Monogamy, Bigamy and Polygamy in Nineteenth Century Canada

By

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**A thesis submitted to the
Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements for the degree of**

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Abstract

In modern Canadian society, monogamy is often associated with romantic love, 'traditional' family values, and, by extension, a stable social order. This study examines how the monogamous marital union has been imposed and scrupulously maintained in the common law system through ecclesiastical courts, their displacement by parliamentary control, and the later efforts of Victorian reformers to expand legal regulation. Some may argue that because monogamy has enjoyed such a long history of legal enforcement and is still favoured by our courts today, one could view monogamy as being more 'natural' than bigamy or polygamy. However, this assumes that the law is representative of the interests of the whole society. As the historical examples surveyed here demonstrate, despite the development of laws to enforce monogamy and prohibit bigamy and polygamy, popular attitudes towards monogamy and marriage have varied over time and between different cultures and classes.

Acknowledgments

People always tell you that ‘you should be careful about what you wish for, because you just might get it,’ well this was certainly true in my case. Ever since my undergraduate years, I have balked at the lack of freedom afforded to students who were engaged in ‘higher learning’. I found that for the most part, my assignments were carefully scripted and one’s entire existence was defined by the annual course syllabus that was handed out in every class each year. It was not until I began writing my M.A. thesis that I truly understood the concept of ‘time management’.

As days turned into weeks, and weeks into months, I had begun to appreciate and yearn for the days when my days were carefully numbered and controlled by the course syllabus. And it certainly didn’t help that I shared a house with roommates who were equally skilled in the art of procrastination. Fortunately I had a research advisor who had no qualms about getting me back on track by any means necessary. Without Barry Wright’s constant reminder of looming deadlines and Andrew Squires’ emailed updates of department dates and deadlines, I don’t think that I would have managed to finish on time.

As such, I would like to extend my thanks to Andrew Squires, for his help with any administrative problems or questions that arose over the course of the year. His door was always open to me and no matter how busy, he was always very supportive and helpful. Undoubtedly Barry Wright was my main source of creative and academic inspiration. I would like to thank him for always giving me feedback as soon as possible and for steering me in the right direction when I veered off track. Finally I would also like to thank Logan Atkinson, who had taken the time to read my work meticulously to ensure that I took notice of any gaping holes in my work. Because of his help, I have not doubt that the quality of my work had appreciated significantly.

I would also like to thank my family, friends and my housemates, who were always there when my printer broke down, disks got mysteriously corrupted and generally when I had to complain about how much I hated computers.

Overall, this has been a very positive experience for me, I had an opportunity to do exactly what I love most, read what I enjoy and see my work in print. And I managed to do it without a syllabus.

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Chapter 1- Introduction

Despite the widespread popularity of Judeo-Christian notions of monogamy and fidelity around the world, it would be impossible to ignore the fact that while some countries enforce moral and legal codes of monogamy, many others tolerate or encourage polygamy. Similarly Yves Simon, a natural law advocate, had also acknowledged the fact that “there are many forms of marriage in the world and in history”¹ despite the fact that he had defined marriage as a universal institution. And even within the same country or society at the same point in history, variations can also be found. Moral positions change over time around the sanctity of marriage, and at any given time there may be class, cultural and religious differences within a society. Despite these differences most western societies have gone to great lengths to formalize legal protections to encourage monogamous marital states and to discourage polygamy, a situation that generally reflects dominant interests rather than social consensus.

From a Darwinian perspective, men would more likely prefer to mate polygamously because it would allow them to maximize their reproductive success, thus ensuring the survival of his progeny. According to Betzig, “Darwin argued that men—like most other males should have evolved to compete for access to the opposite sex. The reason follows from men’s higher potential reproductive rates: men, more than women, can have their genetic representation in future generations by getting access to multiple mates.”² Since Darwin, many scholars have expanded on his study of sexual selection theory and have come to similar conclusions. In Richard

Dawkins' study of the 'The Selfish Gene', he identified the difference between the size and numbers of sperms and eggs as the reason for the greater propensity for males to mate polygamously.³ Because of the lengthy gestation period of the human fetus, and the enormous investment made by the mother during this stage of reproduction, it is unlikely that she would abandon her reproductive investment after the birth of her child. According to Dawkins, "ideally what an individual would 'like' would be to copulate with as many members of the opposite sex as possible, leaving the partner in each case to bring up the children."⁴ Clearly, women are at a disadvantage because a man's reproductive investment is relatively low in comparison to that of a woman. Thus "we must expect that there will normally be some evolutionary pressure on males to invest a little bit less in each child, and try to have more children by different wives."⁵ If this were the case, how can we explain the marked historical shift from polygamy to monogamy in many western societies?

Theoretical and Methodological Considerations

In answer to this question, two general schools of legal theory will be explored. Natural law theory and legal relativism can be applied to the study of monogamy. Studies of the relationship between law and morality often use three categories. The natural law perspective advanced by theorists such as Patrick Devlin suggests that laws should reflect timeless, universal moral standards. Liberals such as John Stuart Mill and Herbert Hart argue that legal interventions into moral matters should be limited because society changes and is diverse. Critical perspectives influenced by Marxists, feminists, post-modernists and cultural theorists and others suggest that the law promotes powerful interests and that morality is ideology or

rationalization to justify these interventions. Rather than engage in a comprehensive examination of how these three basic approaches deal with the issues of monogamy and polygamy (indeed there are many differences in analyses within these three approaches), a contrast between the natural law perspective and what is termed a relativistic perspective (a hybrid of liberal and critical approaches) is explored. These two theoretical conceptions will be examined to explain why monogamy was legally institutionalized in England as well as the North American colonies in the interests of the ‘common good’ or ‘dominant’ interests despite the dictates of evolutionary instincts.

Natural law theorists believe that inherent in human nature is a set of natural laws that are both universal and primordial. Simon defined law as “the rule of reason for the common good, promulgated by the community or by those in charge of the common interests.”⁶ Furthermore, “among laws, the natural laws have more the character of premises than positive laws; they are prior premises.”⁷ Ideally, the laws of a society should be a reflection of these natural laws, which set the boundaries for ‘good’ and ‘evil’. What’s more, with or without the constraints of society, there is knowledge by inclination of what is naturally just and what is naturally unjust.⁸ But if this were the case, then it would naturally follow that every society would share a uniform set of norms, laws and values. Since this is certainly not the case, critics such as John Ladd have responded with the following:

The Universalist, as I have called him, focuses on what he conceives to be the ‘common, permanent, and universal’ aspects of human nature and social life, all the while carefully ignoring those aspects that are unique to individuals and cultures and that differentiate them from one another.⁹

Natural law advocates do in fact acknowledge the existence of cultural and ethical diversity in the world. For example, Simon cites the “strange mores observed in the Pacific Islands, the Amazon Jungle, and throughout the history of mankind”¹⁰ as evidence of such diversity. Natural law theorists account for such ethical variations by dividing the natural laws into two groups—those that are more necessary and those that are less necessary. Just as there is ample evidence of cultural and ethical diversity in the world, “it is possible to see in all the tribes and nations of the earth an impressive uniformity.”¹¹ Thus natural law advocates have suggested that this uniformity is evidence of the ‘more necessary’ natural laws and the ethical variations between societies would fall into the ‘less necessary’ category. For example, in many cultures or legal regimes, murder is uniformly denounced as being ‘wrong’ or ‘evil’ while there is considerable variation in other matters like euthanasia, cannibalism, and marriage. And in reference to monogamy and polygamy, Simon explains the transition from polygamy to monogamy in the following:

The transition from polygamy to monogamy which may be observed in history constitutes a normal progress from a state where only the more necessary laws of nature can be embodied in institutions to a state where institutions can afford to satisfy the less necessary and lofty aspirations of nature.¹²

From the above statement, it is obvious that Simon believes that laws evolve in a progressive and consensual manner, whereby state laws and institutions progressively embody the laws of nature. What is more, he believes that cultural variations could also be a result of social and cultural corruption of the natural laws. As Simon argues, “it is to be suspected that the judgment of every social group is behind or corrupt in some respect and to some extent.”¹³ Natural law is often likened to the laws of science or mathematics; as $1+1$ always equals 2, the laws of nature are

also universal and consistent over time, place and culture. But as discussed earlier, evolutionary biologists like Darwin and Dawkins believe that in the absence of culture and society, men would be instinctively driven towards polygamous mating while Simon seems more inclined to believe that monogamy would be what was prescribed by nature. Conversely, Dawkins' explanation of monogamy and polygamy seems to be more in line with advocates for cultural relativism:

Many human societies are indeed monogamous. In our own society, parental investment by both parents is large and not obviously unbalanced. On the other hand, some human societies are promiscuous, and many are harem-based. What this astonishing variety suggests is that a man's way of life is largely determined by culture rather than genes.¹⁴

For obvious reasons, advocates for legal and cultural relativism balk at the idea of reducing complex and unique variances between cultures into a simple category of 'less necessary' natural laws or by-products of social corruption. For example Ladd responds, "...The selective approach presupposes some sort of distinction between what is morally essential and what is morally inessential in human nature and society."¹⁵ Instead, "ethical relativism is the doctrine that the moral rightness and wrongness of actions varies from society to society and that there are no absolute universal moral standards binding on all men at all time."¹⁶ Conservative critics of the relativist perspective have commonly taken the slippery slope argument and pointed out the danger of denouncing the existence of natural laws. For if there were no prior premises defining 'good' and 'evil' and all laws and values were relative, did that mean that everyone was free to act as they wished without any ethical or legal boundaries? Friedrich Engels responds to such attacks with the following, "truth and error, like all determinations of thought that move in opposite directions, have absolute validity only within an extremely restricted

sphere.”¹⁷ Ethical values and legal principles are only valid within a restricted sphere because they are a product of history and culture, and as such they are only binding upon the culture in which they were originally derived.

As we will see in the succeeding chapters, social and legal definitions of monogamy, divorce and polygamy vary over the course of history, among different cultures and even between classes, gender and religion. Perhaps Ladd’s definition of cultural relativism can shed some light on such a phenomenon:

Cultural relativism maintains that there is an irreducible diversity among cultures because each culture is a unique whole with parts so intertwined that none of them can be understood or evaluated without reference to the other parts and to the cultural wholes, the so-called pattern of culture.¹⁸

Similarly the marital institution and its legal enforcement is inextricably intertwined with the dominant forces within a society, and cannot be evaluated without reference to the relations of power within society. Thus to understand why one marital institution is preferred to another, one must also understand the complex social, cultural and political dynamics of a country, society or social group in order to fully comprehend the function served by that institution.

While the theoretical perspectives outlined above assist in the formulation of questions about the legal and moral regulation of monogamy and polygamy, some preliminary comment on related questions of methodology is in order. The thesis adopts the methods of historical research, primary research on archival sources in the case of the empirical core of chapters three and four, and secondary research on matters of context. The methodology embraces a wider range of sources than usually contemplated in traditional or professional legal research (where there is primary reliance on cases and statutes). Historical examination contributes to legal studies by

making available sources and approaches that enable the scholar to critically interrogate the formation of law, its administration, and its impact in relation to society, culture, power and politics.

Overview

In the preceding sections I have briefly outlined the main tenets of Natural Law and Legal Relativism. I do not intend to engage in further abstract theoretical analysis until the conclusion, other than to suggest that historical overview and more detailed research on 19th century Canada tends to confirm relativism as an accurate analysis of diverse social reality and natural law as reflective of the state's justification for imposing a uniform marital practice by way of law. A comprehensive study of the history and consequent socio-political changes in the control and maintenance of monogamy and polygamy in the next three chapters will illustrate the complex cultural, social and legal diversity that exists both within and between different cultures, controlled, regulated and mediated by state law.

Over the course of history, attitudes towards marriage and polygamy have oscillated from a position of strict adherence to Catholic or Anglican prohibitions for marital dissolution to one of tolerance and ambivalence towards divorce and remarriage. In the medieval period, as a consequence of state and religious efforts there was a marked transition from polygamous mating to monogamy. And up until the reformation period in Europe, monogamy was taken for granted as the normal state of affairs, and marriages were completely indissoluble during this period. But with the spread of Protestantism in Europe, and the efforts of the reformers, jurisdiction over matters pertaining to marriage shifted from the ecclesiastical courts

to the secular courts. As such, marriages became recognized as a civil contract, rather than a sacrament, and therefore dissoluble upon breach of basic terms. It was during this period that laxer or more tolerant attitudes towards divorce and remarriage began to take hold in most European states as well as many colonies. But ironically, it was during the late nineteenth century, when divorces became legal in England that moral reformers in the British North American colonies grew increasingly concerned with the structural integrity of the nuclear family unit and monogamy was once again espoused as being the ideal marital state.

Despite the fact that evolutionary instincts seem to favour polygamous mating as being the natural organization of male and female relationships, monogamy has been scrupulously institutionalized over the course of history, in the interest of preserving social order and political sovereignty, in spite of varying attitudes towards the issue of marriage and divorce found within society. This is because law-makers have traditionally embraced a natural law rationale in law making, where the interests of the majority or the dominant group in society are recognized as being representative of the population as a whole, and the interests of the dominant group should ideally be representative of a set of 'prior premises' that instinctively govern all human beings. And given the fact that the state of marital monogamy has been preserved for almost a thousand years in British influenced jurisdictions, one can only assume that lawmakers or those vested with dominant political influence perceive monogamy as being the 'natural' state of sexual relations.

In chapter two, the history of primarily English laws governing the system of monogamy will be examined to articulate the fluid and changeable relationship

between law and society. According to Engels, “notions of good and evil have varied so much from society to society and from one time to another that they often directly contradict one another.”¹⁹ Throughout Europe in the medieval period, there was a general shift from polygamy to monogamy; and similarly in England one can see that polygamy was replaced in favour of monogamy in the face of political uncertainty. And up until the sixteenth century, polygamy was conspicuously absent in most of Europe while the system of monogamous mating was firmly entrenched in most European states. But since the Reformation period, and more so at the turn of the century, there was evidence of a gradual shift away from monogamy as English society became more socially fragmented and secular.

As mentioned previously the concept of legal relativism is not necessarily restricted to changes over time, but also variations in legal values between countries or cultures. The introduction of liberal divorce policies in some British North American colonies and American states surveyed towards the end of chapter two, suggests that given the same set of marriage laws, there can be many different definitions of marriage and monogamy within the same period in history. As well, varying moral standards between classes and gender in the late nineteenth century will also be introduced towards the end of chapter two.

In the medieval period and throughout the reformation period, conflicting interests between the Church, Crown and the aristocracy provided the greatest source of moral and ethical diversity in Europe. But by the end of the seventeenth century, ecclesiastical and monarchical influence became significantly reduced and gradually became replaced by parliamentary control; increasingly, variances between individual

and class interests became the source of societal fragmentation. And in Engels discussion of ethical relativism, he provides the following explanation:

We see that each of the three classes in modern society—the feudal aristocracy, the bourgeoisie, and the proletariat—has its own particular ethics. We can only conclude from this that in the final analysis human beings develop relationships on which their class status depends.²⁰

In the third chapter, these class and gender differences will be further explored in the analysis of bigamy trials from Ontario in the post confederation period.

Through the analysis of court transcripts, archival documents and relevant academic studies, the third chapter presents early Canadian society as a country mostly populated by Western European immigrants and Indigenous people. By the middle of the nineteenth century a great proportion of Canadian immigrants were poor and work was often difficult to find, and consequently many moved around frequently in search of work opportunities. Despite the increasing cultural and ethnic diversity of Canadian society by late nineteenth century, very little of their own experiences were incorporated into the laws that governed their daily lives. Part of the reason for this can be attributed to the fact that early Canadian laws, and specifically marriage laws, were received under British colonial administration with very little variation from the original English common law and statutes. As well, dominant local elites were resistant to changing these laws and the middle-class moral reformers of the late nineteenth century developed concerns about increasing urban pressures and vulnerable families. These reformers sought to protect the monogamous state, and impose middle-class values, not surprisingly the bigamous relationships of the working poor became a matter of social reform, attention and state intervention. Nonetheless, many of the lower class and working poor still chose to either

circumvent or ignore the stringent marriage laws of the nineteenth century. Despite the general appearance of homogeneity in late nineteenth century Ontario, one can see a diversity of ethics, moral values and practices between different groups, although the state increasingly attempts to impose a Victorian middle class uniformity in family and gender relations.

In the fourth chapter, the focus of analysis moves away from central Canada and towards the indigenous people in the northwest and their subsequent reaction to the same anti-bigamy laws in the nineteenth century. Again, archival records are used to illustrate the tenuous and often contentious relationship between the Canadian government and the Indians during this period in history. Like the moral reformers in the third chapter, the agents, Indian Affairs Department and missionaries saw the Indians as savages and a group badly in need of reform and 'civilizing'. Both the governments and the nineteenth century reformers seem to have taken a natural law justifications for their advocacy and law making, where all acts falling outside the normative values of the dominant culture were labelled as being immoral and deviant. According to Herskovits, "the very definition of what is normal or abnormal is relative to the cultural frame of reference...Ethnocentrism is the point of view that one's own way of life is to be preferred to others."²¹ From the point of view of the Dominion government the native practice of polygamous mating had be eradicated to satisfy the interests of what was regarded as the civilized standards of dominant culture. The indigenous people of Canada in the post-confederation period were no more receptive towards the idea of monogamy than many other marginalized

segments of the Canadian population, but the same middle-class, Victorian laws were imposed upon them for purposes of assimilation.

In the final chapter, recent developments from the twentieth century will be briefly covered to better situate the development and evolution of the legal definition of monogamy over time. By the end of the twentieth century, one can see that the interests of the state have conspicuously moved away from the private sphere, as marriages became increasingly regarded as a private union between a man and a woman entered into freely. Through the analysis of relevant literature, one can see that the social and political significance of divorce, bigamy and polygamy has been reduced dramatically in the last half of the twentieth century, especially after the passage of the Divorce Act of 1968. Even though obstacles for marital dissolution have been all but removed, many couples today have chosen to abandon marriage altogether and instead live in common-law arrangement. It is unclear how these current developments will affect the legal definition of monogamy in the future; advocates of natural law will probably continue to champion the preservation of relatively more 'traditional' definitions of monogamy, whereas legal relativists would argue that the definition of 'monogamy' must be interpreted in light of current and future cultural, political and legal changes within a society.

Statement of Thesis

Although the perspectives of both the natural law theory and legal relativism will be reflected throughout this study, the latter approach appears to make more sense of the conclusions derived. The research demonstrates the importance of a critical, cross-disciplinary evaluation of the social, political and gender implications

of legally imposed monogamy over the course of history. My primary research focus is the divorce, anti-bigamy and polygamy laws of the nineteenth century as administered by Canadian governments, and specifically attempts to enforce monogamy amongst European settlers in Ontario and native populations in the North-West.

Legally imposed monogamy has a long history. Its roots can be found in the early medieval period where all domestic and marital affairs were governed by the ecclesiastical courts. With the annexation of ecclesiastical control over domestic affairs in the reform period, the crown and/or state have held exclusive monopoly in the governance of marital affairs for over three hundred years. Even in the early stages, the justification for legally imposed monogamy had been founded on the assumption that the family or marital unit were the building blocks of civilization and social order. And over time, this has remained a prevalent theme in state policy and validated the paternalistic approach of states in the governance of marital and intimate affairs. In Canada, the state's paternalistic control over monogamy and the domestic sphere had reached its pinnacle in the nineteenth century, and remained almost unchanged for the next hundred years.

However in the next three chapters one can clearly see that the law is an imperfect instrument in practice because of pluralistic understandings of marital relations. More often than not, the laws governing marital relations are only reflective of the interests of dominant groups in society; consequently the socially disenfranchised were commonly the targets for the social and legal penalties associated with anti-bigamy and polygamy laws. And this was especially the case for

the native peoples living in the northwest in the early post confederation period. In spite of stringent marriage and anti-bigamy/polygamy laws, many have chosen to live outside the legally accepted framework for marital relations because definitions of marriage and monogamy are applicable only within a limited sphere of society.

Notes:

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- ¹ Yves R. Simon, The Tradition of Natural Law, ed. Vukan Kuic, New York: Fordham University Press, 1967: 156.
 - ² Laura Betzig, "Medieval Monogamy", Journal of Family History 20 (2) 1995: 182.
 - ³ Richard Dawkins, The Selfish Gene, Oxford: Oxford University Press, 1989: 161.
 - ⁴ Dawkins 140.
 - ⁵ Dawkins 147.
 - ⁶ Simon 117.
 - ⁷ Simon 126.
 - ⁸ Simon 132.
 - ⁹ John Ladd, Ethical Relativism, Belmont California: Wadsworth Publishing Company Inc., 1973: 7.
 - ¹⁰ Simon 126.
 - ¹¹ Robert Redfield, "The Universally Human and the Culturally Variable", Ethical Relativism, Belmont California: Wadsworth Publishing Company Inc., 1973: 130.
 - ¹² Simon 157.
 - ¹³ Simon 158.
 - ¹⁴ Dawkins 164.
 - ¹⁵ Ladd 7.
 - ¹⁶ Ladd 1.
 - ¹⁷ Friedrich Engels, "Ethics and law: Eternal Truths", Ethical Relativism, Belmont California: Wadsworth Publishing Company Inc., 1973: 19.
 - ¹⁸ Ladd 2.
 - ¹⁹ Engels 21.
 - ²⁰ Engels 22.
 - ²¹ Melville J. Herskovits, "Cultural Relativism and Cultural Values," Ethical Relativism, Belmont California: Wadsworth Publishing Company Inc., 1973: 65-66.

Chapter 2- History of Monogamy, Marriage and Divorce in the British Empire

Within societies, individuals are influenced by a general set of ethics or values that are generally shared by dominant groups within a society. These ethics or values not only inform our every-day actions but also help shape our conception of what could be deemed 'right and wrong'. And Green would further argue that law upholds these ethics and values. "From the functional point of view, law may be regarded as the means by which society ensures that its mores are protected by its institutions."¹ But as we have seen from the previous chapter, many theorists pose more complex conceptions of the relationship between law and morality. And social scientists observe that values or mores may vary among classes, cultural and other groups within a society. Further, the laws of one society are not necessarily the same as the laws of another and in fact the laws of a society from a hundred years ago may not be the same as those found within the same society today. This is because "man's views are not static and the society in which he lives is one of constant progress or regression, depending on one's views of moral conduct."² Consequently, one could never say for certain that something is 'right or wrong' because what may be officially classified as aberrant or deviant today may not be so tomorrow.

The marital institution, and specifically the laws governing the system of monogamy are a perfect example of the fluid and changeable relationship between law and society. Green remarks, "the marriage relationship per se illuminates the inter-connection of law with the ethos of society,"³ although it is important to acknowledge that there may not be a homogenous 'ethos'. Throughout Europe in the

medieval period, there was a general shift from polygamy to monogamy, and this change was reflected in the legal codes of many European countries. In surveying the history of the English common law one can see that monogamy was institutionalized in reaction to civil unrest found in England during the medieval period. And up until the sixteenth century, it was scrupulously preserved and maintained to protect the unity and strength of the British Empire. But since the Reformation period, and more so at the turn of the century, there was evidence of a gradual shift away from monogamy. By looking at the evolving nature of the marital institution within England and British influence jurisdictions one can better understand this relativistic concept of law.

In this chapter, the history of the English common law and more specifically, the history of the laws governing monogamy through the legal regulation of gender relations in England will be examined to illustrate changes in societal attitudes and legal approaches over the course of time. But the concept of legal relativism is not necessarily restricted to changes over time, but also variations in legal values between different countries, societies or even between different classes within the same society. English society reflected different classes, cultural attitudes, and ethnic diversity and these elements changed over time. And towards the end of the chapter, with the introduction of English law in the British North American colonies, one could see that under the same set of marriage laws, there can be yet more diverse understandings of marriage and monogamy. Obviously, because of the enormous historical scope of this chapter, only a cursory examination of the developments of the English common law and the legal regulation of marriage can be provided.

Nevertheless, by examining the reactive nature of the English common law to the socio-political dynamics of English society, one can also better understand the relativistic relationship between laws and social mores. A basic context is also provided for the more detailed empirical examinations in chapters three and four.

Monogamy and Medieval English Law

Even though monogamy has become the norm in most civilized western societies, polygamy has been well documented both in history and literature. For example Betzig notes, “the old testament is full of many men with more than one woman. Take the patriarchs—like Abraham, who got sons by Sarah, his half-sister by a twice mated father, and by Hagar, Sarah’s Egyptian maid.”⁴ And in history, the hunting and gathering societies of the past were well known for their unstructured and often polygamous sexual relationships. Also noted by Betzig, “in the family bands that foraged for plants and game over much of human history, a few men-elders, or the best hunters—kept two or, three women at a time.”⁵ But this type of polygamous arrangement was not restricted to the activities of hunting and gathering societies. Even men in civilized societies have been known to mate polygamously. Again to demonstrate that monogamy was not always the norm, “noble men in most civilized societies have had exclusive sexual access to more than one woman in their own households...until monogamy prevailed in modern society, these facts were constants across space and time.”⁶ Finally it is important to note that in the past both adultery and/or concubinage were quite common before and after social controls were put in place to regulate and maintain the monogamous state. As cited in Brundage’s (1993) study, “Non-marital sexual unions are a fact of life in all societies. This was

particularly bothersome for medieval Europeans, whose theological views of sexual morality insisted that marriage must provide the unique situation in which sexual relations could be tolerated.”⁷ If this were the case, how can one account for the marked historical shift away from polygamy and concubinage in the medieval period?

Despite the fact that legal scholars have attempted to define and redefine marriage and sexual relations over the last few centuries, sexual relations are complicated and often do not fall within the legally accepted definition of monogamy. For instance, in the case of bigamy and polygamy, there is a very fine line between concubinage and remarriage. This will be further elaborated upon at a later point. Although, it is often difficult to distinguish between bigamy, polygamy and concubinage, from a legal perspective, only bigamy and polygamy are considered offences that are criminally culpable. For the purposes of this study, however, references to bigamy and polygamy will refer to extra-marital relations that are accepted as being a binding marriage either by the ecclesiastical and/or civil courts as well as those that are accepted informally by the community, culture or religion. As we will see in the next two chapters, many found ways to circumvent the restrictions of monogamy, despite the state’s rigid definition of monogamy.

Restrictions against polygamous unions existed as early as the fourth century, but up until the medieval period, monogamy was mostly governed through the ecclesiastical courts. As argued by Slovenko, “...the plurality of spouses was not a crime under the common law of England but was punished as an ecclesiastical offence.”⁸ The historical shift towards monogamy in the medieval period can be traced to ecclesiastical efforts. The collective culture of medieval England insisted

that the interests of both the crown and the aristocracy must be subverted to serve the greater goal of internal unity through the right ordering of Christian society. This idea is better explained by Carlson as he comments, “the canonists’ overarching goal was the right ordering of Christian society, a goal shared with secular governments, and in their minds no society was orderly in which couples married willy-nilly without a care for their families’ interests, their feudal responsibilities, or the health of their souls.”⁹ The church, in conjunction with the state, consequently established various social and legal mechanisms that ultimately institutionalized monogamy and criminalized polygamy for the purposes of improving the general welfare of the state. Eventually a multitude of laws were created to “define the range of acceptable spouses, establish the terms under which men and woman married, frustrated the dissolution of marriage, and punished those who transgressed its bounds.”¹⁰ Virtually every aspect of marriage fell under the purview of the church and crown for the purposes of improving social and political unity.

Fortunately for the Church, medieval England was a fertile ground for change because of the political tensions between the Church, Crown and aristocracy. Socially imposed monogamy provided a source of unity in medieval English society. Regardless of wealth and power, the same marriage laws and restrictions applied to the Crown, Church, aristocracy and the general populace. MacDonald remarks upon these political tensions in the following:

The evidence, then, indicates that socially imposed monogamy resulted from conflicts of interests between the aristocracy and the ecclesiastical authorities, with the main goal for the church being that of becoming a wealthy, powerful institution. Moreover, the Church was an important source of unity for the monarchs of the period, and thus often served their political interests in competition with the aristocracy.¹¹

However, at this point I must wonder if the political conflicts of medieval England could be so neatly reduced to three contesting factions. Certainly it is likely that even within the aristocracy competing interests existed, and the same could be also said about the Church. Evidently Brundage (1995) also shares this critique of MacDonald's explanation as he argues, "certainly at a high level of abstraction, Christian norms were supposed to be uniform throughout Western Europe. When one examines the church's structure more carefully, this monolithic impression breaks down rather dramatically."¹² But in general the church and crown managed to successfully divide up the matrimonial jurisdictions and shared the responsibility of preserving the monogamous state despite the opposing interests of the aristocracy. By the twelfth century, the church and crown became completely intertwined with interconnecting socio-political interests. Carlson similarly asserts, "marriage was a sacrament and thus its regulation concerned the church, however marriage was also an act with political and economic implications and therefore of concern to the feudal and manorial authorities. Reconciling these claims was a significant part of the crown's achievement in the 12th century."¹³ To a certain degree, this relationship between the church and crown survived the reformation in the sixteenth century and remnants of it still exist today. But this will be further discussed in the next section.

At this point, I will examine the various legal mechanisms that were put in place to enforce monogamy in medieval England. To begin with, marriage was a holy sacrament that was almost entirely indissoluble with the exception of only a few circumstances. More specifically Carlson maintains, "a valid and indissoluble marriage was effected when a man and woman who were free to do so exchanged

words in the present tense indicating their consent to be husband and wife.”¹⁴ The most stringent aspect of the medieval marriage was its indissolubility. Divorce or annulments were only possible under four circumstances: marriage to one’s kin by blood or marriage, vows of children were invalid, impotence and forced consent of either the man or woman.¹⁵ Since the social imposition of monogamy was originally enforced to protect the reproductive opportunities of men, it is important to note that many of the social control mechanisms that were implemented were designed to ensure an optimal level of reproduction between married men and women.

Adultery was also seen to have the potential to seriously undermine the integrity of the monogamous marital state. It is of interest to also mention “if during his spouse’s lifetime, a man committed adultery with another woman, he was barred by virtue of his crime from marrying the second woman after the first wife’s death.”¹⁶ Adultery was perceived to be a serious threat to monogamy and the state wished to eliminate a motive for harming wives. Consequences could be even more severe for women, particularly if they plotted the demise of their husbands. Acts of disloyalty to state (treason) were mirrored with the creation of the offence of petit treason applicable only to women who committed acts of disloyalty towards their husbands. As Gavigan explains, “the conscious and deliberate breach of one’s duty to one’s superior or lord, the abuse of a confidence reposed in one by one’s superior or lord, resulting in the killing of the superior or lord, was a treachery exceeded only by disloyalty to the king, which was called high treason.”¹⁷ Because disloyalty to one’s husband was perceived as being comparable to state treason, the most serious offence

in English law, women who were found guilty of petit treason were put to death by burning, and later hanging.

A second mechanism of social control that was implemented during this time was the prohibition of bigamy, concubinage and generally all relationships outside of the legally accepted marital unit. Despite the fact that the state came to explicitly prohibit bigamy through eventual criminalization, the medieval definition of marriage ironically encouraged, and/or provided opportunities for bigamists. As mentioned previously, during this time voluntary consent and a commitment between a man and a woman was enough to establish a marital union. No witnesses were required by law to ascertain that the marriage had actually taken place. Thus Carlson believes that since “the exchange of words of consent in the present tense was all that was required to create a marriage bond in God’s eyes, it would be quite easy to commit bigamy or adultery since a person already married secretly could conceal the fact of that union while taking up with another partner.”¹⁸ In addition to the problems already mentioned, this was also a source of frustration for lawyers and courts because it meant that secret and clandestine marriages were legitimate marriages in the eyes of the law. But as Brundage notes, “given the fact that consent alone created marriage, medieval ecclesiastical courts and lawyers had enormous difficulty in distinguishing non-marital concubinage from clandestine marriages.”¹⁹ This aspect of the common law was a considerable source of contention for reformists later on.

However, by far the most effective social mechanism was the state’s newfound interest in legitimate offspring. This was observed in Betzig’s study when she noted that “the law began to take greater notice of ‘natural children’, in other

words—getting an heir by a second wife, and getting an heir by a concubine—were barred at about the same time.”²⁰ This greatly curbed the aristocracy’s propensity for polygamous mating, since such extramarital affairs could now greatly reduce their chances of producing an heir. As the laws changed, societal attitudes were influenced by these changes in the attitude of the church and crown as well as by the law itself. An example would be the affect of medieval marriage laws upon the social status of illegitimate children. Increasingly there was a stigma attached to children who were born outside of the legitimate marital unit. Therefore “besides direct ecclesiastical influence, here were a variety of other penalties—arising from the secular authorities and public opinion—that attached to illegitimate birth.”²¹ MacDonald also cites evidence of this change in his study when he looked at how “bastardy came to be used increasingly as a political smear in the fourteenth centuries.”²² From this one can see that both formal and informal social control mechanisms were used in the medieval period to ensure the maintenance of monogamy; and of particular interest is the state’s concern with maximizing fertility within the legally recognized marital framework.

The Reformation and the Canon Law in Europe

In the late medieval period, there was a great reform movement throughout Europe in which the relationship between Roman Canon law and the state was re-evaluated. Among the reformers, Luther, Calvin and Zwingli were undoubtedly three of the great leaders of the movement. This thesis will not attempt to examine the individual complaints of the reformers, and Protestant interest in sexual matters, but I will note that generally their major criticisms revolved around the increasing control

and regulation of the church in sexual and marital relationships in society. Brundage likewise argues, “sexual behaviour was prominent among the moral and disciplinary issues that concerned reformers. They rejected the belief that marriage was a sacrament [and]...criticized the church’s marriage laws.”²³ For the reformers, one of the most important areas of reform was “the Roman Church’s teaching that marriage was one of the seven sacraments.”²⁴ As long as marriage was considered one of the seven holy sacraments, the church held exclusive jurisdiction over the regulation of sexual and marital relations. It is for this reason that illegitimate inheritance forfeitures were directed to the safekeeping of the church, thereby enhancing the wealth and power of the church. During this time many of the reform proposals appear to have been designed for the explicit purpose of undermining the power of the church. For this reason Carlson believes that “among the most offensive aspects of canon law were the laws governing marriage and divorce, and in the decades after 1520, Europe was alive with proposals to abolish popish canon law in general, and to drive the clergy out of people’s bedrooms.”²⁵ It would appear that the church was perceived as overstepping its moral authority and was being asked to leave.

In the previous section, I briefly discussed the problem of consent in the marriage laws of medieval England. As Brundage points out, “Luther, Calvin and Zwingli deplored the prevalence of clandestine marriages and the Alexandrine theory of marriage by consent alone, which made clandestine unions so easy to contract.”²⁶ More specifically the reformers advocated public marriages and the requirement of parental consent for a marriage to be valid. In adding such impediments to the matrimonial union, the reformers were trying to eliminate the prevalence of

clandestine and/or bigamous unions. As such, “it became a major goal of new Protestant and secular marriage ordinances in the sixteenth century to end such secret unions and define impediments more realistically.”²⁷ But the complaints of the reformers did not stop here. Other areas of intimate and sexual relations also fell under the purview of their complaints. For example, they were much more critical of non-marital sex and concubinage than the canonists ever were. As also noted by Brundage, “the reformers and their followers treated non-marital sex with considerable harshness and had no patience with the resigned tolerance of some catholic writers.”²⁸ Despite the fact that the reformers were attacking the church’s treatment of marriage as a sacrament, the reformers’ critiques still indicated a strong desire for the maintenance of the monogamous marital state.

What is interesting is the relative lack of concern of the reformers towards the issue of divorce. At this point, marriages were still completely indissoluble “because medieval theology deemed marriage for eternity and the separated spouses remained husband and wife in the eyes of the church, even though all personal contact and commerce between them had ended.”²⁹ As the reformers objected to the church’s treatment of marriage as a sacrament, they also objected to the indissolubility of marriage. Despite the fact that both the church and the English common law all but prohibited divorces entirely, “most reformers were prepared under certain circumstance, to tolerate divorce followed by remarriage.”³⁰ According to Ozment, “Luther had actually sanctioned bigamous marriages as early as 1521...[and] desertion by a spouse received a great deal of sympathetic support as a ground for divorce.”³¹ However, despite the fact that many of the reformers were highly critical

of clandestine and extramarital affairs, Luther had actually advocated bigamy in preference to divorce. From the complaints of the reformers, one could see that the twin goals of the reform movement were to undermine the increasing authority of the church, while keeping the monogamous state mostly intact.

The reformers were mostly successful in their attempt to divorce the church from the state as ecclesiastical powers were significantly diminished throughout Europe during this period in history. As Brundage puts it, “in much of Protestant Europe...princely and municipal courts extended their jurisdiction over offences against sexual morality and marriage law, while ecclesiastical courts either ceased to exist or restricted themselves to settling disputes involving church property.”³² Whereas before, the church and state had shared the responsibility of governing marital affairs, the reformers had successfully managed to place the governance and the dissolution of the marital institution completely under the jurisdiction of the secular courts. Thus Ozment argues, “the goal, however, was to place marriage on a more secular foundation, both legally and personally, and legal grounds for contesting its validity. In a majority of the Lutheran cities the traditional courts were dissolved and marital affairs placed entirely in the hands of new secular judges.”³³ However, the widespread reform that took place throughout Europe did not touch England as significantly as one might assume.

England and the Reformation

As mentioned previously, the power and authority of the church and crown were intimately linked together in medieval England, and this was still the case at the beginning of the reform period. Carlson reflects upon this relationship as he argues:

When the reformation began in England, a *modus vivendi* had been in place for nearly three centuries by which ecclesiastical and secular powers shared jurisdiction over marriage. Not only were the two authorities compatible, but their successful cooperation was essential in shaping the special character of the English reaction to the reformation.³⁴

Because of the relationship between the church and crown in medieval England, the church's authority in England was not as significantly undermined during the reformation. In the years leading to this period, "Henry II and his successors never attempted to circumscribe the church's matrimonial jurisdiction, although it was at one time the appropriate object of royal legislation."³⁵ This situation remained mostly unchanged until the reign of Henry VIII and the Cromwell administration, where Henry's frustrated efforts to annul his marriage with Katherine of Aragon (which would free him to marry again), eventually led to the complete subjugation of the church to the crown.

Like the reformers, Henry VIII was also highly critical of the church's stringent laws against divorce and remarriage. As Carlson also points out, "since 1529 the Commons had been complaining about the church's independent legislative authority, though Henry VIII had not embraced their complaints. His anger and frustration with the church grew, however as difficulties securing his divorce from Katherine of Aragon proved intractable."³⁶ Because Katherine was unable to produce a male heir for Henry, he was forced to resort to more unorthodox means of annulling his marriage. Since Henry could not obtain his annulment from Rome, he turned instead to the Parliament, and more specifically Thomas Cromwell.

In order to effect the many administrative and legal reforms that both he and the public were seeking, Henry had "appointed Thomas Cromwell his Vicegerent, Vicar General and Special Commissary by a grandiloquent commission."³⁷

Cromwell's main goal was to eliminate the internal conflicts of the church, crown and aristocracy through the complete subjection of feudal and church power to the crown and parliament. Consequently Dickens argues, "The first year of Cromwell's ministry saw the destruction of the legislative independence of the English church, a process which had effectively commenced with the drafting of the Supplication of the Commons against the ordinaries."³⁸ Eventually, Cromwell had successfully granted Henry the annulment that he so greatly desired, as he was granted his annulment in 1527. According to Dickens, "Cromwell secured large majorities in both Convocations for two propositions. The first stated that the Pope had possessed no legitimate power to permit the marriage of Henry to Katherine of Aragon, after she had consummated her former marriage with his brother Arthur."³⁹ Henry's annulment was only the first of many administrative changes that would eventually lead to the separation of England from Rome.

Like many of the other European reformers, Cromwell also believed that the governance of matrimony belonged in the hands of the secular courts. But unlike the other reformers, the source of Cromwell's complaints did not stem from the sacramental status of marriage in the Catholic Church. As Dickens explains, "No aspect of ecclesiastical law during the Middle Ages lay in so confused a state as that relating to matrimony. Numerous divorces disguised as decrees of nullity were sought and given on grounds of pre-contracts made in infancy or substantiated only by flimsy evidence."⁴⁰

A later Cromwell, Oliver was also highly critical of any remaining independent legislative power of the church and cited the confused state of marriage

records as an example of the church's abuse of this power. Thus the 1653 Marriage Act was "the culmination of a century of argument by reforming Protestants that jurisdiction over matrimonial issues belonged properly to secular courts, not to the ecclesiastical judiciary as the English religious settlement had provided."⁴¹ However, in England, partial ecclesiastical jurisdiction over marriage and separation remained until 1857. The reign of Henry VIII had also marked the growth of the Puritan movement, Parson also suggests that:

...the reformers and the Puritans as others, had different notions. They were for one religion, one uniform mode of worship, one form of church government with which all must comply outwardly, whatever were their inward sentiments.⁴²

Under Oliver Cromwell II the assertion of parliamentary authority was paramount. To return to the previous century, Henry believed that the crown should be at the head of this 'one religion'; where all religious matters fell under the jurisdiction of the crown, the crown now defined all religious dogma and undoubtedly marriage and divorce also fell under the jurisdiction of the crown. As Parsons had similarly noted, "the King was chief in the determination of all causes in the church; he had authority to make laws, ceremonies, and constitutions were to be of force."⁴³ The culmination of Henry and Cromwell's efforts resulted in the annexation of the church's power and stimulated anti-clericism. More will be elaborated on this movement at a later point in this chapter.

Despite Henry's criticism of the divorce and marriage laws, marriages basically remained indissoluble even after the reformation. Brundage notes that "marriage remained principally indissoluble in English law, although parliament occasionally did revoke the marriages of peers and influential persons by private bill.

Divorce in the modern sense of the term did not become available to ordinary people in England until the Marriage Act of 1857.”⁴⁴ In other words, dissolution of marriage was an option only available to the most privileged in society through private bills passed into legislative acts. Since ordinary people could not attain divorces until the nineteenth century, many instead resorted to moving to the North American colonies, where divorces were more easily attained in the seventeenth century. As Phillips notes, “it was England, recalcitrant in divorce policy, that was largely responsible for exporting divorce to the New World: the Puritans who settled the New England colonies legalized divorce there from the 1620s.”⁴⁵ This will be further examined later in the chapter in a more detailed discussion of the availability of divorce courts in the British North American colonies.

Any changes Henry did make were made for the purposes of serving his own interests and not because of the influence of the reformers. Thus Carlson argues, “Henry VIII had a rather personal approach to statute making. The two acts with any claim at reforming inconveniences in marriage canon law were both passed explicitly to solve Henry’s own problems.”⁴⁶ And Henry’s problem was Katherine’s inability to produce an heir so that England was protected from civil war after his death.⁴⁷ By now, all church and feudal influence had become completely subsumed by the crown, but Henry was now faced with a new competitor—the rising power of Parliamentary control. The original conflicts between the aristocracy and the church were now replaced with conflicts between the crown and the increasing power of the parliament. Thus Henry resisted many of the more radical reforms that were taking place throughout Europe and instead held onto his ecclesiastical support. But where

the reformers did succeed was in the passage of the bigamy bill, thus making bigamy a felony rather than an ecclesiastical offence.

This added to the criminal sanctions governing gender relationships. In addition to the capital offence of petit treason, bigamy was potentially punishable by death. According to Carlson, “the lords passed a bill providing that no man should put away his wife and marry again unless he be lawfully divorced before competent judges, making a felony of what had only been an ecclesiastical offence.”⁴⁸ This was a mixed victory for the reformers because the bill had to be introduced twice before it was implemented. In 1552 when the anti-bigamy bill was first introduced to parliament, it was struck down and was not passed until 1604. Despite this shaky inception, bigamy eventually became an important offence to the monogamous marital unit, and patriarchal relations. Although bigamy was not widely prosecuted in the seventeenth century, like petit treason, its definition by the state as a capital offence stood as a powerful symbolic or ideological statement about officially sanctioned marital relationships.

The recurring theme of this chapter revolves around the question of upon whom and/or where the centre of political authority is vested. Prior to the medieval period, polygamy was a common practice despite the prohibitions from Rome. By the twelfth century, the Church and Crown had formed an alliance in the interests of political solidarity and managed to significantly diminish the influence of feudal power. By the seventeenth century church authority over the regulation of monogamy was largely displaced with the passage of the bigamy bill, as it became a very important way of legally enforcing monogamy thereafter.

Elizabethan England and the Rise of Parliamentary Control

Unlike Henry VIII, who had been threatened by the rising power of the Parliament and had clung onto his religious allegiances, Elizabeth instead shared her power with the parliament and even allowed them to define her role in moral and religious matters. As Dickens puts it, “over matters of dogma and ritual Elizabeth did not exercise this same personal and Quasi-papal control. Moreover, she had a partner. Parliament, having enhanced its status during the minority of her brother, was becoming a co-ordinate power rather than an agent.”⁴⁹ Dickens adds, “Elizabeth took no small part in controlling the policies of the Anglican Church, she exercised her influence indirectly, often covertly and with an infuriating reluctance to appear responsible for contentious rulings.”⁵⁰ Amid the religious reforms that were taking place throughout Europe during this time, it is not surprising that the Church of England had adopted a position of religious toleration during this period.

There were rising religious tensions in England. Puritan reformers were advocates of a dominant anti-Catholic and Protestant religion, and Catholics wished to restore the hegemony of the church. Amid the religious conflicts taking place in the Elizabethan period, many areas of secular study flourished. The general secularization of English society paralleled the replacement of canonical laws with statute laws legislated by Parliamentary authority. This trend was reinforced under Oliver Cromwell’s legislation in 1653.

Throughout the reformation, the annexation of Church and feudal power, and even the rise of parliamentary power, marriages remained almost completely indissoluble. In the British imperial centre itself, divorces were difficult to petition

and rarely ever granted except in very serious cases. Consequently between the late seventeenth century...and 1857, when civil courts were established, only about two hundred divorces were granted in England.⁵¹ However, marriage was no longer considered a holy sacrament and the family became recognized as a functional unit of the greater society. Thus it was during the seventeenth century, that the family unit and the relationship between a man and woman began to fall under the close scrutiny of the government and the state. Previously, such affairs fell under the jurisdiction of the church, but now “the family was understood to be the basic unit of society, and order within the family was the guarantor of order within the society and government.”⁵² Thus the maintenance of marital integrity within a society also ensured social and political integrity. As Phillips argues, “the family was perceived as a little commonwealth, a microcosm of the larger society and polity.”⁵³ Certainly, such an idea is not a new one, as the early canonists of the medieval period had also shared this view, and later in the nineteenth century moral reformers will continue to champion the preservation of the family.

Marriage and Divorce in the North American Colonies

Anglican prohibitions for divorce and remarriage extended to all the British colonies, and “beyond the North Atlantic coast of North America...the British colonies had generally complied with the prohibition on permitting divorces.”⁵⁴ But as mentioned earlier, many of those who were unhappy with the anti-divorce policy in England had moved to the American colonies where, despite British prohibitions, divorces in some jurisdictions became more easily available. Unlike the canonists of the medieval period, many of the early settlers in the American colonies perceived

marriage as a civil contract rather than a sacrament, and as such, marriage contracts were dissoluble. Consequently Phillips argues, “the secular contractual approach to marriage law was, however, an indispensable precondition of divorce, and the two went hand in hand in the New England colonies as they did in Protestant Europe.”⁵⁵ As early as the seventeenth century, divorces were granted in the New England colonies in America, as well as the Maritime colonies on the Atlantic coast of Canada. But attitudes towards divorce and remarriage varied across the colonies in North America, reflecting social and sectarian differences amongst the settler populations, as well as political willingness of colonial legislatures to depart from received English law and British policy. Some colonies held onto Anglican prohibitions for divorce, while others embraced Protestant attitudes towards divorce and remarriage, encouraging legal innovation.

And this was certainly the case in the American colonies, where the New England colonies on the east coast tended to favour the legalization of divorce while those in the south resisted the liberal divorce policies of the north. And similarly in Canada, the Atlantic colonies on the east coast had also embraced the Protestant pro-divorce policies of their New England counterparts, while the colonies in the central region of Canada had resisted the liberal divorce policies of the Atlantic coast. Phillips explains this phenomenon as follows, “In the seventeenth century, the New World was a patchwork as far as divorce is concerned. This heterogeneity of divorce laws among the colonies is not surprising given the fact that each took responsibility for regulating marriage formation, annulment, and dissolution.”⁵⁶ Phillips further explains the varied Canadian divorce policies in alluding to the fact that “the

Canadian Maritime colonies had more commercial and cultural links with New England than with other Canadian colonies to the west.”⁵⁷ In the next chapter, more detailed descriptions and explanations for such variances will be provided, as the divorce policies of the individual Canadian colonies will be further dissected in a review of Backhouse, Gee and Chunn’s studies of marriage and divorce in nineteenth century Canada.

Despite the fact that divorces were permitted in many of the British colonies along the Atlantic coast, the conditions under which marriages could be dissolved were few. Like the European reformers, the early settlers in these colonies believed that “divorce was not mandatory when one spouse committed adultery, but the offence was considered so heinous that the innocent spouse was entitled to a divorce if he or she could not forgive the adulterous partner.”⁵⁸ In the medieval period, the church forbade spouses who were guilty of adultery to remarry another because of the severity of their actions. Now such behaviour no longer fell under the purview of the church, and instead fell under the jurisdiction of the state, and in many of the American colonies, adultery became a capital offence. As Phillips explains, “Massachusetts, Connecticut, Plymouth and New Haven made adultery with a married or betrothed women a capital crime, and at least three people were hanged for the offence.”⁵⁹ In the review of literature, there was no evidence that this was the case in the Canadian colonies, but adultery was indeed one of the few circumstances in which divorces were granted.

The other condition under which divorces were granted was desertion by a spouse or a prolonged period of absence. As we will see in the next chapter’s

discussion of bigamy trials in the nineteenth century, desertion or a prolonged period of absence were defences frequently used by those accused of bigamy. Women were often deserted or abandoned by their husbands in the British North American colonies, probably reflecting the less established and more transitory nature of colonial communities as well as a greater range of opportunities. If not abandoned or deserted, it was quite common for couples to be separated for long periods of time without much contact. In allowing “divorce in the case of absence, generally for a period of about seven years, the remaining spouse was free to contract another marriage.”⁶⁰ It is clear that women were often the victims of desertion or abandonment because of the relatively greater mobility of men in the New World. And Phillips similarly comments, “many more women than men cited desertion as a sole or joint ground for divorce, indicative of the fact that men have traditionally been more mobile and historically more disposed to abandon their spouses than women have been.”⁶¹ In the previous chapter, Dawkins’ work may provide an evolutionary explanation for such a phenomenon, but through analysis of bigamy cases from the nineteenth century, it appears more likely that the social and economic explanations can better account for such patterns.

By the eighteenth century, marriages were no longer governed by church law, although ecclesiastical courts maintained residual jurisdiction over marriages until 1857 and their declaration of separation was necessary for a civil action for alimony or for divorce petitions. Marriages were not completely indissoluble since divorces could be granted by Act of Parliament. In many British North American colonies, civil courts declared separations and some were willing to grant divorce in certain

circumstances despite the shadow of English prohibitions. But as we shall see in the next chapter, the laws of dominant Canadian Victorian society, like those in England, still defined whom one could or could not marry and rigidly defended the integrity of married life⁶². Despite the laxer attitudes towards divorce found in the colonies along the Atlantic coast of North America in the eighteenth century, social and legal controls over monogamy and marriage had evolved in such a manner that by the nineteenth century marital relations were more closely scrutinized than ever before.

Divorce and Bigamy in the Nineteenth Century

Despite the fact that Oliver Cromwell's 1653 Marriage Act had effectively placed the governance of marriage in the hands of the secular courts, marriages remained remarkably indissoluble in most of the British Empire for almost two hundred years. Prior to the Marriage Act of 1857, divorce by Act of Parliament was the only method under which divorces were granted. This was an expensive and lengthy process, and was available only to the affluent and well-connected. As Phillips comments, "Indeed the divorce procedure by Act of Parliament had given members of the English ruling class close control over this sensitive area of domestic life, and [thus] ensured that divorce was kept out of the hands of the lower classes, where it might have been used irresponsibly."⁶³ This was no longer the case after divorces became available to ordinary people, and at a much lower cost in the late nineteenth century. The result was a dramatic increase in the rates of divorce throughout the British Empire, and this became an area of significant concern in the British North American colonies.

Middle-class, moral reformers of the nineteenth century became highly concerned about the “phenomenon of married men moving from colony to colony, leaving their spouses and married status behind them, [and this] was a chronic problem the courts and churches in the American colonies had to face.”⁶⁴ Polygamy amongst the English working class became a matter of increasing concern as well, reflecting the greater autonomy of urban life. As Frost found in her study of bigamy in Victorian England, “some unhappy couples took little notice of the law, then, and followed their own notions about marriages and separation...the sanctity of marriage, if not the marriage law, may well have been better served by the extralegal families than by those with state approval.”⁶⁵ Because married couples could not conceivably obtain a divorce or remarry legally, they found ways to do this informally or illegally. And similarly Thompson’s study of the sale of wives in eighteenth century England suggests that in the face of insurmountable obstacles regarding divorce, some men resorted to exchanging or selling their wives as a means of informally annulling their marriage. Thus Thompson argues:

One scarcely needs to explain that marriages break down and that some form of divorce is a convenience. There was of course, no such divorce available to the English or the Welsh people at this time. The alternative might be informal exchanges and cohabitation.⁶⁶

Such practices demonstrate significant popular resistance to the state’s attempts to regulate marital relations. These practices were particularly alarming, since the perpetrators of such activities were often working class men leaving families destitute in urban settings or where there was no established network of community support.

The moral reformers increasingly viewed domesticity and the integrity of the nuclear family unit as the cornerstone of social order and civilization. For example Phillips notes, “progressives and conservatives alike recognized that marriage and the family were fundamental social institutions, and that social change or the maintenance of the prevailing social order could not be achieved without taking account of the family.”⁶⁷ And the frequency in which the lower classes failed to adhere to middle-class standards of order and fidelity alarmed them. Other areas, like prostitution and seduction, which were previously lightly regulated by the state, also saw increased criminalization and legal regulation influenced by advocacy of this social purity movement in the nineteenth century.

There was one group in particular that was targeted by the moral reformers for their lax attitudes towards marriage and polygamy—the Mormons who mainly came to reside in the state of Utah and eventually, western Canada. Jenson also suggests, “the Latter-Day Saints enjoyed a fair amount of success among the working classes in the United Kingdom. They appealed to this particular social group because of their own social background, their approach to missions, and their message.”⁶⁸ With industrialization in the nineteenth century, “overpopulation brought England severe economic dislocation during the first half of the century. Periodic agricultural depression and the population explosion complicated the problem of caring for the poor and distressed.”⁶⁹ English society became increasingly stratified, and Victorian Anglicanism, despite being a state religion, gradually became a religion reserved for the wealthy. Conversely, the Mormon missionaries themselves were also from the working class and were thus able to convert a large, although disenfranchised,

population of English society. According to Jenson, “Mormonism profited from this popular image and drew converts from the disenchanted among the large nominal sector of early Victorian Anglicanism.”⁷⁰ The Mormon missionaries of the nineteenth century not only offered salvation for the poor but also provided a strong social network and a new life in the North American colonies.

The book of Mormon was created in 1830 and its birth had resulted from the revelations of a prophet name Joseph Smith Jr. Most would agree that the most distinctive feature of the Mormon religion is its support of polygamy. According to Ferris, “the prophet had a revelation by which polygamy was introduced, as already stated; and this institution is now the most distinctive feature of Mormonism.”⁷¹ Despite the opposing dictates of marriage and anti-bigamy laws of the nineteenth century, polygamy became an intrinsic part of the religion thereafter. Many of the women were raised to believe that their salvation depended on their participation in such marital unions. The wives of the Mormons are typically “young, exceedingly ignorant, and are made to believe that their salvation depends upon it, and it is regarded as no disgrace in the community in which they live.”⁷² Many critics, especially feminists have critiqued the subjugation of women in such marital relations and such arguments still exist even today.

Consequently Gordon cites, “for most of the 1850s polygamy was the marital policy of a portion of the United States, practiced by the governor of the territory and most subordinate officials. Even after a war-torn congress outlawed polygamy in 1862, church leaders openly continued to practice for thirty years.”⁷³ No doubt, the protests of middle-class reformers and maternal feminists in the late nineteenth

century also contributed to the attacks towards Mormonism and polygamy. Again the anti-polygamy reformers in the nineteenth century also recycled earlier medieval arguments for state solidarity in their condemnation of these Mormon activities. Thus Barringer argues, “condemnation of Mormon polygamy allowed reformers to envision the national state and individual marriages as mutually dependent, mutually reinforcing. A connection between marriage and health of the state was not a new theory in the nineteenth century.”⁷⁴ Similarly, Canadian reformers in the north had wholeheartedly embraced similar arguments, and consequently anti-divorce and anti-bigamy policies were more rigorously enforced there than anywhere else in the British Empire. The response to the Mormons and polygamy in Western Canada warrants further study but is beyond the scope of this particular thesis. Controversies have continued to the present day, and include allegations of exploitation, abuse and child abduction.

As mentioned previously, local courts in the Atlantic provinces of Canada assumed responsibility for granting divorces in the late seventeenth century in spite of prohibitions against divorce and remarriage. However this was no longer the case in the post-confederation period when jurisdiction over marital issues was shifted over to the federal government, as Phillips explained in the following:

The limited autonomy of the Canadian colonies in matters such as divorce was lost when they confederated to form the dominion of Canada in 1867. The British North America Act, which defined the respective areas of jurisdiction of the federal and provincial governments, gave authority over matrimonial legislation to the Dominion (federal) parliament.⁷⁵

The new federal government vetoed all attempts to establish provincial divorce courts up until 1968.⁷⁶ Despite the fact that divorce rates were rising throughout the British Empire, Canada’s national policy remained unaffected as

divorces in Canada remained as difficult to obtain as before the Marriage Act of 1857. Backhouse explains this unusual pattern with this passage:

In an effort to portray Canada as a particularly moral nation, legislators and legal commentators strove to distinguish it from England and the United States, which were depicted as suffering severely from liberal divorce laws and an excessive number of divorces.⁷⁷

Other than divorce, many other areas that was previously governed by the Church or not at all, also became part of the Canadian Criminal Code. An entire array of *Offences Against Public Morals and Convenience* were included in the Criminal Code in 1893 originating in legislation passed three years earlier (1890, Canada) 53 Victoria, Ch.37. For instance section 4 included the penalties for seduction, which resulted in two year's imprisonment if found guilty.⁷⁸ Section 5 detailed the penalties for gross indecency, which included five years' imprisonment, and being whipped.⁷⁹ From the harsh penalties that were associated with the seduction of chaste women and homosexual activity, one can see that the moral health of the country was of great importance to the fledgling country and government. Most importantly for our purposes, in section 10 and 11 of the amendment, the penalties for bigamy and polygamy were included as *Offences in Relation to Marriage*.⁸⁰ If found guilty of bigamy, the offender could be liable for seven years' imprisonment and five years and a fine of \$500 if the accused were found guilty of committing polygamy. The new laws were not only extending marital offences, but criminal culpability also became an intrinsic part of a broader social policy for regulating morality. The new national policies were influenced in part by experiences in Ontario, the focus of the next chapter. Their reach is demonstrated when we turn to the governing of native practices explored in chapter four.

As a result of the government's refusal to adopt more liberal divorce policies, many of those who did not qualify for a divorce or were simply too poor to petition for one, chose to find alternative means. Even petitions to the civil courts for alimony support, where there could be legal recognition of separation (although not entitlement to re-marriage), were beyond the reach of many. For instance, many simply separated informally and lived apart, and often remarried without ever petitioning for a legal separation or divorce. As we will see in the next chapter, this method of separation was socially acceptable, especially among the working class. Phillips further describes this in the following, "in many respects, the most straight forward method of terminating a marriage socially was for the husband and wife to separate, to live in separate dwellings, and to lead their own lives, free of any mutual social, economic, or sexual obligations."⁸¹ Because of the relatively laxer divorce policy in the American colonies, many simply chose to cross the border either to get a divorce or simply remarried and remained in the United States. As Phillips explains, "with the greater ease of geographical mobility that the period ushered in, the scale of population movements across national and state borders and across the oceans in the second half of the [nineteenth] century was unprecedented."⁸² In the next chapter, one can see that in reaction to the stringent anti-divorce policy of Canadian governments, bigamy became perceived as a serious problem and of great attention for the moral reformers of the nineteenth century.

Conclusion

Before the reform movement in medieval Europe, many different social mechanisms had been established to ensure and maintain monogamy in society. Such

mechanisms included the indissolubility of marriage, stringent restrictions for divorce, and the prohibition of all forms of non-marital reproduction. Creating order with the elimination of all forms of polygamous mating was the main goal of both the early monarchs and canonists. In levelling the reproductive opportunities of all men within society, the medieval marriage laws provided a source of unity for England. Because the church was granted ecclesiastical jurisdictions over all state matters relating to marriage, the church became very powerful and wealthy during this period.

However, during the reform period in England, with the efforts of Henry VIII and the Cromwell administration, the Church and Crown's alliance came to an end as Henry turned to the Parliament for legislative support. During the reform period of the sixteenth and seventeenth centuries, many of the protestant European countries objected to the rising power and jurisdiction of the church. The reformers in the rest of Europe had heavily contested against the restrictive laws of the Roman Church. Marriages were no longer completely indissoluble during this time, as the sacramental status of matrimony was eliminated and the governance of this institution fell under the auspices of secular courts. Even though the reformers objected to both the church's immense ecclesiastical jurisdiction and many of its teachings, they had in fact reinforced state sanctioned monogamy in the reform period. They were tolerant of divorce and remarriage but were vehemently opposed to all forms of non-marital sex and reproduction. It was during this time that bigamy fell under the jurisdiction of the state, and like those convicted for petit treason the criminally culpable were sentenced with death. But on the whole, the monogamous state remained intact from

the twelfth century right up until the reform movements at the end of the seventeenth century.

Despite the fact that Henry had turned away from Rome during the reformation period, he viewed the rising power of common lawyers and parliamentary influence as a growing threat to the authority of the Crown. The Elizabethan period was undoubtedly where the influence of Parliamentary statute making proliferated and marriage and divorce fell under the jurisdiction of parliamentary control. But on the whole marriages were still indissoluble in the British Empire, despite laxer attitudes towards divorce found in many Protestant European countries. Thus many who were frustrated with the Anglican church's refusal to relax on the issue of divorce and remarriage, resorted to moving to the New World, where divorces were attainable in several of the British North American colonies.

The prevalence of polygamous mating in the nineteenth century clearly indicates a strong disparity between the individual wishes and the public interests expressed by the state, and this was certainly the case in Canada. In the next two chapters, one can clearly see that individual interests began to play a much larger role in the politics of the English and the American colonies in the nineteenth century. What is more, class conflicts, gender differences and moral reform also played a much larger role in shaping the maintenance and regulation of monogamy.

Notes:

- ¹ L.C. Green, "Law and Morality in a Changing Society", University of Toronto Law Journal 20 (4) 1970: 425.
- ² Green 427.
- ³ Green 427-8.
- ⁴ Betzig 182.
- ⁵ Betzig 182.
- ⁶ Betzig 183.
- ⁷ James A. Brundage, Sex, Law and Marriage in the Middle Ages, Aldershot, Hampshire, Great Britain: Variorum, 1993: 1.
- ⁸ Ralph Slovenko, "De Facto Decriminalization of Bigamy", Journal of Family Law 17 (2) February 1978-79: 297.
- ⁹ Eric Josef Carlson, Marriage and the English Reformation, Oxford, United Kingdom: Blackwell, 1994: 28.
- ¹⁰ Ward 38.
- ¹¹ MacDonald 8.
- ¹² James A. Brundage, "Law and Monogamy: A Troubled Relationship", Politics and the Life Sciences 14 February 1995: 28.
- ¹³ Carlson 9.
- ¹⁴ Carlson 18.
- ¹⁵ Ibid.
- ¹⁶ Carlson 22.
- ¹⁷ Shelly A.M. Gavigan, "Petit Treason in Eighteenth Century England: Womens' Inequality Before the Law," Canadian Journal of Woman and the Law, 3 (1989-90): 347.
- ¹⁸ Carlson 19.
- ¹⁹ James A. Brundage, Sex, Law and Marriage in the Middle Ages, 8.
- ²⁰ Betzig 196.
- ²¹ MacDonald 12.
- ²² MacDonald 14.
- ²³ James A Brundage, Law, Sex and Christian Society in Medieval Europe, Chicago: University of Chicago Press, 1987: 552.
- ²⁴ Carlson 3.
- ²⁵ Carlson 67.
- ²⁶ James A Brundage, Law, Sex and Christian Society in Medieval Europe, 552.
- ²⁷ Steven Ozment, When Fathers Rules—Family Life in Reformation Europe, Massachusetts: Harvard University Press, 1983: 2.
- ²⁸ Ibid 557.
- ²⁹ Ozment 80.
- ³⁰ Ibid 552.
- ³¹ Ozment 87-90.
- ³² Ibid 571.
- ³³ Ozment 30.
- ³⁴ Carlson 9.
- ³⁵ Carlson 18.
- ³⁶ Carlson 67.
- ³⁷ A.G. Dickens, The English Reformation, London: William Clowes and Sons Ltd., 1964: 120.
- ³⁸ Ibid 113.
- ³⁹ Ibid 118.
- ⁴⁰ Ibid 121.
- ⁴¹ Roderick Phillips, Putting Asunder—A History of Divorce in Western Society, Cambridge: Cambridge University Press, 1988: 130.
- ⁴² Edward Parsons, Neal's History of the Puritans, London: Longman, Hurst, Rees, Orme and Brown, 1811: 85.

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- ⁴³ Parsons 83.
⁴⁴ Brundage 572.
⁴⁵ Phillips 96.
⁴⁶ Carlson 87.
⁴⁷ Carlson 69.
⁴⁸ Carlson 83.
⁴⁹ Dickens 303.
⁵⁰ Dickens 303.
⁵¹ Ward 37.
⁵² Phillips 96.
⁵³ Phillips 96-7.
⁵⁴ Phillips 434.
⁵⁵ Phillips 135.
⁵⁶ Phillips 144.
⁵⁷ Phillips 151.
⁵⁸ Phillips 147.
⁵⁹ Phillips 147.
⁶⁰ Phillips 146.
⁶¹ Phillips 246.
⁶² Peter W. Ward, Courtship, Love and Marriage in 19th Century English Canada, Montreal: McGill-Queens University Press, 1990: 35.
⁶³ Phillips 230.
⁶⁴ Phillips 403.
⁶⁵ Ginger Frost, "Bigamy and Cohabitation in Victorian England," Journal of Family History 22 (3)(July 1997): 302.
⁶⁶ E.P. Thompson, "Chapter Seven: The Sale of Wives," Customs in Common, New York: The New Press, 1993: 444.
⁶⁷ Phillips 480.
⁶⁸ Richard L Jenson, Mormons in Early Victorian Britain, Salt Lake City: University of Utah Press, 1989: 16.
⁶⁹ Jenson 244.
⁷⁰ Jenson 33.
⁷¹ Benjamin Ferris, Utah and the Mormons, New York: AMS Press, 1971: 234.
⁷² Ferris 263.
⁷³ Sarah Barringer Gordon, "Liberty of Self-Degradation: Polygamy, Women Suffrage, and Consent in Nineteenth Century America", The Journal of American History 83 (3) December 1996: 822.
⁷⁴ Barringer 816.
⁷⁵ Phillips 437.
⁷⁶ Phillips Ibid.
⁷⁷ Constance Backhouse, "Pure Patriarchy: Nineteenth Century Canadian Marriage," McGill Law Journal 31 (1986): 273.
⁷⁸ 53 Victoria, Chapter 37—Amendment to the Criminal Code, 8 July 1890, RG18, Volume 42, National Archives of Canada, Ottawa.
⁷⁹ Ibid.
⁸⁰ Ibid.
⁸¹ Phillips 283.
⁸² Phillips 473.

Chapter 3- Bigamy Trials in the Post Confederation Period

Prior to the passing of the British North America Act in 1867, each of the provinces, with the exception of Quebec (where private matters including marriage were based on French civil law), were governed by English laws, which varied slightly depending on their date of formal reception. After confederation, Canadian criminal law was uniformly instituted under federal jurisdiction throughout Canada and the new federal government assumed jurisdiction over divorce, although other non-criminal matters concerning families came under provincial jurisdiction. English criminal laws such as the offence of bigamy eventually became part of the Canadian Criminal Code. For the most part, the laws of the nineteenth century, and particularly the marriage laws, were inherited from English statutes and in Quebec, from the French civil code. As Ward remarks, “once the British North American colonies had inherited their marriage laws they made very few changes.”¹ As we saw in the previous chapter, the New England and Maritime colonies were an exception to this generalization.

The rigid marriage laws of English Victorian society were designed to protect the monogamous marital state, which was believed to be a fundamental aspect of society and civilization.² However, when these same laws were transported to a Canadian frontier context, it was clearly evident that they did not reflect the values of all early Canadian settlers. In the nineteenth century, Canada, for the most part was populated by a diverse group of immigrants of Western European origin³ and a significant population of indigenous people. Despite the great cultural and ethnic

diversity of early Canadian society, very little of the population's own experiences were reflected in the laws that governed their daily lives. This was especially the case in Ontario, the focus of this chapter.

In order to construct a picture of social attitudes and legal regulation of marital relationships in the early post-confederation period, a sample of thirty bigamy cases, taken from the Ontario provincial archives, was used for analysis. Naturally given the small sample size, conclusions based on cases from this study could not be accurately used to make generalizations about the early Canadian population as a whole, or even as being representative of the entire population of Upper Canada. However, any conclusions or statements that are derived from this sample may be used to either support or supplement existing academic studies or literature. The chronological period that was sampled ranged from 1858 to 1919. The focus of this chapter will be on Ontario cases because the pattern of enacting divorce legislation on the east coast was not adopted in the two largest provinces, Upper and Lower Canada.⁴ Anti-divorce rhetoric was strong in loyalist Upper Canada during this time and Backhouse believed that "the religious convictions of the predominantly Roman Catholic legislators from Lower Canada were instrumental in blocking this development."⁵ Given the exceptional civil law system in Quebec, I have decided to make the largest common law jurisdiction my research focus in this chapter, while recognizing divergences in legal approaches in the Maritime Provinces. In the next chapter, cases from the national archives will provide greater insight for developments on the west coast and the Northwest Territories. In addition to the data taken from the court cases, fifty-two correspondences between the Attorney General's

Office, the Minister of Justice and the Royal North West Mounted Police were also used to contextualize the bigamy cases. In order to complement the data in the court cases, the chronological range of the correspondences sampled, ranged from 1861 to 1916. From this data, I was able to create a partial picture of early Canada in the post confederation period and draw conclusions about the attitudes of government and different segments of society towards marriage, monogamy and bigamy.

Ontario first emerged as the province of Upper Canada in 1791, partitioned from the western portion of the older British North American colony of Quebec, and was first settled by loyalist refugees, retired British military officers, and British and French merchants, supplemented in from the late 1700s until the war of 1812 by non-loyalist American immigrants. British and Irish immigration rose in the 1830s and 40s and by the turn of the twentieth century, with the rise of industrialization, Ontario had become increasingly urban and the population had increased dramatically as a result of internal migration and immigration.⁶ According to Chunn, “the urbanization rate in Ontario was two decades in advance of that for Canada as a whole, with more than 50 per cent of the population residing in urban areas by 1911.”⁷ Such developments led to the rise of a marginal class of working and dependent poor in Canadian society, and particularly this was the case in Ontario. For the working and dependent poor, life was harsh and jobs were hard to come by, thus forcing many Canadians to move around frequently in search of new opportunities. But if life was harsh and difficult for men in the late nineteenth century, it was even more so for women; it was quite common for women to be abandoned, destitute and powerless in a new country where their identity and livelihood was completely dependent on their

husband. In early Canadian society, marriage laws and English notions of monogamy and fidelity were widely ignored in practice. Many found ways to circumvent the laws that governed monogamy, despite the rhetoric of governments and early reformers.

The legal system was generally ineffective and failed to have a deterrent effect for bigamists because it was entirely too difficult to bring the offender to the attention of the authorities and achieve a successful conviction. To exacerbate the situation, even if convicted and found guilty, the sentences ranged from two months to seven years depending on the moral attitude of the particular judge. On the whole, these Canadians were governed by the informal rules of their neighbours, peers and relatives, and not by the criminal law.

The English marriage laws were imported to Ontario with little variation and without recognition of diverse social practices in a frontier, colonial context. Constance Backhouse has examined the Upper Canada/Ontario situation and highlights the rarity of divorces in the nineteenth century as well as the patriarchal and class factors that influenced civil actions for alimony. As suggested in the previous chapter, such actions provided legal recognition of separation and attempted to settle questions of spousal support, but they did not provide any opportunity for remarriage. Those who dominated the state in Ontario were not inclined to diverge from English law and middle class Victorian attitudes toward marriage. Indeed by the end of the nineteenth century, middle class Canadian moral reformers urged even more state intervention into the affairs of family and gender relations.

Marriage, Divorce and Bigamy in the Nineteenth Century

As we saw in the previous chapter the effects of the reformation in Europe never reached England or its laws governing marriage. As Vogel states, “by the middle of the [nineteenth] century, England was the only Protestant country that had retained the Canon Law prohibitions against divorce.”⁸ Even by the end of the century, divorces were rare and reserved for only the wealthiest members of English society. Similarly Vogel argues, “private acts of parliament could in exceptional circumstances grant a divorce. But the exorbitant costs of the procedure involved moved this remedy beyond the reach of all but the most wealthy and best connected families.”⁹ Even if a couple was in a financial position to absorb the cost of a divorce, they were only granted in cases involving adultery. As mentioned in the previous chapter, protection of paternity and/or reproduction within the marital unit was the driving force behind many of the English marriage laws. And “heterosexual liaisons outside of marriage, however struck at the heart of the institution...to violate the vows of monogamy was to break the original premise of the bargain.”¹⁰ Since colonial marriage laws developed out of the Common Law, divorces were equally difficult to obtain in the North American colonies, with the Atlantic exceptions noted earlier.

In Canada, governments began to take a proactive interest in the protection of the family towards the end of the nineteenth century. As noted at the end of the previous chapter, many new offences and penalties were introduced for the purposes of regulating marriage and public morality (Offences Against Public Morals and Convention). As Backhouse notes, “the Canadian parliament seems to have been

awash in anti-divorce rhetoric and sentiments. It had become a matter of national pride to invoke Canada as a country that knew how to value and cherish the ‘sacred character of the matrimonial tie.’¹¹ But prior to the passing of the British North America Act, this was not the case in many parts of Canada, especially in the Maritime Provinces. Before Confederation, the governance of marriage and divorce fell under the complete jurisdiction of the provinces, and “by the early nineteenth century, the Maritime colonies of Nova Scotia, New Brunswick and Prince Edward Island had established specialized divorce courts with the power to terminate marriages upon numerous grounds.”¹² As mentioned before, this was not the case in Upper and Lower Canada, where such courts did not exist and divorce was condemned. Despite the lack of uniform practices among the provinces of early Canada, after the “British North America Act was passed in 1867, the power to legislate in respect of marriage and divorce was transferred to the federal legislature.”¹³ What’s more, as Backhouse notes, “no comprehensive divorce legislation would be enacted for the next hundred years.”¹⁴ As well, in assuming jurisdiction over native peoples, the federal government began to actively regulate marriage and divorce among the indigenous people of Canada. Despite the transfer of jurisdiction, in practice the provinces were still mainly responsible for private family matters. The provinces were also charged with enforcing criminal laws, so there were variations in bigamy prosecutions and as Backhouse notes, “Maritime courts continued to grant divorces based on their long-standing legislation.”¹⁵ Again, given the variations, the conclusions derived from this chapter focused on Ontario are limited in their application to other provinces.

Nevertheless, “it was commonplace in the later nineteenth century for Canadians to congratulate themselves on the sanctity of their marital affairs, and to contrast their national record with that of England and the United States.”¹⁶ Because of such anti-divorce sentiments, for the most part, marriages were legally binding contracts for life. Ironically, these same anti-divorce sentiments are responsible for the prevalence of bigamous relationships in the nineteenth century. Failed marriages could not be terminated and therefore persons entering subsequent marriages were liable to be prosecuted for bigamy, depending on the vigilance of prosecutors. In Ontario, it would seem that police and the Crown pursued cases, particularly where families were left destitute.

Just as Frost has demonstrated that extralegal families were prevalent in practice in nineteenth century England, bigamous unions were not uncommon among the early Canadians in the post-confederation period. From the cases, documents, and relevant academic literature reviewed, it was obvious that adultery was the primary reason for men to leave their wives and remarry. Even among the few divorces that were granted, adultery was the only reason for a successful divorce petition. As Backhouse comments on the Pre Confederation period, “the English tradition, upon which the legislative practice of granting divorces was based, typically provided divorce only to men whose wives had committed adultery.”¹⁷ Similarly in the case of *Queen v. William Morgan*, the defendant felt completely justified in marrying a second time because his first wife was sleeping with another man. And from the testimony of Denny Dale in this case, one can easily derive the attitude of men towards marriage and bigamy:

Dell if you want to take one up for bigamy go and do your damnest I had a private conversation with Mr. Morgan the prisoner in a hotel in Arkona. This was the first time I wished him much joy. He said lets have a drink and we had one and he said my wife has been sleeping with another man for the last 10 years and thought he had a right to get married again I said to him that's your business not mine.¹⁸

Since Morgan's friend had wished him 'much joy' and then shared a drink with him, there was clearly no social stigma attached to men whom married bigamously, especially in cases involving adultery. What's more, adultery appears to be a common reason for men to abandon their wife or family, as in the case of *Queen v. Samuel Jenkins*. As demonstrated in William Bough's testimony, "...I further said to prisoner your wife in England is now cohabiting with another man, prisoner replying to this said yes she took my furniture to another house and I caught her in bed with another man and that's why I left her."¹⁹ From this study, however, what's most interesting is the complete absence of cases in which women had left their husbands because of infidelity.

The absence of such cases could be explained by the absence of social penalties associated with male infidelity and the slow pace of change from the Pre Confederation period (Backhouse later notes that four women successfully petitioned for divorce on the grounds of adultery by the turn of the century). In many of the cases where men had taken second wives, the offenders did not appear to feel that they were doing anything wrong, nor did they appear to feel remorseful. For example, in the case of *King v. John Barnes*, the defendant believed that having two wives was perfectly acceptable. As demonstrated in the testimony of Mrs. John Barnes, "I scalded him and told him he should be ashamed of himself and he said 'Oh that is nothing, many's the man who has two wives and anyways I had the girl in trouble and had to marry her.'"²⁰ Note the discrepancy between the attitude of John

and Mrs. Barnes towards bigamy. This discrepancy can be accounted for by the intolerant social penalties associated with female infidelity. In Backhouse's study she also states, "even those who favoured legal equality for men and women who committed adultery were quick to say that the sexual indiscretions of women were more reprehensible."²¹ Instead, women usually left their husbands because of mistreatment or wife battering.

In the case of *Queen v. Richard Owens*, Nancy had left her husband because he had treated her unkindly. As sworn by Nancy in her testimony, "I lived with him as his wife twelve or thirteen years and then separated, he treated me very unkindly and I could not live with him, after the separation I lived with my father he moved to the township of Townsend in the County of Norfolk—I have never seen him since...."²² From this study, what is obvious is that marriages were not necessarily a life-long contract between men and women, men and women did in fact separate and remarry for one reason or another despite the legal sanctions associated with such actions.

In Frost's study of bigamy in Victorian England, she found that many couples simply followed their own ideas of marriage and separation. For instance, Frost believed that "bigamists also had a wider definition of divorce, which related to the long tradition of self-divorce among the working classes...the simple act of desertion could be enough for some men and women; the fact that they lived apart for several years, they insisted, invalidated their legal ties."²³ And in Canada, many couples also believed that living apart invalidated their marriage ties, thus making it possible for remarriage. In the current study, there were many cases where couples had separated

amicably and/or informally, and perceived this separation as an informal divorce where their spouses were free to go and remarry. As in the case of *Queen v. Welch*, where the accused testified with the following, "...after living with her for some two years, we mutually agreed to separate and lived separate which agreement we have both kept I have seen her but once since."²⁴ And in a Mormon example of self-divorce, "Gibbs alleges he is practically divorced, the distance between the two places being 9 miles...it would appear that Mr.Gibbs has not been living with his second wife since the President's Manifesto, and that he considers himself divorced from her."²⁵ Legally, desertion alone will not make the second marriage legal, but from a sociological perspective, it was widely acceptable for the couple to separate and remarry since their separation alone, dissolved their marriage ties.

This concept of informal separation and self-divorce was not only shared between the couple involved, but was also accepted among the neighbours of the couple. A good illustration of this concept of self-divorce can be found in the case of a German labourer who believed that his second marriage was legal because he had been separated for seven years. In a letter to the Attorney General, Fred Altwasser notes, "although he has been separated for nearly nine years, he has never gotten any divorce or separation papers of any kind, and the Germans around here, of which there are quite a number think, as he has been away from her over seven years this marriage will be legal...."²⁶ There was a clear incongruence between the legal definition of marriage and divorce from what was actually practiced in daily life by these early Canadians. Similarly Backhouse notes, "the high rate of prosecutions for bigamy indicates that many who were not legally entitled to marry again thumbled

their noses at the inflexible divorce laws, trying as much as possible to manage their marital affairs outside of the law.”²⁷ But other than infidelity, mistreatment and mutual separation agreements, there were also other socio-economical factors that positively contributed to the occurrence of bigamous unions in Canada in the nineteenth century. These other factors were peculiar to North America during the post-confederation period and greatly influenced the activities of bigamists and/or potential bigamists.

Profile and Frequent Mobility of Bigamists in Canada

The majority of the defendants in the current study were farmers or those of the working class. And it is also interesting to note that in Frost’s study of bigamy in Victorian England she also found that working class men formed the majority of her sample. As cited in her study, “bigamy involved people of all ages and all regions of the country, but the social standing of the defendants was overwhelmingly working class.”²⁸ There are many reasons that could potentially account for the demographics of the sample. During the late nineteenth century, middle-class reformers viewed the working poor as a threat to the social fabric of society and especially targeted their family life as a source of social disorganization. Consequently Chunn maintains, “during the late nineteenth and early twentieth century, federal and provincial governments enacted a spate of criminal and quasi-criminal legislation that was ostensibly applicable to all children and families but, in effect targeted the non-middle classes.”²⁹ The activism of the middle-class reformers in the nineteenth century could be accountable for the demographics of the current sample.

Or it may be that the working class men would be more likely to be prosecuted for bigamy because they could not afford a divorce from their first wife, even if legitimate grounds existed for a divorce. For instance, in the case of the *Queen v. Samuel Jenkins*, Jenkins had not obtained a divorce from his first wife because he could not afford to pay for it, despite the fact that he was separated from his first wife. And in Joseph H. Walker's testimony he similarly notes, "...prisoner told me that he would have procured a divorce from his wife in England only he was too poor to do so. He also said that he had proposed going to England this fall for the purposes of procuring a divorce that with the money he was earning this summer he expected to be able to do so."³⁰ As mentioned previously, divorce was a luxury reserved for the very rich, while bigamy appears to have been an offence that was reserved for the working poor.

In other cases, wealthier bigamists were able to avoid prosecution through alternative means. In the case of Chana Dina Hertz, her husband had managed to get rid of the first marriage's documents by bribing the Rabbi with \$600, and thus avoided prosecution for his subsequent marriages to the sales girls. And in a letter from Julia Wilson to the Deputy Minister of Justice, she recounts the case of a man who "[was] thick in friends with the inspectors and staff at City Hall and they intended to let him go free to ruin and destroy another girl's life."³¹ Since wealthier members of society were able to avoid bigamy prosecution through various means--the procurement of a divorce, bribery or successful networking--the anti-bigamy laws appeared to adversely affect the lower classes more than anyone else.

The overrepresentation of farmers and steel workers in the sample could be a result of the agrarian based economy that early Canadians mainly subsisted on before the turn of the century. The data surveyed in this study was taken from a precarious point in history. The turn of the century marked the dawn of industrialization and urbanization, and the great number of factory, miners and steel workers in the sample also reflected this crucial transitional point in Canadian history.

The populations of the early North American colonies were generally quite unstable and/or unsettled and this made it easier for men to maintain more than one wife or family without suspicion. The Canadian settlers of the late nineteenth and early twentieth century traveled quite frequently between England, Canada, the United States and many other European countries. But most frequently, Canadians traveled to neighbouring states or provinces and did not move too far; for example, Michigan, New York, Utah, and Ohio were popular destinations for men to remarry and find second wives. Men often had to move around a lot to find jobs and this facilitated bigamous unions because it allowed men to come and go with legitimacy. So it was not unusual for women to not see their husbands for long periods of time for such reasons. For example, in the case of Mrs. Higgins from Halifax, Nova Scotia, she was forced to appeal to the deputy Minister of Justice to inquire about the whereabouts of her husband because he had gone overseas. As stated in Mrs. Higgins' letter, "...requested that I may be informed what I shall do, my former husband went overseas and me not being able to read or write had the news circulated to me of everything my husband being killed in action and my money was stopped and not having any letters or word from him for about six months thought he was

gone.”³² Mrs. Higgins had appealed to the deputy Minister of Justice because she was being charged with bigamy because of her mistaken belief in the death of her husband as a result of his prolonged absence.

The majority of the extraterritorial cases, however, involved cases in which the husbands had twice married and managed to maintain multiple spouses because their jobs had taken them away from home with such frequency. Again in the case of the *King v. John Barnes*, the first wife testified with the following: “My husband has not always been living at home with me, he has been away more or less for the last 13 or 14 years. The longest time he has been away from me at any one time was for about two years.”³³ It seemed to be quite normal for men to come and go without any explanations to their wives because it was not uncommon for men to move around quite frequently during this time. In the testimony of the second Mrs. Barnes, she recounts her first encounter with the accused, “John Barnes came to the Outeris Sault to work at the steel...I met him on the strait to work in the Michigan south and he told me he had got a good job and had come to the Ontario Sault to work.”³⁴ It was not until the second Mrs. Barnes had actively sought the address of the first wife, that John Barnes’ bigamous activities were discovered. Also in the case of the *Queen v. Edward George Edwards*, Edwards’ first wife Jennie Edwards also commented on the frequency in which her husband traveled away from home:

I did not know he was going away—he went without letting me know his intention of going away...I did not know where he was during the time he was away. He said he had been out west. I asked him why he left home, he said he did not know. He did not say what he had been doing out west, he said he had been in Calgary, Vancouver to those places. When he returned last June he remained 2 days out then went away without telling me he was going away. He left to make his luck to work next day and could not call in the morning...³⁵

The unsettled nature of the new Canadian population also made it easy for bigamists to dupe women into marrying them while being already married to another woman. For example in the same case, Eva Maude Ethel Trew the second wife of Edwards also sworn, “he said he was visiting here and had been working for Mr. Fleck at Rock Lake and has decided to go away again, he told me he was a single man when he left Ottawa about the beginning of October he was here then about a month....”³⁶ Because the first marriage had taken place in another county, these women had no way of knowing if the bigamists were lying. The detection of bigamy was usually performed informally through neighbours, friends and families during this time, and if a bigamist had been married previously in another county, this form of surveillance and detection could not be applicable; this idea of informal governance will be better developed later on. But as long as both marriages had taken place within the provinces of Canada, then detection and the successful prosecution of bigamy was well within the means of the government.

The problem arises in cases where bigamists manage to marry women in two different countries. In the case of the *Queen v. Samuel Jenkins*, Samuel Jenkins was first married in England and then again in Huron, Ontario. To successfully prosecute Jenkins, the marriages of both wives must be supported; and in such cases the procurement of evidentiary support is not easily attainable, therefore making it more easy for Jenkins and other bigamists like him, to avoid legal sanctions for their multiple marriages. And in the case of W.C.G.R.J. Grant who had a wife in England and one in Prince Albert, Canada, the second wife Margaret Sangster remarks, “I was totally misled and deceived by the said W.C.G.R.J. Grant, inasmuch as I had

absolutely no knowledge of his previous marriage to Ethel May Grant, and was not aware of the said marriage...until he was apprehended by the Royal North West Mounted Police....”³⁷ In cases where the husband had first married in another country before moving to Canada, it is almost impossible for the second wives to discover the existence and whereabouts of the first wife.

Similarly, the first wife finds herself equally in the dark about her husband’s activities in another country. As in the case of Chana Dina Hertz, who was married in Warsaw, Russia for 27 years before she discovered that her husband was living in Toronto and married to two sales ladies. In a letter from Chana to the Attorney General it was revealed that “she was a native of Warsaw, and had 12 children and 10 months ago Chana came to Toronto from Warsaw, and that’s when she found out her husband was married to sales ladies.”³⁸ In many cases, husbands or wives had to resort to hiring an investigator to ascertain if their spouses were still in fact living because they had been apart for such a long period of time. For example in the case of the Queen v. Hiram Smith, as indicated in the testimony of Sylvester Matthews, “...concerning the former marriage of Hiram Smith in which they stated that the wife of said Smith was reported to have gone to the states, and that at present, it was reported that she was dead.”³⁹ Certainly the scarcity of Canadian jobs and the unsettled nature of the early colonial populations contributed to the high rates of bigamy practiced among Canadians. But there were also many cases in which it was clear that these people crossed state boundaries for the sole purposes of procuring a second marriage, despite the legal prohibitions against multiple marriages in Canada.

Those bigamists who took wives across territorial boundaries were quite familiar with the law and knew that multiple marriages were prohibited and chose to find ways to circumvent the laws. As in the case of the Queen v. Ephraim Hallock, where Hallock's indictment read as follows:

...the said Ephraim Hallock afterwards and whilst he was so married to the said Zepherette as aforesaid to wit on the third day of September in the year of our Lord one thousand eight hundred and sixty one in the state of new York one of the united States of America feloniously and unlawfully did marry and take to wife one Eliza Shannon and to her the said Eliza was then and there married the said Zepherette his former wife being then alive, and the the said Ephraim Hallock before and at the time of the said last mentioned marriage was and from he hitherto hath been and still is a subject of her majesty resident in the Province of Canada and that he left the said province immediately before the said offence was committed with intent to commit the offence aforesaid.⁴⁰

Similarly in John Barnes' (King v. John Barnes) indictment it was also noted that "John Barnes, being already theretofore married to one Sarah Hough Barnes, and being already a British subject resident in Canada, did leave Canada with intent to go through a form of marriage with another woman, Mary Sawyer...."⁴¹ Not only had bigamists resorted to leaving the country to avoid prosecution for bigamy, but some even took care to create aliases to circumvent the stringent Victorian marriage laws. For example, in the cases of the Queen v. Henry Bashti (alias Andrew Crafton), the Queen v. Henry Bingham (alias Edward Taylor) and the case of the Queen v. Harry John Johnson (alias John W. Drennan), it was obvious that they were clearly aware of the laws prohibiting multiple marriage but found alternative means to remarry since divorces were granted so rarely.

Regardless of social standing, many Canadians appeared to be generally unhappy with the marriage and anti-bigamy laws. The wealthier bigamists were able to remarry and avoid bigamy prosecution through the procurement of divorces, bribery or networking with city hall members, while those of the working class used

aliases or traveled to neighbouring counties or countries so that they would be able to remarry. But despite the fact that all segments of society seemed to resent the rigid marriage laws, the anti-bigamy laws appeared to disproportionately affect the working poor more so than others, and the disproportionate number of farmers, factory workers and miners found in the current sample is evidence of this trend. And Frost also comments upon this in her discussion of bigamy, "...they also show a popular resentment at the rigidity of marriage laws, laws that many people believed were made only for the wealthy."⁴² But up until this point, most of the attention has been focused on the bigamists and their reaction to the marriage laws, while ignoring the victims of bigamy. Despite the fact that both men and women committed bigamy, the majority of the sample consisted of male offenders, thus making women more likely to be the victims of bigamy. In the following sections, the implications of this trend will be further discussed.

Victims of Bigamy

Families left destitute and the exploitation of women appear to have motivated moral or middle class reformers in late Victorian Canada. Scholars such as Backhouse, Strange, Loo and Chunn⁴³ have studied these reformers, many of them early feminists, at length. The reformers argued that the state should intervene more actively to resolve social problems that became more acute and visible because of urbanization.

There appears to be a discrepancy in the literature towards the social standing of women who were involved in bigamous relationships. In Frost's study of bigamy in Victorian England, she discovered that "there is some evidence, in fact, that the

men and, especially the women involved in bigamous marriages were not invariably 'ruined' particularly in the working class."⁴⁴ In her study, she discovered that under certain circumstances there were no apparent social penalties assigned to women who were involved with men who were already married. In the current study, the reaction of the victims and the societal response towards such victims varied, but some of the cases seem to suggest that the victims were in fact subjected to harsh social penalties. There was perhaps less tolerance for such practices in Canada because of the activism of moral reformers, "Canadians became obsessed with the notion of the institution of marriage as the structural underpinning of stable and healthy society."⁴⁵ Consequently, the nineteenth century reformers increasingly viewed the nuclear family as the archetype familial structure, with the mother acting as the primary agent holding the family together. As Chunn explains, "women of all classes increasingly accepted the idea that the onus for maintaining the 'proper standards' of child-rearing and family life should fall on the mother, since ideally, she did not work outside the home and could devote her entire time to domestic duties."⁴⁶ As such, any woman who failed to conform to such middle-class ideals were heavily stigmatized or suffered severe social penalties.

And from some of the cases sampled, it is obvious that the women who were involved with married men would have been socially ruined, thus many preferred to keep quiet rather than to start legal proceedings against her bigamous spouse for this very reason. This was better articulated in the *Queen v. Samuel Jenkins*, where William Bough testified with the following, "I said to him you are a mean man. You have blasted the prospect of this young woman for life by marrying her when you had

another wife living in England, and you are so mean that she wants to have no more to do with you.”⁴⁷ In this case, Bough felt that the woman’s prospects of another marriage were permanently ‘blasted’. In the *Queen v. Harry John Johnson*, the victim would rather face being a single, unwed mother than be involved in a bigamous relationship. As argued by the second wife of Johnson, “I know he is a married man and I want no married man for my husband as there is lots of single men in the world and as for being in the family way he has nothing to do with it nor have I any hold on him....”⁴⁸ As suggested, the social stigma attached to a woman involved in bigamy could have been responsible for the lack of cooperation from victims in bigamy prosecutions, thus making it even more difficult to detect and prosecute bigamists.

The successful prosecution of bigamy was often thwarted by the fact that many cases lacked the testimony of the victim, who was usually the material witness for the case. The women who were victims of bigamy were often reluctant to step forward to testify against their husband for one reason or another. For example in Hugh Richardson’s letter from the Department of Justice, regarding the case of Ephrain Hallock he notes, “...the wife by that marriage holds the certificate and all is procured after she refuses to produce us...the original, which we cannot present nor can we surface its production.”⁴⁹ And in the case of *Rex v. William Franklyn Hersh*, a document from the Justice Department indicates a similar level of frustration with their key witness, “Mrs. Hersh, who lives in Rochester New York has declined to come here and give evidence against her husband although at the request of the crown prosecutor I wired her expenses to Calgary. It is believe that Hersh’s relatives, who also live in Rochester have caused her to come to this decision.”⁵⁰ From such cases,

one could assume that the stigma of bigamy was of greater importance to these women than seeing justice served through the successful prosecution of their spouse. Or it may indicate a certain level of ambivalence on the part of the injured party towards the behaviour of the bigamists.

The victims of bigamy were not only reluctant to testify against their spouse, but there is also evidence that suggests that these women were quite tolerant in their response to the husband's infidelity. To cite, for example the case of the Queen v. Samuel Jenkins, William Bough had wanted the first Mrs. Jenkins to testify before a magistrate but "she refused saying that her and Jenkins had parted good friends and that she wanted to have no more to do with him now and that she had done wrong she could not help..."⁵¹ And in some cases, women had openly defied marriage laws by marrying a man who already had a wife and with full knowledge of his being as such. This was the case in the marriage of Pauline Deering and Daniel Berg, where Pauline "said she was going to marry Berg and knew that he had a wife and four children but his wife was living with another man."⁵² Again here, you see another example of an informal self-divorce on the grounds that husband and wife were no longer living together.

Pauline's defiance of the anti-bigamy law was socially and economically motivated, and not the result of a flagrant disregard for the sanctity of the home and family. As stated by Paul Altwasser in a letter to the Attorney General, "she thinks she is getting a man and a home, and he wants someone to work for him, as he told me himself."⁵³ Because of the middle-class Victorian ideals for femininity, women were generally dependent upon their husbands for their livelihood, as he was socially

recognized as being the 'breadwinner' of the family. Women were almost forced into marriages in order to gain financial support and a home from a husband. As in the case of the Queen v. Harry John Johnson, where the second Mrs. Johnson states, "...about a month before Christmas he asked about marriage and asked me if I had any reason to not be his wife. I said that I had not and then he said that we would get married Christmas day...."⁵⁴ Despite her obvious ambivalence towards her upcoming nuptials, she had married Johnson because she had been keeping house for her uncle and had wanted a home of her own. And in one of the few cases where the defendant was a woman, Mrs. G. Higgins had to "marr[y] again for the upkeep of her home and children"⁵⁵ after her husband had gone overseas without word for six months. The social and economic position of women had placed them in a vulnerable position because without a husband, women were left destitute and forced to find new sources of support and protection.

Prior to the 1870s, the role of a husband and/or wife was very clearly delineated in the English Common Law, leaving men with the exclusive rights to hold property and the responsibility to support and protect his wife and her property. Women needed men for financial support. A woman's primary concern was to find a man to support her and her children, and the quality of her marriage and the fidelity of her husband were secondary. As Ward suggests, "in fact, in terms of civil law, a married woman had no independent existence. She could not make a will, sell her property, sign a contract, or engage in business without her husband's consent."⁵⁶ What's more, Ward argues, "in England a woman's property became her husband's when she married and any which she acquired during her marriage fell to her husband

as well. She could not legally hold property apart from him.”⁵⁷ What this means is that if a woman was abandoned or forced out of her home without first procuring a divorce or legal separation, she would be left homeless because she was not legally entitled to hold property apart from her husband. And from the current study, there is evidence to suggest that even after married women gained legal independence in the late nineteenth century, there had been a continued dependency, both economically and socially.

For instance, in the current study there were many cases where women were often left homeless when they separated from their husbands and were forced to keep house for their father, brother or some other male relative for support. One such example can be found in the case of the Queen v. Henry Bashti where Molly, the first wife testified with the following: “...my husband threw me out of the house and have just one of the...cash and took all my things and I have not had with him...when I was married my Birthday is the 30 of April I have two children.”⁵⁸ And similarly in the case of the Queen v. William Morgan, “Mrs. Ann McGregor can give some information that will show that his first wife did not leave him of her own free will but was sent away by the prisoner and his mother.”⁵⁹ Finally in the case of the Queen v. John Orell, the first wife “has two children by him [the accused] and he went away about two years since left her nothing to live on he had no property....”⁶⁰ Fortunately, the “1888 statute did provide a summary procedure that allowed a deserted woman to appear before a police magistrate or two justices of the peace who, upon a finding of desertion, would summons the delinquent husband...and enforce the order with criminal sanctions.”⁶¹ Such statutory changes were the results of the reformers’

efforts, as they became increasingly concerned with the welfare of working poor families.

For this reason, women were tolerant of being married to a man who had married previously as long as he was able to support her and provide a home. And in Frost's study, she found that "second spouses often declared themselves willing to cohabit with men and women who were already married."⁶² And in the current study, there were also cases where the victims of bigamy had quickly forgiven their husband in light of the fact that the accused was a good provider for their family and children. For instance, the case of the Queen v. William Isaac DeGur, the first wife Harriet J. DeGur did not harbour any ill feeling towards her husband despite the fact that she had just found out about his philandering activities. As cited in Harriet's testimony, "I only heard that my husband was married to another woman a short time since. He has always been a kind husband to me, I have one child a boy about three years old in January—he was always kind to our boy also."⁶³ This woman does not seem to be particularly angry with her husband because he was a kind husband and father.

Similarly the other wife of DeGur, Eliza Jane Casselman noted:

He has always been a good provider for his family and a kind husband and father. I have one child a girl about three months old. I did hear a report last fall about the time we moved to Whales that my husband had another wife living which he denied, and I believed him and considered the report false, and only this day heard...⁶⁴

Overall, the Canadian women of the nineteenth century appeared to be quite tolerant or ambivalent towards male infidelity and bigamy. Female victims of bigamy often refused to testify against their spouses; due to economic dependency, to avoid social persecution or because they held no ill feeling towards the actions of their spouses. In the case of DeGur, both wives had given positive testimonies

regarding his treatment towards his wife and children despite the fact that the accused was charged with bigamy. And the explanation for this can be found in the socio-political identity of women in the nineteenth century. And up until the late nineteenth century the “very existence of the wife was legally absorbed by her husband.”⁶⁵ Thus women placed a greater priority in the support and financial assistance of her husband than they did in the quality and fidelity of their marriage. It is interesting, however, to note that men did not share this tolerant attitude towards female infidelity; and the disparate attitudes between men and women towards the issue of bigamy was examined earlier in the discussion of self-divorces and adultery in divorce cases. However, if men held a laxer view towards bigamy and marriage and their wives seemed to have a similarly tolerant attitude towards bigamy, then who managed to bring bigamy to the attention of the authorities?

Informal Governance of Bigamy

Generally toleration of bigamy was governed by friends, family, and neighbours and in some instances, even ministers who performed marriage ceremonies. It would depend on the tolerance of the community in which the bigamists lived, whether investigation and prosecution of bigamy would proceed. According to Ward, “marriage was a public act to which the community’s welfare was intimately linked.”⁶⁶ In Frost’s study of bigamy in England, she found that community surveillance was the main source of governance in the investigation and control of bigamy in the nineteenth century. From her research she came to the conclusion that “many communities accepted bigamous families under certain circumstances. There were limits to their tolerance, but if a bigamous couple fit

within those parameters, they could live their own way.”⁶⁷ However in the current study, there is evidence suggesting that many nineteenth century Ontario communities were more intolerant of bigamous marriages than their English counterparts. This was particularly the case in more urban areas. Rural areas containing poor American immigrants of religious non-conformist background appear to be more tolerant.

Often well meaning neighbours took an active interest in the people living in their township or county. Marriages were constantly under the heavy scrutiny of their friends and neighbours and many did not hesitate to report deviant activities to the people involved or the local magistrate. For example in the testimony of Rose Minor from the *Queen v. Guy Bryant* case, she seemed to be aware of the most intimate details of their neighbour’s lives:

I know Guy Bryant and also know Frances Warner. I cannot say whether he has married Frances Warner only from report. Frances Warner has lately lived close by my husband’s house in a dwelling belonging to Guy Bryant, who was frequently in there. They appeared to be quite into mating like man and wife. She was living then about a month. During this summer I heard her say he would have two wives.⁶⁸

And similarly in the case of the *King v. John Barnes*, the second Mrs. Barnes was able to quickly discover the existence of Barnes’s first wife through well meaning friends and neighbours. As Sarah Barnes revealed in her court testimony, “I was informed by parties who said they had been told by parties...that Mr. Barnes was already married before he married me and I wrote a letter addressed to Mrs. John Barnes at Moose Creek.”⁶⁹ Neighbours from the same county or township were good material witnesses in the bigamy prosecutions because they were able to provide detailed testimonies attesting to the exact nature of the relations of the people

involved. Similarly, the testimony of Ann Blackman in the *Queen v. William Morgan* will illustrate this idea; “I have seen them together several times a number of times. I first saw them together in 1881 having seen them together is one of my reasons for knowing they have lived together as man and wife.”⁷⁰ From the testimonies above, one can see that some of the smaller Canadian counties were rather intolerant of bigamy and kept themselves abreast of every detail of their neighbours’ lives. The role they played in bigamy prosecutions will be further discussed in the next section.

In other cases, relatives of the victim were responsible for bringing the bigamists to the attention of the authorities. The case of the *Queen v. Richard Owens* is a good illustration of such cases. George Johnson and Flora Elizabeth Wibberly, respectively the brother of the first wife and niece were the key witnesses because of their intimate relation to the couple in question. In Johnson’s testimony, he was able to provide details of the first marriage and subsequent separation:

...after they lived in Tp.J. Saltfleet as man and wife for a number of years about 12 or 13 years at the time that they had a disagreement and so parted, they had a family of two children, they separated by consent...I know my sister went back to her fathers they separated and have lived there most of the time since making it her home.⁷¹

What’s interesting in this particular case is that the relatives of the victim were not the only parties interested in bringing Owens to the attention of the courts, but his own relatives were also present to testify against him. As Flora Wibberly testifies:

Richard Owens is an uncle of mine being my father’s brother and he told me about a year since that his wife was living near the same place the last he heard from her, her name was Nancy Johnson before she married to Owens and the last he heard from her she was keeping house for her brother-in-law near Harley.⁷²

Flora’s testimony was important to the Crown’s case because her testimony

attests to the fact that Owens was aware of the fact that his wife was alive when he had remarried. Despite the fact that many parties were obviously interested in playing a role in the detection, surveillance and prosecution of bigamy, it was actually quite difficult to successfully prosecute and convict bigamists for their multiple marriages through the court system.

Evidentiary Support and Sentencing for Bigamy

The threshold for evidentiary support in nineteenth century bigamy cases was really very high, and consequently would seem to lack a deterrent effect upon potential bigamists. The mere presentation of two marriage certificates supported by the testimony of the victims was not enough to ensure a successful conviction. Many witnesses were needed to prove that the marriages had in fact taken place, that the clergy had the authority to do so and that the accused had knowledge of his original wife being alive during the time of his second or subsequent marriages.

Certain witnesses were frequently subpoenaed for such trials; the clergymen who had performed the marriage ceremony, the witnesses to both marriages and the victims of the multiple marriages were commonly used in the prosecution of bigamy. As in the case of the Queen v. Samuel Jenkins, William Bough swears, "I am a minister of the Methodist church. I know the prisoner and also the complainant. I was the officiating clergyman at the marriage of the prisoner and the said Elizabeth Louisa Hurrem."⁷³ What is more the officiating clergymen had to also prove that they had the authority to perform the ceremony for the marriage to be considered valid. And as such, William had qualified his testimony with the following, "my authority for such marriage was the license now produced and marked exhibit 'A'."⁷⁴

In previous sections, the unsettled nature of early colonial communities was discussed as well as the extraterritorial nature of many bigamy cases; the resulting implication is an increased level of difficulty in witness testimonials for bigamy trials. Because witnesses had to sometimes travel great distances for such cases, the crown had to first obtain authority from Ottawa to cover the resulting expenses that would be incurred. For example in the case of Amos Provis, the crown had to first obtain permission from the Justice department before he could have Reverend Samuel Teeson subpoenaed. As revealed in a letter from the Deputy Minister of Justice, “I have the honour to state that you are authorized to procure the attendance of Reverend Samuel Teeson at the trial of the above case, and this department will recoup any expenditure that may be incurred by you in the matter.”⁷⁵ And the crown had met with similar difficulty when procuring other witnesses for attendance in such trials.

The case of Ephrain Hallock is another extraterritorial case that had been more difficult for the crown because both the witnesses and the clergy from the first marriage had resided in the United States:

...requesting the authority to visit Buffalo with reference to Ephrain Hallock's charge of bigamy now in custody here. Prisoner was married in 1860 in United States and the witnesses to that marriage as well as the justice who solemnized in live there.⁷⁶

As common sense would dictate, the testimony of both wives of the accused was required to support the existence of multiple marriages. Again this was not always an easy task for the crown in extraterritorial cases. In the case of *Rex v. William Franklyn Hersh*, a letter addressed from the crown prosecutor revealed the following, “William Hersh arrested here charged with bigamy, first wife resides at Rochester New York, and is necessary witness. Please write me authority to pay her expenses for her and return, with escort if necessary.”⁷⁷ And to further frustrate the

efforts of the crown, the unwillingness of victims to cooperate in bigamy trials provided another obstacle for a successful conviction for the crown; to reiterate this idea from another example, in the case of the Queen v. Joseph Pinschenant, the second wife's absence had caused the crown to plead for an adjournment, "I sent a summons on out to Margaret Nippler one of the principle witnesses in this case. The said witness has not appeared and I ask an adjournment."⁷⁸ Indeed the many extraterritorial bigamy cases provided a great source of frustration for the crown, but by far the crown's greatest obstacle stems from the fact that the onus is placed on the crown to prove that the accused was aware that his/her spouse was alive during the time of the second marriage.

Proving that the offender had knowledge or reasonable expectation that his/her spouse was alive is a necessary qualifying element in successful bigamy convictions, but quite difficult to do in many cases. This issue was addressed in great detail in a letter from Sgd. Frank Pedley to the Department of Indian Affairs:

With reference to a more or less prevalent idea that a man or woman can legally contract a fresh alliance if he or she in good faith and on reasonable grounds believes his wife or her husband to be dead or if his wife or her husband has been continually absent for seven years then last past and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years.⁷⁹

If the accused could successfully prove that he/she had reasonably believed their spouse to be dead or had not seen them for seven years then they could be acquitted. And this is again complicated by the fact that many of these early Canadians were immigrants and/or frequently moving around the country looking for work opportunities. Since it appears to have been quite common for both men and women to not see their spouses for long periods of time, this defence could easily be used in many of the cases. For example in the case of E.C.G.R.J. Grant, Grant had

left his first wife and moved to Canada to find work and had not heard from his first wife in three years before remarrying. As Grant admits, "...the charge is right, I admit it, I could not get along with my wife in England. We had money troubles, when I got married again out here I start all over again. I have not heard anything of my wife for three years."⁸⁰ And similarly in the case of the Queen v. Hiram Smith, William Teller's testimony read as follows, "Hiram since told me that he had not heard from her for 16 years. I think it was his object to know if she was either dead or alive. I did not see her but I believe from report that she is alive."⁸¹ In order for the crown to furnish a strong case against the accused, many witnesses were often brought forth by the crown to first testify to the fact that both spouses of the accused were currently living and that the offender had knowledge of this fact.

Not only was the threshold for evidentiary support set quite high for bigamy cases, even if a guilty verdict had resulted, the lack of uniformity in sentencing would fail to produce a deterrent affect upon potential bigamists. A full term of seven years was the maximum penalty for bigamy, but sentencing did not seem very uniformly distributed. It seemed to range anywhere from two months to a maximum term. For instance, in the case of the King v. Carswell Phillips, Phillips was found guilty and sentenced to two months in Gaol with a strong recommendation for mercy⁸² while De Gur, in the case of the Queen v. William Isaac De Gur, received the full term. The reason for the varying attitudes of the judges was not revealed in the court transcripts that were reviewed in this study. Unlike current court transcripts, many of the nineteenth and early twentieth century court cases in the study provided only verdicts. Some included sentencing details but none of the cases provided insight for how the

judges had come to their decision. What's more in some cases the judge's verdict was completely unrecorded, and given the small sample size of the current study, rates of conviction or generalizations can not be made. However, Frost' study of bigamy in England had also resulted in similar findings in sentencing patterns. As she contends, "popular opinion was so at variance with the law that many judges applied it with great flexibility...[they] did not believe in harsh penalties for all bigamists."⁸³ Perhaps the erratic and unpredictable judgments in bigamy trials were a reflection of the varying sentiments of the early Canadian population at the turn of the century.

Conclusion

There were many factors that positively contributed to the rates of bigamy in Canada around the turn of the century. The strict marriage and divorce laws, as well as the efforts of the Victorian moral reformers undoubtedly played a very significant role in the prevalence of bigamy prosecutions during this period. Since marriages were a contract for life and divorces were not feasibly attainable by the average Canadian, many instead chose to circumvent the laws through informal separation and subsequent remarriages. These practices were tolerated in some communities but they were never officially tolerated.

The harsh economic reality of the early colonial climate had forced many early Canadians, men especially, to move across the country on a regular basis in search of work opportunities. This provided the opportunity for men to move about, from one wife to another, without evoking suspicion. Often aliases were used, women were duped and investigation of his infidelity was difficult or impossible.

The attitude of the victims themselves was indicative of a double standard toward the issue of bigamy and gender. It appears as though many women had a somewhat tolerant view towards male infidelity and bigamy, but this was not the case in the reverse scenarios. Men who had discovered their wives with other men felt that they were entitled to leave and remarry, with or without a divorce. This double standard could potentially be explained by the fact that women in the nineteenth century were completely dependent on their male counterparts, both legally and financially. As such, many victims were unwilling to testify against their husbands, or accepted his infidelity as long as he continued to provide for her.

The criminal laws and laws of divorce at the turn of the century did not appear to be equipped to deal with the socio-economic realities or factors that were accountable for the prevalence of bigamy during this period. Enforcement and prosecutions were inconsistent. To bring cases to trial, many witness testimonials were required for the crown to construct a successful case, but the unsettled nature of the Canadian colonial environment made it difficult to find and subpoena witnesses. What is more, in some cases trials were very expensive because they often needed to transport witnesses overseas, as many Canadians were immigrants with their original wives still living abroad. Finally, even if victim and witness testimonials had resulted in a successful conviction, the sentencing of such court cases appeared to be quite inconsistent from case to case. Overall, the practice of bigamy appeared to be a socially acceptable practice among certain sectors of Canadian society. Although moral reformers called for more uniform enforcement of the law and new laws to

protect women from exploitation, monogamy was a middle class Victorian idea, and values in these matters appear to be surprisingly diverse in this period.

Notes:

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- ³ Ellen Gee, "Marriage in Nineteenth Century Canada," Canadian Review of Sociology and Anthropology 19 (3)(1982): 316.
- ⁴ Constance Backhouse, "Pure Patriarchy: Nineteenth Century Canadian Marriage," McGill Law Journal 31 (1986): 270.
- ⁵ Backhouse, "Pure Patriarchy: Nineteenth Century Canadian Marriage", 271.
- ⁶ Dorothy Chunn, From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario (Toronto: University of Toronto Press, 1992) 26.
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- ⁸ Ursula Vogel. "Whose Property? The Double Standard of Adultery in Nineteenth Century Law", Regulating Motherhood and Sexuality, ed. Carol Smart, 160.
- ⁹ Vogel 160.
- ¹⁰ Constance Backhouse, Petticoats and Prejudice: Women and Law in Nineteenth Century Canada (Canada: Osgoode Society, 1991) 187.
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- ¹² Backhouse, "Pure Patriarchy: Nineteenth Century Canadian Marriage", 266.
- ¹³ Ibid 272.
- ¹⁴ Ibid.
- ¹⁵ Backhouse, "Pure Patriarchy: Nineteenth Century Canadian Marriage", 277.
- ¹⁶ Backhouse, "Pure Patriarchy: Nineteenth Century Canadian Marriage", 265.
- ¹⁷ Backhouse, Petticoats and Prejudice: Women and Law in Nineteenth Century Canada 170.
- ¹⁸ The Queen v. William Morgan, County of Middlesex Spring Assizes, 1884 (Transcripts, Archives of Ontario) RG 22-392.
- ¹⁹ The Queen v. Samuel Jenkins, County of Bruce Fall Assizes, 1885 (Transcripts, Archives of Ontario).
- ²⁰ The King v. John Barnes, Supreme Court of Ontario, United Counties of Stormont, Dundas and Glengarry, 4 November 1915 (Transcripts, Archives of Ontario).
- ²¹ Backhouse, Petticoats and Prejudice: Women and Law in Nineteenth Century Canada 190
- ²² The Queen v. Richard Owens, Kent Fall Assizes, 1883 (Transcripts, Archives of Ontario).
- ²³ Frost 295.
- ²⁴ The Queen v. Welch, County of Perth, 29 September 1862 (Transcripts, Archives of Ontario).
- ²⁵ Sgd. E.L. Newcombe, Letter to Royal North West Mounted Police Commissioner, 29 March 1905, RG18, Volume 373, National Archives of Canada, Ottawa.
- ²⁶ Fred Altwasser, Letter to Attorney General—Ottawa, 5 September 1913, RG18, Volume 461, National Archives of Canada, Ottawa.
- ²⁷ Backhouse, Petticoats and Prejudice: Women and Law in Nineteenth Century Canada 170.
- ²⁸ Frost 287.
- ²⁹ Chunn 44.
- ³⁰ The Queen v. Samuel Jenkins
- ³¹ Julia B. Wilson, Letter to Deputy Minister of Justice, 22 January 1917, RG13, Volume 209, National Archives of Canada, Ottawa.
- ³² Mrs. G. Higgins, Letter to Deputy Minister of Justice, March 1894, RG13, Volume 231, National Archives of Canada, Ottawa.
- ³³ The King v. John Barnes.
- ³⁴ Ibid.
- ³⁵ The Queen v. Edward George Edwards, Supreme Court of Ontario, County of Carleton, 24 September 1914 (Transcripts, Archives of Ontario) RG 22-392.
- ³⁶ Ibid.
- ³⁷ Margaret M. Sangster, Statement to the Police, 5 May 1916, RG 18, Volume 3256, National Archives of Canada, Ottawa.

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- ³⁸ Chana Dina Hertz, Letter to Hon J.J. Fay.K.C. Attorney General, 17 July 1910, RG 13, Volume 162, National Archives of Canada, Ottawa.
- ³⁹ The Queen v. Hiram Smith, County of Elgin Fall Assizes, 1858 (Transcripts, Archives of Ontario) RG 22-392.
- ⁴⁰ The Queen v. Ephraim Hallock, County of Oxfore Fall Assizes 1861 (Transcripts, Archives of Ontario).
- ⁴¹ The King v. John Barnes.
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- ⁴³ See endnote for "Pure Patriarchy: Nineteenth Century Canadian Marriage," Petticoats and Prejudice: Women and Law in Nineteenth Century Canada, and From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario
- ⁴⁴ Frost 297.
- ⁴⁵ Backhouse, "Pure Patriarchy: Nineteenth Century Canadian Marriage", 266.
- ⁴⁶ Chunn43.
- ⁴⁷ The Queen v. Samuel Jenkins.
- ⁴⁸ The Queen v. Harry John Johnson, Court of Oyer and Terminer and General Gaol Delivery, County of Middlesex, 21 March 1899 (Transcripts, Archives of Ontario).
- ⁴⁹ Hugh Richardson, Letter to the Department of Justice, RG 13, Volume 5, National Archives of Canada, Ottawa.
- ⁵⁰ Royal North West Mounted Police, RG 18, Volume 46, 10 December 1903, National Archives of Canada, Ottawa.
- ⁵¹ The Queen v. Samuel Jenkins.
- ⁵² Const. Stanley Clarke, Crime Report of Royal North West Mounted Police, 18 September 1913, RG 18, Volume 46, National Archives of Canada, Ottawa.
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- ⁵⁴ The Queen v. Harry John Johnson.
- ⁵⁵ Mrs. G. Higgins, Letter to Deputy Minister of Justice, 8 March 1894, RG 13, Volume 231, National Archives of Canada, Ottawa.
- ⁵⁶ Ward 40.
- ⁵⁷ Ward 38.
- ⁵⁸ The Queen v. Henry Bashti, County of Essex, 22 September 1892 (Transcripts, Archives of Ontario) RG 22-392.
- ⁵⁹ The Queen v. William Morgan.
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- ⁶⁴ Ibid.
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- ⁶⁶ Ward 35.
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- ⁶⁸ The Queen v. Guy Bryant, County of Leeds and One of the United Counties of Leeds and Grenville, Fall Assizes 1862 (Transcripts, Archives of Ontario) RG 22-392.
- ⁶⁹ The King v. John Barnes.
- ⁷⁰ The Queen v. William Morgan.
- ⁷¹ The Queen v. Richard Owens.
- ⁷² Ibid.
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- ⁷⁴ Ibid.
- ⁷⁵ Deputy Minister of Justice, Letter to Johnston, Crown Prosecutor, November 1902, RG 18, Volume 239, National Archives of Canada, Ottawa.
- ⁷⁶ Hugh Richardson, Letter to Justice Department, 19 September 1861, RG 13, Volume 5, National Archives of Canada, Ottawa.

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⁷⁸ The Queen v. Joseph Pinshenant, Waterloo Fall Assizes 1892 (Transcripts, Archives of Ontario) RG 22-392.

⁷⁹ Sgd. Frank Pedley, Letter to all Indian Superintendent Agents in the Dominion, 18 May 1906, RG 10, Volume 3881, National Archives of Canada, Ottawa.

⁸⁰ Royal North West Mounted Police, Crime Report, 17 May 1915, RG 18, Volume 3256, National Archives of Canada, Ottawa.

⁸¹ The Queen v. Hiram Smith.

⁸² The King v. Carswell Phillips, Supreme Court of Ontario, Carleton County, 23 September 1919 (Transcripts, Archives of Ontario) RG 22-392.

⁸³ Frost 298.

Chapter 4-

MacDonald's Segregation and Assimilation Program

In the last chapter, we surveyed the reaction of the immigrant-based colonial population of Canada in the post-confederation period towards the anti-bigamy laws focusing on Ontario cases. Now let us turn our attention to the reaction of Canada's indigenous population towards the same criminal laws and additional forms of legal regulation during this time. As Canada's population grew in size, so did the scope of the government's control and power. At Confederation the new Dominion government assumed responsibility for native peoples from the British Crown. Asserting sovereignty over the vast northwestern territories and developing them according to Ottawa's economic priorities, were central to Sir John A. Macdonald's nation-building policies. Ambitious social interventions by the state into the activities and cultural practices of native peoples, no longer simply the business of church missionaries, accompanied these policies; and many of these new interventions were authorized by the federal Indian Acts. As Leslie and Maguire assert, "As Canada grew, both in territory and population, increased regulation became necessary to define the evolving relationship. Thus the Indian Act became more complex and intruded more and more into the daily life of Indian people."¹ Although the Indian Act never specifically dealt with monogamy or polygamy, the department of Indian Affairs and the local agents made use of it in their attempts to instil the doctrine of marital monogamy within the indigenous people.

Again, archival records illustrate the tenuous and often contentious relationship between the Canadian government and the Indians during this period in

history. A sample of ninety-three correspondences written between 1889 and 1908, from Indian agents, Royal North West Mounted Police records, Deputy Superintendent General, the Department of Indian Affairs, Deputy Minister of Justice, Indian Commissioner and various missionaries were used to articulate the response of the Indians towards the anti-polygamy laws. Again, because of the relatively small sample of archival cases studied, any conclusions or statements made in this chapter that are derived from the archival material can not be accurately used to make generalizations about the entire early Canadian population. However, the conclusions or statements that are derived from the present study can be used to either confirm or further contribute to existing legal scholarship.

The indigenous people of Canada in the post-confederation period were no more receptive towards the idea of monogamy than segments in the rest of the Canadian population. As in the previous chapter, the legal system was ill equipped to deal with the issue of multiple marriages among the Indians. But the reasons for their inability to control and eradicate the practice of polygamy among the native population differed greatly from those for the rest of the immigrant Canadian population. To begin with, although the federal government assumed jurisdiction over native affairs, native rights including cultural practices were theoretically protected through the Crown's trusteeship under the Royal Proclamation, 1763. However, by the mid 19th century these legal treaty obligations had been long-neglected, paving the way for social engineering by the federal government. More importantly, in practice the problem of intervening into aboriginal polygamy was greatly complicated by the extensive hierarchy of government bodies who all had

vested interests in the control of this indigenous population. Internal conflicts within the government made it difficult for them to form a united approach towards the prevalence of multiple marriages within the Indian population.

Moreover, the English anti-polygamy laws they were attempting to instil within the indigenous population were so at variance with their traditional values, that it was not surprising that many agents were so frustrated with their lack of success. Despite the obvious disparities between the two cultures, “most of the changes in the Indian Act during the post-confederation period derived from a belief that Indians could be integrated with the majority community.”² And in their attempt to integrate the native people into the dominant culture, the government had accepted both Indian and non-Indian marriages as being legal, with the belief that eventually all Indians would obtain civil marriages in place of the traditional way. But this made it more difficult to legally sanction native people in cases of multiple marriages; the anti-bigamy laws of the late nineteenth century were never designed to apply to indigenous marriages, since these traditional marriages did not fall within the Canadian legal system’s definition of marriage.

What is most interesting is that the experience of the early Canadian government and the methods that were used for the control and maintenance of monogamy were not unlike those methods used by the church and crown in the medieval period. But unlike the medieval experience in England, the Canadian government appears to have met with much less success, at least in the shorter term.

Hierarchy of Government Control in the Post-Confederation Period

For the purposes of governing native Canadians, there was a hierarchy that was in place to oversee and protect the interests of the indigenous people of Canada in the late nineteenth century. Aboriginal peoples were governed both by the Criminal Code, which was uniformly instituted throughout Canada, and the Indian Act that was specifically designed to both integrate and govern the daily lives of the indigenous population. The North West Mounted Police was created shortly after Confederation, and territorial justices administered the criminal law. At the top of the native affairs hierarchy was the Department of Northern Indian Affairs in Ottawa, then the Indian Commissioner, the local agents, and then the appointed chiefs on the reserves and at the bottom were the local missionaries.

Despite the agents' relatively low position in the hierarchy, they were the front line members of the government, and consequently had the most contact with the indigenous population. The functions of the agents encompassed many roles: that of a general tribunal, Justice of the peace and social worker all fell within the scope of the agent's job description. For this reason, the legal authority of the agents increased quite dramatically within a very short period of time. The position of the agent was not created until the late nineteenth century when "further reorganization was carried out in 1880 with the appointment of district agents."³ However by 1894 "clause eight [of the Indian Act] empowered Indian Agents to be ex officio justices of the peace for Indian Act offences and certain sections of the 1892 Criminal Code."⁴ Unfortunately, many of the agents did not seem to have a very clear grasp in their understanding of the Canadian laws or the Indian Act but were afforded great

discretionary powers and legal independence in their governance of natives on the reserves. Evidence of this was found in a letter from the Indian Commissioner to an Indian Agent from the Assiniboine reserve:

Further I do not see that you were justified in trying Roger Anselm under the vagrancy sections of the criminal code. If he is an Indian belonging to the reserve how could he be a vagrant? His offence appears to have been defamation of character, and your trial, the authority for which you yourself were not clear about, seems to have caused more strife.⁵

From this letter, one can see that the hierarchical nature of the Canadian government provided a system of checks and balances to ensure that the agents were working in accordance with the wishes of the department. This hierarchy is comparable to the relationship between the crown, aristocracy and the church that was discussed in the second chapter. And not unlike the contentious relationship between the crown, aristocracy and the church, there was ample evidence of a similar relationship between the department, the agents and the missionaries regarding how aboriginal persons should be governed and reformed.

For instance, in the case of Nellie and Joseph Jack, conflicting instructions between the local missionary and the agents had proved to further complicate the separation of Nellie and her husband. In a letter addressed to the Indian Commissioner, Joseph stated, "I was induced to this hasty marriage by Mr. and Mrs. McKenzie, the resident missionary and wife, almost in defiance to the Agent's urgent wish to become engaged first, and build a house and get a few things together before I get married."⁶ And in the same case, the agent had reported similar conflicts with the local mission in a letter to the Indian Commissioner:

In reply to your letter of the 5th instant relating to the trouble between Joseph Jack and his wife I have done what I can but find that the fact of her stopping at the Mission is an impassable obstacle. As stated in previous letter at the time this young woman was at my house she was only too glad to have gone back at any time, but since she has been at the

Mission a change has come over her though I think at her heart she would like to go back to her husband.⁷

The Indian agent appears to play the role of a social worker, who is both responsible for maintaining peace among aboriginal persons and the front line person responsible for maintaining peace between natives and the Department of Indian Affairs. The agents appeared to be intimately involved in the relationships of the natives living on their reserve. For example in a letter written by the Commissioner regarding the same case as above, the Commissioner was noted for instructing the agent as follows: "Talk to him kindly and advise him to take back his wife and treat her properly...I have reason to believe that she has been a good wife, and the wise course for all is that he should take her back to his house, and give her the care of the child again."⁸ But regarding the issue of Indian polygamy, many of the correspondences between the agents and the department indicated conflicting attitudes towards the treatment of the Indians. In response to agent Wilson's appeal to apply legal proceedings to a case of native polygamy, the Commissioner had replied with the following, "it would be better not to take action at all than to fail after having taken proceedings. And moreover, it would be necessary to go very cautiously lest any general feelings should be worked up among the Indians on the subject."⁹ The agents had frequently appealed to the Department for the authority to apply legal sanctions in cases of native polygamy, but were cautioned by the Department to do otherwise.

Even the Indian Commissioner had appealed to the Department for permission to apply more stringent measures against cases of polygamy among the Indians. As revealed in a letter to the Superintendent General of Indian Affairs, "I have the

honour to state for the information of the department that in spite of every effort, short of criminal prosecution, to suppress polygamy among our Indians, cases still occur, and the question arises whether some more stringent measures than heretofore resorted to should not be adopted.”¹⁰

The North West Mounted Police, territorial justices, Department of Justice and the Canadian government however, were reluctant to take legal measures against natives who had married polygamously, despite prohibitions that existed within the Criminal Code. The Indian Commissioner and the agents were not the only ones who had objected to the liberal treatment of the Indians on the reserve, the majority community was also at variance with the position taken by the Department. As Leslie and Maguire notes, “public opinion was rapidly building against the Reserve Commission. Many settlers, both the coast and in the interior, thought the Commission was being too liberal towards the Indians.”¹¹ Given the appeals from the agents and the Indian Commissioner as well as the protests of public opinion, why had the government taken such a lenient position against the Indians in the cases of native polygamy?

Most of the records seem to suggest that the Canadian government wanted to pick their battles carefully, as their main objective was to win the cooperation of the Indians and gradually integrate them into the dominant society. The current national policy advocated a peaceful coexistence with the Indians until treaties were drawn and the west was properly settled and colonized. And Macleod further explains this in the following:

The primary task of the new force was to effectively occupy the west for Canada until the growth of population established Canadian ownership beyond any doubt. This meant avoiding by whatever means possible, conflicts between white settlers and native peoples.¹²

Although native polygamy was a source of concern for the missionaries, the agents and even the Indian Commissioner, the Department did not prioritize this as such, in the context of larger national policy. Evidence of such was noted in a letter addressed from the Assistant Commissioner to the Indian Agent of Blackfoot Agency in 1895:

Before however resorting to force to secure the desired end, you must carefully weigh the chances of serious opposition being offered thereto by the Indians and the extent to which such opposition is likely to be carried, in which connection I notes your remark that trouble would likely arise out of arrests being made and that the older Indians are strongly against any interference in the matter...If after mature consideration you find that the introduction of any power greater than that of suasion is calculated to raise too great a spirit of opposition than prudence would dictate the abandonment of such methods for the time being at least...¹³

The Assistant Commissioner's last remark seems to suggest that the caution utilized in this matter was only a temporary position until the threat of Indian opposition was no longer imminent. As Macleod suggests, "the treaties were negotiated in this period and relations with the Indians established on a firm enough basis that the two great crises, Sitting Bull's sojourn in Canada and the 1885 rebellion, could be dealt with. Once the railway was complete, the Indians could safely be pushed to one side and forgotten."¹⁴

Not only were there conflicts within the federal branch of the Canadian government, but conflicts also emerged between the new western provinces and the federal government as well. As Leslie and Maguire contend, "Indian administration in British Columbia was chaotic because, in addition to personal inadequacies of federal officials, nearly every move was impeded by the provinces."¹⁵ Given the lack of accord within the government towards the governance of Indians during this period

and the cautionary stance taken by the department towards Indian polygamy, it is not at all surprising that many Indians had paid no heed to the anti-bigamy laws.

Local Governance

The agents and the department appear to have developed a congenial relationship with the chiefs and often solicited their help in introducing Canadian laws to the Indians. This parallels the success noted by historians of the North West Mounted Police in winning the confidence of native populations resulting in less state violence than in the American “Wild West”. According to Macleod, “in maintaining the peace with the Indians, the most significant victories of the police were over the other government departments, whose zeal to civilize the Indians often outstripped their commonsense.”¹⁶ While there was state repression (notably the North West Rebellion, 1885), generally the regulation of native peoples was more subtly managed than south of the border. Perhaps their decision to form a friendly allegiance with the Indian chiefs was also motivated by budgetary restrictions, as “the United States government by 1870 was spending approximately 20 million dollars a year to subdue the Indians, more than the total Canadian budget.”¹⁷ Nevertheless, the result was a more congenial relationship between the government and aboriginal people, and an appearance of local autonomy, at least in early years.

As suggested in a letter written by the Blackfoot Agency’s agent to the commissioner, “I have not receded from the position I have taken, but have explained to the chiefs and parents that I would continue to see them in reference to all matters which the department wished to introduce for their welfare...”¹⁸ The position of the local chiefs and second chiefs was established shortly after confederation and the

purpose was to allow natives a certain degree of self-governance. This was better articulated by Leslie and Maguire's study,

The sixty-first through sixty third clauses concerned elections of chiefs and councils and gave Indians more control then previously. The Enfranchisement Act of 1869 had provided for a form of local government through election of one chief for every band of 30 members or in the proportion of one chief and two second chiefs for every two hundred people.¹⁹

Despite the fact that the rationale behind the appointment of local chiefs was to allow aboriginal peoples a certain degree of control and autonomy, the chiefs' position was mainly created to support and further advance the government's assimilation program. The department had strict control over who was installed as chief for the agencies, because the chief had to act as a liaison between Ottawa and the Indians, thus ensuring the cooperation of natives on the reserves. This was not always an easy task, as the missionaries, local agents and chiefs all shared the responsibility of governing the Indians within the agencies. To further complicate the situation, language barriers often made it difficult to maintain a congenial relationship between these three bodies of local governance. For instance, the Assiniboine Agency had lacked a proper interpreter and the Indian Commissioner had made the following comments to Reverend T. McAfee: "If it is time that the missionary has no proper interpreter and does not speak the Indian language himself, it appears to me the Indians have some reason for complaint. The missionary and our Indian agent do not pull well together, which makes matters worse..."²⁰ Not only were there internal conflicts within the Federal government, but there were also conflicts within the agencies over the governance of Indians living on the reserves.

However, if a chief had acted contrary to the wishes of the department, he would be deposed and replaced. For instance, Chief Star Blanket was in danger of

being dismissed as chief once again, because he had abandoned his first wife and remarried against the wishes of the department. And the details of this case were revealed in a letter addressed to the Secretary of the Department of Indian Affairs from the commissioner: "I informed him that this practice was against the wishes of the department and that we expected more from him, especially now that he had been re-installed as chief, and in reply to this he said that he would much sooner lose the chiefship than give the woman up..."²¹ Chief Star Blanket had been deposed previously for general misconduct and now his chiefship was again in question.

Within the hierarchy of governance, the chiefs held a relatively low position. Their position was intended to provide the Indians with a sense of autonomy without any real legal authority. And this was similarly suggested in Leslie and Maguire's analysis: "The government no doubt assumed that substitution of limited local administration for existing tribal organizations would accelerate the assimilation process."²² If the chiefs did not act in accordance with the interests of the department, then they were quickly stripped of their title and authority. But nevertheless, their position within the agency had further complicated the governance of native peoples in the later nineteenth century, and one has to wonder if their presence had the opposite effect than the one the government had originally intended.

Regulation of Native Marital Relations

Given the limited influence of the chiefs, the agents and the department had strict control over the courtship and marriage of Indian couples living on the reserve. The agents, acting as social workers, played a large role in the courtship and choice of wives of many of the Indians living on the reserve. In the case of Joseph Jack, the

Indian agent made the following remark in a letter to the commissioner: "I may say that I advised that this marriage should be delayed till Joseph had time to build a house for themselves and also till they get a little better acquainted."²³ As part of the assimilation program, the Indian agents were attempting to indoctrinate the aboriginals with ideas associated with a more sedentary lifestyle as well as sexually segregated roles of men and women in marriage. This suggests emerging ambitious attempts by the state to engage in social engineering or what some scholars refer to as citizen formation. For Ottawa, the policies of segregation and assimilation were described in late Victorian paternalistic language of 'civilizing' the 'savages'.

For natives who had graduated from the industrial schools, who were perceived as being reformed, there were certain expectations placed upon them for their choice of wives. For example, Alfred Cappel's new wife was unacceptable to the agent at the Muskowpetung Agency because of his education in the industrial school. And the agent's complaints were detailed in letter to the Indian Commissioner as follows: "...the women are very undesirable companions for young men who have received a good common education and a Christian training and of whom we have a right to expect better things."²⁴ There seems to have been a higher social and economic threshold for Indian couples who chose to marry; the agents made sure that the men had homes to provide for their wives and even their choice of wife was heavily scrutinized by the government. When an Indian was married to two women, the agent would weigh the moral characters of the two women to determine who would be a more suitable wife, therefore labeling one marriage as valid and casting off the other. In the case of Kah-ka-no-wen-a-pew, the agent from Crooked

Lake had made the ensuing comments about Kah-ka-no-wen-a-pew's marriage to E-squa-sis:

For the marriage of Kah-ka-no-wen-a-pew to one E-squa-sis of no.320 Piapots band, a woman of dissolute character, whose tent this Indian, and others had been visiting during May to such an extent that some Indians reported immoral carryings on...learning of the publication of banns by Mr. McKay I wrote him a personal note telling him he should not marry this man and woman.²⁵

Clearly the validity of E-squa-sis' marriage to her husband was dependent on her adherence to Victorian notions of female decorum and respectability. Because of her 'dissolute character' and sexual promiscuity, she was labelled as being an unsuitable wife for Kah-ka-no-wen-a-pew. And conversely the agent had praised Kah-ka-no-wen-a-pew's other wife, Kah-kay-pin-ah-soo-quay for keeping a tidy house and remaining a faithful wife.²⁶ If one considers the fact that the only restrictions placed upon a non-Indian marriage were mutual consent and the presence of witnesses, then the agent and department's paternal control seems particularly intrusive.

British standards of morality not only dictated how many wives the Indians were permitted to have, but also dictated and regulated how old their wives had to be. As in the case of Running Crane, where the agent had made the following report: "The girl in question is only 13 years of age. I therefore trust you will grant me authority to push this case, by either placing the man in prison, or by taking the girl away, and having her put in an industrial school."²⁷ Again there seems to be a double standard in the treatment of the Indians and the rest of the population, as the legal age for a girl to marry was twelve years of age, but the Rev. Mr. Swanson had taken Running Crane's wife away because she was only thirteen. And this was revealed in the commissioner's chastisement of the agent's actions in the following letter:

...I would point out that while the principle which you wish to inculcate is certainly most proper and one that is desirable should be conformed to by our Indians, I fear your seal has in this case carried you into putting before the Indians as law, what really does not exist as such, being merely usage. I refer to your informing the Indians that 'no one could marry a girl under 18 years of age'. A girl is marriageable at the age of twelve...but at the same time, they should be made to understand that while such marriages may be lawful, they are most undesirable for obvious reasons.²⁸

Not only was the government and Department of Indian Affairs regulating the number of wives, and the ages of the wives taken by the Indians, but the department had to also be assured that the husbands had the education and the skills necessary to earn a living before taking a wife. In the industrial schools, the Indians were provided with education in the areas of agriculture and mechanical skills, with the hopes that they could eventually become invaluable members of the mainstream economy. But this was not particularly surprising considering that "Canada was then an agricultural country and it would have been highly unusual if the stress laid on agriculture as a way of life was not reflected"²⁹ in the Department's regulation of Indian marriages. Through the industrial schools, the younger generations of Indians were removed from their traditional settings and values and instead were exposed western expectations of marriage and fidelity. The older natives and chiefs were naturally vehemently opposed to such interference and the eradication of traditional customs, values and culture. Regarding the earlier issue of regulating the age in which Indian girls were allowed to marry, Old Sun and the other chiefs of the Blackfoot Agency were noted for stating, "if regulations as to girls not being allowed to marry under 16 years were carried out, I might expect blood."³⁰ But the opposition of the chiefs did not carry much weight, considering their limited influence within the hierarchy of Indian governance.

As stressed in the previous chapter, having a house to keep was important to a woman, and often it was the main reason for a woman to marry. It appears as though this concept had been rather successfully inculcated among the Indian women, and this was especially the case for those girls who had graduated from the industrial schools. For instance, Nelly Jack was a recent graduate of the Regina Industrial School and had clearly embraced western definitions of male and female roles within a marriage. As stated in a letter to the Indian Commissioner, “Joseph, I was given to understand before I married him had a house of his own...if he is anxious to have me back he will show it by getting his new house ready as soon as the weather will permit, until then I shall live apart but I wish to get my little girl and reasonable support from my husband.”³¹ The male natives also embraced these sexually segregated roles; much like their non-Indian counterparts, the male Indians of the younger generation also expected their wives to keep their homes. For example, Joseph Jack had responded to his wife’s complaints with the following, “another fault I found about her is her indifference to household work—she did well from the first few weeks but after that I could not induce her to keep up her training in the house or even her personable appearances.”³² Through the regulation of marital relations, the department was indirectly attempting to curtail the nomadic lifestyle of the Indians and slowly move them into the agrarian economy/society of nineteenth century Canada.

Much like their non-Indian counterparts, female natives in the late nineteenth century had no recognized identities outside of their husband or family; when their husbands threw them out or abandoned them they were forced to appeal to their

agents or local missionary for assistance. Indian women had no means of support, property or money of their own because their annuity payments were paid through their husband. Again in the case of Nellie Jack, a letter from Mr. Aspdin to the Commissioner would reveal, "Mrs. Jack has been allowed to stop at my house almost since parting from her husband; at first it was her request so as to make clothes for herself and after that pending the hope that a reconciliation would be made."³³

However, unlike non-Indian women who had few avenues of legal support when abandoned or tossed out by her husband, the government and the Indian Affairs department had taken a very paternal interest in the welfare of deserted spouses.

And such provisions were even included in sections 72 and 73 of the Indian Act, which gave the commissioner and agents the power to withhold annuity payments of men who had acted against department policy. In reference to the case of Alfred Cappo, the agent had reacted with the following response to the commissioner:

To discountenance such proceedings I therefore propose, subject to your approval, to recognize the unions and at the next annuity payments to inform these men that the woman will not be recognized as their wives nor will any children born to them be regarded as legitimate and will pay each person their respective annuity separately, unless the parties became legally married.³⁴

Much like the medieval experience, the government had threatened the natives with illegitimacy for their future offspring, with the government being the largest benefactor if the annuity payments were forfeited. But it was difficult to control natives by withholding annuity money because they neither understood nor did they covet the accumulation of monetary wealth. And evidence of this was found in the

case of Wee-you-tain-hee-ma-kaye of band no.120, where agent Sibbald had appealed to the commissioner for assistance:

The man however has taken another woman and has cast of his legal wife. I have had them both to the office and exhausted all my power of persuasions to get him to take his wife back again but without making the slightest impression...I have told him that his treaty money will be withheld and given to his wife but he treats that with indifference.³⁵

These cases suggest that the agents, the commissioner and the Department of Indian Affairs closely scrutinized virtually every aspect of the native marital union. The choice of wives, the ability of the husband to provide, the age and moral character of the wives and even the legitimacy of future offspring were assessed and controlled by the government.

Evidence of Cultural Disparity—Problems With the Assimilation Program

Initially when the anti-bigamy laws were first introduced to the aboriginal peoples there were no apparent objections. And this was noted in the agent's report from the Blood Agency, "I have the duty to inform you that the chiefs, headmen and Indians were duly notified during the summer that no plural marriages would be permitted for the future. At the time no serious objections were raised to this movement."³⁶ However, by the end of the nineteenth century, the government was deeply concerned with their lack of success in the assimilation program. As Leslie and Maguire contend, "in the last two decades of the 19th century, the Indian Affairs department was concerned primarily with the extension of its work to western Canada. Officials soon found that eastern customs and procedures were not always applicable."³⁷ Although polygamy was not at the top of MacDonald's agenda, the Indian Commissioner and the department had perceived the continued practice of native polygamy as evidence of moral atavism among the Indians. And the Indian

Commissioner had made similar reports to the Dep. of Superintendent General of Indian Affairs in 1893: “I regret to have to inform you that despite every effort on our part in the way of moral suasion and the religious influence of missions, the old Indian custom still prevails to a discouraging extent.”³⁸ The failure of the assimilation program can mainly be attributed to the cultural and moral disparities between western and Indian culture.

The Native people simply held a different value on marriage, where monogamy was neither enforced nor was it observed within their culture. Spouses and families were often abandoned and replaced with new ones without any social or legal penalties associated with such behaviour. And this was noted in S. Stewart’s report to the commissioner: “the marriage relation is not always sacredly observed by them. The habit of taking a wife and throwing her away for the most trivial cause and taking another, is frequent, not only among this band but also in several bands of the Lake of the Woods.”³⁹ Men, especially often sent their wife away on grounds of infidelity, or instead abandoned their wife and family on grounds of infidelity on their spouse’s part. The abandoned wives often appealed to the agent or the commissioner for financial assistance, as their annuity payments were provided through their husband. As in the case of Chief Star Blanket’s wife whose appeal for financial assistance was recorded in the commissioner’s letter: “Since reporting the case to you Star Blanket has discarded his first wife and she has appealed to me for destitute patrons, claiming that she has nothing whatever to live on.”⁴⁰ As discussed in chapter three, women were often placed in a financially vulnerable position because they were often in danger of being abandoned and left destitute. However, in the case of

Indian women, the government had made special provisions in the Indian Act to protect deserted parties in such cases. This will be further discussed at a later point in this chapter.

Unlike western notions of marriage and monogamy, aboriginal marriage ties were not lifelong bonds, and were easily dissolved. As such, within the native culture, polygamy was completely acceptable. And unlike the Mormons, who had practiced polygamy in secret while officially denying any and all practice of polygamy, native cultures openly embraced such practices in defiance of the bigamy offence in Canadian criminal law and later 'protection of women' provisions in the Criminal Code. However, the local agents and missionaries were quite alarmed by such practices and viewed them as open defiance of Canadian laws and civilized morality. As noted by the agent for the Battleford Agency to the commissioner:

I have the honour to request that you will give me a reading on the following subject...Indians who are legally married by a minister, desert one another; and then live immorally with other party...this is a very pernicious habit which is very much indulged at this agency so much so that they seem to rather pride themselves at defying the law on the point and I would very much like to put a stop to it.⁴¹

Despite the efforts of the department, the missionaries and the agents' instructions, the practice of polygamy was quite common and rampant among the Indians. As seen in the last chapter on nineteenth century Ontario, the majority of bigamy offenders were men, but in the practice of polygamy on the reserves, both men and women seemed to pay little attention to the anti-bigamy laws. And this was the case in the Hobbema Agency, where the Indian agent had appealed to the commissioner with the following report:

One of our Indians, Paul Bull, is legally married, but on account of domestic disagreements he has ill treated and cast off his wife; this man has taken another woman to live with him, said woman being the lawful wife of another Indian, Arthur Ward; until whom she refuses to

live—what make this affair more complicated is the fact that Arthur Ward is living with the legal wife of Moose Chu We Mi.⁴²

The legal sanctioning of native polygamy would seem to serve no purpose when anti-polygamy laws were not accepted as being valid to begin with. For this reason, every early correspondence between the agents and the department seems to indicate a sense of futility and frustration in their attempts to impose Canadian laws and/or standards of morality among aboriginal peoples. A letter addressed to the Indian Affairs department from the commissioner had revealed similar sentiments: “It would seem that their pernicious practices in that matter referred to so far from showing sign of the gradual eradication which was expected, are more prevalent than ever nor does there appear to be any hope of their being discontinued unless some strong measures be adopted to stop them.”⁴³ The department and the commissioner had viewed aboriginal polygamy as evidence of savagery. Note the difference in the attitude of the government towards Mormon and aboriginal polygamy; the Canadian government viewed aboriginals as children or savages who did not know any better and must be protected and chastised, while the Mormons’ behaviour was merely perceived as being moral decadence.

The Validity of Indian Marriages and Resulting Implications:

To further confuse the situation, both Indian marriages and Christian marriages were considered legally binding in the Canadian courts. Undoubtedly this was also part of MacDonald’s segregation and assimilation program, to slowly ease the Indians into the dominant culture while still accepting their traditional customs. According to Frank Pedley, Department of Indian Affairs, “the validity of marriages between Indians contracted in accordance with the customs of their tribes has been

established by the courts, notably in the case of Connolly vs. Woolwich in 1867.”⁴⁴

Since Indian marriages were legal in the Canadian courts, all Indians who were married polygamously in such a manner were guilty and liable to criminal prosecution. And the Deputy Minister of Justice had further clarified the legal standing of Indian marriages in a letter to the Deputy Superintendent General of Indian Affairs with the following:

If such an Indian is validly married to one of the woman with whom he lives and has gone through a form of marriage with the other or others which would make her or them his wife or wives but for the fact that he was already married, there can be no question that he is guilty of bigamy and liable to the penalties of the crime. See Criminal Code S. 276.⁴⁵

However, from a legal perspective, the police and the department of Indian Affairs were uncertain of how the Criminal Code exactly applied to marriages contracted through Indian customs. According to section 278 of the Criminal Code, a successful prosecution and conviction for bigamy and/or plural marriage would require some form of contract of marriage. But a letter from M. Millar, the Indian Agent at the Crooked Lake Agency had defined the pagan Indian custom of marriage as the following:

I beg to say that the Pagan Indian custom of marriage referred to at present time is that a man desiring a certain girl in marriage asks the parent or guardian for her, and if he is accepted it is customary, although not always followed, for the man to make a present to the one giving consent. Parties entering into marriage according to this custom are regarded as entering into a union of one man and one woman for life to the exclusion of all others.⁴⁶

Note from above that legitimating such a marriage could be quite problematic because the Indian marriage ceremony is completely incomparable to non-Indian marriages. There were no witnesses required, no contract, and no mutual consent between the couple. The only point of congruity would be the fact that Indian marriages were considered as a ‘union of one man and one woman for life to the

exclusion of all others'. Because Indian marriages performed according to traditional customs did not include marriage contracts or certificates, a conviction for bigamy or polygamy would be rather difficult. In the last chapter, the difficulties in achieving successful convictions for bigamy were already established. In a letter to the Indian Superintendent of Victoria, B.C., the Deputy Superintendent General of the Indian Affairs department had raised this issue with the following comments:

There was positively no record of these Indian marriages, as being the first intimation to the department of the grounds upon which he held that 'the ceremony of marriage according to the Indian customs, was not a real marriage at all within the meaning of the term as used in the criminal code.⁴⁷

The anti-bigamy laws were only recently applied to the Indians at this point and neither the Chiefs, agents nor the department were quite sure of how exactly the laws would apply to the Indian marriages. Recall in the bigamy cases from chapter three, successful prosecutions often required many witnesses to testify; and the witnesses who were commonly subpoenaed by the prosecution were the reverend and the witnesses whose names appeared on the certificate or contract of marriage. Because there was no marriage contract, marriages performed according to Indian customs were almost indistinguishable from concubinage.

Since there were no legal penalties for concubinage, many of the agents' attempts to curtail the prevalence of multiple marriages in their agency were often thwarted. The agents themselves were also unclear of the difference between a legally valid marriage and mere cohabitation. And this was similarly noted in a letter from the Assistant Indian Commissioner to an agent, "I am afraid that agents are sometimes too lax in that they recognize as marriage according to what is called 'Indian Custom' of Indians without any regard as to what is essential to making such

a union valid.”⁴⁸ For instance, in the Hobbema agency the agent had appealed to the Commissioner for instructions in dealing with cases of abandonment and remarriage in his agency. But the Commissioner had replied with the following, “as there has been no second marriages in any of them there is no ground for a charge of bigamy and the act of cohabitation being consented to by the respective women, who are presumably of an age to give consent, does not therefore render the parties liable to criminal prosecution.”⁴⁹ As discussed in the second chapter, informal social governance had played a significant role in keeping rates of concubinage relatively low, but among the native people, social penalties for concubinage did not exist.

In making native forms of marriage legal in the eyes of the Canadian courts, the government had indirectly criminalized a large segment of the Canadian population, but was left helpless and frustrated in their attempts to sanction or curtail aboriginal polygamy in the agencies. It is of great importance to note that while the government had respected and incorporated the traditional custom of Indian marriages into their legal system, they had completely ignored the fact that Indian marriages were by nature dissoluble. And this was further explained in Frank Pedley’s letter from the Department of Indian Affairs: “It is particularly deserving of notice that the validity of Indian divorces has never been affirmed in Canada, and Indian marriages, if valid, cannot be dissolved according to Indian customs, but only in such manner as other marriages may be dissolved.”⁵⁰ In legally recognizing Indian marriages without acknowledging their dissoluble nature, it is clear that the new Dominion government wanted to maintain a peaceful relationship with the native

peoples, while maintaining an uncompromising determination to integrate them with the rest of the Canadian population.

Nevertheless, the Department and the government continued in their vigilance to instil the monogamy doctrine among the aboriginals living on the reserves despite their contrary practices of polygamy. And this was evident in a letter addressed to the an agent from the Dep. Superintendent General of Indian Affairs:

As an Indian divorce is not recognized as valid...she cannot legally marry another man until after Pewean's death, unless it could be shown that at some time during the six years immediately preceding the second alliance she knew or had good reason to suspect that her husband was alive.⁵¹

Indians married according to traditional customs must follow the same marriage laws as those who had married under Christian or civil laws. And as such, they could not remarry unless their spouse was dead or continually absent for seven years, even if the couple had been separated for some time. For instance, Isaac Reid from the Muskowpetungs Agency could not remarry a second time even though he was already separated from his wife and tradition had permitted him to do so. The details of Reid's case were documented in an ensuing letter from the Indian Commissioner to the agent from the Muskopetungs Agency:

...the Indian form of marriage is binding, therefore in the case of Isaac Reid re. 207 Piapot's band, who is shown in the pay sheets as a married man, he should not be allowed to take a second wife, or recognized as eligible to do so even if he has separated from his wife and they are living separately, in that case the annuity should be paid to each.⁵²

Despite the agents' and commissioner's insistence that natives should conform to western doctrine of monogamy and anti-bigamy laws, the vast disparity between the two cultures made it almost impossible to rein in the polygamous activities of the Indians through the court system. For example, "the Supreme Court of British Columbia not long ago refused to convict an Indian of bigamy on the

ground that the local tribal custom according to which the first alliance was formed virtually constituted a contract terminable at any time by either of the two contracting parties.”⁵³ Since native marriages were easily terminable at any time, the practice of separation and remarriage without legal intervention was common practice among the Indians. For this reason Agent Sibbald from Onion Lake had remarked, “few of these Indians understand the serious nature of a contract a man and woman enters into by marrying according to our laws and they do not seem to be learning that their free and easy custom of marrying is improper.”⁵⁴ The government’s failure to acknowledge and take into account the vast disparities between the dominant and Indian culture left the legal system with the impossible task of reconciling two sets of laws with one criminal code.

Legal Sanctions for Native Polygamy

As we have seen, the laws prohibiting polygamy or bigamy appear to have had a relatively benign effect when applied to cases of aboriginal polygamy. The Indian Act was clearly drafted without much attention being paid on the problem of Indian polygamy, since it left the government quite powerless in their attempt to reform the Indians. There were, however various sections of the Criminal Code, that pertained to Indian polygamy since Indian marriages were subject to the same marriage and anti-bigamy laws as any other marriage in Canada:

S. 11-4—

Everyone who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, and every male person who, in Canada, simultaneously, or on the same day, marries more than one women, is guilty of felony and liable to seven years’ imprisonment.

S. 11-5—

Everyone who practices, or by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practice or enter to—

- (a) any form of polygamy; or—
- (b) any kind of conjugal union with more than one person at the same time; or—
- (d) who live, cohabits, or agrees or consent to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union; and—

--is guilty of a misdemeanour, and liable to imprisonment for five years and to a fine of \$500.⁵⁵

And many of the agents on the reserve had suggested to the government or Indian Affairs department that perhaps the aforementioned sections of the criminal code should be more proactively enforced on the reserves. As in the case of J.B.

Belly, where agent Sibbald had made the following recommendations:

I beg to enclose herewith a copy of a letter of the 22nd ultimo from Mr. Agent Sibbald regarding violation of the marriage laws by Indians and to say that sec. 278 Sec B, Chap 46, 63-64 vic. Of the criminal code, I think cover the above cases, and as we are likely to have similar reports from other reserves, I would suggest that all Indians who are legally married and violate the law should be prosecuted after giving them due notice and they persist in living immoral lives on the reserves.⁵⁶

Similar appeals came from the assistant commissioner, as indicated in a memo from the Department of Indian Affairs, “they are now so fully cognizant of the fact that a plural marriage is a criminal act that any further postponement of the prosecutions which they have all along been led to expect will undoubtedly bring them to a point where their regard for the law will be lessened.”⁵⁷ Despite the provisions in the criminal code and the appeals of the agents and the commissioner, the government was still reluctant to take legal action against the Indians for polygamy or bigamy. Its reluctance stemmed from the fact that cases of Indian polygamy were difficult to prove, since the laws were not readily applicable to Indian marriages.

Again the problem of the marriage contract was addressed in a letter from a law clerk to the Department of Indian Affairs: "If it cannot be established that they can be successfully prosecuted, either under sec 275 or sec 278, as amended, mere cohabitation without any form of contract...would not render them guilty of either polygamy or bigamy..."⁵⁸ The case of Bare-Shin-Bone, on file 94, 189 in March 1899 was the first test case in which an Indian was legally sanctioned for polygamy. As agent Wilson reported, "after proof the judge convicted Bears Shine Bone holding that the law applied to Indians as well as white...he would not sentence him that day but allow him out on suspended sentence on the understanding that he gives up his second wife..."⁵⁹ Notwithstanding this case, "there are, however on the files different letters upon the subject of wife desertion, polygamy and bigamous marriage. It appears that there has been some doubts as to whether there could be successful prosecution in the different cases."⁶⁰ Consequently, withholding the payment of annuity money was still the favoured method of legal control used in cases of Indian polygamy.

Various provisions in the Indian Act had made it possible for government agents to control and prevent natives from abandoning their families. According to Leslie and Maguire, "the legislation of 1887 amended the 72nd and 73rd clauses of the 1886 Act, and authorized the superintendent-General to prevent all Indian family deserters from sharing in band properties, annuities or interest moneys and to apply those funds 'towards the support' of the deserted parties."⁶¹ Similar penalties were also listed in the Indian Act of 1869 to prevent Indian women from marrying non-Indians. If she did, her annuity payments would be forfeited, as "clause six stipulated

that if an Indian woman married a non-Indian, she and her offspring would neither be entitled to collect annuities, be members of her band, nor be Indians within the meaning of the Act.”⁶² The implications of such provisions in the Indian Act were clear. First and foremost, a native woman’s identity was directly connected to her husband and if she had chosen to marry outside her band, her right to land endowments would be forfeited with the state being the largest benefactors. The annuity payments were used to control many aspects of the natives’ lives, and most notably the practice of family and/or wife desertion was one of the most immediate areas of concern.

Conclusion

In light of the enormous disparities between the dominant culture and that of natives living on the reserves, one has to wonder about the effectiveness of using the annuity payments as a means of control over the prevalence of polygamy on the reserves. The largest obstacle, however was obviously the lack of accord found within the government. The agents and even the Indian Affairs department had wanted to make fuller use of the Criminal Code and set a legal precedent for the Indians to deter them from taking more than one wife. But the government in contrast, had repeatedly enforced an attitude of restraint and tolerance towards Indians who separated and remarried despite criminal sanctions.

The restraint displayed by the government at least in the early years towards aboriginal people in the matter of bigamy and polygamy was a strategic consideration in the implementation of the national policy to colonize the west through peaceful means. As suggested by Macleod, “the development of the west was shaped in part

by utopianism...the society they envisaged was to be orderly and hierarchical; not a lawless frontier democracy but a place where powerful institutions and a responsible and paternalistic upper class would ensure true liberty and justice.”⁶³ Since the Canadian government rejected or could not afford to achieve this through more oppressive means, like their southern neighbours, they sought to ‘civilize’ the native people through more subtle and incremental means. The congenial relationship between the government and the native people would prove to be temporary until the west was settled and established, with the completed construction of the C.P.R. and stable population and representative government in the west.

The reason for such an attitude could also be attributed to the fact that much of the Criminal Code was made up of criminal laws received from England, without much change or consideration for the complex cultural and ethnic dimensions of the late nineteenth century Canadian situation. As we saw in the previous chapter, the imported marriage laws also did not adequately reflect the socio-economic complexities of Canada in the post-Confederation period, and this was certainly the case for the Indians living on the reserves. Despite the restrictions in the Criminal Code and ambitious aims of the Indian Act, supported by the efforts of the agents, the Department and the missionaries, cases of polygamy/bigamy still persisted at the turn of the century.

Notes:

¹ John Leslie and Ron Maguire, The Historical Development of the Indian Act, (Canada: Treaties and Historical Research Centre, Research Branch Corporate Policy, Indian and Northern Affairs Canada: 1978) 191.

² Leslie and Maguire 51.

³ Leslie and Maguire 74.

⁴ Leslie and Maguire 97.

⁵ David Laird, Indian Commissioner, Letter to Indian Agent, Assiniboine Reserve, 22 January 1904, RG 10, Volume 3559, File 74, National Archives of Canada, Ottawa.

⁶ Joseph Jack, Letter to Hon. David Laird, Indian Commissioner, 28 December 1903, National Archives of Canada, Ottawa.

⁷ Mr. Aspdin, Letter to Indian Commissioner, David Laird, 13 January 1904, National Archives of Canada, Ottawa.

⁸ David Laird, Indian Commissioner, Letter to Indian Agent from the Assiniboine Reserve, 18 December 1903, National Archives of Canada, Ottawa.

⁹ Department of Indian Affairs, 4 March 1894, RG 10, Volume 3881, National Archives of Canada, Ottawa.

¹⁰ David Laird, Indian Commissioner, Letter to the Superintendent General of Indian Affairs, 6 September 1892, National Archives of Canada, Ottawa.

¹¹ Leslie and Maguire 75.

¹² R. C. Macleod, "Canadianizing the West: The North-West Mounted Police as Agents of the National Policy, 1873-1905", Essays on Western History, ed. Lewis H. Thomas, 103.

¹³ Assistant Commissioner, Letter to Indian Agent, Blackfoot Agency, 11 March 1895, National Archives of Canada, Ottawa.

¹⁴ Macleod 104.

¹⁵ Leslie and Maguire 74.

¹⁶ Macleod 103.

¹⁷ Macleod 102.

¹⁸ Indian Agent, Blackfoot Agency, Letter to the Indian Commissioner, 16 March 1895, RG 10, Volume 3881, National Archives of Canada, Ottawa.

¹⁹ Leslie and Maguire 66.

²⁰ David Laird, Indian Commissioner, Letter to Reverend T. McAfee, Clerk of Presbytery, 21 January 1904, RG 10, Volume 3559, File 74, National Archives of Canada, Ottawa.

²¹ David Laird, Indian Commissioner, Letter to Secretary of Department of Indian Affairs, 13 September 1898, National Archives of Canada, Ottawa.

²² Leslie and Maguire 66.

²³ Mr. Aspdin, Indian Agent, Letter to Hon David Laird, Indian Commissioner, 30 December 1903, RG 10, Volume 3559, File 74, National Archives of Canada, Ottawa.

²⁴ Indian Agent, Letter to David Laird, Indian Commissioner, 9 July 1900, National Archives of Canada, Ottawa.

²⁵ Sgd. Miller, Indian Agent, 18 July 1907, RG 10, Volume 3881, National Archives of Canada, Ottawa.

²⁶ Ibid.

²⁷ Sgd. J.A. Wilson, Indian Agent, Letter to David Laird, Indian Commissioner, 20 February 1895, RG 10, Volume 3881, National Archives of Canada, Ottawa.

²⁸ Asst. Commissioner to Indian Agent, Letter to Sgd. A.E. Forget, 28 February 1895, National Archives of Canada, Ottawa.

²⁹ Leslie and Maguire 51.

³⁰ Sgd. Magnus Begg, Indian Agent, Letter to Indian Commissioner, 23 February 1895, RG 10, Volume 3881, National Archives of Canada, Ottawa.

³¹ Nellie Jack, Letter to Hon. David Laird, Indian Commissioner, 25 December 1903, RG 10, Volume 3559, File 74, National Archives of Canada, Ottawa.

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- ³² Joseph Jack, Letter to Hon. David Laird, Indian Commissioner, 28 December 1903, National Archives of Canada, Ottawa.
- ³³ Mr. Aspdin, Indian Agent to Hon. David Laird, Indian Commissioner, 22 December 1903, National Archives of Canada, Ottawa.
- ³⁴ Indian Agent, Letter to David Laird, Indian Commissioner, 9 July 1900, RG 10, Volume 3559, File 74, National Archives of Canada, Ottawa.
- ³⁵ W. Sibbald, Indian Agent, Letter to Hon. David Laird, Indian Commissioner, 22 June 1904, National Archives of Canada, Ottawa.
- ³⁶ Indian Agent, Blood Agency, Letter to the Indian Commissioner, 21 January 1895, RG 10, Volume 3881, National Archives of Canada, Ottawa.
- ³⁷ Leslie and Magurie 51.
- ³⁸ David Laird, Indian Commissioner, Letter to Dep. Of Supt. Genl of Indian Affairs, 25 September 1893, RG 10, Volume 3881, National Archives of Canada, Ottawa.
- ³⁹ Sgd. S. Stewart, Asst Secretary, Letter to David Laird, Indian Commissioner, 31 July 1899, RG 10, Volume 3881, National Archives of Canada, Ottawa.
- ⁴⁰ David Laird, Indian Commissioner, Letter to Indian Agent, File Hills Agency, 20 January 1899, RG 10, Volume 3559, File 74, National Archives of Canada, Ottawa.
- ⁴¹ Indian Agent, Battleford Agency, Letter to Hon. David Laird, Indian Commissioner, 20 June 1903, National Archives of Canada, Ottawa.
- ⁴² W.L. Grant, Indian Agent, Letter to Indian Commissioner, 21 March 1898, National Archives of Canada, Ottawa.
- ⁴³ Office of the Indian Commissioner, Letter to the Dep. Of Supt. Genl of Indian Affairs, 25 September 1893, RG 10, Volume 3881, National Archives of Canada, Ottawa.
- ⁴⁴ Sgd. Frank Pedley, Department of Indian Affairs, Circular to all Indian Superintendent Agents in the Dominion, 18 May 1906, RG 10, Volume 3881, National Archives of Canada, Ottawa.
- ⁴⁵ Deputy Minister of Justice, Letter to Dep. Superintendent General of Indian Affairs, 4 January 1895, National Archives of Canada, Ottawa.
- ⁴⁶ Sgd. Millar, Indian Agent, Letter to Indian Commissioner, 2 August 1907, National Archives of Canada, Ottawa.
- ⁴⁷ J.D. McLean, Acting Deputy Superintendent General of Indian Affairs, Ottawa, Letter to A.W. Vowell, Esq. Indian Superintendent, 19 September 1906, National Archives of Canada, Ottawa.
- ⁴⁸ Assistant Indian Commissioner, Letter to Indian Agent, Hobbema Agency, 5 October 1907, RG 10, Volume 3559, National Archives of Canada, Ottawa.
- ⁴⁹ Indian Commissioner, Letter to Indian Agent, Hobbema Agency, 5 April 1898, National Archives of Canada, Ottawa.
- ⁵⁰ Sgd. Millar, Indian Agent, Letter to Indian Commissioner, 2 August 1907, RG 10, Volume 3881, National Archives of Canada, Ottawa.
- ⁵¹ Sgd. Frank Pedley, Deputy Superintendent General of Indian Affairs, Letter to S.M. Dickinson, Esq. Acting Indian Agent, 1 March 1905, National Archives of Canada, Ottawa.
- ⁵² Indian Commissioner, Letter to Indian Agent, Muscowpetungs Agency, 12 July 1900, RG 10, Volume 3559, File 74, National Archives of Canada, Ottawa.
- ⁵³ J.D. McLean, Acting Deputy Superintendent General of Indian Affairs, Letter to Hon. David Laird, Indian Commissioner, RG 10, Volume 3881, National Archives of Canada, Ottawa.
- ⁵⁴ Mr. Sibbald, Indian Agent, Letter to Indian Commissioner, 22 December 1900, RG 10, Volume 3559, File 74, National Archives of Canada, Ottawa.
- ⁵⁵ 53 Victoria, Chapter 37, Amendment to the Criminal Code in Relation to Polygamy, 8 July 1890, RG 18, Volume 42, National Archives of Canada, Ottawa.
- ⁵⁶ Indian Commissioner, Letter to the Secretary of the Department of Indian Affairs, 5 January 1901, National Archives of Canada, Ottawa.
- ⁵⁷ Assistant Commissioner, Department of Indian Affairs, RG 10, Volume 3881, National Archives of Canada, Ottawa.
- ⁵⁸ Sgd. Reginald Rimmer, Law Clerk, Letter to the Department of Indian Affairs, 9 January 1901, National Archives of Canada, Ottawa.
- ⁵⁹ Jas Wilson, Indian Agent, Letter to Indian Commissioner, 13 March 1899, National Archives of Canada, Ottawa.

⁶⁰ Assistant Indian Commissioner, Letter to the Department of Indian Affairs, 29 January 1906, National Archives of Canada, Ottawa.

⁶¹ Leslie and Maguire 92.

⁶² Leslie and Maguire 54.

⁶³ Macleod 110.

Chapter 5-

Conclusion and Overview of Contemporary Developments

Over the course of history, one can see that there does not seem to be one universal theme underlying the many legislative initiatives and legal controls over marriage and monogamy in England and British North America. What has remained consistent, however, is the dominant moral idea that the family unit is integral to the stability of the state or nation. As Bailey suggests, “many commentators take the view that the family is the ‘cornerstone’ of society, and that it is important to provide a protective legal framework for the family in order to ensure the strength and survival of a nation.”¹ At the core of this conception of the family unit is the monogamous married couple, and since the medieval period, all state and reform efforts to control marital relations have been grounded in this basic principle. By the mid to late nineteenth century the state was urged to intervene yet further into the affairs of the family. But interestingly enough, with the general decentralization of government control over the family and intimate affairs in Canada, we seem to have come full circle in the last half of the twentieth century. Current attitudes and definitions regarding what constitutes a ‘family’ or ‘marriage’ seem to resemble those loose, unregulated relationships of the early medieval period.

Evolving Definitions of Monogamy

The word ‘monogamy’, like the word ‘family’, has exhibited many changes in its definition over the course of history. As we saw in chapter two, in the medieval period a permanent monogamous union was effected upon the mutual consent of a man and a woman. During this period, the ecclesiastical courts governed all matters

pertaining to matrimony until the sixteenth century, when reformers in Europe became increasingly critical of the manner in which marriage records were kept. Because of the private nature of marriage ceremonies, there was no way for the state to differentiate legal marriages from concubinage, and this was a point of contention for the reformers in Europe. Consequently in many European states, marriages gradually became a public affair regulated by the state courts. Similarly in England, under the reign of Henry VIII, a civil ceremony became mandatory in order for a valid monogamous marriage to be affected. Despite the efforts of some reformers to permit divorces, marriages in English law were still binding contracts that were virtually indissoluble until the middle of the nineteenth century and even later in Canada. As divorces became available to ordinary people, monogamy was restricted to the duration of the marriage, as marriages were dissoluble upon the termination of the marriage contract.

With the rise of parliamentary power, and urged by Victorian reformers in the nineteenth century, the state took a significantly greater interest in the marital unit. As Bailey explains, “the assumption was that the state had a vital interest in the legal relationship between man and wife, and that it was the role of the state operating through agreement, to determine the terms governing their relationship or its breakdown.”² As we saw in chapters 3 and 4, in the nineteenth century the word ‘monogamy’ became increasingly entangled with legislative rhetoric, and consequently a vast array of laws were created for the regulation of monogamy in Canada. For instance, the laws of seduction, prohibitions against bigamy and polygamy as well as monetary penalties for desertion were all designed to enhance

the monogamous marital state in Canada at the turn of the century. Despite the fact that divorce was technically available throughout the British Empire with the Divorce Act of 1857, divorces remained quite difficult to obtain in Canada up until the 1960s.

With the exception of the acceptance by some courts of divorce in the maritime colonies of Canada, marriages were legally indissoluble until remarkably recently. With the passage of the Divorce Act of 1968 divorce became readily accessible in all provinces of Canada.³ The relative accessibility of divorce in Canada coincided with the sexual revolution in the 1960s and the general disenchantment of the public with the moral paternalism of the state. Consequently “enormous changes have occurred in the family over the past two centuries, changes so profound that many scholars place the term ‘the family’ in quotation marks to denote the fact that there is not now and never has been one family form.”⁴ And today the word ‘monogamy’ is no longer restricted to the relationship between a married couple, and has instead taken on a new, almost amorphous definition where many different relationships can fall within its scope. As such, the dissolubility of a marriage is no longer a pertinent factor in the definition of monogamy. And the rise in common-law living arrangements seem to suggest that many couples are choosing to sidestep the legal entanglements of marriage altogether.

With the withdrawal of state interest in the family and monogamy in the twentieth century, “freedom of choice has become an even stronger value in the twentieth century, as marriage has evolved from a relationship to be entered into at the instance of one’s family to a matter strictly of individual choice.”⁵ With the increasing prevalence of common-law relationships or marriages, current definitions

of monogamy seem to closely resemble medieval monogamy, where a monogamous union was effected with the private mutual consent of the couple.

However by the end of the twentieth century, it is obvious that “the nuclear breadwinner family is no longer the norm, having been replaced by the dual-income family and joined by a growing number of single-parent families.”⁶ But just as there were and always will be reformers seeking tighter control over socially deviant behaviour in society, there are those that have been seeking reforms since the sixteenth century. Although there must have been discrepancies among the middle and upper class members even in the nineteenth century, their censorial approaches to law making seemed to have been unanimously directed towards the behaviour of the working poor. However, with development of human rights law in the second half of the twentieth century, and in particular the adoption of the Charter of Rights in the Constitution Act, 1982, dissident or minority groups have more recently been given a louder voice in influencing legislative reforms through challenges in the courts. And now in the new millennium, it has become less clear whose interests the marriage laws are protecting. There are many critics who seem to believe that the definition of monogamy and marriage should include same sex couples, common-law couples and greater attention should be paid to step families and the children involved in such familial arrangements. At the same time “concerns over the fate of the family have led some observers to call for greater restrictions on access to divorce and a narrowing of access to the benefits and responsibilities associated with marriage.”⁷ But if history repeats itself, it is obvious that social reformers will always play an

important role in shaping the social and legal definition of monogamy, marriage and the family.

Efforts of Reformers

With every change in the definition of monogamy, there were reformers present to either oppose or champion state sanctioned reforms in the area of monogamy and the family unit. In chapter two, we saw how the efforts of reformers in the late medieval period led to the annexation of ecclesiastical authority in Europe and indirectly the rise of secular and legislative control over the family. In chapter three, we saw that the efforts of middle-class reformers were largely responsible for the large increase in the number of laws that were designed for the protection of the family, and indirectly, monogamy. These influential reformers not only defined monogamy, but also gender roles and rules of conduct for the working poor. A similar agenda is reflected in chapter four, targeting the native peoples. The main theme of chapters three and four was undoubtedly the increasing encroachment of state interest and control in areas that fell within the ‘domestic sphere’ of Canadian Victorian society. And the culmination of reform efforts resulted in the preservation of the ideal nuclear breadwinner family for almost a century.

The Limits of the Law

Despite legal intrusions and the efforts of late nineteenth century reformers to deepen the legal regulation of domestic affairs in Canada, one can also see popular resistance. People have always found a way to circumvent legal prohibitions when it suited them to do so. As Arnup puts it, “in considering the issue of divorce, we must bear in mind that, irrespective of whether judicial or parliamentary divorces were

available, people managed to find ways to leave their marriage.”⁸ In the second chapter, we saw how many North American colonies allowed divorces despite the fact that they were prohibited from doing so by the Church of England and the English Common law. In the third and fourth chapter, there was ample evidence of the propensity for couples in the nineteenth century to simply separate and remarry, thus viewing their separation as a form of self-divorce. As described by Arnup, “we must bear in mind of course that history provides ample evidence that people have left unhappy, violent, or loveless marriages, even when the law appeared to render that impossible.”⁹ However, because of the efforts of the middle-class reformers in the nineteenth century, people who chose to separate in such a manner were heavily penalized, if disapproved of by their social peers, or the legal system.

In the late nineteenth century, rates of divorce had risen dramatically throughout the western world, but interestingly Canada’s divorce policy remained steadfastly stringent, and monogamy and the preservation of traditional ‘family values’ became part of the national policy. In areas of European settlement such as Ontario, bigamy trials were numerous. Yet we have seen that many Canadians living in the province were in fact quite tolerant of bigamy under certain circumstances. Many believed that in cases of adultery and desertion, the victims were justified in remarrying despite legal prohibitions. And it seems that it was undoubtedly more socially acceptable for men to commit adultery than it was for women. This trend was reinforced by the greater mobility of men in the nineteenth century.

In chapter four, we saw that despite the efforts of the missionaries, the agents and the Indian Commissioner to curb polygamy, the native people living on the

reserves in the North West continued the practice of bigamy and polygamy. There the legal system was ill equipped to deal with the complaints of the agents. Moreover, the priority on peaceful economic development of the northwest meant a gradual approach to imposing the dominant European conceptions of marital and family relations. This did not mean long-term toleration of native practices. The government had no intention of respecting native rights and autonomy promised under the 1763 Royal Proclamation and the Indian Act reflected an ambitious strategy to suppress native practices and to 'civilize' them to the dominant culture.

The response to Mormon polygamy in western Canada is one important area warranting further research. As we saw in chapter two, the practice of Mormon polygamy was a source of concern for the reformers in the United States. In fact, the received English criminal law was elaborated in the Criminal Code provision on bigamy. The Law Reform Commission of Canada in fact suggests that the elaboration stemmed from a concern about Mormons: "Section 257 of the criminal code was introduced into [Canadian] law...to prohibit this particular practice at the time of codification at the end of the last century."¹⁰ Again, the suppression of Mormon polygamy warrants further study. The high rate of bigamy prosecutions in Ontario and concern over native practices in the North West may have also influenced the Criminal Code provisions.

Theoretical Implications

One can see that over the course of history, the definition of ‘monogamy’ and legitimate forms of marital relations have exhibited many permutations; its meaning and significance has changed and varies between different people, classes, cultural groups, places and time. Similarly, the legal regulation of divorce, bigamy and polygamy has also varied at different times in history.

As noted in the introduction, natural law advocates believe that ideally our laws should be reflective of a universal set of natural laws. In respect to changes in the definition of monogamy, natural law theorists would likely point out the fact that monogamy has been rigorously preserved in most western societies for over a thousand years, and that this was indicative of the fact that monogamy was dictated by nature and necessary for social cohesion centred around the family. But if this were the case, how can one explain why there are just as many cultures or countries around the world that do not legally enforce or maintain monogamy? And how can natural law theorists account for the lack of accord within western societies over the course of history? It is impossible to ignore the fact that marital relations and relations of the family are inextricably linked with their cultural, political and social environment, and because of this the legal significance of monogamy must be limited by such factors. While states may have used natural law reasoning to justify legal interventions, the historical practices suggest the reality of relativism. The liberalization of divorce laws acknowledges this reality. Legal relativists would argue that ethical and legal boundaries should only be applicable within a limited sphere because human society is constantly evolving and culturally varied and complex.

The liberal position is limited in descriptive analysis however. Critical perspectives need to be drawn from in order to understand the class, patriarchal and cultural influences on the state, the nature of state interventions or 'paternalism', the 'civilizing' missions of the Indian Acts and their relationship to agendas of economic development. We see the introduction of a new dimension of intervention into marital and family relations. Although these ambitions are frustrated in practice they are of interest to historians concerned about moral regulation, citizenship and state formation. While there are common patterns in the attempts to regulate marital and family relations that warrant further investigation, it is also important to recognize differences between regions, between urbanizing European settled areas and the frontier.

From Clandestine Marriages to Common-Law Marriage

But even given the fact that many Canadians had continued the practice of bigamy and polygamy in the late nineteenth century and the laxer divorce policy of the late twentieth century, the monogamous marriage continues to be protected under the auspices of the Criminal Code and public policy. As the Law Reform Commission stated in 1985, "bigamy and polygamy are the principal threats to monogamous marriage...despite the existence of provincial legislation, we feel it is necessary to include a section on bigamy in the Criminal Code, first, because of the nature of the offence, and secondly, to ensure uniformity throughout Canada."¹¹ Even with ongoing concerns over Mormon polygamy in the United States, the Law Reform Commission suggested, "polygamy was a marginal practice and corresponds to no meaningful legal or sociological reality in Canada."¹² However, recent

allegations of abuse in some Mormon communities in Western Canada would suggest that controversy over polygamy is not entirely dead. However, the liberalization of divorce and serial monogamy is now widely tolerated. Given the rising popularity of common-law relationships and declining marriage rates, people seem to be avoiding marriage altogether, thus avoiding potential charges for bigamy or polygamy. As such, one must wonder what new legislative controls will be introduced to control and maintain the monogamous marital institution in the coming years.

Today, marriage and marriage-like relationships have increasingly been recognized as a private union between a couple, entered into freely and dissoluble. As such, it is not surprising that rates of common-law unions have risen in the past fifty years as many have chosen not to validate their private union with a civil ceremony. Similarly in the medieval period, a legally binding union was contracted simply through the private mutual consent of a man and a woman and was completely indistinguishable from clandestine marriages or concubinage. Since then, many social and legal controls have developed for the purposes of controlling and restructuring the marriage ceremony; consequently by the seventeenth century, marriages became recognized as a public affair, and an integral part of civic life. In the nineteenth century, the marital integrity of a couple was perceived as being directly linked with the well being of the nation. However at the end of the twentieth century, there was a marked change in the attitude of Canadians towards marriage and monogamy.

For hundreds of years, divorce, bigamy and polygamy were prohibited because those who have championed the preservation of the nuclear family had

identified them as the principal threats to the monogamous marriage. Common-law unions, instead, has become just as great a threat to the Canadian marital institution in recent years. As Popenoe argues, “cohabitation has skyrocketed 1150% in 40 years. We are seeing a very significant cultural change where romantic love and courtship has been giving way to an altogether new alternative.”¹³ Like the clandestine marriages of the medieval period, common-law relationships have been critiqued because of their private nature, and the inability of the state to distinguish them from formal marriages sanctioned by the state. As Bailey remarks, “the fluidity surrounding marriage-like relationships because of the absence of any formal process of registration not only raises questions as to what the appropriate test for spousal status should be, but also makes it difficult to determine whether parties meet the relevant test for any particular purpose.”¹⁴ Undoubtedly the prevalence of common-law unions has posed a serious challenge to the institution of marriage and the definition of monogamy in the twentieth century, as now monogamy is no longer confined to the boundaries of marriage or any legally binding contract.

Notes:

¹ Martha Bailey, Marriage and Marriage-Like Relationships, Ottawa, Ontario: Law Commission of Canada: 26

² Bailey 19.

³ Katherine Arnup, Close Personal Relationship Between Adults: 100 Years of Marriage in Canada, Ottawa, Canada: Law Commission of Canada, 2001: 25.

⁴ Arnup 6.

⁵ Bailey 15.

⁶ Arnup 29.

⁷ Arnup 6.

⁸ Arnup 16.

⁹ Arnup 25.

¹⁰ Law Reform Commission, Bigamy—Working Paper 42, Ottawa: The Commission, 1985: 22.

¹¹ Law Reform Commission 13-28.

¹² Law Reform Commission 23.

¹³ David Popenoe, “The Problem of Cohabitation—Excerpts from “Promises to Keep”, Online, 20 January 2002.

¹⁴ Bailey 41.

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