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WENDY OWEN AND J.M. BUMSTED

Divorce in a Small Province: A History of Divorce on Prince Edward Island from 1833*

THE HISTORY OF DIVORCE IN CANADA is a veritable quagmire of inconsistencies and contradictions — constitutional, legal, and moral. Complicating matters even further are frequent misapprehensions and misunderstandings, particularly among the lay public, about the nature and extent of divorce law and practice in Canada's past. Contrary to popular mythology, the common law provinces of Canada did not slavishly follow British precedents and practice during the colonial period. Although the common law and Anglo-Canadian legislation did provide some common thread to the experience of divorce, at least outside Quebec, it is impossible to deal sensibly with much of its history except on a province-by-province basis.¹ Before Confederation the provinces of British North America had widely varying procedures on divorce, which was plainly a provincial matter. And despite the granting of jurisdiction over divorce to the Dominion in section 91 of the British North America Act, as in other legal matters the provinces retained a substantial say on the subject. Sections 129 and 146 provided that all laws in force and all courts to enforce them — including divorce courts — in the provinces entering union would be allowed to continue.²

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1 No reliable or satisfactory modern study of the history of divorce in Canada exists. Until Professor James Snell's long-awaited study covering the period 1900-1939 appears, we are forced to rely upon: (a) older legal studies such as J.A. Gemmill's, *The Practice of the Parliament of Canada upon Bills of Divorce* (Toronto, 1889) or C.S. McKee's, "Annotations: Law of Divorce in Canada", *Dalhousie Law Review*, 1 (1922), pp. 17-120; (b) twentieth-century textbooks on divorce practice such as R.R. Evans, *The Law and Practice Relating to Divorce and other Matrimonial Causes* (Calgary, 1923) or H.L. Cartwright and E.R. Lovekin, *The Law and Practice of Divorce in Canada* (3rd ed., Toronto, 1962); and (c) a handful of modern articles, such as Constance Backhouse, "Pure Patriarchy: Nineteenth Century Canadian Marriage", *McGill Law Journal*, XXXI (1986), pp. 265-312, and "Shifting Patterns in Nineteenth-Century Canadian Custody Law", in D.H. Flaherty, ed., *Essays in the History of Canadian Law: Volume 1* (Toronto, 1981), pp. 212-48; J.G. Snell, "'The White Life for Two': The Defence of Marriage and Sexual Morality in Canada, 1890-1914", *Histoire Sociale/Social History*, XVI (1983), pp. 111-30, and "Marital Cruelty: Women and the Nova Scotia Divorce Court, 1900-1939", *Acadiensis*, XVIII, 1 (Autumn, 1988), pp. 3-31; Rebecca Veinott, "Child Custody and Divorce: A Nova Scotia Study, 1866-1910", in P. Girard and J. Phillips, eds., *Essays in the History of Canadian Law: Volume 3, the Nova Scotia Experience* (Toronto, 1990), pp. 273-302.

2 *Constitution Act, 1867* (U.K.), 30 and 31 Victoria, c. 3 (hereafter *British North America Act*).

New courts in other provinces, which could act in divorce cases, would subsequently be permitted as well. Provincial variation on the matter of divorce was a way of life before the federal divorce reform of 1968, and, since that legislation operated through provincially administered courts and did not deal with many questions integral to divorce proceedings still in provincial jurisdiction (such as property rights and family law), the role of the provinces has remained crucial — and distinctive.

The history of divorce on Prince Edward Island offers an excellent illustration of the extent of deviation possible from almost any generalization about the subject in Canada, as well as helping to make the point that deviation from norms is one of the few possible generalizations that can be advanced.³ No one could claim that the Island's curious record on divorce was typical of Canada, but the conditions which made peculiarity possible were built into the system. Thus the Island had a pre-Confederation divorce court which was allowed to remain dormant until 1945, when it was resurrected to deal with the marital problems of returning servicemen. Because the court was an old colonial legislative court, it was unusually constituted — at least for the 1940s — and was eventually reformed by the province after what should have been an important constitutional opinion by the Island Supreme Court that appears to have gone virtually unnoticed. This paper represents the first attempt to reconstruct the full history of the Island's strange record on divorce. Such a reconstruction must deal not only with the Island's peculiarities, of course, but also with the constantly shifting circumstances that made them possible.

Prince Edward Island made its first foray into divorce jurisdiction in 1833, when its Legislative Assembly heard a petition from one Peter Fisher of Indian River. Fisher was a mariner, whose wife of three years had left his house and child — while he was at sea — to “maintain an adulterous intercourse” with a tailor “now resident in another Province”.⁴ The petitioner wanted a divorce, and in the absence of a “competent Court in the country to grant the same”, prayed that the Assembly would grant him relief. The Assembly, obviously regarding the matter as one within its purview and competence, sent the petition to a subcommittee to deal with, “by Bill or otherwise”.

That divorce was a question that colonial legislatures could consider had ample precedents, despite the monopoly over the dissolution of marriages

3 The only scholarly attempt to deal with the history of divorce on Prince Edward Island is to be found in the pages of Frank McKinnon's *The Government of Prince Edward Island* (Toronto, 1950), pp. 262-5. This brief account is admirable as far as it goes, but not even McKinnon could fully communicate the labyrinth represented by divorce on the Island in a few pages, and he was concerned mainly with the period from 1945 to 1950. See also the brief article by W.E. Bentley, K.C., “Divorce Practice in Prince Edward Island”, *Alberta Law Quarterly*, 4 (1940-42), pp. 246-9.

4 *Journal of the Legislative Assembly of the Province of Prince Edward Island*, 1833, 9 February 1833.

maintained by the English ecclesiastical courts of the time and the fiction maintained by those courts that divorce was impossible.⁵ The Puritan founders of the New England colonies in the 17th century had never acknowledged the authority of the ecclesiastical courts, and had established secular divorce courts with relatively liberal grounds in the first years of settlement.⁶ Divorce was therefore possible in secular terms in several colonies of North America before 1750, when the Nova Scotia Council had granted an army officer serving in the province a divorce from his wife on the grounds of her adultery, providing for his remarriage but not hers. The British government disallowed this particular ruling, but could not stem the trend in a Nova Scotia heavily influenced by New England precedent. One of the first acts of the Nova Scotia Assembly, when it was finally called by Governor Charles Lawrence in 1758, gave the governor and council the right to hear “all matters relating to prohibited marriages and divorce”.⁷ Through its use of the royal disallowance, the British government forced a narrowing of initially broad grounds (including desertion for three years while wilfully withholding maintenance), reducing the grounds to impotence, consanguinity or pre-contract, adultery and cruelty.⁸ Nevertheless, Nova Scotia had gone considerably further than the English law in its definition of grounds, which were much broader than merely adultery.

When New Brunswick passed a 1791 “Act for Regulating Marriage and Divorce, and for Preventing and Punishing Incest, Adultery, and Fornication”, provincial leaders had no doubt about the right or necessity of such legislation “in order to the keeping up of a decent and regular society”.⁹ Unlike Nova Scotia, New Brunswick did not accept cruelty as a ground, although frigidity was allowed. In any event, both Nova Scotia and New Brunswick had established precedents and principles that Prince Edward Island could apply in response to Peter Fisher’s petition. Although the Assembly of 1833 was a warmly partisan one, the divorce issue seems to have been uncontentious. Two days after Fisher’s petition was presented to the House, the committee to which it had been referred presented a bill entitled “An Act for establishing a Court of Divorce, and for preventing and punishing Incest, Adultery and Fornication”. That bill was amended several

5 For the British background, see Reginald Haw, *The State of Matrimony: an Investigation of the Relationship between Ecclesiastical and Civil Marriage in England* (London, 1953), and Lee Holcombe, *Wives and Property: Reform of the Married Women’s Property Law in Nineteenth-Century England* (Toronto, 1983).

6 On the American background, see Nancy F. Cott, “Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts”, *William and Mary Quarterly*, 3rd ser., XXXIII (1976), pp. 586-614.

7 *Statutes of Nova Scotia*, 32 George II, c. 17. See Kimberly Smith Maynard, “Divorce in Nova Scotia, 1750-1890”, in Girard and Phillips, eds., *Essays in the History of Canadian Law*, pp. 232-72.

8 *Statutes of Nova Scotia*, 1 George III, c. 7.

9 *Statutes of New Brunswick*, 31 George III, c. 3.

times in the House and revised further by the Council, but it was passed within days and sent off for royal assent. The reason the legislation had appeared so swiftly out of committee was, of course, because that body had turned to the New Brunswick statutes and reproduced them virtually intact for the Island.¹⁰

The main features of the bill taken from the New Brunswick legislation included: the use of the lieutenant-governor (or the chief justice of the supreme court in his stead) and the Council (or five members thereof) as a divorce court; the power of other courts to punish "Incest, Adultery, Fornication and all Acts of lewdness and unlawful Cohabitation and intercourse between Man and Woman"; the grounds for divorce ("frigidity or impotency, adultery, and consanguinity..."); and finally, a clause providing "that the Wife, in such case [of a decree of divorce], shall not be thereby barred of her Dower, or the Husband be deprived of any Tenancy by the Curtsey [sic] of England, unless it shall be so expressly adjudged and determined in and by such Sentence of Divorce". As in New Brunswick, the Island's property laws had (since 1781) guaranteed to married women their common law right to a life interest in one-third of the real property at the death of their husband, with a similar provision for husbands. It would have been logical for those rights to cease at divorce, as indeed most of the 20th century textbooks on Canadian divorce law would insist that they did.¹¹ There was, however, nothing automatic about the extinction of dower or curtesy through divorce on Prince Edward Island according to the Divorce Act of 1833. The major new element, introduced through amendment on the Island, was a clause debarring an adulterous party from remarrying during the lifetime of the former spouse.

Like all Island legislation, the Divorce Act of 1833 required royal assent before becoming law. In his comments on the 1833 legislation, Attorney-general Robert Hodgson noted that the neighbouring colonies of Nova Scotia and New Brunswick had established a similar court, adding that "the present Act is (with the exception of the clause prohibiting the Guilty party from marrying during the life of his or her Wife or husband and which is believed to be novel) a mere transcript of the one in force in the latter Colony, and which is considered beneficial".¹² Hodgson's observation on the novelty of the remarriage clause was

10 During the same period that the Island was establishing a divorce court, New Brunswick was revising its legislation to enable its divorce court to hear cases more expeditiously, while during its 1833-34 legislative session, the assembly of Upper Canada heard introduced (and dropped before second reading) a bill "to enable married people to obtain divorce in certain cases". Whether this increased activity on the divorce front was purely coincidental or a response to some presently unknown common stimulus is not clear.

11 See, for example, Cartwright and Lovekin, *The Law and Practice of Divorce*, which states axiomatically (p. 146) that "Dower being an inchoate right which only crystallizes when a husband predeceases his wife, having been during the marriage seized of lands, the right automatically expires upon the granting of a decree of divorce or annulment".

12 Colonial Office Papers [hereafter C.O.] 226/50/163, Public Records Office, London.

not entirely accurate, since Nova Scotia had attempted to do something similar nearly a century earlier. But the British government behaved similarly in both cases, and this bill was not accepted by the Crown in the normal course of events. The reasons for this delay were apparently not forwarded to the Island authorities and need not concern us here. In any case, the 1833 bill was resubmitted in 1835 as Prince Edward Island 5, William IV, c. 10 with both the remarriage clause and the clause allowing other courts to punish various sexual digressions (copied originally from the New Brunswick legislation) omitted. The comments of Attorney-general Hodgson on the amended legislation are instructive:

The want of a Court of Divorce is felt as a grievance, and it is believed that this is the only Colony in North America which has not such a Court. The Act of the 3rd year of the reign of His Present Majesty, which the present Act repeals, has not yet received His Majesty's Assent, and it is surmised that some of the Provisions of that Act which go to preclude the guilty party in cases of Divorce for Adultery from again contracting Matrimony in the lifetime of his or her former Wife or husband and provide for the punishment of Incest and Adultery in the Supreme Court have been the chief obstacles to the passing, the present Act therefore has been passed to meet these Objections, consequently leaving out the Clauses contained in the former Act supposed to be obnoxious — in case that Act should by any chance be assented to in the mean time, this Act contains a Clause repealing it.¹³

Whatever the reasons for the delay, the Crown confirmed the 1835 legislation in 1836, and the Island finally had a divorce court.

Having a court to deal with divorce is not quite the same thing as actually having divorce, and a number of sources repeat the misconception that, as Backhouse puts it, “not one application was brought [before the court] during the entire nineteenth century”.¹⁴ The records of the Island court of marriage and divorce have certainly not survived *in toto*, but enough scattered evidence remains to indicate that the court did, at least occasionally, have applicants. Peter Fisher may have used the court once it was established, and two other cases can be documented in some detail. For the case of *Collings v Collings*, filed in the court of divorce late in 1840 and heard in 1841, a complete case file survives in the Public Archives of Prince Edward Island.¹⁵ In the case of *Capel v Capel*, heard in 1864, most of the papers on the divorce action do not survive, but material on two other cases related to that action is still available and it is possible to reconstruct, at least partially, the original case.

13 C.O. 226/52/294-5.

14 Backhouse, “Nineteenth Century Canadian Marriage”, p. 270.

15 RG 2810/141-2, Public Archives of Prince Edward Island [hereafter PAPEI].

By 1840 an Executive and a Legislative Council had replaced the governor's council of the Island, and the court of divorce — as the lieutenant-governor's court — went to the former rather than the latter. At this point responsible government had not yet been introduced on the Island, and so the Executive Council was not yet composed of the ministers of the government. Nevertheless, the question of the composition of the court was one of a number of rules of practice detailed in several papers included in the *Collings v Collings* case file, one labelled "Queries as to practice in Divorce Court" and another "Precedents in the Court of Marriage & Divorce, or Memo, of the usual proceedings in the Court of Marriage and Divorce with a table of fees". The presence of these papers suggests that the court had not met often, if at all, since its creation, and was laying down its rules before hearing this particular case. The proceedings were as follows: a libel (or claim) was filed by the plaintiff and served upon the defendant who was to file an answer; a commission examined witnesses for either side using prepared interrogatories; the complainant then petitioned for publication of testimony, which was read at the first meeting of the court; then counsel was heard, if necessary; finally the court was closed and the decision (either a divorce decree or a dismissal of the case) was rendered. These procedures were relatively non-adversarial. The schedule of fees included 11s 8d per day to the registrar for attending court and £1 per day for the lieutenant-governor and each councillor attending court; a simple case was not likely to cost less than £20, and complex ones could be even more expensive. Given such costs, only the well-to-do ought to have been able to afford the process.

The libel stated the claims of the plaintiff. Collings and his wife had been married in 1826; she had left his bed and board in 1838 and ever since lived separate from him, committing adultery and removing from the Island in the process. The plaintiff was unable to supply the original copy of the marriage licence, and the question of the documentation of the marriage became as important a matter to the interrogatory commission as the alleged adultery. The defendant (but not the person with whom the alleged adultery had been committed) was served with a writ at Miramichi in New Brunswick, but did not respond. The proceedings continued nonetheless. The commissioners determined that it was practice at the time of the marriage for the presiding justice-of-the-peace to retain the original copy of the licence, but in this case the j.p. had died and his papers had been destroyed. They also heard several witnesses on the subject of the adultery, which was, itself, a fairly complex business.

According to two independent witnesses, the defendant had been a member of a party intending to sail from Charlottetown to St. Peter's Harbour on the north shore of the Island. When the voyage was delayed by high winds, the party was invited by one Edward Wood to pass the night aboard his schooner, docked at the Charlottetown wharf. The defendant, appearing intoxicated, went down into the cabin of the vessel with her fellow passengers, and more wine was drunk. After a time, the other passengers were ordered off the vessel, one commenting,

“This is strange work, I see we are not wanted here, I will go and watch them”. In company with one of his colleagues he looked through the companionway to see Wood “assisting the said Ann Collings into one of the Births [sic] in the Cabin and immediately after the said Edward Wood got into the same Birth [sic] with the said Ann Collings”. The witnesses then went off to various taverns in Charlottetown for more refreshment, returning later to observe that the two were still in the same berth. When the boat for St. Peter’s was at last ready to depart the defendant was summoned, but could not be found. The boat ultimately proceeded without her. The principal witness testified that he could not “but believe that the said Edward Wood and the said Ann Collings had illicit connexion with each other on the night referred to”. A second witness corroborated most of the story, also testifying that he believed “that criminal connexion must have taken place”. Based upon this evidence, the court dissolved and annulled the Collings marriage “for the Crime of adultery”, and went on, as was its prerogative, to bar the dower of the defendant. The two commissioners charged three guineas each for the examination of five witnesses, three of them regarding the marriage and its certificate, and with clerk’s costs, the bill for the execution of the commission was £9 6s 8d, raising the total cost of the action well over £20.

The next divorce case on the Island for which we have evidence occurred in 1864, the year of the Charlottetown Conference. By this time, two significant changes had taken place that affected the Island court of marriage and divorce. One was the adoption of responsible government, which meant that the court was no longer simply a legislative court, but a political one as well, since the Island’s Executive Council, from which most of its membership was drawn, was now the cabinet and composed of the party in power in the House of Assembly. The second was the passage of imperial statutes on divorce, particularly the Divorce and Matrimonial Causes Act of 1857 (20 and 21 Victoria, c. 85) and its subsequent revisions (21 and 22 Victoria, c. 108; 22 and 23 Victoria, c. 61; and 23 and 24 Victoria, c. 144). By 25 and 26 Victoria, c. 81, the act of 1860, which was due to expire on 31 July 1862, was made perpetual, and it was thus in force in England in 1864. This act shifted jurisdiction for divorce from ecclesiastical courts to a Court for Divorce and Matrimonial Causes, and established the notorious double standard for cause, whereby husbands could gain divorce on the sole grounds of adultery, while wives would have to demonstrate that since the celebration of the marriage, the husband “has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without any reasonable excuse, for two years or upwards”.¹⁶ The new legislation also provided for the court to order alimony to the wife in the divorce decrees. This legislation,

16 This provision was repealed by the Canadian Parliament in 1925.

while not in force on Prince Edward Island, did suggest the direction of England's reform of its divorce law.

A case file for *Capel v Capel* in the court of marriage and divorce does not survive, but there is documentation on two related cases involving the litigants. One was an indictment in the Supreme Court of the Island for assault upon Anne Capel by her husband, Henry, brought by a jury from the Court of Assize and General Jail Delivery for Queen's County early in 1864. The defendant was found guilty and sentenced to three months in the common jail of Queen's County as well as a recognizance of £100 to keep the peace before discharge.¹⁷ The Court of Marriage and Divorce not only granted Anne a divorce, but ordered Henry (who was a surgeon residing in Bedford) to pay alimony to the plaintiff. He refused to pay, and was imprisoned for contempt by the court. Capel's lawyer applied for a writ of *Habeas Corpus* on the ground "that the Court has not the power to enforce its decree by attachment". This petition was rejected by a Supreme Court judge at chambers on 21 August 1865 because, opined the judge, "I incline to think that the 5 Wm. 4 c. 10, which constitutes the Governor and Council 'A Court of Judication in the matters and premises aforesaid with full power and jurisdiction in the same', intended to give this power to enforce its decree".¹⁸

The unnamed judge went on to explain his ruling:

It is, no doubt, true that where a Statute creates a tribunal to put in force laws of the mother country, which were previously dormant for want of a Court to administer them, the new tribunal must follow the principles and, as far as possible, the forms of procedure usual in Courts having cognizance of such matters in *England*. But in this country one (and indeed the most effective) mode of enforcing a decree used in *England* (*viz.*, excommunication) cannot be employed, as we can hardly presume the Legislature intended to give that power to the Governor and Council. And therefore, it would seem reasonable to suppose that while the Legislature intended the new tribunal to adhere to the principles followed in administering that branch of law in *England*, it did not intend to restrict it in every particular to the English practice, but left it to adopt one more fitted to the circumstances of the country in which its functions were to be exercised. But I pronounce no decided opinion on this point. If it were necessary to do so, I should require to give a more careful examination to the authorities than I have done.

17 Supreme Court Records, Case Papers 1864: *Capel v Capel*, RG6, PAPEL.

18 *Reports of Cases determined in the Supreme Court, Court of Chancery and Court of Vice Admiralty of Prince Edward Island by the Honourable James Horsfield Peters* (Charlottetown, 1872).

The application was discharged because “the complaint is merely that the mode adopted to enforce obedience to a legal decree is irregular”. Presumably at this point Henry Capel decided to pay, since there is no further record of him in the court files of the Island, and no further evidence of any activity by the court of marriage and divorce; one later commentator insisted without documentation, however, that Capel had died in jail.¹⁹ In any event, a subsequent chronicler of the “Bench and Bar” of the Island reported that in the Capel v Capel case, “the court appears to have exhausted its energies”.²⁰ The suggestion is strong that no further cases were heard by the court before the entrance of the Island into Confederation in 1873.

While it would be tempting to conclude that upon entrance into the Dominion the Island had sacrificed its jurisdiction over divorce to section 91 of the British North America Act, such was not the case. It was true that by 1901 the Island had achieved a certain fame (or notoriety) as the only jurisdiction in North America that had not experienced a divorce over the preceding thirty-odd years, but that record was the Island’s own responsibility and was not connected to union.²¹ The Island could and did blame Ottawa for many things, from lack of ferries to fishery policy, but not for the lack of a divorce court. An Island government had on at least one occasion refused to resurrect the now-dormant court of marriage and divorce, and only in 1913 did any Islander desire a divorce sufficiently strongly to employ the complex and expensive mechanism of the Canadian Senate’s Committee on Divorce, the procedure available to Canadians without access to provincial courts of divorce. The refusal of the Island government to constitute the divorce court in the case ultimately brought to the Senate in 1913 was perhaps understandable since it was common knowledge at the time that the case was collusive.²² One member of the Island government of the time later insisted that if the defendant in the Senate case “had applied to the Supreme Court of Prince Edward Island he would certainly not have obtained a divorce; but the Senate here was not supposed to know the circumstances, and a divorce was granted”.²³ In any event, the strength of Island feelings about divorce would be exhibited in 1920, when a bill was introduced into the Canadian Senate to establish a divorce court for the Island.

The increasing pressure for divorce in Canada, exacerbated by the social upheavals of World War I, led to the introduction of several bills respecting

19 Bentley, “Divorce Practice”, p. 247.

20 John A. Mathieson, “Bench and Bar”, in D.A. MacKinnon and A.B. Warburton, *Past and Present of Prince Edward Island* (Charlottetown, 1906), p. 140.

21 The *Daily Patriot* (Charlottetown), 6 March 1901, reprinting an undated article from the *Boston Herald*, reports on the absence of divorce on the Island.

22 *Statutes of Canada* 3-4 George V, c. 183, “An Act for the relief of Elizabeth Adelaide Rayner”.

23 *Debates of the Senate of the Dominion of Canada* (Ottawa, 1920), pp. 201-2. Senators always suspected that a fair percentage of the cases they heard were collusive in nature.

divorce in the Canadian Senate in 1920. One piece of general legislation was withdrawn and replaced with two bills, Bill J (an omnibus piece of reform applying to all Canada except Quebec) and Bill I (intended to give divorce jurisdiction to the Superior Courts of Ontario and Prince Edward Island and extending to those provinces the law of England as it existed on 15 July 1870, thus effectually transferring parliamentary jurisdiction over divorce to those courts and introducing English principles such as the double standard). The proponents of the latter legislation insisted that it was “very conservative”, leaving “the substantive law exactly as we have it today”, which was not entirely true for the Island, given its 1835 legislation.²⁴ Bill I’s introduction by the Chairman of the Senate Divorce Committee was largely a result of the increasing number of divorce cases from Ontario being heard in the Senate. The inclusion of Prince Edward Island was merely to provide symmetry, since the Island was the only other common law province besides Ontario that had no superior court with jurisdiction over divorce. Unlike Ontario, however, the Island did have a pre-confederation court. One senator from the Island insisted that the province had no need or desire for a divorce court, and another maintained that the province had a perfectly good divorce court and did not require special legislation. “We have a court in Prince Edward Island”, he argued, “leave the question to us. We do not want the Federal Government to override our authority”.²⁵ Other senators agreed with this position, indicating a willingness to vote against the legislation because of the inclusion of the Island and adding to the strength of those who opposed divorce in general.

In the course of the debate, the cost of a divorce in Ottawa — as much as \$2,000 — for returning servicemen from a poor province was advanced by some as one argument in favour of a local court, while others maintained that the cost and difficulty of a Senate divorce was a useful deterrent.²⁶ In the end, Island Senator B.C. Prowse supported the bill, insisting:

We do not often have a divorce case in Prince Edward Island. So far as I can remember, we have had only one. But I do not see any reason why we should not have a divorce court on the Island, in case we should need it, so that a poor man as well as a rich man might take advantage of it.²⁷

To this position others had already responded by pointing out that an Island court already existed. Both divorce bills were passed by the Senate by large majorities, opposition coming chiefly from Quebec, but were left off the order

24 *Ibid.*, p. 166.

25 *Ibid.*, p. 171.

26 *Ibid.*, pp. 176, 232.

27 *Ibid.*, p. 233.

paper in the House of Commons on a technicality in the 1920 session.²⁸ Divorce was too touchy an issue to be debated in the popularly-elected and badly fragmented House of Commons in 1920.

The chairman of the Senate Divorce Committee insisted in 1920 that “there is a great disappointment” on Prince Edward Island regarding the failure of Bill I, adding “I understand that there are a few cases in which soldiers are concerned, and it is a long way to have to come up here in the winter time, when, as everybody knows, the ice conditions are bad.” His observations probably said more about the Senate awareness of Island grievances about the transportation links promised at Confederation than about divorce, however. While the Senate was debating Bill I, the Legislative Assembly of Prince Edward Island passed a resolution on the proposed legislation:

... *Whereas*, The people of this Province have not requested the establishment of a Divorce Court. And *Whereas*, The establishment of such a Court will tend to destroy the stability of the home and encourage the dissolution of the marriage tie. *Resolved*, That in the opinion of this House it is not in the best interests of our people that a Divorce Court should be established in this Province until such time as our people indicate a desire for the establishment of such a Court in the Province.²⁹

The *Charlottetown Examiner* editorialized of the legislative resolution a few days later:

The attempt of the Senate to foist a Divorce Court upon this Province was properly denounced. It is stated that more than fifty per cent of the divorces granted in the United States are based on “trumped up charges” resulting from the fascination of the husband, or wife for someone else. Given facilities for it in the courts, the Divorce Evil will increase. So far, P E Island is practically free from it. We need no Divorce Court. We want none.³⁰

Neither the Legislative Assembly nor the newspaper indicated what evidence for popular desire would be acceptable.

And so the Island continued in a virtual state of limbo regarding divorce. The Island’s own Lucy Maud Montgomery made use of the absence of divorce courts in Ontario and Prince Edward Island in her 1927 novel *Jane of Lantern Hill*. The

28 *Ibid.*, p. 858.

29 *Journal of the Legislative Assembly of the Province of Prince Edward Island*, 1920, p. 94.

30 *Charlottetown Examiner*, 29 April 1920.

plot hinged on the marital separation of young Jane's mother and father, the former living in Toronto and the latter on the Island and thus unable to finalize a divorce. Montgomery obviously had not done much research on the subject, since either parent could have gone to the Senate with evidence of adultery on the part of the other, and the availability of provincial courts would not have made divorce possible in the absence of an adulterous relationship. Certainly the Island continued with its curious reputation on divorce, as an article in a 1929 issue of *The American Magazine* entitled "Prince Edward — The Island where there is no Divorce *and no Crime*" demonstrated.³¹ This piece was a paean of praise for an idyllic Island without a divorce problem, a crime problem, an unemployment problem, or a poverty problem. As author William S. Dutton put it:

Progressive, prosperous, and up-to-date, enjoying the newest comforts of modern life and familiar with its luxuries, the 88,000 folks of this Island go nightly to their beds untroubled and unscathed by those dark problems which are keeping our own police, sociologists, and preachers awake or tossing with bad dreams. Why? It seemed to me that we in America, with our rising crime and divorce rates, ought to be interested in the answer. My wife and I went up to Prince Edward Island to get it.

As a piece of investigative journalism, this article may have left much to be desired. But the author did offer some interesting insights into both his own preconceptions and particularly into the official Island mentality.

How long William S. Dutton spent on the Island doing his research is not clear from his article, nor can we know the names of everyone he talked with on the subject of divorce. He mentioned by name Frederick J. Nash, the president of the Patriot Publishing Company, Frank R. Heartz, the lieutenant-governor of the province, John A. Mathieson, the chief justice, Dr. Cyrus Macmillan, head of the English department at McGill University, and A.E. Dewar, "a prosperous retired farmer now residing in Charlottetown" and known for "his reputation for sound thinking and common sense". All five men were quoted at some length on the subject. Dutton's informants, to a man, emphasized the importance of the home and the church in producing a social standard in which divorce was unthinkable. Interestingly enough, they did not single out the Island's substantial Roman Catholic population as a crucial element, regarding traditional Protestantism as being as inimical to divorce as Catholicism.

According to Dutton's report of his interview, publisher Nash pointed out that "few young men marry here until they can provide homes for their brides and

31 William S. Dutton, "Prince Edward Island: The Island where there is no Divorce *and no Crime*", *American Magazine*, CVIII, 6 (December 1929), in RG 2537/64, PAPEI.

maintain them". Mathieson opined that "Divorce is looked upon as an admission of failure here, ...a mark against a man's record, a thing he must explain", adding that "the fact that a man is divorced is a handicap to him if he seeks a responsible position and justly so". According to farmer Dewar, "divorce just isn't fashionable here. It isn't a subject for popular conversation. Folks aren't concerned about it like you are in the States. ...That's how you came by your divorce problem: You made divorce fashionable and popular through arguing about it. Up here, we just don't argue". The Lieutenant-Governor observed that the Island was empowered by the 1835 statute to establish a divorce court, "but no governor has ever bothered to form something for which there is no public demand". He went on to argue:

I know of no place that has a higher standard of morality, and of no people who take a greater pride in their homes. The people derive from God-fearing wholesome stock. They are industrious, and the wealth is generally distributed and not concentrated in a few hands.... We are isolated and beyond the influence of any large city. The island might be likened to a big village in which everybody knows everybody else.

Professor Macmillan observed that few Islanders went to the United States to get divorces, adding his view that "the inheritance laws of the Island don't recognize such divorces" and assuring the interviewer that "It doesn't happen often enough even to be talked about as gossip". The most powerful deterrent to divorce, Macmillan insisted, was "Tradition"; he stressed that "sentiment in a community of this size is more powerful than any law". Not surprisingly, therefore, the creation of a divorce court for Ontario in 1930 was an event that produced not a ripple on Prince Edward Island, despite the earlier legislative tandem.

As we have seen, William Dutton's assertions that one divorce in 1913 was "the only divorce in the Island's recorded history of almost four hundred years" and that the Island's own divorce court had never met were overstatements. As for Dr. Macmillan's opinion that few Islanders went abroad for divorce, it was probably accurate enough, although the occasional foreign divorce would emerge in the subsequent records of the divorce court of the Island after 1945, and even the handful of divorced people recorded in the Canadian censuses were more than Canadian courts could account for.³² In a rural society in which property inheritance was critical, the refusal of Island courts to recognize foreign divorce would be — if true — a genuine deterrent, as was the cost of establishing a foreign domicile. While it remains impossible to probe Island popular opinion on the subject, there was certainly no observable demand for divorce from Islanders until the 1940s. Marital breakups on the Island produced separations,

32 Divorced persons living on Prince Edward Island numbered 42 in 1921, 28 in 1931, and 41 in 1941.

but not divorces. When the 1941 census counted separated persons as well as divorced ones, it found 380 Islanders living apart from their spouses, and, while the Island had, with Quebec, one of the lowest ratios in Canada of divorced and separated people to total population, one in every 225 Islanders was either divorced or separated, compared with one in 122 of all Canadians outside the territories. Prince Edward Island's divergence from the national average is even more conspicuous when only divorce is considered. One Islander out of 2,318, was divorced, against a national statistic of one in every 820.³³ According to the 1941 census, the proportion of separated to divorced persons on the Island was one of the highest in Canada (9:1, exceeded only by Quebec's 14:1 and compared with Ontario's 6:1 and British Columbia's 3:1).³⁴ With the onset of World War II, however, the continental patterns of marital instability began to affect even the Island, which between 1941 and 1945 achieved a measurable divorce rate, albeit one of only 2.2 per 100,000 people, as Islanders began to take advantage of the Canadian Senate procedures and foreign courts.

The physical separations of war helped spawn marital problems and divorce everywhere in the world, and the Island was no exception. By the spring of 1945, the Island government, led by premier Walter Jones, under pressure to act from the Canadian Legion, concluded there was sufficient support on the Island to warrant the establishment of a provincial divorce court.³⁵ The government tried first to shepherd a resolution through the General Assembly calling on the Parliament of Canada to extend to the Island the same legislation that it had used in 1930 to create an Ontario divorce court (Canada 20-21 George V, c. 14).³⁶ That effort was defeated in committee of the whole by a vote of 14 to 10. The motion was defended by its mover as necessary to deal with the "unfortunate marriages contracted by soldiers overseas, where wives had proved unfaithful and where application for divorce on grounds of adultery must now be referred at a great expense to the Senate of Canada".³⁷ The opposition insisted that only a small number of wives were unfaithful, but none of the all male participants in the debate noted that husbands might similarly be adulterous while living apart from their wives and families. Facilitating personal readjustment (including divorce) for returning servicemen was an undebatable issue in 1945, and all the speakers paid homage to their plight. The proponents of an Island divorce court insisted that its absence caused unhappiness, bigamy, and common law marriages, adding that the costs of a Senate divorce in Ottawa exceeded \$1,000. As one

33 *Eighth Census of Canada*, 1941 (Ottawa, 1944), II, pp. 258-9.

34 *Canada Year Book*, 1945 (Ottawa, 1945), p. 102.

35 *Charlottetown Guardian*, 13 April 1945. There is no Hansard for the Legislative Assembly debates on Prince Edward Island, and we are forced to rely on newspaper accounts.

36 *Ibid.*

37 *Ibid.*

speaker observed, "All the existing practice does is to set up a divorce court a thousand miles away for trial before a committee of Senators at Ottawa who know nothing about the case". The proponents of a local court emphasized that no changes in grounds of divorce or other practice were contemplated. The opponents of a court advanced the usual arguments about the loosening matrimonial bonds and the frequency of collusion and fabrication of evidence. One speaker instanced the negative provincial response to Edward VIII's marriage to a divorced woman as evidence of Island public opinion. Another seriously suggested that returned servicemen could be accommodated within the existing system by making a provincial grant available to cover the expenses of a journey to Ottawa for a Canadian decree.

Unable to gain legislative support for Canadian action, Jones' government turned to the long-dormant court of marriage and divorce. On 6 September 1945, the Executive Council ordered the Lieutenant-Governor to appoint the Chief Justice to preside in his stead in such a court, and on 6 December of that year the court held its first meeting to make rules of practice and procedure. Because a pre-Confederation statute, seldom used and never substantially amended during the colonial period, was being resurrected, the Island's Court of Divorce consisted of the chief justice and at least five members of the Executive Council, now synonymous with the cabinet. It was thus a political rather than a judicial court, a fact lamented by political scientist Frank MacKinnon in his classic study of the government of the Island.³⁸ Moreover, Island politicians were not at all certain whether sections 129 and 146 of the British North America Act, along with other enabling documents which allowed laws in force at the time of the union with Canada to continue, also permitted those laws to be amended after Confederation by a Legislative Assembly greatly altered in character from the one that had passed the original statute. Both because of the hostility to divorce of the Legislative Assembly and because of the constitutional problems, 5 William IV, as given minor amendment in 1866, was allowed to stand as the statute establishing the new court.

The first meeting of the court, reported in an "Extra" *Royal Gazette* dated 22 December 1945, established its ground rules. It set down the relevant legislative enactments relating to the court (5 William IV, c. 10; 29 Victoria, c. 11; the Queen's proclamation of the separation of the Council dated 13 December 1838; the British North America Act sections 129 and 146 and related material) and Schedule "B" laid down the "General rules of practice and procedure for the Court of Divorce of Prince Edward Island". The court followed the general rules of the Island's Supreme Court of Judicature for civil actions, supplementing them with the rules of the Ontario court regarding divorce proceedings and a few special rules, most made necessary by the statute of 1835. The most important of the special rules was that the Chief Justice should make "all necessary rulings on

38 MacKinnon, *The Government of PEI*, pp. 262-5.

questions of evidence and points of law arising”, while the council could, by vote, “make findings of fact or render a special or general verdict upon the evidence adduced”. From the standpoint of the historian, also important was the rule that stated “It shall not be necessary for any formal record or minute of judgment or decree of the Court to state or recite the steps or procedure by which such judgment or decree has been reached”. In its final internal rule, the court allowed for a “partial rebate of fees to a plaintiff who has served in His Majesty’s armed forces”, thus reinforcing the general exigency under which it had been ostensibly returned to life. It now merely needed to wait for applicants. The first application appeared early in 1946, and the court convened for business on 22 May.

While it is not our intention in this article to analyse in detail the cases brought before the Prince Edward Island Court of Divorce after 1946, a few general observations based on those cases may be useful. Most of the initial cases heard by the court involved returning servicemen, and were brought by the husbands as plaintiffs. By 1947, however, the bulk of the servicemen cases had been heard and the court began dealing chiefly with marital breakdowns not directly associated with the war. Female plaintiffs became increasingly common. Roman Catholic marriages as well as Protestant ones were dissolved. Most of the marriages involved and dates of separation went back well before the war, and for several years the court dealt mainly with a backlog of cases that had obviously built up because of the lack of access to a divorce court in the province. Few of these separations had resulted in formal agreements of separation. The early court case records, moreover, make quite clear that divorce on Prince Edward Island was hardly the prerogative of the middle or white collar or landed farmer classes of the province. The vast bulk of identifiable occupations of those appearing before the court were relatively unskilled working class ones, and in such cases little or no landed property was involved. Thus, although the court apparently did routinely bar dower for female defendants in cases where husbands held property, dower was barred less frequently than one might expect. Curtesy was barred in only one isolated instance. Despite the continual fears expressed in the debates over divorce on and off the Island that collusion and fabrication of evidence would become a way of life in court cases, there was little justification for such concerns. Indeed, in the majority of post-servicemen cases heard by the court, the co-defendants had established a long-term relationship with children resulting from the adultery. There is no evidence of interference with the divorce process by the politicians who constituted the court and were paid \$10.00 per case for their attendance. It is impossible from the records, of course, to determine whether having cases heard before members of the Island’s Cabinet deterred some Islanders — particularly prominent ones — from submitting to the process.

Despite the successful operation of the Island Court of Divorce, continual murmurings were heard about its legitimacy and the constitutionality of the reform by the provincial Assembly. Therefore, although early in 1949 the Legislative Assembly amended 5 William IV, c. 10 to provide a joint jurisdiction in divorce for the Supreme Court of the Island and a procedure for transfer of cases from the Court of Divorce to the Supreme Court, that statute was not brought into force until the Island's Supreme Court *in banco* under the provisions of section 41 of the Judicature Act had ruled on the constitutional issues. The question referred to the Court by the Executive Council was: "Is it within the legislative power and competence of the Legislative Assembly to enact Chapter 10 of the Statutes of 1949"? The case was heard at a special sitting of the Supreme Court on 14 July 1950, with the province's attorney-general arguing in writing for the constitutional validity of the statute and Mr. H.F. MacPhee, King's Counsel (one of the Island's most prominent opponents of divorce) arguing the negative interest. Opinion was rendered by the Court on 11 December 1951.³⁹

In its argument, the province submitted "that the Statute in question falls within the purview of Section 92 (14) rather than 91 (26) [of the British North American Act] and consequently belongs to the matters in relation to which the provincial legislature may *exclusively* make laws", on the grounds that "'Divorce' in section 91(26) is merely general language, while 'the Administration of Justice in the Province...including Procedure in Civil Matters in those Courts' is precise and particular language and consequently operates by way of exception". Although competent divorce legislation by the Dominion might override the Island statute, "Canada has established no Divorce Courts under Section 101 of the B.N.A. Act, nor, indeed, could Canada do so until some Federal Divorce laws exist to be administered by such Courts". But, the province insisted, there was no overlapping jurisdiction, for the matters in section 92(14) were reserved to the provinces, and the Island legislature was as free to act as it was before the British North America Act was passed.

In his "Factum of Counsel for Opposite Interest", Mr. McPhee acknowledged that both counsels had agreed that the pre-1949 divorce legislation was valid and not at issue. He proceeded to argue, however, that the 1949 amendment was not simply legislation concerning the administration of justice, because "the substantial effect of the amendment is to confer upon the Supreme Court of Judicature jurisdiction in divorce which it did not have when this Province entered Confederation", and divorce was a "subject matter beyond the competency of the Provincial Legislature". Precedents bearing directly on the question could not be submitted, he insisted, since "the situation in Prince Edward Island in reference to its divorce law is different from that of the other provinces". In Nova Scotia and New Brunswick, the divorce legislation had remained substantially as at the time of Confederation, and the provincial legislatures had not conferred

39 (Supreme Court), file 6973 (1950), RG24, PAPEI.

any new divorce jurisdiction on provincial courts. In British Columbia, divorce law was brought into Confederation, but the right of appeal (a new jurisdiction) could be conferred only by the Dominion parliament. In Manitoba and Ontario, jurisdiction had been extended by Act of Parliament. In a lengthy historical section, McPhee observed that in the Maritime provinces, divorce legislation was introduced before the first English statute creating secular courts. The Maritime statutes conferred jurisdiction not upon the courts, but upon Governor-in-Council, a legislative body. After the English act and before Confederation, Nova Scotia and New Brunswick amended their legislation to transfer jurisdiction from the legislature to the courts, but Prince Edward Island did not follow suit. Prince Edward Island may have taken its own divorce law into Confederation, but that law gave jurisdiction not to the Supreme Court but to "a special Court", representative of the law making body. In this light, the 1949 amendment altered altered the Island divorce law "radically, essentially, and substantially". The early law specifically provided that divorces "be heard by a Tribunal representative of the law making body", rather than the Supreme Court, and this provision was the "special distinctive and fundamental characteristic of Divorce law in this province as compared with that of other jurisdictions".

Historians have typically been more attracted by ingenious historical arguments than lawyers, and this case provided no exception. In the unanimous opinion of the Supreme Court of Prince Edward Island, written by Chief Justice Thane Campbell, Mr. McPhee's history (plus both his precedents and his insistence that none were really directly relevant) was virtually rejected. The British Columbia references appeared particularly germane, the Court admitted, because in that province "substantive law (as our own) was a continuation of the law prevailing when British Columbia joined Confederation". The Court sidestepped the British Columbia line of reasoning, in which appeal procedures were held to be a Dominion prerogative, in favour of the cogency of Manitoba decisions, concluding that "in the absence of Dominion legislation conferring jurisdiction and regulating procedure in divorce and matrimonial causes, a provincial legislature may confer such jurisdiction on a provincially constituted Court, and may regulate the procedure therein". It dismissed the arguments about Nova Scotia and New Brunswick, pointing out that those two provinces had recently altered the composition of their courts by legislative amendment. The opinion took more seriously the contention that the Island amendment "would have the effect of converting divorce from a quasi-legislative remedy to a purely judicial one". This argument it rejected on a variety of grounds, but chiefly that the 1835 court was specifically a Court of Judicature and that the pattern of legislative control had greatly altered since 1835. The "substantive law remains the same", it contended, "namely relief by a Court of Judicature upon specifically enacted and limited grounds". The Court thus unanimously answered the original question in the affirmative.

After the constitutionality of PEI 13 George VI, c. 10 was settled, those appearing before the Island Court of Divorce had the option of transferring proceedings to the Island Supreme Court. In practice, what occurred for a brief period was that the cases were heard by the Court of Divorce, which granted the decree *nisi*, and the case was then transferred by petition of the plaintiff (with the consent of the defendants) to the Supreme Court for the decree absolute. No reason for this practice was ever given. Seventeen cases were dealt with in this awkward fashion, but in April of 1952 the Legislative Assembly amended the 1949 legislation to allow the transfer of the action upon the consent of the Queen's Proctor either with the consent of all parties or after notice was given to all parties.⁴⁰ Thereafter, cases were routinely heard by the Supreme Court and the Divorce Court returned to the dormancy it had enjoyed between 1864 and 1945. Although the Island continued to have some distinctive practice growing out of pre-Confederation statutes (such as the barring of dower and curtesy) for many years after 1952, it no longer had a distinctive jurisdiction for the hearing of divorce cases and increasingly became integrated into general Canadian practice. In 1967 the Parliament of Canada finally enacted a general divorce statute (Canada, 16 Elizabeth II, c. 24), and in 1975 the Island reformed its Supreme Court to create a Family Division (PEI 24 Eliz. II, c. 27). A few years later family law and property rights on the Island were reformed, which, among other revisions, abolished the common law rights to dower and curtesy and repealed the province's dower legislation.⁴¹ More recently, the Island has provided for custody jurisdiction and enforcement, accepting the Convention on the Civil Aspects of International Child Abduction.⁴²

The thorough integration of divorce jurisdiction and practice on Prince Edward Island in ways common to most Canadians has been a slow and evolutionary process. As we have seen, the Island was an exception to many generalizations about divorce in Canada until after World War II. That divorce on the Island could be so distinctive for so many years is evidence of the many complexities of the history of divorce in Canada. The Island's experience suggests not only one additional way in which it did things differently, but the national circumstances that made such differences possible.

40 *Statutes of Prince Edward Island*, 1 Eliz. II, c. 15.

41 *Ibid.*, 27 Eliz. II, c. 6.

42 *Ibid.*, 33 Eliz. II, c. 17.