Condonation as a Bar to Divorce in Canada

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I. Introduction

The *Divorce Act*[1] has failed to resolve the controversies regarding the interpretation and application of condonation as a bar to divorce. Section 9(1)(c) provides:

> On a petition for divorce it is the duty of the court...
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> (c) where a decree is sought under section 3, to satisfy itself that there has been no condonation or connivance on the part of the petitioner, and to dismiss the petition if the petitioner has condoned or connived at the act or conduct complained of unless, in the opinion of the court, the public interest would be better served by granting the decree [.]

According to section 9(1)(c), condonation is only relevant to petitions of divorce based on grounds enumerated in section 3. These include adultery,[2] sodomy, bestiality, rape and homosexual acts,[3] bigamy,[4] and physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.[5] Thus, condonation as a bar to divorce only pertains to matrimonial offences which are fault-based. It is not relevant to petitions under section 4, which are concerned with the permanent breakdown of marriage.[6]

The intention of this paper is to examine the various definitions of condonation developed by the courts both before and since the enactment of the *Divorce Act*, and to outline the current approach to its meaning. In addition, the criteria established by the courts to determine when it is in the public interest to grant a divorce notwithstanding condonation will be discussed. The interpretation given to section 9(2) will be reviewed, as well as the relationship between the section and article 197 of the Quebec Civil Code (the equivalent provision for legal separation).

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1 S.C. 1967-68, c. 24; now R.S.C. 1970, c. D-8.

2 *Ibid.*, s. 3(a).

3 *Ibid.*, s. 3(b).

4 *Ibid.*, s. 3(c).

5 *Ibid.*, s. 3(d).

6 Buglass, *Canadian and Australian Bars to Divorce* (1969) 34 Sask. L. Rev. 87, 93.

II. The definition of condonation

Although section 9(1)(c) stipulates that condonation of a section 3 matrimonial offence is a bar to divorce, the *Divorce Act* does not provide a definition of "condonation". According to the recent cases of *Blue* v. *Blue*[7] and *Nielsen* v. *Nielsen*,[8] condonation has retained the meaning given to it by the courts prior to the enactment of the *Divorce Act*. The courts of Canada have maintained the interpretation of condonation enunciated by Lord Chelmsford in *Keats* v. *Keats & Montezuma*: condonation is a "blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed".[9] The test, in this view of condonation, is whether forgiveness exists to the extent that reconciliation between the spouses takes place. As Lord Chelmsford stated, "the forgiveness which is to take away the [husband's] right to a divorce must not fall short of reconciliation".[10] Eighty-nine years later, in *Mackrell* v. *Mackrell*,[11] Denning L.J. (as he then was) elaborated upon the test developed by Lord Chelmsford. The *Mackrell* case involved the alleged condonation by a spouse of cruel acts committed by her husband. Denning L.J. agreed with Lord Chelmsford's statement that "reconciliation being the test of condonation nothing short of it will suffice".[12] Denning L.J., however, provided a definition of reconciliation. Reconciliation, he stated, "does not take place unless and until mutual trust and confidence are restored".[13] In contrast to Kelly J. in *Allin* v. *Allin*,[14] who stated that condonation does not exist until the wronged spouse *completely* restores the offending spouse to the position he or she had in their relationship prior to the commitment of the matrimonial offence, Denning L.J. stated:

> It is not to be expected that the parties can ever recapture the mutual devotion which existed when they were first married, but their relationship must be restored, by mutual consent, to a settled rhythm in which the past offences, if not forgotten, at least no longer rankle and embitter their daily lives. Then, and not till then, are the offences condoned.[15]

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[7] *Blue* v. *Blue* (1970) 17 D.L.R. (3d) 226, 228 (Sask. Q.B.).
[8] *Nielsen* v. *Nielsen* (1970) 15 D.L.R. (3d) 423, 427 (Ont. H.C.).
[9] *Keats* v. *Keats & Montezuma* (1859) 1 Sw. & Tr. 334, 346, 164 E.R. 754, 759 (Divorce Ct).
[10] *Ibid.*, 765.
[11] *Mackrell* v. *Mackrell* [1948] 2 All E.R. 858 (C.A.).
[12] *Ibid.*, 861.
[13] *Ibid.*, 860.
[14] *Allin* v. *Allin* [1942] O.W.N. 444, 445 (H.C.).
[15] *Supra*, note 11, 860.

Denning L.J. also stated that mere attempts at reconciliation do not amount to condonation; it is reconciliation itself which constitutes condonation.[16] This proposition is supported in *Strachan* v. *Strachan*.[17] In this case, the petitioner sought to achieve a reconciliation, which ultimately failed. Ruttan J. held that attempts on the part of the spouse to effect a reconciliation did not constitute condonation of the adulterous acts of her husband.[18] A decree *nisi* was granted by the British Columbia Supreme Court.[19]

The interpretation given to condonation by the English courts has been adopted in several Canadian cases decided since the promulgation of the *Divorce Act*.[20] The *Keats* and *Mackrell* definition of condonation emphasizes two elements: forgiveness on the part of the innocent spouse and reinstatement of the erring spouse to the position he or she had occupied prior to committing the matrimonial offence. Knowledge on the part of the innocent spouse of the offence engaged in by the guilty spouse, however, is not stressed to the extent that it is in *Herbert* v. *Herbert*,[21] *Inglis* v. *Inglis & Baxter*[22] and *Blue* v. *Blue*.[23] Willmer L.J. and Harman L.J. stated in *Inglis* that it is fundamental to the existence of condonation that the wronged spouse know all the material facts of the offence. Moreover, it is the duty of the spouse seeking forgiveness to reveal all the material facts of the offence which he or she committed.[24] Material fact is defined as any fact:

> which would reasonably have had a substantial weight with the [husband] in determining whether, on the one hand, to exercise his right to repudiate [his wife] for the wrong which she had done him or, on the other, to remit his right to do so.[25]

Therefore, according to the *Inglis* case, the guilty spouse who does not disclose all the material facts cannot plead condonation as a bar to divorce. The exception to this rule is an implicit or express

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[16] *Ibid.*, 861.

[17] *Strachan* v. *Strachan* (1969) 72 W.W.R. 383 (B.C.S.C.).

[18] *Ibid.*, 387.

[19] Note that according to the Law Reform Commission of Canada, an intention to be reconciled is sufficient for condonation. See Law Reform Commission of Canada, *Divorce* (Working Paper 13) (1975), 15.

[20] See, *e.g.*, *Crosby* v. *Crosby* (1971) 6 R.F.L. 8, 9 (Ont. H.C.); *Nielsen* v. *Nielsen*, *supra*, note 8, 427; *Aucoin* v. *Aucoin* (1977) 28 R.F.L. 43, 46-47 (N.S.S.C., App. Div.); *Pellegrini* v. *Pellegrini* (1976) 30 R.F.L. 293, 295 (Ont. H.C.).

[21] *Herbert* v. *Herbert* [1936] O.R. 432 (C.A.).

[22] *Inglis* v. *Inglis & Baxter* [1967] 2 All E.R. 71 (C.A.).

[23] *Supra*, note 7, 228.

[24] *Supra*, note 22, 80-81.

[25] *Ibid.*, 80.

waiver by the innocent spouse of the requirement of further knowledge from his or her spouse.[26]

The Ontario case of *Herbert* v. *Herbert*[27] also emphasized that knowledge of the circumstances is required before condonation can exist. Fischer J.A. stated that suspicion that a matrimonial offence was committed is not sufficient; the wronged spouse must have substantial knowledge of the facts before he or she can be found to have condoned the offence.[28] The importance of the element of full knowledge is also apparent from the definition of condonation given in *Blue* v. *Blue*:

> Condonation of a matrimonial offence means the forgiveness of the offence, having been made fully aware of all the circumstances, followed by a restoration of the offending party to his former position on the understanding expressed or implied that no further matrimonial offence will be committed.[29]

The most comprehensive treatment of the concept of condonation by the Canadian courts is in *Leaderhouse* v. *Leaderhouse*,[30] wherein Disbery J. enumerated the three essential components of condonation: knowledge by the innocent spouse of the matrimonial offence; the intention of the innocent spouse to forgive and remit the offence; and reinstatement to his or her marital position of the guilty spouse by the innocent spouse.[31] He then stated that, in law, forgiveness has occurred when "the legal remedy for the wrong is waived by the injured spouse", and concurred with Lord Chelmsford in *Keats* that forgiveness must be accompanied by reconciliation for condonation to exist.[32] With respect to the element of reinstatement, Disbery J. stated that unless the guilty spouse desires to be restored to his or her former matrimonial position, there can be no reinstatement and thus no condonation:

> An innocent spouse who desires to condone the offence which has been committed by the guilty spouse and thus resume their married life together cannot bring such to pass unless the guilty spouse is willing that such be done.[33]

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[26] *Ibid.*, 81.
[27] *Supra*, note 21.
[28] *Ibid.*, 437.
[29] *Supra*, note 7, 228.
[30] *Leaderhouse* v. *Leaderhouse* (1970) 17 D.L.R. (3d) 315 (Sask. Q.B.).
[31] *Ibid.*, 320.
[32] *Ibid.*
[33] *Ibid.*, 321. The criteria established by *Leaderhouse* to determine whether a s. 3 offence has been condoned were adopted in *Grandy* v. *Grandy* (1972) 26 D.L.R. (3d) 359, 361 (N.S.S.C., App. Div.); and *Sergeant* v. *Sergeant* (1972) 33 D.L.R. (3d) 734 (N.S.S.C., T.D.); and approved by Davies, *Power on Divorce and other Matrimonial Causes* 3d ed. (1976), vol. 1, 120.

Whether condonation is a unilateral act of the wronged spouse or a bilateral act on the part of both spouses remains a subject of controversy. According to *Keats, Mackrell* and the Canadian decisions which adopt their interpretation, reconcilation is the test of condonation. Denning L.J. has defined reconciliation in terms of mutual trust and confidence which implies that condonation is a bilateral act. The statement of Wright J. in *Douglas* v. *Douglas & Miller* also supports the view that condonation involves acts on the part of both spouses: "... whatever the acts of the innocent spouse, condonation cannot be found if the erring spouse does not want to be reconciled".[34]

It was held in *Douglas* that because the husband continued to engage in adulterous acts, the desire to resume marital relations was not mutual. The decree *nisi* was granted in favour of the wife. In addition, Disbery J. stated in *Leaderhouse* that reinstatement (which is a necessary element of condonation) cannot be achieved unless the guilty spouse expresses a desire for it.[35] Davies is also of the opinion that condonation is not solely dependent on the acts and conduct of the innocent spouse.[36]

On the other hand, Quebec authors Pineau[37] and Deleury and Rivet[38] are of the opinion that condonation is a unilateral act on the part of the innocent spouse. Pineau distinguishes between forgiveness and reconciliation:

> ... le pardon est une décision unilatérale, différente théoriquement de la réconciliation qui suppose une volonté commune.[39]

The French version of section 9(1)(c) of the *Divorce Act* translates condonation as *"le pardon"*. *Pardon* can be translated as "forgiveness". "Forgiveness" denotes a one-sided act — only one of the parties need cease to feel resentment for forgiveness to occur. If forgiveness without reconciliation is sufficient to constitute condonation, Pineau is correct in his statement that condonation is a unilateral act on the part of the wronged spouse. However, the majority of cases state that reconciliation is a necessary element of condonation, thus underlining its bilateral nature.

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[34] *Douglas* v. *Douglas & Miller* [1977] 1 W.W.R. 95, 96 (Man. Q.B.).
[35] *Supra,* note 30, 321.
[36] Davies, *supra,* note 33, 123.
[37] Pineau, *Mariage séparation divorce* (1976), 145.
[38] Deleury & Rivet, *Droit Civil: Droit Des Personnes Et De La Famille* (1973), 214.
[39] Pineau, *supra,* note 37, 145.

III. Sexual intercourse and condonation

Another difficulty not contemplated by the *Divorce Act* is the relationship between sexual intercourse and condonation.[40] If the innocent spouse engages in sexual intercourse with the guilty spouse after full knowledge of the matrimonial offence committed under section 3, is this conduct tantamount to condonation?

According to *Keats* v. *Keats & Montezuma,* the single act of intercourse of a husband with his guilty wife is conclusive evidence that he condoned her misconduct.[41] Viscount Simon L.C. in *Henderson* v. *Henderson & Crellin* states the one exception to this rule:

> ... if the intercourse was induced by a fraudulent mis-statement of fact by the wife, that circumstance will prevent the husband's actions from having the effect of condonation... .[42]

The principle enunciated in *Keats* does not apply to a woman. According to *Keats, Henderson* and *Mackrell,*[43] sexual intercourse of the wife with her guilty husband does not necessarily imply that she condoned his acts. The basis for the distinction between the sexes is that a "husband would not take a delinquent wife to bed unless he had forgiven her".[44] It is believed that although a man generally has the financial capacity to move out of the matrimonial home, a woman often has no alternative but to reside with her guilty spouse and to "submit to intercourse out of necessity".[45] In addition, it was stated that the consequences of the act of intercourse are potentially more serious for the woman in that she could become pregnant.[46] Lord Chelmsford summarized the position of the courts:

> The wife is hardly her own mistress; she may not have the option of going away; she may have no place to go to; no person to receive her; no funds to support her; and therefore her submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of the husband in renewing his intercourse with his wife.[47]

Whether the rule established by the English courts is applicable in Canada has been questioned in such cases as *Anema* v. *Anema &*

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[40] Buglass, *supra,* note 6, 98.
[41] *Supra,* note 9, 760.
[42] *Henderson* v. *Henderson & Crellin* [1944] A.C. 49, 52 (H.L.).
[43] *Supra,* note 11.
[44] *Supra,* note 30, 321.
[45] *Beeby* v. *Beeby* (1799) 1 Hagg. Ecc. 789, 162 E.R. 755, cited in *Leaderhouse, supra,* note 30, 322.
[46] Davies, *supra,* note 33, 123.
[47] *Supra,* note 9, 760.

Foss[48] and *Saunders* v. *Saunders*.[49] According to Payne, the Canadian courts have not maintained the distinction between the sexes.[50] Payne argues that the courts in Canada do not invariably conclude that a husband's participation in sexual intercourse with his wife constitutes condonation:

> ... in the light of the extending social and economic emancipation of the woman in modern society, however, there seems little justification for maintaining a distinction in application of the rules of condonation according to the sex of the petitioner ... .[51]

Davies agrees that "however justified this distinction between the sexes may have been in the nineteenth century, it is anomalous today".[52]

Some writers suggest, however, that sexual intercourse, while not conclusive in itself, has a special importance as regards condonation.[53] It is argued that when an act of sexual intercourse takes place, a strong presumption is created that the innocent spouse intended to condone the acts of his or her spouse. This presumption will not be easily rebutted.[54] *Blue* v. *Blue*[55] is a case which reflects this view. In its decision, the Court placed special emphasis upon the act of intercourse. Johnson J. held that due to the petitioner's conduct in allowing her husband to enter the premises and to engage in sexual intercourse, she had condoned his cruel behaviour.[56]

Other cases have adopted Davies' interpretation of the relationship between sexual intercourse and condonation. Basing her reasoning on *Leaderhouse* v. *Leaderhouse*, she states that no presumption, rebuttable or irrebuttable, can be inferred from sexual intercourse; it is merely one element of evidence which must be treated equally with others.[57] For example, the issue in *Nielsen* v. *Nielsen*[58] was whether the five or six acts of intercourse between the spouses amounted to condonation. It was held that due to the absence of

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[48] *Anema* v. *Anema & Foss* (1976) 27 R.F.L. 156, 157 (Man. Q.B.).

[49] *Saunders* v. *Saunders* (1976) 22 R.F.L. 210, 213 (Man. Q.B.).

[50] Payne, *The Concept of Condonation in Matrimonial Causes: A Restatement of Henderson v. Henderson and Crellin* (1961) 26 Sask. Bar Rev. 53, 56.

[51] *Ibid.*, 58.

[52] Davies, *supra*, note 33, 124.

[53] See Payne, *supra*, note 50, 57, and Chapman, *Everything You Should Know About Law and Marriage* (1971), 67.

[54] Payne, *supra*, note 50, 57.

[55] *Supra*, note 7.

[56] *Ibid.*, 228.

[57] Davies, *supra*, note 33, 124.

[58] *Supra*, note 8.

reconciliation between the spouses, Mrs Nielsen could not be found to have condoned her husband's act of adultery. Galligan J. stated that sexual intercourse is only one piece of evidence from which a court can infer condonation.[59] Similarly, Disbery J. in *Leaderhouse* held that the cruel acts of the respondent were not condoned by the petitioner despite the fact that the parties had had sexual intercourse.[60] Furthermore, an innocent spouse may engage in intercourse without any intention of either forgiveness of past offences or reinstatement of the guilty spouse.[61] According to Disbery J., sexual intercourse may be nothing more than the satisfaction of a biological urge.[62]

Is sexual intercourse necessary to establish condonation? According to *Tingey* v. *Tingey*, condonation can exist in the absence of sexual relations between the parties.[63] The requirements of condonation are forgiveness and the resumption of the previous marital relationship (reinstatement) — which relationship may not have been characterized by acts of intercourse. As Grant J. stated, "It is not necessary that the offending spouse's position in the affection of the other spouse be elevated beyond what it previously was".[64] He held that although the petitioner did not have intercourse with her husband subsequent to his adulterous acts, she had nevertheless condoned his offence. Because she had not had sexual intercourse with him for many years prior to his adultery, but continued to sleep in the same room and perform domestic duties after knowledge of his acts, she satisfied the requirements of section 9(1)(c). The petition was dismissed.

IV. Cohabitation and condonation

The *Divorce Act* provides that under certain circumstances, cohabitation will not amount to condonation:

> "condonation" does not include the continuation or resumption of cohabitation during any single period of not more than ninety days,

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[59] *Ibid.*, 429.

[60] *Supra*, note 30, 323.

[61] *Ibid.*

[62] *Ibid.*

[63] *Tingey* v. *Tingey* (1970) 12 D.L.R. (3d) 559, 564 (Ont. H.C.). See also *Grandy, supra*, note 33, 363; *Strachan, supra*, note 17, 386; *Croft* v. *Croft* (1969) 10 D.L.R. (3d) 267, 269 (N.S.S.C., T.D.); *Trites* v. *Trites* (1969) 9 D.L.R. (3d) 246 (N.S.S.C., T.D.); and *Aucoin, supra*, note 20, 46 for support for the proposition that, failing forgiveness on the part of the innocent spouse, subsequent intercourse is not sufficient to result in a finding of condonation.

[64] *Ibid.*, 564.

> where such cohabitation is continued or resumed with reconciliation as its primary purpose [.][65]

Gould J. in *Einarson* v. *Einarson* stated that section 2 is not to be viewed as a definition of condonation; section 2 cannot be interpreted to mean that any cohabitation in excess of ninety days constitutes condonation.[66]

A problem which remains unresolved with respect to section 2 is the meaning of "any single period of not more than ninety days". According to *Cherniski* v. *Cherniski*[67] and Mendes da Costa,[68] the section applies to those situations in which there are several periods of cohabitation, provided that each period is less than ninety days and reconciliation is the primary purpose of the cohabitation. However, *Armstrong* v. *Armstrong*,[69] *Goodland* v. *Goodland*[70] and Davies[71] state that section 2 is applicable only to one period of cohabitation, and does not aid the spouse who attempts for a second time to effect a reconciliation, even though the spouses in each period have not lived together for more than ninety days.

If the petitioner does not come within section 2, to what extent should the courts view cohabitation as evidence of condonation? In *Ifield* v. *Ifield*,[72] a wife petitioned for divorce on the ground of physical cruelty under section 3(d) of the *Divorce Act*. Disbery J. held that by continuing to cohabit with her spouse, she had condoned the cruel acts of her husband.[73] *Saxton* v. *Saxton*[74] involved a petition for divorce by the husband on the grounds of mental cruelty. Verchere J. stated that in continuing to live with his wife, the husband had condoned the behaviour of which he complained. The fact that the conduct of his spouse made him physically and mentally ill did not have any influence on the existence of condonation.[75]

The *Aucoin* case[76] held that mere cohabitation does not establish condonation, and cohabitation is not to be accorded more eviden-

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[65] *Divorce Act*, s. 2.
[66] *Einarson* v. *Einarson* (1971) 20 D.L.R. (3d) 126, 128 (B.C.S.C.).
[67] *Cherniski* v. *Cherniski* (1970) 16 D.L.R. (3d) 606 (Man. Q.B.).
[68] Mendes da Costa, "Divorce" in Mendes da Costa (ed.), *Studies in Canadian Family Law* (1972), vol. I, 359, 393.
[69] *Armstrong* v. *Armstrong* (1971) 21 D.L.R. (3d) 140 (Ont. H.C.).
[70] *Goodland* v. *Goodland* (1974) 3 O.R. (2d) 464 (H.C.).
[71] Davies, *supra*, note 33, 130.
[72] *Ifield* v. *Ifield* (1975) 24 R.F.L. 237 (Sask. Q.B.).
[73] *Ibid.*, 245.
[74] *Saxton* v. *Saxton* (1974) 12 R.F.L. 135 (B.C.S.C.).
[75] *Ibid.*, 157.
[76] *Supra*, note 20, 46.

tiary weight than are other factors. MacKeigan C.J.N.S. referred to the statement of Bucknill L.J. in *Mackrell* v. *Mackrell* that forgiveness cannot be invariably inferred from the fact that the spouses are living in the same house.[77] Denning L.J. in the same decision stated:

> The fact that the parties continue to live in the same house or the fact that the guilty party is reinstated in his or her former position is, indeed, evidence from which reconciliation may be inferred, but it is by no means conclusive. The longer the parties continue to live together and the closer their relationship, the stronger, of course, is the evidence of reconciliation; but cases often arise where the parties continue to live in the same house by force of circumstances.[78]

In *Einarson* v. *Einarson,* the petitioning wife resumed and continued cohabitation for over a year after the occurrence of the marital offence. The Court held that since reconciliation was not effected between the spouses, condonation did not exist. A decree absolute was granted in favour of the wife, notwithstanding cohabitation.[79]

Strachan v. *Strachan*[80] is illustrative of a situation in which economic considerations were the main reasons for the cohabitation of the spouses. Although the petitioner resided with her husband in full knowledge of his adulterous acts, the parties maintained separate existences. They never went out together on social occasions, they did not engage in sexual relations, and they rarely communicated. The petitioner cooked her husband's meals and laundered his clothes. Due to their financial situation, neither spouse could afford to move out of the matrimonial home. Ruttan J. held that the wife's continued presence in the home and her performance of domestic duties did not constitute condonation of the adultery.[81]

A number of cases distinguish between situations in which a husband resumes cohabitation and those in which a wife does so.[82] It is argued that a man is often more economically secure and has a choice with respect to living in the matrimonial home. A woman may only acquire the necessary funds with which to find alternative accommodation upon obtaining judgment against her husband. In *Khader* v. *Khader,* a decree *nisi* was granted in favour of the

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[77] *Supra,* note 11, 860.

[78] *Ibid.,* 861. *Tingey* v. *Tingey, supra,* note 63, 561, and *Crosby* v. *Crosby, supra,* note 20, 9, also support the view that living under the same roof does not necessarily imply that a meaningful relationship exists between the spouses.

[79] *Supra,* note 66.

[80] *Supra,* note 17.

[81] *Ibid.,* 387.

[82] *Mackrell, supra,* note 11, 860; *Khader* v. *Khader* (1975) 20 R.F.L. 365 (Ont. C.A.); and *Francescutti* v. *Francescutti* (1976) 24 R.F.L. 378 (B.C.S.C.).

wife, despite the fact that she returned to the matrimonial home following a physical assault.[83] The wife had no friend or relative with whom she could live, nor did she have sufficient finances with which to rent living premises. *Francescutti* v. *Francescutti* also supports the view that the act of a woman in continuing to reside in the matrimonial home does not necessarily constitute condonation.[84] The petitioner was financially dependent on her husband, had no working experience and had three small children to care for, one of whom was disabled.

Is cohabitation necessary to a finding of condonation by the courts? According to Chapman[85] and the Law Reform Commission of Canada,[86] resumption or continuation of cohabitation is a necessary element of condonation. However, McLellan Co. Ct J. in *Trites* v. *Trites*[87] as well as Deleury and Rivet[88] are of the opposite opinion. Several recent Canadian cases support the view expressed by Deleury and Rivet that condonation does not depend on any one particular fact but is based upon the circumstances of each case. Neither cohabitation[89] nor sexual intercourse[90] is a necessary ingredient of condonation. As suggested by Deleury and Rivet, no single factor — such as the delay between the knowledge of the offence and the bringing of an action in divorce, the length of time in which the innocent spouse continues to live with the guilty spouse, and the resumption or continuation of sexual relations — is conclusive in determining the existence of condonation.[91]

V. The public interest

Section 9(1)(c) of the *Divorce Act* provides that a decree *nisi* may be granted notwithstanding condonation if "in the opinion of the court, the public interest would be better served by granting the decree".

Much controversy surrounds the issue of whether condonation is a discretionary bar to divorce. Payne,[92] Buglass[93] and much of the

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[83] *Supra,* note 82, 366.
[84] *Supra,* note 82, 388.
[85] *Supra,* note 53, 67.
[86] *Supra,* note 19, 15.
[87] *Supra,* note 63, 262.
[88] Deleury & Rivet, *supra,* note 38, 214.
[89] *Trites* v. *Trites, supra,* note 63, 262.
[90] *Tingey* v. *Tingey, supra,* note 63, 563.
[91] Deleury & Rivet, *supra,* note 38, 214.
[92] Payne, *Bill C-187* (1968) 18 U.N.B.L.J. 85, 87.
[93] *Supra,* note 6, 85.

jurisprudence suggest that it is within the discretion of the court to grant a decree if it deems it to be in the public interest. On the other hand, it has been argued by Mendes da Costa[94] and Disbery J. in *Ifield* v. *Ifield*[95] that section 9(1)(c) does not authorize the judge to exercise discretion; should the court decide that it is in the public interest to grant the decree despite condonation, it is its duty to grant it.

Regardless of the interpretation to be given to section 9(1)(c), the court must first decide whether the public interest is being served by granting the decree. Public interest is not, however, defined in the *Divorce Act*. Some Canadian courts[96] have adopted the tests established by the House of Lords in *Blunt* v. *Blunt*.[97] Viscount Simon L.C. stated that the following conditions ought to be examined:

> 1) the position and interest of any children of the marriage;
> 2) the interest of the party with whom the petitioner [*sic*] has been guilty of misconduct, with special regard to the prospect of their future marriage;
> 3) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife;
> 4) the interest of the petitioner, and, in particular, the interest that the petitioner should be able to remarry and live respectably;
> 5) ... of primary importance, namely, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.[98]

A factor considered by the Canadian courts to be important, if not decisive, in determining whether it is in the public interest to grant the decree, is the breakdown of the marriage.[99] McLellan Co. Ct J. in *Trites* v. *Trites* stated:

> ... the pendulum of public opinion has swung far in the direction of recognizing the futility of continuing the bonds of matrimony in cases where the marriage has utterly broken down.[100]

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[94] Mendes da Costa, *supra*, note 68, 386.

[95] *Supra*, note 72, 247.

[96] See, *e.g.*, *Miller* v. *Miller* (1971) 1 R.F.L. 314, 320 (N.S.S.C., T.D.); *Saxton*, *supra*, note 74, 158-59; and *B.* v. *Dame D.* [1971] C.S. 413, 417.

[97] *Blunt* v. *Blunt* [1943] A.C. 517 (H.L.).

[98] *Ibid.*, 525.

[99] *Raney* v. *Raney* (1973) 13 R.F.L. 156, 160 (Ont. H.C.), and *Crosby*, *supra*, note 20, 10 held that in view of the failure of the marriage, it was in the public interest to grant the decree.

[100] *Supra*, note 63, 263.

Similarly, Morse J. held in *Saunders* v. *Saunders* that:

> to perpetuate this marriage, in my opinion would be to perpetuate a farce, a marriage which does not exist except in name and has no hope of survival.[101]

In addition, Robertson J.A. in *Allan* v. *Allan*[102] and Osler J. in *Mark* v. *Mark*[103] maintained that public interest requires an end to a marriage which has been characterized by unhappiness and which does not benefit anyone.

Another factor which is accorded considerable weight by the courts is the interest of the children. Several cases have held that it is in the public interest to grant the decree in order to stabilize the lives of the children of the marriage.[104]

Disbery J. in *Ifield* v. *Ifield* stated that it is essential that the courts distinguish between the public interest — which is the interest of the community — and the private interest. The benefit which might be derived by a petitioner from the granting of the decree ought not to be considered. He maintained that preconditions to the applicability of section 9(1)(c) are that an interest in the community at large be involved and that the public interest be better served by the decree.[105] Similarly, in *Blue* v. *Blue* (one of the few cases where the decree was refused), it was stated that the public interest and private interests must be clearly delineated and that the desire of the parties to remarry does not meet the requirement of public interest in section 9(1)(c).[106]

Another yet unresolved problem is whether the public interest is to be narrowly or widely construed by the courts. According to *Harasyn* v. *Harasyn*, a narrow interpretation would have the effect of discouraging spouses from attempting to save their marriages:

> To refuse the decree because the petitioner for a long period before final separation from her husband desperately sought to maintain the marriage by repeatedly condoning acts of cruelty on the part of her husband would tend to indicate disapproval of such attempts on the part of a spouse to maintain the marriage, and could tend to discourage such attempts at reconciliation.[107]

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[101] *Supra*, note 49, 213.

[102] *Allan* v. *Allan* (1971) 7 R.F.L. 96, 98 (B.C.C.A.).

[103] *Mark* v. *Mark* (1973) 15 R.F.L. 73, 86 (Ont. H.C.).

[104] See *Francescutti, supra*, note 82, 389; *Getson* v. *Getson* (1970) 12 D.L.R. (3d) 525, 532 (N.S.S.C., T.D.); and *Raney, supra*, note 99, 160.

[105] *Supra*, note 72, 247.

[106] *Supra*, note 7, 229. Thus, some of Viscount Simon's criteria were rejected by Johnson J. of the Saskatchewan Queen's Bench.

[107] *Harasyn* v. *Harasyn* (1970) 13 D.L.R. (3d) 635, 637 (Sask. Q.B.).

However, it is argued by Mendes da Costa[108] and Buglass[109] that a liberal interpretation of public interest would render the concept of condonation meaningless. If decrees were readily granted by the courts, the effectiveness of condonation as a bar to divorce would be reduced. In view of section 4(1)(e)(i), which provides that after a separation period of three years the spouse can obtain a divorce, the courts should not be reluctant to dismiss petitions. *Sergeant* v. *Sergeant* is illustrative of a narrow interpretation of "public interest". The spouses lived separately and there was no evidence of attempts at cohabitation. Cowan C.J.T.D. held that the fact that there was no possibility of reconciliation was irrelevant. The court was not satisfied that the public interest would be better served by granting the divorce and the petition was dismissed.[110]

VI. Doctrine of revival

According to section 9(2) of the *Divorce Act*, once a matrimonial offence under section 3 is condoned, it cannot be revived by the subsequent misbehavior of the guilty spouse so as to constitute a ground for divorce. The section reads:

> Any act or conduct that has been condoned is not capable of being revived so as to constitute a ground for divorce described in section 3.

Prior to the enactment of the *Divorce Act*, the doctrine of revival, enunciated in 1730, rendered condonation conditional.[111] If a spouse whose wrong had been condoned committed a further matrimonial offence, the innocent spouse was entitled to petition not only on the later uncondoned matrimonial offence, but also on the basis of the earlier condoned offences. Therefore, condonation was conditional upon the spouse not committing a further matrimonial offence. If such a further offence were committed, this would have the effect of "reviving" the earlier condoned offence. Thus, condonation was not viewed as being final or absolute by the courts.[112]

The Parliament of Canada abolished the doctrine of revival and made condonation absolute by virtue of section 9(2). The wronged spouse can no longer plead as a ground for divorce conduct which she or he condoned. Had the doctrine been included in the *Divorce*

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[108] Mendes da Costa, *supra*, note 68, 386.
[109] Buglass, *supra*, note 6, 95.
[110] *Sergeant*, *supra*, note 33, 738.
[111] *Worsley* v. *Worsley* (1730) 2 Lee 572, 161 E.R. 444.
[112] Davies, *supra*, note 33, 125. See also Mendes da Costa, *supra*, note 68, 390; *Ifield*, *supra*, note 72, 245-46, and *Leaderhouse*, *supra*, note 30, 319.

Act, a matrimonial offence in section 3, which had been condoned, could be revived by a subsequent offence of lesser gravity. The effect, then, is that unless an uncondoned act exists, a divorce cannot be granted.[113]

Some courts have not adhered to a strict interpretation of section 9(2). It has been suggested that although condoned acts are prohibited from being revived, they may nonetheless serve as background against which the uncondoned acts may be assessed.[114] One writer[115] has stated:

> ... il sera possible, dans le cas de récidive, de faire allusion à la faute passée pour illustrer la situation globale à laquelle le couple fait face. La nouvelle faute sera le fondement de l'action en divorce alors que la faute pardonnée deviendra un élément de la preuve générale.[116]

This argument is used particularly in cases where the petition is based on cruelty. Cruelty is of a different nature from the other grounds of divorce enumerated in section 3 — adultery, sodomy, bestiality, rape, homosexual acts and bigamy. While these grounds relate to the performance of a specific act, cruelty involves a course of conduct. It is argued, therefore, that the courts must examine conduct prior to condonation in order to characterize conduct which occurs after condonation as cruelty. As decided in *Lyons* v. *Lyons*:

> ... the true character of, perhaps, slight acts of cruelty only emerges when it is considered in the light of conduct which occurred prior to the condonation.[117]

Stark J. expressed a similar view in *Jaworski* v. *Jaworski*:

> If regard may be had to the long history of cruel acts in the past, even though condoned by a subsequent reconciliation, then a single serious incident occurring after the condonation bears an increased importance [.][118]

Thus, acts which in themselves do not amount to cruelty under section 3(d) may assume that character when viewed in the light of previously condoned acts of cruelty.

A comparison of section 9(2) with the equivalent provision in the Quebec Civil Code on legal separation discloses that the *Jawor-*

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[113] *Supra*, note 72, 246.

[114] See, *e.g.*, *Lyons* v. *Lyons* (1970) 1 R.F.L. 328, 330 (N.S.S.C., T.D.); *Croft*, *supra*, note 63, 271; *Raney*, *supra*, note 99, 157, and *Jaworski* v. *Jaworski* (1973) 34 D.L.R. (3d) 44 (Ont. H.C.).

[115] Ouellette-Lauzon, *Droit Des Personnes Et De La Famille* (1976).

[116] *Ibid.*, 199.

[117] *Lyons*, *supra*, note 114, 330.

[118] *Jaworski*, *supra*, note 114, 46.

ski/Lyons interpretation of section 9(2) is, in effect, an acceptance of the doctrine of revival.

> Article 196: The action for separation from bed and board is extinguished by a reconciliation of the parties taking place either since the facts which gave rise to the action or after the action brought [*sic*].
>
> Article 197: In either case the action is dismissed.
> The plaintiff may nevertheless bring another, for any cause which has happened since the reconciliation, and may in such case make use of the previous causes in support of the new action.

It appears that the doctrine of revival exists for legal separation in Quebec law.[119] According to article 197, the original grounds for separation from bed and board may be used by the spouse in support of a new action, provided that the latter action is based upon events which have transpired since the reconciliation. Mignault concurs in the view that the doctrine of revival is applicable to legal separation:

> Remarquez même que sa demande est alors admissible, encore que les faits nouveaux ne soient pas *par eux-mêmes* assez graves pour la faire admettre, si, d'ailleurs, leur réunion aux faits antérieurs leur donne la gravité suffisante qu'ils n'ont point par eux seuls: autrement, dans quel but la loi permettrait-elle de faire revivre les faits antérieurs?[120]

Jetté also maintains that reconciliation in article 197 is conditional:

> ... si la réconciliation rend l'action non recevable, elle ne l'éteint pas cependant absolument, ou plutôt elle ne fait disparaître que conditionnellement les causes qui la justifiaient.[121]

The commentaries to the Draft Civil Code, in distinguishing between section 9(2) and article 197, state that although condoned conduct cannot be invoked in a petition for divorce, acts prior to reconciliation may be used to support an action for separation from bed and board.[122] Cases such as *Lyons* v. *Lyons* and *Jaworski* v. *Jaworski*, which give to section 9(2) a meaning similar to that of article 197, have departed from the clearly expressed intent of Parliament. Their interpretation renders section 9(2) nugatory.

Is there an inconsistency between section 9(2) and section 9(1)(c) of the *Divorce Act?* The question focuses on whether the court is permitted to examine condoned conduct when exercising

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[119] *M.* v. *Dame X.* [1943] B.R. 668; *Dame Stickler* v. *Maxwell* (1923) 36 B.R. 408; and *Dame Couteau* v. *Skelley* (1901) 20 C.S. 216.

[120] Mignault, *Le Droit Civil Canadien* (1896), t. 2, 19.

[121] Jetté, *De la Séparation de Corps* (1928-29) 7 R. du D. 214; cited in *M.* v. *Dame X., supra,* note 119, 672.

[122] Civil Code Revision Office, *Report on the Québec Civil Code* (1977), vol. II (Commentaries), t. 1, Bk 2, 177.

its discretion under section 9(1)(c). *Lyons* v. *Lyons* outlines the problem:

> Suppose, in a hypothetical case, that the court was satisfied that the public interest would be better served by granting the decree, the petitioner's condonation notwithstanding, to grant the decree would be in effect reviving the condoned conduct, because without it there would be no ground for the divorce, and yet to do so seems to be flying in the face of the clear meaning of s. 9(2).[123]

The Court stated that section 9(1)(c) must be read subject to section 9(2). In other words, condoned conduct may not be considered by the court when it is deciding whether or not the public interest will be served by granting the decree. To do otherwise would be to revive the condoned conduct and thus to contravene section 9(2).[124]

Payne, however, suggests that section 9(2) is inapplicable in cases where the court is exercising its discretion under section 9(1)(c); section 9(2) must be read subject to section 9(1)(c).[125] Parker J. agreed that evidence of conduct prior to condonation may be examined by the courts in the course of their decision as to whether or not the public interest would be better served by granting the decree.[126] This is the better view, according to Davies. She states that the *Lyons* interpretation places significant and unwarranted constraints upon the broad discretion which section 9(1)(c) was intended to confer upon the courts.[127]

VII. Conclusion

Despite the fact that many unresolved issues exist with respect to condonation, it is important to remember that the *Divorce Act* is only ten years old. Although some areas of law are not completely settled,[128] the courts are moving in the direction of unanimity.

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[123] *Supra*, note 114, 331.

[124] *Ibid.*, 332.

[125] Payne, *The Divorce Act (Canada) 1968* (1969) 8 Alta L. Rev. 1, 26.

[126] *Raney* v. *Raney, supra*, note 99, 157.

[127] Davies, *supra*, note 33, 127.

[128] Unlike other aspects of condonation, the courts have reached a consensus with respect to the burden and standard of proof. The onus of proving that an offence has not been condoned lies on the petitioner. As Davies explains, there is a *prima facie* presumption against condonation and it is only in situations in which the court suspects that condonation has occurred that this burden lies with the petitioner: *ibid.*, 125. The petitioner must prove on a balance of probabilities that he or she did not condone the offence of his or her spouse: *Trites, supra*, note 63, 254. A matrimonial offence under s. 3 is capable of being condoned up to the date of the decree absolute: *Brown* v. *Brown* [1971] 1 W.W.R. 236 (Sask. Q.B.).

The following trends may be discerned:

1) condonation is a bilateral act rather than a unilateral act;
2) sexual intercourse and cohabitation are to be treated equally with other elements of evidence which establish condonation; and
3) it is within the court's discretion to grant a decree *nisi*, notwithstanding condonation, if it is deemed to be in the public interest.

It is to be hoped that the remaining issues in this area of law will be approached by the courts in a more uniform fashion.