DEFENCE DISCLOSURE: IS THE RIGHT TO "FULL ANSWER" THE RIGHT TO AMBUSH?

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In Canada, a complete set of codified defence disclosure rules does not exist. Rather, these rules exist in piecemeal form, some being statutory, some common law and others in place for the sake of expedience. Like the Crown, the defence is required to disclose at the investigative, pretrial and trial stages. Although defence disclosure appears to run contrary to the accused's right to silence and the right to make full answer and defence, it is emphasized that these rights are not absolute. They must be assessed against other Charter *principles. The accused, for example, rarely remains silent until the final stages of the trial to subsequently "ambush" the Crown with his or her defence. The "ambush" defence, perceived as a strategic advantage, denies fundamental principles of fairness and ultimately hinders the search for truth. The author examines the numerous benefits of codifying the procedural rules. A clear statement of disclosure obligations, for example, would avoid lengthy debates over disclosure rules and thus ultimately lead to quicker resolution of the real issue. Further, should they operate unfairly against either party, the court would be in a position to waive them. Due to the many advantages and the corresponding lack of disadvantages such legislation would confer, it is strongly urged that a set of procedural disclosure rules be statutorily enacted.*

Il n'existe pas, au Canada, d'ensemble complet et codifié de règles de divulgation pour la défense. Ces règles existent plutôt sous forme sporadique, certaines étant prévues par la loi, d'autres par la common law et d'autres encore sont utilisées par opportunisme. Tout comme la Couronne, la défense doit communiquer pendant l'enquête, et avant et pendant le procès. Bien que la divulgation par la défense semble contraire au droit au silence de l'accusé et à son droit de présenter une défense pleine et entière, on fait valoir le fait que ces droits ne sont pas absolus. Ils doivent notamment être évalués par rapport aux principes de la Charte. *L'accusé maintient d'ailleurs rarement son droit au silence jusqu'aux dernières étapes du procès pour ensuite poser « une embuscade » à la Couronne. Cette démarche de défense, considérée comme un avantage stratégique, va fondamentalement à l'encontre du principe de l'impartialité et, en définitive, nuit à la recherche de la vérité. L'auteur examine les nombreux avantages que présente la codification des règles de procédure. Un énoncé clair sur l'obligation de divulguer éviterait notamment les longs débats sur les règles de divulgation et aboutirait en définitive à une résolution plus rapide du véritable problème. De plus, si l'application de ces règles venait à nuire à une des parties, la cour pourrait alors y renoncer. En raison des nombreux avantages et du manque correspondant d'inconvénients qu'une telle législation conférerait, l'adoption de règles de procédure relatives à la divulgation est fortement conseillée.*

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I. INTRODUCTION

Ever since disclosure by the Crown was held to be mandatory[1] the debate has simmered over the propriety of reciprocal disclosure rules for the defence. This debate is misdirected. The question is not whether to have defence disclosure rules, but whether to clean-up the odds and ends of current defence disclosure requirements through a codified set of procedural rules.

Yes, Virginia, there really is defence disclosure. It exists just as surely as the principles of fairness and truth seeking exist. It has form and substance. It is not some abstract philosophical notion awaiting a more utopian world. It is here, among us, now. The only ghost in this debate is the spectre of a "purely adversarial role" for the accused, manifested as the right to a defence by ambush.

I will not trouble the reader by taking you over well-travelled ground in order to prove defence disclosure should be formalized. I will not remind the reader that ours is one of the few common law jurisdictions that does not have legislated defence disclosure rules. I will not draw comparisons between Canada and those states that have found defence disclosure to be constitutionally valid. I will not appeal to the reader's fatalism by suggesting legislated rules are just a matter of time. Nor will I try to invoke the reader's sympathy for the prosecutor's frustration with ambush defences and the game theory of advocacy.

Instead, I will simply appeal to the reader as though they were an impartial arbitrator, and the debate, a hearing. Consider the evidence. Consider the principles that bear on the issues. Then draw your own conclusions. My submission is that defence disclosure rules should be codified in order to streamline the current practices and reconcile them with the fundamental principles of justice.

II. OBLIGATIONS FOR THE DEFENCE TO DISCLOSE ALREADY EXIST

A. AT THE INVESTIGATIVE STAGE

There already exist, even at the investigative stage of a criminal matter, processes that compel a suspect or accused to disclose information to the authorities. Physical evidence such as DNA,[2] fingerprints,[3] photographic recordings,[4] and breath samples[5]

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1 *R.* v. *Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.) [hereinafter *Stinchcombe*].

2 *Criminal Code*, R.S.C. 1985, c. C-46, s. 487.05; *R.* v. *F.(S.)* (2000), 141 C.C.C. (3d) 225 (Ont. C.A.).

3 *Criminal Code*, *ibid.*, s. 501.

4 *R.* v. *Shortreed* (1990), 54 C.C.C. (3d) 292 (Ont. C.A.).

5 *Criminal Code*, *supra* note 2, s. 254; *R.* v. *Thompson* (2001), 151 C.C.C. (3d) 339 (Ont. C.A.).

can be lawfully taken from a suspect before a charge is laid without violating the right to silence.

Physical exhibits in the hands of defence counsel must also be surrendered. This is not an obligation of the accused, but a professional responsibility of counsel for the accused. The Alberta rules of professional conduct, for example, state: "A lawyer must not counsel or participate in the concealment of property having potential evidentiary value in a criminal proceeding."[6] The commentary accompanying this rule specifies that counsel is obliged to turn over to the authorities any criminal evidence that comes into their possession.

Testimony from a suspect can be compelled in a public inquiry. This does not violate the right to silence as long as the main reason for compelling the witness is a legitimate public purpose and the witness is not prejudiced by giving testimony.[7] The purpose of such inquiries is not to fix blame, but to find out what occurred. Although the testimony cannot be used to incriminate an accused in a subsequent criminal trial, derivative evidence that was otherwise discoverable may be admissible.[8]

B. AT THE PRETRIAL STAGE

The rhetoric that surrounds the right to silence conjures the image of an accused hiding in the reeds, waiting until the close of the Crown's case to spring the defence and take the Crown totally by surprise. In reality, that is almost never done. There are many factors that compel an accused to disclose his defence long before the Crown's case is in, and usually before the trial begins. Although the accused is entitled to wait until there is a case to meet, as with most general rules there are exceptions. Some of these are statutory, like the provincial regulation requiring notice of *Charter* challenges.[9] Some are common law rules, like notice of alibi.[10] Others are matters of expedience, dictated by the exigencies of a criminal trial, like notice of a defence expert to avoid a Crown adjournment application during the defence case.[11] Each represents some level of compulsion on the accused to disclose their defence in advance, with a consequence for withholding that disclosure.

The notice requirements for *Charter* challenges are perhaps the most formalized of the current defence disclosure rules. These began as procedural and evidentiary rules at common law, based on principles of fairness. First, because they seek to exclude

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6 The Law Society of Alberta, *Code of Professional Conduct*, c. 10, r. 20(d).

7 *Phillips* v. *Nova Scotia* (1995), 98 C.C.C. (3d) 20 at 54-56 (S.C.C.).

8 *Thompson Newspapers* v. *Director of Research and Investigations* (1990), 54 C.C.C. (3d) 417 (S.C.C.) [hereinafter *Thompson Newspapers*].

9 *Provincial Court Act*, R.S.A. c. P-20; *Constitutional Notice Regulation*, A.R. 102/99.

10 *R.* v. *Cleghorn* (1995), 100 C.C.C. (3d) 393 at para. 4 (S.C.C.) [hereinafter *Cleghorn*].

11 Submissions on Behalf of the Criminal Trial Lawyer's Association (Ont.), Re proposed s. 657.3(3) CC at para. 8: <www.criminallawyers.ca/publicmaterials/press&submissions/crimamendments submissions.htm> "The Association acknowledges that the 'surprise' defence expert would normally, and properly, permit a Crown application for an adjournment while it considers the proffered evidence. Such adjournments mid-trial should be avoided."

evidence based on an alleged *Charter* breach, the defence has the burden of proof. Second, reasonable notice of the application to the Crown was necessary to enable the Crown to call the relevant witnesses. Third, reasonable notice to the Crown and the judge was necessary to enable a proper consideration of the legal principles. Fourth, the procedure had to facilitate the orderly presentation of all relevant evidence available to the parties. Fifth, if the defence ambushed the Crown instead of giving timely notice, this would prevent the judge from deciding the case on all the circumstances.[12] As indicated in the paragraph above, these requirements are now also codified by provincial regulations. Although most of the requirements are procedural and can be waived, a failure to comply could result in the *Charter* application being dismissed.

More rigid is the notice requirement for *Charter* challenges to legislation. Fourteen days notice to both the federal and provincial Attorneys General is mandatory, failing which no finding of invalidity can be made by the court.[13]

It seems ironic that something as fundamental as a breach of *Charter* rights would oblige the defence to not only give notice of its allegations, but to lead evidence to prove it — two intrusions into the right of silence. Yet, it is only common sense that the party alleging special circumstances should be obliged to spell out, in advance, what those circumstances are so that all relevant evidence can be called. Ironically, even a defence demand for further disclosure compels the defence to disclose to the trial judge the circumstances that make the additional evidence relevant.[14]

Other statutory disclosure compulsions imposed on the accused include the following:

- An application to cross-examine a victim on prior sexual conduct requires seven days notice of the application along with particulars the accused intends to adduce.[15] This does not infringe the accused's right to silence.[16]
- By recent *Criminal Code* amendments, either party intending to call expert witnesses will have to give 30 days notice of that intention along with the witness's name, area of expertise, and qualifications.[17]
- Pretrial conferences are mandatory for all jury trials and discretionary for judge-alone trials. The stated purpose is for the Crown, the defence, and the judge to discuss "such matters as will promote a fair and expeditious trial."[18] Obviously, this creates a gentle compulsion for the defence to admit facts not in issue, indicate the theory of the defence, and disclose any special issues or applications they intend to make.

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12 *R.* v. *Dwernychuk* (1992), 77 C.C.C. (3d) 385 at 393-94 (Alta. C.A.).

13 *Judicature Act*, R.S.A. 1980, c. J-1, s. 25(1).

14 *R.* v. *Chaplin* (1995), 96 C.C.C. (3d) 225 at paras. 30-32 (S.C.C.).

15 *Criminal Code*, *supra* note 2, s. 276.1.

16 *R.* v. *Darrach* (2000), 148 C.C.C. (3d) 97 at para. 55 (S.C.C.) [hereinafter *Darrach*].

17 Bill C-15A, s. 62, amended the *Criminal Code* by adding s. 657.3(3)-(7) (Proclamation date, 23 September 2002).

18 *Criminal Code*, *supra* note 2, s. 625.1.

The common law procedure for an alibi defence creates another defence disclosure obligation. This is often characterized, erroneously, as the only defence disclosure rule in our jurisprudence. The obligation is not mandatory, nor does it specify when the defence should give notice. The basic requirement is that the alibi defence be disclosed early enough, and with sufficient detail, to allow the Crown time to investigate. This is a rule of expedience intended to guard against surprise alibis fabricated in the witness box that leave the Crown powerless to challenge them. Inadequate or late disclosure can lead to an adverse inference or give less weight to the alibi evidence.[19] Although the rule is limited to alibi defences, the reasons for this rule would apply to any affirmative defence.

Other affirmative defences also compel early disclosure. Although an accused has the strict right not to reveal his defence until the Crown's case is in, the practical realities of a trial, particularly a jury trial, compel alerting both the Crown and the judge to any special defences that will be advanced. This is particularly true of defences where the accused has a burden of proof and will be calling expert evidence, as in automatism[20] or insanity.[21] Even if the Crown has some idea of what the defence might be, it is not expected to call evidence in its case-in-chief that responds to possible defences. In the words of Martin J.A. in *R.* v. *Campbell*[22] (noted with approval by the Supreme Court in *R.* v. *Chalk*[23]),

> The prosecution may have some anticipation that the defence will raise a defence be it innocent intent, accident, mistake, necessity or alibi or that the defence may be calling some expert witness as to the state of mind of the accused or as to the cause of the injury as in *R.* v. *Campbell* ... and so on. The defence may give some hint of the line of its defence in the cross-examination of Crown witnesses but in many cases it would be speculative and presumptuous for Crown counsel to anticipate: *R.* v. *Perka et al.* (1982), 69 C.C.C. (2d) 405 (B.C.C.A.). It would be, moreover, difficult and wasteful in time because Crown counsel could not be sure of just the exact issue or evidence it had to meet.

Springing a surprise defence could necessitate a lengthy adjournment at the start of the defence case so the Crown could prepare for cross-examination of the defence witnesses and muster rebuttal evidence. A lengthy adjournment in mid-trial is never desirable. With a jury, it could prove so impractical that the only solution might be a mistrial. As with other examples listed above, this disclosure obligation is not mandatory, but there are consequences for failing to disclose.

C. IN THE CROWN'S CASE

Even after the trial has started, there are principles that compel defence disclosure before they have elected to call evidence. In theory, it may be possible to go through the entire Crown case, cross-examine each of the prosecution witnesses, challenge the

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19 *Cleghorn*, *supra* note 10.

20 *R.* v. *Stone* (2001), 134 C.C.C. (3d) 353 (S.C.C.) [hereinafter *Stone*].

21 *R.* v. *Chalk* (1990), 62 C.C.C. (3d) 193 at 238 (S.C.C.) [hereinafter *Chalk*].

22 *R.* v. *Campbell* (1977), 38 C.C.C. (3d) 6 at 26 (Ont. C.A.).

23 *Chalk*, *supra* note 21.

admissibility of certain evidence, and yet give absolutely no hint of what the defence evidence or theory would be. In reality, the defence usually reveals its position early in the trial, wants the judge and jury to know its theory, and strives to repeatedly emphasize that theory in cross-examination.

This practice is encouraged by a common law principle known as the rule in *Browne* v. *Dunne* which holds that the defence theory should be put to the prosecution witnesses, particularly if the intent is to call evidence to contradict those witnesses.[24] Failure to do so can result in an adverse inference or affect the weight given to the defence evidence. This is a "rule of fairness that prevents the 'ambush' of a witness by not giving him an opportunity to state his position with respect to later evidence which contradicts him on an essential matter."[25]

Other attempts to contradict witnesses in cross-examination may also compel disclosure. If the defence wants to do it by a prior inconsistent statement, they are obliged to produce the statement to the witness.[26] Where the witness does not admit the prior statement, the defence has to prove the statement in order to assert the inconsistency.[27]

Another "disclosure window" comes at the close of the Crown's case. Before electing whether to call evidence, the defence can make a *Corbett* application. This is a request to exempt the accused from being cross-examined on his criminal record because it might be too prejudicial. In considering the application, a trial judge may hold a *voir dire* in which the defence discloses what evidence it intends to call. The defence cannot be forced to call evidence, nor is it limited at trial to the evidence it called in the *voir dire*. However, should the defence evidence change between the *voir dire* and the trial, the trial judge can change the *Corbett* ruling.[28] As with other "compulsions," the failure to adequately disclose can have adverse consequences for the defence.

D. IN THE DEFENCE'S CASE

Even the accused's election — that fundamental choice between the right to call evidence and the right to stand silent — is not free from "compulsions." As noted earlier, foundations for affirmative defences have to be laid. Some, such as insanity and automatism, impose a legal burden of proof on the defence. Others, such as an honest belief in consent, impose an evidentiary burden.[29] If the Crown evidence does not give an "air of reality" to the defence, the accused will be compelled to tender evidence. The tactical obligation felt by the accused to call evidence will no doubt increase with the strength of the Crown's case.[30] As the Supreme Court noted,

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24 *Browne* v. *Dunne* (1893), 6 R. 67 (H.L.).
25 *R.* v. *Verney* (1993), 87 C.C.C. (3d) 363 at 376 (Ont. C.A.).
26 *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 10.
27 *Ibid.*, s. 11.
28 *R.* v. *Underwood* (1998), 121 C.C.C. (3d) 117 at paras. 9-11 (S.C.C.).
29 *R.* v. *Osolin* (1993), 86 C.C.C. (3d) 481 at 545-49 (S.C.C.).
30 *R.* v. *Boss* (1988), 46 C.C.C. (3d) 523 at 542 (Ont. C.A.).

> once there is a "case to meet" which, if believed, would result in 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 must answer the case against him or her, or face the possibility of conviction.[31]

Other compulsions come into play after the defence case opens. The notion that the defence can keep playing its cards close to its chest is erroneous. The opening address to the jury can constitute a waiver of the right to silence entitling the Crown to further disclosure of the defence evidence. For example, an expert report might have to be produced to the Crown even before the accused has testified as to the facts on which the expert opinion is based.[32] Other disclosure rules apply equally to both Crown and defence witnesses. If a witness reviews a statement to refresh his or her memory before taking the stand, counsel is entitled to production of the statement during cross-examination.[33] If the evidence reveals that there are other witnesses who could have corroborated the defence evidence but were not called, the defence is under a compulsion to explain the absence or risk an adverse inference.[34]

These compulsions on the accused to disclose range from a practical expedience to a statutory prerequisite. Consistent in all the above examples is an obligation to disclose and a consequence for failing to do so. Presumptively, these requirements do not infringe the right to silence or, if they do, they constitute reasonable limits to that right. They are concrete examples of existing defence disclosure obligations.

III. THE RIGHT TO SILENCE IS NOT ABSOLUTE

Have these requirements eroded the right to silence? I suggest they have not. The right to silence exists both as a liberty right[35] and a testimonial right.[36] At the investigative stage of a criminal process, a suspect has the same rights as any other citizen to remain silent when questioned by the police. He or she is under no obligation to speak to the authorities and reveal information about the matter being investigated.[37] He or she is also entitled to choose whether to make a statement about his or her own involvement without being subjected to the coercive powers of the state.[38] Once charges have been laid, the accused is entitled not to be a witness against him or herself. If he or she chooses to testify, that evidence cannot be used to incriminate him or her in any other proceeding. The accused is also entitled, in a strict

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31 *R.* v. *M.B.P.* (1994), 89 C.C.C. (3d) 289 at 306 (S.C.C.).

32 *Stone*, *supra* note 20 at 402-403.

33 *R.* v. *Morgan* (1993), 80 C.C.C. (3d) 16 at 20-21 (Ont. C.A.); leave to appeal to S.C.C. refused 86 C.C.C. (3d) vi.

34 *R.* v. *Jolivet* (2000), 144 C.C.C. (3d) 97 at paras. 26-28 (S.C.C.).

35 *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

36 *Ibid.*, ss. 11(c), 13.

37 *R.* v. *Woolley* (1988), 40 C.C.C. (3d) 531 at 539 (Ont. C.A.).

38 *R.* v. *Broyles* (1991), 68 C.C.C. (3d) 308 at 317-22 (S.C.C.).

sense, to maintain his or her silence until the Crown's case is in, not revealing the defence until the evidence is called.[39]

The right to silence, however, is not absolute and it can be waived.[40] It may also conflict with the right to make full answer and defence. In fact, it is usually difficult to exercise the latter right without waiving the former. Once a decision has been made to call defence evidence, the defence will be disclosed to the Crown. The only question is when.

What right of the accused is at risk from early disclosure? I say none. Once the decision to call evidence has been made, the right to silence will not be preserved. It will be waived by the tendering of defence evidence. The only possible concern has to be that earlier disclosure will prejudice the defence. That is the fear that drives the rhetoric against pretrial disclosure of the defence case, a fear that I would suggest has no foundation in principle.

IV. RIGHT TO "FULL ANSWER" IS NOT THE RIGHT TO AMBUSH

The right to make full answer and defence is also not absolute.[41] First, it has to be balanced against other individual rights and societal interests. Second, the accused is entitled to procedures that are fair, not procedures that are as favourable as possible.[42] Third, a fair trial means fair from the perspective not only of the accused but the public, which the Crown represents. Fourth, there is no constitutional right to a defence by ambush.

The accused's right to full answer and defence is not entitled to literal and unrestricted enforcement, but must be balanced against other *Charter* values.[43] The suggestion that other individual rights are not effected by a criminal trial ignores complainants, witnesses, and the general public. These people have fundamental rights that may be infringed by a criminal procedure. A complainant's equality and privacy rights are clearly effected whenever an accused seeks to cross-examine about prior sexual acts.[44] How those complainants are treated by the criminal process also impacts on their security rights, effecting their sense of safety and their willingness to co-operate.[45] The broader aspect of security rights relates to the protection of other members of society through effective enforcement of criminal laws. As McLachlin J. observed in *R.* v. *Cunningham*,

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39 *R.* v. *Chambers* (1990), 59 C.C.C. (3d) 321 at 343 (S.C.C.).

40 *R.* v. *Hebert* (1990), 57 C.C.C. (3d) 1 at 2-3 (S.C.C.).

41 *R.* v. *Crawford* (1995), 96 C.C.C. (3d) 481 at 482 (S.C.C.) [hereinafter *Crawford*].

42 *R.* v. *Lyons* (1987), 37 C.C.C. (3d) 1 at 46 (S.C.C.).

43 *Crawford*, *supra* note 41.

44 *R.* v. *Mills* (1999), 139 C.C.C. (3d) 321 at 324-25 (S.C.C.) [hereinafter *Mills*].

45 *R.* v. *Seaboyer* (1991), 66 C.C.C. (3d) 321 at 387 (S.C.C.).

> The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally.[46]

In addition, every witness has his or her liberty and freedom of expression impacted by the process. The power to compel testimony is a deprivation of liberty.[47] One need only observe a long and arduous cross-examination to appreciate how much a criminal trial can intrude upon a witness's individual rights. Not only does the process compel their attendance and submission to questioning, but it further compels the witness to give answers, even if that means revealing personal, sensitive, or embarrassing information. The witness's freedom of expression, which includes the freedom to say nothing,[48] is impacted by the process.

The right to a fair trial is not only a right of the accused. It is also a right of the Crown, as the representative of the public. Although it may sound like a radical notion, the Crown is entitled to procedural fairness.[49] Accordingly, trial fairness is judged not just from the accused's perspective, but also from the perspective of the community and the complainant.[50] As McLachlin J. put it: "A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused."[51] Procedural fairness does not mean every procedure must be to the accused's advantage. For example, the accused's right to defend against all of the Crown's efforts to convict him or her does not mean the accused always gets to argue last.[52]

What principle of justice, then, is the basis for the ambush defence? Implicit in the notion of surprise defence evidence is the idea that a tactical advantage will be gained because the Crown cannot properly respond. The tactic tries to take unfair advantage by presenting evidence that cannot be effectively challenged or tested. If the Crown cannot get an adjournment, does not have time to investigate the defence evidence, and cannot properly prepare for cross-examination, then the accused can present his or her version with impunity.

The principles of fairness say this must not be. The accused is not entitled to call evidence that would distort the truth seeking process.[53] As Cory J. put it in *Darrach*: "The right to make full answer and defence does not include the right to defend by ambush."[54] Many of the reasons given by the Supreme Court in *Stinchcombe* for imposing disclosure upon the Crown apply with equal force to the defence. The search

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46 *R.* v. *Cunningham* (1993), 80 C.C.C. (3d) 492 at 499 (S.C.C.).

47 *Thompson Newspapers, supra* note 8.

48 *Slaight Communications* v. *Davison* (1989), 59 D.L.R. (4th) 416 at 446 (S.C.C.).

49 *R.* v. *Wald* (1989), 47 C.C.C. (3d) 315 at 336 (Alta. C.A.).

50 *Mills, supra* note 44 at para. 72.

51 *R.* v. *Harrer* (1995), 101 C.C.C. (3d) 193 at para. 45 (S.C.C.).

52 *R.* v. *Rose* (1998), 129 C.C.C. (3d) 449 at paras. 102-103 (S.C.C.).

53 *Mills, supra* note 44 at para. 74.

54 *Darrach, supra* note 16 at para. 5.

for the truth is advanced rather than retarded by disclosure of all relevant material.[55] Although withholding disclosure may make it more difficult to cross-examine witnesses, tactical advantages must be sacrificed in the interests of fairness and the ascertainment of the true facts of the case.[56]

The ambush defence is not an integral element of the right to full answer and defence. It is not based on a principle of fundamental justice. It is nothing more than an opportunity the accused might exploit to take unfair advantage of the Crown. As a trial tactic, it only works if the trial judge indulges the unfair advantage by denying the Crown a reasonable opportunity to challenge the defence evidence.

In light of these principles, is there any legitimacy left to the idea of an ambush defence? Obviously not. I acknowledge that an accused can still insist on his right to silence and "spring" a defence on the Crown. But it does not happen because it does not work. Many defence lawyers may think it exists. They have heard stories of it being successful. There are unconfirmed sightings, but as with other legends, no hard proof exists to show that this is anything but a figment of the imagination.

V. "DISCLOSED FULL ANSWER" IS STILL "FULL ANSWER"

What, then, are the disadvantages of formalized defence disclosure rules? Will they violate the right to silence? Will they erode the accused's ability to make full answer and defence? Will they constitute an affront to the principles of fundamental justice? I suggest the answer to all these questions is a resounding "No."

I am not speaking here of a general requirement that an accused bare his or her soul. I am speaking of disclosure where the accused has decided to call evidence. The defence will certainly be disclosed, at the very latest, once the evidence is called. The requirement that the defence be disclosed before trial avoids mid-trial delays created by surprise defences. Such disclosure rules in other jurisdictions have been termed "accelerated disclosure." Requiring accelerated disclosure of an affirmative defence does not infringe the right to silence. The accused is still entitled not to reveal his defence in advance, but faces the possibility of an adverse inference for late disclosure.[57]

The advantages of accelerated disclosure are obvious. The existing rules, requirements, and compulsions can be consolidated into one body of rules and reconciled with principles of fundamental justice. It would provide clear guidance to defence counsel as to their disclosure obligations. It would motivate consistency in the practice of disclosure, a practice that is currently idiosyncratic.[58] It would assist the efficiency of trials by identifying what is not in issue and focusing the hearing on what

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55 *Stinchcombe*, *supra* note 1 at 8.

56 *Ibid.* at 15-16.

57 *Jones* v. *Superior Court of Nevada County*, 58 Cal. 2d 56 (Sup. Ct. Cal. 1962).

58 In *R.* v. *J.D.B.*, [1996] O.J. No. 5073 (Ont. Gen. Div.), online: QL (OJ) Watt J. observed that defence counsel frequently disclose to the Crown what witnesses they will be calling.

is. It might even strengthen the defence case by prompting secondary disclosure from the Crown. The Crown may have other evidence, considered irrelevant based on the Crown's case, that turns out to be relevant to the defence being raised.[59]

Before someone accuses me of "pulling a fast one," I have not lost sight of the undecided accused. It may well be that some accused do not know until the end of the Crown's case whether they will tender defence evidence. The "prove it" defence is still the first response to the Crown allegations in many cases. In other cases the accused may not be willing or able to decide until after he or she has heard the whole of the Crown's case. Defence disclosure rules could not take away an accused's right to stand silent until the end of the Crown's case. Should they then choose to advance an affirmative defence, they could not be prevented from doing so. The rules would simply create procedures for notice and a mechanism for dealing with inadequate notice to prevent unfair use of a surprise defence.

A useful structure for such rules can be found in the proposed amendment to the *Criminal Code* dealing with expert evidence.[60] It requires 30 days pretrial notice of the name, area of expertise, and qualifications of any expert either side intends to call. Copies of any expert reports must also be turned over in advance, with the accused's obligation being to do so no later than the close of the Crown's case. Failure to do so entitles the other side to an adjournment, an order for disclosure, or the right to recall witnesses. If the defence chooses not to call that witness, the Crown is precluded from using the material disclosed to strengthen its case. Nor can the Crown use it to incriminate the accused in another proceeding.

The same principles could apply to other defence evidence, even the testimony of the accused. If the defence intended to call evidence, they would be expected to disclose a basic outline of that evidence and the witnesses to be called before the trial began. The Crown would be precluded from using that material to strengthen its case-in-chief. The defence would still be entitled to change its position and call no evidence. Where the defence chose not to disclose in advance, or had not decided whether to call evidence until the Crown closed its case, they would still be entitled to call that evidence. However, the consequences for the late disclosure might include an adjournment for the Crown to prepare, an order for detailed disclosure before the defence evidence can be heard, or the recalling of witnesses to address new issues raised by the defence. The lateness of disclosure may also affect the weight to be given the defence evidence, or invite an adverse inference as with an alibi defence.

VI. CONCLUSION

To conclude, there are a great many reasons to have statutory rules of procedure for disclosure, both for the Crown and the defence. There are no good reasons not to have them. For those that would lament the demise of a purely adversarial posture, do not be dismayed for the accused loses nothing. First, these would be procedural rules. They

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[59] *R.* v. *Barbosa*, [1994] O.J. No. 2064 at para. 45 (Ont. Gen. Div.), online: QL (OJ).

[60] *Supra* note 17, s. 657.3(3).

can be waived by the court if strict enforcement would operate unfairly against the accused. Second, the accused always has the right to raise a constitutional challenge to any rule or procedure that violates his or her rights. If the application of a disclosure rule created real prejudice in an accused's particular circumstances, it would not survive a *Charter* challenge. Third, the "purely adversarial" role for an accused no longer has any legitimacy. The ambush defence has no place in the principles of fundamental justice as they are now understood. In days gone by it may have been an accepted way for an accused to defend him or herself, but then so was trial by combat.