# NOTES

## The Validity of "Common Law" Marriages

### The Case

The Saskatchewan Court of Appeal recently had occasion to consider the validity of so-called common law marriages in the case of *Ex parte Coté.*[1]

The case came before the court on appeal from a judgment of MacDonald,J. of the Court of Queen's Bench,[2] who had granted an application of Barbara Anne Coté for a writ of *habeas corpus ad subjiciendum* after she had been remanded to custody and cited for contempt by a judge of the Magistrates' Court for her refusal to testify at the trial of one Wilfred Severight.

Although not married in accordance with the provisions of the *Marriage Act,*[3] Barbara Anne Coté claimed she was the "wife" of Wilfred Severight and hence, on the basis of section 4 of the *Canada Evidence Act,*[4] not a competent or compellable witness for the prosecution. The relevant provisions of section 4 of the *Canada Evidence Act* read as follows:

> 4(1). Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.
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> (2). The wife or husband of a person charged with an offence against section 33 or 34 of the *Juvenile Delinquents Act* or with an offence against any of sections 143 to 146, 148, 150 to 155, 157, 166 to 169, 175, 195, 197, 200, 248 to 250, 255 to 258, 289, paragraph 423(1)(c) or an attempt to commit an offence under section 146 or 155 of the *Criminal Code,* is a competent and compellable witness for the prosecution without the consent of the person charged.
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> (3). No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

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[1] *Ex parte Coté,* (1971) 22 D.L.R. (3d) 353, (1971) 5 C.C.C. (2d) 49, [1971] 4 W.W.R. 308 (Sask. C.A.).

[2] *Ex parte Coté,* (1971) 19 D.L.R. (3d) 486 (Sask. Q.B.).

[3] *The Marriage Act,* R.S.S. 1965, c. 308.

[4] *Canada Evidence Act,* R.S.C. 1952, c. 307; now R.S.C. 1970, c. E-10.

Although it never appeared in the reports for what offence Wilfred Severight was being prosecuted, counsel for the Crown and Ms. Coté agreed that she could not be a competent and compellable witness for the prosecution if she were the "wife" of Severight.

The circumstances of the relationship between the parties are outlined by MacDonald,J. as follows:

> Barbara Anne Coté met Wilfred Severight in or about the year 1966. They are both Treaty Indians and reside on the Coté Indian Reservation near the town of Kamsack, in the Province of Saskatchewan. In 1967 Barbara and Wilfred decided to live together as husband and wife. She informed her parents and they agreed. Wilfred asked his parents and they agreed. Barbara and Wilfred moved into the home of Wilfred's parents. At that time, 1967, Barbara was approximately 16 years of age and Wilfred was approximately 20 years of age. The couple lived with Wilfred's parents for about a year when they obtained a house of their own and have lived in it since that time (1968). They have two children, Josephine born on January 2, 1969, and Emile, born December 15, 1969. Barbara said that she and Wilfred agreed to live with each other forever and had no intention of going through any form of marriage.[5]

Additional evidence concerning their relationship was given by a community development worker, Rev. Clifford Lloyd, who had worked on the Coté Reserve from 1967 to 1970. He knew Ms. Coté and Severight and considered them married. He testified that perhaps half the couples on the reserve were so "married", and that such marriages, in the words of MacDonald,J., "were generally accepted on the reserve".[6] The provincial Department of Welfare recognized them as a "unit", but the basis of this determination was unknown. The federal Department of Indian Affairs, on the other hand, listed the two persons individually. The only evidence adduced to prove the existence and substance of Indian marital customs was that "the two persons concerned agree(d) to live as man and wife forever and asked for their parents' consent".[7]

MacDonald,J. began his consideration of the issue before him by first referring to *Coffin* v. *The Queen*,[8] a decision of the Quebec Court of Appeal. In that case, the appellant, James Coffin, lived with a woman known as Marion Petrie Coffin. The couple were not married according to law. One of the arguments advanced on

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[5] (1971) 19 D.L.R. (3d) 486, at p. 487.
[6] (1971) 19 D.L.R. (3d) 486, at p. 488.
[7] (1971) 19 D.L.R. (3d) 486, at p. 488.
[8] *Coffin* v. *The Queen*, (1955) 21 C.R. 333 (Que. C.A.).

behalf of Coffin in the appeal was that testimony given at trial by Marion Petrie Coffin should not have been admitted in evidence.

Mr. Justice Hyde dealt with this contention by noting that the provisions of section 4 of the *Canada Evidence Act* are exceptions to the general rule that all persons are competent to testify. Because there is a specific reference to "husband" and "wife" in section 4, and because the section is exceptional, no meaning other than the precise legal definition of the terms could be accepted. Hence, Marion Petrie Coffin was not the "wife" of James Coffin.[9]

In his reasons for judgment, Mr. Justice Rinfret rejects the notion of the validity of common law marriages when he says:

> ...dans la province de Québec, le seul mariage qui soit reconnu est celui qui est célébré suivant les prescriptions et les formalités édictées par le code civil.
>
> Le mariage, pour être valide, doit être célébré publiquement devant un fonctionnaire reconnu par la loi (art. 128 et 129).
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> Nul autre mariage, dans la province de Québec, n'est reconnu par le code.[10]

Rinfret,J. outlined the elements of a common law marriage as defined by *Corpus Juris*, which can be summarized as follows:

- — In the absence of a statute otherwise providing, neither solemnization nor adherence to a particular form are required;
- — There must be actual and mutual agreement by parties capable in law of contracting to enter into a matrimonial relationship that is permanent and exclusive of all others;
- — The marriage must be consummated by cohabitation, or by mutual, open assumption of marital duties;
- — There must be mutual consent to the constitution of marriage.[11]

Rinfret,J. rejected the validity of the theory cited in *Corpus Juris* and found that James Coffin and Marion Petrie Coffin were not husband and wife.[12]

Despite this rather unambiguous holding of Hyde and Rinfret, JJ., MacDonald,J. apparently accepts the assertion in *Corpus Juris* that common law marriages are valid in Canada,[13] and proceeds to examine some analogous cases.

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[9] (1955) 21 C.R. 333, at p. 343.

[10] (1955) 21 C.R. 333, at pp. 366-67.

[11] (1955) 21 C.R. 333, at p. 369, *per* Rinfret, J., citing 38 C.J., at p. 1316, paras. 89-90.

[12] (1955) 21 C.R. 333, at p. 369, *per* Rinfret, J.:

> Il est donc évident que, même si l'on admettait la théorie de l'appelant (ce que je n'admets pas)....

[13] 38 C.J., at p. 1316, para. 88.

In *R.* v. *Williams*,[14] a couple were "married" according to Indian custom 20 years prior to the trial of the husband for murder. From this relationship several children were born. Despite the fact that the woman had "redeemed" herself, that is paid the man two or three times the amount he paid to her guardian at the time of the marriage, Gregory,J. decided, without reasons, that the woman was not a competent witness for the prosecution.

In *R.* v *Nan-E-Quis-A-Ka*,[15] an Indian couple consented to live together, and according to Indian custom, this constituted marriage. Westmore,J. held the relationship to be a "legal and binding marriage", and thus rejected the evidence tendered by the wife at the trial of the husband.

In *Re Noah Estate*,[16] Sissons,J. was called upon to decide whether the estate of a male Eskimo, who died intestate, would devolve to his "wife" (married according to Eskimo custom) and their children, or to his collateral relations. The learned judge found the marriage was valid according to Indian custom, being a voluntary monogamous union.

MacDonald,J. concluded his reasoning by noting that the provincial *Marriage Act*[17] neither prohibited nor invalidated such "marriages" as existed between Ms. Coté and Severight, nor did the federal *Marriage Act*[18] define marriage.

The application for *habeas corpus* was accordingly granted and Ms. Coté was released from custody.

In the Court of Appeal, Maguire,J.A.[19] began by referring to the notes of Rinfret,J. in *Coffin*[20] and questioned the accuracy

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[14] *R.* v. *Williams*, (1921) 37 C.C.C. 126 (B.C. Sup. Ct.).

[15] *R.* v. *Nan-E-Quis-A-Ka*, (1889) 1 Terr. L.R. 211 (Ct. N.W.T.).

[16] *Re Noah Estate*, (1961) 32 D.L.R. (2d) 185 (N.W.T. Terr. Ct.).

[17] R.S.S. 1965, c. 308.

[18] *Marriage Act*, S.C. 1967-68, c. 24, s. 24(2); now R.S.C. 1970, c. M-5.

[19] *Ex parte Coté*, (1971) 22 D.L.R. (3d) 353 (Sask. C.A., Maguire,J.A., delivering the judgment of the Court, Woods and Hall,JJ.A. concurring).

[20] (1955) 21 C.R. 333. Maguire,J.A. believed that the judgment of Rinfret,J. was open to the construction that had more evidence of a permanent marital relationship been present, Rinfret, J. "might have held that a valid marriage at common law had been established". Such a view, it is submitted, is difficult to reconcile with the words of Rinfret, J. cited *supra*, n. 10. Article 159 of the Civil Code is also of interest on this point. It reads:

> No one can claim the title of husband or wife and the civil effects of marriage, unless he produces a certificate of the marriage, as inscribed in the registers of civil status, except in the cases provided for in article 51.

Article 51 merely provides for a means of proving acts of birth, marriage, and death when registers of civil status have either not been kept or are lost.

of the statement in *Corpus Juris* that "in Canada informal marriages are valid". The cases cited thereat, according to the learned justice of appeal, "fail to establish this broad statement".[21] Moreover, Maguire,J.A. considered it important to distinguish between the kind of marriage defined in *Corpus Juris* and common law *relationships*, which latter could never be viewed as a valid marriage.

The case of *Hyde* v. *Hyde and Woodmansee*,[22] which contained the statement that "marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others", was rejected as inapplicable to the instant case as dealing not with what constituted the validity of common law marriages, but with the jurisdiction of English courts concerning a Mormon marriage in Utah.

What, then, does constitute a marriage valid at common law? Maguire,J.A. finds the answer in *R.* v. *Millis*,[23] where, he says, it was established that "the common law of England required that *verba de praesenti*[24] must be pronounced in the presence of an episcopally ordained priest in order to constitute a valid marriage".[25] This latter decision, according to *Merker* v. *Merker*,[26] is binding law. However, as Sir Jocelyn Simon,P. notes, the intervention of the *Marriage Act* (1753)[27] and its successors has limited the effect of the decision to instances where the *Marriage Act* (U.K., 1949)[28] does not apply, and to locales where no other relevant local law

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[21] 38 C.J., at p. 1316, para. 88: *Johnston* v. *Hazen*, (1914) 43 N.B.R. 154, which decided that a common law marriage, valid in the State of New York, was valid in New Brunswick; *Robb* v. *Robb*, (1891) 20 O.R. 591, which held that the daughter of a man who was married according to Indian custom was a legitimate child and a legal heir; *Lawless* v. *Chamberlain*, (1889) 18 O.R. 296, which was an action in declaration of nullity on the ground of coercion; *Doe d. Breakey* v. *Breakey*, (1846) 2 U.C.Q.B. 349, which raised the question of the validity of a marriage performed by a Presbyterian clergyman in Ireland; and *Connolly* v. *Woolrich*, (1867) 11 U.C. Jur. 197 [*sic*, the correct citation is 11 L.C. Jur. 197], which considered the validity of a marriage between an Indian and a non-Indian performed according to Indian custom.

[22] *Hyde* v. *Hyde and Woodmansee*, (1866) L.R. 1 P. & D. 130.

[23] *R.* v. *Millis*, (1843) 10 Cl. & Fin. 534, 8 E.R. 844.

[24] When the parties exchange the words of consent to marry.

[25] (1971) 22 D.L.R. (3d) 353, at p. 357.

[26] *Merker* v. *Merker*, [1962] 3 W.L.R. 1389, at p. 1394.

[27] *An act for the better preventing of clandestine marriages*, (1753), 26 Geo. 2, c. 33 (Lord Hardwicke's Act).

[28] *Marriage Act*, (1949), 12 & 13 Geo. 6, c. 75.

governing marriage is in force.[29] Thus, in the United Kingdom itself, the relevant statutory provisions must be adhered to in order for a marriage to be valid.

Finally, Maguire,J.A. rejected the argument advanced by counsel for the respondent that because the provincial *Marriage Act*[30] does not prohibit the solemnization of marriage in the form undergone by Ms. Coté and Severight, that it is consequently valid.

**Comment**

It is submitted that the view adopted by the Saskatchewan Court of Appeal was correct in law.

Not only had the parties not been married in conformity with the provincial *Marriage Act*,[31] their relationship did not even fall within the criteria established in the *Millis* case. Furthermore, the argument that the provincial *Marriage Act*[32] did not prohibit such marriages was bound to fail as the act in question exhausts the ways in which a marriage can be solemnized, even to the extent of having special provisions for members of the Doukhobor sect.[33] It therefore follows that the appeal of the Crown was properly allowed and the decision of MacDonald,J. to quash the conviction of Ms. Coté set aside.

While conceding that the law was properly applied, there is nonetheless cause to consider whether the law, in the circumstances, produced a desirable result. It would appear from the facts that Ms. Coté and Severight were certainly "married" in the non-technical sense of the word. At the time of the appearance at the trial of Severight, the couple had been living together for four years (three of the years in their own home) with the consent of their parents, and had two children born of their relationship. Certainly, the nature of the relationship was more than casual, indeed, it is reasonable to infer from all the facts that they intended to live together as husband and wife permanently. All that was lacking to validate their marriage in the eyes of the law was compliance with the appropriate provincial legislation. In such circumstances,

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[29] The examples given are: in British colonies where the Common Law prevailed; in countries where by capitulatory agreement the Crown exercised jurisdiction over British subjects; in Her Majesty's ships of war and British merchant ships outside foreign territorial waters; and within the lines of British armies.

[30] R.S.S. 1965, c. 308.

[31] *Ibid.*

[32] *Ibid.*

[33] *Ibid.*, s. 41.

it is submitted, the law unduly penalizes the parties when persons such as Ms. Coté are not afforded the protection provided in the *Canada Evidence Act*,[34] especially when it is considered that her lifestyle would not have been altered in the slightest had she been married according to law.

It is submitted that the result of the case is an undesirable one in instances where the parties involved: 1) are capable of contracting marriage, or, not being capable, have their parents' consent; 2) have mutually agreed to live with each other permanently and exclusively of all other relationships; and 3) are cohabiting and openly assuming recognized marital duties towards each other and their children.

It is clear from the instant case, however, that it is not open to the courts to reach such a decision. Legislative intervention is required.

A sensible course of action would be for Parliament to amend section 4 of the *Canada Evidence Act*[35] by adding thereto an interpretative sub-section which would define "husband" and "wife" as including not only those persons validly married according to law, but also those persons who could demonstrate to the satisfaction of the court that: 1) they were of majority age or had obtained their parents' consent; 2) they were not otherwise married; 3) they had agreed to cohabit with each other permanently and to the exclusion of all other relationships; and 4) they had openly assumed marital duties towards one another and their children (should there be any). The proposed addition to the Act would well be completed by requiring that the burden of proving the existence of such a relationship as contemplated would be placed on the party who sought to invoke it.[36]

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[34] R.S.C. 1970, c. E-10.

[35] *Ibid.*

[36] The recommendation which this note proposes is specifically limited to the problem raised in the case under review. When formulating what recommendation should be made, various alternatives were considered, such as an appropriate amendment to the federal *Marriage Act*, R.S.C. 1970, c. M-5, or the *Interpretation Act*, R.S.C. 1970, c. I-23. However, the consequences of such proposals extend far beyond the issue presented by *Ex parte Coté*. For example, how might a universal application of the recommendation affect the provisions of the new federal *Income Tax Act*, S.C. 1970-71-72, c. 63, regarding transfers of property between spouses? The author does not pretend to have undertaken a survey of all federal or provincial legislation where marital relations are in some way involved. However, the absence of such a mammoth undertaking does not, it is submitted, in any way diminish the salutory effect of the present recommendation limited to the *Canada Evidence Act*, R.S.C. 1970, c. E-10.

By imposing such evidentiary requirements, the sufficiency of which would be determined by the court, the law would not be available for use by persons who cohabit in a casual or non-permanent nature. However, persons such as Barbara Anne Coté, who was married in every sense of the word excepting the necessity of solemnization, would be afforded the protection of the law that only a mere technicality now denies them.[37]

Allan Hilton *

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[37] It is interesting to note, however, that the *Criminal Code,* R.S.C. 1970, c. C-34, also employs the words "husband" or "wife" in section 143 (rape), section 146 (statutory rape), section 148 (intercourse with the feeble minded), and section 158 (excepting the offences of buggery and gross indecency in the cases of husband and wife, and consenting persons over 21 years of age). Presumably, a couple not married according to law but cohabiting could be involved in any of these offences in circumstances where the offence(s) could be proved. In order to eliminate this apparent anomaly, the same suggested addition to the *Canada Evidence Act* could be added to section 138 of the *Criminal Code,* which is the interpretative section of Part IV of the Code (Sexual Offences, Public Morals, and Disorderly Conduct).

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