary voice, "that was said was destitute of distinction."

He continued to take an interest in the affairs of the Supreme Court and often chatted with his colleagues on the Bench. His successor as Chief Justice, Rinfret J. once stated that he even kept a close eye on their judgments.

He would read our judgments regularly and very, very often he would write to me his comments, whether favourable or not — always courteous and kind. He would say: "I congratulate the Court on the able solution given to that problem" or — although not too often: "I am not sure that, in this case, the Court has reached the right conclusion."³¹

Sir Lyman did not slip entirely from public view in retirement. Indeed, in these years he gathered a rich collection of tributes earned over his many years of public service. In 1947, the Canadian Bar Association honoured him. Prime Minister Mackenzie King offered this tribute:

Forty years a judge, nearly all of that time a Justice or a Chief Justice of the Supreme Court, Sir Lyman Duff, by his principles, his judgments and his personality, has done more than any other man I know to keep aflame in the hearts and minds of Canadians that respect for the courts which is so wholesome and precious an element in the life of the Nation.³²

In the following year, the Canadian Bar Association presented a bust of Sir Lyman to the Government of Canada. The sculptor was Mr. Orson Wheeler of Montreal. The bust, which is cast in bronze, is a splendid piece of work. It has been placed at the front entrance of the main Courtroom of the Supreme Court Building, and greets every barrister who comes before the Court. At its unveiling, speeches were delivered by Chief Justice Rinfret, The Right Honourable J. L. Isley, P.C., Minister of Justice, and Mr. John T. Hackett, Q.C., President of the Canadian Bar Association.

In these years Sir Lyman remained a friend and confidant of many public figures. Prime Minister St. Laurent had known Sir Lyman a long time. The day he entered the Cabinet as Minister of Justice, Mr. St. Laurent telephoned my office to inquire if he might pay a call on Sir Lyman and the Members of the Court as he was forsaking his professional career for a political one. Sir Lyman was delighted to see him and wished him well.

³¹ *Supra*, note 1 at 338.

³² *A Great Canadian Jurist* (Editorial Obituary), *The Ottawa Citizen*, April 27, 1955, at 52, column 1.

When Mr. St. Laurent succeeded Mr. King as Prime Minister, Sir Lyman wrote him a letter indicating that with his many talents, he would be one of our greatest Prime Ministers. Their friendship continued after Sir Lyman's retirement and they exchanged birthday and Christmas greetings for some years.

In June 1954, Mr. St. Laurent called at Sir Lyman's house one afternoon. I happened to be in an adjacent room talking to Miss Duff when the maid showed the Prime Minister into the study where Sir Lyman was waiting. After Mr. St. Laurent departed Sir Lyman told me that the Prime Minister had said that he proposed appointing Kerwin J. as Chief Justice of Canada, but he wondered if there would be any criticism because Kerwin J. was a Roman Catholic. Sir Lyman said that he had told the Prime Minister that religion, race or creed should have no bearing on any Supreme Court of Canada appointment, whether it be Chief Justice or Puisne Judge; that legal competence, character, breadth of vision and quality of heart and mind should be the deciding factors on any appointment; and that Kerwin J. had been an excellent trial judge in Ontario, an outstanding Puisne Judge on the Supreme Court of Canada, and would make a first-class Chief Justice of Canada. Sir Lyman also told me that the Prime Minister discussed his intention to appoint his Minister of Finance, the Hon. D. C. Abbot, P.C., to the Bench to fill the vacancy from the Province of Quebec which would be caused when Chief Justice Rinfret retired. Again, there was concern that there might be criticism because, although Mr. Abbott was completely bilingual, his native tongue was English and he was an Anglican. Again, Sir Lyman said that he had assured the Prime Minister there would be no criticism whatever because Mr. Abbott's name was highly respected throughout all of Canada, and because he had demonstrated his ability and judgment in the several Cabinet posts which he had held. Sir Lyman was confident that Mr. Abbott would be a credit to the Supreme Court of Canada. After this conversation, which it should be noted occurred some ten and one-half years after Sir Lyman's retirement, the Prime Minister and Sir Lyman took tea together.

Sir Lyman's last public appearance took place upon the occasion of the retirement of his friend, Chief Justice Rinfret, on June 21, 1954. Sir Lyman, who was then eighty-nine, was invited to sit on the Bench with the Members of the Court and say a few words. Since the new Courthouse had not been completed until 1946, two years after Sir Lyman's retirement, this was his first opportunity to sit on the dais in the impressive new courtroom. He made a warm and fitting speech, testifying to the character and ability of his old friend Rinfret. On January 7, 1955, Sir Lyman reached his ninetieth birthday and was inundated with congratulatory telegrams, letters and telephone calls.

Sir Lyman's health had been good up until his ninetieth birthday, but he began to fail in the following month. He told me that his appetite was gone and that he tired very easily. He took to spending most of his time in bed. One day during the latter part of February, I got permission from Chief Justice Kerwin to take a long lunch hour. I purchased four dozen oysters (opened on the half shell) and a bottle of champagne, and went to see Sir Lyman. I was determined that I was going to see that he ate something. He

was in bed when I arrived, but when I told him what I had for him, he said, "I am getting up — a gentleman can't eat and drink in bed." We went to a room off the upstairs library and demolished the oysters and drank the champagne. Sir Lyman returned to his bed and never got up again.

A week or so later he was admitted to the Ottawa Civic Hospital. I saw him two or three times daily while he was in the hospital. Mr. Justice Rand had developed a particular affection for Sir Lyman during their association on and through the Court, and one day I took him with me on my visit to the hospital. Mr. Justice Rand had been enquiring daily about Sir Lyman's condition and I was delighted when he said that he would like to pay a call. Justice Rand held Sir Lyman somewhat in awe; on the way to the hospital he said that he regretted he did not know Sir Lyman in the intimate fashion that I did. He asked me what I was in the habit of doing when I went into the room. I said that the sides of the bed were raised, but I always went to Sir Lyman, took his hand and stroked his forehead. When he entered the room, Justice Rand was a little embarrassed but he did exactly as I had been doing. Sir Lyman opened his eyes and looked at his visitor. "Rand," he said, "you are my friend." Justice Rand and I were deeply moved.

Even though he realized that he was desperately ill, Sir Lyman remained cheerful to the very end. I was with him when he passed away on April 26, 1955. When news of his death was published, tributes to Sir Lyman poured in by letter and telegram from all over the world. Queen Elizabeth sent condolences to the family through the Governor General. His old friend, Grattan O'Leary, wrote a magnificent tribute for the *Ottawa Journal*.³³ Sir Lyman was remembered by more than powerful and public figures. A taxi driver from the Red Line Taxi Company, the firm Sir Lyman always used, called at the house just before the funeral and presented a wreath of flowers. It is interesting to note that the drivers of the company, on hearing of Sir Lyman's passing, took up a collection to honour a man they looked upon as a friend.

Miss Duff asked me to make the necessary funeral arrangements. The service, a private one, was held in the Duff home. The Venerable Archdeacon Channel G. Hepburn, C.B.E. read the service. The honorary pallbearers included Prime Minister St. Laurent, Justice Minister Garson, Chief Justice Kerwin, and all of the Members of the Supreme Court, former Chief Justice Rinfret, and Hon. Frank Hughes, Q.C., one-time judge of the Supreme Court of Canada. A group of friends were also asked to serve as pallbearers, and numbered among these were some of Sir Lyman's oldest colleagues. This group included the Hon. W. D. Herridge, M. Grattan O'Leary, Francis Hardy, and Dr. Lyman Duff, a cousin of Sir Lyman and Dean of the medical school at McGill. Miss Duff asked me if I would serve with them and I was more than honoured to accept.

I was the Executor of Sir Lyman's will, and his very modest estate was bequeathed to his sister, Miss Annie Duff. Before he died, Sir Lyman told me that he regretted that he could not leave anything to me, to which I replied that he had already given me the priceless gift of his friendship and I

³³ Editorial Obituary, *Ottawa Journal*, April 27, 1955, at 6, column 1.

could not ask for more. One of the last things he asked of me before he died was to promise him that I would look after his sister until she died. I assured him that I would be happy to do so and I saw Miss Duff three or four times each week until she passed away in May, 1965.

Sir Lyman Duff is still regarded by many Members of the Bench and Bar as being our greatest jurist. It is a view which I, of course, am happy to share. The tributes paid to him at the time of his death remain, to my mind, as fresh and relevant now as they were almost twenty years ago. Justice Minister Garson wrote the following at that time:

Upon all the many, complex, intricate and difficult assignments which he undertook, he brought to bear a highly trained, well-informed and massive native ability, plus an unusual capacity for hard, sustained and painstaking labour, great as was his ability he never placed an undue reliance upon it alone. His impressive achievements were the product not only of his talents but of his industry, his perseverance and his thoroughness.³⁴

While all this is true, I claim the privilege of remembering him in another light. I shall remember him for giving me the opportunity to be associated with the Court, for the many hours he devoted to helping me gain some understanding of the law, for the respect he instilled in me for the administration of justice and, particularly, for the Supreme Court of Canada. Moreover, I shall remember him for his conversations and for our talks on books.

But above all, I shall always remember his abiding and precious friendship.

³⁴ *Tribute to Sir Lyman Duff paid by Justice Minister*, Ottawa Journal, April 27, 1955 at 2, columns 1 and 2.