Alibi Evidence: Responsibility for Disclosure and Investigation

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al·i·bi (noun) 1. *Law* - A form of defence whereby a defendant attempts to prove that he or she was elsewhere when the crime in question was committed. From Latin, meaning *"elsewhere"* (alius, *other* on the model of ibi, *there*).

I. INTRODUCTION

The consequence of the defence failing to disclose an alibi properly to the Crown is that the trier of fact *may* draw an adverse inference that it has been fabricated. Although there may be good reason why defence counsel may wish to withhold alibi evidence from the Crown or even the police, they risk an adverse inference at trial which they may not be able to correct later.

While the imposition of an evidentiary burden on the accused may be justified even though it still impairs the right to be presumed innocent,[1] raising alibi can be regarded as a very high risk defence as it can effectively reverse the onus of proof with a jury believing the accused (or his witnesses) has lied to escape conviction. On the other hand, providing it to the Crown or the police in a timely manner could mean, if your client is innocent, the timely dismissal or stay of charges by the Crown.

Although there is no standard mechanism for disclosing an alibi in Canada, many U.S. and Australian states have stringent "alibi-notice-laws" imposed on defence counsel. By adopting some of the legislated practices elsewhere, defence counsel in Canada may be able to navigate some of the

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1 *Cf R v Laba*, [1994] 3 SCR 965 at 1011, 120 DLR (4th) 175, per Sopinka J for the majority. See also John G Webster, "The Proper Approach to Detection and Justification of Section 11(d) Charter Violations Since Laba" (1995), CR 39 (4th) 113.

intricacies in the law to the benefit of all parties without having such rules imposed on them by statute.

For example, an accused is facing trial on a serious offence which, if convicted, could result in a significant penitentiary term. The accused has confided in counsel that they are innocent and provided a version of events that, if believed, puts them hundreds of miles from the crime at the relevant time. After some basic fact checking of the story, Counsel decides to call the accused as the only witness. For tactical reasons, or maybe because of some mistrust of the police or the Crown with the information, the information is not disclosed in advance of trial.

In order to constitute an alibi, the evidence at issue must be determinative of the final issue of guilt or innocence. Such evidence contemplates that it is impossible for the accused to have committed the crime because, at the time of its commission, he was elsewhere. [2] There must be no "window of opportunity."[3]

The requirements of an alibi are strict; evidence that an accused had only a limited opportunity to commit a crime is not an alibi. Once properly raised, the Crown must refute the alibi beyond a reasonable doubt or the accused is entitled to be acquitted.[4]

On February 20, 2017, the Supreme Court released a short judgment, affirming the majority decision of the British Columbia Court of Appeal that a false alibi or deliberate lie could be used as *some evidence* of guilt without first considering whether there was sufficient evidence of concoction, independent of the evidence used to reject the alibi.[5]

In Clifford, defence counsel did not call the accused; rather the alibi was led through to two police officers who had interviewed him about an arson that took place in Cranbook, British Columbia. The accused maintained he was in Camrose, Alberta, at the time of the fire – some 670 kilometres away. However, based on evidence of the accused's animus towards the victims, cellphone records and the presence of a car he used in Cranbrook at the relevant time, the trial judge found his alibi was irreconcilable with evidence led by the Crown.

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2 *R v MR* (2005), 195 CCC (3d) 26; [2005] OJ No 883 (QL) at para 29 (CA).

3 *R v TWC*, [2006] OJ No 1513 (QL); 209 OAC 119 at para 2 (CA).

4 *R v Allen*, 2017 MBCA 88 at para 8, 142 WCB (2d) 71 [*Allen* MBCA].

5 *R v Clifford*, 2017 SCC 9, [2017] 1 SCR 164, aff'g 2016 BCCA 336 at paras 30–32, aff'g 2015 BCSC 435 [*Clifford*].

As a result the trial judge expressly found that the alibi given to the police was deliberately false and could be used as *some evidence* of guilt. However it could not be the only evidence. There needed be other evidence independent of the finding that an alibi is false to conclude that it was deliberately fabricated and that the accused was involved in that attempt to mislead the jury.[6] A false alibi or a lie, without more, is not evidence that can assist the prosecution in establishing guilt. There must be other evidence, independent of that finding upon which the trier of fact can find fabrication or concoction such that it may constitute incriminating evidence for the prosecution.[7]

II. Delayed Disclosure of Alibi

While the 'alibi' in Clifford was provided to the police within days of the offence "when there was no possibility of forgetfulness, mistake or oversight" on the part of the accused,[8] the risk of proffering the same evidence months or years later at trial when it may be harder to disprove (or corroborate), carries the same risk should a witness die or become forgetful. Indeed, if it is possibly true, failing to disclose the alibi in a timely manner to either the police or the Crown may result in adverse inferences against the accused.

For example, in *R v Cain*, the accused were arrested for murder in November 2006 and committed to stand trial in October 2007. While the defence obtained alibi statements from several witnesses in late 2006 and subsequently advised the Crown and police as to the existence of an alibi defence in December 2007, no details were provided except that one of the witnesses had died a few days earlier (but a year after the defence had obtained a statement from him). The statement of the dead witness was provided to the Crown in June 2008 and the information about the other witnesses was provided in December 2008, a month before the original trial date. The alibi witnesses subsequently made themselves available for interview by the police on February 25, 2009.

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6 *R v Laliberté,* 2016 SCC 17 at para 4, [2016] 1 SCR 270.

7 *Oland v R,* 2016 NBCA 58 at para 8, [2016] NBJ No 288 (QL) (new trial ordered), aff'd 2017 SCC 17, [2017] 1 SCR 250 (but the issue of alibi was not argued before the Court) [*Oland*].

8 *Clifford*, *supra* note 5 at para 30.

The trial judge gave 'late alibi adverse inference' instructions to the jury, which advised that they "may, not must, accord less weight to the alibi." The jury ultimately returned a verdict of guilty. The Ontario Court of Appeal affirmed the jury instructions were correct, holding:

> It was obvious on the record that investigation of both alibis was hampered by the late disclosure. This was a case in which early disclosure was critical to a proper investigation of both alibis. The police had to be able to assess the accuracy of each alibi witness's [sic] estimate of the timing of the movements of the accused … [Indeed] late disclosure … deprived police of the ability to speak with Williams as disclosure that Williams was the alibi witness was not made until after he was dead.[9]

While it is true that an accused person does not have to disclose his defence, including alibi, the consequence of failing to disclose an alibi in a timely manner to the Crown is that the judge or jury *may* draw an adverse inference that it has been fabricated. Nevertheless a delayed disclosure by the accused may only weaken the alibi evidence, and it cannot be excluded at trial.

An alibi does not need to be disclosed on arrest or at the first possible opportunity. All that is required is that it be disclosed sufficiently prior to trial and in a manner that will permit a meaningful investigation by the Crown. Given the ease with which an alibi could be fabricated, this rule protects against a last minute defence that may be impossible for the Crown to verify. Where the alibi is not disclosed and the accused presents it for the first time at trial, the judge can instruct the jury to draw an adverse inference from the late disclosure, but cannot prevent the evidence from being called.

However, where there is evidence that an alibi has been fabricated, this may be used as circumstantial evidence to draw an inference or "consciousness" of guilt. Nevertheless, an alibi that is merely disbelieved or rejected cannot serve to corroborate or complement the Crown's case, let alone permit an inference of guilt by the Crown. As noted by the Supreme Court in *R v Hibbert*:

> Evidence that the accused attempted to put forward a fabricated defence, that effort, akin to an effort to bribe or threaten a witness or a juror, could be tendered as evidence of consciousness of guilt. However, an alibi that is merely disbelieved

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9 *R v Cain*, 2015 ONCA 815 at paras 34, 36, 330 CCC (3d) 478, leave to appeal to SCC refused 2016 CanLII 66195. See also *R v Gulliver*, 2018 SCC 24, aff'g 2017 ABCA 223 at para 8, which found the trial judge was entitled to rely on a late disclosure of 18 months when evaluating the strength of the alibi evidence in determining it was unreliable [cited to ABCA].

> is not evidence of guilt. It is only if it can be proven that the accused participated in the deceit or was directly involved in creating the false alibi, that there can be an inference of guilt.[10]

Nevertheless, even if defence counsel has notified the Crown of its intention to present an alibi, the Crown may have to wait until the accused has presented the evidence before it seeks to establish that it was false and/or fabricated. The reason for this is that the Crown cannot rebut a defence not called, and the accused is under no duty to advance any particular defence.[11]

However in *R v Tudor*[12] (as in Clifford) the Alberta Court of Appeal held that it was open to a trial judge to find that an alibi was fabricated even where it is the Crown that tenders the accused's statement containing the alibi during its case, and the accused does *not* tender any evidence of alibi.[13]

III. Obligation to Disclose Alibi

At trial, the accused is protected by a right to silence. Specifically, they cannot be compelled to testify, and they have a right not to have their testimony used against them in future proceedings. These protections against testimonial compulsion have been constitutionalized in s. 11(*c*) (right of the accused not to be compelled to testify)[14] and s. 13 (right of witness not to have his or her testimony from one proceeding used to incriminate him or her in a subsequent proceeding)[15] of the *Charter*. When

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10 *R v Hibbert*, [2002] 2 SCR 445 at 62–63, 211 DLR (4th) 223. See also *R v Trochym*, 2007 SCC 6 at para 172, [2007] 1 SCR 239; *R v Tessier* (1997), 113 CCC (3d) 538, [1997] BCJ No 515 (QL) (five-judge panel of the CA); *Oland*, *supra* note 7.

11 In addition, situations may change such that defence counsel becomes ethically prevented from calling alibi evidence in support of an alibi he or she knows or reasonably believes is false based on admissions from his or her client. See Federation of Law Societies of Canada, *Model Code of Professional Conduct*, ch 5.1-1[10] (as amended 14 March 2017), online: <https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf>.

12 *R v Tudor*, 2003 ABCA 352, 26 Alta LR (4th) 27 [cited to ABCA].

13 *Ibid* at para 11. See also *R v O'Connor* (2002), 62 OR (3d) 263, 2002 CanLII 3540 at paras 24–33 (CA) [cited to CanLII]; *Clifford*, *supra* note 5.

14 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

15 *Ibid*, s 13.

combined with s. 11(*d*) (presumption of innocence),[16] ss. 11(*c*) and 13 of the *Charter* protect the basic tenet of justice that the Crown must establish a "case to meet" before there can be any expectation that the accused should respond.[17]

However, once there is a "case-to-meet" which, if believed, would result in a conviction, the accused can no longer remain a passive participant in the prosecutorial process and becomes - in a broad sense - compellable. That is, the accused may have to answer the case against him, or face the possibility of conviction.[18]

While the relationship between the case-to-meet principle and the presumption of innocence is altered by such constitutionally permissible reverse-onus provisions, the Supreme Court of Canada has held that such provisions, which violate s. 11(*d*) of the *Charter*,[19] may nonetheless constitute a reasonable limit, demonstrably justified in a free and democratic society.

For example, the defence in Canada is under no legal obligation to cooperate with or assist the Crown by announcing any special defence, such as an alibi, or by producing documentary or physical evidence.[20] However, "this protection against disclosure is not an absolute one, and failure to

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16 *Ibid*, s 11(d).

17 *R v P(MB)*, [1994] 1 SCR 555 at 580, 113 DLR (4th) 461 [*P(MB)*]. Nevertheless, it is an error to instruct the jury that they are entitled to draw an adverse inference from the failure of the accused to testify in support of his or her alibi defence. See *R v Miller* (1998), 131 CCC (3d) 141, [1998] OJ No 356 (QL) (CA).

18 *P(MB), supra* note 17. See also *R v Noble*, [1997] 1 SCR 874, 146 DLR (4th) 385 [*Noble*], and *Clifford*, *supra* note 5 at para 9, where the Court stated that "this principle may be traced back in this court to *R v Jenkins* (1908) 14 CCC 221 (BCCA), if not farther." See also *Murray v United Kingdom* (1996), 22 EHRR 297, where the European Court of Human Rights held that drawing an adverse inference "in situations which clearly call for an explanation" is acceptable because "the question whether the right [to silence] is absolute must be answered in the negative."

19 *Charter*, *supra* note 14.

20 *R v Stinchcombe*, [1991] 3 SCR 326 at 333, 83 Alta LR (2d) 193. Indeed, where the defence is not one of alibi, but evidence is called to show the accused was outside a shed where the offence happened verses inside, it does not have to be disclosed to the prosecution, nor can an adverse inference be drawn because of this as the accused was not "elsewhere." See *R v Taylor*, 2012 NLCA 33, rev'd [2013] 1 SCR 465 but not on this point.

disclose an alibi defence in a timely manner may affect the weight given to the defence."[21]

As noted by the Supreme Court, "alibi defences create exceptions to the right to silence. For example, while the accused generally has a right to silence during the investigative stage of a criminal proceeding, if an alibi defence is not disclosed in a sufficiently particularized form at a sufficiently early time to permit the police to investigate it prior to trial, the trier of fact may draw an adverse inference from the accused's pre-trial silence."[22]

This rule has a strong tradition in Canada, and is based upon the relative ease with which an alibi defence can be fabricated. As a result, the potential for the fabrication of alibi evidence allows a negative inference to be drawn against such evidence where the alibi defence is not disclosed in sufficient time to permit investigation.[23]

Furthermore, while the failure to testify cannot be used to assess credibility of witnesses, in the case where the defence of alibi is advanced, the trier of fact may draw an adverse inference from the failure of the accused to testify and subject themselves to cross-examination. "While it must be conceded that this exception does undermine the presumption of innocence and the right to silence, it has a long and uniform history pre-dating the Charter and must be taken to have been incorporated into the principles of fundamental justice in s. 7."[24]

Nevertheless, as noted in *R v Sophonow*:

> there is no rule of law or practice which precludes evidence in support of an alibi being tendered in the absence of testimony by the accused. The accused's right not to testify is absolute and its exercise does not limit his right to call other witnesses. [While] appellate courts have said on many occasions that as a general rule an alibi defence will not be entertained on appeal unless supported by evidence from the

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21 *P(MB)*, *supra* note 17 at 578. This was reaffirmed in *R v S(R.J)*, [1995] 1 SCR 451 at 517, 121 DLR (4th) 589.

22 *Noble*, *supra* note 18 at para 111. See also *R v Chambers*, [1990] 2 SCR 1293 at 1320, 119 NR 321.

23 *R v Russell* (1936), 67 CCC 28 at 32. See also *Vézeau v The Queen*, [1977] 2 SCR 277 [*Vézeau*]; *P(MB), supra* note 17; *S(RJ), supra* note 21; *Noble*, *supra* note 18; *R v Cleghorn*, [1995] 3 SCR 175, 186 NR 49 [*Cleghorn*].

24 *Noble*, *supra* note 18 at para 113. See also *R v Creighton*, [1995] 1 SCR 858 at 878, 179 NR 161; *Vézeau*, *supra* note 23 at 288.

> accused, that does not mean ... that the accused is not entitled, without testifying himself, to set up an alibi defence by calling other witnesses.[25]

However, where that witness appears for the first time at trial, the weight afforded to that witness's evidence may be significantly reduced and may in fact draw an adverse inference from the Court. As noted by the Supreme Court in *R v Cleghorn*[26]:

> Disclosure of an alibi has two components: adequacy and timeliness. This principle was recently reiterated in *R v Letourneau* (1994), 87 CCC (3d) 481 (BCCA), where Cumming J.A. wrote for a unanimous court at p. 532:
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> > It is settled law that disclosure of a defence of alibi should meet two requirements:
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> > (a) it should be given in sufficient time to permit the authorities to investigate: see *R v Mahoney, supra,* at p. 387, and *R v Dunbar and Logan* (1982), 68 CCC (2d) 13 at pp. 62-3 (Ont CA);
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> > (b) it should be given with sufficient particularity to enable the authorities to meaningfully investigate: see *R v Ford* (1993), 78 CCC (3d) 481 at pp. 504-5 (BCCA).
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> > Failure to give notice of alibi does not vitiate the defence, although it may result in a lessening of the weight that the trier of fact will accord it.

However, as noted by the Ontario Court of Appeal in *R v Wright*, where the alibi defence is disclosed in time to permit meaningful investigation of the defence, there can be no justification for the adverse inference instruction.[27]

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25 See *R v Sophonow* (1986), 38 Man R (2d) 198 at paras 129–130, 25 CCC (3d) 415, leave to appeal to the SCC refused, [1986] 1 SCR xiii, 44 Man R (2d) 80.

26 *Cleghorn, supra* note 23 at 179–180.

27 *R v Wright*, 2009 ONCA 623 at para 20, 98 OR (3d) 665. See also *R v Hogan* (1982), 2 CCC (3d) 557 at 566, [1982] OJ No 189 (QL) (CA). Furthermore, failure to investigate an alibi that has been disclosed carries with it a risk to the Crown of failing to disprove the alibi; however, it does not prejudice the accused, who is in a position to benefit from the Crown's failure to disprove the alibi. See *R v Levesque*, 2003 ABCA 349, [2003] AJ No 1480 (QL).

IV. Right to Silence

While some authors at the time suggested that the Supreme Court had not actually ruled on the constitutionality of the alibi exception with respect to the right to silence enshrined in the *Charter*,[28] the Court had already ruled that the imposition of an evidentiary burden on the accused may be justified even though it still impaired the right to be presumed innocent, so long as the burden of proof was not on the accused.[29]

Furthermore the Supreme Court did state that the rule "has been adapted to conform to Charter norms in that disclosure is proper when it allows the prosecution and police to investigate the alibi evidence before trial". [30] As such it appears that in *R v Cleghorn* the rule did receive some scrutiny by the Court with respect to the Charter. In addition, one must consider that the case cited by the Supreme Court (*R v Letourneau*) was actually on leave to the Court at the time of this decision, specifically with respect to the alibi exception and the right to silence.[31] As such, it cannot be said that the Court did not consider the alibi exception to the right to silence, and as a result I will explore this case further.

In *Letourneau*, the defence gave no alibi notice whatsoever. As a result the trial judge stated that the jury could take the delay into account, stating "the longer the delay from the time the offence was committed to the time when the accused told the Crown that they were elsewhere on the date it took place, the more suspicious the alibi becomes."[32]

As argued by the Crown, it was incumbent upon the defence to disclose their alibi in a timely manner because, "if supported on investigation, [it]

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28 *Cf* John D Craig, "The Alibi Exception to the Right to Silence" (1996) 39:2 CLQ 227.

29 *Laba*, *supra* note 1 at 1011.

30 *Cleghorn*, *supra* note 23 at para 4.

31 Leave to appeal the decision in *R v Letourneau* (1994), 87 CCC (3d) 481, 22 WCB (2d) 451 (BCCA), was filed on May 12, 1995 [*Letourneau*]. One of the issues on appeal was "whether the Court of Appeal erred in holding that the requirement that an accused give notice of an alibi did not violate his s. 7 Charter rights." However, leave to appeal was subsequently dismissed on November 2, 1995, shortly after the decision in *Cleghorn*, *supra* note 18, was released on September 21, 1995. See Supreme Court Bulletins dated July 21 and November 3, 1995, docket 24645.

32 *Letourneau*, *supra* note 31 at para 163, leave to appeal to SCC refused (1996), 102 CCC (3d) vi (2 November 1995). See also *R v Usereau*, 2010 QCCA 894 at paras 96–97, 256 CCC (3d) 499.

demonstrates that the Crown has charged the wrong person ... it is a matter of common sense that delay in disclosing alibi leaves the evidence open to suspicion. By its very nature alibi is a defence that has the potential of being a complete answer to a criminal charge, or at least of rendering the accused's participation in the event highly improbable, and thus one would expect the accused to raise the matter at an early time."[33]

On the other hand, defence counsel submitted "that no adverse inference should be drawn, or prejudice to the accused incurred, where the defence determines to exercise the right to silence and elects not to call defence evidence. He therefore submitted that there can be no obligation to disclose a potential alibi defence until the accused forms the intention to rely on that defence at trial [and that] the accused is under no legal or practical obligation to respond to the accusation until there is an evidentiary case to meet."[34]

He argued that a "determination to disclose a potential alibi may only be meaningfully made when the defence has received full and timely disclosure of the Crown's case. There can be no crystallization of an obligation to disclose an alibi before the defence has been fully apprised of the case to be met without rendering the right to silence meaningless. He submitted that, in this case, the failure by the Crown to make full and timely disclosure of all relevant material effectively negated the imputed defence's obligation to disclose potential alibi evidence in sufficient time for investigation."[35]

In response, the Crown submitted that whether or not they had made full disclosure, the appellants knew the nature of the charges they were facing at the time of their arrest. Furthermore, the Crown submitted that by its very nature, alibi is a unique defence that denies any involvement by the accused in the crime alleged, and the Crown's case is irrelevant to the defence of alibi.

The Court agreed with the Crown, stating that:

> The so-called rule that an alibi must be disclosed "at a time when an investigation may uncover something" with "full particulars of the defence" is an exception to the general rule of inadmissibility of pre-trial silence.

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33 *Letourneau*, *supra* note 31 at paras 164, 169.

34 *Ibid* at para 173.

35 *Ibid* at paras 174–76.

> It is almost inexplicable why two men arrested as suspects in a recent, brutal murder, if innocent, would not immediately disclose the fact that they were elsewhere. It is even more inexplicable that the same two men, facing or following a committal at a Preliminary Inquiry, with competent legal advice, would not explain themselves in order to avoid trial and the risk of being convicted of such a serious offence.
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> ...
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> In my judgment, an alibi is either true or not true, and, if true, constitutes a complete defence. It is unlike most defences about which an accused can remain silent until he has had an opportunity to assess the Crown's case, the disclosure of which is governed now by *Stinchcombe*, supra. When it comes to factual innocence, however, what the Crown has or has not disclosed, and when, must be irrelevant.[36]

In reaching their unanimous decision, the Court of Appeal relied on a previous decision of the Court in *R v Ford*.[37] In that case the Court held that for an alibi to be investigated, the Crown requires the following from the defence[38]:

A) Full particulars of the defence including the names of any witnesses.
B) Disclosure at a time when an investigation may uncover something.

The Court further noted that considering many criminal trials take two years or more to proceed, disclosure ought to take place at a time before memories of and records of a certain day have failed or been destroyed. For instance, in this case, if the accused's alibi had been disclosed to the police within the first two months, something may have been discovered. However by waiting nearly 17 months, "what chance would there be of anything being remembered? One cannot follow a cold trail. In the case at bar, the disclosure of alibi was so sparse as not to constitute full and proper disclosure."[39]

Although the accused is under no legal obligation to cooperate with or assist the Crown by announcing its defence, failure to disclose an alibi in a timely manner may affect the weight given to it by the jury. In *R v Nelson*,[40] the court had to decide whether an alibi arising out of cross-examination of the accused qualifies as an undisclosed alibi allowing for an adverse

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36 *Ibid* at paras 178–180, 189.

37 *R v Ford* (1993), 78 CCC (3d) 481, [1993] BCJ No 147 (QL) (CA).

38 *Ibid* at para 92.

39 *Ibid*.

40 *R v Nelson* (2001), 147 OAC 358, [2001] OJ No 2585 (QL) (CA).

inference, considering he has a Charter right to silence until he actually takes the stand:

> When arrested shortly after the event, the appellant had told the police that he was at home when Ms. Edwards was attacked. He offered no further details as to his whereabouts and made no reference to his uncle's girlfriend or the two women in the other apartment. These details first emerged during the appellant's cross-examination.
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> Counsel for the appellant forcefully submitted that the Crown improperly invited the jury to draw an adverse inference from the defence's failure to call witnesses who could, according to the appellant's testimony, account for his whereabouts at the time of the attack on Ms. Edwards and her friend. Counsel further argued that even if the inference could be drawn, the trial judge erred in failing to instruct the jury as to the limited nature of that inference and the caution to be exercised before drawing that inference.[41]

On appeal the Crown characterized this as a case of an undisclosed alibi. It was argued that the accused's failure until cross-examination to reveal the identity of witnesses who could confirm his whereabouts amounted to a failure to give timely notice of the essential details of an alibi, and invited an instruction as to the adverse inference, which could be drawn from the failure to give that timely notice.

The Court of Appeal accepted the Crown's submission that the accused's failure to disclose to the prosecution until cross-examination the identity of those who could confirm his whereabouts denied the prosecution the opportunity to effectively investigate the alibi. The Court stated that "in these circumstances, the trial judge should have told the jury that the accused's failure to make timely disclosure ... was a factor to be considered in determining what weight should be given to his evidence."[42]

However, even if the accused notifies the Crown that it intends to raise an alibi defence, the Ontario Court of Appeal has ruled in *R v Witter* that the Crown must wait until the accused actually testifies before it attempts to show the alibi is false, and thus draw an inference of guilt. The Court reasoned that the Crown cannot rebut a defence not called and the accused is under no duty to advance any particular defence.[43]

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41 *Ibid* at paras 5–6. See also *R v Hinde*, 2001 BCCA 723 at para 22, 52 WCB (2d) 143 [*Hinde*].

42 *Hinde, supra* note 41 at para 22.

43 *R v Witter* (1996), 105 CCC (3d) 44, 1996 CarswellOnt 325 (five-judge panel of the CA) [*Witter*]. However, see *contra R v Gillespie* (1990), 10 WCB (2d) 461, 1990 CarswellOnt

V. Alibi Notice as Evidence

An interesting issue that arose during *Witter* was whether or not an alibi notice was a statement made by counsel as agent for the accused and was, therefore, admissible as a statement made by him in Court, whether or not he actually testified.[44]

In this case, the defence provided written notice to the Crown about ten days before the trial advising that they intended to advance an alibi defence. They provided the Crown with a statement signed by the accused's former girlfriend, which stated that the accused was at her home when the incident occurred. Investigation by the police subsequently determined that the alibi was false and the Crown submitted that the alibi notice was a statement made by counsel as agent for the accused and was, therefore, admissible.

The defence objected to the admissibility of the alibi notice, stating that they could not decide whether to call the alibi evidence referred to in the notice until it had heard the case for the Crown. The defence argued that if the Crown were allowed to tender the alibi notice as part of its case, they would be forced to put forward the alibi defence or risk an adverse inference from its failure to advance that defence before the jury. Furthermore, it was argued that the accused's constitutional right to remain silent and his constitutional protection against self-incrimination precluded the admission of the alibi notice during the case for the Crown

At trial, the judge held that the alibi notice was in the same position as any other relevant and voluntary statement made by an accused to the police, and the Crown was entitled to put in such a statement as part of their case, whether or not they call evidence to refute it. Further, if the prosecution is able to prove beyond a reasonable doubt that the alibi is false then that may well become a circumstance requiring a judicial instruction to the jury on consciousness of guilt.

A number of grounds were argued on appeal, including whether or not the notice was in fact a statement of the accused. If so, whether or not it was voluntary considering that it was "coerced" by the common law rule which requires an accused to make timely disclosure of an alibi or risk an adverse instruction based on the failure to disclose that alibi, or if it should have

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3957; *R v Rossborough* (1985), 81 CR App R 139, [1985] Crim LR 372.

44 *Witter, supra* note 43 at para 9.

been excluded by a privilege akin to that which protects communications made in pursuit of settlement.

Unfortunately, the Court of Appeal did not rule on any of these grounds stating that "the question of when, if ever, an alibi notice provided to the Crown by an accused's solicitor can be treated as a statement of the accused is an open one [as is] the further question of whether the alibi notice should be admissible as part of the Crown's case even if it is regarded as a statement of the accused as equally open."[45] Instead, the Court ordered a new trial on the sole ground that the trial judge had erred in instructing the jury that they could find that the alibi referred to in the notice was concocted by the appellant and could provide a basis for an inference of consciousness of guilt.[46]

While the Court confirmed that an inference of guilt could be drawn from an accused that fabricates an alibi, and thus proves beyond a reasonable doubt that the accused was the person who committed the crime, there must be evidence that the alibi was deliberately fabricated *and* that the accused was a party to that fabrication – mere rejection of alibi evidence as untruthful or unreliable does not constitute affirmative evidence of guilt. There was, however, no basis for suggesting that the alibi witness deliberately put forward an alibi that she knew was false, or that the accused played any role in authoring it.

However, if the evidence adduced by the Crown is capable of supporting the inference that an accused concocted a false alibi, an alibi notice professing an intention to advance that alibi at trial would be relevant in that it would tend to support the consciousness of guilt inference. Ultimately, although the alibi evidence that was potentially offered by the former girlfriend was found to be untruthful or unreliable, it could not be shown that it was fabricated or concocted by the accused.[47]

As such it is possible that a fabricated alibi (although not an alibi that is unreliable or unbelievable) may be tendered as evidence by the Crown, even though it has not been led by the defence, other than by way of a pre-trial notice. While this is generally not the case in the United States, where

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45 *Ibid* at para 38.

46 *Ibid* at para 29.

47 However, see *R v Nielsen* (1984), 30 Man R (2d) 81, 16 CCC (3d) 39 (CA), leave to appeal to SCC refused, [1985] 1 SCR xi, and the subsequent re-trial of Jerry Stolar in 1989 where his "alibi" witness (former girlfriend) actually turned out to be a witness for the Crown.

the Courts have stated that the "prosecution should not be permitted to impeach a defendant who has elected not to present an alibi defence at trial with statements contained in a notice of alibi withdrawn before trial,"[48] the Courts have held that a prosecutor may use a withdrawn alibi notice, where an entirely different alibi is provided at trial.[49]

VI. Australian Experience

As a result of the foregoing it is obvious that an accused has no absolute right to pre-trial silence in Canada if he intends to call alibi evidence. While the failure to disclose an alibi prior to trial does not make it inadmissible, the Court may draw an adverse inference as to its reliability and credibility.

However, in Australia, the courts traditionally viewed the alibi rule differently than in Canada. For example, in *R v Petty and Maiden*, Brennan J. of the High Court held that historically "even where an accused proposes to raise an alibi, there is no common law duty to give the Crown notice of the alibi."[50] Furthermore, he stated that:

> Unless [the accused] was under a duty to inform the Crown before the trial that he proposed to raise a 'defence' ... it was impermissible to draw an adverse inference from the raising of the defence at a stage of the trial which left the Crown with insufficient time to investigate it fully. A criminal trial is the prime example of an adversarial proceeding. Its adversarial character is substantially unrelieved by pre-trial procedures designed to limit the issues of fact in genuine dispute between the Crown and an accused. The issues for trial are ascertained by reference to the indictment and the plea and, subject to statute, the Crown has no right to notice of the issues which an accused proposes actively to contest. The Crown bears the onus of proving the guilt of an accused on every issue apart from insanity and statutory exceptions. The Crown must present the whole of its case foreseeing, so

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48 *People v Brown*, 98 NY2d 226 at 235 (2002). See also *People v Holland*, 445 NW2d 206 (1989); *People v Hunter,* 291 NW2d 186 (1980); *New Jersey v Gross*, 523 A2d 212 (NJ Super AD 1987).

49 See e.g. *People v Von Everett*, 402 NW2d 773 (1986); *People v Malone*, 447 NW2d 157 (1989); *People v Lorenzo McCray*, Mich CA LC #98-001064 (2001). See also *People v Franklin Rodriguez*, 2004 NY Int 147, in which a majority the court (4:3) held that the alibi notice should not have been used as evidence of the suspect's guilt where there was a plausible basis for abandoning it (the minority held that the alibi notice was properly admitted as evidence). Nevertheless, the majority held that the error was harmless and affirmed the convictions.

50 *Petty and Maiden v The Queen*, [1991] HCA 34 at para 6, 173 CLR 95, per Brennan J in a concurring opinion.

> far as it reasonably can, any "defence" which an accused might raise, for the Crown will not be permitted, generally speaking, to adduce further evidence in rebuttal on any issue on which it bears the onus of proof: *Shaw v The Queen* (1952) 85 CLR 365, at pp 379-380. The Crown obtains no assistance in discharging that onus by pointing to some omission on the part of an accused to facilitate the presentation of the Crown's case or to some difficulty encountered by the Crown in adducing rebuttal evidence which an accused could have alleviated by earlier notice.[51]

As a result most Australian states have now legislated a uniform set of rules with respect to alibi disclosure. For example, s. 190 of the Victoria *Criminal Procedure Act 2009*,[52] states that:

> 190. Alibi evidence
>
> (1) An accused must not, without leave of the court-
>
> (a) give evidence personally; or
>
> (b) adduce evidence from another witness-
>
> in support of an alibi unless the accused has given notice of alibi within the period referred to in subsection (2).
>
> (2) A notice of alibi must be given by serving the notice on the DPP [Director of Public Prosecutions] within 14 days after-
>
> (a) the day on which the accused was committed for trial on the charge to which the alibi relates; or
>
> (b) if paragraph (a) does not apply, the day on which the accused received a copy of the indictment.
>
> (3) A notice of alibi must be served in accordance with section 392.
>
> (4) A notice of alibi must contain-
>
> (a) particulars as to time and place of the alibi; and
>
> (b) the name and last known address of any witness to the alibi; and
>
> (c) if the name and address of a witness are not known, any information which might be of material assistance in finding the witness.

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51 *Ibid.*

52 *Criminal Procedure Act 2009* (Vic), s 190. See also New South Wales *Criminal Procedure Act 1986* (NSW), s 150 "notice of alibi."

(5) If the name and address of a witness are not included in a notice of alibi, the accused must not call that person to give evidence in support of the alibi unless the court is satisfied that the accused took reasonable steps to ensure that the name and address would be ascertained.

(6) If the accused is notified by the DPP that a witness named or referred to in a notice of alibi has not been traced, the accused must give written notice to the DPP, without delay, of any further information which might be of material assistance in finding the witness.

(7) The court must not refuse leave under subsection (1) if it appears to the court that the accused was not informed of the requirements of this section.

(8) If-

(a) an accused gives notice of alibi under this section; and

(b) the DPP requests an adjournment-

the court must grant an adjournment for a period that appears to the court to be necessary to enable investigation of the alibi unless it appears that to do so would prejudice the proper presentation of the case of the accused.

In addition, until January 1, 2010 the Victoria *Crimes (Alibi Evidence) Regulations 2003*[53] provided the actual format in which alibi disclosure had to be made. The current notice of alibi, now considerably condensed, is found in Rule 4.11 and Form 6-4E of Victoria's *Supreme Court (Criminal Procedure) Rules 2008*. A similar notice of alibi for Country Court is found in rule 2.07 of the *County Court Criminal Procedure Rules* 2009.[54] Templates for both alibi notices are found in Appendix A.

VII. UNITED STATES EXPERIENCE

Like Australia, most American states have codified the rules regarding alibi disclosure. In essence, the various state governments have legislated the common-law principles that had developed with respect to alibi disclosure, requiring that it should be given in writing to the prosecutor, and with sufficient time (usually 10-14 days after committal) and with sufficient

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53 *Crimes (Alibi Evidence) Regulations 2003* (Vic).

54 Supreme Court (Criminal Procedure) Rules 2008, SR No 12/2008; County Court Criminal Procedure Rules 2009, SR No 181/2009.

particularity to permit the authorities to investigate (including the name and address of any witnesses). Furthermore, failure to give notice of alibi may result in it being ruled either inadmissible or carrying an adverse inference.

Notice-of-alibi provisions exist in a majority of States, some dating back to early last century. While the Supreme Court of Canada may not yet have ruled officially on the constitutionally of the alibi rule as it applies to an accused's right to silence (excepting the reference to *R v Letourneau* in *R v Cleghorn*) the Supreme Court of the United States first ruled on the issue in 1970.

In *Williams v Florida*,[55] the U.S. Supreme Court upheld a Florida statute requiring a defendant who intends to rely on an alibi to disclose to the prosecution the names of his alibi witnesses. Failure to comply could result in exclusion of alibi evidence at trial (except for the defendant's own testimony). The Court held that such a rule does not violate the Fifth Amendment privilege against compelled self-incrimination.

> Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate ... The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.
>
> Very similar constraints operate on the defendant when the State requires pretrial notice of alibi and the naming of alibi witnesses. Nothing in such a rule requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice. That choice must be made, but the pressures that bear on his pretrial decision are of the same nature as those that would induce him to call alibi witnesses at the trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments.
>
> In the case before us, the notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at earlier date information that the petitioner from the beginning planned to divulge at trial.

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55 *Williams v Florida*, 399 US 78 (1970).

> Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.[56]

As the Florida legislation required reciprocal disclosure from the Prosecution as to what they did with the alibi evidence, the Court did not decide if the defendant enjoyed reciprocal discovery against the State. However that issue was resolved a few years later in *Wardius v Oregon*, when the Court held that reciprocal discovery was required by "fundamental fairness."[57] Although the Oregon legislation did not require it, the Court stated the State should grant "reciprocal discovery ... in the absence of fair notice that petitioner will have an opportunity to discover the State's rebuttal witnesses, petitioner cannot, consistently with due process requirements, be required to reveal his alibi defense."[58]

As such, all States with notice-of-alibi laws require reciprocal disclosure. As an example, the statutory notice-of-alibi rules for the State of South Dakota are reprinted below:

> 23A-9-1. (Rule 12.1(a)) Time of notice to prosecutor of alibi defense--Contents. Within the time specified in § 23A-8-4 for pretrial motions, upon written demand of the prosecuting attorney stating the time, date, and place at which the alleged offense was committed, a defendant shall serve within ten days, or at such different time as the court may direct, upon the prosecuting attorney a written notice of his intention to offer a defense of alibi. The notice shall state the specific place or places where the defendant claims he was at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.
>
> 23A-9-2. (Rule 12.1(b)) Notice to defendant of rebuttal witnesses on alibi defense. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the prosecuting attorney shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.
>
> 23A-9-3. (Rule 12.1(c)) Notice to adverse party of newly discovered witness on alibi. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under § 23A-9-1

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56 *Ibid* at 85.

57 *Wardius v Oregon*, 412 US 470 (1973), headnote.

58 *Ibid.*

> or 23A-9-2, he shall promptly notify the other party or his attorney of the existence and identity of such additional witness.
>
> 23A-9-4. (Rule 12.1(d)) Exclusion of testimony of undisclosed alibi witness--Defendant's right to testify. Upon the failure of either party to comply with the requirements of § 23A-9-1, 23A-9-2, or 23A-9-3, the court shall exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This section shall not limit the right of a defendant to testify in his own behalf.
>
> 23A-9-5. (Rule 12.1(e)) Exception granted to notice requirements. For good cause shown, a court may grant an exception to any of the requirements of §§ 23A-9-1 to 23A-9-4, inclusive.
>
> 23A-9-6. (Rule 12.1(f)) Evidence of alibi notice inadmissible after withdrawal. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.[59]

VIII. WINNIPEG EXPERIENCE

Until 2001, the Winnipeg Police had no specific guidelines regarding the receipt and investigation of alibi evidence that had been disclosed after an accused had been charged. However, in his report regarding the *Inquiry Regarding Thomas Sophonow*, former Supreme Court Justice Peter Cory made several recommendations with respect to how the Winnipeg Police Service, the Department of Justice, and the defence should investigate alibi evidence:

> 1. The alibi defence should be disclosed within a reasonable time after the Crown disclosure has been completed and the Defence has reviewed it and is in a position to know the case that must be met. When that disclosure should be made by the Defence will vary from case to case. It will obviously depend upon the extent of the Crown disclosure, how long it will take the Defence to review that disclosure and how quickly Defence Counsel can prepare the alibi evidence disclosure. To the extent that it is possible, the disclosure of the alibi evidence should be in the form of statements signed by the witnesses. Alibi evidence may well establish innocence and the Defence should spend all the time and energy required to put forward a complete and detailed position on the alibi evidence.

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[59] *Statutes of South Dakota*, Criminal Procedure, SD Codified L § 23A-9-1 (2016), Rule 12.1, "Notice of Alibi." See also *Statutes of Michigan*, Code of Criminal Procedure, MI Comp L § 768.20 (2016), regarding the disclosure of alibi defences.

2. How should the police investigate the alibi evidence? Obviously, it is incumbent upon them to ensure that the alibi defence is credible. However, because of the importance of the evidence, the same care should be taken in interviewing the alibi witnesses as is taken with the interviews of suspect. That is to say, wherever possible, the interview should be videotaped and, if that is not feasible it must, at the very least, be audiotaped. The entire interview must be on tape. Anything which is alleged to have been said that is not transcribed should be considered inadmissible.

The interviewing of alibi witnesses should be undertaken by officers other than those who are the investigators of the offence itself.

It has been suggested that it should be done by members of other police forces. However, this is cumbersome and may be unnecessarily expensive. If the interview is conducted by an officer other than one involved in the investigation of the crime itself and if the interview is videotaped or audiotaped, this will provide sufficient safeguards.

3. The alibi witnesses should not be subjected to cross-examination or suggestions by the police that they are mistaken. The alibi witnesses should be treated with respect and courtesy. They should not be threatened or intimidated or influenced to change their position. However, I agree that it is appropriate for the police to instruct the witnesses that it is essential that they tell the truth and that a statement can be used as proof of its contents. The witnesses should be advised that they should be careful to tell the truth and of the consequences of a failure to do so.

4. If, as a result of the disclosure of the alibi and the interviewing of the alibi witnesses, the Crown deems it appropriate to conduct further interviews of Crown witnesses expected to be called at the trial, a procedure similar to the interrogation of the alibi witnesses should be followed. That is to say, if there is to be a further interview of a Crown witness, it should be conducted by someone other than the investigating officers. The police conducting the interview should make every effort to avoid leading questions or questions which suggest the position of the police on the case.

5. It is essential that any further interviews of Crown witnesses following the disclosure of the alibi evidence should as well be videotaped or, if that is impossible, audiotaped. Every portion of the interview should be transcribed. Any statement alleged to have been made by the witness and which does not appear on the tape recording should be deemed to be inadmissible.[60]

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[60] Peter D Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001), online: <https://digitalcollection.govmb.ca/awweb/pdfopener?smd=1&did=12713&md=1>.

In November 2006, Legal Counsel for the Winnipeg Police stated before the *Driskell Inquiry* that current police in-service training now addresses issues which often arise in wrongful conviction cases, such as the need to follow-up on all leads, suspects *and potential alibis* to prevent tunnel vision. The Sophonow investigation was cited as an example used during this training.[61]

IX. CONCLUSION

The consequence of the defence failing to disclose an alibi properly to the Crown is that the trier of fact *may* draw an adverse inference that it has been fabricated. While a delayed defence disclosure does not make it inadmissible, it can weaken alibi evidence. As noted by the Court of Appeal in *R v Letourneau*, an "alibi constitutes a complete defence to the charge … [and] it is almost inexplicable why two men arrested as suspects in a recent, brutal murder, if innocent, would not immediately disclose the fact that they were elsewhere. It is even more inexplicable that the same two men, facing or following a committal at a Preliminary Inquiry, with competent legal advice, would not explain themselves in order to avoid trial and the risk of being convicted of such a serious offence."[62]

Although there may be good reason why Defence counsel may wish to withhold alibi evidence from the Crown, they risk an adverse inference from

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61 Patrick LeSage, *Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (Winnipeg: Manitoba Justice, 2007); Winnipeg Police Service, *Response on Behalf of the Winnipeg Police Service to the Systemic Submission Made on Behalf of James Driskell and AIDWYC* at 4–5, online: <www.driskellinquiry.ca/pdf/submission_by_wps.pdf> (accessed 4 November 2017).

See also *Phillion v Ontario (Attorney General)*, 2014 ONCA 567, 121 OR (3d) 289, leave to appeal SCC refused (19 February 2015), Ottawa 36093, regarding whether there was liability for the delay in the Crown disclosing the accused's alibi evidence once Crown disclosure obligations changed after *Stinchombe*.

62 *Letourneau*, *supra* note 31. See also *R v Allen*, 2016 MBPC 70 at para 33, 135 WCB (2d) 363, where Corrin PJ drew an adverse inference from the accused's failure to call his alibi witness: "After all, it is only logical that an accused claiming an air-tight alibi that would definitely prove his innocence would call the person who could confirm and corroborate his testimony and thereby assure his acquittal by buttressing his credibility on such a key trial issue." While not disagreeing with this statement, the adverse inference was reversed on appeal as it was conceded by the Crown that the witness would not have been able to state where the accused physically was at the time of the accident. See *Allen* MBCA, *supra* note 4 at paras 8–9.

the trier of fact which they may not be able to correct later. As noted in *R v Manson* "I agree with the Crown that the defence has created the situation in which he now finds himself. He made a strategic decision not to earlier disclose the alibi defence [and must therefore suffer the consequences]."[63]

As such, risking an adverse ruling as to the legitimacy of an alibi which is disclosed late, many defence lawyers will disclose an alibi at the earliest convenience. Furthermore, if defence lawyers start to delay in disclosing alibi evidence, they risk having more stringent "alibi-notice-laws" imposed on them by the state, such as those in the U.S. and Australia.

Nevertheless adopting some of the guidelines established by the courts or legislatures in Australia or the United States, such as the format previously used in Victoria, Australia (see Appendix A), requiring that all alibi evidence be disclosed to the Crown in writing and with sufficient particularity to enable the authorities to meaningfully "uncover something," may be beneficial to all parties.

This would include the exact time, date and location where the accused was, and the names and addresses of those that can verify it. In addition, to the extent that it is possible, the disclosure of the alibi evidence should be in the form of statements signed by the witnesses. Alibi evidence may well establish innocence and the Defence should spend all the time and energy required to put forward a complete and detailed position on the alibi evidence.

While there is no requirement that an accused submit to further interrogation by the police and can provide his alibi information via third parties (ie: his lawyer, witnesses, interested parties), there is nothing preventing an accused from waiving his right to silence and participating in such a process. While some police officers may be loath to taking an alibi statement when the accused "already had his chance" to tell his story, they also stand to benefit from a false or fabricated alibi if not clear an innocent person.

Nevertheless raising alibi can be regarded as a very high risk defence as it can effectively reverse the onus of proof with a jury believing the accused (or his witnesses) has lied to escape conviction. On the other hand, providing it to the Crown or the police in a timely manner could mean, if your client is innocent, the timely dismissal or stay of charges by the Crown.

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63 *R v Manson*, 1997 CanLII 3456 at para 14.

APPENDIX A

Supreme Court (Criminal Procedure) Rules 2008
Rule 4.11 and Form 6-4E

Rule 4.11 **FORM 6–4E**

IN THE SUPREME COURT OF VICTORIA
AT

The Queen

v

[*name of accused*]

NOTICE OF ALIBI

I, [*name and address of accused*], give notice of alibi in accordance with section 190 of the **Criminal Procedure Act 2009.**

1. Particulars as to time and place of alibi: [*insert details*]

2. Name and last known address of any witness to the alibi: [*insert names and addresses of witnesses to alibi*]

3. *[*If name and last address of any witness to the alibi is not known*] the following information might be of material assistance in finding the witness [*insert details*].

Date:

[*Signature of accused*]

* Delete if not applicable

The Crimes (Alibi Evidence) Regulations 2003, S.R No. 2/2003
Passed Pursuant to the Victoria Crimes Act 1958,

Section 399A

FORM 1
NOTICE OF PARTICULARS OF ALIBI To the Director of Public Prosecutions

Informant: [full name]
Defendant: [full name]
Charge filed on: [date]
Nature of offence: On [date] in the Magistrates' Court at [venue] the Defendant was committed for trial for the above offence.

Take notice that the Defendant intends to adduce at the trial evidence in support of an alibi and provides the following information in support of the alibi: [If space insufficient attach a separate sheet.]

(a) [State the name of each witness the Defendant proposes to call];
(b) [State the current address of each witness, if known to the Defendant];
(c) [if the name or address of each witness is not known, the Defendant must state all information he or she has which might help locate the witness];
(d) [State the facts on which the Defendant relies].

This notice to the Director of Public Prosecutions may be given by leaving it at his or her office or by sending it in a registered or certified letter addressed to the Director of Public Prosecutions at his or her office. If the Defendant is in a prison or a police gaol, the officer in charge of the prison or police gaol will arrange for this notice, when completed by the Defendant, to be given or sent to the Director of Public Prosecutions. _____

FORM 2

NOTICE OF PROVISIONS WITH RESPECT TO ALIBI To the Defendant [full name]

Take notice that under section 399A of the Crimes Act 1958 a Defendant is not entitled at his or her trial, without leave of the court, to establish an alibi unless the Defendant gives notice of the particulars of the alibi in court during or at the end of the committal proceedings or in writing to the Director of Public Prosecutions.

Notice must be given within 10 days from the day on which you are given a copy of the statement and particulars of the offence as charged in the presentment. If you were committed for trial on the charge in relation to which the alibi is sought to be relied upon, you must give notice within 10 days from the day on which you were committed. Your attention is drawn to the following matters:

1. Notice of particulars of an alibi must contain the following information in support of the alibi:
    (a) the name of each witness you propose to call to establish the alibi;
    (b) the current address (if known to you) of each witness;
    (c) if the name or address of the witness is not known to you, any information in your possession which might help locate the witness;
    (d) the facts on which you rely.

2. The address of the Director of Public Prosecutions for service of the notice of the particulars of an alibi is [insert address].

3. Before you give notice of particulars of an alibi which does not include the name or address of a witness, you should first take reasonable steps to ascertain the name or address of that witness.

4. If you are notified by or on behalf of the Director of Public Prosecutions that a witness has not been traced from the information you have given, you should immediately give the

Director of Public Prosecutions notice of any other information you then have which might be of material assistance in finding the witness. If you subsequently receive any such information, you should immediately give the Director of Public Prosecutions notice of that information.

Dated: Director of Public Prosecutions

Note: Notices of alibi can be obtained from registrars of the Magistrates' Court and officers in charge of prisons or police gaols.

ENDNOTES 1. General Information The Crimes (Alibi Evidence) Regulations 2003, S.R No. 2/2003 were made on 22 January 2003 by the Governor in Council under section 399A of the Crimes Act 1958, No. 6231/1958 and came into operation on 1 February 2003. Regulation 10 expired on 31 December 2003: regulation 10(3). The Crimes (Alibi Evidence) Regulations 2003 will sunset 10 years after the day of making on 22 January 2013 (see section 5 of the Subordinate Legislation Act 1994).

2. Table of Amendments There are no amendments made to the Crimes (Alibi Evidence) Regulations 2003 by statutory rules, subordinate instruments and Acts. Where a provision has expired, the provision has been omitted and an explanatory sidenote included.

3. Explanatory Details

1 Reg. 4: S.R No. 178/1992.

S.R No. 2/2003

Crimes (Alibi Evidence) Regulations 2003