SPOUSAL TESTIMONY IN CRIMINAL CASES IN CANADA

A Report for the Law Commission

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Introduction:

The current legal rules, which apply to spousal testimony, operate to insulate some witnesses and some evidence from admission into the criminal trial process based on the existence of a legal relationship between the witness and an accused person. It is neither novel nor profound to say that the Canadian law dealing with spousal testimony is both anachronistic and unprincipled[1]. It is an anachronism because the original rationale, the prohibition against testimony by persons interested in the litigation, has not existed since the mid-19th century. As well, many common law rulings were influenced by the fact that an accused person was not a competent witness until late in that century. Piecemeal statutory reform since the mid-19th century has produced efforts to improvise a new policy rationale based on the value of preserving marital harmony. Over time, this argument has lost some force with changing attitudes towards domestic relationships.

The rules are unprincipled for a number of reasons. First, they apply only to legally married people. Clearly, there are, within our community, various other forms of intimate relationships beyond the legal marriage of a man and woman who are valued and are worthy of protection from external intrusions. Secondly, while there are statutory exceptions, the list of offences which trigger compellability is incomplete.

The tensions generated by the current regime are obvious. If they are intended to preserve the harmony of domestic relationships, they do so in a way that is incoherent, ineffective and incomplete. Moreover, when the rules apply to render someone incompetent or

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[1] The Supreme Court has used the descriptive words Aarbitrary@ and Aantiquated@: see R. v. Hawkins, (1996), 111 CCC(3d) 129 (SCC) at 146.

uncompellable, the result is likely in exclusion from the trial process of relevant and probative evidence. For these reasons, there seems to be almost universal agreement that the regime needs to be reformed. However, any effort at reform needs to resolve a fundamental question of direction: (a) should the protective cloak be expanded to encompass other relationships; or (b) should it be eliminated or reduced to bring relevant evidence into the trial process.

In this report, I want to examine the current regime and the available directions for reform to identify the relevant principles and implications. The legal rules are a combination of statute and common law which cover three basic issues: competence, compellability, and privilege. In recent years, there have been some refinements made through judicial interpretation and the application of the Charter. However, the judicial role is limited to incremental change[2] and is not capable of crafting wholesale reform. Legislative reform should promote accepted principles in a purposive and internally coherent manner. Accordingly, before discussing the three reform options, I will try to distil the relevant principles and policies so that they can be placed into a framework that will illustrate the advantages and disadvantages of the reform options.

Part I: The Current Law

1. Common Law Background:

(a) The Rule and its rationale:

[2] See the comments of Iacobucci, J., in R. v. Salituro, [1991] 3 SCR 654 at 670 explaining when the court should engage in reforming the common law to conform with Charter values and a changing social reality.

At common law, a spouse was not competent to give evidence for or against his or her spouse in a criminal trial. The origin of the rule can be traced back to the 16th century and was noted by Coke in 1628[3]. The initial rationale was simple. At the time, anyone with an interest in litigation was not competent to testify because of perceived bias. Since spouses were considered, in law, to be a single inseparable entity, the concept of interest answered the issue; neither an accused nor his or her spouse could testify. In England, the exclusion by reason of interest was abolished by the *Evidence Act* of 1843 which provided that no person was to be incompetent by reason of interest[4]. A similar statutory reform was effected in Canada a few years later[5]. With the demise of the interest prohibition, modern cases have relied on the goals of preserving marital harmony and promoting Aconjugal confidences@ as the operating

[3] See the comments of Blair, J.A. in R. v. Salituro (1990), 56 CCC(3d) 350 (Ont.C.A.) at 353-354 that the rule Acan be traced as far back as the sixteenth century, but received its first emphatic expression by Lord Coke in 1628: Co. Litt., 6b.@

[4] Also known as Lord Denman's Act, 6 & 7 Vict., c.85. However, the incompetence of spouses continued until 1984 when s. 80 of the *Police and Criminal Evidence Act* made spouses competent for either the prosecution or the accused, unless the spouses were jointly charged, and compellable by the prosecutor or a co-accused, unless the offence involves an assault or threat to the spouse, or an assault or sexual offence against a person under the age of 16: see the discussion, infra, at pages 26-27.

[5] (1849), 12 Vict., c.70

rationale for preserving the incompetence standard[6]. This has been supplemented by the related concern about the appearance of forcing one spouse to give evidence against another.[7]

[6] See Hawkins, supra, note 1, at 146-147.

[7] See, for example, R. v. Sillars (BCCA) at 286, where Craig, J.A. relies on Wigmore for this secondary rationale. It is also noted in the English Criminal Law Revision Committee's 11th Report, Evidence (General), Cmnd. 4991 (1972) quoted by McLachlin, J.A. in R. v. McGinty, infra, note 14.

The rule applies only to legally married individuals. People who may have been considered to be Acommon law spouses@ because of the nature of their relationship are not covered[8]. In terms of the subject matter of testimony covered by the common law rule, it applied regardless of when the event occurred so long as, at the time of trial, the relevant witness was a spouse of the accused[9]. In other words, a spouse could not give evidence about an event whether it occurred before the marriage or during it. The issue was determined by the status of spouse at the time of trial[10].

[8] See, for example, R. v. Cote (1972), 5 CCC(2d) 49 (Sask.C.A.)

[9] See Pedley v. Wellesley (182), 3 C & P 558; Hoskyn v. Metropolitan Police Commissioner, [1979] AC 474

[10] See R. v. Kobussen (1995), 130 Sask.R. 147 (QB) at 153; also see R. v. Lonsdale (1973), 15 CCC(2d) 201 (Alta.C.A.) per Sinclair, J.A. at 203.

While the common law situation was relatively straightforward, there are two additional points that need to be made. First, with respect to co-accused, the common law was quite clear that the spouse of an accused person could not give evidence on behalf of another person jointly charged. Almost without exception, the authorities, both English and Canadian, support the conclusion that a witness cannot testify for a co-accused in any case where the witness' spouse is also a co-accused[11]. There seems to be only one contradictory authority, the 1844 case of R. v. Bartlett[12], in which a wife was permitted to give evidence that exculpated a person

[11] For English authorities, see R. v. Thompson (1872), 12 Cox C.C. 202 (CCCR), per Bovill, CJ who stated that Awe are all of the opinion that the wife of one of the prisoners stands in the same position as regards the admissibility of her evidence at the trial, as her husband@. However, this decision relied on R. v. Payne (1872), 12 Cox C.C. 118 which held that a co-accused could not give evidence for a person jointly charged since accused persons were incompetent. For a Canadian authority, see R. v. Thompson and Conroy (1870), 2 Hannay 71 per Ritchie, CJ which held that the wife of one prisoner could not give evidence on behalf of the other.

[12] (1844), 1 Cox C.C. 105, per Wightman, J. In another case, R. v. Sills (1840), 1 C. & K. 494, 174 E.R. 908, Tindal, C.J. permitted a wife to give evidence exonerating a co-accused by saying that she brought the stolen property to the co-accused's house. This ruling was made without authority or discussion. An earlier case, R. v. Smith (1826), 1 Moo. C.C. 289, 168 E.R. 1275, in which a wife was ruled incompetent to give alibi evidence for a co-accused was not mentioned. The Smith case was relied upon both by Bramwell, B. in R. v Thompson, supra, note 11, and by Ritchie, C.J. in the New Brunswick decision R. v. Thompson and Conroy, supra, note 11.

jointly charged with her husband. However, the judge who ruled her testimony admissible commented that he did so Awith considerable doubt@.

(b) Exceptions:

The only common-law exception arose when the charge involved the person, life or health of the spouse[13]. While this ensured that a victimized spouse could give evidence for the prosecution if the spouse was willing, it did not by itself answer the issue of compellability. In R. v. McGinty[14], McLachlin, J.A., as she then was, concluded that competence included compellability and added a new policy dimension to the analysis. She observed:

[13] See Lord Audley's Case (1631), 3 State Tr. 401, Hutton 115, 123 E.R. 1140 where a wife was permitted to testify against her husband who was charged as a party to a rape by one of his servants.

[14] (1986), 52 C.R.(3d) 161 (YTCA); application for leave to appeal to the SCC discontinued.

> It emerges clearly from a review of the authorities that policy plays a large part in resolving the question of the compellability of a wife or husband to testify against his or her spouse in a case arising from an act of violence against the witness spouse[15].

After noting the related concerns of Adisturbing marital harmony@ and the Arepugnant@ appearance of forcing one spouse to give evidence against the other, she concluded that policy interests favoured compelling testimony in cases of domestic violence. First, these offences were usually committed in private with no witnesses present. Accordingly, the evidence of the spouse is essential. More importantly, since compellability removes any question of choice, the witness would not be subject to additional violence in an effort to manipulate that choice. She concluded that competence without compellability would more likely Abe productive of family discord than to prevent it@. With respect to the matter of appearance, she observed that Afair-minded persons generally find it abhorrent that persons who commit crimes go unprosecuted@. The Astate's duty to protect the safety of its citizens@, which underlies testimonial competence in cases of violence against a spouse, also dictates that the spouse be compellable.

(c) Divorce, Separation, and R. v. Salituro:

Notwithstanding an English authority directly to the contrary[16], Canadian courts have held that spousal incompetence does not survive divorce. In R. v. Bailey[17], Morden, J.A. said:

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[15] Ibid, at 186.

[16] R. v. Algar,[1954] 1 Q.B. 279, per Ld. Goddard, which relied on an a very old civil precedent, Monroe v. Twisleton (1802), 170 E.R. 250 in which Ld. Alvaney, C.J. ruled that a divorced wife could not be called to prove a contract made during marriage.

[17] (1983), 4 CCC(3d) 21 (Ont. C.A.)

> The modern policy justification for the rule in question is that it supports marital harmony. It is difficult to see how this policy has any sensible application to a situation where the marriage no longer exists. The incompetence should not survive the dissolution of the marriage. A divorced spouse should not be disqualified form testifying concerning events which occurred during marriage[18].

In 1991, in R. v. Salituro[19], the Supreme Court modified the common law rule when faced with spouses who were irreconcilably separated. The Court was concerned to bring the common law in line with modern reality and Charter values. A man was charged with forging his wife's signature on a document. At the time of trial, they were irreconcilably separated. The wife gave evidence for the Crown and the man was convicted. On appeal, it was argued that she, like any other spouse, was not a competent witness for the Crown. The appeal was dismissed on the basis that the common law which made spouses incompetent should be modified to treat irreconcilably separated spouses like divorced ones. In the Supreme Court, Iacobucci, J. discussed the role of the courts in developing the common law in the post-Charter era:

> Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law[20].

[18] Ibid, at 23, relying on R. v. Marchand (1980), 55 CCC(2d) 77 (NSSC. App. Div.)

[19] Supra. note 2.

[20] Ibid, at 670.

After pointing out that courts should confine themselves to Aincremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society@[21], he proceeded to examine the common law rule of spousal incompetence. He concluded that any policy justification based on marital harmony necessarily disappears upon divorce or the irreconcilable separation of spouses. He pointed out that a continuation of incompetence would be contrary to Charter values since it denied choice to the woman in favour of an historical rule that was promulgated at a time when a Awoman's legal personality was incorporated into that of her husband's on marriage...@. Subsequently, the Supreme Court refused to modify the common law in R. v. Hawkins[22] where the accused and the witness had married after she had given evidence against him at the preliminary inquiry. The Supreme Court noted the arguments in favour of new approaches, both to make spouses competent for the Crown but not compellable, or to go farther and make spouses both competent and compellable. However, the majority, concluded:

> While such alternative approaches to the rule of spousal incompetence may serve to promote the autonomy and dignity of an individual spouse, it is our opinion that any significant change to the rule should not be made by the courts, but should rather be left to Parliament[23].

2. The Statutory Framework:

Section 4 of the *Canada Evidence Act* is the modern legislative response to the issue of spousal testimony. It has evolved over time and, as a result, does not reflect a unified or coherent policy approach. It has preserved the common law, as least to the extent that it is not affected by the statute.

Section 4 provides:

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[21] Ibid.

[22] Supra, note 1.

[23] Ibid, at 148.

4. (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

(2) The wife or husband of a person charged with an offence against subsection 50(1) of the Young Offenders Act or with an offence against any of sections 151, 152, 153, 155 or 159, subsection 160(2) or (3), or sections 170 to 173, 179, 212, 215, 218, 271 to 273, 280 to 283, 291 to 294 or 329 of the Criminal Code, or an attempt to commit any such offence, is a competent and compellable witness for the prosecution without the consent of the person charged.

(3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

(4) The wife or husband of a person charged with an offence against any of sections 220, 221, 235, 236, 237, 239, 240, 266, 267, 268 or 269 of the Criminal Code where the complainant or victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged.

(5) Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

(6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

The set of offences included in s.4(2) in respect of which a spouse is both competent and compellable are:

Young Offenders Act:

s.50(1): inducing a young person to breach a term of a disposition, or removing a young person from a place of custody

Criminal Code:

s.151: sexual interference with a person under 14
s.152: invitation to sexual touching to person under 14
s.153: sexual exploitation of a person 14 to 17
s.155: incest

s.159: anal intercourse[24]
s.160(2): compelling bestiality
s.160(3): bestiality in presence of or with person under age of 14
s.170: parent procuring sexual activity of person under 18
s.171: householder permitting sexual activity of person under 18
s.172: corrupting children(adultery, sexual immorality, habitual drunkenness)
s.173: indecent act
s.179: vagrancy
s.212: procuring
s.215: failure to provide necessaries
s.218: abandoning child
s.271-273: sexual assault, with a weapon, and aggravated sexual assault
s.280-283: abduction (person under 16, under 14, against custody order)
s.291-294: bigamy, procuring feigned marriage, polygamy, pretending to marry
s.329: theft by spouse while living apart

The set of offences included in s.4(4) in respect of which a spouse is both competent and compellable when the victim is under 14 years of age are:

s.220: criminal negligence causing death
s.221: criminal negligence causing bodily harm .
s.235: murder
s.236: manslaughter
s.237: infanticide
s.239: attempted murder
s.240: accessory after the fact to murder
s.266: assault
s.267: assault bodily harm
s.268: aggravated assault
s.269: unlawfully causing bodily harm

[24] This offence does not apply to acts in private between a husband and wife or persons over the age of 18. However, it has been found to violate the Charter and has been ruled unconstitutional: see R. v. M.C. (1995), 41 C.R. (4th) 134 (Ont. C.A.); R. v. Roy (1998), 125 CCC(3d) 442 (Que. C.A.)

While concerns about the safety of children and the sexual integrity of both children and adults lie behind most of the inclusions, this cannot be considered a fully operative and effective rationale. Most, but not all, of the offences included in s. 4(2) are sexual and involve young people and children. Other offences in that group are related to domestic relations within a family or couple. Section 4(4) contains offences of violence and covers much of the subset that can be committed against a young person under 14. However, missing from either subsection are: s.264 (criminal harassment); s.264.2 (uttering a death threat); s.279 (kidnapping); s.343 (robbery); s.346 (extortion)[25]. On the other hand, the inclusion of an offence like vagrancy in s.4(2) is difficult to explain, although it may have been included because it can arise in connection with a past conviction for a sexual offence when the person is found Aloitering in or near a school ground, playground, public park or bathing area@[26].

[25] The Supreme Court has held that extortion can extend to demanding sexual favours: see R. v. Davis, [1999] 3 SCR 759.

[26] See s.179(1)(b) which may have serious Aoverbreadth@ problems.

There are still some questions about the scope of s.4(1). First, does Acompetent for the defence@ include compellability? While the early case of R. v. Gosselin, discussed below at pages 14-15, suggests that it does, that decision applied to a differently worded provision that did not contain the Afor the defence@ limitation. While one might have sympathy for a broad judicial interpretation since the provision at the time seemed to be a broad and radically new departure from the common law prohibition, the subsequent amendment limiting it to testimony Afor the defence@ blunts this argument substantially. More recently, the Supreme Court dealt with s.4(1) in R. v. Amway Corp.[27], a case which raised the issue of whether a corporation could be compelled to produce an officer for discovery in a Federal Court action for forfeiture. One of the arguments included the general question of the effect of s.4(1) on the common law. Sopinka, J. for the court, said:

> It is apparent from the words of the section that it addresses only one of the two components of the rights and obligations of a witness: that is, competence. It does not purport to deal with compellability. At common law an accused was neither competent nor compellable as a witness. By virtue of s. 4(1) of the Canada Evidence Act, first introduced in 1893 and amended by S.C. 1906, c. 10, s. 1, the common law was altered to make an accused a competent witness for the defence. These amendments left intact the common law with respect to the non-compellability of an accused person at the instance of the Crown[28].

This would appear to be the end of any attempt to rely on Gosselin to say that competence includes compellability for a s.4 purpose.

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[27] [1989] 1 SCR 20

[28] Ibid, at 29.

Another issue is the applicability of s.4 to cases involving co-accused. The British Columbia Court of Appeal has confirmed that s.4(1) does not assist the Crown in attempting to use a spouse's evidence against a person jointly charged with the witness' spouse[29]. The harder question is whether s.4(1) affects the ability of a co-accused to use the evidence of a co-accused's spouse. At common law, the wife of a co-accused could not be called to give evidence by a person jointly charged with the witness' spouse[30]. However, an interpretation of Afor the defence@ in s.4(1) based on the Amway decision would suggest that a spouse could be competent as a witness for a co-accused but never compellable, exactly the situation recommended by the *Uniform Evidence Act* which was never enacted[31]. Thus, whether a spouse testifies for a co-accused is the choice of the spouse witness. This is different from the situation in the United Kingdom where a spouse witness is competent for all offences, but also compellable by a co-accused for the same specified offences that would make the witness compellable for the prosecution[32]. In Canada, regardless of the offence, a co-accused cannot compel exculpatory evidence from a witness who is a spouse of a person jointly charged if the witness chooses not to volunteer. Given recent attempts by the Supreme Court to entrench an Ainnocence at stake@ exemption for informer privilege[33]and even for solicitor-client privilege[34], discussed below, the non-compellability of the spouse of a co-accused raises interesting questions.

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[29] See R. .v. Singh and Amar, [1970] 1 CCC 299 (BCCA) per Bull, J.A. for the court at 302 to 303.

[30] See the discussion, supra, at pages 4-5.

[31] See s.92(2), *Uniform Evidence Act*, Appendix 4 to Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (Carswell, Toronto: 1982) and the discussion at 250-262.

[32] See Cross and Tapper on Evidence, 9th Ed. (Butterworths, London: 1999) at 222-223; also see the discussion supra, at pages 26-27.

[33] R. v. Leipert, [1997] 1 SCR 281, at 295-296.

[34] R. v. McClure (2001), 151 CCC(3d) 321 (SCC) at 334-336.

3. Summary of the Statutory and Common Law Rules:

This collection of statutory and common-law rules produces the following set of consequences:

- preserves the general common law position that spouses are not competent or compellable witnesses for the prosecution, except for the subset of offences recognized at common law [where the spouse's safety or person has been attacked].

- the protection only applies to legally married persons

- married persons who are divorced or irreconcilably separated are not covered by s.4 or the common law rules of incompetence

- spouses are competent to give evidence for the defence [see s.4(1)]

- spouses are competent and compellable for the prosecution when the accused is charged with certain stipulated offences [see the s.4(2) list above] or certain stipulated offences and the victim was under the age of 14 years [see the s.4(4) list]

-spouses who are competent to give evidence cannot be compelled to disclose communications with their spouse which took place during the marriage [see s.4(3)]

-neither the judge nor the prosecutor can make a comment to the jury about the failure of a spouse to testify [see s.4(6)]

4. Marital Communication Privilege:

(a) History and Rationale:

Because, at common law, the basic position was incompetence, there was no consideration of any privilege that might apply to marital communications. This development occurred by statute in the 19th century after legislation made spouses competent witnesses, to some extent, in criminal cases.

In England, the provision was enacted in 1853 and provided:

> No husband is compellable to disclose any communication made to him by his wife during the marriage, and no wife is compellable to disclose any communication made to her by her husband during the marriage@[35].

[35] See s.3, 1853 *Evidence Amendment Act*; s. 1(d), *Criminal Evidence Act*, 1898. In England, this privilege did not survive death or divorce: Shenton v. Tyler, [1939] Ch. 620. Nor did it apply to communications before the marriage.

In the 1950 edition of Phipson's Manual of Evidence, the legislative objective was described as the Aneed of securing absolute confidence during marriage@[36]. Rupert Cross, in early editions of his text, offered the following discussion of the rationale:

[36] R. Burrows, Phipson's Manual of Evidence, 7th Ed. (Sweet & Maxwell, London: 1950) at 80-81.

> So far as the rationale of the privilege is concerned, it is presumably based on the desirability of promoting the utmost candour and confidence in matrimonial relations, and the undesirability of shocking public opinion by compelling one spouse to disclose confidential statements made by the other although he or she might be most unwilling to do so. Perhaps it is open to question whether there is any real substance in the first point because it is hard to believe that married couples would feel that they were under any constraint in their exchanges of confidences by the reflection that theses might be divulged in Court; but, if the point with regard to the promotion of candour is a valid one, there would be something to be said for a broad construction of the statute so as to protect widows, widowers and divorced persons from the necessity of disclosing communications made to them during their respective marriages. It is doubtful whether public opinion demands such an extension, and it is also doubtful whether it would be practicable to confine the privilege to confidential communications in accordance with suggestions which are sometimes made for improving this branch of the law. On the whole it seems wisest to retain the privilege in its present attenuated form or else to abolish it altogether[37].

A form of privilege was contained in the 1893 *Canada Evidence Act*, enacted contemporaneously with the first Criminal Code. However, it was embedded in the section dealing with competence which did not limit it to evidence for the defence:

> s.4. Accused husband and wife competent-----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, whether the person so charged is charged solely or jointly with any other person. 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[38].

Note the different use of language: compellable in the English statute versus competent in the Canadian. This was subsequently changed to the current use of Acompellable@.

(b) <u>Practical Elements of the Privilege:</u>

[37] R. Cross, Evidence (Butterworth & Co., London: 1958) at 237.

[38] 56 Vict., c.31

(i) Not applicable to observations: The Canadian provision, in its original 1893 form, was considered by the Supreme Court in 1903 in R. v. Gosselin[39]. The wife had been called by the Crown to give evidence as to observations of bloodstains on the accused's Adrawers@. The Supreme Court observed that the legislation did not have the Afor the defence@ limitation found in the 1898 English statute and that its Aplain and unambiguous@ meaning was to make spouses competent generally subject only to the statutory privilege. Davies,J., for the majority, held that to Ainterpolate@ the words Afor the defence@ into the provision would do Aviolence to the language of the section@[40]. Accordingly, the competence of spouses was Aunrestricted@. He went on to hold that the extension of competence included compellability. This left only the issue of privilege in a marital communication. Davies, J. distinguished between observations and communications:

> Nor do I think that the evidence given by the prisoner's wife came in any way within the statute, which retains her incompetence to disclose any communication made to her by her husband during marriage. The facts to which she testified were independent facts gained by her own observation and knowledge and not from any communication from her husband. She saw the blood on the clothes after her husband had left the house to deliver him up. She washed them after that in order to obliterate the blood stains as the solicitor told her to do, and she contradicted her husband as to her being unwell at the time he swore he had carnal connection with her[41].

Shortly after this decision, s.4 was amended to include the Afor the defence@ limitation[42].

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[39] R. v .Gosselin (1903), 33 SCR 255

[40] Ibid, at 273.

[41] Ibid, at 277-78.

[42] See S.C. 1906, c.10.

(ii) Can be waived by the witness: Canadian law makes it clear that the privilege belongs to the witness, and not the accused[43]. Consequently, it is the listener and not the person who made a marital communication who has control over whether it can be divulged. Many have questioned the reason for giving the privilege to the listener and not the communicator[44]. If the spouse is a competent witness who agrees to testify, or a compellable witness who is subpoenaed, the witness decides what will be divulged and what will be protected[45]. There is a conflicting authority from the Quebec Court of Appeal which has held that a witness who is compellable by the Crown cannot rely on privilege to resist answering a relevant question[46]. This pragmatic decision has received some support[47].

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[43] See Rumping v. D.P.P., [1962] 3 All E.R. 256 (H.L.); also see R. v. Zylstra (1995), 41 C.R.(4th) 130 (Ont. C.A.) at 133.

[44] Rumping, ibid, per Ld. Reid, at 259.

[45] See R. v. Jean and Piesinger (1979), 46 C.C.C.(2d) 176 (Alta. C.A.); affirmed by S.C.C. at (1980), 55 C.C.C.(2d0 193 (SCC).

[46] See R. v. St. Jean (1976), 32 CCC(2d) 438 (Que C.A.)

[47] See Mailloux (1980), 55 CCC(2d) 193 (Ont. C.A.) where Donnelly, J. relied on it when deciding not to quash a committal after a preliminary inquiry where the justice had employed the St. Jean decision to compel disclosure. On appeal, Martin, J.A. decided the matter on the basis that the justice's decision on admissibility was insulated from review whether right or wrong. He expressly did not decide the marital communication point but only pointed out the countervailing authority.

(iii) Divorce or death ends privilege: Some Canadian cases, relying on R. v. Kanester[48], suggest that s.4(3) does not survive divorce or death. This is consistent with the use of the specific words Ahusband@ and Awife@ in s.4(3) which seems to exclude widow, widower, and former spouse. However, there may still be some room for controversy[49]. In R. v. Bailey[50], Morden, J.A for a panel that included Martin, J.A. said that he had read the Supreme Court facta in Kanester and that the point had not been argued in that Court. As a result, he observed that it was not yet settled.

(iv) Intercepted communications: Letters written by one spouse to another which are opened prior to delivery and subsequently given to the police have been held to be admissible without regard to the privilege[51]. However, wiretaps receive different treatment. In R. v. Lloyd[52], the Supreme Court considered whether the issue of conversations between spouses which were the subject of a wiretap were privileged under s.4(3). This would then trigger the protection in

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[48] See R. v. Kanester, [1966] 4 CCC231 (BCCA) per MacLean,J.A. in dissent; Crown upheld allowed on basis of dissenting reasons, per Taschereau, CJC, upheld, [1967] 1 CCC 97n (without any discussion). See the obiter comments of Cooper, J.A. and Hart, J.A in R. v. Marchand (1980), 55 CCC(2d) 77 (NSSC, App. Div.).

[49] See the discussion in Sopinka, Lederman and Bryant, The Law of Evidence in Canada (2nd Ed.) At 774-775.

[50] Supra, note 17, per Morden, J.A. at 24.

[51] See Rumping, supra, note 41; also see R. v. Armstrong (1970), 1 CCC(2d) 106 (NSCA).

[52] [1981] 2 SCR 645

what was then s.178.16(5) of the Criminal Code [now see 189(6)] that provided that privileged information which is intercepted Aremains privileged and inadmissible as evidence...@. The British Columbia Court of Appeal had held that s.4(3) did not apply since it was Aa privilege attaching to a witness, not to the information@. For the majority, Laskin, CJC rejected this Atoo narrow view@ of the interaction between s.4(3) and the wiretap provisions. Accordingly, the intercepted spousal conversations were not admissible.

5. Related Recent Developments in the Canadian Law of Evidence:

(a) Confidentiality: In the early 1990's, the Supreme Court expressed concerns about class privileges and favoured a case-by case analysis. The issue arose in the context of a statement made by a parishioner to her pastor[53]. In rejecting a Apriest-penitent@ class privilege, the court accepted that some confidential communications should be protected from being divulged in judicial proceedings if they met the following test (known as the Wigmore four-fold test[54]):

> 1. The communication must originate in a confidence that it will not be disclosed;
>
> 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
>
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered;
>
> 4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

In Gruenke, the court held that the statement failed the first element, the need to originate in confidence. In a subsequent case, A.(M.) v. Ryan[55], the Supreme Court dealt with the unusual question of whether a psychiatrist's notes were privileged and consequently protected from

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[53] See R. v. Gruenke [1991] 3 SCR 263

[54] See 8 Wigmore, Evidence (McNaughton Rev.) at para. 2285, previously applied by the Supreme Court in a university employment disciplinary context in Slavutych v. Baker [1976] 1 SCR 254.

[55] [1997] 1 SCR 157

disclosure in a civil suit against the psychiatrist brought by a former patient. The plaintiff patient was objecting to disclosure, attempting to maintain confidentiality in the statements she made to her former therapist. For the majority, McLachlin, J., as she then was, made the following observations about privilege and changes in social reality:

> The common law principles underlying the recognition of privilege from disclosure are simply stated. They proceed from the fundamental proposition that everyone owes a general duty to give evidence relevant to the matter before the court, so that the truth may be ascertained. To this fundamental duty, the law permits certain exceptions, known as privileges, where it can be shown that they are required by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth": Trammel v. United States, 445 U.S. 40 (1980), at p. 50.
>
> While the circumstances giving rise to a privilege were once thought to be fixed by categories defined in previous centuries - categories that do not include communications between a psychiatrist and her patient - it is now accepted that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate: Slavutych v. Baker, [1976] 1 S.C.R. 254; R. v. Gruenke, [1991] 3 S.C.R. 263, at p. 286.
>
> It follows that the law of privilege may evolve to reflect the social and legal realities of our time. One such reality is the law's increasing concern with the wrongs perpetrated by sexual abuse and the serious effect such abuse has on the health and productivity of the many members of our society it victimizes. Another modern reality is the extension of medical assistance from treatment of its physical effects to treatment of its mental and emotional aftermath through techniques such as psychiatric counselling. Yet another development of recent vintage which may be considered in connection with new claims for privilege is the Canadian Charter of Rights and Freedoms, adopted in 1982.
>
> I should pause here to note that in looking to the Charter, it is important to bear in mind the distinction drawn by this Court between actually applying the Charter to the common law, on the one hand, and ensuring that the common law reflects Charter values, on the other...[56].

She concluded that it would be Aopen to a judge to conclude that psychiatrist-patient records are privileged in appropriate circumstances@[57]. She then applied the Gruenke analysis noting that most cases would satisfy the first three elements leaving the decision to the balancing

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[56] Ibid, at 170-171.

[57] Ibid, at 179.

required by the fourth part. Ultimately, the majority upheld the order permitting restricted disclosure of certain documents to the defendants' lawyers and experts.

(b) Hearsay: A major change in evidence law occurred in 1990 when the Supreme Court recognized that hearsay evidence could be admitted even if it did not qualify as one of the recognized exceptions so long as it was reliable and necessary[58]. This expansion of admissible evidence is relevant to the issue of competence and spousal testimony. In a subsequent case, R. v. K.G.B.[59], the Supreme Court was faced with the situation of witnesses who recanted in the stand from previous statements saying that they had lied when they originally incriminated the accused. Building on the new Areliability and necessity@ discretionary category for admissibility, the Court ruled that previous inconsistent statements could be adduced for their truth in these circumstances if there were sufficient guarantees of trustworthiness to warrant a conclusion of Athreshold@[60] reliability. Lamer, CJC for the majority pointed out that some of the traditional hearsay deficiencies (not present, no oath and no cross-examination) could be addressed by techniques like videotaping, and having statements sworn. Moreover, the recanting witness is in the stand and can be cross-examined. Subsequent to this decision, what are known as AK.G.B. applications@ are common in cases of domestic violence where a spouse is not forthcoming in the witness stand. Of course, in such cases, the spouse is a competent and compellable witness because of the common law exception. Even if a witness is not compellable, however, a previous out of court statement can be admitted if the Areliability

[58] See R. v. Khan,[1990] 2 SCR 531; R. v. Smith,[1992] 2 SCR 915.

[59] [1993] 1 SCR 740.

[60] This phrase was not used in K.G.B. but has been superimposed on the analysis by subsequent cases.

and necessity@ test is met. In R. v .Hawkins[61], the Supreme Court held that spousal incompetence satisfied the necessity criterion. What this means is that whether spouses are compellable or not, the prospect of spousal evidence, subject to any marital privilege, exists so long as the police have interrogated the spouse and recorded the statement in a way that reflects Acircumstantial guarantees of trustworthiness@. In some Canadian jurisdictions, this new line of cases combined with a desire to effectively prosecute domestic violence cases, has led to improved police interrogation practises in an effort to enhance the prospect of future admissibility. What is needed are substitutes for the traditional hearsay deficiencies (absence, no oath, no cross-examination) which can supply the circumstantial guarantees of trustworthiness[62]. While an expansion of the situations in which persons are compellable may produce problems of recantation or balking, the new line of cases provide mechanisms for responding by encouraging better interrogation practises.

[61] Supra, note 1.

[62] See, for example, the decision of MacDonnell, PCJ in R. v. Mohamed, [1997] O.J. No. 1287 (QL) where the combination of audiotaping and making plain the importance of telling the truth about a serious matter were sufficient for admissibility of a previous statement when the spouse later recanted.

(c) Innocence at Stake Exception: Two recent Supreme Court decisions have shed new light on the ability of an accused person to pursue exonerating evidence even in the face of recognized privilege. In R. v. Leipert[63], the Supreme Court considered whether an accused is entitled to the details of a ACrime Stoppers@ tip as part of the right to make full answer and defence. The Crown refused to disclose the information standing behind the common law of informer privilege. The trial judge edited the tip sheet to remove the informer's name and ordered disclosure of the rest of the sheet. Instead, the Crown ended its case and the accused was acquitted. The Court of Appeal reversed, ordering a new trial. In the Supreme Court, McLachlin, J., as she then as, for the majority, re-asserted the fundamental importance of informer privilege to criminal investigations. Unlike other forms of privilege like Crown privilege or confidentiality privilege, once found to exist there is no balancing against other interests. It does not depend on the judge's discretion. The privilege belongs to the Crown but it cannot be waived, either expressly or impliedly, without the informer's consent. It is subject to only one exception, known as Ainnocence at stake@ which arises where there is a Abasis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused@. Speculative usefulness to the defence is insufficient. Ultimately, the Court concluded that the exception did not apply and disclosure should not have been ordered.

In discussing the Charter principle of fundamental justice that the innocent must not be convicted, McLachlin, J. said:

> To the extent that rules and privileges stand in the way of an innocent person establishing his or her innocence, they must yield to the Charter guarantee of a fair trial. The common law rule of informer privilege, however, does not offend this principle. From its earliest days, the rule has affirmed the priority of the policy of the law Athat an

[63] Supra, note 33. The Leipert decision represents a consolidation of a number of earlier rulings on the issue including Bisaillon v. Keable, [1983] 2 SCR 60 and R. v. Scott, [1990] 3 SCR 979.

innocent man is not to be condemned when his innocence can be proved@ by permitting an exception to the privilege where innocence is at stake..[64].

[64] Ibid, at 297.

Obviously, this general rationale has implications for any kind of privilege or protection. This was confirmed in R. v. McClure[65] when the Supreme Court extended the Ainnocence at stake@ exception to solicitor-client communications, although with a more stringent standard. To pierce the privilege, an accused must show that the information being sought is not available from any other source and that Ahe is unable otherwise to raise a reasonable doubt as to his guilt@[66]. The exercise cannot be speculative. First, the trial judge must determine if there is privileged material which Acould@ raise a reasonable doubt. If so, the judge examines it to determine if the material will Alikely raise a reasonable doubt@. The material must go directly to an element of the offence and cannot simply provide an Aancillary attack@ as, for example, material that could be used to impugn the credibility of a Crown witness. Only by meeting this standard will a judge order production that infringes solicitor-client privilege.

The analogy to the current situation of a spouse witness and a co-accused is clear. Relying on the Ainnocence at stake@ rationale, a co-accused would subpoena the spouse who would object to compellability under s.4(1) or might even raise spousal communication privilege under 4(3). Relying on Leipert and McClure, the co-accused would have a strong case for compelling testimony if it could be shown that the spouse had information that would likely show the innocence of the co-accused. If the trial judge ordered the spouse to testify for the co-accused, the interesting question is whether in cross-examination by the Crown questions could be asked about the spouse accused. Certainly, s.4(3) could be raised if a communication during marriage was in issue. However, what if the object of the question was a past observation of a relevant event? This would not be covered by s.4(3). Defence counsel could object arguing that the testimony could endanger marital harmony and that it is unseemly to force a spouse to give

[65] Supra, note 34.

[66] Ibid, at 335. The Court added that the exception will only apply in Athe most unusual cases@. There must be a Agenuine risk of a wrongful conviction@.

incriminatory evidence. One can only speculate as to how a judge would rule[67].

Part II: Options for Reform:

1. Other Jurisdictions:

[67] Generally, although a witness is called for one purpose, questions applicable to other relevant purposes can be put so long as they do not violate a privilege. An interesting example of multiple purposes arises in cases where co-accused are tried separately and one is compelled to give evidence against another. The principle against self-incrimination kicks in to protect the witness from subsequent use including from derivative evidence: see R. v. S.(R.J., [1995] 1 SCR 451. If the paramount purpose in compelling the original testimony was not for the purpose of that proceeding but was to obtain self-incriminatory evidence against the witness, then it cannot be used subsequently in the trial of the witness, nor can any evidence obtained as a result of the compelled testimony: see R. v. Z. (L.) (2001), 54 O.R.(3d) 97 (Ont .C.A.).

(a) United States: In federal criminal cases in the United States, spouses are competent to testify but are not compellable. This is often described as a testimonial privilege. In other words, the witness can object to being called by the prosecution but the accused cannot[68]. It applies only to couples who are legally married[69]. Preserving marital harmony is usually cited as the policy justification. Conversely, under some state laws, spouses are treated the same as any other witness[70]. This is consistent with Rule 601 of the Federal Rules of Evidence which says that Aevery person is competent except as otherwise provided in these rules@[71].

[68] See Trammel v. United States (1980), 445 U.S. 40.

[69] See U.S. v. Snyder (1983), 707 F.2d 139 (5th cir.)

[70] See McCormick on Evidence, 5th Ed (West Group, St. Paul: 1999) at 281.

[71] In Trammel, supra, note the Supreme Court applied Rule 501 (which preserves common law privileges in the federal sphere) rather than Rule 601 to decide spousal compellability. In state prosecutions, state law determines issues of privilege.

A privilege for marital communications has been described as Aa late offshoot of an ancient tree@[72]. Efforts to carve out a special privilege for conversation and communications between spouses can be traced back to 1842 in the United States[73]. The privilege was created to encourage and preserve marital confidences. By 1999, there was some provision in almost every state which prohibits the disclosure of communications between spouses even though the spouse is competent to testify[74]. Most jurisdictions have a requirement that the communication be confidential[75]. However, communications in private between spouses are assumed to be confidential[76]. Consistent with Wigmore's view, most jurisdictions consider that the holder of the privilege is the communicator, not the witness[77].

(b) United Kingdom: This regime was set out in s.80 of the 1984 Police and *Criminal Evidence Act*[78], modelled for the most part after a draft bill recommended by the Criminal Law Revision Committee[79]. The regime, amended slightly in 1999, provides that spouses are competent for the prosecution and for a co-accused unless the spouse witness is also a co-accused[80]. A spouse is compellable to give evidence on behalf of the accused, unless the spouse is also a

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[72] McCormick, supra, note 70, at 323.

[73] Ibid, at 324.

[74] Ibid.

[75] Ibid, at 329-330.

[76] See Blau v. U.S.(1951), 340 U.S. 332

[77] McCormick, supra, note 59, at 336. Although the authors note that there are some states in which both spouses can assert the privilege.

[78] *Police and Criminal Evidence Act*, 1984 (c.33)

[79] See 11th Report, Evidence (General), Cmnd. 4991, paras. 143-157 and Annex 1, para. 9.

[80] As of 1999, this is the result of the combination of ss. 80(2) and the exception in 80(4).

co-accused[81]. Spouses are only compellable by the prosecution or a co-accused in respect of a Aspecified offence@ which means if it:

> (a) is an assault on, or injury or threat of injury to, the wife or husband [of the accused] or a person who was at the material time under the age of 16; or
>
> (b) is a sexual offence alleged to have been committed in respect of a person who was at the material time under that age; or

[81] Ss. 80(2) and (4)

> (c) consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a) or (b) above[82].

Two points are worth noting. First, this is a complete code which does not preserve any common law residue. Secondly, any pre-existing privilege for marital communications was repealed by s.80(9) of the 1984 statute.

As a brief summary, in the United Kingdom the spouse is competent for the prosecution in almost all situations but only compellable in respect of the specific subset of violent and sexual offences involving the spouse as victim, or a victim under the age of 16. With respect to a co-accused, a spouse of a person jointly charged is competent to give evidence but only compellable for the same subset of offences in which the prosecution could also compel the spouse to testify. The Act is explicit that a divorced person is competent and compellable Aas if that person and the accused had never been married@[83].

[82] Section 80(2A) and (3) of the *Police and Criminal Evidence Act*, 1984(c.33) as amended by the Youth Justice and Criminal Evidence Act, 1999 (c.23), Schedule 4, para.13.

[83] Section 80(5).

(c) Australia: Until recently, most Australian jurisdictions provided that a spouse of an accused is not compellable by the prosecution. However, in two states[84] this was changed so that a spouse became compellable subject to the discretion of the trial judge to exempt the witness from testifying. In Victoria, a judge could exempt a spouse, parent or child if Athe interest of the community in obtaining the evidence is outweighed by (a) the likelihood of damage to the relationship between the accused and the proposed witness; or (b) the harshness of compelling the proposed witness to give the evidence@' or (c) the combined effect of (a) and (b)[85]. The statute went on to list the factors that the judge should consider:

- nature of the offence
- importance of the evidence
- availability of other evidence to establish the facts
- nature Ain law and fact@ of the relationship
- Athe likely effect upon the relationship and the likely emotional, social and economic consequences if the proposed witness is compelled to give the evidence@
- whether any breach of confidence is involved[86]

[84] Victoria and South Australia. The Victorian statute, An Act to Amend the Law relating to the Competence and Compellability of Married Persons, No. 9230 (1978) assented to on December 19, 1978 provides that a Ahusband, wife, mother, father, or child@ could apply to be exempted from giving evidence.

[85] Ibid, s. 3(3).

[86] Ibid, s.3(4)

Subsequently, the Australian Law Reform Commission looked at this issue and was impressed by this approach. It recommended that a spouse, including a de facto spouse, and the parents and children of an accused should be compellable subject to the discretion of a judge to excuse them if it is found that Athe harm that would be caused directly or indirectly to the individual witness or the relationship between the witness and the accused outweighs the desirability of receiving the evidence[87]. After seeking comments on its interim proposal, the Commission noted that it had received substantial support. In the final report, it added a concern about a Agrave risk of harm@ to the potential bases for excusing a witness[88]. Although the Commission recommended a general discretionary privilege for confidential communications where there was a legal, ethical or moral obligation not to disclose them, it did not support a specific privilege for marital communications. The recommended test for determining a confidentiality privilege was similar to what our Supreme Court adopted in Gruenke.

The Commission's recommendations resulted in the Evidence Act 1995[89]. Section 12 provides that, except as otherwise provided, every person is competent to give evidence, and any person who is competent is also compellable. Section 17 ensures that accused persons are not competent for the prosecution and that a co-accused is not compellable unless being tried separately. Section 18 deals with spouses and related individuals who would otherwise be competent and compellable. Section 18(2) provides that a spouse, de facto spouse, parent or child of an accused may object to being required to give evidence or to disclosing a communication with the accused. Although the objection is to be made by the witness before

[87] Law Reform Commission Report No.38, Evidence, at para. 79.

[88] Ibid, at para. 82.

[89] No.2 of 1995

giving testimony, the court must be satisfied that the witness is aware of the right to object[90].

The court shall excuse the persons from giving evidence generally or from giving evidence of a communication if it finds that:

> (a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the accused; and
>
> (b) the nature and extent of the harm outweighs the desirability of having the evidence given[91].

The Act lists the following factors that must be taken into account:

> (a) the nature and gravity of the offence for which the accused is being prosecuted;
>
> (b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;
>
> (c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor ;
>
> (d) the nature of the relationship between the accused and the person;

[90] Ibid, s.18(4)

[91] Ibid, s.18(6)

(e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the accused[92]

There is a limited exemption which makes the s.18 regime inapplicable in respect of a small number of Australian Capital Territory offences, involving offences against children or domestic violence[93].

This approach represents an interesting compromise on three fronts. First, it deals with a

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[92] Ibid, s. 18(7). Throughout, I have used Aaccused@ but the statute uses Adefendant@.

[93] Section 19 provides:

> Section 18 does not apply in proceedings for an offence against or referred to in the following provisions:
> (a) an offence against a provision of Part III or IIIA of the *Crimes Act* of 1900 of the Australian Capital Territory, being an offence against a persons under the age of 16 years;
> (b) an offence against section 133, 134, 135 139 or 140 of the *Children's Services Act* 1986 of the Australian Capital Territory ;
> (c) an offence that is a domestic violence offence within the meaning of *the Domestic Violence Act* 1986 of the Australian Capital Territory or an offence under s.27 of that Act.

The offences under the 1900 *Crimes Act* in s. 19(a) are crimes of violence and sexual offences. The offences in the 1986 *Children's Services Act* deal with employing children in dangerous activities and the neglect or ill treatment of children.

larger set of potential witnesses who may have an intimate relationship with the accused. Secondly, while it starts with a presumption that everyone is compellable, it provides an opportunity to be excused when giving evidence will produce a likelihood of harm to the witness or the relationship. Thirdly, one of the factors that must be considered gives weight to the fact that the proposed testimony involves a breach of confidence.

2. Assessing the Available Options:

It is essential that a reform proposal be internally coherent. This means that it should depend on solid principles and that its details must serve to promote and not undermine these principles. Accordingly, it will be worthwhile to try to list the principles which might apply.

(i) Relevant principles and values:

- Canadian evidence law is based on the concept that all relevant material is admitted unless a clear rule of law or policy excludes it[94];

- one aspect of respect for human dignity as reflected in the *Canadian Charter of Rights and Freedoms* is respect for the rights of individuals to choose[95];

- within our community, people live in a variety of relationships which reflect, in varying degrees, intimacy and dependence. These relationships are, for the most part, inherently valuable and ought to be protected from unwarranted intrusions by the state. Legal marriage is just one of this set of relationships;

- criminal offences represent different degrees of gravity, harm, and risk;

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[94] See R. v. Morris (1983), 36 C.R.(3d) 1 (SCC) per Lamer, J., as he then was, at 13; also see R. v. Corbett (1988), 64 C.R.(3d) 1 (SCC) per La Forest, J. at 33-34.

[95] Choice, autonomy and freedom from state coercion has been recognized as aspects of security of the person protected by s.7 when the issue involves bodily integrity or psychological stress: see R. v. Morgentaler (1988), 62 C.R.(3d) 1 (S.C.C.) and Rodriguez v. Attorney General of B.C., [1993] 3 SCR 519. With respect to the right to remain silent, choice has also been pivotal: see R. v. Hebert, [1990] 2 SCR 151.

- Canadian evidence law protects confidential communications but not where there is a greater public interest in disclosure

- when the proof of innocence is really at stake, evidentiary rules and privileges tend to evaporate.

With these principles in mind, we can begin to assess the various options.

(ii) Competence: There seems to be no basis for continuing a regime in which a person is denied the opportunity to choose whether to give evidence or not because of a legal status. The idea of incompetence is repugnant to universal respect and demeans the individual who may be forced to remain silent regardless of a desire to give evidence. Competence is a mark of personhood. Child witnesses are not deemed incompetent; if under 14, the trial judge must embark on an inquiry to determine whether they have the capacity to give evidence[96]. If a spouse chooses to give evidence, that choice ought to rank higher than any presumptive claim that incompetence preserves marital harmony. For the same reason, there is no merit in an argument to expand the scope of incompetence to include other relationships. Issues about motives can be explored during the testimony for credibility purposes. This should have no bearing on competence.

(iii) Compellability: This issue raises difficult questions about when a person can be compelled to give evidence which may incriminate and lead to the conviction of a loved one. The current ss.4(2) and (4) permit this degree of compulsion in a number of cases. While the set of offences is not entirely homogeneous, it targets various sexual offences and offences against children. The common law adds to this list those offences in which the spouse is a victim of violence. In some of the cases covered by the expanded compellability, there will always be a dearth of witnesses given the nature of the offence. However, the list does not include some of our

[96] See Canada Evidence Act, ss.16(1) and (3) and cases interpreting their function: R. v. Marquard, [1993] 4 SCR 223; R. v. Farley (1995), 40 C.R.(4th) 190 (Ont. C.A.) per Doherty, J.A.

gravest crimes (murder, attempted murder, aggravated assault) unless the victim is under the age of 14. As a result, there are serious cases in which a spouse cannot be compelled to testify. Serious crimes ought to be prosecuted vigorously and one can argue that the prosecution should not be denied relevant probative evidence.

The countervailing principle is that forcing people to participate in the jailing of their loved ones is injurious to that relationship and unseemly. This rationale applies to a larger set of people than just those who are legally married. People who are not married but who share relationships with the accused can be compelled to be witnesses without regard to the integrity of the relationship or the gravity of the offence. One can conjure up images of tearful and guilt-ridden spouses, partners, children and parents being advised of the power of contempt if they refuse to answer questions about their loved one. Is this a scene we want to encourage? Aside from appearances, is it even fair to force a young child to give evidence against a mother or father?

The options are:

> (A) Expand the scope of the current protection to include other relationships. While this will ensure that some people in situations that can be identified with a spouse will not be generally compellable, it would leave them subject to compulsion for s.4(2)and (4) offences and offences in which they were victims. It would also present definitional problems; who would fall within the class of relationships sufficiently intimate to warrant this protection? For those within it, the prosecution would be denied their evidence regardless of the gravity of the offence.
>
> (B) Repeal any exemption and make all persons compellable at the behest of the Crown or a co-accused regardless of any harm that this might cause and regardless of the nature of the offence. It is suggested that this option makes the truth-seeking function of the criminal trial the paramount consideration. However, it must be noted that our justice system recognizes other privileges (legal, public interest, informer) with very high thresholds before anyone can intrude to pursue the truth. As well, other exclusionary rules based on unfairness (e.g. involuntary confessions) operate to keep relevant material from the trier of fact. So, it is a stretch to say that truth seeking always trumps other concerns.
>
> (C) The Australian compromise model. That is, provide a vehicle for a discretionary exemption that responds to the facts of the case: the nature of the charge, the nature of the relationship, the nature of the evidence, and the potential harmful implications of the

testimony.

(iv) Marital Communications Privilege:

The Canadian law is problematic for a number of reasons. Although the justification is to encourage and preserve confidences between spouses, it may not survive divorce or death. Also, it is exercised by the listener not the communicator; and, if there is merit in providing some kind of protection, it should not be restricted to legally married people. Although a marital communications privilege continues to exist in the United States in varying degrees, it does not apply to all communications but only those which can be said to have been made confidentially. Of course, in many American jurisdictions, a private communication is considered to be a confidential one. The point is, however, that the protection is hinged to confidentiality. This is narrower than the law of Canada which applies to all communications.

Clearly, the current situation is not defensible. As noted above, the privilege has been repealed in the United Kingdom. In Australia, respect for confidentiality has been incorporated into the discretionary test. The options for Canada are:

(A) Maintain the privilege but refine it to make it internally consistent;

(B) Expand the set of people to which it applies, to enhance its coherence;

(C) Repeal it, leaving any issue of confidentiality to be determined by the Gruenke test;

(D) The Australian model which incorporates a concern about confidentiality into the general discretionary decision.

Looking at all four options, the Australian model seems to serve, in varying degrees, all the objectives of the other options. The only argument in favour of retaining a privilege is the value inherent in encouraging confidences within a marital or other intimate relationship. However, if the Canadian courts and legislatures are not prepared to grant a class immunity to psychiatrist/patient and priest/penitent relationships, it is hard to argue that a marriage sits on a higher plateau. Is it essential to a functioning and happy relationship that each partner reveal all

secrets to the other? In my view, it is a difficult claim to make. Consequently, the Australian model is very attractive.

(v) Evaluating the Australian Model:

In a paper prepared for the Uniform Law Conference by Jeffrey Schnoor[97], the author argued that the disadvantage of this approach was the uncertainty that it would generate. Prosecutors would not know whether they would be able to rely on a spouse or other intimate until the trial judge had ruled. Accordingly, this would present problems for trial planning. This is not an insignificant point. However, we are living in an era when judicial discretion is playing a larger role in evidentiary matters. The new residual hearsay exception based on necessity and reliability (some times referred to as the principled approach) produces uncertainty with respect to highly probative material until the completion of a voir dire and a ruling. The admission of similar fact evidence, more recently described as Apast discreditable conduct@[98], can be the pivotal issue in a trial. It is another issue that is determined by a discretionary decision rather than an absolute rule[99]. Similarly, there is the example of case-by-case confidentiality, as exemplified by Gruenke and Ryan, discussed above. There is also the recent recognition of the residual discretion in a judge to exclude any evidence if its prejudicial effect is greater than its probative value[100]. The recognition of enhanced judicial discretion makes many issues uncertain until the trial and the trial judge's ruling. This has become the reality of Canadian criminal trials and the parties seem to have adapted.

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[97] J. Schnoor, Q.C., Evidence by Spouses in Criminal Proceedings (1999), at http://www.law.ualberta.ca/alri/ulc/criminal/espouse.htm

[98] See R. v. B.(L.) (1997), 9 C.R.(5th) 38 (Ont.C.A.)

[99] See R. v. B.(L), ibid; also, R. v. Arp, [1998] 3 SCR 339.

[100] See R. v. Potvin (1989), 68 C.R.(3d) 193 (SCC) at 236-237; R. v. Corbett, [1988] SCR 670.

When the Australian Law Reform Commission tried out its proposals in an interim report, it observed that they received substantial support but that the opposition came mostly from prosecutors who raised concerns about wasting time and losing relevant evidence. As a result, the Commission made inquiries in Victoria and South Australia where similar proposals had been in place for some time. It reported:

> Information obtained indicates general satisfaction with the approach and that the issue rarely arises and when it does rarely occupies much time[101].

[101] See ALRC Report No.38, supra, note 87, at para. 81.

On the question of losing relevant evidence, this problem is controversial and may have been over-stated. The prospect of relying on the evidence of someone closely linked with the accused will always present some uncertainty given the dynamics of personal relationships. The prosecutor will have a problem whether the witness is compellable and recants or balks, or is exempted from testifying. In either case, the expansion of the admissibility of previous out-of-court statements through the Khan/Smith/K.G.B. line of cases discussed above[102], addresses the issue. If a previous statement was taken in circumstances that provide some guarantees of trustworthiness sufficient to meet the reliability test, then the earlier statement may be admissible. Certainly, the necessity hurdle is easier to cross if the witness is ruled non-compellable[103]. Accordingly, as seems to be the experience in Australia, losing relevant evidence should not be a major concern.

One deficiency of the Australian legislation is that it applies only to spouses, de facto spouses, parents, and children. It does not include siblings or others who may live in an intimate relationship with the accused. One could consider adding a phrase like Aor other participant in an intimate relationship with the accused@ which could be defined in terms of a mutually dependent emotional and economic relationship. This would bring siblings who live together into the provision, and perhaps others who could meet the test. Also, it is silent about the situation of compulsion by a co-accused. Consequently, the statutory objection mechanism is not available when a spouse, de facto spouse, parent or child is compelled to give evidenced on behalf of a co-accused.

3. Conclusion: There is much to recommend the Australian model. It is a true compromise on

[102] Discussed supra, at pages 20-22.

[103] See Hawkins, supra, note 1.

a number of fronts. Perhaps compromise is not the correct term since it might suggest a negative connotation. It may be more accurate to say that the model reconciles competing interests and provides a framework that achieves a lot while sacrifices very little. Where warranted, it protects confidences and avoids hardships. Yet it is based on the importance of permitting the justice system to secure relevant evidence. It also removes many of the anomalous and inconsistent situations that currently characterize Canadian law. Aside from these advantages and those discussed above, it permits a thoughtful drafting of a definition for relevant intimate relationships. This scope also applies to defining the set of factors which a court must consider when addressing the compellability issue.

With respect to the co-accused situation, there is a possibility that evolving Canadian law will not deny someone exculpatory evidence simply because the bearer of the evidence is the spouse of a co-accused. The Australian model could easily be adapted to encompass this situation and still ensure that it is not abused by expanding the discretionary exemption mechanism. The addition of words like A as a witness for the prosecution or a co-accused@ somewhere in the triggering mechanism would permit judicial discretion to control the use of this group of witnesses by co-accused. The consequential judicial ruling could also deal with the issue of limiting questioning about the witness's spouse. Perhaps the co-accused issue is esoteric and has only limited application. While it can be left until a decision is made about the general direction for reform, it still needs to be addressed as part of a legislated reform package.

The Australian model fits neatly with the more functional and less categorical approach which the Law Commission seems to have taken in the remainder of the draft report. It recognizes the value of relationships in a way that encourages a fair assessment of the nature of a specific relationship and the degree of emotional, economic or social inter-dependence which characterizes it. Also, it has the important attribute that it is in place and operating in another jurisdiction.