CANADIAN BAR ASSOCIATION

NATIONAL CRIMINAL JUSTICE SECTION

COMMITTEE ON CRIMINAL CODE REFORM

DOUBLE JEOPARDY

INTRODUCTION

"Double Jeopardy" is an omnibus term used to describe a basic tenet of the criminal law - "no person should be punished twice for the same offence".

DOUBLE JEOPARDY

Double jeopardy may be a special plea to the customary guilty or not guilty pleas in our criminal law process. It is raised where a previous acquittal or conviction has occurred or where a previous issue has been litigated in a criminal process. The Criminal Code specifically provides in s. 606 for pleas of guilty, not guilty or the special pleas of autrefois acquit, autrefois convict and pardon.

"Double Jeopardy" has many constituent parts:

1) Special Pleas:

- Autrefois Acquit
- Autrefois Convict
- Pardon

2) Rule against multiple convictions referred to as the Kineapple principle.

3) Procedural Unfairness - Splitting the Crown's Prosecution

4) Res Judicata / Issue Estoppel

The Law Reform Commission of Canada (L.R.C.) in working paper 63 has reviewed various aspects of the area of Double Jeopardy. This paper will synopsize that working paper, briefly review some important legal decisions and then present various options to be considered by this Committee.

1. AUTREFOIS ACQUIT, AUTREFOIS CONVICT and PARDON are provided for in sections 607 - 619 of the current Criminal Code of Canada.

607.(1) An accused may plead the special pleas of

(a) autrefois acquit;

(b) autrefois convict; and

(c) pardon.

(2) An accused who is charged with defamatory libel may plead in accordance with sections 611 and 612.

(3) The pleas of autrefois acquit, autrefois convict and pardon shall be disposed of by the judge without a jury before the accused is called on to plead further.

(4) When the pleas referred to in subsection (3) are disposed of against the accused, be may plead guilty or not guilty.

(5) Where an accused plead autrefois acquit or autrefois convict, it is sufficient if he

> (a) states that he has been lawfully acquitted, convicted or discharged under subsection 736(1), as the case may be, of the offence charged in the count to which the plea relates; and
>
> (b) indicates the time and place of the acquittal, conviction or discharge under subsection 736(1).

(6) A person who is alleged to have committed an act or omission outside Canada that is an offence in Canada by virtue of any of subsections 7(2) to (3.4) or subsection 7(3.7) or (3.71), and in respect of which that person has been tried and convicted outside Canada, may not plead autrefois convict with respect to a count that charges that offence if

> (a) at the trial outside Canada the person was not present and was not represented by counsel acting under the person's instructions, and
>
> (b) the person was not punished in accordance with the sentence imposed on conviction in respect of the act or omission, notwithstanding that the person is deemed by virtue of subsection 7(6) to have been tried and convicted in Canada in respect of the act or omission.

608. Where an issue on a plea of autrefois acquit or autrefois convict is tried, the evidence and adjudication and the notes of the judge and official stenographer on the former trial and the record transmitted to the court pursuant to section 551 on the charge that is pending before that court are admissible in evidence to prove or to disprove the identity of the charges.

609. (1) Where an issue on a plea of autrefois acquit or autrefois convict to a count is tried and it appears

> (a) that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and
>
> (b) that on the former trial, if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count to which the plea

> of autrefois acquit or autrefois convict is pleaded. the judge shall give judgement discharging the accused in respect of that count.
>
> (2) The following provisions apply where an issue on a plea of autrefois acquit or autrefois convict is tried:
>
> (a) where it appears that the accused might on the former trial have been convicted of an offence of which he may be convicted on the count in issue, the judge shall direct that the accused shall not be found guilty of an offence of which he might have been convicted on the former trial; and
>
> (b) where it appears that the accused may be convicted on the count in issue of an offence of which he could not have been convicted on the former trial, the accused shall plead guilty or not guilty with respect to that offence.
>
> 610. (1) Where an indictment charges substantially the same offence as that charges in an indictment on which an accused was previously convicted or acquitted, but adds a statement of intention or circumstances of aggravation tending, if proved, to increase the punishment, the previous conviction or acquittal bars the subsequent indictment.
>
> (2) A conviction or an acquittal on an indictment for murder bars as subsequent indictment for the same homicide charging it as manslaughter or infanticide, and a conviction or acquittal on an indictment for manslaughter or infanticide bars a subsequent indictment for the same homicide charging it as murder.
>
> (3) A conviction or an acquittal on an indictment for first degree murder bars a subsequent indictment for the same homicide charging it as second degree murder, and a conviction or acquittal on an indictment for second degree murder bars a subsequent indictment for the same homicide charging it as first degree murder.
>
> (4) A conviction or an acquittal on an indictment for infanticide bars a subsequent indictment for the same homicide charging it as manslaughter, and a conviction or acquittal on an indictment for manslaughter bars a subsequent indictment for the same homicide charging it as infanticide.

These special pleas are to be raised before formal arraignment and are to be determined by the trial judge. The identity of the charges previously dealt with, either by trial or by guilty plea may be proved in accordance with s. 608.

If the trial judge finds "the matter on which the accused was given in charge on the former trial is the same in whole or part ....." and if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count before the court the judge shall discharge the accused in respect of that count, and direct that the accused shall not be found guilty of any offence of which he might have been convicted on

the former trial.

The plea of Autrefois is available for example:

i) where an accused is tried and acquitted on the basis of an incorre essential averment in the indictment. A second trial on the "correctec indictment is barred.

ii) where an accused has been charged and convicted of possession of dru on a specific date. A second trial for possession for the purpose arising o of that possession is barred.

iii) on both summary s. 795 Criminal Code and indictable offences, but is n permissible at preliminary hearings.

It is however limited in application and scope as evidenced by recent Supreme Cou of Canada decisions. In Van Rassell v. The Queen [1990] 1 S.C.R. 225, 53 CC (3d) 353 the Court at page 359, specifically recognized the independent nature each of the various aspects of Double Jeopardy. They must be consider separately when determining if they are applicable to a given fact situatio McLachlin J. reviewing specifically autrefois acquit at Page 360 states:

> "To make out the defence of autrefois acquit, the accused must show that the two charges laid against him are the same. In particular, he must prove that the following two conditions have been met:
>
> (1) the matter is the same, in whole or in part, and
>
> (2) the new count must be the same as at the first trial, or be implicitly included in that of the first trial, either in law or on account of the evidence presented if it had been legally possible at that time to make the necessary amendments.
>
> It is sometimes difficult to apply the principle of autrefois acquit to charges arising in criminal law systems completely different from our own. While the laws of different countries are rarely the same, it must be recognized that the plea of autrefois acquit is based on the principle of justice and fairness and that the Criminal Code does not require that the charges be absolutely identical. Despite the technical form of the relevant sections of the Criminal Code, the substantive point is a simple one: Could the accused have been convicted at the first trial of the offence with which he is now charged? If the differences between the charges at the first and second trials are such that it must be concluded that the charges are different in nature, the plea of autrefois acquit is not appropriate. On the other hand, the plea will apply if, despite the differences between the earlier and the present charges, the offences are the same.

Querie: The finding of the trial judge is a question of law and therefore

subject to appeal. Should the judicial pronouncement be a judicial stay of proceedings would be the appropriate disposition as in entrapment?

Section 613 provides:

> "Any ground of defence for which a special plea is not provided by this Act may be relied on under the plea of not guilty."

Aside from the specific Code provisions above noted general Code provisions make room for the "presentation of other aspects of double jeopardy in criminal proceedings".

In addition the Charter of Rights and Freedoms specifically provides for double jeopardy in s. 11(h):

> "11. Any person charged with an offence has the right
>
> (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again."

Section 7 of the Charter provides a broad and general overriding protection and may therefore provide significant flexibility to raise, developing and to be developed areas of double jeopardy in criminal proceedings:

> "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

2. RULE AGAINST MULTIPLE CONVICTIONS

The Supreme Court in Kineapple v. The Queen (1974) 15 CCC 2d set out the rule against multiple convictions at page 539:

> "In short, in relation to potentially multiple convictions, it is important to know the verdict on the first count, just as in the case of successive prosecutions it is important to know the result of the first trial: see Friedland, Double Jeopardy (1969), at p.94
>
> If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions: see Connelly r. Director of Public Prosecutions, [1964] A.C. 1254 at pp. 1305 and 1308, per Lord Morris of Borth-y-Gest:

c.f., R. v. Kendrick and Smith (1931), 23 Cr. App. R. 1.

I test the matter in two other ways. If an accused may be charged on two counts, as in the present case, and may properly be found guilty on each for the one act of sexual intercourse with the same girl, it should be open to the Crown to charge him successively in the same way. If it obtains a verdict of guilty of rape it should be entitled to prefer another charge under s. 146(1) in order to obtain another verdict of guilty and seek a further consecutive sentence. Yet it seems clear enough that on the second charge, res judicata would be a complete defence since all the elements and facts supporting the conviction of rape would necessarily be the same under s. 146(12). Moreover, since the occurrence involved a proved negation of consent, there could be no conviction under the second aspect of s. 146(1) when there has been a conviction of rape.

In saying that res judicata (as an expression broader than autrefois convict) would be a complete defence, I am applying the bis vexari principle against successive prosecutions, a principle that, according to Morris and Howard, in the essay mentioned earlier, is grounded on the Court's power to protect an individual form an undue exercise by the Crown of its power to prosecute and punish.

The second test is to reverse the order of the counts in the present case. If on the first charge of an offence under s. 146(1) the jury brings in a verdict of guilty, it would be inconsistent to find an accused guilty on a second count of rape because there may have been consent; and even if not, the consideration underlying res judicata would preclude a verdict of guilty of rape. Of course, if on a first count under s. 146(1) the accused was found not guilty, there could obviously be no finding of guilty of rape unless on the basis that the girl involved was over age 14: apart from that, there has been either no sexual intercourse proved even if there was no consent, or there has been no sexual intercourse proved albeit there was consent.

Parliament's power to constitute two separate offences out of the same matter is not in question, but unless there is a clear indication that multiple prosecutions and, indeed, multiple convictions are envisaged, the common law principle expressed in the Cox and Paton case should be followed."

The Court in R v. Prince (1986) 30 CCC (3d) 35 clarified the judicially muddied water interpreting Kineapple's principles and applying same.

Chief Justice Dickson commented on the changes brought about by Kineapple's principles.

1) The test for application of the rule against multiple convictions was now framed in terms of whether the same cause, matter or delict was the foundation for both charges.

2) There was a recognition of the specific independent legal identity of different offences which led to choosing words like cause, matter or delict above noted.

When determining if the rule against multiple convictions applies Dickson CJC stated:

1) There must be a factual nexus between the charges, at page 44,

> "In most cases, I believe, the factual nexus requirement will be satisfied by an affirmative answer to the question: Does the same act of the accused ground each of the charges? As Cote demonstrates, however, it will not always be easy to define when one act ends and another begins. Not only are there peculiar problems associated with continuing offences, but there exists the possibility of achieving different answers to this question according to the degree of generality at which an act is defined: see Dennis R. Klinck at p. 292, H. Leonoff and D. Deutsher at p. 261, and A.F. Sheppard at p. 638. Such difficulties will have to be resolved on an individual basis as cases arise, having regard to factors such as the remoteness or proximity of the events in time and place, the presence or absence of relevant intervening events (such as the robbery conviction in Cote), and whether the accused's actions were related to each other by a common objective. In the meantime, it would be a mistake to emphasize the difficulties. In many cases, including the present appeal, it will be clear whether or not the charges are founded upon the same Act."

2) Is there a legal nexus between the offences, at page 45,

> "Once it has been established that there is sufficient factual nexus between the charges, it remains to determine whether there is an adequate relationship between the offences themselves. The requirement of an adequate legal nexus is apparent from the use by the majority in Kineapple of the words "cause", "matter" or "delict" in lieu of "act" or "transaction" in defining the principle articulated in that case. More telling is the fact that Laskin J. went to considerable pains to discuss the legislative history or rape and carnal knowledge of a female under 14 years and to conclude that the offences were perceived as alternative charges when there was non-consensual intercourse with a female under 14. I am not prepared to regard Justice Laskin's analysis in this regard as unnecessary or irrelevant to the outcome in Kineapple, which it would of course be if the rule against multiple convictions applied whenever there was a sufficient factual nexus between the charges.
>
> In my opinion, the weight of authority since Kineapple also supports the proposition that there must be sufficient nexus between the offences charged to sustain the rule against multiple convictions.

3) Is there the presence of additional, distinguishing elements, at page 49,

> I conclude, therefore, that the requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the Kienapple

principle.

There is, however, a corollary to this conclusion. Where the offences are of unequal gravity, Kienapple may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence.

There are 3 ways at least in which the elements of one crime may be not be additional to or distinct of another crime:

i) one element may be a particularization or included in another element (page 50)

ii) more than one method embodied in more than one offence to prove a single delict (page 50)

iii) Parliament has deemed a particular element to be satisfied by proof of a different nature. (page 51)

Dickson CJC clearly stated that unless there is an express intention of Parliament that multiple convictions should occur, the rule against multiple convictions should be applied.

The affect of a finding that the rule against multiple convictions applies has been addressed by the Supreme Court in R v. Provo [1989] 2 S.C.R. 3

The trial judge is to hear the evidence, when the charges are tried together. At the conclusion of the trial the Court is to address the evidence tendered and make findings of guilty if warranted on the charges. The Court should then apply the rule and if found applicable enter a conditional stay of proceedings on the charge(s) which would be affected by the Rule. That conditional stay remains effective until all appeals have been exhausted. If the charge(s) on which convictions were entered survive, the conditional stay becomes a permanent order.

If the charge(s) are tried "separately" the logical procedure is to raise the issue before the trial judge. The evidence should be tendered and the Court render it's decision based on a review of the evidence and charge(s) previously determined. This process would eliminate the difficulties procedurally and the delay of proceeding inherent in interlocutory motions.

3. PROCEDURAL UNFAIRNESS

This has been referred to as "Splitting the Crown's Prosecution". In effect it is prosecuting a person for an offence arising from a set of facts but refraining from prosecuting at the same time for other offences which could have been proceeded with, only to do so later.

The ability to combine charges together to proceed at one time has in the past been statutorily barred (i.e. murder). However in general the discretion of the Crown to proceed on charges has been unfettered until recently. Clearly if there are improper, oblique motives for the exercise of or failure to exercise Crown discretion - same is reviewable by the Courts and a remedy may be available - **Abuse of Process.** Such a finding may result in a judicial stay of proceedings.

In the absence of such a finding, the Crown's prosecution may in fact proceed to separate trials.

Querie: Should there be a general statutory provision fettering the Crown's discretion to prosecute separately even in the absence of a finding of "abuse of process".

4. RES JUDICATA - ISSUE ESTOPPEL

The Supreme Court has stated that issue estoppel is available in criminal proceedings. (Gushue v. The Queen [1980] 1 S.C.R. 798) There are limitations to the application of estoppel.

a) Issue estoppel cannot be based on false evidence where evidence of the falsity is not available at the trial where it is alleged issue estoppel originates from.

b) A perjury prosecution is not barred where as a result of perjured evidence a court has made a finding of not guilty.

c) Findings on an interlocutory proceeding (i.e. voir dire) do not support issue estoppel.

d) Issue estoppel does not apply to offences involving different victims.

5. SPECIFIC CRIMINAL CODE PROVISIONS

a) Generally:

Section 12. (11) Where an act or omission is an offence under more than one Act of Parliament, whether punishable by indictment or on summary conviction, a person who does the act or makes the omission is, unless a contrary intention appears, subject to proceedings under any of those Acts, but is not liable to be punished more than once for the same offence.

b) Drunk Driving:

Section 254(6) Specifically bars more than one conviction for an offence arising out of the same transaction - as follows:

254(2) - Alert demand
254(3)(a) - Breathalyser sample
254(3)(b) - Blood sample
254(5) - Refusal to provide samples

c) Attempts:

Section 661(2) bars a subsequent prosecution for the full offence if at trial on an attempt charge the full offence is proved but the person is convicted for the attempt only. Section 661(1) would allow for the trial judge - prior to a conviction being entered on the attempt to discharge the accused and direct that the accused be indicted on the complete offence which has been proved. Failure of the trial judge to do so in the absence of a challenge by the Crown based on the failure of the trial judge to properly exercise his discretion would bar a subsequent proceeding.

d) Foreign Conviction/Acquittals

Conspiracy - s. 465(7) deems a person to have been tried and dealt with in Canada for an offence of conspiracy if they were tried and dealt with outside of Canada and would be able to raise the special pleas of autrefois acquit, autrefois convict or pardon.

s. 607(6) however bars a plea of autrefois convict if the person:

i) was not present and was not represented by counsel acting under the person's instructions,

and

ii) was not punished in accordance with the sentence imposed the L.R.C. opines that although there is no specific provision in the Criminal Code as regards the use of the doctrine of res judicata to bar subsequent prosecutions in Canada where a

foreign prosecution has taken place, given the "weight of common law and statutory authority in favour of applying double jeopardy principles between nations, it is a reasonable assumption that in an appropriate case the Court would bar proceeding where a foreign court has already ruled on the issue."

(page 18, working paper 63)

6. FEDERAL/PROVINCIAL OFFENCES

In the United States where both Federal and State governments exercise criminal jurisdiction double jeopardy is not barred unless state legislation specifically prohibits dual prosecution. In Canada definitive judicial authority is lacking. The L.R.C. states at p. 19

> "... in light of Kineapple recent authorities indicate that double jeopardy principles can be applied where the accused faces both a conviction for a Code crime and for a quasi-criminal provincial offence."

CODIFICATION

The L.R.C. has expressed general dissatisfaction with the uncoordinated disjointed manner in which Double Jeopardy issues are addressed.

(Page 43 Working Paper 63)

> "The existing Code regime governing double jeopardy, pleas and verdicts is characterized by an occasional lack of comprehensiveness, confusing procedures and the existence of anachronisms - three characteristics that offend the principle of clarity. Also evident are a number of procedures that produce undue delay and thereby compromise the principle of efficiency. Finally, there are particular shortfalls in the protection offered to the accused, a situation that calls into question the principle of fairness."

It is recommended that the Committee endorse the codification of Double Jeopardy issues, the procedure(s) to raise and adjudicate such issues and the nature of remedies available. Codification must be specific, and clear yet flexible for future development.

The L.R.C. has made thirteen (13) recommendations for codification of Double Jeopardy issues:

1. Prosecution for Each Crime Permitted Unless Rules against Double Jeopardy Apply

> 1) 1. Where the conduct of an accused with respect to the same transaction makes its possible to establish the commission of more than one crime, it should be possible to prosecute the accused for each crime, subject to the following recommendations protecting against double jeopardy.

Whether this or some similar wording is utilized, it is essential to ensure that persons who commit offences are subjected to full but fair consequences as provided by the law. Protection from double jeopardy is recognized as an essential element of our criminal justice system. Criminal liability therefore must be subject to that protection.

Recommended Provision:

> A person is liable to be prosecuted and punished for any or all offences where the conduct of that person constitutes two or more offences, subject to Sections
>
> This recommendation recognizes the Committee's use of "conduct" as a basis for criminal liability. It also recognizes the dual aspects of prosecution and punishment for each offence subject to specific provisions. This provision is similar in wording and scope to the Draft Code of the English Law Commission.

2) Rule against Separate Trials

> 2. (1) Unless otherwise ordered by the court in the interests of justice - such as preventing prejudice - or unless the accused acquiesces in a separate trial, an accused should not be subject to separate trials for multiple crimes charged or for crimes not charged but known at the time of the commencement of the first trial that:
>
> (a) arise from the same transaction;
> (b) are part of a series of crimes of similar character (evidence of each of which is admissible in proof of the others);
> (c) are part of a common scheme or plan; or
> (d) are so closely connected in time, place and occasion that it would be difficult to separate proof of one from proof of the other(s).
>
> (2) When the accused is unrepresented, the express consent of the accused to separate trials should be obtained.
>
> (3) In assessing whether it is in the interests of justice to have separate trials, a courts should be permitted to consider, among other factors:
>
> (a) the number of charges being prosecuted;
> (b) whether the effect of the multiple charges would be to raise inconsistent defences;
> (c) whether evidence introduced to support one charge would prejudice the adjudication on the other charge(s);
> (d) whether the case is to be tried by a judge alone or with a jury; and
> (e) the timing of the motion for severance.

The following is recommended:

> 2. (1) No person shall be tried separately for multiple offences if
> (a) the offences arise from the same conduct
> (b) are part of a common course of conduct or
> (c) the conduct is closely connected in time, place and occasion
>
> (2) Where subsection (1) applies to bar separate trials an accused may in writing consent to separate trials on one or more of the offences charged.
>
> (3) A court may direct that notwithstanding subsection (1) offences are to be tried separately on application by the Crown or the accused if it is in the interest of justice to have separate trials. The interests of justice may include among other factors:
>
> a) the number of charges being prosecuted
> b) whether the effect of multiple charges would raise inconsistent defences
> c) whether the evidence introduced to prove one charge would prejudice to proceeding on one or more of the other charges
> d) the mode of election for trial
> e) the timing of the motion for severance of the charges

Recommendation 2(1) recognizes the need to provide guidance as to when charges should be tried together. Logically where a factual or temporal nexus occurs the

effective administration of justice would call for one trial. The L.R.C. has recommended the inclusion of offences which are "part of a series of crimes of similar character", in a trial of all similar fact allegations against an accused. Concern arises as to the value of such proceeding including the procedural fairness to an accused and the evidentiary difficulties to be encountered proceeding on numerous charges spanning lengthy periods of time.

It is also proposed that the application to sever given the mandatory nature of 2(1) should be available to both the Crown and accused.

3) No Subsequent Trial for the Same or Substantially the Same Crime

> 3. (1) An accused should not be tried for the same or substantially the same crime for which the accused has been acquitted, convicted, discharged pursuant to what is currently section 736(1), or pardoned.
>
> (2) An accused should not be tried for a crime that was included in the crime of which the accused was acquitted, convicted, discharged pursuant to what is currently section 736(1), or pardoned, or that was an element of one of the alternative ways specified by statute of committing the crime of which the accused was acquitted, convicted, discharged or pardoned.
>
> (3) An accused should not be tried for a crime if the accused has been previously acquitted or convicted, discharged pursuant to what is currently section 736(1), or pardoned in relation to a crime included in, or specified by statute as an element of, one of the alternative ways of committing that crime.

Recommendation 3 is a re-statement in plain language by LRC of autrefois acquit and autrefois convict: It adds however in 3(2) and 3(3) "an element of one of the alternative ways specified by statute of committing the crime". Included offences or greater offences are included in double jeopardy protection. Is there a need to go further. LRC suggests so as follows:

> "For example, following an acquittal on a charge of assault, an accused cannot later be tried for the included crime of attempted assault. (Attempts are defined by law as crimes included in the completed offence.) Or suppose a person is charged with the crime of robbery by assaulting someone with intent to steal from him under what is currently section 343(c). Here assault is an element of one of the ways specified by statute of committing the greater crime of robbery. Therefore the person, if convicted of the crime of robbery, cannot later be tried for assault arising out of the same incident."

It would seem that the examples would be governed by 3(1) "for the same or substantially the same .." and therefore the provision may be unnecessary.

4) Rule against Multiple Convictions

> 4. (1) Where an accused is charged with more than one crime arising out of the same transaction, it should be possible to register a conviction against the accused for only one of the crimes charged, where:
>
> (a) the other crimes are included in, or are specified by the statute as elements of alternative ways of committing, the crime upon which the conviction has been registered;
> (b) the other crimes consist only of a conspiracy to commit the crime upon

which the conviction has been registered;
(c) the other crimes are, in the circumstances, necessarily encompassed by the crime upon which the conviction has been registered;
(d) the other crimes are alternatives to the crime upon which the conviction has been registered;
(e) the crimes differ only in that the crime upon which the conviction has been registered is defined to prohibit a designated kind of conduct generally and the other crimes to prohibit specific instances of such conduct; or
(f) the crimes charged constitute a single, continuous course of conduct that the statute defines as a single, continuing crime.
(g) the crimes charges constitute a single, continuous course of conduct that the statute defines as a single, continuing crime.

(2) This rule should not apply when the statute expressly provides for a conviction to be registered for more than one crime, or, in the case of a continuing course of conduct, where the law provides that specific periods of such conduct constitute separate crimes.

Recommendation 4 is an embodiment of the Kineapple Principle with some modification. The LRC recommended introduction may be amended as follows:

> Where a person is charged with more than one offence arising out of the same conduct they shall not be liable to be convicted of more than one offence arising out of that same conduct where:

This introduction is in keeping with the terminology of the Committee.

LRC clause 4(b) broadens the current scope of Kineapple. This provision would preclude a conviction for the substantive offence and a conspiracy to commit said offence. Such an application may be too broad given the current state of the law in Canada.

4(d) codifies what was previously a policy decision in the drunk driving scenario. While legally permissible to convict for more than one offence under s. 253 of the Criminal Code, Parliament based on policy considerations barred multiple convictions. Should this be codified or a matter left to policy makers?

5) Inconsistent Judgements

5. (1) A prosecution for a crime should be barred if a conviction or acquittal on a charge at a former trial necessarily required a determination of a factual or legal issue inconsistent with the determination of an identical issue that must be made in order for a conviction to be made on a different charge at a subsequent trial of the same accused.

(2) Recommendation 5(1) should not apply to a subsequent trial for perjury (perjury or making other false statements) if proof of the crime is made by calling additional evidence not available through the use of reasonable diligence at the time of the first trial.

(3) Nothing in these recommendations should be seen as preventing the courts from further developing the law on inconsistent judgements.

Recommendation 5 is seen as adequately dealing with the area of issue estoppel as it currently stands. 5(3) is seen as unnecessary given the authority of the Court to develop and interpret both common law and statutory enactments.

6) Effect of Foreign Judgements

> 6. (1) Where a person is charged in Canada with the same or a substantially similar crime for which the person was acquitted or convicted by a court of competent jurisdiction in a foreign state, the foreign acquittal or conviction should have the same effect as a judgement in Canada if:
>
> (a) the foreign state took jurisdiction over the crime and the accused on the same or similar basis as could have been exercised by Canada; or
> (b) Canada acquiesced in the claim by the other state of jurisdiction.
>
> (2) For purposes of subsection (1), where a person has been convicted in his absence by a court outside Canada and was not, because of such absence, in peril of suffering any punishment that the court has ordered or may order, the court in Canada should have the power to disregard that conviction and proceed with the trial in Canada.
>
> (3) A foreign conviction should not include a judgement made in absence of the accused that would be annulled upon the return of the accused so that a trial on the charge could then proceed.

It is suggested that LRC recommendation 6 is acceptable. It represents the codification of the rule of double criminality from extradition/rendition proceedings. It recognizes that a person is not liable to extradition/rendition unless conduct constitutes offences in both countries, and further recognizes that offences will not be identical in their formulation in foreign countries. Essential is that the conduct resulting in the offence is punishable by an offence which is the same or substantially the same in Canada.

7) Application of Rules against Double Jeopardy to Federal Offences

> 7. Where an act or omission is punishable under more than one Act of Parliament, and unless a contrary intention appears, the offender could be subject to proceedings under any of those Acts, but should not be liable to be punished more than once for that act or omission.

Recommendation 7 extends the current section 12 of the Code to include Federal regulatory offences. This may also extend to disciplinary actions unless a specific contrary intention appears. The recommendation does not extend to provincial offences for obvious constitutional reasons.

8) Abuse of Process

> 8. Nothing in this Part should limit the power of a court to stay any proceedings on the ground that they constitute an abuse of the process of the

court.

Recommendation 8 of the LRC is considered not necessary given the current state of the development of abuse of process.

9) Double Jeopardy Issues May Be Raised in Pre-Trial or Trial Motions

> 9. (1) Challenges to the validity of criminal proceedings involving double jeopardy should be capable of being raised either by way of pre-trial motion or as trial motions.
>
> (2) Any issue involving double jeopardy may, in the discretion of the trial court, be disposed of before or after plea is entered.

Given the current movement in Charter cases to litigate such issues at trial and not fragment proceedings by interlocutory motions and given the Supreme Court view opposed to fragmentation in R v. Prince [1986] 2 S.C.R. 480 Double Jeopardy issues should likely be raised at trial where evidence will be presented on the offences charged. While this may delay somewhat a resolution, given Askov and the speed with which criminal proceedings are now dealt with - such concern may be ameliorated. It is recommended therefore that Double Jeopardy issues be dealt with as a trial motion after plea.

10) Effect of Pre-Trial or Trial Motions on Double Jeopardy Issues

> 10. Where double jeopardy issues are decided in favour of the accused, the court, subject to Recommendation 12, should terminate the prosecution on the relevant charge by means of a termination order.

Recommendation 10 the LRC recommends a termination order is the means by which a prosecution on an offence should end if double jeopardy has been found to apply.

By whatever term, a judicial order is appropriate to signify such a finding. In keeping with previous recommendations a judicial stay of proceedings may be appropriate.

11) Evidentiary Matters to Determine Whether the Person Has Been Previously Acquitted or Convicted of the Same Crime

> 11. Where a double jeopardy issue under Recommendation 3 is being tried, the evidence and adjudication and the notes of the judge and official stenographer on the former trial and the record transmitted to the court on the charge that is pending before that court, should be admissible in evidence to prove to disprove the identity of the charges.

Recommendation 11 is a re-statement of the Criminal Code current provisions as regards proof of the previous trial proceedings.

12) Effect on Verdicts When the Rule against Multiple Convictions Applies

> 12. (1) Where an accused pleads not guilty to more than one crime arising out of the same transaction and where the rule against multiple convictions applies, the accused:
>
> (a) if acquitted of the crime for which the prosecution seeks a conviction, on appropriate evidence of guilt should be convicted of the crime equal or closest to it in terms of gravity or seriousness; or
> (b) if convicted of the crime for which the prosecution seeks a conviction, on appropriate evidence of guilt should have a verdict of conviction pronounced, but not entered, on the other crimes, and a conditionally stay should be entered in relation to those crimes.
>
> (2) If the accused, having been charged with more than one crime, pleads guilty to a crime charged other than the one the prosecution wishes to prosecute, the plea should be held in abeyance until a verdict on the prosecution's charge has been pronounced and, if the rule against multiple convictions applies, the accused:
>
> (a) if acquitted of the crime for which the prosecution seeks a conviction, should be convicted of the crime for which the accused pleaded guilty; or
> (b) if convicted of the crime for which the prosecution seeks a conviction, should have a verdict of conviction pronounced, but not entered, against him or her for the crime in relation to which the plea of guilty was entered, and a conditional stay should be entered in relation to such crime.

Recommendation 12 is a re-statement of the Supreme Court decision in Provo to set out the procedure the court should follow when finding "double jeopardy" has been made out.