Federal Marriage Legislation

by Hon. Ronald C. Stevenson

In every society and religion there are rules prohibiting marriages between certain persons within defined familial relationships. Generally the prohibitions apply to persons closely related either by consanguity (blood relatives) or by affinity (relatives by marriage). Since 1867 Parliament has enacted five Public Acts of general application and eleven Private Acts to authorize marriages of couples who sought exemptions from these prohibitions. The Private Acts, passed between 1975 and 1984, prompted a review of the law and resulted in the enactment in 1990 of a statute that redefines the prohibitions. This article outlines the evolution of marriage law and the decline of religious influence on attitudes towards it.

Pre-Confederation law in Canadian common law jurisdictions was derived from the law of England. The classes of couples prohibited, or said to be prohibited, from marrying were those originally set out in a table published by Archbishop Parker in an Admonition in 1563, adopted by the Church of England as Canon 99 in 1603, and annexed to the Book of Common Prayer in 1662.

Prohibited marriages in Quebec were defined in the Civil Code of 1866. The prohibition against a man marrying his deceased wife's sister had been controversial from at least the 17th century.[1]

The first attempt to change the law in post-Confederation Canada began on February 25, 1880 when the Member of Parliament for Jacques Cartier, Mr. Girouard, introduced a bill that would have provided that a marriage between a man and the sister of his deceased wife, or between a woman and the brother of her deceased husband, would be legal and valid. Mr. Girouard was prompted to introduce the bill when he was approached by a lady who had married her deceased sister's husband. Children had been born to both marriages. The father had entailed his substantial estate in favour of his legitimate children. She wanted to know if the children of her marriage were excluded. Under the *Civil Code* that marriage was absolutely null and void. The bill was debated at some length on second and third readings and in Committee of the Whole. At the second reading stage a hoist motion was defeated 140-19.

On April 21 Senator Ferrier introduced the Bill in the Upper House. On moving second reading he said there was:

> a cry for relief from the grievous disability now resting on the people of Canada" and that the Bill would give relief from the disabilities to which they are now subjected by the unscriptural ecclesiastical law which prevails, especially in the code of jurisprudence of the province of Quebec ... The Roman Catholic Church grants a dispensation to any of its people who wishes to marry a sister-in-law but their children are still under the disabilities of the civil law. ... Protestants have the unyielding iron law of affinity, reinforced by the bishops, a law which has no foundation in the Bible.

Senator Dickey moved another hoist of the bill "in order to give time to consider the various petitions to the Senate for and against the bill, and to ascertain the sentiment of the people on the question at the next session of Parliament". On April 28 the bill was killed when the hoist motion was carried by a vote of 33-31.

Two years later Mr. Girouard again introduced a bill in the House of Commons. It would permit a man to marry his deceased wife's sister, but not the converse. Mr. Girouard explained that the language of the bill

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would repeal laws rather than make the marriages lawful. The changes had been made in the hope of gaining support. The bill was given second reading without debate by a vote of 137-34.

The same year Mr. Strange (York North) made two motions intended to expand the bill to cover marriages with a deceased husband's brother. The first was defeated on division, the second by a vote of 87-49. The House then concurred in minor amendments that had been made in Committee of the Whole and gave the bill third reading.

The next day Senator Ferrier introduced the bill in the Senate. After 3 days of debate a six months hoist proposed by Senator Bellerose was defeated 40-19.On April 13 the bill was considered in Committee of the Whole and was reported without amendment. It received Royal Assent on May 17.[2]

While his name was not mentioned in any of the debates, the circumstances of Sir Alexander Tilloch Galt may have influenced the course of parliamentary action.

A Father of Confederation and the first federal Minister of Finance, Galt was appointed as Canada's first High Commissioner to London in 1880. In 1848 he had married Elliott Torrance who died shortly after the birth of their only child on May 24, 1850. In 1851 he married Elliott's youngest sister, Amy Gordon Torrance. The wedding took place in New York because of the deceased wife's sister rule in Canada. When Sir Alexander became High Commissioner it appeared that Lady Galt would not be received at court because of the same rule. Galt was prepared to resign rather than be presented without his wife. The Prince of Wales, who in the House of Lords had been supporting efforts to change the law, personally intervened with Queen Victoria and it was arranged that Lady Galt would be presented. It seems, however, that she may not actually have been presented due to a period of mourning for another of the Torrance sisters.[3]

In 1890 Parliament amended the 1882 statute.[4] The amendment added a section repealing all laws prohibiting marriage between a man and the daughter of his wife's sister when no law relating to consanguinity was violated, with respect to both past and future marriages. The bill was introduced in the Senate by Senator Almon. He said it was Parliament's duty to remove "the anomaly from the law". No satisfactory answer was given to Senator Power's question as to why the bill did not extend to the daughter of the deceased wife's brother as well as to the daughter of a sister. When the bill was considered in Committee of the Whole Senator Power moved an amendment with respect to the daughter of a brother. The amendment was defeated.

On March 31 the Minister of Justice, Sir John Thompson, sponsored the bill in the House of Commons. It passed through second reading, committee consideration and third reading with only eight lines of discussion being recorded in Hansard.

In 1923 Parliament took the next step by passing an *Act to make lawful the marriage of a woman to her deceased husband's brother or such brother's son.*[5] Senator Hardy said the bill would put a woman on the same plane as a man so far as marriage rights were concerned. Many such marriages had been entered into by those who assumed that if it was legal to marry a deceased wife's sister it was of course legal to marry the brother of a deceased husband. In committee of the whole the Government and Opposition Leaders, Senators Dandurand and Lougheed, supported the bill in the briefest of interventions. The bill was given third reading and sent to the House where the sponsor, Mr. McMaster (Brome), was the only speaker. He pointed out that the 1880 bill, had it passed, would have accomplished the same result (at least with respect to the deceased husband's brother).

In 1932 Parliament passed the last of the piece-meal marriage statutes. *An Act to Amend the Marriage and Divorce Act*[6] provided for marriages to the daughter of a brother of a deceased wife or to the son of a sister of a deceased husband.

There was limited discussion in both Houses directed mainly to a comparison with a statute passed in England the previous year and to the question of whether the bill would apply to marriages already entered into. It appears from statements made by Senator Griesbach that the bill may have been designed to meet the needs of a particular couple who had been advised that they could not legally become husband and wife. He gave an example of a situation to which the bill would apply. An elderly man with a young wife dies. The young widow wishes to marry her deceased husband's brother's son who is her age. The amendment would cover such a case.

Senator Meighen (who was the Government Leader but spoke as a private member) said that all of the Canadian amendments had been made in anticipation of special cases and no general review of the merits of the question had taken place. The restrictions had been removed piece by piece. No further changes were considered until the 1970s.

When Newfoundland entered Confederation the pre-1835 English marriage laws still prevailed there, including the prohibition against a man marrying his wife's sister. Article 18 of the *Terms of Union of*

Newfoundland with Canada provided that, subject to the *Terms*, all laws in force in Newfoundland at or immediately prior to the Union would continue subject to being repealed, abolished or altered by Parliament or by the provincial Legislature according to the division of powers in the *British North America Acts, 1867 to 1946*.

Article 18(2) provided that Statutes of the Parliament of Canada could be brought into force in Newfoundland by Act of Parliament or by Proclamation of the Governor General in Council. Several Acts and Proclamations were passed and issued under that provision. On May 28, 1952 an omnibus Proclamation was issued which (as amended by a Proclamation on June 28, 1952) brought into force in Newfoundland, on July 1, 1952, all statutes of the Parliament of Canada that had been in force at the date of the Union and were still in force other than 13 Acts or parts of Acts listed in a Schedule to the Proclamation.[7] One of the Acts listed in the Schedule was the *Marriage and Divorce Act*. Thus the prohibitions contained in the original Table of Kindred and Affinity remained in effect in Newfoundland until 1991.

Among marriages forbidden by the *Table of Kindred and Affinity* and by the *Civil Code* were those between persons related as uncle and niece or as aunt and nephew. Several couples who were thus related petitioned Parliament for Private Acts to exempt them from the prohibitions. Nine of the eleven private marriage Acts passed between 1975 and 1984 authorized such couples to marry.

The first such bill was introduced in the House of Commons in 1975. Speaking to second reading Mr. Poulin (Ottawa Centre), on behalf of the sponsor, Mr. Campbell (LaSalle-Émard-Côte-St. Paul), explained that Richard Fritz, 32, wished to marry his half-niece, Marianne Strass, 25. Marianne Strass' father and Richard Fritz were half-brothers. The marriage was prohibited by the *Civil Code* and only Parliament, in the exercise of its legislative authority over marriage, could change the law or provide an exemption. The parties had consulted their doctor and had "been assured with respect to their consanguinity. There should be no problem with respect to children". The parties' church was prepared to grant any necessary dispensation. The bill was referred to the Standing Committee on Miscellaneous Private Bills and Standing Orders, was reported without amendment and given third reading.

The bill passed through all stages in the Senate. During the brief debate a number of senators advocated a review of marriage legislation as preferable to having to deal with applications for exemptions from the existing law. The bill received Royal Assent on July 30.[8]

During the parliamentary session of 1977-78 two similar bills were passed concerning uncles and nieces of the full blood. The bills were passed with a minimum of debate and became law on March 22, 1978.[9]

In 1983-84 Parliament passed eight exemption Acts.[10] Three were sought by uncles and nieces of the full blood, one by an aunt and nephew of the full blood, one by an uncle and niece by marriage and one by an aunt and nephew by marriage. Each of the other two bills authorized the marriage of a divorced person with a niece or nephew of that person's former spouse. As already noted, from the introduction of the first exemption bill in 1974 parliamentarians had expressed support for a review of the law respecting marriage. It had been only a few years since Parliament had been relieved of the responsibility for granting statutory divorces to persons domiciled in provinces without divorce courts. Members did not want to be faced with an endless queue of petitioners seeking exemption from out of date restrictions on marriages. The Senate delayed the first four exemption bills introduced during the 1983-84 session until it adopted, on February 9, 1984, a motion to refer the subject matter of the public general law against marriage between related persons to the Standing Committee with instructions to report its recommendations, if any, for amendment of the law.

The Minister of Justice, Mark McGuigan, appeared before the committee. He suggested the Senate was in the best position to review all related issues and invited the committee to get the views of experts and the reaction of churches and of society's moral leaders.

Dr. Abby Lippman, an eminent geneticist and an associate professor at McGill University, appeared before the committee to address genetic and eugenic concerns. The Standing Committee reported all eight bills without amendment.

On April 12, 1984 the bills passed all stages in the House of Commons without debate. Marcel Lambert entered a caveat that no more such bills should be entertained until the general law had been changed. The eight bills received Royal Assent on April 17.

Seven of the eleven private Acts were sought by residents of Quebec, three by residents of Saskatchewan and one by a couple resident in Ontario.

The Standing Committee had, in 1978, concluded that the *Civil Code* did not prohibit marriages between persons who were sister and brother by adoption and had declined to report an exemption bill sought by such a couple. The appropriate ecclesiastical authority had accepted the Committee's report as clearance for the marriage to take place. The Alberta Court of Appeal also concluded that adoptive relationships did not fall within the prohibited degrees of consanguinity and affinity.

On April 3, 1984 Senator Stanbury introduced Bill S-13. It would make void only marriages between persons

related lineally by consanguinity, between brothers and sisters, and between half-brothers and half-sisters. It would not prohibit marriages between persons related only by affinity or adoption. Speaking to second reading Senator Stanbury cited ambiguities in the existing law, timeliness of reform, desirability for uniformity, and the desire to eliminate private bill exemptions as justifications for presenting the bill.

The chairman of the Standing Committee wrote to all major religious denominations in Canada inviting comment on related moral and religious issues. A memorandum that accompanied those letters contained this succinct statement of the reasons for the bill:

> In the view of some, many of the marriage prohibitions are outmoded and unnecessary. The risk of the birth of genetically defective children is said to be insignificant in all but the marriage of close blood relations. And the prohibitions based on marital relationship are also viewed as anachronistic.

The denominations were asked to respond to several questions with respect to, *inter alia*, fixed doctrinal views, the practice of dispensations, objections to the proposed reform, and their views with respect to adoptive and step-relationships.

The responses, which were published as part of the committee's proceedings,[11] covered a spectrum ranging from approval by the Jehovah's Witnesses, who found the bill to be in harmony with their practice, to the strong objections of the Greek Orthodox Church which retained many prohibitions including one against marriage of a godparent with either a godchild or the parent of a godchild (spiritual affinity). Several respondents favoured a prohibition with respect to those in adoptive relationships. Bill S-13 died when the 32nd Parliament was dissolved on July 9, 1984.

When the next Parliament met in December another bill was introduced in the Senate and referred to the Standing Committee. During 1985 the committee considered the bill on several occasions and received conflicting submissions about adoptive relationships, something the bill did not directly address.

On November 6, 1985 the Standing Committee adopted several amendments to the bill, including one to prohibit marriages within adoptive relationships. On December 18 the Senate adopted the report but deferred third reading. The next day Senator Flynn proposed an amendment that would prohibit marriage between those related lineally by adoption but not between siblings by adoption. The debate was adjourned. On April 29, 1986 the Senate agreed to the Flynn amendment and the bill, as amended, was given third reading. However, the House of Commons took no action on the bill and it died when the session was prorogued on August 28, 1986.

On February 12, 1987 a third bill was introduced in the Senate. By then there were 22 petitions for private bills filed with Parliament. The bill provided that

- persons related lineally or as brother and sister could not marry
- uncle/niece and aunt/nephew marriages would be allowed
- a person whose marriage was dissolved by divorce could marry the brother, sister, nephew , niece, uncle or aunt of the divorced spouse
- a person whose spouse had died could marry the uncle or aunt of the deceased spouse
- relationship by adoption would not be a bar to marriage except lineally, i.e one might not marry an adopted child or grand-child.

On March 31 the bill was read a second time and referred to the Standing Committee. The Committee reported the bill without amendment and the Senate gave it third reading on June 16.

In the House of Commons Mr. Nicholson (Niagara Falls) moved second reading and reference to a legislative committee. It seems there was some concern within the government about the content of the bill. Mr. Gérin, the Parliamentary Secretary to the Minister of Justice and Attorney General, moved that the bill not be read a second time but that the order be discharged, the bill withdrawn and the subject matter be referred to the Standing Committee on Justice and Solicitor General. That motion was agreed to without debate or division.

The Commons committee agreed to hold two meetings to deal with the reference. Senator Nurgitz, chairman of the Senate Standing Committee, appeared as a witness and outlined the background of the bill. Professor Hubbard of the Faculty of Law at the University of Ottawa also appeared. His comments on the bill are published as part of the committee proceedings. He said Parliament should either prohibit or permit marriages in case of adoptive relationships. Silence would only invite contradictory judicial decisions and it was unlikely the Supreme Court of Canada would ever have an opportunity to give a definitive ruling. He thought it strange to remove an existing prohibition with respect to step-parents and step-children while adding a prohibition with respect to adopted children. He said the law should reflect dispassionate conclusions rather than conditioned reflexes and advocated a law that would impose minimum restrictions on individual freedoms and civil liberties and be consonant with public welfare. The Commons committee did not consider the matter again and did not make a report.

Reform of the marriage law was next taken up on June 21, 1989. On that date Senator Nurgitz told the Standing

Committee there was some indication that the Minister of Justice was interested in discussing the subject. There seemed to be a consensus in the committee that the real problem was not with the Minister, but with officials in the Department of Justice.

On January 23, 1990 Senator Nurgitz discussed whether a new bill should be introduced. Senator Neiman felt there should be some assurance of cooperation from the House of Commons; if the Minister of Justice could not give that assurance, the Senate should proceed to deal with the petitions for private bills. Senator Nurgitz said he had informed the Minister (Doug Lewis) of the committee's concern and the Minister had said to proceed with a bill. The Minister's support may have been partly due to the fact that the applicants for one of the private bills were his constituents. The committee agreed that the chairman should introduce the bill in the Senate.

Senator Nurgitz introduced the bill on February 15, 1990. He spoke to second reading on May 9 and the bill was referred to his committee. On June 6 the committee agreed, without discussion, to add a provision prohibiting marriages between adoptive siblings. The bill was reported with that amendment.

On June 7 Senator Nurgitz explained to the Senate that the earlier approach to adoptive relationships caused some difficulties for provincial agencies dealing with adoptions. He said the committee wished to solve an old problem, not create a new one. The bill was given third reading.

The House of Commons referred the bill to a legislative committee. Senators Neiman and Nurgitz appeared before that committee to explain the bill. After a brief discussion the committee agreed to report the bill. It was read a third time. The bill received Royal Assent on December 17. The bill provided for a delay in its coming into force of up to a year in order that the provinces could amend provincial regulations and forms that contained references to the previously existing prohibitions. Finally, on December 17, 1991, the *Marriage (Prohibited Degrees) Act*[12] became the law of the land.

Conclusion

During the period from 1974 to 1990 Parliament was concerned, not with biblical or religious overtones, but with making laws to fit the pluralistic society of the time. There has, however, been recognition that organized religions may impose additional restrictions on their members. For example in the Confederation Debates in the Legislative Assembly of the Province of Canada the Solicitor General, the Hon. Hector Louis Langevin, read the following statement of the purpose of assigning legislative authority over marriage to the federal Parliament:

> The word "Marriage" has been placed in the draft of the proposed Constitution to invest the Federal Parliament with the right of declaring what marriages shall be held and deemed to be valid throughout the whole extent of the Confederacy, without, however, interfering in any particular with the doctrines or rules of the religious creeds to which the contracting parties may belong.[13]

And as recently as December 18, 1985 Senator Neiman said:

> Those religions which wish to maintain a large number of prohibitions are free to do so, and are free not to give their sanction to adherents who do not comply.[14]

The Act of 1990 created one anomaly that some had foreseen. Suppose a widower or divorcee with children of both genders marries a widow or divorcee who also has both sons and daughters. The two families are blended. If each parent adopts the children of the other, no marriage can take place among members of the blended family. But if the parents do not adopt, a step-son may marry his step-sister, or a step-parent might marry a step-child.

> ***Few statutes enacted to regulate personal or familial relationships will succeed in covering every situation, nor will such statutes always be free from anomalous results.***

In the 1880s Senators and members of the House of Commons engaged in spirited and informed debate about the meaning of the scriptures. In recent debates there was no suggestion that the civil law should reflect religious principles although the views of religious leaders were solicited. The early attempts at marriage legislation focused on removing particular restrictions from a centuries old law that was accepted without question by many but ignored by those who wished to marry despite it. Later amendments achieved gender equality. The initiation of individual exemption bills brought Parliament's attention to society's rejection of the old rules and the need to develop a law reflective of modern community standards.

Notes

1. Agitation for relaxation of that rule intensified in England in the 19th century. A Royal Commission appointed in England in 1847 recognized that it was common for the sister of a deceased mother to assume her sister's place "in the care

of the children, and in the superintendence of the domestic establishment". The sister of a deceased mother seemed to the Commission to be "above all persons" qualified to supply the vacancy in the family. The Commission left "to the wisdom of the Legislature" whether the law should be relaxed or strengthened. It would be 60 years before the law was changed. Several bills to reform the law were introduced but none passed until 1907 when the *Deceased Wife's Sisters Marriage Act*, 1907, 7 Edw. 7, c. 47 was adopted.

2. *An Act concerning Marriage with a Deceased Wife's Sister*, S.C. 1882, c. 42.

3. O.D. Skelton: *The Life and Times of Sir Alexander Tilloch Galt* (Toronto: Oxford University Press, 1920); pp. 260-261, Donald Creighton: *John A. Macdonald - The Old Chieftain* (Toronto: MacMillan, 1955); p. 290 ,W.S. MacNutt: *The Days of Lorne* (Fredericton: Brunswick Press, 1955); pp. 57-58, H.B. Timothy: *The Galts: A Canadian Odyssey* (Toronto: McLelland and Stewart, 1984); pp. 56-57, 135, John deP. Wright: *"Origin of the Marriage Act R.S.C. 1985"* (1990), *Law Society Gazette*, Vol. 24, p. 127.

4. *An Act to Amend An Act concerning Marriage with a Deceased Wife's Sister*, S.C, 1890, c. 36.

5. S.C. 1923, c. 19.

6. S.C. 1932, c. 10.

7. The several Acts and Proclamations are conveniently collected in an Appendix found in Volume 10 of the *Revised Statutes of Newfoundland, 1990*.

8. S.C. 1974-75-76, c. 113.

9. S.C. 1977-78, c. 45 and c. 46.

10. S.C. 1984, chapters 52 to 59.

11. Canada, Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, No. 7 (May 10, 1984), Appendix B.

12. S.C. 1990, c. 46; also found in the loose-leaf and CD-ROM versions of the Statutes of Canada as chapter M-2.1.

13. Parliamentary Debates on the Subject of Confederation of the British North American Provinces, February 21, 1865, p. 388.

14. Canada, Senate, *Debates*, December 18, 1985, p. 1747.