# Ontario Divorce As It Once Was

*John deP. Wright*

In 1968 a revolution was wrought upon North American society. In Canada, this revolution included the reform of our divorce law. Canada had been a puritanical society. So important was the subject of divorce considered to be that the constitution assigned it to the federal jurisdiction.[1] Until 1930 the only way a person in Ontario could get a divorce was to arrange to have a special Act of Parliament passed, dissolving the marriage. A Committee of the Senate vetted each Bill, hearing witnesses and passing it to third reading or killing it in Committee. After 1930 the subject was one that was justiciable by the courts. Not any court: only the federally appointed trial division of the Supreme Court of Ontario.

While divorce was a civil matter, in law provable upon a "balance of probabilities", it sometimes seemed that the threshold was proof "beyond a reasonable doubt". Although there were exceptions, Ontario judges tended to take to heart the words in *Evans v. Evans*: [2]

> … yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples who now pass

*John deP. Wright sits on the Ontario Superior Court of Justice.*

1 In contrast to the United States Constitution, Canada's primary written constitution – the Constitution Act, 1867 (formerly the British North America Act, 1867) (30 & 31 Victoria, c. 3) – assigns to the federal parliament all legislative powers not "assigned exclusively to the Legislatures of the Provinces" (§ 91). The federal parliament's jurisdiction was partially enumerated, however, and this enumeration of powers included, among other things, "Marriage and Divorce" (Constitution Act, § 91.26), though "Solemnization of Marriage" was reserved to the provinces (§ 92.12). Inevitably, this gave rise to litigation: In the Matter of a Reference to the Supreme Court of Canada of Certain Questions Concerning Marriage, [1912] A.C. 880 (Judicial Committee of the Privy Council).

2 1 Hag Con 35 at 36-38 (1790).

> through the world with mutual comfort, with attention to their common offspring and to the moral order of society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their mutual offspring, and in a state of the most licentious and unreserved immorality. In this case, as in so many others, the happiness of some individuals must be sacrificed to the greater and more general good.

Some of our judges felt no qualms about sacrificing the happiness of some individuals to the greater and more general good!!!

In the days of which I write, 1930 to 1967, the indissolubility of marriage was reinforced by actions for "Crim Con" – Criminal Conversation – and "Enticement". Crim Con was an action by a husband against his wife's lover for damages arising out of adultery. The essence of this action was the defilement of the wife. Enticement was committed when one harboured a spouse who had fled from the matrimonial home. There were no women's shelters in those days for the simple reason that such institutions were open to suit at the instance of the husband. Enticement was to marriage what the Runaway Slaves Act was to slavery. Its enforcement helped cause the overthrow of the entire system. In theory, Enticement also lay at the suit of the wife, but not in practice. After a number of false starts it was finally decreed that there was no action in Ontario for "Alienation of Affections", a different cause of action.

Decorum in court was quite different from what it is today. Female witnesses, especially a plaintiff, defendant or co-defendant, dressed in a manner appropriate to a suppliant before the Monarch's representative. Dresses. No pants! Hats. At one time: gloves and veil. Some sheriffs followed the custom of having a collection of hats available in a basket by the door for female witnesses who had forgotten their own.

The judges were awe-inspiring. One senior counsel advised me when I was starting out: "in the United States counsel treat the judges like dirt. In Canada judges treat counsel like dirt". Judges were addressed as "My Lord" or "Your Lordship" by gowned counsel. (There were *no* Madam Justices on the Bench in those days.) Counsel joked that none of the judges wanted to become known as "No Man" – as in "Those whom God hath joined together, let no man put asunder".

The first procedural hurdle facing an action for divorce was service. Service had to be effected personally. Both defendant and co-defendant had to be found and handed the papers. If either could not be found then there was no divorce. This requirement of personal service caused particular hardship after the war. Many men just never returned to their wives. Some men found that their wives had disappeared. The spouse of the missing partner was caught in limbo. One answer was an application under the Marriage Act for a declaration of death based upon an absence of seven years. This was always dangerous. It was imperative that the lawyer's reporting letter confirm with the client that while such a declaration might allow her to remarry, if the missing spouse should prove not to be dead in fact, her second marriage was void.

Not only did the Writ and Statement of Claim have to be served personally, they had to be served by a sheriff or his deputy. No one else could be trusted with such an important task. Immediately upon effecting service, the process server had to make a memorandum of service on the back of the original documents so there could be no chance of a mistake as to which documents had been served.

The identity of the persons served had to be established. Two different means of identification were generally required. One of the sadder aspects of the practice was the necessity of having the client bring in a photo of the spouse to be served so that it could be given to the sheriff for use in identifying the person being served. Often the only photo the client

could produce was a wedding photo. The portrait would be torn in half and the portion showing the defendant spouse would be given to the sheriff. The sheriff would have it when he served that spouse. What the feelings of that spouse were when he or she saw a torn portion of their wedding portrait in the hands of the bailiff can only be imagined.

Proof of service could not be effected by simply producing an affidavit from the process server. Oh no! It didn't matter that the rules provided that a judge could order that a particular fact might be proven by affidavit. There had to be an affidavit but the process server also had to be present to testify orally that he (there were no "shes") had effected that service, made the requisite memo on the back of the documents, and had sworn the affidavit. And sworn the affidavit before someone other than the solicitor for the plaintiff, his partner or clerk!

Even if the defendant and co-defendant had been found and service of the Writ and Statement of Claim effected, that was not the end of the need for personal service. If the case was traversed to another sitting of the court, Notice of Trial had to be re-served. It was convenient to have the same person effect service of that notice in order to facilitate proof that service had been effected. In theory, an order might be obtained dispensing with service of Notice of Trial, but not all judges recognized the validity of their Brothers' orders in this regard.

Even after the divorce had been granted the problem of service still existed. The trial judgment, called the Decree Nisi because it was not the final judgment, had to be served upon the defendant personally.

The next hurdle was proof of the validity of the marriage which was sought to be dissolved. It has always struck lay-persons that the law's requirement that the existence of a marriage be proven before it can be dissolved is rather silly. In their eyes, if a marriage can not be proven to exist then it need not be dissolved. Alas, this thinking did not commend itself to the judges of the day.

The validity of the marriage had to be proved. Strictly! Capacity to marry had to be established and a certificate of marriage had to be produced. The only certificate accepted was the Registrar General's certified version. It didn't matter that the clergyman's certificate had the advantage of being first hand evidence. Those who were clever ordered the "long form" certificate. This contained the signatures of the parties and made the certificate easier to prove. It didn't matter that under the Vital Statistics Act, a certified copy of the Registrar General's Certificate was prima facie proof of the contents thereof. The document still had to be proved by oral evidence. And that evidence had to be adduced properly. One could not simply produce the certificate and ask the client "Is this your marriage certificate?" There was a routine about the proof of such documents. The ground work had to be laid first:

> "Are you married?" (The client had to be warned in advance that you would be asking this question otherwise he or she might think you had taken leave of your senses. Of course she was married. Why else would she be seeking a divorce?)
>
> "To whom are you married?"
>
> "When were you married?"
>
> "Where were you married?"
>
> "Have you ever been married before?"
>
> "To the best of your knowledge, information or belief, has your [husband, wife] ever been married before?" (Dangerous – some judges pounced on this: "How do you know?")
>
> "Has your marriage been dissolved by death or any other court proceedings?"
>
> "I show you a document purporting to be certified by the Registrar General of the Province of Ontario: do you recognize this document?"
>
> "What is it?"
>
> "Are the facts stated therein true?"

> "My Lord I tender a certificate from the Registrar General of the Province of Ontario certifying that a marriage was solemnized between AB and CD at XYZ on the … day of … "

The proof of valid marriage in cases involving "D.P.s" – Displaced Persons, Europeans who had fled the refugee camps after the war to seek a new life in Canada – was sometimes next to impossible. Many had lost all such documentation.

If either the plaintiff or defendant had been previously divorced then there was the problem of proving the validity of that divorce. Clients couldn't understand the need to establish the validity of the previous divorce in order to verify the validity of a marriage one was seeking to dissolve. If the previous divorce had been granted in Ontario, the only problem was proving the identity of the parties. Often the present spouse had been a party to the prior proceedings as a co-defendant so that made proof of the other spouse's divorce easier. But if the divorce had been granted by a "foreign" jurisdiction, one had to refresh one's memory on the rules governing the recognition of foreign divorce under private international law.

Although there were other grounds for divorce (cruelty and desertion were not among them), adultery of the defendant was the only practical ground for divorce. How to prove adultery? This occupied the thoughts of counsel. One might consider that conception of a child while the husband was overseas during the war would be sufficient evidence of adultery on the part of the wife. Not necessarily! Those judges inclined to resist granting the divorce relied upon the presumption of legitimacy and the rule that evidence could not be led which would have the effect of bastardizing a child. They also made proof of non-access by the husband very difficult. Army records establishing that the husband had been beyond a submarine-infested ocean under the scrutiny of the military at all material times were not necessarily accepted as evidence that he could not be the father.[3]

The trial was fraught with pitfalls. Defendants could only step up and give their own evidence with the greatest caution. Even then their evidence had to be corroborated by independent evidence.

Over the head of every litigant, every counsel, hung the fear of the "three c's": collusion, connivance and condonation. Any one of these was a bar to a divorce. The first two were possible grounds for charges of perverting the course of justice. Behind each was the threat that action by the Queen's Proctor might be provoked. (The Queen's Proctor was an official appointed by the Attorney General to ensure that the streams of justice ran pure in divorce cases. Given the difficulty of proving adultery, even when adultery existed, this was like asking a Boy Scout to ensure that the effluent from the sewage plant ran pure by picking up debris along the edge of the stream.)

At that time divorce was of concern not just to the litigants. It was of concern to society as well. It was thought to be important that divorce should only be granted in accordance with the law and on proper facts. The eventual decree was one *in rem*, not just *in personam*. When children were involved, even if there was no dispute over their custody or support, a divorce automatically triggered the intervention of the Official Guardian. The OG would commission the local Children's Aid Society to conduct a home study on the care of the children. Some people were deterred from seeking a divorce by the possibility that intervention by

3 E.g., Hare v. Hare [1943] O.W.N. 121, a divorce founded upon military records of non-access. The Court of Appeal sent the case back for a new trial at [1943] O.W.N. 324. Notwithstanding this decision of the C.A., Urquhart, J. subsequently refused to accept army records and he dismissed a later case. See Stafford v. Stafford and Cope [1945] 1 D.L.R. 263.

the CAS might mean the loss of their children to the Children's Shelter. At the very least it introduced a sometimes officious social worker into the homes of the parties.

After the decree had been granted, and the "Decree Nisi" personally served, one had to wait three months in case the defendant wished to challenge the integrity of the divorce. To assist those defendants who wanted to cause trouble, a notice was given to them which outlined their right to object to the manner in which the divorce had been obtained. In case of an objection, "Her Majesty's Proctor" was notified and might intervene. There was plenty of scope for a mischievous litigant to cause grief to one's client.

Given the procedural requirements of personal service, the technicalities of proof of the marriage, the difficulties of proving adultery and the complications that could arise from a complaint about how the divorce had been obtained, a person who wanted a divorce was well advised to solicit a discreet degree of co-operation from the other side.

Evidence of adultery tended to fall into three genres. The first genre was the confession. Where the parties had defied convention by publicly living together they might agree to come to court to admit to their adultery. But their public confession, under oath, was not enough! Their evidence had to be corroborated by independent evidence. Before the late 50's or early 60's it was not common for couples living together in an unwed state to admit to this. There was a great prejudice against unmarried people living together. As late as 1951 a man and a woman were convicted of contributing to the delinquency of juveniles and imprisoned because they were living together in an unmarried state in the same household with the woman's children.[4] Quite different from today.

If the defendants chose not to co-operate they could not be compelled to give admissions of adultery. They could not even be asked such embarrassing questions without their consent. Once on the stand they had to be warned:

> "Under the law of the Province of Ontario I may not ask you, nor are you bound to answer, any question the answer to which may tend to show that you have been guilty of adultery or you may answer some questions but refuse to answer others. Do you understand this right?"
>
> "Are you content that I ask you such questions?"

As counsel for the plaintiff you couldn't just ask the witness "Is it true that you have committed adultery with … ?" No, no! One had to be ever so circumspect, not leading the witness.

To provide the required corroboration of the admissions of the defendants, their neighbours and friends would be called to say that they had visited at the home of the couple and yes, her clothes were in the bedroom closet with his and yes, her stockings were hanging in the bathroom while his shaving tackle was in view.

The second genre of evidence involved the testimony of a private detective. He would testify that he had followed the couple one evening; that they had demonstrated affection towards each other by holding hands and kissing (a shocking display at the time- respectable people did not hold hands in public and they only kissed each other publicly on train station platforms); that he had followed them back to the woman's apartment where he had waited until 11:30 p.m.; that when the man had not left by that time the witness had inserted a matchbook cover in the crack at the top of the door so that if the door were opened the matchbook cover would fall to the floor; that he had gone home; that he had returned at 7:00 the following morning and observed that the matchbook cover was still in place; that at 7:30 a.m. the man had come to the door accompanied by the woman in her night dress; that she had kissed him at the door and that the man had then left.

4 This last conviction was set aside: R. v. Bloomstrand (1952) 15 C.R. 249; 104 C.C.C. 34.

The third genre of evidence involved calling the deskman of a hotel who would testify that the couple had rented a hotel room (the register with signature would be produced). The maid would then testify that when she went into the room the next morning to tidy up (or deliver breakfast), the one bed had been slept in and the clothes of both were in disarray in the room and yes, the people in the photos appended to the documents of service were the people in the room.

Unfortunately, towards the middle of the 1960's, the pressure for divorce got so heavy that some lawyers began to offer "the full service". They supplied the evidence. Even the most liberal judges became uncomfortable with the same lawyers producing the same co-defendants giving the same testimony.[5] The Queen's Proctor was finally called in and an investigation conducted. The hypocrisy of the system was made public and several years later the Divorce Act, 1968 was passed.

Another bar to a divorce besides the "three c's" was the adultery of the plaintiff. Divorce was meant for the outraged spouse. A plaintiff who had also been guilty of a matrimonial offence had to pray the discretion of the court. Unfortunately, it seemed to this young lawyer that a distressing number of women who had discovered their husbands' unfaithfulness were inclined to dash out and have a fling themselves. They were then devastated to learn that they might well have consigned themselves to the married state "until death do you part".

Adultery on the part of the plaintiff was not an absolute bar. The judge could exercise his discretion and grant a divorce notwithstanding this antisocial behaviour by the plaintiff. To assist the judge in deciding whether to exercise his discretion in favour of an adulterous plaintiff, the facts of the plaintiff's adultery and the extenuating circumstances related thereto were discreetly sealed in an envelope entitled "discretion statement" and filed with the court. I always considered that the decent judges didn't read these. Some couldn't wait to read them and the envelope would be ripped open before the trial began.

By 1968 Pierre Elliott Trudeau was Minister of Justice. He was to the social revolution in Canada what Martin Luther had been to the ecclesiastical revolution in Germany. He believed that the state had no business in the bedrooms of the nation. He decriminalized homosexual conduct (in those days "same sex partners" were jailed under the law, not awarded spousal recognition). Although he was a bachelor, he brought in a new Divorce Act, the Divorce Act, 1968. The Canadian law of divorce has never been the same. The social fabric of Canadian society has never been the same. The revolution of 1968 rolled on and its effects are still being felt.

5 Ontario experienced a long-delayed echo of the American experience in this regard. By the late 1800's, lawyers in New York "openly advertised their skill at arranging divorce … Manufactured adultery was a New York specialty. [Some lawyers] hired young secretaries and other enterprising girls for this business. The girls would admit on the witness stand that they knew the plaintiff's husband, then blush, shed a few tears, and leave the rest to the judge." Friedman, A History of American Law 502 (1985).