What's Left of Marital Harmony in the Criminal Courts? The Marital Communications Privilege After the Demise of the Spousal Incompetence Rule

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ABSTRACT

Amendments to the Canada Evidence Act in 2015, abolishing the spousal incompetence rule, have recently thrust the surviving marital communications privilege into the spotlight. Now that the spousal incompetence rule no longer prevents the Crown from calling a spouse as a witness, the privilege is being more frequently asserted in courtrooms across the country. Unfortunately, the approach courts have taken to interpreting the privilege remains fraught with confusion and inconsistency. In focusing solely on a strict interpretation of the literal wording of the statutory provision, which has remained virtually unchanged since the provision was first enacted, the courts have crafted a peculiar form of privilege that simultaneously fails to keep pace with modern developments in privilege law in general, and is ineffective at upholding the underlying rationales on which it supposedly exists.

We argue that in the wake of the recent repeal of the spousal incompetence rule, it is time to reconsider the current approach to marital communications privilege. Courts should re-evaluate whether a literal interpretation of the provision remains appropriate given the objectives underlying the privilege, and in light of broader developments in the law

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that afford greater protection to privileged communications in general. While complex policy questions may remain as to whether the protection of spousal communications is important enough to justify impeding the truth-seeking function of trials, the privilege must be given a sensible, contemporary interpretation that allows it to achieve a meaningful purpose if it is to be retained.

I. INTRODUCTION

In July 2015, the law of evidence underwent a subtle but significant modification. Through a statutory amendment to the *Canada Evidence Act*,[1] the husbands and wives of accused persons began being treated as competent and compellable witnesses for the prosecution <u>regardless of the type of offending being tried</u>.[2] Since spouses have been compellable in civil proceedings across Canada for decades, the change means that marital status has virtually ceased to be a reason to avoid having to give evidence in court.[3]

The death of the spousal incompetence regime is a welcome development that many had called for.[4] The rule was erratic in operation, with a myriad of oddly connected exceptions. When it did preclude the Crown from calling a witness, the rationale for doing so - to advance the

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1 *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*]The amendment occurred through the *Victims Bill of Rights Act*, SC 2015, c 13, s 52. The Act received Royal Assent in April 2015, and came into force 90 days later: *Ibid*, s 60(1).

2 *CEA*, *supra* note 1, s 4(2) now makes it clear that "[n]o person is incompetent, or uncompellable, to testify for the prosecution by reason only that they are married to the accused."

3 The sole exception pertains to regulatory offences, where in four provinces rules rendering spouses either incompetent or uncompellable remain in place for the time being: see *Evidence Act*, RSBC 1996, c 124, s 6; *Evidence Act*, RSNB 1973, c E-11, s 5; *Evidence Act*, RSNL 1990, c E-16, s 4(a); *Evidence Act*, RSNS 1989, c 154, s 48.

4 For a particularly scathing commentary on the rule, see Lee Stuesser, "Abolish Spousal Incompetency" (2007) 47 CR (6th) 49. The rule's deficiencies did not go unnoticed by the judiciary either: see e.g. the comments of Iacobucci J in *R v Salituro*, [1991] 3 SCR 654 at 673, 9 CR (4th) 324: "The grounds which have been used in support of the rule are inconsistent with respect for the freedom of all individuals…The common law rule making a spouse an incompetent witness involves a conflict between the freedom of the individual to choose whether or not to testify and the interests of society in preserving the marriage bond." Iacobucci J and Lamer CJC also critiqued the rule in *R v Hawkins*, [1996] 3 SCR 1043 at para 42, [1996] SCJ No 117 (QL) [*Hawkins*], calling on Parliament to craft an alternative approach.

objective of maintaining "marital harmony" between the spouses - was hotly contested as being a sound reason for precluding access to key evidence. Though the repeal of the rule has ended this controversy, it would be wrong to assume that marital harmony is no longer a consideration in Canadian courtrooms. Despite abolishing the spousal incompetence rule, Parliament made the deliberate, albeit somewhat unusual, decision to retain s. 4(3) of the *Canada Evidence Act*. Section 4(3) provides that:

> No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication to her by her husband during their marriage.[5]

Section 4(3) recognizes the "marital communications" privilege, a protective device ostensibly designed to allow spouses to communicate freely together.[6] Though the privilege has existed for as long as the spousal incompetence rule, it was rarely invoked when spouses could not be called as witnesses for the Crown at all in the vast majority of cases.[7] But with the abolition of the incompetence rule, the marital communications privilege has now been thrust into the spotlight. Unfortunately, it is not clear whether the privilege is ready for “prime time.” A number of recent decisions have grappled with its parameters, raising important questions about the nature of the privilege, how it can be asserted, and what types of evidence it extends to.

As we intend to explore, the current jurisprudence surrounding s. 4(3) simultaneously reveals serious confusion about the purpose behind the marital communications privilege and an approach that is inconsistent with the way evidence law, and particularly its treatment of privilege, has evolved generally over the past century. In short, the rule is difficult to apply and premised on an uncertain principled foundation. Given that marital communications privilege is being more frequently asserted in courtrooms

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[5] *CEA*, *supra* note 1, s 4(3).

[6] See Sidney N Lederman, Alan W Bryant & Michelle K Fuerst: *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis Canada, 2018) at 1068-1069.

[7] Under the former spousal incompetence regime, spouses were not compellable witnesses for the prosecution, unless specific statutory or common-law exceptions applied: for example, if the offence was “against the spouse” or against a child of the spouse, if the accused was charged with certain sexual offences if the complainant or victim was under the age of 14, or if the spouses were irreconcilably separated, they could be called to testify for the Crown. In these situations, the marital communications privilege could potentially still be asserted. For a discussion of the common law exceptions to the spousal incompetence rule, see *R v Schell*, 2004 ABCA 143.

across the country, we argue that it is time for the current approach to be reconsidered. Rather than conforming strictly to the outdated wording of a statutory provision that has never been modernized, courts should strive to interpret the rule in a way that gives meaningful effect to the underlying rationale behind it. In the alternative, Parliament should reform the rule, either making it a true privilege with clear parameters, or abolishing it entirely. The status quo should not be an option, as the current application of s. 4(3) is marked mainly by inconsistent and unprincipled treatment that borders on incoherence. More importantly, the privilege as interpreted completely fails to achieve the supposed purpose for which it exists, as it is ineffective at protecting communications between spouses from being accessed by the state and put before the courts.

The article will begin by outlining the current scope of s. 4(3) and the cases that have considered it, highlighting in particular the approach courts have taken to the nature of the privilege as being "testimonial" only. It then examines in detail some of the problems with the current jurisprudence from a principled perspective. In particular, we explore the discord between the way marital communications privilege is currently treated and contemporary developments in the law of evidence more generally, as well as the ways in which the current approach to the privilege undermines its very rationale for existing. Finally, we will suggest a path forward.

II. THE CURRENT STATE OF SECTION 4(3)

It is helpful to begin an assessment of s. 4(3) by outlining a few basics. The privilege is rife with ambiguities, many of which stem from the fact that the wording of the statutory provision is virtually identical to what it looked like when first enacted in 1893, and it uses the language of the time.[8] Parliament has never attempted to modernize the privilege, owing to

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[8] By virtue of the *Canada Evidence Act, 1893*, SC 1893, c 31, s 4, which read as follows: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, where the person so charged is charged jointly with any other person. <u>Provided, however, that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage</u>." [Emphasis Added]. As spouses were not competent to testify at common law, with few exceptions, the question of privilege was not an issue prior to the enactment of this statutory provision, which made spouses competent witnesses (see *R v Couture*, 2007 SCC 28 at para 41 [*Couture*]).

inadvertence, a general reluctance to legislate in the area of evidence,[9] or perhaps because the necessity of doing so was not readily apparent when the spousal incompetence regime resolved most questions about a spouse giving evidence, and the privilege played only a supplemental role.

Tasked with applying s. 4(3)'s archaic wording in practice, courts have generally applied a literal interpretation of the provision's plain text. Under this interpretation, marital communications privilege is incredibly limited. It is worded as a "testimonial privilege," only permitting a testifying witness to refuse to answer questions posed to him or her about what their husband or wife told them, so long as the communication was made during the period in which they were married.[10] Though the issue has never been definitively settled in Canada, the weight of authority suggests that because of the wording of the statute, which refers to "husband" and "wife," the parties must also be married when the witness is called to testify.[11] The privilege extends to communications only, and anything observed by the testifying witness is not covered by the privilege.[12] In contrast to most other privileges, confidentiality may not even be a core requirement, as the statutory wording does not require it.[13]

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9 See David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at 7. Parliament has a long tradition of neglecting evidence law, leaving much of its substance to the courts to sort out. As such, the common law remains the main source of evidence law in Canada today, with legislation merely supplementing specific areas of the common law.

10 *R v Coffin* (1954), 19 CR 222 (Que QB), [1954] JQ No 16 (a statement made to a witness during period in which they were cohabiting was not protected, even where the witness married the accused prior to trial). See also *R v Couture*, *supra* note 8 at para 41.

11 *Shenton v Tyler*, [1939] 1 Ch 620 (CA). See also *Layden v North American Life Assurance Co* (1970), 74 WWR 266 (Alta SC), [1970] AJ No 105 (QL); *R v Kanester*, [1966] 4 CCC 231 (BC CA) at 240, 48 CR 352, per Maclean JA, dissenting, leave to appeal to SCC granted,[1967] 1 CCC 97 (SCC). Appeal to SCC was allowed on the basis of dissenting reasons but without any discussion. But see *Connolly v Murrell* (1891), 14 PR 187 at 188 (Ont PC), [19811] OJ No 170 (QL), aff'd (1891) 14 PR 270 (Ont CA) (spousal privilege was found to still apply even though the wife was no longer alive- The court commented that "the death of a husband or the wife did not remove the seal from the lips of the survivor; even their divorce did not compel them to break their silence.").

12 *R v Gosselin* (1903), 33 SCR 255, 7 CCC 139. See also *R v Meer*, 2015 ABCA 141 at para 69 [*Meer*].

13 *MacDonald v Bublitz* (1960) 24 DLR (2d) 527 (BC SC), [1960] BCJ No 100 (QL). However, the jurisprudence is not completely clear on this point, given the recent

As this basic overview reveals, marital communications privilege has very little in common with the other class privileges in existence today. First, the privilege belongs to the recipient of the communication only. Every other privilege recognized in Canadian law protects the person who makes the communication, rather than the person who receives it.[14] A client is entitled to speak to a lawyer, and the lawyer cannot waive privilege without the client's consent.[15] Informants speak to police, who are then precluded from turning over the informant's identity without the informant's agreement.[16] This approach is sensible. Given that the objective of all privileges is to encourage socially desirable communications between parties, it makes sense to protect the interests of the person who makes the otherwise incriminating statement. But with marital communications privilege, the privilege belongs exclusively to the testifying spouse. A testifying spouse has the right to waive the privilege if he or she so chooses,[17] and statements can be disclosed without the consent of the spouse who made them.

Second, the privilege does not protect the statement, only the witness. There is a fair amount of recent jurisprudence applying the provision literally, regarding the privilege as being a "testimonial" one only.[18] As a result, even if a witness invokes the privilege to refuse to testify in court, a marital communication acquired by the Crown outside of court can still become admissible evidence. The implications of this are made clearer by considering the following two scenarios in which it commonly arises:

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comments of the Alberta Court of Appeal in *Meer*, *supra* note 12 at para 70: "If the spouses communicate in public, requiring them to repeat those conversations while testifying is not within the purpose of the privilege. Disclosing communications that are already public cannot reasonably affect the marital relationship."

14 Or in some cases, belongs to both parties. Informer privilege, for example, cannot be waived without the consent of both the informant and the Crown.

15 Paciocco & Stuesser, *supra* note 9 at 243.

16 *Ibid* at 302.

17 *Couture*, *supra* note 8 at para 41. See also *Meer*, *supra* note 12 at para 69; *R v Cuthill*, 2016 ABQB 60 at para 12 [*Cuthill*].

18 *Couture*, *supra* note 8 at para 41; *Meer*, *supra* note 12 at para 70; *R v Oland*, 2015 NBQB 247 at para 12 [*Oland*]; *R v Grewal*, 2017 ONSC 4099 at para 52 [*Grewal*]; *R v Nguyen*, 2015 ONCA 278 at para 135 [*Nguyen*]; *R v* Nero, 2016 ONCA 160 at para 186 [*Nero*]; R *v Siniscalchi*, 2010 BCCA 354 at para 53 [*Siniscalchi*]. See also *Rumping v Director of Public* Prosecutions, [1962] 3 All ER 256 (HL) [*Rumping*]; *Lloyd v The Queen*, [1981] 2 SCR 645 at 654-55, [1981] SCJ No 109, per McIntyre J, dissenting [*Lloyd*].

(a) The accused's wife is interviewed by police prior to trial, and she tells them that her husband confessed to the crime. At trial, she is entitled to invoke the privilege to avoid having to testify about what her husband told her, but the Crown could nonetheless attempt to admit her prior statement to police under a hearsay exception.[19]

(b) The police intercept a letter, email or text message from the accused husband to his wife that is incriminating, or a conversation is directly overheard by a third party who can testify to the accused's admission. At trial, the wife wishes to invoke the privilege, but may not even be called as a witness. Regardless, the Crown could attempt to admit the evidence notwithstanding that it qualifies as a marital communication.

Scenario B in particular has been the subject of recent litigation with respect to text messages and recorded phone conversations between spouses that have been obtained later by police.[20] Though defence counsel often argue to have such communications excluded, their efforts tend generally to be unsuccessful. The courts commonly reject this line of argument by applying a strict interpretation of s. 4(3)'s wording, holding that text messages or recordings of phone conversations between spouses are not privileged in and of themselves, and therefore are not inherently protected from admission under s. 4(3).[21] The result is that the privilege is often ineffective at actually preventing conversations between spouses from being used as evidence.

It should also be noted, however, that the jurisprudence is inconsistent with respect to Scenario B, yet another unusual aspect of the privilege. In the context of wiretapped conversations between spouses authorized under

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19 Or in some cases, the evidence might be advanced for a purpose other than truth, rendering the hearsay rule irrelevant.

20 Scenario A has arisen in the case law recently as well, however. In *R v Willier*, 2015 ABCA 185, the accused's wife gave an audiotaped statement to police prior to trial. The statement was admitted through a hearsay exception, as the former spousal incompetency rule prevented the Crown from being able to call her as a witness at trial. While the case dealt with spousal incompetence rather than privilege, there is no meaningful distinction for the purposes of the example.

21 See e.g. *Grewal*, *supra* note 18; *Cuthill*, *supra* note 17; *Oland*, *supra* note 18; *Siniscalchi*, *supra* note 18.

s. 189(6) of the *Criminal Code*,[22] the combined effect of s. 189(6) and s. 4(3) of the *Canada Evidence Act* has resulted in these sorts of records being ruled inadmissible.[23] Section 189(6) reads as follows:

> Any information obtained by an interception that, but for the interception, would have been privileged remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege.

Courts have reasoned that communications between spouses are "information that a person has a right not to reveal,"[24] which is enough for them to fall within the definition of "privileged information" in this provision. As a result, the privilege looks and feels much more like a substantive privilege than a mere testimonial one in this one particular context. Consider, for example, the observations of the Alberta Court of Queen's Bench in *R v Lam*: "[I]n the context of s. 189(6), the s. 4(3) spousal privilege attaches to intercepted communications between spouses. Its recognition does not depend on the spouse claiming it. It exists unless it has been waived or lost."[25] On its face, this type of language is inconsistent with the notion of the privilege being "testimonial" only, though the incongruity is said to be justified on the basis of the wording of s. 189(6).[26]

Finally, although there has been no definitive jurisprudence on the issue, it has on occasion been speculated that the protection applies <u>only</u> to statements received – as opposed to statements made – by the testifying witness. For example, in *Rumping v Director of Public Prosecutions*,[27] Lord Morris suggested that "the enactment would protect a husband or wife from being obliged to disclose a communication made to him or her by the other but would not protect him or her from being obliged to disclose a communication made by him or her to the other."[28] In other words, even if

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22 *Criminal Code*, RSC 1985, c C-46.

23 *R v Jean and Piesinger* (1979), 46 CCC (2d) 176 at 187 (Alta SC(AD)), aff'd [1980] 1 SCR 400 [*Jean and Piesinger*]; *Lloyd*, *supra* note 18 at 650-51; *R v Lam*, 2005 ABQB 33 at para 14 [*Lam*].

24 *Jean and Piesinger*, *supra* note 23

25 *Lam*, *supra* note 23 at para 14.

26 *Siniscalchi*, *supra* note 18 at para 50.

27 *Rumping*, *supra* note 18 at 275. See also *Meer*, *supra* note 12 at para 69: "[t]he privilege…lies in the recipient of the communication, in this case the appellant's wife…she could not be compelled to testify as to anything that her husband…told her in confidence…The appellant, conversely, could be cross-examined on an anything he said to his wife, but not anything she said in reply."

28 *Rumping*, *supra* note 18 at 275.

the Crown calls the accused's wife as a witness and she invokes the privilege, if the accused then testified his own admissions to his wife would not be protected.

To summarize, the privilege currently protects nothing more than a witness' ability to refuse to answer questions in court about a communication made to them by their spouse – and only if they are legally married both at the time of making the statement and at the time of the trial. There is virtually no guaranteed protection for the statement maker that what was said will not be disclosed in court, given that their spouse can waive the privilege if he or she chooses. Further, an accused who makes a statement to his or her spouse may still be questioned at trial about it. In addition, the privilege does not prevent marital communications from being admitted as evidence through any other means, except for a narrow exception in the context of authorized wiretaps. Evidence of a marital communication obtained by a third party through phone recordings, intercepted text messages or letters, an overheard conversation, or a prior out-of-court statement might be admitted through a hearsay exception.

In short, an examination of the current state of marital communications privilege reveals a lack of coherence. In focusing almost exclusively on the strict wording of the provision, archaic and outdated though it may be, courts have interpreted the privilege in a manner that impedes its utility, rendering it functionally ineffective at protecting communications made within the marital relationship. As the next section of this article will explore, there are compelling reasons to re-evaluate this approach.

III. PROBLEMS WITH THE CURRENT APPROACH TO SECTION 4(3)

The major problems with the current approach to s. 4(3) can be broadly classified into two main categories. First, the privilege fails to accord with developments in privilege law generally, and also with an evolution in how the law treats traditional notions of marriage and marital status. Second, the privilege is ineffective at upholding the underlying rationales on which it supposedly exists, excluding evidence so erratically that one is left to wonder what purpose it actually serves.

One of the primary difficulties with the courts' interpretation of s. 4(3) is that it is inconsistent with how the law of privilege has otherwise evolved in Canada with respect to the disclosure of communications to third parties.

The current approach to the provision adopts an incredibly narrow view of the privilege that focuses exclusively on whether the information is being sought in court. This "testimonial" approach to privilege stands in stark contrast to the way Canada's other class privileges are approached today, though it would not have looked odd in 1892, when the section was first enacted. Indeed, at that time it made perfect sense to read marital communications privilege as merely being "testimonial" in nature, because all privileges worked that way at the time.[29] Where a third party somehow accessed information otherwise protected by a privilege, the traditional common law position was that the privilege was lost. Until relatively recently, privileges only protected the source of the information and not the information itself.[30]

Privilege law no longer operates in this manner, however, and today the courts provide much greater protection to privileged communications.[31] For example, since the Supreme Court of Canada's decision in *Descôteaux v Mierzwinski*,[32] courts have held that solicitor-client privilege is more than just a testimonial privilege or a rule of evidence. Rather, it creates a broad substantive right to avoid having to disclose communications made between lawyers and clients, unless specific and narrow exceptions apply. Information that is accessed by a third party almost always remains privileged. As the Alberta Court of Appeal summarized in *Royal Bank v Lee*, "[a]t one time privilege was thought to be a mere rule of evidence, a ground to resist a subpoena, and not a rule of property or other substantive law…[But] that is no longer the law in Canada…older cases saying that privilege is lost when a document is dropped on the street, or when a non-party steals it, seem very doubtful in Canada today."[33]

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29 For an example of a court interpreting section 4(3) by drawing upon the previous approach to loss of solicitor-client privilege when third parties accessed a communication, see *R v Kotapski* (1981), 66 CCC (2d) 78 at 85 (Que SC), [1981] QJ No 398 (QL).

30 Paciocco & Stuesser, *supra* note 9 at 241.

31 *Ibid*.

32 Descôteaux v Mierzwinski, [1982] 1 SCR 860 at 873. See also the more recent Supreme Court decisions of Alberta (Information and Privacy Commissioner) v University of Calgary, 2016 SCC 53 at paras 38-44; Canada (National Revenue) v Thompson, 2016 SCC 21 at para 17; Canada (AG) v Chambre des notaires du Québec, 2016 SCC 20 at para 28.

33 *Royal Bank v* Lee, 3 Alta LR (3d) 187, 1992 ABCA 166 (CanLii) at para 17.

The Supreme Court of Canada's recent approach to litigation privilege offers another example of how courts now view privilege as being more substantive in nature. In *Lizotte v Aviva Insurance Company of Canada*,[34] the Court confirmed that litigation privilege applies not only against opposing parties in litigation, but against third parties as well. The Court recognized that administrative or criminal investigators should be prohibited from accessing documents that fall within the privilege, because otherwise there would be nothing to prevent third parties from subsequently disclosing the documents to the public or the opposing party, and thus the documents could wind up in court notwithstanding the existence of the privilege. The Court quite sensibly pointed out that this type of approach would result in "the very kind of harm that [the] privilege is meant to avoid."[35]

Given the developments that have occurred with respect to other forms of privilege, then, it is not clear why courts should continue to refuse to reconsider the current approach to marital communications privilege as well. Rather than remaining beholden to the literal wording of the statute, there is certainly room for courts to consider applying an approach that reconciles s. 4(3) with modern developments in privilege law generally, recognizing that the wording of s. 4(3) was merely a product of its time. While it may have been unnecessary to carefully scrutinize how the section should be interpreted while the spousal competence rule remained in place, the elimination of the spousal incompetence rule should at least cause courts to reconsider whether a literal interpretation of s. 4(3)'s wording remains appropriate today.

Similarly, the modern approach to privilege warrants reconsidering the notion that marital communications privilege applies only to communications made *to* a testifying witness, as opposed to communications made by the witness, as the statute is ambiguous on this point. With respect to the scope of other privileges, courts now emphasize broad, substantive protection over narrow, technical readings. Consider, for example, the police informant privilege, which - at its most basic level - protects only "the identity of those who give information related to criminal matters in confidence."[36] Although at face value the privilege does not extend to the information that the informant provides, courts have recognized that restricting its scope to the strict boundaries of the

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[34] *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52.

[35] *Ibid* at para 48.

[36] Application to proceed *in camera*, *Re*, 2007 SCC 43 at para 16.

informant's identity would severely undermine the rationales upon which the privilege rests: to protect informants and encourage disclosure of information to police. In *R v Leipert*,[37] the accused argued for a stricter interpretation, attempting to secure information attached to an anonymous tip that did not expressly reveal the informant's identity. The Supreme Court rejected the argument, recognizing that:

> Informer privilege prevents not only disclosure of the name of the informant, but *of any information which might implicitly reveal his or her identity*. Courts have acknowledged that the smallest details may be sufficient to reveal identity. In *R. v. Garofoli*, [1990] 2 SCR 1421, at p. 1460, Sopinka J. suggested that trial judges, when editing a wiretap packet, consider:
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> > …whether the identities of confidential police informants, and consequently their lives and safety, may be compromised, bearing in mind that such disclosure may occur as much by reference to the nature of the information supplied by the confidential source as by the publication of his or her name…[38]

The scope of solicitor-client privilege has been approached in a similar fashion. Although the privilege is technically restricted to communications made or received for the purpose of obtaining legal advice, courts have construed these terms broadly. The rationale for this type of interpretation has been to ensure that privileged communications are not revealed indirectly by the disclosure of other information arising from the lawyer-client relationship, such as a lawyer's bills. The judiciary's approach was summarized well in the British Columbia Court of Appeal's decision of *Wong v Luu*,[39] where the Court noted that:

> The privilege extends to administrative facts tending to reveal the nature or extent of legal assistance sought and received…[The prevailing jurisprudence] restates the importance of ensuring that disclosing factual information…does not give the recipient insight into protected communications he is not entitled to receive.[40]

If the privilege is retained, there is no good reason not to treat the scope of marital communications privilege in a similarly broad fashion. Under the current approach to s. 4(3), the protection for marital communications, presumably deemed to be important enough to justify the existence of the privilege in the first place, can effectively be lost. A more modern, principled approach to the privilege would at least recognize that a witness should not

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37 *R v Leipert*, [1997] 1 SCR 281, [1997] SCJ No 14 (QL).

38 *Ibid* at 293-294 [emphasis added].

39 *Wong v Luu*, 2015 BCCA 159.

40 *Ibid* at paras 39, 41.

be compelled to disclose any communication made between that witness and their spouse which would reveal a protected communication, whether it be by direct or indirect means.[41]

An even more obvious archaism found within s. 4(3) is its failure to accord with modern viewpoints about marriage and marital status. In referring to "husbands" and "wives" as being the only parties to which the privilege applies, the literal text of the provision excludes common-law spouses. A few lower courts have recognized how problematic this approach is, even going so far as to hold that the current wording of s. 4 is unconstitutional. As the Court noted in *R v Masterson*,[42] "the vast changes to the make-up of Canadian families over the last few decades have been recognized in a wide variety of provincial laws... Within many communities, across generations and cultures, the distinction between married and common law unions is no longer made."[43] However, to date this type of reasoning has not been adopted at the appellate level in relation to s. 4(3) specifically.[44] It is somewhat troubling that though the law has evolved in many other ways to recognize the "changing societal values regarding common law partnerships, and the importance of recognizing and protecting relationships that are functionally equivalent to marriage,"[45] s.

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[41] For support of this interpretation, see *Moore v Whyte* (No 2) (1922), 22 SR (NSW) 570 at 583 (CA), where, in interpreting similar legislation in New South Wales, the Court of Appeal in that jurisdiction noted that "the word "communication" is a comprehensive word of wide meaning... To purport to observe the strict meaning of the words used, while so interpreting them as completely to nullify this intention is not permissible in our opinion." Note that the current New South Wales legislation now explicitly refers to the privilege as applying to communications *made between* spouses: See Lederman, Bryant & Fuerst, *supra* note 6 at 1066, n 460. Similar legislation also exists in some other Australian jurisdictions, as noted in Australian Law Reform Commission Report No 26 *Evidence* (Volume 1, Interim Report), [1985] ALRC 26 at 54.

[42] *R v Masterson* (2009), 245 CCC (3d) 400 (Ont SC), [2009] OJ No 2941 (QL) [*Masterson*]. See also *R v Hall*, 2013 ONSC 834 at para 28.

[43] *Masterson*, *supra* note 42 at para 51.

[44] In *Nero*, *supra* note 18, the Ontario Court of Appeal expressly concluded at para 185 that section 4(3) does *not* apply to common-law spouses. Note that in coming to this conclusion, the Court relied on the decision *Nguyen*, *supra* note 18. *Nguyen* dealt with the constitutionality of the now defunct spousal incompetence rule, holding that the provision was *prima facie* discriminatory but justified on the basis of section 1 of the *Charter*. Other appellate courts have come to the opposite conclusion (see e.g. *R v Legge*, 2014 ABCA 213 [*Legge*]), and the issue was a long-running controversy prior to the abolishment of the spousal incompetence rule.

[45] *Legge*, *supra* note 44 at para 38.

4(3) continues to be worded in language that allows courts to exclude any recognition of common-law relationships. Here again, the narrow scope of s. 4(3) is not in keeping with modern developments in the law.[46]

As the above analysis demonstrates, the application of s. 4(3) is problematic, and clashes mightily with modern thought about how privileges should operate, with no strong justification for the divergence. However, even if one were to accept that Parliament deliberately intended for the privilege to operate in an archaic fashion, there is another, even more glaring, difficulty: as interpreted, the privilege is completely ineffective at actually promoting the policy rationales that purportedly justify its existence. For this reason alone, there is a strong argument in favour of revising the status quo.

To the extent that the rule exists to encourage open and candid communications between spouses, the limited interpretation the courts have given to s. 4(3) renders it nearly incapable of doing so. After all, the privilege belongs only to the testifying spouse, who may "if he or she wishes, help or hinder the spouse who is charged, and there is nothing that spouse can do about it."[47] Further, the accused is not protected from having to answer questions about communications made to his or her spouse, and even if the accused doesn't take the stand, evidence of a matrimonial communication might be admitted anyway through a hearsay exception. In short, despite the fact that an accused's spouse might be able to refuse to testify about matrimonial communications, there is a strong possibility that the communications could find their way into court as admissible evidence anyway. How can this approach possibly be effective, then, at encouraging spouses to communicate freely with each other?

Similarly, if the purpose of the privilege is to promote candour between spouses, this goal is also undermined somewhat by the fact that the privilege ceases to exist if the spouses are no longer married at the time of trial. If widows/widowers or divorced persons are not to be protected by the rule, there is less assurance that a communication made in confidence to one's

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[46] It should be noted that a number of provincial jurisdictions have already modernized the language of equivalent provisions to section 4(3) to refer to "spouses" or "adult interdependent partners", rather than "husbands" and "wives". See e.g. *Alberta Evidence Act*, RSA 2000, c A-18, s 8 (spouses or adult interdependent partners); *Evidence Act*, RSBC, c 124, s 8 (spouses); *Evidence Act*, RSNB 1973, E-11, ss 5, 10 (spouses); *Evidence Act*, RSO 1990, c E.23, s 11 (spouses); *The Evidence Act*, SS 2006, c E-11.2, s 7 (spouses), *Evidence Act*, RSNWT 1990, c E-8, s 6 (spouses).

[47] *Jean and Piesinger*, *supra* note 23 at 185.

spouse will not ultimately be divulged sometime in the future, and consequently less support for the assertion that the rule effectively promotes open and honest communication between spouses.

Finally, even if one accepts that another underlying rationale for the privilege is to prevent "the indignity of conscripting an accused's spouse to participate in the accused's own prosecution,"[48] that justification can hardly be said to be supported by the current state of the rule either. With the death of the spousal incompetence regime, there is no doubt that an accused's spouse may now be compelled to participate in the accused's prosecution. Given that the privilege only covers "communications," narrowly construed, the spouse may be forced to testify to what he or she witnessed the accused do, or about any incriminating evidence he or she observed. Further, the spouse is not protected from having to testify about anything he or she said <u>to</u> the accused. On the right facts, any of these situations could make a significant contribution towards the prosecution of the accused. Moreover, if the rule is truly about protecting against the indignity of one spouse being made to assist in the prosecution of the other, why should it matter whether the spouses were married when the communication was originally made, so long as they are married at the time of the trial? Here again, the rule is inconsistent with another of its purported rationales. Surely there is little justification for retaining in its current form a privilege that is functionally ineffective, no matter how one attempts to rationalize the reason for its existence.

IV. THE WAY FORWARD

Having outlined the problematic nature of s. 4(3) in its current form, the obvious question that follows is how these problems should be rectified. There are essentially two options available: either the nature and scope of the privilege should be expanded, in order to modernize it and render it effective at promoting the policy objective of encouraging free communication between spouses, or the privilege should be abolished entirely.

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48 *Hawkins*, *supra* note 4 at para 38. Note that the Court in *Hawkins* was referring to the rationale underlying the now defunct spousal incompetence rule, but some commentators have posited that the same rationale also underpins spousal privilege: See e.g., Lederman, Bryant & Fuerst, *supra* note 6 at 1068-1069.

In *R v Oland*, the New Brunswick Court of Queen's Bench rejected an invitation from defence counsel to expand the current scope of marital communications privilege by interpretation, reasoning that the status quo should not be disturbed as the current legal trend is to give the privilege less prominence.[49] Indeed, it is true that in some other jurisdictions the privilege has been abolished entirely.[50] Nonetheless, the Court in *Oland* was incorrect to suggest that there has been no fundamental change in circumstances that would warrant re-assessing the current approach to marital communications privilege in Canada.[51] The fact that Parliament expressly chose to retain the privilege while abolishing the spousal incompetence rule is some evidence of its attachment to the rule and desire to preserve a measure of the "marital harmony" rationale in the law of evidence. Parliament made a clear policy choice that although all spouses should have to testify in criminal trials, regardless of the type of charge being tried, certain communications between spouses should retain protection. It is difficult to understand the unwillingness of courts to look afresh at this issue in light of the changed circumstances, and consider interpreting aspects of the law in a more principled fashion.

It would certainly not be unprecedented for the courts to focus more clearly on the underlying purpose of the privilege in delineating its boundaries. The Supreme Court of Canada's decision in *R v Couture*[52] provides direct support for this approach. In *Couture*, the Supreme Court considered a situation where the accused's wife had made prior statements to police relaying confessions made to her by the accused. Since the wife was incompetent to testify at trial, the question facing the Court was whether the wife's prior out-of-court statements could nonetheless be admitted under a hearsay exception. In holding that the statements could

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49 *Oland*, *supra* note 18 at para 18.

50 For example, in England the privilege was abolished for criminal matters by s 80(9) of the *Police and Criminal Evidence Act*, 1984, c 33, and for civil matters by s 16(3) of the *Civil Evidence Act (UK)*, 1968, c 64. In Australia, the privilege has been retained to some extent by s 18 of the *Evidence Act 1995*, which gives a spouse, who would otherwise be compellable, the right to object to disclosing a communication with the accused. The court can give effect to the objection if there is a likelihood of harm to the relationship that outweighs the desirability of hearing the evidence, having regard to a number of specified factors such as the nature and gravity of the offence, and the substance and importance of the information that the witness might give.

51 *Oland*, *supra* note 18 at para 17.

52 *Couture*, *supra* note 8.

not be admitted, the majority was concerned that to admit them would undermine the purpose behind the spousal incompetence rule. As Charron J summarized the majority's approach, "[t]he question…is whether, from an objective standpoint, the operation of the principled exception to the hearsay rule in the particular circumstances of the case would be disruptive of marital harmony or give rise to the natural repugnance resulting from one spouse testifying against the other."[53]

One could make the case that the reasoning from *Couture* applies as powerfully to marital communications privilege as it did to the spousal incompetence rule, given that the underlying rationale for both is said to have been the same. Consider once again Scenario A, outlined earlier in this article, where a wife gives a statement to police prior to trial in which she tells them that her husband confessed to the crime. In this scenario, s. 4(3) would permit the wife to refuse to testify at trial. The Crown would then attempt to tender the statement in another fashion, most likely by showing a video recording from the police station. *Couture* should be directly applicable here: allowing the admission of a prior out-of-court statement made by the accused should be precluded, since it would almost certainly undermine the privilege's purpose. In fact, it might even be argued that the rationale for extending protection is stronger for the privilege than it was for spousal incompetence, as Parliament's recent deliberate decision to retain s. 4(3) despite abolishing the spousal incompetence rule is a clear statement that communications between spouses are worthy of protection. Functionally then, the privilege could operate as more than just testimonial in nature through an application of the common law principles arising from *Couture*, at least with respect to Scenario A.

Couture is admittedly less directly applicable factually to Scenario B, where the police intercept a letter, email or text message from the accused husband to his wife that is incriminating, or a conversation is directly overheard by a third party who can testify to the accused's admission. Nonetheless, the broader principle arising from *Couture* – that communications should not be admitted as evidence if to do so would undermine the statutory protection afforded to spousal relationships – could be applied to Scenario B as well. Additionally, some support for a wider interpretation of the marital communications privilege with respect to Scenario B may also be found elsewhere in the case law. Although the

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53 *Ibid* at para 66.

cases have drawn a distinct line between the admission of wiretapped conversations authorized under s. 189(6) of the *Criminal Code* and evidence of spousal communications intercepted by third parties in other ways, the reasoning underlying the distinction is tenuous at best. Section 189(6) speaks of "privileged information"- as McIntyre J pointed out in dissent in *R v Lloyd*, if s. 4(3) is truly a testimonial privilege only then the information itself cannot be said to be privileged, which should make s. 189(6) inapplicable.[54] Nevertheless, the majority in *Lloyd* was willing to apply s. 189(6) to marital communications. Arguably, what the majority was really doing was signaling a willingness to view s. 4(3) as creating more than just a testimonial privilege.[55] It is somewhat illogical to essentially view the provision as creating a substantive privilege in one context (authorized wiretaps) but not in others. Why should the Crown be permitted to tender text messages between spouses that have been obtained by police as admissible evidence, when they are not allowed to do so had the police chosen to wiretap a telephone conversation instead?

Of course, some might be appalled at the idea that highly relevant evidence contained in a text message sent between spouses, perhaps confessing to a crime, would be inadmissible. However, it is not clear why. After all, a text message of the same variety sent to a lawyer would be excluded instantly. As L'Heureux Dubé J noted in *R v Gruenke*,[56] "[c]ourts and legislators have…been prepared to restrict the search for truth by excluding probative, trustworthy and relevant evidence to serve some overriding social concern or judicial policy."[57] Further, as Charron J summarized in *Couture*, "[p]rivilege, unlike other rules of exclusion, is not intended to facilitate truth-finding. The evidence is excluded, not because it lacks probative value but, rather, on policy grounds based on broader social interests."[58] The basic idea of s. 4(3), as with all privileges, is to exclude probative evidence that points to guilt in restricted circumstances. The provision recognizes that the bond between spouses is important enough in

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54 *Lloyd*, *supra* note 18 at 655, McIntyre J, dissenting.

55 Of course, in citing with approval a passage from the dissenting opinion in *Lloyd*, Charron J in *Couture* seems to have expressly disagreed with that assertion (*Couture*, *supra* note 18 at para 41). Nonetheless, it is clear that there is at least some support in the Supreme Court's previous jurisprudence for the notion that section 4(3) is a broader protection than how it is currently being applied.

56 *R v Gruenke*, [1991] 3 SCR 263, [1991] SCJ No 80.

57 *Ibid* at 295.

58 *Couture*, *supra* note 18 at para 62.

society to allow the confession even of one's deepest, darkest, and most incriminating secrets. One can certainly debate the notion that this interest should trump the justice system's need to get at the truth,[59] but it is difficult to contest the fact that excluding evidence of this sort is exactly what s. 4(3) is designed to accomplish.

The question that must ultimately be asked then, as with any privilege, is whether "the benefit derived from protecting the relationship outweighs the detrimental effects of privilege on the search for the truth."[60] As has been noted above, in having made the deliberate decision to retain s. 4(3), a strong argument can be made that Parliament has already answered that question in the affirmative. If this is the case, the privilege should be given a sensible, contemporary interpretation by courts, enabling it to meaningfully protect communications arising from spousal relationships. Alternatively, Parliament should reform the privilege to the extent necessary to allow for the same result. If, on the other hand, the spousal relationship is not considered important enough to justify overriding the truth-finding process of trials, then only logical course of action seems to be to abolish the privilege entirely.[61]

V. CONCLUSION

As the above critique has demonstrated, the current approach to s. 4(3) is in dire need of reform. As presently interpreted, marital communications privilege is difficult to apply, out of step with modern developments in the law of evidence, and generally ineffective at achieving its purported purpose for existence. Although these deficiencies may have previously gone unnoticed, the spotlight is now being shined on them by Parliament's decision to repeal the spousal incompetence rule. With the privilege now being given a "starring role," it is critical to reconsider what the nature and scope of that privilege is, to whom it applies, and how it should operate in practice.

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59 See e.g. Lederman, Bryant & Fuerst, *supra* note 6 at 1069-1070.

60 *A(LL) v B(A)*, [1995] 4 SCR 536 at para 34, [1995] SCJ No 102.

61 Were this to occur, it would eventually be necessary to assess whether the common law privilege could be used to exclude such communications, and in what circumstances. This would be an extremely interesting question. After all, it would be difficult to argue that the communications should be protected - even on a case by case basis - if Parliament were to make the deliberate decision to abolish their special status.

Parliament's intention in deliberately retaining s. 4(3) may well have been to protect the importance of communications between spouses. If this is indeed the case, the courts can and should strongly consider given the privilege a broader interpretation that would permit it to more fully achieve that goal. However, if courts continue to apply the wording of the provision in a literal fashion, without considering how this undermines the rule's underlying rationale, Parliamentary intervention will be necessary. Ultimately, what Parliament might choose to do with the privilege involves a complex public policy question. The key matter to be decided is whether the protection of spousal communications is important enough to justify impeding the truth-seeking function of trials. If so, the statute and case law should reflect this policy choice accordingly. The current half-measured approach is unsatisfactory no matter how one feels about marital communications more generally.