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Marriage Prohibitions, Adoption and Private Acts of Parliament: The Need for Reform

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In this article, the uncertainties and anomalies of the law in Canada regarding relationships within which marriages are prohibited are canvassed fully. The author demonstrates the need for legislation to remove the irregularities with which the law has become encrusted and to provide a background against which to consider two even more important reasons for legislative reform. First, the law no longer reflects the needs and wants of society, as witnessed by the easy passage of private acts of exemption that belie any justification for the general rules themselves. Sccondly, the intersection of the federal marriage prohibitions with provincial adoption laws has produced a legal quagmire, and a coherent federal policy regarding the capacity of adoptive relatives to intermarry is overdue. In his conclusions, the author reviews the purposes of marriage prohibitions and makes concrete suggestions for legislative change.

L'auteur souligne les incertitudes et les anomalies à l'égard des empêchements au mariage en droit canadien afin de démontrer qu'une réforme législative serait souhaitable, y ajoutant deux justifications de fond mettant davantage en relief l'utilité d'un changement. D'abord, les lois actuelles ne rencontreraient pas les besoins de la société, à preuve les nombreuses lois d'exemption privées rendant superflus les principes légaux eux-mêmes. Ensuite, le chevauchement entre les lois fédérales prohibitives sur le mariage et les lois provinciales sur l'adoption aurait produit un marasme judiciaire dans le domaine. Une politique fédérale cohérente sur les possibilités de mariage entre personnes liées par une filiation adoptive semblerait ainsi nécessaire. Enfin, l'auteur examine la raison d'être des empêchements matrimoniaux et fait quelques suggestions quant au contenu des changements législatifs désirables.

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Synopsis

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Introductiou

The law in Canada regarding the impediment to marriage known as the "prohibited degrees" is not as settled as might at first appear, even apart from the difficulties occasioned by its intersection with the more modern laws of divorce and adoption. Despite Parliament's exclusive competence in the matter,[1] the prohibited degrees of marriage remain either those that existed in each province at the time it became a part of Canada [2] or those incorporated by reference in subsequent federal legislation of local application,[3] with the exception of a number of such relationships since removed by federal legislation.[4] Not only is this law antiquated, confused and of uncertain uniformity across the country, it is also socially outmoded, as witnessed by the recent spate of applications to Parliament for private acts of exemption. In demonstrating the need for legislative reform, the state of the general law must be canvassed first. This investigation includes the narrow but contentious issue of the effect of federal divorce laws on prohibited relationships. Following an explanation of the scope of the growing practice of private exemptions from public law, the special problems occasioned by the impingement of provincial adoption laws upon this federal sphere are considered. In conclusion, a number of reasons are given to support the suggestion that the

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[1] See the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), s. 91(26). The matter of prohibiting marriages on the basis of kinship is one of capacity to marry and clearly falls within Parliament's exclusive power in relation to "marriage and divorce". The authorities on this point are legion. See, *e.g.*, the cases cited *infra*, notes 4 and 21. See also H. Hahlo, *Nullity of Marriage in Canada With a Sideways Glance at Concubinage and its Legal Consequences* (1979) 5-6.

[2] See the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), s. 129. Because only Parliament can legislate on this matter, the provinces have been unable to alter the laws existing at the time of confederation in this respect.

[3] See, *e.g.*, the *Annulment of Marriages Act (Ontario)*, R.S.C. 1970, c. A-14. First enacted in 1930 as the *Divorce Act (Ontario)*, S.C. 1930, c. 14, this federal legislation introduced into Ontario the law of England concerning divorce and annulment as it was on 15 July 1870. The Territories and all the western provinces (save British Columbia) also received the general law of England as of 15 July 1870: *An Act further to amend the law respecting the North-West Territories, 1886*, 49 Vict., c. 25, s. 3; *The Yukon Territory Act, 1898*, 61 Vict., c. 6, s. 9; *An Act respecting the application of certain laws therein mentioned to the Province of Manitoba, 1888*, 51 Vict., c. 33, s. 1. Alberta and Saskatchewan were carved out of the Territories and retained the laws formerly applied within their boundaries, unless and until altered by competent legislation: see *Board* v. *Board* [1919] A.C. 956, (1919) 48 D.L.R. 13 (P.C.). The laws the other provinces carried with them into confederation have remained untouched regarding prohibited degrees, except with respect to the federal legislation referred to *infra*, note 4.

[4] Beginning in 1882, Parliament enacted a series of statutes effecting the piecemeal removal of various marriage prohibitions, culminating in what is now the *Marriage Act*, R.S.C. 1970, c. M-5. The earlier legislation is reviewed in *Crickmay* v. *Crickmay* (1966) 60 D.L.R. (2d) 734, (1966) 58 W.W.R. 577 (B.C.C.A.) [hereinafter cited to D.L.R.].

recent Australian reform of this area of the law should be followed substantially in Canada. Marriages should be prohibited and void on the ground of relationship only between biological siblings and persons related lineally either by consanguinity or adoption. There should be no other prohibitions.

I. The Law of Prohibited Degrees: A Chimera?

A. *Historical Development*

It is a commonplace that marriages are prohibited between persons related within certain degrees, either by consanguinity (blood) or by affinity (marriage), and the social taboos against incest are usually reinforced by the criminal law.[5] Our Western culture traces its prohibitions against such unions to Chapter 18 of the Book of Leviticus in the Old Testament. Certain sexual unions are condemned therein as being incestuous and prohibited, but neither a formula nor a list inclusive of all relationships within a given degree is provided. Rather, specific relationships are set out, some involving persons related by half-blood and some arising by affinity, but none more remote than the third degree.[6] The impediment of prohibited relationship was adopted by the Christian church and rationalized into *degrees* of relationship as opposed

[5] In Canada, by virtue of s. 150(1) of the *Criminal Code*, R.S.C. 1970, c. C-34, a person is guilty of the crime of incest if he or she has sexual intercourse with another person who he or she knows is "by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be". Curiously, our criminal law also condemns (but not as incest) sexual intercourse between a man and his step-daughter, but not between a man (or boy) and his step-mother. Moreover, the condemned intercourse must be "illicit", and only the step-father is guilty of the offence which is indictable and punishable by up to two years in prison. See the *Criminal Code*, s. 153. The sociological purposes apparently underlying these prohibitions are dealt with at length in the Conclusion, *infra*, because they are more relevant to a consideration of what the law ought to be than to what it is.

[6] Uncle-aunt, for instance. The Jews have always read these injunctions strictly and, since it is not expressly prohibited in Jewish law, a man may marry his niece. It was permitted because there was no reason to prohibit it. However, owing to the importance attached to the familial authority of one generation over the next, marriage was forbidden between aunt and nephew because the husband's authority over his wife would conflict with the generational authority of the aunt over her nephew. In contrast, an uncle's authority over his niece is enlarged by his marriage to her. The Christian prohibition against marriage of uncle and niece was simply an extension by analogy of the aunt-nephew prohibition, as though there were no real difference between them. But if you remove the difference based upon authority, then marriage should not be prohibited in either case. See Finlay, *Farewell to Affinity and the Calculus of Kinship* (1975-77) 5 U. Tasmania L. Rev. 16, 20 and the authorities cited therein. See also *Cheni (otherwise Rodriguez)* v. *Cheni* [1962] 3 All E.R. 873 (P. Div.). Perhaps this illustrates the danger of interpreting legislation in this area as extending by "necessary intendment" to relationships not specifically named. *Seidler* v. *Mackie* [1929] 4 D.L.R. 478, [1929] 2 W.W.R. 645 (Alta S.C.) involved such a relationship.

to a series of specific prohibitions. The number of degrees within which marriages were prohibited, and the circumstances giving rise to such relationships, were greatly expanded until, at one time, the canon law proscribed marriages of persons related within seven degrees by its method of counting — fourteen by the common law method. Moreover, for a time, prohibited relationships arose not only by blood and marriage, but by sexual relations outside marriage. Marriages were also once prohibited between persons spiritually related, so that a godparent could not marry his or her godchild, nor could either marry blood relatives of the other within the number of degrees specified. The canon law underwent considerable modification long before the Reformation, but its prohibitions remained more extensive than those of Leviticus.[7]

For a period of time following the Reformation, the law of England touching this matter was not entirely clear. However, certain prohibitions were laid down in the *Statutes* of Henry VIII. Like those of Leviticus, they were specific prohibitions; not all relationships of the same degree were encompassed.[8] In 1563, less than a quarter century after the last of them was enacted, Archbishop Parker prepared a Table of prohibited degrees, apparently based on the *Statutes* of Henry VIII. Although the Table does not speak of degrees, nor provide a formula, it lists all the possible relationships up to and including the third degree, arising either by blood or marriage.[9] This Table was adopted by the Church of England as Canon 99, and it was set forth in the *Book of Common Prayer*. Apparently, it was this Table that came to be applied by the Ecclesiastical Courts of England in annulment actions under the Church's jurisdiction and, until the *Marriage Act*[10] of 1835, such marriages were treated as merely voidable. *Lord Lyndhurst's Act*, as it is commonly called, provided: "W[hereas] Marriages between Persons within the prohibited Degrees are voidable only by Sentence of the Ecclesiastical Court. . . all Marriages which shall hereafter be celebrated between Persons within the prohibited Degrees of Consanguinity or Affinity shall be absolutely null and void to all Intents and Purposes whatsoever." The evolution of

[7] See generally J. Jackson, *The Formation and Annulment of Marriage*, 2d ed. (1969); H. Ayrinhac, *Marriage Legislation in the New Code of Canon Law* (1919) 168 *et seq.*; W. Goodsell, *A History of Marriage and the Family*, rev'd ed. (1934) 174-5.

[8] As with the Levitical prohibitions, those of Henry VIII did not expressly prohibit a marriage between an uncle and niece.

[9] It is now well-settled that the prohibitions extend to persons related by half-blood. See most cases cited in this Part and *R.* v. *The Inhabitants of Brighton* (1861) 30 L.J.M.C. (N.S.) 197, [1861-73] All E.R. Rep. 471 (Q.B.). Historically, however, the extension of the prohibitions to the half-blood has not been so general. As observed by Professor Finlay, *supra*, note 6, marriage with a half-sister was permitted in several cultures and, indeed, Abraham married his half-sister Sarah.

[10] 5 & 6 Wm IV, c. 54 (U.K.).

English law beyond this point need not be considered for the purposes of determining the law in Canada pertaining to this impediment.

There has been some uncertainty expressed as to whether the prohibited degrees prior to *Lord Lyndhurst's Act* were those set out in Archbishop Parker's Table or were the more restricted list to be culled from the *Statutes* of Henry VIII. The weight of opinion seems to be that the prohibited degrees of consanguinity and affinity referred to in *Lord Lyndhurst's Act* are those set out in the Table, and that they render marriages void in those provinces in which that *Act* is in force.[11] However, in *Crickmay* v. *Crickmay*, Mr Justice Davey of the British Columbia Court of Appeal, in what appears to have been an *obiter dictum*, interpreted some of these same precedents as holding "that the degrees of affinity that avoid a marriage under *Lord Lyndhurst's Act*, 1835 (U.K.), c. 54, are those specified by the Statutes of Henry VIII, and not those mentioned in the Scriptures or prescribed by canon law. These statutes are part of the common law of England, and became part of the law of this Province".[12]

The view that Archbishop Parker's Table, rather than the *Statutes* of Henry VIII, set forth the law of England in this matter prior to 1853 is weakened to the extent that the Table is seen to derive its authority from *Lord Lyndhurst's Act*. Thus, the applicable prohibitions are somewhat less certain in those provinces in which that *Act* is not in force and, whatever the degrees

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[11] See *Seidler* v. *Mackie*, *supra*, note 6; *Dejardin* v. *Dejardin* [1932] 2 W.W.R. 237 (Man. K.B.). In those cases, it was held that *Lord Lyndhurst's Act* was in force in these provinces with the effect that Archbishop Parker's Table is applicable and marriages so prohibited were void *ipso jure*. In Nova Scotia, the law of England seems to have been received prior to *Lord Lyndhurst's Act*, and in *Rosenberg-De La Marre* v. *Rosenberg-De La Marre* (1970) 14 D.L.R. (3d) 127, 128 (N.S. Ct for divorce), Gillis J. was satisfied that the applicable law is to be found in the common law of England, that marriages so impeded are void and that the prohibited degrees "have, for many years, received statutory recognition but, previous to statute, were expressed in a table set forth by authority in the year 1563". Some support can be found for the view that Archbishop Parker's Table was never the law *ex proprio vigore*, but simply either an expression of the common law or a filling-in of the missing relationships within the degrees dealt with, and as necessarily intended by, the *Statutes* of Henry VIII. See in particular, *Seidler* v. *Mackie*, *supra*, note 6, 480-1. However, if it is the law of England prior to *Lord Lyndhurst's Act* that applies in Nova Scotia, it is difficult to see how it could be concluded that the impediment renders such marriages void. Prior to the *Divorce Act (Ontario)*, S.C. 1930, c. 14, the law regarding this matter in Upper Canada, and then in Ontario, was that of England in 1792. Pre-1930 decisions held that the impediment rendered an Ontario marriage voidable only. See *Gray* v. *National Trust Co.* (1915) 23 D.L.R. 608, (1915) 8 W.W.R. 1061 (Alta S.C.); *Hodgins* v. *McNeil* (1862) 9 Gr. 305 (Ct Ch. U.C.). Indeed, it was held that the Ontario courts lacked jurisdiction to annul or declare marriages void even at the suit of one party during the lifetime of the other, regardless of the impediment. See *May* v. *May* (1910) 22 O.L.R. 559 (Div. Ct); *Vamvakidis* v. *Kirkoff* (1929) 64 O.L.R. 585, [1930] 2 D.L.R. 877 (App. Div.).

[12] *Crickmay* v. *Crickmay*, *supra*, note 4, 736. See also the diseussion of the *Rosenberg-De La Marre* case, *ibid.*

may be, their effect upon the validity of marriage is even less clear in such provinces.[13]

As already noted, the scope and effect of the impediment of relationship may vary in Canada from province to province, since it depends in part on the state of the law of England, either at the time such law was received into the territory of the province, or when it was incorporated subsequently into provincial law by reference through federal legislation.

Although the matter is not entirely free from doubt, the prevalent opinion is that the prohibitions contained in Archbishop Parker's Table, less those removed by federal legislation, are the applicable prohibitions throughout the common law jurisdictions of Canada. The effect of the impediment in a number of provinces remains a matter of serious uncertainty.[14] The law of Québec evolved differently respecting the prohibited degrees, but it is now substantially the same as in the rest of Canada, marriages being prohibited in that Province between persons related within three degrees by consanguinity or affinity, except as otherwise provided by federal legislation.[15] Parliament has not enacted general legislation affecting relationships of consanguinity, but beginning in 1882 it dealt with the collateral degrees of affinity on a number of occasions, the law as it presently stands having been enacted first in 1932:[16]

> 2. A marriage is not invalid merely because the woman is a sister of a deceased wife of the man, or a daughter of a sister or brother of a deceased wife of the man.
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> 3. A marriage is not invalid merely because the man is a brother of a deceased husband of the woman, or a son of a brother or sister of a deceased husband of the woman.[17]

Although the *Marriage Act*[18] of Canada expressly removes the prohibitions impeding a marriage between a man and his deceased wife's sister or

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[13] See the discussion of the *Rosenberg-De La Marre* case, *supra*, note 11.

[14] See *supra*, note 11. The differences between a void and a voidable marriage are dramatic, and new federal legislation would serve the purposes, *inter alia*, of putting this uncertainty to rest and of providing uniformity of treatment throughout Canada.

[15] See the *Civil Code*, arts 124-6. Article 127 would appear to prohibit, as well, marriages of even more remotely related persons, depending upon the rules of particular religions. The Privy Council, in overruling the courts below, emasculated this provision by holding that it merely entitles the minister of a particular religion to refuse to solemnize the marriage in question. See *Despatie* v. *Tremblay* [1921] 1 A.C. 702, (1921) 47 B.R. 305 (P.C.). However, because *stare decisis* is, in theory, foreign to the civil law, the courts of Québec have not uniformly followed this decision. See *Dubois* v. *Sharpe* [1936] 1 D.L.R. 238 (Qué. S.C.); *Coates* v. *Romanelli* [1936] 1 D.L.R. 244 (Qué. S.C.).

[16] *An Act to amend the Marriage and Divorce Act*, S.C. 1932, c. 10. For a full legislative history, see *supra*, note 4.

[17] The *Marriage Act*, R.S.C. 1970, c. M-5. There are only three sections, the first of which merely provides the short title.

[18] R.S.C. 1970, c. M-5.

niece, and between a woman and her deceased husband's brother or nephew, strangely it does not expressly remove the prohibitions against a marriage between a man and his deceased wife's aunt and between a woman and her deceased husband's uncle. Whether our courts would go so far as to infer the removal of these particular prohibitions by necessary intendment is a moot point, and it is one which presents us with yet another uncertainty in an area of law that could, and should, be quite simple.[19]

B. *Divorce and the Prohibited Degrees*

One of the most confused areas of the law respecting the impediment of relationship is the effect of divorce on affinity. The common law prohibitions — whether those of Archbishop Parker or those of Henry VIII — make no reference to the relatives of a *deceased* spouse, or of a *divorced* spouse. Nowhere was it written that a man cannot marry his "*deceased* wife's sister"; rather, it was simply said that he cannot marry his "wife's sister". However, marriage being monogamous at common law, it is obvious that neither spouse can marry anyone else at all, let alone a blood relative of the other, during the subsistence of their marriage. Marriage can be terminated only by the death of one of them, or by divorce. Consequently, if the impediment of affinity is to have any meaning, it must prohibit the marriage of either spouse to a blood relative of the other, within the degrees specified, *following the termination of their marriage*. Although, *prima facie* at least, it should not matter whether the marriage is terminated by divorce rather than by death, the first question that arises is whether, for the purpose of determining capacity to marry, prohibitions based upon affinity survive the dissolution of marriage by divorce just as they survive the dissolution of marriage by the death of a spouse. While at common law one could not marry one's *deceased* spouse's kin, was there ever any prohibition against marrying one's *divorced* spouse's kin? If the answer is that such marriages were prohibited regardless of what terminated the prior marriage, death or divorce, a second question arises: What is the

[19] See *In re Phillips, Charter* v. *Ferguson* [1919] 1 Ch. 128, (1918) 88 L.J. Ch. 27. In that case, a marriage between a man and his deceased wife's niece was declared void. The Court rejected the argument that the *Deceased Wife's Sister's Marriage Act, 1907*, 7 Edw. 7, c. 47 (U.K.), expressly removing that prohibition, extended by necessary intendment to persons more remotely related. The Appellate Court in the *Crickmay* case, *supra*, note 4, also seems to have taken the view that only those relationships named expressly are prohibited. However, *Seidler* v. *Mackie*, *supra*, note 6, appears to indicate that the courts can fill in the gaps left by Parliamentary oversight. In Ontario, the *Marriage Act*, R.S.O. 1980, c. 256, like that of many provinces, contains a form (Form 1) setting out the prohibited degrees. The Ontario Form no longer lists a wife's sister, wife's niece, husband's brother, or husband's uncle. However, it still lists a wife's aunt and husband's uncle. See also the discussion, *supra*, note 11 and *infra*, note 51.

effect upon a divorcée's capacity to marry of the legislation which now permits marriages between two persons one of whom was related within the prohibited degrees to the *deceased* spouse of the other? These questions came before Canadian courts in *Teagle* v. *Teagle*,[20] *Re Schepull and Bekeschus and The Provincial Secretary*,[21] *Crickmay* v. *Crickmay*,[22] *Power* v. *Power*,[23] and *Christians (Wiltshire)* v. *Hill*[24]. Prior to the decision of the Court of Appeal of British Columbia in the *Crickmay* case, the learned Judges who dealt with the problem seemed to assume that, following the termination of a marriage, the impediment of "affinity" precluded certain marriages regardless of the terminating event, whether death or divorce. It was to the second question that these Judges addressed themselves, and with differing results.

In *Teagle* v. *Teagle*,[25] Mr Justice Whittacker, of the Supreme Court of British Columbia, accepted the proposition that, apart from the statutory exceptions that have been made since the relevant law of England was introduced into British Columbia, a marriage between a woman and her divorced husband's brother is as much prohibited as it would be had her marriage been dissolved by her husband's death instead. He went on to conclude that the federal legislation which creates an exception to this prohibition, permitting a marriage even though "the man is a brother of a *deceased* husband of the woman", does not permit a marriage where the man is a brother of the woman's *divorced* husband who is still living.

A different view was taken in the case of *Re Schepull*,[26] in which Mr Justice Spence concluded that a marriage between a man and his divorced wife's sister was not invalid. Section 57 of the English *Divorce and Matrimonial Causes Act* of 1857 was then applicable in respect of divorces obtained in Ontario, and it provided that the parties to a divorce could remarry, "as if the prior [m]arriage had been dissolved by [d]eath".[27] According to Spence J., when that provision is read with the federal legislation allowing a man to marry his deceased wife's sister, it follows that he may marry his divorced wife's sister as well. That reasoning, which appears to have been borrowed without acknowledgement from Professor G. Kennedy,[28] was rejected in the

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[20] [1952] 3 D.L.R. 843, (1952) 6 W.W.R. (N.S.) 327 (B.C.S.C.) [hereinafter cited to D.L.R.].

[21] [1954] O.R. 67, [1954] 2 D.L.R. 5 (H. Ct).

[22] At trial: (1966) 57 D.L.R. (2d) 159, (1966) 55 W.W.R. 564 (B.C.S.C.) [hereinafter cited to D.L.R.], and on appeal: *supra*, note 4.

[23] (1974) 5 O.R. (2d) 537, (1974) 51 D.L.R. (3d) 21 (H.C.).

[24] (1981) 22 R.F.L. (2d) 299, (1981) 123 D.L.R. (3d) 471 (Alta Q.B.).

[25] *Supra*, note 20, 845-7.

[26] *Supra*, note 21.

[27] 20 & 21 Vict., c. 85 (U.K.).

[28] Kennedy, case comment, (1952) 30 Can. Bar Rev. 508.

Crickmay case.[29] Tyrwhitt-Drake J., sitting as a Local Judge of the Supreme Court of British Columbia, pointed out the fallacy of this literal and arithmetic approach: once divorced, a couple could not marry each other, and the great many such marriages that have occurred would be void. He went on to say that the expression "'as if the prior marriage had been dissolved by death' . . . [is] an illustration only, and not a phrase importing any effect in law".[30] It is unnecessary to elaborate upon this justifiable criticism of *Re Schepull* because the basis of that decision would appear to have been removed by the *Divorce Act*, 1968, which repealed the previous law and enacted simply that, following a divorce, "either party to the former marriage may marry again".[31] However, before leaving the *Re Schepull* argument, it may be noted that it was not given favourable treatment by the Court of Appeal in the *Crickmay* case, although that Court happened to reach the same conclusion as did Mr Justice Spence.[32]

C. *The Crickmay Case*

The only decision on this question at the appeal level is that of the British Columbia Court of Appeal in *Crickmay* v. *Crickmay*,[33] wherein the contested marriage was between a woman and her divorced husband's brother, and it was held unanimously that such a marriage is not unlawful in that province. Davey and Norris JJ.A. were of the view that "the rule prohibiting a man from marrying his brother's wife did not include the brother's divorced wife".[34] Such a marriage was *never* prohibited at common law and, because the federal legislation does not prohibit it, it remains permissible. Although McFarlane J.A. balked at that conclusion, and the reasoning underlying it, he was of the view that the prohibition was repealed by federal legislation, and the other two Appellate Justices also gave as their alternative reason that "if the rule did include a divorced wife, it has been repealed by legislation of the Parliament of Canada".[35]

The reasoning underlying the first ground upon which Davey and Norris JJ.A. rest their decision seems so tenuous that many may join Mr Justice McFarlane in remaining unconvinced by it. The majority clearly felt that any

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[29] *Supra*, note 22.

[30] *Ibid.*, 162.

[31] R.S.C. 1970, c. D-8, s. 16. But see *Christians (Wiltshire)* v. *Hill*, *supra*, note 24, in which Prowse J. of the Alberta Queen's Bench suggests that this enactment does not affect the reasoning in *Re Schepull*, *supra*, note 21. It is submitted that he is wrong in this respect.

[32] *Supra*, note 4, 741.

[33] *Ibid.*

[34] *Ibid.*, 735 and 746.

[35] *Ibid.*, 735 and 746-7.

other decision would be "contrary to prevailing social and ethical opinion", and that attitude would appear to explain much. They wished to ensure that this particular rule would be "in harmony with the enlightened common sense of the nation", which, of course, corresponds with their own common sense, yet they did not want to rely too heavily upon that same common sense for fear of falling into the error of "judicial legislation and a usurpation of the authority of Parliament".[36] When deductive logic and "common sense" seem to dictate opposing conclusions, it must indeed be a difficult task to adopt and support the common sense conclusion on the basis of deductive logic.

Justices Davey and Norris felt that there never was any prohibition against a woman marrying her *divorced* husband's brother, even though there was a prohibition against a woman marrying her *husband's* brother. Because she could not validly marry a second man during the course of her prior marriage, it is conceded by these Judges that the prohibition at least prevented her marrying her *deceased* husband's brother. Although the language expressing the prohibition does not mention either "deceased" or "divorced" husband's brother, and even though it must be taken to refer to a brother of a previous husband of the woman, it cannot be taken to include "divorced". Why not? Because these Judges have the notion that, somehow, it is proper to speak of a widow as the wife of the deceased,[37] but it is improper to speak of a divorcée as the wife of her divorced husband. She is the "former" wife. If there is any substance to that distinction, it is awfully fine; it is probably specious. Although the point is not made in the *Crickmay* case, it is obvious that following a divorce, which can only be pronounced during their joint lives, the former spouses are no longer husband and wife. Thus, short of their remarriage, neither can ever become the deceased spouse of the other. However, unlike a decree of nullity, the prior existence of the marriage is not denied by a decree of divorce, and many legal incidents continue to flow from that marriage, just as they continue to flow from a marriage terminated by death. In the final analysis, whether a divorced couple continue to be related by affinity to each other's blood relatives, or whether the decree severs those relationships as well as the bond of marriage, would seem to be irrelevant. If it is true that a divorced man and his former wife's sister are no longer affines, it would seem reasonable to suppose that they would no longer be related had the marriage been terminated by death instead. If, on the other hand, that relationship survives death, why should it be held to have terminated on divorce? Because of some arbitrary view of what is correct English usage?

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[36] *Ibid.*, 735.

[37] Davey J.A. ventured the view that it is "usual, and I think quite proper, after death to speak of the spouses as the husband or wife of the other, because that was the condition until death intervened", *ibid.*, 735. He did not go on to enlighten his readers as to the proprieties when the spouse has been widowed several times.

Death dissolves marriage and frees the survivor from bonds preventing remarriage. It is no less effective for this purpose than is divorce, which, after all, was designed in imitation of death in that respect.

It is submitted that what is prohibited is the marriage of two persons, one of whom was *formerly* married to a blood relative of the other. The purpose of the prohibited degrees of affinity was to promote charity and the multiplication of friendships, and to discourage undesirable conduct between persons *while* related through marriage by precluding the possibility of their marrying each other in the future when they might otherwise become free to do so. Clearly, such a purpose would be frustrated by allowing the parties to marry following divorce, but not following death. Indeed, while it may be the currently predominant view to see no reason why a woman should not be permitted to marry her divorced husband's brother if she is allowed to marry her deceased husband's brother, for a considerable time in England, at least, it was thought to be socially undesirable to allow persons so related to marry each other during the lifetime of the former spouse even though they could marry following that spouse's death.[38]

It is suggested that the other reason given by the majority in *Crickmay* to support this particular conclusion is not very persuasive either. The Parliament of Canada, in granting divorces by private act, has authorized the petitioner to "at any time hereafter marry any other [person] whom [he or she] might have lawfully married in case the marriage had not been solemnized". It is "inconceivable that Parliament would by private Acts... allow divorced spouses to marry persons they were forbidden to marry by general law".[39] Of course, that Parliament would do the strangest things is perfectly conceivable. Indeed, in enacting private acts of dispensation so as to allow the marriage of persons "forbidden to marry by general law", Parliament appears to have done precisely what the Justices considered inconceivable. Be that as it may, this argument seems to lend to private acts of divorce the effect of a decree of nullity as far as capacity to marry is concerned. A literal interpretation of the wording quoted would lead to the rather startling proposition that a man could marry his step-daughter, provided her mother did not die before he could divorce her. Sexual relations between a man and his step-daughter are sufficiently frowned upon to make intercourse between them a crime in certain circumstances and to prohibit the marriage of such persons, at least where the

[38] See the *Deceased Wife's Sister's Marriage Act, 1907*, 7 Edw. 7, c. 47 (U.K.). The Statute included a proviso, in s. 3(2), that "it shall not be lawful for a man to marry the sister of his divorced wife, or of his wife by whom he has been divorced, during the lifetime of such wife".

[39] *Supra*, note 4, 737-8.

step-mother dies before a decree absolute of divorce is granted.[40] It will be recalled that s. 57 of the English *Divorce and Matrimonial Causes Act*[41] of 1857 was incorporated into the laws of several Canadian jurisdictions by Parliament. That section permitted the subsequent marriage of each spouse as though their marriage had been dissolved by the death of the other. Was it the intention to prohibit a divorced couple from re-uniting in marital bliss? Are the many such marriages that have occurred void? Did not Parliament, by adopting s. 57, provide a separate slate of potential new spouses for the judicially-divorced than for those divorced by private act of Parliament? If the formula used in these private acts is to be interpreted and applied literally, then so too must the formula used in s. 57 of the *Act* of 1857. Either it is conceivable that Parliament would allow persons divorced by private acts to marry those whom they could not marry following a dissolution of their prior marriages by death or judicial decree, or else that form of words is to be interpreted sensibly as Tyrwhitt-Drake J. interpreted s. 57 of the original English divorce statute: this kind of phrase "is an illustration only, and not a phrase importing any effect in law... it merely gives emphasis to the intention... to declare the capacity of divorced persons to marry again".[42]

The second ground upon which the Justices in *Crickmay* concluded that a woman may marry her divorced husband's brother, with which McFarlane J.A. agreed, was that if the rule prohibiting a man from marrying his brother's wife did include a divorced wife, it has been repealed to that extent by legislation of the Parliament of Canada. The reasoning involved seems to come to this: the repeal of a rule repeals whatever is included in it; assuming that the rule against marrying a brother's wife included a *divorced* brother's wife, the repeal of the rule repealed the included prohibition, and a man may now marry his divorced brother's wife. The fact that ss 2 and 3 of the *Marriage Act*[43] are not in the form of repealing statutes and refer to "deceased" and do not mention "divorced" spouses is avoided in the following way. There was a Canadian provision enacted in 1882 stating expressly that "[a]ll laws prohibiting marriage between a man and the sister of his deceased wife are hereby repealed... as if such laws had never existed".[44] If the overall rule was that a man cannot marry his "wife's sister", then this would seem to include both his *deceased* wife's sister and his *divorced* wife's sister; had that

[40] There would seem to have been no doubt that, at common law, a man was not permitted to marry his wife's daughter, nor a woman her husband's son, nor do the federal exceptions that apply upon the death of a spouse include these relationships. But if the argument in the *Crickmay* case, *ibid.*, is sound, then there has never been any prohibition against such marriages following divorce.

[41] 20 & 21 Vict., c. 85 (U.K.).

[42] *Crickmay*, at trial, *supra*, note 22, 162.

[43] R.S.C. 1970, c. M-5.

[44] *An Act concerning Marriage with a Deceased Wife's Sister*, 45 Vict., c. 42, s. 1.

rule been repealed expressly, the argument made by Davey and Norris JJ.A. might be more forceful. But only one aspect of the overall rule was repealed. Nevertheless, the Court of Appeal took the view that the expressly repealed aspect (*deceased* wife's sister) was primary, and that its repeal carried with it the secondary aspect (*divorced* wife's sister) as well. Parliament would not repeal the primary aspect of the rule and leave the secondary aspect intact.[45] Accordingly, the whole rule, prohibiting a man from marrying either his divorced or his deceased wife's sister, was by necessary intendment repealed. Then, in 1890, Parliament similarly repealed all laws prohibiting marriage between a man and the *daughter* of his deceased wife's sister.[46] Section 2 of the subsequent *Marriage Act*[47] does not reinstate the repealed rules.

It is clear that, if the reasoning of the British Columbia Court of Appeal on this point is correct thus far, it still leaves certain questions unanswered. The legislation of 1882 and 1890 did not repeal any of the prohibitions dealt with in s. 3 of the later enactment such as deceased husband's brother and deceased husband's nephew, and the *Crickmay* case involved a marriage between a woman and her husband's brother, not between a man and his wife's sister. It was held that s. 2 of the *Marriage Act*[48] was meant to continue the effect of the earlier *Acts*, and that s. 3 had an identity of purpose and must be treated similarly. Thus, by a rather venturesome exercise of statutory interpretation, historical speculation and current common sense "harmonizing", the conclusion was reached that, even if at one time a man could not marry his divorced wife's sister or niece, nor could a woman marry her divorced husband's brother or nephew, they are now permitted to do so.[49]

The effect of divorce upon the prohibited degrees of marriage arose in two later cases involving the scope and validity of certain forms annexed to provincial marriage legislation. In *Power* v. *Power*,[50] it was decided that a woman could not marry her divorced husband's brother because "husband's brother" was one of the prohibited relationships set out in Form 10 annexed to

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[45] It may be noted however, that the Parliament of England did not consider the relationship between a man and his divorced wife less significant because it maintained expressly that allegedly "secondary" prohibition when it repealed the prohibition between a man and his deceased wife's sister.

[46] See *An Act to amend An Act concerning Marriage with a Deceased Wife's Sister*, 53 Vict., c. 36.

[47] R.S.C. 1970, c. M-5. See also *supra*, note 16 and accompanying text.

[48] R.S.C. 1970, c. M-5.

[49] *Crickmay*, *supra*, note 4.

[50] *Supra*, note 23.

the *Marriage Act*[51] of Ontario. The decision in the *Power* case may be correct but, because the earlier cases were not considered, it appears to have been rendered *per incuriam*. In *Christians (Wiltshire)* v. *Hill*[52] it was held that, such matters being beyond provincial jurisdiction, Form 5 of *The Marriage Act*[53] of Alberta could not determine capacity to marry. After dealing very cursorily with *Re Schepull and Bekeschus*[54] and *Crickmay* v. *Crickmay*,[55] Prowse J. said: "The reasoning in both decisions was that when Parliament enacted the provisions which are now ss. 2 and 3 of the Marriage Act the combined effect of those amendments with s. 57 of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict.), c. 85 (which equated the effect of divorce to that resulting from the death of a spouse), ended any prohibition (which may have existed) against a man marrying the sister of his divorced wife and a woman marrying the brother of her divorced husband."[56] With respect, this is simply not so. The Court of Appeal in *Crickmay* did not indicate any disagreement with the trial judge's cogent refutation of the reasoning in *Re Schepull and Bekeschus*, and their reasons for reversing his decision had nothing to do with s. 57 of the *Divorce and Matrimonial Causes Act*[57] of 1857.

Although the problem does not appear to have come before any other Canadian courts, it is now before Parliament in the form of an application for a private act of exemption from Québec domiciliaries, one of whom is divorced from the sibling of the other. The effect of divorce on the prohibitions is uncertain and, due to its distinct evolution in the various provinces, the law may be different in jurisdictions where it has yet to be judicially considered.

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[51] R.S.O. 1970, c. 261. But see now Form 1 annexed to the *Marriage Act*, R.S.O. 1980, c. 256. This new Form lists "Degrees of affinity and consanguinity, which under the statutes in that behalf, bar the lawful solemnization of marriage". The list no longer includes any mention of the following relationships: wife's sister, brother's wife, wife's brother's daughter, wife's sister's daughter, husband's brother, sister's husband, husband's brother's son, and husband's sister's son. The assumption seems to be that divorce, as well as death, removes the prohibition and so the relationships need not be mentioned at all. If this were based on the Ontario *Re Schepull* case, *supra*, note 21, it is to be noted that the reasons for that decision are no longer valid, if they ever were. If it were based on the British Columbia *Crickmay* case, *supra*, note 4, then the removal of these relationships corresponds with the second ground of that decision. However, the Form continues to include relationships indicated by the first ground of the *Crickmay* case never to have been prohibited, *i.e.*, all relationships severed by divorce, such as divorced wife's mother, divorced wife's daughter, and so on. In any case, it is not the function of the Ontario Legislature to interpret the law, particularly in a matter beyond its legislative competence.

[52] *Supra*, note 24.

[53] R.S.A. 1970, c. 226, s. 13 and Alta Reg. 173/78, Form 5.

[54] *Supra*, note 21.

[55] *Supra*, note 4.

[56] *Supra*, note 24, 303.

[57] 20 & 21 Vict., c. 85 (U.K.).

Indeed, the pre-confederation law of Québec in this matter was derived from the law of France, not from the common law of England, and the *Crickmay* reasoning would not seem applicable there. What is required, clearly, is general legislation resolving the matter, and not a series of private acts which lack any consistent theoretical justification.

II. Private Acts of Special Dispensation: A Mockery of the General Law?

Unlike the canon law, which provides for the granting of dispensations from certain prohibitions in accordance with specific criteria, the general law of Canada permits of no such exception.[58] Consequently, regardless of any special or compassionate circumstances that might be involved, those Canadians whose marriages are impeded would seem to be doomed to frustration, legal if not physical. However, such is not the case. It is open to Parliament to enact private legislation in relation to matters within its competence, and some who have found the course of true love stymied by a particular prohibition have had the prescience to seek the assistance of a Senator or of their local Member of Parliament in the presentation of an application for a private bill of exemption from the general law.

At one time, the dissolution of marriage by private act of Parliament was a frequent occurrence in Canada.[59] Such private acts were the fruit of political expediency occasioned by the presence in certain provinces of large blocks of voters opposed to divorce. The justification for such acts can be distinguished sharply from that which applies to private legislation granting particular exemptions from the general prohibitions of marriage.

Almost from the beginning of confederation, the remedy of divorce was available in most jurisdictions in Canada in a court action based on specific grounds and subject to known rules and safeguards. Parliamentary divorce was merely a device used to provide a forum for citizens domiciled in the few provinces whose courts lacked jurisdiction to dissolve marriages. A special Senate Committee conducted hearings regarding divorce applications and, in substance if not in form, the same law to which all other Canadians had access was applied.

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[58] It is interesting to note that a regime of judicial dispensation from the prohibited degrees existed in Australia for a brief time. This is discussed in the Conclusion, *infra*. See also *The Marriage Act 1942*, Tasm. Stat. 1826-1959, Vol. 3, ss 19(1) & (2) and Schedule 4; *The Marriage Act 1955*, N.Z. Rep. Stat. 1908-57, Vol. 9, s. 15(2).

[59] Such proceedings ceased with the *Divorce Act*, R.S.C. 1970, c. D-8, enacted in 1968.

In contrast, the growing practice of enacting private exemptions from general prohibitions is obviously not meant to provide disadvantaged citizens of certain regions with rights and remedies enjoyed by Canadians generally. Its purpose is quite the contrary. Although no secret is made of the practice, it is one which is generally unknown and seldom envisioned by lawyers.[60] Moreover, no criteria have been established or published either to guide Parliament in dealing with specific cases, or to assist potential applicants in measuring their chances of success.[61]

The first private act of this kind in Canada was enacted in 1975 in order "to provide an exception from the general law relating to marriage in the case of Richard Fritz and Marianne Strass".[62] Following a number of recitals, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacted as follows: "Notwithstanding any law prevailing in the province of Quebec respecting the degrees of consanguinity or affinity within which persons may not marry, Richard Fritz and Marianne Strass, both of the City of LaSalle, in the Province of Quebec, may marry each other." The recitals indicated that the parties are uncle and niece by half-blood; that they were thirty-two and twenty-five years of age, respectively; that under the law applicable in Québec the parties "will be unable to marry each other unless the Parliament of Canada enacts that they may"; that Parliament has exclusive legislative authority in relation to the matter; and, finally, that the Petitioners had "received medical advice that their *degree* of consanguinity will not impair their ability to have normal healthy children".[63]

In its 1977-78 Session, three more bills providing for exceptions to the prohibited degrees came before Parliament.[64] Two of these bills concerned an

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[60] On 5 July 1982, the Canadian Broadcasting Corporation aired a special report on such private acts on its news program, *The National*. Two couples whose marriages had been enabled by private acts of exemption were interviewed, as were their lawyers. The lawyers indicated that they had been unaware of this proccdure, and that their clients had stumbled upon it for themselves. How many similarly-situated people have failed to stumble upon this avenue of relief?

[61] It may be noted, however, that Mr Raymond L. du Plessis, Q.C., Law Clerk and Legal Counsel to the Senate, has prepared a document entitled *Procedure on Private Bills*. The document relates to private bills of all kinds and, with Mr du Plessis' kind permission, a copy of it appears as an Appendix, *infra*.

[62] S.C. 1974-75-76, c. 113. This *Act* began its life as Bill C-1001, *An Act to provide an exception from the general law relating to marriage in the case of Richard Fritz and Marianne Strass*, on 21 July 1975. See [1974-75-76] 2 Debates of the Senate, 1st Sess., 30th Parl., 1233.

[63] *An Act to provide an exception from the public general law relating to marriage in the case of Richard Fritz and Marianne Strass*, S.C. 1974-75-76, c. 113 [emphasis added]. The use of the word "degree" may indicate a concern not with the problems peculiar to this particular couple, but with the possibility of impairment generally associated with such relationships.

[64] Bill S-5, *An Act to provide an exception from the public general law relating to marriage in the case of James Richard Borden and Judy Ann Borden*, grantcd Royal assent on 22 March

uncle and his niece by the whole-blood. They were in form substantially the same as their 1975 predecessor, except that they contained no recital as to medical advice. One couple was from Saskatchewan, the other from Québec. They eventually obtained private acts and were married. The third of these bills concerned a Québec couple related as brother and sister by reason of the adoption of one of them by the natural parents of the other. It will be discussed in detail below.

Not yet in bill form are three more cases of which notices of application to Parliament for private bills have been published. Two of these involve an uncle and his niece, one couple living in Ontario, and the other living in Québec. The other case is from Québec and involves parties related by affinity through a marriage since terminated by divorce.[65] Although they have not reached the stage of formal notice of application, other petitions are being considered, including one from Saskatchewan involving a man and his brother's adopted daughter, and another involving a divorced spouse's sibling.[66]

The granting of private exemptions from public law would seem to be inherently dangerous in that it is arbitrary and may undermine respect for the law. However, the making of exceptions for persons whose circumstances reveal nothing to distinguish their cases from those of any similarly related couple in Canada is totally inconsistent with any semblance of social purpose in the general law on the prohibited degrees of marriage. The only apparent point of concern in Parliament's deliberation on these bills was eugenics. Assurance was sought that any children that might be born would be unaffected by the consanguinity of their parents.[67] Of course, this limited

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1978. See [1977-78] Debates of the Senate, 3d Sess., 30th Parl., 511; Bill S-6, *An Act to provide an exception from the public general law relating to marriage in the case of François Eugène Arthur Waddell and Marie Anne Marguerite Benoît*, granted Royal assent on 22 March 1978. See [1977-78] Debates of the Senate, 3d Sess., 30th Parl., 511; Bill S-7, *An Act to provide an exception from the public general law relating to marriage in the case of Lucien Roch Joseph Morin and Marie Rose Hélène Morin*, withdrawn from Senate consideration, 22 March 1978. See [1977-78] Debates of the Senate, 3d Sess., 30th Parl., 506.

[65] This petition involves the question of the effect of divorce on the prohibited degrees. If the *Crickmay* case, *supra*, note 4, is correct and applicable in Québec, the private act is unnecessary.

[66] As the inquiries in question have not been made public, information about them is unavailable.

[67] Having received that assurance, the record shows that those parliamentarians who were active in the "affair" almost assumed the role of Cupid. For instance, the Senate sponsor of Bill C-1001, Senator Denis, confessed that "even though some of us are old we know what it means for a husband and wife to spend a lifetime together, according to the law and the religious principles they believe in", [1974-75-76] 2 Debates of the Senate, 1st Sess., 30th Parl., 1234. At various stages of the Bill's progress the couple were congratulated and offered best wishes. When, on 14 February 1978, Bills S-5 and S-6 came before the Standing Senate Committee on

concern overlooks the fact that the general law does not prohibit an uncle and niece from having children. It merely prohibits them from having *legitimate* children.[68] More importantly, since the medical opinion on the point is based primarily on the *degree* of relationship rather than on any physical attributes peculiar to the parties, the risk is virtually the same for all similarly related couples; such risk can hardly be used as a criterion for treating some cases differently from the rest. It would appear, then, that the only justification for private legislation is the perception that the general law prohibiting marriages within the degrees in question is no longer socially acceptable and ought to be changed. In fact, the debate on the various bills reveals that this was the prevailing sentiment, as the following exchange indicates:

> *Senator Flynn*: . . . Senator Neiman, myself and others have expressed the view that something should be done by Parliament to provide for the settlement of such cases. We should not be called upon to pass a special law in every special case. . . . I would ask the government leader to discuss with his colleagues in government whether there should not be an amendment, not to the Civil Code of Quebec but to all laws applicable across Canada with respect to this problem, so that it can be dealt with in a more general way in the future.
>
> *Senator Perrault*: Honourable senators, I give an undertaking that the proposal of the Leader of the Opposition's [*sic*] will be brought to the attention of the appropriate government people.
>
> *Senator Asselin*: When do you expect an answer?
>
> *Senator Perrault*: As the honourable senator is aware, this government attempts to work with dispatch on all matters affecting the public interest.
>
> *Senator Flynn*: The Leader of the Government says that with tongue in cheek.[69]

When, some two and-a-half years later, three more private bills came before the Senate, the same misgivings were voiced, and Senator Perrault removed tongue from cheek in order to say the following:

Legal and Constitutional Affairs, the Chairman observed that "[t]his being Valentine's Day, we have two bills relating to marriage". (Minutes of Proceedings, 14 February 1978, 3d Sess., 30th Parl., Issue No. 1, 6). When these Bills were before the Standing Committee on Miscellaneous Private Bills and Standing Orders, the sponsor of Bill S-6 in the House of Commons, Mr Campbell, said that the Bill had "been passed by the Senate. The sooner we can dispense, the sooner this beautiful couple will be allowed to marry." The Chairman's concluding remarks were, "[s]o, gentlemen, I want to thank you for allowing this morning four lovers in Canada to make love legally". (House of Commons, Standing Committee on Miscellaneous Private Bills and Standing Orders, Minutes of Proceedings and Evidence, 2 March 1978, 3d Sess., 30th Parl., Issue No. 2, I0). Other such remarks can be found throughout the record. While there is nothing amiss in these good-natured comments, they do reveal the pervasive concern for the individual interests involved. Parliament was content to repress consideration of the social interests implicit in such matters in order to enact private exemptions apparently even at the risk that they might prove to be contrary to public policy — curiously, it is to repressions that the Oedipus complex is said to lead.

[68] In fact, in some jurisdictions, the prohibitions do not even have that effect, illegitimacy virtually having been abolished. See, *e.g.*, *Children's Law Reform Act*, R.S.O. 1980, c. 68, s. 1(4).

[69] [1974-75-76] 2 Debates of the Senate, 1st Sess., 30th Parl., 1251-2.

Senator Perrault: Honourable senators, the last time the subject of exceptions from the general law relating to marriage was discussed in the Senate, the Honourable Senator Asselin asked if the federal government had any intention of introducing uniform marriage legislation in Canada which, presumably, would make it unnecessary for Parliament to pass laws of exception in individual cases, such as in the Fritz-Strass case to which Senator Bourget referred a moment ago. Senator Asselin asked this question during the debate on the motion for third reading of the Fritz-Strass bill on July 23, 1975. At that time the Leader of the Opposition also expressed support for the idea of providing uniform marriage legislation in order that this problem could be dealt with, as he said, "in a more general way in the future" so that Parliament would not be called upon to pass a special law in every case. This appeared to many of us to be an eminently sensible idea. He mentioned that both he and Senator Neiman had in committee — and, again, I quote Senator Flynn — "questioned the principle of introducing a law of exception in this particular field." Then later the sponsor of the bill, Senator Denis, expressed general support for that position and said:

I agree that the federal Parliament should carry out a deeper study in order to know whether there is any possibility of amendments.

In any event, he noted an assurance that I gave at that time, as reported on page 1252 of *Debates of the Senate*, when I said:

Honourable senators, I give an undertaking that the proposal of the Leader of the Opposition's [*sic*] will be brought to the attention of the appropriate government people.

After that discussion with respect to the Fritz-Strass bill I made verbal representations to the Department of Justice about the matter. Shortly thereafter, the Senate adjourned for a summer recess, but I can now read to honourable senators a letter which I have just received from the Honourable the Minister of Justice. It was prompted by a letter which I wrote to him a few days ago in anticipation of the introduction in this chamber of three bills of a similar type to the Fritz-Strass bill of 1975.

The letter to my colleague expressed again the Senate's concern in this matter. The reply from the Minister of Justice and Attorney General of Canada, dated February 7, 1978, reads as follows:

In response to your letter of February 2nd, concerning three private (marriage) bills, I have noted your concerns and asked my officials to look into the feasibility of preparing legislative proposals that would allow for settlement of affinity and consanguinity cases in a general way so that Parliament would not be called upon to pass a special law in each case.

I hope some progress can be made in the direction of reform. As I notcd earlier, the minister's views are in response to suggestions which have come from various members of this chamber, including the Leader of the Opposition.[70]

It will next be seen that the uncertainties of our law in the area of prohibited degrees are increased greatly by the impact of provincial adoption laws. Having regard to the anomaly-infested state of this law and to the highly questionable practice of enacting private exemptions, it is clearly time for the long-awaited reform.

[70] [1977-78] Debates of the Senate, 3d Sess., 30th Parl., 305-6.

III. The Effect of Adoption on the Prohibited Degrees: Confusion Compounded

The case of *Re Broddy and Director of Vital Statistics*[71] which appears to be a case of first impression in Canada, concerned an application to compel the issuance of a marriage licence refused to the applicants on the ground that,

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[71] (1981) 130 D.L.R. (3d) 758 (Alta Q.B.) [hereinafter *Re Broddy*]. The judgment of Dea J., which was under appeal when this paper was accepted for publication, has now been reversed in an as yet unreported decision of the Alberta Court of Appeal delivered by Kerans J.A., McClung and Belzil JJ.A. concurring. See *Broddy* v. *Director of Vital Statistics* (Edmonton 152-78) 4 November 1982. While its decision seems sound, the reasoning of the Court of Appeal is rather vague in places and serves to add to the confusion in this area of the law, thus making legislative reform all the more desirable. The Court begins, at 2, with the proposition that "[A] province can, as an aspect of adoption, prohibit marriage among those affected by the adoptive relationship". However, "[w]hile a provincial attempt to create new law might be materially good it can be formally bad". See discussion at 13. Assuming an intention to prohibit such marriages, the Province of Alberta evidently went about it in the wrong way, because, as the Court states at 12-3, "it cannot do so by *deeming* them to be in a prohibited category in a federal law. The distinction is a close one, but it must nevertheless be recognized." [emphasis added]. In support of this, Kerans J.A. repeated, at 12, this sentence from the judgment of Dickson J. in *R.* v. *Sutherland* [1980] 2 S.C.R. 451, 456, (1980) 113 D.L.R. (3d) 374: "The purpose of any 'deeming' clause is to impose a meaning, to cause something to be taken to be different from that which it might have been in the absence of the clause." The legislation under consideration did not use any form of the verb "to deem", and we are left to assume that the Court treated the words "as if" in s. 57(1) of the *Child Welfare Act* of Alberta, R.S.A. 1980, c. C-8, as equivalent phraseology. Kerans J.A. then went on, at 12, as follows: "And, in Canada, one level of government cannot impose its choice of meaning on a statute which was enacted by the other level, because this would amount to an amendment to, and therefore an express contradiction of, that statute." In the same vein, Kerans J.A., at 13-4, says that: "Provinces do not define words in federal law unless that is the federal legislative intention. For example, s. 118(c) C.C.C. makes it a crime to obstruct those 'making a lawful distress or seizure.' One would look to provincial law to decide whether there was a lawful distress or not. But this is because Parliament intended to treat provincial law as received fact for the purposes of the federal statute...But one cannot say that in this case." Mr Justice Kerans then sums up his view, at 14, in these words: "[I]t is one thing to create a status which existing federal law recognizes or to define a prohibition supplementary to a federal prohibition: it is quite impossible however for a province actually to amend federal law." It would seem from all this that any provincial adoption provision purporting to define the federal law in question, or to insert into that law additional categories, would be an abortive attempt to amend that law. Apparently, however, an independent assertion by the province of prohibitions of its own would be both materially and formally good. The validity of this general proposition is rather doubtful in the light of the decision of the Supreme Court of Canada in *Natural Parents* v. *Superintendent of Child Welfare*, *infra*, note 88. If Mr Justice Kerans' premises are correct, would they not lead to the following conclusion: although a province could not "amend" the *Indian Act*, R.S.C. 1970, c. I-6, by "deeming" to fall outside its scope a biological Indian adopted by non-Indians, that province could deprive a biological Indian child of its Indian status simply by setting out in its adoption legislation an express prohibition against the registration under that *Act* of an Indian child adopted by non-Indians? Such a conclusion would seem to be diametrically opposed to the reasoning of the Supreme Court of Canada in the

being uncle and niece by adoption, they lacked the capacity to marry each other. Mr Justice Dea, who dismissed the application, stated the applicants' argument in this way: "[T]he references in the prohibited degrees to mother, father, son, uncle, etc., have reference only to relationships arising from blood or marriage. To interpret the degrees as including relationships created by the application of adoption laws would ... allow a provincial Legislature in enacting an adoption law to change laws respecting the capacity of persons to marry."[72] Although it is nowhere stated expressly, the issue as seen by Mr Justice Dea appears to have been whether there was any conflict between the adoption laws of Alberta and the federal laws prescribing the degrees of relationship within which persons are prohibited from intermarrying, the resolution of which "requires in the absence of case law on the issue, an analysis of the effect and purpose of both laws".[73] Unfortunately, but understandably,[74] the intersection of these two sets of laws was examined in a very superficial way, the "required" analysis consisting of the following three paragraphs:

> Lord Lyndhurst's Act directs itself to the issue of capacity to marry. It denies to persons who stand in particular relationships with each other, the right to intermarry. It is a law against the marriage of persons in close relationship with each other.
>
> The adoption laws on the other hand are concerned with the welfare of children and in furtherance of that object, provide for changes in legal status. Those changes most notably affect a person adopted but they also, of necessity, affect his adoptive parents, his natural parents and all of the kin in both groups with whom the person adopted becomes a part of or is disassociated from "for all purposes".
>
> It seems to me that when the law respecting the prohibited degrees and the law respecting adoptions are so viewed, no conflict is disclosed between the provincial and Dominion laws. The Dominion law sets forth the prohibited degrees of marriage. The provincial law determines the legal status of the applicants. In applying the Dominion law it is proper to make reference to the legal status of the applicants as that legal status is established by provincial law. To suggest that the prohibited degrees should be interpreted or construed as if the legal status of the applicants as established by provincial law was of no force or effect is unwarranted and without merit.[75]

Natural Parents case. Moreover, it is not clear whether Kerans J.A. would go so far as to allow such express legislation even if the supplementary prohibitions were not necessary to the effective operation of the provincial law, but were simply the potentially competing view of the province in a closely connected collateral matter. If it is this that he is suggesting, then it is respectfully submitted that he is wrong. See *infra*, notes 113 and 119. In any case, since no provincial adoption legislation states expressly that marriages are prohibited between persons in specific adoptive relationships, on the reasoning of the Alberta Court of Appeal, such marriages would not be prohibited anywhere in Canada.

[72] *Re Broddy*, *ibid.*, 759.

[73] *Ibid.*, 760.

[74] The pressures of the system in which they function are such that, without a high degree of specialized knowledge, neither counsel nor the court are likely to devote the time and attention sometimes required to explore fully the ramifications of such a superficially simple case.

[75] *Re Broddy*, *supra*, note 71, 760-1.

The first of these paragraphs purports to be an analysis of the purpose and effect of the laws pertaining to prohibited degrees. In fact, it is not. Mr Justice Dea has simply said that the law prohibiting persons standing in particular relationships to each other from intermarrying is a law against the marriage of persons in close relationship to each other. This tautological statement does not tell us *why* such marriages are prohibited. Although not similarly redundant, the second paragraph is not particularly helpful. It tells us that adoption is concerned with the welfare of children in furtherance of which it replaces one set of relationships with another. It does not indicate why the welfare of adopted children requires that their capacity to marry should be twice as restricted as the capacity to marry of unadopted children.[76] The third paragraph is the bald conclusion that when these laws "are so viewed" no conflict between them is disclosed. With all respect, it is submitted that a more thorough analysis of the purpose, effect and interaction of the two sets of laws would, at the very least, raise serious doubts as to whether provincial adoption laws affect capacity to marry.[77]

In 1978, a similar problem came before the Standing Senate Committee on Legal and Constitutional Affairs in the form of Bill S-7.[78] The Bill had as its purpose to permit by private act of Parliament the marriage of two persons who supposedly lacked the capacity to marry each other, being within the prohibited degrees as provided by the general law. The couple in question, who were Québec domiciliaries, were brother and sister by adoption. Parliament, having already enacted a private act enabling biological third-degree relatives — an uncle and his half-niece — to marry, the Committee was prepared to report favourably on the enactment of an exemption for these relatives by adoption, if there was a prohibition against such a marriage in the first place. At this stage, the writer was invited to present to the Committee an opinion on the matter. The written submission expressed the view that there was, at least, very serious doubt as to whether the proposed marriage was within the prohibited degrees[79] and that, even if it were, the desirability of

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[76] Unadopted children, whether their natural parents were ever married or not, are precluded from marrying their biological relatives within three degrees. According to *Re Broddy*, *ibid.*, adopted children are prohibited from marrying both their biological relatives and their relatives by adoption within three degrees.

[77] The recent unreported decision of the Court of Appeal of Alberta, *supra*, note 71, reversing Mr Justice Dea, does nothing to resolve these doubts. See *infra*, note 84.

[78] Bill S-7, *An Act to provide an exception from the public general law relating to marriage in the case of Lucien Roch Joseph Morin and Marie Rose Hélène Morin*, withdrawn from Senate consideration, 22 March 1978. See [1977-78] Debates of the Senate, 3d Sess., 30th Parl., 506.

[79] The Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, Minutes of Proceedings, 15 February 1978, 3d Sess., 30th Parl., Issue No. 3, Appendix 3-A.

granting an exemption so as to permit it was equally dubious.[80] After providing reasons for such assertions, the opinion concluded by urging that the report of the Senate Committee on Bill S-7 be delayed pending careful consideration of these two matters. However, in the oral presentation of this view, the opinion was asserted firmly that the Québec adoption legislation did not abridge the petitioners' capacity to marry each other.[81] The Senate Committee concurred in that conclusion, and, rather than simply delaying their report in order to study the matter in greater detail, the Committee decided not to proceed with the Bill and the petitioners were advised that no impediment to their marriage arose out of the fact that one of them was adopted by the biological parents of the other.[82]

Whether provincial adoption legislation affects capacity to marry involves two separate issues: (a) Does such legislation purport to establish relationships within the prohibited degrees? (b) If so, is such legislation operative for such purposes?[83]

A. *Does Provincial Adoption Legislation Purport to Establish Relationships Within the Prohibited Degrees?*

As noted in Part I, it has been held repeatedly that the degrees of relationship within which marriage was prohibited in England at the time such law was introduced into the various parts of Canada were those set forth in Archbishop Parker's Table, and that such law remains in force unless and until altered by federal legislation. It was noted, as well, that Parliament has legislated in this field only so as to remove some of the prohibitions against marriages between persons related by affinity. No one would assert provincial competence to enact legislation directly and expressly for the purpose of modifying the prohibited degrees, and what we are concerned with therefore, is whether provincial legislation can *incidentally* affect prohibited degrees.[84]

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[80] This aspect of the written presentation to the Senate Committee involves matters that were not considered in *Re Broddy*, *supra*, note 71, but which would be relevant in determining whether the welfare of adopted children is promoted by restricting their capacity to marry.

[81] *Supra*, note 79, 17.

[82] See the Senate of Canada, *Report of the Standing Senate Committee on Legal and Constitutional Affairs* in [1977-78] Debates of the Senate, 3d Sess., 30th Parl., 506.

[83] The same two issues, of course, arose respecting the Québec legislation dealt with in Bill S-7, and some repetition of the submissions made to the Standing Senate Committee, *supra*, note 79, in that regard are inevitable.

[84] In light of the reasons given by the Court of Appeal of Alberta, in reversing the trial judgment in *Re Broddy*, *supra*, note 71, this statement may have been over-confident. In the course of his opinion, Kerans J.A. said, at 6: "It was also argued that capacity to marry, as a legislative subject matter, is exclusively reserved to Canada. I do not accept this proposition."

The adoption legislation of one half of the provinces contains an express reference to the laws of incest and to the prohibited degrees,[85] while that of the other provinces and of the two Territories does not.[86] Typical of the former is s. 57 of the Alberta *Child Welfare Act*:

> 57(1) For all purposes an adopted child becomes on adoption the child of the adopting parent and the adopting parent becomes the parent of the child as if the child had been born to that parent in lawful wedlock.
>
> (2) For all purposes an adopted child ceases, on adoption, to be the child of his existing parents, whether his natural parents or his adopting parents under a previous adoption, and the existing parents of the adopted child cease to be his parents.
>
> (3) Any reference to "child","children" or "issue" in any will, conveyance or other document, whether heretofore or hereafter made, shall unless the contrary is expressed be deemed to include an adopted child.
>
> (4) The relationship to one another of all persons, whether the adopted child, the adopting parent, the natural parents, or any other persons, shall be determined in accordance with subsections (1), (2) and (3).
>
> (5) Subsections (2) and (4) do not apply for the purposes of the laws relating to incest and to the prohibited degrees of marriage to remove any persons from a relationship in consanguinity that, but for this section, would have existed between them.
>
> (6) This section
>
> (a) applies and shall be deemed always to have applied with respect to an adoption made under any legislation heretofore in force, and
>
> (b) is binding on the Crown for the purpose of construing this Act and the rights of succession affecting adopted children,
>
> but nothing in this section affects an interest in property that has vested in a person before the making of an order of adoption.[87]

Subsection (5) of this provision implies several things. First, it recognizes implicitly that if the prior subsections apply to such matters at all, then

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However, in the context of the rest of his remarks, it is submitted that he meant only that, in relation to a matter within its competence, a province could legislate so as to affect capacity to marry. It would seem to be his view that provincial legislation can indirectly or incidentally affect prohibited degrees, but only by expressly creating prohibitions supplementary to those provided by federal law.

[85] The provinces are Alberta, British Columbia, Nova Scotia, Ontario, and Prince Edward Island. See *Child Welfare Act*, R.S.A. 1980, c. C-8, s. 57(5); *Adoption Act*, R.S.B.C. 1979, c. 4, s. 11(6); *Children's Services Act*, S.N.S. 1976, c. 8, s. 22(3) [the *Act* appears in the Consolidated Statutes of N.S. as c. C-13]; *Child Welfare Act*, R.S.O. 1980, c. 66, s. 86(5); *Adoption Act*, R.S.P.E.I. 1974, c. A-1, s. 19(4).

[86] The statutes in question in Manitoba, New Brunswick, Newfoundland, Québec, Saskatchewan, the Northwest Territories, and the Yukon, respectively, are: *The Child Welfare Act*, S.M. 1974, c. 30; *Adoption Act*, R.S.N.B. 1973, c. A-3; *Adoption of Children Act*, S.N. 1972, No. 36; *Adoption Act*, R.S.Q., c. A-7; *Family Services Act*, R.S.S. 1978, c. F-7; *Child Welfare Ordinance*, R.O.N.W.T. 1974, c. C-3; *Child Welfare Ordinance*, R.O.Y.T. 1971, c. C-4.

[87] R.S.A. 1980, c. C-8, s. 57. When considered in *Re Broddy*, *supra*, note 71, this provision was s. 60 of the *Child Welfare Act*, R.S.A. 1970, c. 45.

they apply to the matter of incest as well as to the matter of prohibited degrees of marriage. Secondly, because it says that subss (2) and (4) do not apply so as to *remove* previous relationships, an implication is that subs. (1) *does* apply so as to place persons not otherwise so related in a relationship of consanguinity within the scope of the laws as to incest and prohibitions. In other words, subs. (5) would appear to be unnecessary unless subss (2) and (4) succeeded in removing natural relationships of consanguinity from the scope of the laws as to incest and prohibitions, and if these provisions succeed in that respect, then subs. (1) must also succeed in placing artificial relationships of consanguinity within the scope of these federal laws. A third implication might be that the Alberta legislature regards as socially undesirable marriages between persons deemed by adoption to be related within three degrees, and continues to view as socially undesirable marriages within three degrees between actual biological relatives, one of whom has been adopted by a third party.

Unlike the Alberta-type provision, the adoption legislation of the other provinces, and of the Territories, simply purports to make the adopted child, for all purposes, the child of the adopters and thus related to their kin, and to eradicate for all purposes the child's previous relationships, including the purely biological. In making no reference to the laws of incest or the prohibited degrees, such legislation lends itself more easily to the interpretation that it was not intended to, and does not, affect such matters. However, the express references in legislation such as that in Alberta can arguably be said to have been enacted *ex abundante cautela*, leaving such legislation in the same position as that of the other provinces. Unnecessary precautionary legislation is not rare. Indeed, in an analogous situation, the Supreme Court of Canada considered a particular provincial provision that stated that adoption does not affect the Indian status of an adopted child.[88] It was held that the provision, at best, served only to reinforce the view the Court had already reached that provincial adoption legislation could not deprive an adopted child of his Indian status.

The purpose of the provincial legislation in question — whether or not it contains an express reference to incest and prohibited degrees — is to place the adopted child, so far as is possible and consistent with general law, in the same position *as if* it had been born to the adopting parents rather than to its biological parents. We are dealing with a legal fiction whose purpose is clearly to parallel consanguinity rather than affinity. We are not asked to pretend for legal purposes that the adopters are the child's mother- and father-in-law and that their other children are its brothers- and sisters-in-law. Rather, these provisions *deem* these parties to be biologically related, and

[88] *Natural Parents* v. *Superintendent of Child Welfare* [1976] 2 S.C.R. 751, (1975) 60 D.L.R. (3d) 148 [hereinafter cited to S.C.R.].

deem that the adopted child and his natural kin are not biologically related. However, it is submitted that there is no prohibition under the general law of Canada against the marriage of persons *deemed* to be biologically related, and that the incapacity to intermarry attaches indelibly *only* to those *actually* biologically related, whether legitimate or not. Archbishop Parker's Table shows only two kinds of prohibitions. The first are those involving natural, *i.e.* biological, relationships, as distinct from artificial relationships. Such relationships exist independently of law, and they link people regardless of their legal relationships. The law can no more extinguish or create biological relationships than it can prevent the sun from setting. The status of legitimacy — of being the lawful child and heir — was as irrelevant then in the matter of capacity to marry as it is now in defining incest, and for the same reasons, no doubt. In defining "incest", the *Criminal Code* uses the expression "blood relationship".[89] It is suggested that this means *actual* blood, and that provincial laws *deeming* persons to be related by blood do not place them within the ambit of the criminal law on incest. If that is correct, it is not simply because the *Criminal Code* is involved, but because the gravamen of the offence is the eugenic concern and the general sense of revulsion at the forbidden conduct. The common law prohibitions against consanguineous marriages exist, in part, for the same reason: to prevent incestuous intercourse. Natural relatives, whether legally related or not, could not intermarry within certain degrees. This was so whether they were of the "whole-blood" or of the "half-blood". But relationships of the "*deemed*-blood" were not included in these prohibitions, and unions between persons so related involve neither eugenic considerations, nor, as will be seen in the next Part, any general sense of revulsion. Apart from affinity, it is natural relationships and only such relationships, that are involved in the prohibited degrees.

The second kind of prohibition contained in Archbishop Parker's Table was in respect of artificial relationships. Although relationships produced by adoption are artificial, at common law the only kind of artificial relationships affecting capacity to marry were those of affinity arising by operation of law as a legal incident of marriage. The artificial relationships established by operation of law through the device of *legal* adoption, being unknown at common law, did not affect capacity to marry.[90] If adoption is to operate as a *third* class of relationships within which marriages are to be prohibited, there would have to be legislation to that effect. No provincial legislation states

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[89] R.S.C. 1970, c. C-34, s. 150(1).

[90] *De facto* adoption, of course, was known at common law. Yet, although the social justification, if any, for restricting the capacity to marry of adopted persons is virtually the same whether the adoption is legal or simply *de facto*, no such prohibition was thought necessary. In the course of his unreported judgment in the *Broddy* case, *supra*, note 71, 2, Kerans J.A. observed that "the common law did not recognize a notional relationship created by adoption".

expressly that "marriage is prohibited between persons related within three degrees by adoption", and it would be *ultra vires* if it did. Since Parliament has not legislated so as to prohibit marriages between persons related by adoption, such marriages are not now prohibited. Since the incapacity to intermarry on the ground of artificial relationship arises only through marriage, it follows that adoption simply does not affect capacity to marry.

Some support for this argument can be found in the opinion expressed by Mr Justice Davey in *Crickmay* v. *Crickmay*.[91] In holding that a woman was not prohibited from marrying the brother of her divorced but living husband, Davey J.A. made what appears to be an analogous argument, and one in which Mr Justice Norris concurred. Although the rules set out by Archbishop Parker preclude a woman from marrying her deceased husband's brother,[92] because there was no divorce at common law there was no common law rule prohibiting her from marrying her divorced husband's brother. At the time divorce became part of the general law, such a marriage could be entered into because neither the common law nor statute prohibited it.[93] By analogy, it may be argued that, although at common law a woman could not marry her biological brother, since there was no legal adoption at common law, there was no common law rule prohibiting her from marrying her adopted brother.[94] When legal adoption became possible, in the absence of an express statutory prohibition,[95] she could marry him because there was still no common law rule prohibiting her from doing so.

The submission under consideration is that provincial adoption legislation does not really purport to affect incest and capacity to marry. Assuming that this legislation is open to such an interpretation, a second proposition may

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[91] *Supra*, note 4, 734. Obviously, the preceding argument is not meant to depend on the analogy being drawn to Mr Justice Davey's argument, since a strong criticism of his argument (for reasons not applicable in the matter of adoption) has already been registered in dealing with the effect of divorce on the prohibited degrees. However, if his argument is valid, then it would certainly reinforce the view that adoption does not affect capacity to marry.

[92] Such a marriage is now permitted by the *Marriage Act*, R.S.C. 1970, c. M-5.

[93] Because there was no judicial divorce, it would seem that the opportunity to marry a divorced spouse's sibling could not arise. However, prior to the introduction of judicial divorce in England, in 1857, it was possible in certain circumstances to obtain a private act of divorce. According to Mr Justice Davey's argument in *Crickmay*, *supra*, note 4, there could have been no prohibition against a marriage between a person divorced by private act, and the sibling of his or her divorced spouse.

[94] Of course, since there was no legal adoption, there was no opportunity to marry a legally adopted brother. However, as already discussed, there was *de facto* adoption, and if there are any substantive reasons (*i.e.* reasons other than the merely accidental intersection of federal and provincial laws) for restricting a legally adopted child's capacity to marry, surely those reasons are equally applicable in the case of *de facto* adoption.

[95] It is probable that legislation must be clear and express in order to affect the validity of marriage in general, and the prohibited degrees in particular. See *supra*, note 19.

be advanced. Where legislation is susceptible of two interpretations, that which produces anomalies and undesirable consequences ought to be rejected. It is suggested that an interpretation whereby provincial adoption legislation affects these matters leads to bizarre consequences and ought to be rejected.

In exercising its exclusive jurisdiction to prohibit marriages for closeness of kinship, and to render criminal, as being incestuous, sexual intercourse between certain persons, Parliament has prohibited biological siblings from intermarrying and has made sexual relations between them a criminal offence punishable by up to fourteen years in prison. Similarly, a person is prohibited from marrying his or her biological child or grandchild, and sexual relations between them are criminal.

A totally unrestricted interpretation of provincial adoption legislation would not only have the effect of prohibiting an adopted person from marrying a sibling or parent by adoption, but it would make sexual intercourse between them a crime.[96] In every province and territory, except New Brunswick, it would also prohibit a marriage between an adopted person and his or her aunt, uncle, niece, or nephew by adoption. Under the sharply different New Brunswick legislation,[97] the impeded relationships would not include a person's third degree collateral relatives by adoption. Moreover, while in all other jurisdictions sexual intercourse between the adopted child and persons deemed by the adoption to be his or her sister, brother, parent, or grandparent would be criminally incestuous, such conduct between the adopted child and his or her adopted parent's parent would not be incestuous in New Brunswick because adoption does not create a relationship of adopted child-grandparent in that province. The relevant provision reads as follows:

> A person adopted shall stand in regard to the legal descendants, but to no other kindred, of the adopting parent in the same position as if he had been born to the adopting parent in lawful wedlock.[98]

There is a further difference between the New Brunswick provision and the legislation of other Canadian jurisdictions, and it is particularly anomalous. An adopted person could marry his or her adopting parent's sister or brother, because they are not the descendants of the adopting parent. This provision does not deem them to be nephew-aunt or niece-uncle by adoption. However, the adopted person would be prohibited from marrying his or her sibling-by-adoption's daughter or son, since the latter are descendants of the adopting parent and the provision deems such parties to be uncle-niece or aunt-nephew by adoption.

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[96] The Alberta Court of Appeal did not address this point in its judgment in the *Broddy* case, *supra*, note 71.

[97] See the *Adoption Act*, R.S.N.B. 1973, c. A-3, s. 33(2).

[98] *Adoption Act*, R.S.N.B. 1973, c. A-3, s. 33(2).

Still pursuing the hypothesis of an unrestricted interpretation of the provincial legislation, in those provinces that lack a saving provision — so as not to remove anyone from a previous relationship for the purpose of the laws of incest and prohibited degrees — although an adopted person could not marry an adoptive sibling or parent, he or she could marry a biological sibling or parent,[99] and sexual intercourse between them would not be a crime. Thus, assuming that all relevant events occurred within the province whose legislation is in question, a marriage between an adopted person and his or her biological parent or sibling would be permitted in some provinces, but not in others. Similarly, sexual relations between such persons would be criminal in some parts of Canada, but not in others. As if this were not sufficiently bizarre, consider the problems that might arise where all the events do not occur within the territory of one province. What law applies to determine the *capacity to marry* of an *adopted* person? Is it the law of the parties' domicile? And what if they have different domiciles? Is it the law of the place of celebration? The law of the forum? The law of that jurisdiction with which they have a real and substantial connection? Or should the problem be characterized as essentially an adoption matter to which yet a different choice of law rule might apply?[100] And what is the effect of a specific provincial law dealing with foreign adoptions, including those of another province, when it comes to determining the validity in that province of the marriage elsewhere of an adopted person? Several provinces have enacted that an adoption order made anywhere else will have the same effect in the province as if it had been made there.[101] One province grants that effect only to foreign adoption orders of countries listed in certain regulations.[102] Another specifically recognizes foreign adoption orders for succession purposes, thereby implying that it does not recognize them for other purposes.[103] Two provinces, Nova Scotia and Newfoundland, seem to accord to the adopted child and adopting parent under a foreign adoption order, but apparently not to other relatives by adoption, the status, rights and duties they would have under a local adoption order.[104] The

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[99] Or aunt, uncle, niece, or nephew.

[100] See J.-G. Castel, *Introduction to Conflict of Laws* (1978) 95-6 concerning capacity to marry, and 131 concerning adoption.

[101] These provinces are Alberta, British Columbia, Manitoba, Ontario, Prince Edward Island, the Yukon and the Northwest Territories; see *Child Welfare Act*, R.S.A. 1980, c. C-8, s. 61; *Adoption Act*, R.S.B.C. 1979, c. 4, s. 12; *The Child Welfare Act*, S.M. 1974, c. 30, s. 81; *Child Welfare Act*, R.S.O. 1980, c. 66, s. 87; *Adoption Act*, R.S.P.E.I. 1974, c. A-1, s. 27; *Child Welfare Ordinance*, R.O.Y.T. 1971, c. C-4, s. 86(11); *Child Welfare Ordinance*, R.O.N.W.T. 1974, c. C-3, s. 93.

[102] See *Adoption Act*, R.S.N.B. 1973, c. A-3, s. 35. This was also the position until quite recently in British Columbia. See *Adoption Act*, R.S.B.C. 1960, c. 4, s. 11.

[103] See *Family Services Act*, R.S.S. 1978, c. F-7, s. 66.

[104] See *Children's Services Act*, S.N.S. 1976, c. 8, s. 28 [the *Act* appears in the Consolidated Statutes of N.S. as c. C-13]; *Adoption of Children Act*, S.N. 1972, No. 36, s. 18.

Nova Scotia provision, which is essentially the same as that of Newfoundland, reads as follows:

> 28. When a person has been adopted in another province, state or country according to the law of that place, and while domiciled or resident there or having been born there, or while his adoptive parent was domiciled or resident there, *he and his adoptive parent have* for all purposes in the Province the same status, rights and duties as if the adoption had been in accordance with this Act.[105]

Apart from leaving unclear the status of the adopted person and his adoptive parent where both of them are no longer domiciled or resident in the place of adoption, these provisions seem to indicate that the relationships of sibling, uncle, aunt, nephew, and niece by foreign adoption are not recognized in those two provinces. For example, if provincial legislation is taken to affect such federal matters, sexual intercourse between a man and a woman adopted by his parents in another province would be criminally incestuous in every province but these two. A man and a woman deemed to be his sister by an adoption in Ontario, for example, would lack the capacity to marry in that province. But apparently they could go to Nova Scotia or New Brunswick and get married. Neither the consummation of, nor a naughty anticipation of, that marriage would be criminal if it occurred in either of those provinces. But their marriage would be void *ipso jure* in Ontario, and it could be so treated in any action in that province in which its validity should arise, whether they are parties to the action or not. And if they returned to Ontario and had the temerity to indulge in marital intercourse there, they would be guilty of the crime of incest.

The possibility for proliferating the ridiculous becomes staggering when the effect of subsequent adoption orders is brought into consideration. Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Prince Edward Island, and the Yukon and Northwest Territories do not deal separately with the effect upon the earlier order of a subsequent adoption of the child. In Manitoba, which lacks the "saving provision", the situation would appear to be that the relationships established by the first adoption are completely wiped out, just as biological relationships are terminated by the first adoption. But in the other jurisdictions, since an adoption order expressly does not apply so as *to remove* anyone from a relationship for the purpose of the laws pertaining to incest and prohibited degrees of marriage, and since the first adoption, *ex hypothesi*, created such relationships, the second adoption would not remove them. Thus, a man could marry his former sister-by-adoption in Manitoba, but she would be added to his personally prohibited list in the seven other jurisdictions. The remaining provinces have specific provisions whereby a subsequent adoption terminates the status, relationships and rights created by

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[105] *Children's Services Act*, S.N.S. 1976, c. 8, s. 28 [the *Act* appears in the Consolidated Statutes of N.S. as c. C-13; emphasis added].

the previous adoption, except vested interests in property.[106] The anomalies occasioned by a subsequent order are increased even further by the possibility that the adoption orders may be in separate jurisdictions. Suppose, for instance, that the first adoption occurred in Alberta and the second one in Manitoba. Would Alberta recognize the Manitoba adoption as eradicating for all purposes all of the relationships created by the Alberta adoption when a second Alberta adoption would not have that effect?

A final factor that should be taken into account is that the adopted child may have only one adopting parent. Not only are single applicant adoptions possible, but not infrequently the marriage of joint adopters ends through death or divorce, and the survivor may remarry. Suppose H and W adopt a son, S. W dies and H marries X who has two daughters, D and E. S and D are in their late teens and do not wish to be adopted by either X or H, respectively. But E is much younger and is adopted by H. Assuming there were no other impediments to such an eventual union, S could marry D, and sexual relations between them would not be criminal, but he could not marry D's sister E, and sex with *her* would be the crime of incest. Although sexual intercourse between H and E would be incestuous, his intercourse with E's sister D would not be the crime of incest. However, because D is his step-daughter, sexual relations with her might involve him in the non-incestuous lesser offence of illicit sexual relations with a step-daughter, a crime punishable by up to two years imprisonment.[107]

The foregoing review of the difficulties that would otherwise result points to the soundness of interpreting the federal law in these matters as pertaining only to actual, not deemed, biological relationships.[108] This does no

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[106] See the *Adoption Act*, R.S.N.B. 1973, c. A-3, s. 36; *Adoption of Children Act*, S.N. 1972, No. 36, s. 16(2); *Adoption Act*, R.S.Q., c. A-7, s. 40; *Family Services Act*, R.S.S. 1978, c. F-7, s. 67.

[107] See the *Criminal Code*, R.S.C. 1970, c. C-34, s. 153. This is not the crime of incest, but the separate offence of illicit sex with a step-daughter. Presumably if they were married in a jurisdiction permitting it, their sexual intercourse would not be illicit. Incidentally, in order to be a step-daughter for the purposes of s. 153, the child must be the legitimate child of the step-father's wife. If a man marries a woman who has an illegitimate daughter, she is not his step-daughter for the purposes of s. 153. See *R.* v. *Groening* (1953) 107 C.C.C. 234 (Man. C.A.). *Quaere*, whether a provincial statute abolishing illegitimacy (see *supra*, note 68) would deprive an accused of this defence. However, the illegitimate daughter would be the accused's step-daughter for the purpose of the prohibited degrees, as it has long been held that relationships for these purposes do not depend upon legitimacy.

[108] As Kerans J.A. points out in the *Broddy* case, *supra*, note 71, 6-7: "[T]he distracting possibility of 10 varying rules on capacity [to marry] in Canada . . . is the price one pays to have a federal state, and therefore cannot be a reason for denying jurisdiction to a province." However, this is not to say that one's choice between two possible interpretations of provincial legislation is not to be influenced by the particularly anomalous consequences of one of them upon the application of federal law.

violence to provincial adoption legislation, the scope of which remains intact for all other purposes. Moreover, it is submitted that, even if provincial adoption legislation purports to do so, as a matter of constitutional law it is doubtful that it could operate so as to alter or modify the capacity of Canadians to marry.

B. *Is Provincial Legislation Inoperative to the Extent that it Purports to Affect Capacity to Marry?*

Although the provinces cannot validly enact laws *expressly* in relation to matters coming within the heads of power assigned to the Parliament of Canada, they may in certain circumstances enact legislation that affects incidentally such federal matters.[109] It was once considered that provincial legislation could not intrude even incidentally into an occupied federal field — and a strong argument can be made that Parliament has totally occupied the field of prohibited degrees — but that view seems now to have been generally discarded.[110] However, under the so-called paramountcy doctrine, there is no doubt that where valid federal and valid provincial legislation meet, the provincial legislation will be inoperative, at least to the extent that it is inconsistent with the federal law.[111] The submission being made is that the relevant adoption provisions of some provinces may be *ultra vires* as being expressly in relation to the federal laws on incest and prohibited degrees and

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[109] Presumably the relationship of parent-child conferred by adoption, for example, incidentally enables one person to claim another as a dependant for federal income tax purposes. This general point is dealt with thoroughly in P. Hogg, *Constitutional Law of Canada* (1977) 80-92, and the leading cases are cited therein.

[110] See *ibid.*, 103-10.

[111] See *ibid.*, 102-14. See also *Multiple Access Ltd* v. *McCutcheon* (1982) 138 D.L.R. (3d) 1, (1982) 44 N.R. 181 (S.C.C.) *rev'g* (1978) 19 O.R. (2d) 516, (1978) 86 D.L.R. (3d) 160 (C.A.); *Natural Parents* v. *Superintendent of Child Welfare, supra*, note 88. Although the term "inconsistency" has a naturally flexible connotation it would certainly appear to embrace an operational inconsistency such as where the observance of provincial law involves the breach of federal law, or where the application of federal law would be ousted by the provincial provision. In the course of reversing the trial decision in the *Broddy* case, *supra*, note 71, 11, Kerans J.A. said this: "There is no conflict between the section under review and *Lord Lyndhurst's Act*. The pre-confederation statute forbids the male appellant from marrying his natural niece. The province would forbid him also from marrying his adoptive niece. He could obey such a provincial law without breach of the other." However, if the test were simply whether obedience to provincial law involved breach of federal law, then the legislative intent of Parliament could be effectively thwarted. For instance, if Parliament were to enact legislation stating that "a marriage is not invalid merely because the parties are related by adoption", could a province then effectively prevent such marriages by declaring expressly in adoption legislation that such marriages are void? Inasmuch as the parties "could obey such a provincial law without breach of the other", why not? See also *infra*, notes 124 and 126.

that, in any case, there exists between all such present provincial legislation and those federal laws an inconsistency of such character as to preclude the operation of the provincial law within the occupied federal field.

It has already been pointed out that the adoption legislation of several provinces contains a "saving provision" whereby an adoption does not remove any persons from a pre-existing relationship of consanguinity for the purpose of the laws relating to incest and to the prohibited degrees.[112] The adoption legislation in the remaining provinces and in the Territories makes no reference at all to these federal matters. It could be argued that the former legislation containing the "saving provision" deals expressly with the criminal law on incest and with the prohibited degrees of marriage and, precisely because it purports not to remove any previously existing relationships from the reach of federal law, it purports directly to bring certain relationships within the scope of such federal law. It could then be asserted that such a direct invasion of the federal powers would be *ultra vires*.[113]

In those jurisdictions in which there is no "saving provision", the effect, if any, of their adoption law on the federal laws in question would be incidental, and the applicability of the paramountcy doctrine must be considered. The adoption legislation in such jurisdictions would clearly be inopera-

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[112] See *supra*, note 85.

[113] Although the point is not dealt with clearly in his judgment, it is likely that Kerans J.A. in the *Broddy* case, *supra*, note 71, would be of a different view. But see the opinion of Beetz J. in the *Natural Parents* case, *supra*, note 88, 787, regarding another "saving provision" in the British Columbia *Adoption Act*, R.S.B.C. 1960, c. 4. The saving provision in question, which was s. 10(4a) as added by *An Act to amend the Adoption Act*, S.B.C. 1973 (2d Sess.), c. 95, s. 1 [now s. 11(5) of the *Adoption Act*, R.S.B.C. 1979, c. 4], was to the effect that subss (1), (2) & (3), creating and extinguishing relationships "for all purposes", do not apply so as to affect Indian status either by removing it from or conferring it upon an adopted person. This provision was inserted after the *Natural Parents* case had begun, but before it reached the Supreme Court of Canada. In the course of his judgment, at 787, Mr Justice Beetz said that "subs. (4a) of the *Adoption Act* is, in my opinion, clearly *ultra-vires*. This may be paradoxical since s. (4a) appears to have been dictated by the intent not to invade federal jurisdiction. But what was said is what matters, not what was meant. Whether 'the status, rights, privileges, disabilities and limitations of an adopted Indian person acquired as an Indian under the *Indian Act*' are affected or not affected by adoption is, as a matter of legislative policy, exclusively for Parliament to decide, or, as a question of interpretation in a proper case, for the courts to rule upon." He went on to find that, even without the *ultra vires* provision, adoption does not affect Indian status. Pigeon and de Grandpré JJ., at 783, agreed with this view. The other members of the Supreme Court took the view that the provision was inoperative, whether for constitutional reasons or simply because it was purely precautionary. See the judgments of Laskin C.J.C. at 755, Martland J. at 766 and Ritchie J. at 776. All members of the Court went on to find that, even without the *ultra vires* provision, adoption does not affect Indian status. This reasoning would seem to apply with greater force to saving provisions purporting not to affect by removing, *but purporting therefore to affect by conferring*, relationships by consanguinity for the purposes of the federal laws on incest and prohibited degrees.

tive to the extent that it might be taken to sever pre-existing relationships of consanguinity so as to provide a defence to a charge of incest, or to purport to render valid a marriage otherwise void. However, since it might be argued that provincial law could prohibit that which the federal law merely permits,[114] it is not immediately apparent that the provinces could not incidentally add to the prohibited degrees and render criminally incestuous intercourse between biological strangers. However, unless the provision creating the new relationships for the purposes of the laws of incest and prohibited degrees can be severed from the provision purporting to extinguish the natural relationships, then both provisions must be inoperative.[115] The scheme of the provincial legislation is *to replace* one set of relationships with another, so these provisions are as inextricably related as two sides of a coin. They cannot effectively be severed and, just as the riven faces of a physically divided coin could have no separate currency, neither of these provisions can operate independently of the other so as to affect the federal laws in question.[116] But assuming that these two provincial provisions were severable, would it not be an odd quirk of constitutional law if the provincial legislation operated, even incidentally, to remove a substantive defence to a charge of incest under the *Criminal Code*, namely, that the parties are not biologically related? In any event, if provincial law, as an incidental effect of adoption, can intrude into either of the federal fields of incest and prohibited degrees, it can intrude into both. Indeed, this proposition is implicit in the "saving provisions" found in many of the provincial statutes.[117] Does this provincial legislation render incestuous an act of intercourse not otherwise criminal? If not, then neither does it prohibit a marriage not otherwise impeded. If it does, not only would it be an apparently unprecedented instance of a provincially created felony, but it would result in conduct being criminal in one province but not in another.[118] If the apparently direct incursion into these federal areas in those provinces whose legislation has the "saving provision" is *ultra vires*, as suggested above, then such legislation does not make criminal intercourse between a person and his or her adopted parent, grandparent or sibling. If the legislation

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[114] See Hogg, *supra*, note 110. An example might be this: suppose the *Criminal Code* were to prohibit driving over 100 km/h on any highway in Canada. A provincial law restricting the speed to 80 km/h would not be repugnant. See also the discussion of *Broddy*, *supra*, note 111.

[115] See Hogg, *ibid.*, 88-90.

[116] Although some provinces provide for the termination of previous relationships in a separate provision from that establishing the new relationships, other provinces set out the entire process of replacement of relationships in the same provision, making their severance even more improbable.

[117] See *supra*, text accompanying notes 112 and 113.

[118] The differences in provincial adoption legislation leading to such anomalies were canvassed earlier. See *supra*, text accompanying notes 99 to 108. It should also be noted that the legislation in the twelve jurisdictions involved was enacted at different times, amended at different times, and it is subject to local change at any time.

in the other provinces were operative for such purposes, then the guilt or innocence of the crime of incest would depend upon the province in which a couple slept together. Would it not be absurd that the consummation in one province of a marriage validly entered into in another would be criminal?[119]

Finally, with respect to the constitutionality of a provincial incursion, direct or indirect, into the federal fields of incest and prohibited degrees, the case of *Natural Parents* v. *Superintendent of Child Welfare* [120] should be examined. That case was drawn to the attention of Mr Justice Dea in *Re Broddy*,[121] but he took the view that it was of peripheral value only, and he did not bother to distinguish the earlier Supreme Court of Canada decision from the case before him. It is respectfully submitted that, although the *Natural Parents* case did not deal specifically with the effect of adoption on the laws of incest and prohibited degrees, it is sufficiently apposite to that issue that it ought to have been carefully distinguished — if indeed it can be — before being found inapplicable.[122] The case concerned the adoption, under the British Columbia *Adoption Act*,[123] of a status Indian child by non-Indian adopting parents. The adoption purported to sever all prior relationships and to treat the child as though born to his adopting parents in lawful marriage. Of course, had he been their biological child, he would not have been an Indian.

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[119] It may be that provincial law can have an effect upon the application of the *Criminal Code*, R.S.C. 1970, c. C-34, *e.g.*, setting an age limit for the purpose of defining "juvenile" in accordance with which certain punishable conduct may be dealt with differently than under the *Criminal Code*. However, it would not seem open to the provinces to change the essential character of conduct proscribed by federal law so that in one province that conduct is indictable, while in another it is not even legally reprehensible and will not be interfered with by the law. Unfortunately, in his judgment in *Broddy*, *supra*, note 71, Kerans J.A. did not consider the question whether a province could expressly make sexual intercourse between adoptive relatives a *crime*. He did indicate that a province cannot insert a new category into a federal law, and it would appear to follow that it could not thrust people into the scope of a federal criminal prohibition. However, he seems to imply that the province can create *supplementary* prohibitions in relation to the scheme of valid provincial legislation. Apparently, if a province stated expressly that a man may not marry his adopted sister, that prohibition would be valid because it would be independent of, and not an amendment to, federal law. Would it be his view that, if a province stated expressly in its adoption legislation that sexual intercourse between a man and his adopted sister is incestuous and punishable by a fine, then such a provision would be valid and enforceable? Why not? Is s. 91(27) of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), to be dealt with differently than s. 91(26)?

[120] *Supra*, note 88.

[121] *Supra*, note 71, 760.

[122] In overruling Mr Justice Dea in *Re Broddy*, the Alberta Court of Appeal, *supra*, note 71, 8-9, considered the *Natural Parents* case only in relation to the "double aspect" rule. It is submitted that Kerans J.A., who seems to express some doubt as to the opinion of Chief Justice Laskin regarding this rule, has missed the essential point of the *Natural Parents* case in relation to the issue before him.

[123] R.S.B.C. 1960, c. 4 [now R.S.B.C. 1979, c. 4].

It was held that the provincial *Adoption Act* could not deprive the child of the right to Indian status, which was a federal matter.[124]

The main question before the Court in the *Natural Parents* case was whether the *Adoption Act* of British Columbia applied at all to Indians living in that province. The opinions handed down varied as to whether the applicability of general provincial law to Indians depends on such law having been incorporated by reference under s. 88 of the *Indian Act*,[125] or whether provincial law of general application would apply to Indians living within the province even in the absence of s. 88. In the result, the members of the Court were all of the view that the British Columbia *Adoption Act* does apply to Indians in that province so as to permit their adoption, whether by Indians or non-Indians. More importantly in the present context, the Justices all concluded that the words "for all purposes" found in the provisions extinguishing and creating relationships by adoption do not destroy entitlement to registration under the *Indian Act*. The same conclusion had been reached unanimously by the Court of Appeal of British Columbia, which concluded that "[t]he *Adoption Act* applies to the extent that it is not inconsistent with the *Indian Act*. Where there is an inconsistency, the *Indian Act* prevails".[126] Mr Justice Martland, in agreeing with the view of the Court of Appeal, put it this way: "[T]he words 'for all purposes' in subss. (1) and (2) of s. 10 of the Adoption Act must be taken to refer to *all purposes within the competence of the British Columbia Legislature*. Section 10...did not purport to deprive the child of any status or rights which he possessed under the Indian Act at the time of his adoption, and it is clear that no provincial legislation could deprive him of such rights".[127] Such provisions no more purport to affect marital capacity and incest than they purport to affect Indian status, and the statement that these identical subsections "must be taken to refer to all purposes within the competence" of the enacting province does not lose its validity simply by changing the context of competing federal law from the *Indian Act*[128] to the

[124] The reverse situation arose in *Sahanatien* v. *Smith* (1982) 134 D.L.R. (3d) 172 (F.C.T.D.), in which Mr Justice Cattanach followed the reasoning in the *Natural Parents* case, *supra*, note 88, by holding that a full-blooded Indian who was ineligible to be registered under the *Indian Act*, R.S.C. 1970, c. I-6, because of his illegitimate birth, did not become eligible for such registration by reason of his adoption in Ontario by registered Indians.

[125] R.S.C. 1970, c. I-6.

[126] *Sub nom Re Adoption Act* (1974) 44 D.L.R. (3d) 718, 721 (B.C.C.A.). In the *Sahanatien* case, *supra*, note 124, 177, Mr Justice Cattanach found an inconsistency between the adoption provision, which purports to make the adopted child the child of its adopting parents "for all purposes", and the specific requirements for registration under the *Indian Act*, R.S.C. 1970, c. I-6. He held that the provincial legislation could not operate so as to "circumvent the precise conditions precedent to registration set out in s. 11 of the *Indian Act*".

[127] *Natural Parents*, *supra*, note 88, 775 [emphasis added].

[128] R.S.C. 1970, c. I-6.

Criminal Code [129] and capacity to marry. It follows that provincial adoption legislation is blunted to the extent of inconsistency with *any* federal law which is validly enacted and therefore cannot curtail or deprive persons of their capacity to marry, which is itself an incident of status, nor can it render them criminally culpable. Is this not even more apparent where the consequence would be to make conduct criminal in some provinces, but not in others, and to make marital status different in the various provinces so that the application of federal impediments would result in a couple being married in one province, but not in another? To borrow from the concluding remark of the Chief Justice of Canada in the *Natural Parents* case, surely the strange and unacceptable consequences of finding provincial adoption legislation to operate so as to affect the laws pertaining to incest and the prohibited degrees constitute "a result to which [the courts] would not come unless clearly compelled to do so by unambiguous legislation".[130]

The better view is that adoption does not affect the prohibited degrees of marriage, much less the law relating to incest. Whether adoption ought to affect such matters is a separate question, and it is addressed in the conclusions that follow.

Conclusion

Legal systems react to social change as if perceiving it from afar. By the time the light of such change dawns, the attitudes that prompted it are obsolescent, yet emergent patterns of social behaviour remain undetected. To be a step behind the times is endemic to the system; but the law can, at least, be made to reflect *recent* sociological developments. The failure of Canadian law to contemplate contemporary realities is nowhere more evident than in relation to marriage and the family. The Fathers of Confederation clothed Parliament with the authority to determine the common and essential characteristics of marriage and to maintain these elements in conformity with evolving social values. Whether to avoid offending provincial sensibilities, or to minimize regional risks at the polls, successive federal governments have shied away from exercising this potentially unifying authority. A century passed before the first general and comprehensive divorce law was introduced,[131] and another may pass before Canada has a clear and uniform

[129] R.S.C. 1970, c. C-34.

[130] *Supra*, note 88, 766.

[131] Prior to the *Divorce Act*, S.C. 1968, c. 24 [now R.S.C. 1970, c. D-8], Parliament enacted a number of minor provisions for the benefit of those provinces which entered confederation endowed with divorce law. The first comprehensive divorce law passed was not general; it was enacted for one province only — Ontario. The *Divorce Act (Ontario)*, S.C. 1930, c. 14,

law of marital capacity. Although Australia has enjoyed such legislation for several years, a general statute on the nullity of marriage is certainly a long way off in this country. While the relative ease of modern divorce may have diminished the interest in nullity law reform, a serious problem remains — persons who should be able to marry each other are being denied that right. The divorce law holds no remedy for them. Only Parliament can redress the situation, and it ought to do so by general enabling legislation and not through a series of *ad hoc* dispensations. Reform of the law in the small area that concerns the prohibited degrees of marriage is uncomplicated and should prove to be rather uncontroversial. It happens, as well, to be the only field in the federal domain of marriage that Parliament has already occupied. What is required now is only that it move about in that field. The revision of existing federal legislation in this narrow field ought not to be delayed pending as yet uncontemplated omnibus changes that may be decades away.

At the outset it was suggested that Canada ought to follow substantially the Australian lead in eliminating all prohibitions of marriage save those of biological siblings and persons related lineally either by consanguinity or by adoption. An account of their historical purposes reveals the present inappropriateness of most of the prohibitions and lends ample support to this approach.

The historical justification for prohibiting the marriage of related persons rested on formerly predominant religious and moral views, reinforced in the case of consanguineous marriages by eugenic considerations that may now be of somewhat diminished weight. The likelihood of genetic defects occurring from a given sexual union is a matter of statistical probability and, despite contrary popular opinion, it is far from certain that the progeny of a consanguineous union will be defective. In fact, the odds are against it. The medical advice provided to Parliament in support of Bill C-1001, the first private bill seeking an exemption from the prohibitions, reads in part as follows:

> Each cell in the body has 46 chromosomes (23 matching pairs). When a baby is conceived, the baby receives one set of 23 chromosomes from one parent, and the other 23 matching chromosomes from the other parent.
>
> A chromosome consists of thousands of genes, each of which works together with the corresponding gene on the matching chromosome. It is generally assumed that each person in the general population carries one or two altered recessive genes. Each of these genes, on its own (heterozygote) is not harmful, but in a double dose, (i.e., one from each parent,(homozygote) it may affect development of the child. If a person marries an

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introduced into Ontario sixty year-old English divorce and nullity law, notwithstanding that it had long ceased to be current there. Predictably, while radically different from the century-old law it replaced, from its inception the present law of divorce has failed to harmonize with the behaviour and expectations of society.

> unrelated person the chances of them both having the same harmful recessive gene is small; therefor there is a small risk of their child inheriting the same harmful gene from both parents and being affected. However, if the parents have a common ancestor... the risk to each of their children is higher than if they were not related, but [in the case in question — half-uncle and half-niece] is still not a high risk in itself.[132]

Although the increase in the risk becomes progressively more significant with the nearness of kinship, even where the union is that of siblings, the margin of safety might be considered by some to be sufficient that the state should not intervene to prohibit such a marriage solely to prevent the taking of that risk.[133] Indeed, were eugenics to become the preponderant consideration, the results could be frightening. For instance, certain observable traits in biological strangers might indicate a far greater risk of their producing defective children than would be the risk for siblings who do not have such observable traits; yet

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[132] The Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, Minutes of Proceedings, 22 July 1975, 1st Sess., 30th Parl., Issue No. 24, Appendix B.

[133] For a more detailed explanation of the factors involved in consanguineous marriages, see A. Mange & E. Mange, *Genetics: Human Aspects* (1980), particularly ch. 20, entitled "Inbreeding and Isolates". Because the actual number of cases of inbreeding diminishes with the closeness of relationship, the authors deal at greater length with first cousins. At 476-7, they offer this "prognosis for a first cousin marriage":

> What should be said to first cousins who contemplate marriage and are anxious about possible harm to their offspring? Popular opinion holds that such children are likely to suffer malformations or genetic diseases or be less intelligent than their peers. But the data presented previously suggest that first cousins carry only an additional small per cent risk of having children with genetic defects of greater or lesser severity. All couples, whether related or not, face the likelihood (perhaps 2 to 3 per cent) of having a child with a serious defect, depending on the criteria used to define "serious." Another few per cent of children may fall outside a commonly accepted definition of "normal" but not have a serious defect.
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> A genetic counselor will certainly obtain a detailed family history from first cousins. If there is a suggestion of a deleterious recessive allele in one partner or in an ancestor (or in more than one), a specific probability calculation can be made. The couple can then consider both the precise risk and tbe severity of the defect. More often than not, however, there will be nothing in the family history on which to base a specific calculation. As we have seen, this is because rare recessive detrimental alleles will usually be hidden in heterozygous condition generation after generation. Only vague statements of the small but real increased general risk from first cousin consanguinity can then be made. The couple will have to evaluate this not very satisfactory information and come to a decision on their own.

The actual medical history of the proposed parents may reveal a narrower probability factor upon which they, if not the State, can base a decision whether to have natural children of their own, or indeed, whether to get married. Should the prohibition against uncle-niece and aunt-nephew marriages be removed, because couples so related are almost certainly aware that there is some risk (indeed, most would entertain an exaggerated fear of it), they are likely to seek advice on the matter. If it were regarded as sufficiently important that they obtain such advice, consideration might be given by the provinces to making consultation with a genetic counselor a requirement for such a couple to obtain a marriage licence.

such marriages are not outlawed. Were the prohibitions of marriage to be based simply on eugenics, the next step would be to establish an arbitrary probability of risk factor, to require a genetic profile of all applicants and then to refuse or permit marriages accordingly, regardless of relationship. Compulsory sterilization would not be far behind.[134] Nevertheless, there is undoubtedly a social abhorrence of parents knowing their children carnally, and of siblings having such a connection. Both such unions are likely to remain beyond the pale of acceptability for some time to come. However, there is no common repugnance to any other unions, and their prohibition must rest on other principles.

The prohibition of marriage between affines was based on two other considerations, one of them narrow and long since rejected. The allegorical identification of the wife with the person of her husband took root in the common law and led to the conclusion that, the spouses being of one flesh, her sister, for example, was *his* sister, *her* mother *his*, and *vice versa*. The abandoned doctrine of the unity of spouses no longer lends support to the prohibition of particular marriages. The broader consideration underlying the prohibition of affinitive marriages was applicable to the prohibition of consanguineous marriages as well. The objectives of exogamy were to promote new alliances for charitable, religious or political purposes, and to avert perceived dangers to the moral welfare and harmony of the family. The following passage from a mid-nineteenth century treatise expresses aptly this viewpoint:

> [I]f a concourse between brothers and sisters might be allowed, or their marriages be tolerated, the necessity there is that they should be educated together, and the frequent opportunities they have with each other, would fill every family with lewdness, and create heart-burnings and unextinguishable jealousies between brothers and sisters, where the family was numerous; and it would confine every family to itself, and hinder the propagating common love and charity among mankind, because there would be a danger of taking a wife out of any family, if women were liable to be corrupted by such vieious freedoms. This prohibition is likewise carried to uncles and aunts, nephews and nieces; because, upon the death of a father and mother, they come into the education of the children *loco parentum*; and by consequence it was necessary to propagate the same reverence of blood in such near degrees, that the uncle might have the same regard and command as a father, and a niece the same duty as a daughter. It was also necessary, in order to perfect the union of marriage, that the husband should take the wife's relations, in the same degree, to be the same as his own, without distinction, and so *vice versa*; for if they are to be the same person, as was intended by the law of God, they can have no

[134] In recommending that such conduct between consenting adults no longer be a criminal offence, the Law Reform Commission of Canada makes much the same point as to the eugenic aspects of the crime of incest. See *Report on Sexual Offences* (1978) 27. This particular recommendation proved quite controversial and failed to make its way into the reforming legislation now before Parliament.

> difference in relations, and, by consequence, the prohibition touching affinity must be carried as far as the prohibition touching consanguinity.[135]

Given the extended and extensive families once prevalent, and their territorial stability, prohibitions extending to the third degree may not seem untoward. But there is no further interest in compelling persons to marry strangers, and the advent of the so-called nuclear family in a time of unparalleled mobility has removed any threat to family welfare that the marriage of affines may have posed. It is obvious as well that the marriage of an uncle and his niece, or of an aunt and her nephew, carries no threat to the nuclear family, and such a couple can easily obtain medical affirmation that their union poses no significant genetic problems. Having been assured as to the eugenic safety of third degree unions, Parliament has found nothing repugnant in permitting them in specific cases. Indeed, such marriages seemed so innocuous to our parliamentarians that not one of them even questioned whether the nation's sensibilities might be offended, and three such private bills were enacted with little debate, congratulations and best wishes being offered the couples even before final reading of the enabling legislation. Marriage between a man and his niece is permitted in many countries,[136] and only a chauvinist or a zealot would treat the marriage of a woman and her nephew differently. Thus, it seems evident that the present prohibitions,[137] other than those relating to marriages between siblings and persons descended one from the other, are now devoid of substantive purpose, and a secular society ought not to adhere to the restrictive practices and beliefs of any particular religious community.

The final area of reform concerns the effect that adoption should have on capacity to marry. In Part III, it was submitted that there is no prohibition in our present law against marriages of persons related by adoption only. The point is not unequivocal, however, and federal legislation should deal with it expressly.

In Australia, legislators have chosen to treat the adoptive relationship exactly as that of consanguinity for the purpose of determining capacity to marry, and a strong argument can be made in support of this position. If we are not prepared to allow a man to marry his sister, why should we allow him to marry his adopted sister? Apart from the eugenics of the union, which may now be of little significance, are not the considerations the same? All of the members of a family are thrown into the closest and most intimate proximity. It is probably the moral and psychological influences that family members

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[135] L. Shelford, *A Practical Treatise of the Law of Marriage and Divorce* (1841) 159. This same passage is quoted by Finlay, *supra*, note 6, 30.

[136] See Finlay, *ibid.*, 20.

[137] This assumes that adoption does not presently affect the prohibited degrees of marriage.

thus have on each other, rather than a dread of defective children, that has occasioned societal taboos against incest. These taboos are natural and are found throughout history and in every part of the world; they are reinforced by society through its laws on marriage and incest. The law thus fosters attitudes that go some way toward diminishing the incidence of sexual abuse amongst family members. No one will likely be heard to suggest that a father be permitted to marry his daughter, or a brother his sister. Yet, surely the adopted child is as deserving of protection within the family circle as is the natural child. A father or brother should no more be able to take advantage of an adopted daughter or sister than of a natural one. The family ambiance, including the inculcation of an aversion to incest, should be the same for the adopted child as for the natural child. Just as importantly, the assimilation of the adopted child into its new family should not be endangered by distinctions based on biological relationships.

On the other hand, it may be argued that the protection extended to an adopted child by prohibiting that child's marriage to members of the adoptive family is simply illusory. Might it not seem absurd to raise the bogey of fathers and sons abusing the little girls in the family unless restrained by marital prohibitions? The inability to marry is hardly likely to deter sexual desires that persons are otherwise inclined to indulge, and if their mutual affection is sufficiently strong, they will cohabit outside the bonds of matrimony. Knowledge that it is a criminal offence may have some deterrent effect, but it is not likely to be suggested that adoptive relationships be included in the criminal law definition of incest. Are we then to prohibit these marriages for the sake of assimilation or symmetry? To sacrifice any freedom for such purely formal objectives is a difficult matter, and it seems particularly unwarranted in this instance in the light of good adoption practices. Adoptive parents are urged to make the child aware of its adoption at the earliest possible moment, and an increasing number of adopted children seek to meet their natural mothers, and sometimes fathers, when they are old enough to do so. Furthermore, we are likely to continue to prohibit an adopted child from marrying his or her natural sibling even though they were raised as total strangers. Where, then, is the symmetry between them when the adopted child has two sets of prohibitions and the natural child but one? What is the point of carrying legal assimilation to such lengths when social agencies are stressing candid differentiation, not in terms of affection and rights, but in terms of personal identity? In fact, we neither have nor want complete assimilation, and there seems to be no compelling reason why the law should carry assimilation to such lengths as to affect capacity to marry.

It may seem strange initially that, although it precludes the marriage of an adoptive parent and his or her adopted child, English law, unlike Australian law, does not prohibit the marriage of an adopted child and the natural

child of its adopters. There seem to be good arguments either for including both relationships within, or excluding both from, the prohibited degrees. But why include one while excluding the other? Perhaps English society is more apprehensive about the adoptive parent-child relationship, and would view such a sexual union with some degree of revulsion. The underlying sentiment may be that "[t]he unity and integrity of the family. . . cannot but be disturbed if either spouse has reason to see in his or her child a possible successor in the affections, in a matrimonial sense, of the other".[138] Another factor that might be pertinent is the possibility of undue parental influence in procuring marriage, or sexual intercourse through a promise of marriage, with an adopted child. It may be noted, as well, that adoption is the deliberate choice of the adopter, but not of the adopter's children, natural or adopted. Perhaps the prohibition is within the adopting parent's expectations; but should his or her choice affect the siblings' capacity *vis-à-vis* each other?

If marriage between persons closely related by adoption is to be prohibited for the sake of family harmony and the protection of infant children, then other relationships as well should be considered closely. The complete abolition of affinity carries with it the abandonment of the prohibitions respecting step-relationships. Such relationships, which are far less common, are to be distinguished from the usual "in-law" relationships for this reason: the marriage of one's child brings one into relationship with someone already of marriageable age. Thus, to prohibit a marriage between a parent and his son's wife, or her daughter's husband, would not afford the protection to *infants* that might warrant prohibiting a marriage between a parent and his or her own child, adopted or natural. However, where one spouse already has a child when the parties wed, the other spouse becomes in law (by affinity) that child's step-father or -mother, and may be involved in raising that child. For this reason, it may be urged that the prohibition of such marriages be retained. Nevertheless, the step-relationship can be distinguished from that of adoption even for such purposes. For one thing, when the parents of unrelated children wed, those children do not become related; there is no legal connection between a man and his step-sister; there is no affinity between a man's son and the man's wife's daughter, and there has never been any prohibition against their marriage. More importantly, while adults are seldom adopted, many, perhaps most, remarriages involve persons whose children are grown up. If we are to prohibit all persons within a class of relationships from intermarrying because there may be some instances in which the welfare of an infant

[138] *In Re Woodcock and Woodcock* [1957] N.Z.L.R. 960, 963 (C.A.), *per* Finlay A.C.J. Professor Finlay, *supra*, note 6, 26, quotes this brief statement as well and then declares that "[t]his in fact is what might well be called the modern rationalisation of the old ecclesiastical rule". The case concerned the proposed marriage of a parent and a step-child, a marriage now permitted by Australian law.

might thereby be afforded some small degree of protection, then we ought to cast the net even farther. The burgeoning phenomenon of stable cohabitation outside the bonds of marriage involves similar *de facto* situations. Are the children involved to go unprotected because the couple raising them are living together without benefit of nuptials? In fact, such informal unions are now receiving a degree of legal recognition and protection, and one consort may even become, in certain respects, legally responsible for the child of the other. It is highly unlikely that a man will be prohibited from marrying his *common law* wife's daughter even if he "has demonstrated a settled intention to treat [her] as a child of [his] family" and has become to some extent legally responsible for her.[139] There seems no more reason why he should be prohibited from marrying his step-daughter.

It is the accumulated weight of various factors that justifies the prohibition of marriage of close consanguines and persons similarly related by adoption. In the former case there lingers a doubt as to the eugenic safety of such unions, which doubt may be strengthened by the fact that the probability of defective offspring increases in proportion to the nearness of kinship of the parents. Although the risk becomes greater, that risk may or may not be considered too high in itself. In any event, the marriage of close consanguines probably remains repugnant to the vast majority in society. The interests of family harmony and infant protection are served by the prohibition as well. These interests, and the objective of assimilating the adopted child within its new family, are also served by extending the prohibition to adoptive relationships, particularly that of parent and child. Such a union may also spark a general sense of aversion. The relationship that might give pause is that of siblings-by-adoption. A man has never been prohibited from marrying his step-sister, and there seems little reason to prohibit him from marrying his adopted sister. Adoption is not a secret, and assimilation can never be complete. It can hardly be claimed that there is a general sense of revulsion towards such a marriage; after all, it is permitted in England. The possibility of such a marriage produced no feelings of revulsion when adoption was *de facto*, and the legal document making it *de jure* is unlikely to spawn such revulsion. The proposed marriage of siblings-by-adoption did not raise feelings of outrage in Parliament when considered in the context of a private bill.[140] Indeed, as already seen, the opinion handed down was that the mar-

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[139] See, *e.g.*, *Family Law Reform Act*, R.S.O. 1980, c. 152, ss 1(a), 1(e), 14(b) & 16; *Child Welfare Act*, R.S.O. 1980, c. 66, s. 19(1)(e)(iii)(A)(2).

[140] Bill S-7, *An Act to provide an exception from the public general law relating to marriage in the case of Lucien Roch Joseph Morin and Marie Rose Hélène Morin*, withdrawn from Senate consideration, 22 March 1978. See [1977-78] Debates of the Senate, 3d Sess., 30th Parl., 506.

riage was not prohibited in Canada, and the couple in question may by now be married. Even before applying to Parliament, they had begun to live together and had had children. Apparently, they wished to marry in part for reconciliation with their church, which was ready to solemnize such a marriage if the law of the land allowed it. Why should such a couple be forced to live "common law"? Surely not because some legislative draftsman wishes to preserve a certain symmetry between consanguinity and adoption and, being unable to do so by eliminating the prohibition against the marriage of natural siblings, insists upon creating a prohibition against the marriage of adoptive siblings? The danger to family harmony and the risk to the children's welfare posed by the possibility of such a marriage seem extremely negligible, and they are obviously discounted in England. The guiding principle ought to be to restrict freedom as little as possible, and there are few rights more important than the right to choose one's own spouse.

The prohibited degrees of marriage formed but a very small part of the matters dealt with in the sweeping family law reforms introduced into Australia by the *Matrimonial Causes Act*,[141] 1959-1966, and the *Marriage Act*,[142] 1961-1966. The former set out prohibitions, which extended to all relationships up to and including the third degree, arising either by affinity or by consanguinity, by a relationship of the whole-blood or half-blood, whether it is traced through, or to, any person of illegitimate birth. Marriages within the prohibitions were made void *ipso jure*.[143] The *Marriage Act* equated adoption with consanguinity for the purposes of the prohibited degrees.[144]

Although this legislation made no exceptions as of right for a deceased spouse's kin, the courts were authorized to dispense from the impediment of affinity where "satisfied that the circumstances of the particular case are so exceptional as to justify the granting of the permission sought".[145] In exercising the discretion conferred by these short-lived provisions, the position, as described by Crocket J. in *Re an Application by P. & P.*, was as follows: "If the conclusion reached is that the circumstances are not such as probably to promote a sense of outrage or give offence or invoke substantial opposition in the way that I have mentioned then it would be open to find them so exceptional as to justify the grant of permission to marry." [146] In other words,

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[141] *Matrimonial Causes Act*, 1959-66 (Com.).

[142] *Marriage Act*, 1961-66 (Com.).

[143] *Matrimonial Causes Act*, 1959-66 (Com.), ss 18 & 19 and Second Schedule. These provisions were repeated in the *Marriage Act*, 1959-73 (Com.), ss 22, 23 & 24.

[144] *Marriage Act*, 1961-66 (Com.), ss 23 & 24. These provisions were repeated in the *Marriage Act*, 1961-73 (Com.).

[145] *Matrimonial Causes Act*, 1959-66 (Com.), s. 20(2). This provision was repeated in the *Marriage Act*, 1961-73 (Com.), s. 24(2).

[146] (1973) 21 F.L.R. 450, 461, [1973] Vict. L.R. 533 (S.C.) [hereinafter cited to F.L.R.].

it seems, the exceptional would be the rule. In commenting on this case, Professor H. A. Finlay observed:

> The case rather suggests that the test of exceptionality is not a satisfactory one. Certainly *Re P. & P.* suggests that the test used there was the various considerations spelt out by Crocket J. The real test, it is submitted, was whether the parties were living together or were likely to do so even if permission was refused, and the detriment or otherwise to the institution of marriage if as a result of a prohibition set up by law, and preserved by the decision of a judge persons were forced (if they did not wish to part from one another) to cohabit and possibly to procreate without the benefit of legal marriage. So long as our society remains based on the assumption that marriage is a desirable and socially important institution — an assumption, one might add, that is being increasingly questioned, — then any legal impediment to marriage may be regarded as *prima facie* contrary to the interests of society. The justification of such an impediment must then be looked for in the existence of very strong countervailing considerations.[147]

The Australian experience shows that the conferring of a discretion to grant dispensations from the prohibited degrees is an unsatisfactory approach to the problem and that, having decided to allow exceptions — as the Parliament of Canada by private acts has done already — the value of maintaining such prohibitions becomes highly questionable. As Crocket J. put it in *Re P. & P.*: "The stage of social evolution would seem to be near when even the theoretical justification for prohibition of marriage of affines will no longer be acceptable."[148] Indeed, in Australia at least, the stage for clearing away the last vestiges of affinity was set, and the *Family Law Act*[149] of 1975 swept away not only *all* the prohibitions of affinity, but the prohibitions against marriages between uncles and nieces, and aunts and nephews, as well. However, the equating of adoption with consanguinity for such purposes was preserved.[150] For reasons already given, it is suggested that this innovative legislation should have gone at least one step further by removing the prohibitions of marriage between siblings-by-adoption. Symmetry between consanguinity and adoption is not an appropriate end in itself. It would seem that marriage is not prohibited presently in Canada by reason of an

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[147] Finlay, *supra*, note 6, 28-9.

[148] *Supra*, note 146, 460, although he went on to add: "However, if I may venture the opinion, our society is not yet possessed of the degree of spiritual sterility necessary to permit it to accept completely the abolition of such an impediment."

[149] *Family Law Act*, 1975 (Com.), s. 51(3). In Part I, *supra*, it was seen that the prohibitions arising by affinity that prevent marriage with a deceased spouse's kin have already been removed in Canada except, through oversight, for those of a deceased wife's aunt and deceased husband's uncle. Obviously, this should be corrected. Although it would appear to have been wrongly decided, the *Crickmay* case, *supra*, note 4, undoubtedly expresses the prevailing view as to what the law ought to be, and the prohibitions should not apply after the dissolution of marriage by divorce either. Thus, as a minimum reform, Parliament ought to remove all prohibitions of marriage between affines.

[150] See the *Family Law Act*, 1975 (Com.), s. 51(4).

adoptive relationship between the parties,[151] and any legislation should reinforce that position. However, if we in Canada are going to move in that direction at all, we should only go so far as to impose the prohibition upon the adopted child-adopting parent relationship,[152] as is the case in England. The prohibitions should also be made to render a marriage void *ipso jure*.

In reflecting upon these changes in Australian law, Professor Finlay made the following observations:

> [T]he abolition of affinity excited very little controversy in the recent Australian Parliamentary Debates. In the Senate, there was no debate on the relevant clause at all. In the House of Representatives, Mr. W. C. Wentworth moved an amendment designed to restore to the Bill provisions identical with those on the prohibited relationships in the *Matrimonial Causes Act* 1969. Mr. Wentworth, although he did indicate that he was opposed to abolition, used as his main argument the fact that no adequate consideration had been given to the implications of the new law by members of the House and that he wanted members to have an opportunity for further consideration. The amendment was defeated by 62 to 47. The Attorney-General (Mr. Enderby) speaking against the amendment, referred principally to the absence of eugenic considerations. However, the debate on this amendment only occupied five pages in Hansard.[153]

We are living in a time when marriage is not a condition of cohabitation. Our law on the prohibited degrees does not prevent people from living together outside the bonds of matrimony, and there is no longer any social stigma in their doing so. If they wish to get married, why prevent them, particularly when to do so is only to weaken the institution of marriage by threatening its relevance? The reforms in question are unlikely to excite any more controversy here than they did in Australia. Indeed, were Parliament to reject such reform, the private acts of exemption it has already passed would make a mockery of the general law by which everyone else would be expected to abide. Clearly, the time for reform of this anachronistic law has arrived.

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[151] See *supra*, note 71.

[152] A corollary of introducing prohibitions based on adoption is the necessity of dealing with the effect of subsequent adoption orders. In Australia it is provided expressly that the relationships created by a previous adoption continue for the purpose of determining marital capacity. Similarly, in England, one cannot marry one's former adopted child should a subsequent adoption order be made. In light of the chaotic state of provincial law respecting the effect of subsequent orders explained in Part III, *supra*, that Parliament actually settle this matter is more important than the manner in which it does so.

[153] Finlay, *supra*, note 6, 31-2.

Appendix

Procedure on Private Bills

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Unlike public bills, private bills are bills that confer specific powers or rights on particular persons or groups of persons. The petitioner for a private bill should make sure beforehand that the objective sought can only be achieved in that manner.

While private bills are passed by Parliament in much the same way as public bills, the procedure governing their introduction is quite different. The following is a brief explanation of that procedure.

1. Notice

Under the rules of both Houses, every application to Parliament for a private bill must be advertised by a notice stating the nature and objects of the proposed bill.

The notice has to be published, in English and in French, in the *Canada Gazette* at least once a week for a period of four weeks. It also has to be published the same number of times in the official gazette of the province concerned and in a leading newspaper with substantial circulation in the area where the applicant resides or, in the case of a corporation, where the corporation has its principal place of business. In such cases, publication in both official languages is necessary only when required by the population composition of the province or area concerned.

The notice may be signed either by the applicant, whether the applicant is an individual or a corporation, or by the lawyer acting on behalf of the applicant.

2. Affidavit of Publication

After the notice has been published, it is necessary, in accordance with the rules of both Houses, to submit a statutory declaration as proof of the publication.

3. Petition

Since a private bill is for the particular interest or benefit of a person or group of persons and is solicited by the parties who are seeking its passage, it is always founded on a petition.

The petition, drawn up in the prescribed form and stating the broad purposes and objects of the bill sought to be enacted, must be addressed separately to each of the Houses of Parliament. It may be in either of the official languages. It must be signed by the petitioner, and if the petitioner is a corporation, it must have the seal of the corporation affixed thereto.

In the Senate, the petition may be filed at any time. In the House of Commons, there is a rule of procedure limiting the time for receiving petitions to the first six weeks of a new session of Parliament. However, when a bill based on a petition that was presented after that deadline reaches the House of Commons, a formal request may be made for the suspension of this rule in relation to the bill, and such a request is normally granted.

4. Fees

If a bill is initiated in the Senate, the fee is $200; if it is initiated in the House of Commons, it is $500. In addition to this fee, there are printing and translation costs, calculated on the basis of $150 per printed page of the bill (including the title page). To cover these fees and costs a deposit of $500 is required prior to the formal presentation of the petition in the Senate.

5. Parliamentary Agent

Under the rules of the House of Commons, it is necessary for the lawyer who acts on behalf of the petitioner to become registered as a parliamentary agent for the purposes of the bill. The registration fee for parliamentary agents is $25.00 and the forms can be obtained from the Chief, Committees and Private Legislation Branch, House of Commons, Ottawa.

6. Sponsors

It is, of course, necessary before a private bill is introduced in either House, to choose a senator and a member of the House of Commons to act as sponsors of the bill in their respective Houses. Generally speaking, the sponsor is from the constituency or province in which the petitioner is located. It is a well-established Parliamentary practice that Ministers of the Crown do not act as sponsors of private legislation.

7. Applicable Rules of Procedure

In the Senate, Rules 51 to 61 and 85 to 102 apply to private bills. In the House of Commons, the rules that apply are Standing Orders 90 to 116.

8. Time Involved

It often takes no more than two or three weeks after first reading for a private bill to be passed by the Senate. In the House of Commons, the time can sometimes be longer since private bills usually alternate each week with private members' public bills, and can therefore only be considered every

second week during the hour reserved for private members' business on Tuesday, Thursday and Friday.

Private legislation can sometimes be treated on an urgent basis. In such cases, the sponsors of the bill should approach the House leaders of the various political parties in each House in an attempt to obtain their support to have the bill proceeded with as quickly as possible. With unanimous consent, the rules of both Houses can be suspended to enable speedier passage of the bill.

9. Officials to be Contacted

(1) Parliamentary Counsel to the Senate:
The Parliamentary Counsel to the Senate is prepared to assist and advise in the drafting of the notice, the petition and the bill. The notice, before it is published, and the petition, before it is signed, should be submitted to the Parliamentary Counsel for approval.

(2) Director of Committees, The Senate:
The completed affidavit attesting to compliance with the rules relating to publication of the notice, the signed petition addressed to the Senate and the $500 deposit must be deposited with the Director of Committees, the Senate, before the bill can be formally introduced in the Senate. Copies of the affidavit and the signed petition should also be sent to the Parliamentary Counsel to the Senate.

(3) Chief, Committees and Private Legislation Branch, House of Commons:
The signed petition addressed to the House of Commons and the completed affidavit should be submitted to the Chief, Committees and Private Legislation Branch, House of Commons at the same time that these documents are submitted to the Senate.