

Appendix

ADMINISTERING FIRST NATIONS MARRIAGE AND DIVORCE TO 1951

VIGILANT EFFORTS TO ENSURE THE SUPREMACY of the monogamous model of marriage continued in the twentieth century in the face of successive waves of anxiety and disquiet over the state of marriage and family. Wives were constantly reminded, even through the “humour” found in popular magazines, for example, that they were to be “‘passive, loving and submissive’ lest they incur the ‘rightful’ wrath of husbands unwilling to share privilege and power.”²¹ The work of reforming and redesigning marriage continued into the new century with new agendas and resolve. In early twentieth-century English Canada, fears emerged anew of threats to marriage and the family, particularly in the light of the arrival of diverse immigrants. As James G. Snell and Cynthia Comacchio Abeele have argued, “At the centre of these English-Canadian anxieties was a fear that traditional values and ‘British’ ideals were being subverted by the new peoples and the new social environment developing around them.”²² Various reforms were enacted that were aimed at restricting and regulating access to marriage during the early decades of the twentieth century. This emphasis on restriction began before the First World War and gained impetus during the war years as anxieties developed about the future of the “race.” Marriage was to become a privilege for those who “demonstrated the features most desired in the future Canada: genetic quality, emotional and mental stability, good health, maturity.”²³ New regulations reflected evolving concerns that couples often married too young and without parental consent. Further, the diseased and the genetically weak were to be prevented from marrying or at least procreating. New regulations included Saskatchewan’s 1933 application of eugenic principles to marriage. An amendment to the Marriage Act required any prospective groom to submit a medical certificate

proving that a qualified doctor had examined him within ten days of the planned marriage. In 1941, prospective brides too had to submit a medical certificate. Alberta had less rigorous legislation, but the couple to be wed had to swear they were not infected with venereal disease or tuberculosis. Through these regulations “improper” marriages were to “find less facility.”⁴ Heightened concern about behaviour identified as immoral or deviant flourished. In this social climate, suggestions were made once again to legislate against interracial marriage and more informal interracial relationships.⁵

Aboriginal people, the subject of much scrutiny during the period of this study, had little place in this emerging discussion about regulating access to marriage. Aside from the missionaries and Indian agents who worked in these communities, little concern was shown about issues of family stability, healthy offspring, and the future of the “race” in their communities. Their domestic affairs had been dramatically disrupted and undermined through the turbulence and disarray of the many late nineteenth and early twentieth century efforts to alter and redesign marital arrangements. As one indicator of the depth of this disruption, historian Lesley Erickson has offered evidence from the late nineteenth and early twentieth centuries that suicides of both men and women, who were predominantly young to middle-aged and married, were associated with “the moral uncertainty and confusion that accompanied government and missionary efforts to impose monogamous, Christian marriages.”⁶ Aboriginal witnesses connected suicides to the “confusion in gender roles and marital relationships that accompanied colonialism,” and they cited domestic disputes as the precipitating cause in 40 per cent of cases. Both Aboriginal and non-Aboriginal observers felt that the marital relations in reserve communities had become increasingly turbulent and temporary. Many more people lived together in temporary relationships with no marriage whatsoever, whether performed by clergy or according to Aboriginal law.⁷ Cree Elder Glecia Bear asked another “little old woman” about the old days, and she was very critical of the temporary nature of marriage in her Saskatchewan community: “‘For one month, or sometimes not even for a month, they live with their husbands and then they leave them,’ she said, ‘that did not use to happen,’ she said; ‘in the old days one used to have respect for everything,’ she said, ‘and one used to lead a proper life.’”⁸

Well into the twentieth century the DIA continued to attempt to impose monogamy and its policy on marriage and divorce as decided in 1887 and as articulated in the 1906 circular letter; however, it continued to be the case that their degree of control was limited, and their threats of prosecution hollow. Following the 1914 Department of Justice advice in the case of “TME,” no attempts were made to prosecute bigamists. Hundreds of copies of the circular letter on the recognition of Indian marriage and divorce were distributed to Indian agents, missionaries, and other concerned individuals well into the late 1920s.⁹ A typical request was from an Anglican missionary at the Griswold (Manitoba) Agency who wrote, “I am sometimes very much

in doubt as to what constitutes a valid marriage in the case of Indians.”¹⁰ A copy of the circular was sent to the missionary. Sending along the circular letter in answer to any and all inquiries avoided the thorny task of having to address sundry specific situations.

When new bureaucrats arrived on the scene in the departments of Indian Affairs or Justice, the policy was often questioned, and new approaches suggested. For example, in 1917 law clerk A. S. Williams thought that it would be an easy matter for an agent paying treaty money to ask a woman claiming to be the wife of an Indian if she could prove that she was married. If she did not have a marriage certificate she would have to prove that she was married “according to Tribal Custom.” “It would not be sufficient,” Williams wrote, “for the couple to say that they were so married, they should prove it to the satisfaction of the Agent by evidence in corroboration of their own Tribal Custom, and that all the formalities of that custom have been complied with. They may find it so difficult to do this that they will get married according to the Christian form of marriage in order to draw annuity.”¹¹ No action was taken on this impractical and naïve suggestion.

A new policy direction was debated in the House of Commons in 1921 when an amendment to the Criminal Code was proposed that would make it an offence for any white man to have “illicit connection with an Indian woman.” The legislation was generated by agents in British Columbia who called attention to the numbers of young women from the reserves visiting seaports where they met “large numbers of dissolute men of a very cosmopolitan character.”¹² Initially it was proposed that the amendment was to apply only to “unmarried” Indian women, but this was struck from the suggested amendment. The deputy minister of justice explained the situation this way: “I do not see why a man should be in any more favourable position because the woman is married.”¹³ The debate sheds light on the negative representations of Aboriginal people shared and perpetrated by Canadian parliamentarians. It was first suggested that the wording had to be changed to “illicit connection” with any *unenfranchised* Indian woman, as an enfranchised woman was put “on the footing of the every-day, ordinary citizen.”¹⁴ One MP thought that the clause would do more harm than good, as “there is nothing to prevent any Indian female laying a charge against a white man and having her buck Indian coming behind her for the few dollars and holding up the white man...we do not want to give the buck Indian an opportunity, by such legislation, to take money out of white people’s pockets.” Continuing in this vein he said, “Indian women, particularly out in the West, have their bucks to look after them, and they are pretty jealous of and able to look after their women... we are going to pass a law that is going to expose the white man to be the victim of an Indian woman.” Another MP said that “the Indian women are, perhaps, not as alive as women of other races in the country to the importance of maintaining their chastity.” The section was dropped.

Missionaries too continued to suggest new approaches such as a 1924 resolution, presented by the Missionaries and Teachers of the Methodist Church, that the Indian Act be amended to make wife- or husband-desertion a crime, and together with seduction, punishable by imprisonment.¹⁵ The reply was no, that the Criminal Code covered desertion and seduction, and that it was “not considered advisable to make a distinction between Indians and other residents of the country with respect to the Criminal Law.”¹⁶

Suggestions for change were disregarded and the 1906 circular continued as DIA policy to the early 1930s. People were told, as had been previous generations, that they could not remarry unless legally divorced. In 1925 a Whitehorse man, married according to Aboriginal law, wanted to remarry as his wife had been placed in an asylum for life.¹⁷ She had murdered a woman and was declared insane. He was left with three small children, and he was handicapped in caring for them as he hunted for their living and had his trapline to maintain. He needed to remarry and consulted a clergyman, who consulted his bishop, who in turn consulted with officials of the DIA. The answer, sent by telegram, was that “Indian married by tribal rights legally married (stop) Such Indian cannot marry again so long as his present wife is living unless legally divorced.”¹⁸ However, no one was ever prosecuted for bigamy, and there was also a clear recognition that the policy outlined in the circular was being disregarded by many individuals. In 1926, W. R. Haynes, a missionary on the Piikani Reserve, received the circular letter in answer to his inquiry about whether he could marry people in the church who had previously been married according to Aboriginal law and had separated. The missionary reported, “It is useless having rules and regulations, if they are not be carried out, it only makes the dept [sic] look ridiculous in the eyes of their wards.” As no action was being taken on a very clear case of bigamy, the Indian agent was the “laughing stock of the reserve,” at least according to the missionary.

Although the circular letter was widely distributed to those who requested advice and direction, on at least one occasion it was not sent, and its existence even denied. For example, the Wetaskiwin, Alberta, law firm of Loggie and Manley wrote the Ottawa DIA office in 1928 stating, “We should be glad to know whether there are any regulations with reference to the marital life of the Indians promulgated by the Department under any Statute of the Dominion. If there is would you kindly send us a copy or advise us where we can procure same.” Under the British North America Act, the provinces were given the exclusive right to make laws with regard to the solemnization of marriage. The federal DIA was on perilous ground with the policy and advice outlined in the 1906 circular that marriage but not divorce according to Aboriginal law was valid. The reply to the Wetaskiwin lawyers from A. F. MacKenzie, acting assistant deputy and secretary, was that “this Department has no regulations with respect to the marital life of Indians.” Even an “acting” and “assistant”

bureaucrat would have known that reams of correspondence, contained in numerous files housed in the Ottawa office, contradicted this statement.

There was no particularly obvious wellspring of pressure that led to a new policy, initiated in 1933 through a Department of Justice opinion prepared by R.V. Sinclair, that “no marriage celebrated according to the Indian custom is valid,” but it may have been due to the growing awareness, reflected in the request of the Wetaskiwin law firm, that the federal government should not be involved in marriage. Aboriginal marriage was no longer to be regarded as valid unless it was a “marriage by necessity, that is if the contracting parties live so far from a person duly authorized to solemnize a marriage that the law would determine that they could not reasonably be required to travel the distance necessary to reach such authorized person.”²¹⁹ In those cases the marriage would be valid, and the children legitimate, “provided that such marriage involves the union of one man and one woman for life.” In a Department of Justice opinion it was argued that as “natural born British subjects, the Indians of Canada...were subject to and entitled to the benefits flowing from the laws of the Provinces or Territories forming part of the Dominion in which they reside. This applies both to their political, civil and domestic life.”²²⁰ Bureaucrats in the department began to carefully word their advice on marriage, and to deny the existence of the policy pursued for the previous several decades, saying for example that “the question of Indians being considered legally married...has never been one upon which the department could rule at any time, although the department has been prepared at times to recognize the aboriginal marriages for certain purposes of administration only.”²²¹

By the early 1930s Indian agents were informed that everyone on the reserves from then on would have to comply with the provincial marriage acts, “the same as other people.”²²² Immediate problems and confusions emerged in Saskatchewan, where every male candidate for marriage had to produce a health certificate. No marriage license could be taken out without such a certificate. A DIA doctor wrote for instructions: “As we have nothing to do with Provincial laws am I obliged to give health certificates to Treaty Indians?”²²³ The reply was, “yes”; health certificates would have to be produced in accordance with the provisions of the marriage laws of the province. There were also questions concerning the cost of these medical exams, and of who would pay for them. Missionaries complained that they had difficulty persuading men who wished to be married to undergo the required exam when they had to pay for it. It was reported that men refused to pay the fee saying, “If the white men want the Indians to be married in the white man’s way, they (the white men) should pay the fees, and not expect the Indians to do so.”²²⁴ As a result, wrote one missionary from Prince Albert, “There are now numbers of Indian couples living together without marriage.”²²⁵ On one reserve it was reported that there were nine young couples living together without marriage. Missionaries asked for discretionary power to perform marriages without the medical certificates.

A thorny question that also emerged in the light of the new policy was whether or not couples who had been married according to Aboriginal law, and now wished to be married in a Christian or civil ceremony, had to go through the process of acquiring a license, publishing banns, and providing medical certificates. The Prince Albert missionary gave as an example the case of a chief and his wife, married according to “Indian custom” for forty years, who then consented to be married as an example to younger couples. “In such cases the publishing of banns seems superfluous,” the missionary wrote.²⁶

The cost of obtaining a provincial marriage license, about five dollars, also deterred people from this route, as many did not have the money and travel was necessary to purchase the license in a town or municipal office. They were then required to stay where the license was issued for three complete days before the ceremony could be performed, and few could afford this. Agents and missionaries wondered if the license fee could be dispensed with where all the parties were treaty Indians.²⁷ However, the new line from the Ottawa office was that “an Indian cannot be considered legally married unless he is married according to the laws of the land,” and while it was regretted that people could not afford to purchase marriage licenses, the department had no authority to waive the license fee for treaty people.²⁸

In 1940 the department took the position, in contrast to the sixty-plus previous years, that references to “marriage” in the Indian Act meant marriage according to provincial regulations. A clear answer on the issue was extracted by Battleford Indian Agent J. P. B. Ostrander who asked for the exact interpretation of the section defining an Indian as “Any woman who is or was lawfully married to such a person.”²⁹ The matter was referred to the department solicitor who refused to give a clear answer, stating that this particular point could only be determined by reference to the provincial Attorney General and court in the province in which an alleged marriage took place. Secretary T. R. L. MacInnes informed Ostrander, however, that the interpretation placed on this section of the Indian Act was that marriage must be in accordance with provincial regulations. This change in policy had enormous and immediate ramifications. Treaty and status women not “legally” married according to provincial laws, but living with (or married according to Aboriginal law or by “common law”) non-treaty or white men were now entitled to their relief, medical, and other benefits. If married according to provincial laws, these women would not be so entitled. As one Indian agent complained, “It seems unreasonable to give privileges to those people who do not get legally married, and deprive those who obey the regulations and do what is right by getting legally married.”³⁰ This agent noted that this was not the department’s policy in the past—that hundreds of women lived with “other than Indians,” that these marriages had in the past been regarded as valid, and that they would now be eligible for treaty benefits. In only very few cases were their children admitted to treaty, but they would now all be eligible as well. As he understood it, “If this were done it would throw a great responsibility on the Department and the

financial part of it would be very heavy. Many of the children have married and have children of their own. These would apparently be entitled to be classified as Treaty Indians.” Secretary MacInnes continued to insist throughout 1940, however, that being a “common law” wife of a non-Indian did not affect a woman’s Indian status or membership in a band, and that “under the Indian Act, an Indian woman can lose her Indian status only by marriage or by enfranchisement, and is not affected by being what is known as the ‘common law’ wife of a non-Indian.”³¹

One year later, however, a complete about-face had occurred, and it was back to the policy as established in 1887, and as continually emphasized through the widely distributed circular letter of 1906. Clearly a switch to only recognizing marriages according to provincial law could potentially have added and/or restored thousands of women and children to treaty status, and the policy had to be rethought. Aboriginal marriage had to be accepted as valid by the department. Department officials were also being informed that, as school principal A.E. Caldwell wrote in 1939, “the ‘Indian marriage’ rite is often undertaken deliberately in preference to legal marriage, it being recognized that this marriage is not legally binding, and that desertion may follow without the consequence of the deserter being held legally responsible for support.”³² He had tried to persuade a young couple, married according to Aboriginal law, to become “legally married,” but had met with the opposition of an older relative of one of the parties who “advised them not to be legally married, as ‘the only time an Indian has trouble is when he has a Certificate.’” Caldwell urged the department to declare that up to a certain date all persons married according to Aboriginal law, who were not previously married, be considered as legally married, and that after this specified date all those uniting in marriage must do so under the marriage act of whatever province they resided in. He also urged (as had many in the past) that a means of divorce be devised, that a solicitor be appointed by the department to hear cases of legal separation and make settlements where separations are granted, and to grant divorces when necessary. He wrote in brackets that it was “unnecessary to point out that Indians are prohibited from taking advantage of divorce legislation because of the expense.” All of this, Caldwell thought, would create respect for social and domestic laws and for law in general and promote the stability of domestic life.

This policy was partially adopted. In August 1941 Secretary MacInnis advised a clerk at the agency office in Cardston, Alberta, that “according to my advice Indian marriages by tribal custom are valid and parties thereto should be recognized as lawfully married.”³³ The old opinions from the Department of Justice and the 1887 order-in-council were once again dusted off and reviewed. Department Solicitor W. Cory now wondered whether R.V. Sinclair, in preparing his opinion, had been aware of “an old Order in Council No. 345 G dated the 31st day of August, 1887”? In view of this old order-in-council, Cory was “of the opinion that that policy as laid down therein should be adhered to as closely as possible.”³⁴ Indian agents were instructed, however, that new marriages were to be according to provincial laws. While marriage

according to Aboriginal law was to be recognized as valid with regard to “old Indians,” “in future no recognition should be taken of Indian marriages unless the parties concerned are married by the proper authority, in accordance with Provincial Regulations.”³⁵

While no action was taken on divorce and separation, hearings were being held into marital disputes at the offices of Indian agents with the agent presiding, who drew up separation agreements. At the File Hills Reserve in 1938, the agent found that one couple could “not agree in their home life and have agreed to break up their home and live separately.”³⁶ The wife was given the children and the home, and the husband agreed to pay to the agent the sum of fifty dollars per month to be administered by the agent for the keep and care of the wife and children. The wife agreed to have the money handled by the agent.

Confusion must have been rampant in reserve communities due to the conflicting and changing directions on marriage and divorce. The question of the validity of marriage according to Aboriginal law emerged during World War II because of the necessity of determining the eligibility of the widows of First Nations soldiers to veterans’ benefits. The 1943 opinion of Deputy Justice Minister F.P. Varcoe was cautious and tentative, concluding that “conceivably some marriages performed according to Indian Tribal customs would, under these sections, be valid, assuming of course that the marriage in each particular case is a marriage according to our understanding of the term, namely a voluntary union for life of one man and one woman to the exclusion of all others.”³⁷

Testimony given at the 1946 and 1947 Special Joint Committee of the Senate and the House of Commons examining the Indian Act provides insight into the effects of the confusing and contradictory policies. There was concern about how “legal” marriages were being avoided, particularly in the case of treaty and status Indian women marrying non-treaty Indians, non-status Indians, or white men. As one witness explained, “If an Indian woman marries a white man, she forfeits entirely her Indian status and rights and so do her children. Yet, if an Indian woman becomes the common law wife of a white man, she is still recognized as an Indian. If the white man deserts her she can return to the reserve but her children are destitute. This provision should be revised, as at present ‘it encourages living in sin and tends to lower the moral standard of the band.’”³⁸ If an Indian woman “legally” married a white man, and he deserted her or died, she could not legally return to her reserve with her children. The children of these relationships were not able to make sustained contacts with their extended family on reserves, as pointed out in presentations to the Joint Committee: “A child either legitimate or illegitimate of a Treaty Indian woman and a white man is precluded from absorption into the maternal grandparents home, even though socially such a placement is desirable and would thereby establish normal family contacts.”³⁹ There were calls for changes to this situation to permit women and their children to be restored to full treaty rights, or to permit the bands

to decide on membership.⁴⁰ “We think an Indian Band is like a big Family,” submitted the Boyer River Band of Alberta, “and therefore the Chief and Councillors should decide whether anyone is or is not of Indian blood, belonging to the band.”⁴¹

As part of the major Indian Act revisions of 1951 that emerged from the Special Committee, there was a reformulation of band membership lists. An “Indian Register” was introduced with the name of every person belonging to a band. The definition of an “Indian” was changed to mean “a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.”⁴² In many ways the 1951 revisions continued and even enhanced discrimination against women, particularly those who “married out.” The male line of descent was emphasized as the major criterion for inclusion on a band register. Until 1951 women who “married out” could still remain on the band list, receive annuities, and any other monies, if they had not opted to take commutation of their annuities. They were known in the 1930s and 1940s as “red ticket” women for the special treaty card issued to them. After 1951 all women marrying non-Indians were obliged to take the lump sum payment, and they were automatically enfranchised and deprived of Indian status and band rights from the date of marriage. From then on they were no longer entitled to life on their reserves and they had thirty days to sell any property they owned there. Through various provisions of the 1951 amendments, large numbers of children whose parents were both “Indian,” but who were identified as “illegitimate,” also lost their status. Marriages according to Aboriginal law were recognized for the purposes of membership up to 1951, but after that date, “legal” marriages only were to be recognized.

