
**Acquitted with an Asterisk:
Implementing the “New Double Jeopardy”
Exception into Canadian Law**

by

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A thesis submitted in conformity with the requirements

For the degree of Master of Laws (LL.M)

Faculty of Law

University of Toronto

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Master of Laws (LL.M) Thesis 2012

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Abstract

Since the end of the 20th century the protection better known to all as double jeopardy has been under attack. With public pressure put on the United Kingdom government to address individuals who had been acquitted of violent crimes, the Labour government implemented a radical overhaul of common law criminal procedural protections. The reform created an exception to double jeopardy, allowing re-prosecution of acquitted individuals. Many of the commonwealth countries starting with Australia took the U.K. exceptions and adopted them into their own criminal justice systems. This paper is going to look at the exception created, and the factors that lead to the bypass of such a critical legal protection throughout the commonwealth nations. Then analyze the current state of double jeopardy in Canada to determine if such an exception is needed; or if any factors from the exception can be adapted to strengthen the Canadian criminal justice system.

“Failure is simply the opportunity to begin again, this time more intelligently”

- Henry Ford

To the one who failed me, to those who picked me right back up, and to my partner in crime,

Thank you...

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List of Appendices

APPENDIX A

Chart 1: Police reported crime rate, Canada, 1962 to 2011

Statistics Canada, 2012. “Police Reported Crime Statistics, 2011.” *The Daily*, July 24. Statistics Canada Catalogue no. 85-002-XIE. p. 1, Table 252-0051. <<http://www.statcan.gc.ca/daily-quotidien/120724/dq120724b-eng.pdf>> (accessed July 27th, 2012).

APPENDIX B

Chart 2: Police reported crime severity indexes, Canada, 2001 to 2011

Statistics Canada, 2012. “Police Reported Crime Statistics, 2011.” *The Daily*, July 24. Statistics Canada Catalogue no. 85-002-XIE. p. 2, Table 252-0052. <<http://www.statcan.gc.ca/daily-quotidien/120724/dq120724b-eng.pdf>> (accessed July 27th, 2012).

Acquitted with an Asterisk:
Implementing the “New Double Jeopardy” exception into Canadian Law

Yuce Baykara – LL.M Thesis

I. Introduction

Criminal Law is the law that protects the citizens from violence dishonesty and other “sins with legal definitions¹”. Criminal Law is not a one-way street; while it protects the citizen; it also restricts his liberty by forbidding certain kinds of acts². While the law is used to govern behavior in a society, it also has limitations built in order to protect from abuses by society. One of the most important rules in criminal procedure is the rule of Double Jeopardy. Historically, the rule against double jeopardy was understood to prohibit both multiple prosecutions and the imposition of multiple punishments for the same crime³. It was a way to make sure that a person did not keep paying for the wrongs of an offence. The origin of the maxim can be traced back to a conflict involving King Henry II and Archbishop Thomas Becket. The clerks accused of a murder were punished in the ecclesiastical court, which Becket argued further punishment in the King’s court would violate the maxim *Nemo bis in idipsum* – no man ought to be punished twice for the same offence⁴.

As one of the foundations of the criminal justice system, in recent times, the rule prohibiting multiple prosecutions and punishments has been changed to allow an exception, mirroring the criminal law exceptions drafted by the United Kingdom Parliament. Reforms to this rule have been attempting to limit cases in which guilty people walk, and use double

¹ Canada, Law Reform Commission General Principles of Criminal Law project, *Criminal Law: Strict Liability*, Working Paper No 2, (Ottawa: Law Reform Commission of Canada, 1974), at pg. 1.

² *Ibid.*

³ Carissa Byrne Hessick & F. Andrew Hessick, “Double Jeopardy as a limit on punishment” (2012) 97:1 Cornell L Rev 45, at pg. 2 (QL).

⁴ Martin Friedland, *Double Jeopardy*, (Oxford: Clarendon Press, 1969), at pg. 5.

jeopardy protection as a shield to a subsequent prosecution. On first glance this rule seems like it must unambiguously benefit defendants⁵, however it benefits any accused from barring constant prosecution, harassment from the state for the crime, and the finality of the process once a decision is reached. The United Kingdom parliament introduced sweeping changes to the double jeopardy principle, attempting to address victims' rights, in an attempt to allow the state to re-prosecute specific cases in the interest of justice. Considerations of fairness in the system would mandate that criminal law integrate victims into the theory of liability⁶, and the changes to the rule attempt to address gap that exists for victims to gain closure to matters where individuals are acquitted.

With cases visible to the public of individuals being acquitted of violent crimes, English public pressure help to initiate a review of this age old maxim, and the conclusions of various agencies brought about the changes in the procedural practice. It has now given the state prosecuting service the ability to apply for a reinvestigation to the Court of Appeal, and if the court sees fit, order a retrial on the original chargers. Thus bypassing the age old maxim, and allowing a second trial for the same crime. Shortly after the English reforms, other common law jurisdictions, such as Australia, and Scotland reviewed their use of double jeopardy and reformed their criminal law to reflect the changes recommended and implemented by the English.

Canada has a similar criminal legal system to England but has established double jeopardy as a right rather than a legal protection. The exceptions adopted in the other jurisdictions are a form of corrective justice, and Canadian values of fairness and finality, do not allow the state to go back and prosecute just to correct a decision. Instead of corrective measures,

⁵ Vikramaditya Khanna, "How does double jeopardy help defendants?" (2001) *Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series*, Paper 315, online: http://lsr.nellco.org.harvard_olin/315 (accessed June 28, 2012), at pg. 2.

⁶ Vera Bergelson, *Victims' Rights and Victims' Wrongs* (Stanford California: Stanford Law Books, 2009) at pg. 161.

similar to those seen in the United Kingdom, the reliance on DNA and other types of compelling evidence can be implemented before the trial process. This attention to the investigative process will help better to provide accurate judgments and provide the same outcome as those desired through eliminating the double jeopardy maxim. The protections in Canada do not need to be changed or altered; rather implementation of the principles of the exceptions to double jeopardy can achieve the same end result as intended by the English parliament.

This paper will go over the current state of double jeopardy in Canada, to see if the legal and philosophical principles that lead to the reforms can be applied to justify a change to the Canadian practice. Then the paper will illustrate a comparison of the changes to the double jeopardy maxim in four major common law jurisdictions. The sections will go over the cases which gained public attention, helping to pressure the respective governments to review their own criminal procedure practices, and ultimately change their laws concerning double jeopardy. The final section will analyze the principles of the two exceptions, to see if in whole or in part be integrated into the Canadian context.

II. The way it has been for centuries: Double Jeopardy in Canada

Double Jeopardy is a part of a larger legal doctrine known as *Res Judicata*, which is a final decision pronounced by a judicial tribunal having the competent jurisdiction over the matter in dispute and over the parties thereto⁷. The idea is as old as the common law⁸, with its origins evolving from different religious believers and practices, which were then transplanted into the common law. Through time and use of the maxim, the common law began employing the idea as a basic protection for an accused. The protections known as double jeopardy are under the pleas of *autrefois convict* and *autrefois acquit* which enable a judge to discharge a charge⁹ which has been already pleaded. The overall protection afforded by the *autrefois* protections; allow a decision made by a judicial decider to be made, respected and protected.

The legitimacy of the decision made is also protected by the maxim, and the argument for using double jeopardy as a protection encompasses the people's general notion that the judicial system is basically fair and worth of respect and adherence¹⁰. An effective justice system requires public confidence in order to realize its ends in society¹¹. The protection of accuracy of a decision is crucial in society, and double jeopardy allows for the decision not to be retried and questioned, because allowing the decision to be overturned and over ruled, would then bring the legal systems used into question as not being fair and stable.

The general rule granting absolute finality to a decision has been broadly and repeatedly defended as perhaps the most fundamental rule of double jeopardy¹². As a final decision this

⁷ Don Stuart, Ronald J. Delisle and Tim Quigley, *Learning Canadian Criminal Procedure*, 10th ed (United States: Carswell, 2010), at.1025.

⁸ *Ibid.*

⁹ Martin Friedland, *Double Jeopardy*, (Oxford: Clarendon Press, 1969), at pg. 22.

¹⁰ Kyden Creekpaur, "What's wrong with a Little more Double Jeopardy? A 21st Century Recalibration of an ancient individual right" (2007) 44 Am Crim L Rev 1179, at 1187.

¹¹ Fredrick Schumann, "The Appearance of justice: Public Justification in the legal relation" (2008) 66:2 U Toronto Faculty L Rev 189, at 203.

¹² See Creekpaur, *supra* note 10, at 1190.

allows there to be a close or end to the matter, allowing all the involved parties to carry on with their lives. It is meant to bring closure to the situation at hand, and allows an accused to know the decision was final, and nothing more would carry on after¹³. To achieve the finality the system must be underpinned by the sanctity of the verdict¹⁴, meaning that the verdict should be respected, because it is not in the interest of justice to question every decision made, rather the people should have faith in the states prosecuting service, and the rules which govern the practice of this protection. Added to this, is that it requires the investigative procedures carried out by law enforcement officials to be thorough so there is no questionable decisions made. By allowing a possible secondary trial for the same charge it may discourage investigative and prosecutorial efficiency¹⁵ because there could be a second chance to investigate.

Double Jeopardy also protects principally against wrongful convictions. It prevents the unwarranted harassment of the accused by multiple prosecutions¹⁶. An innocent person may be convicted because they do not have the stamina or resources to fight a second charge¹⁷ - coupled with the fact that the accused then disclosed their complete defense at the first trial¹⁸, thus giving the prosecution an unfair advantage. It caps the power of the prosecutor and limits their ability of investigations to the first charge. The prosecutor's weaponry is so well stocked that some limit must be placed on his/her power to re-indict the accused for other offences¹⁹

¹³ Note: **The finality principle applies both to conviction and acquittal. As long as a final decision is made regardless of the outcome the double jeopardy protection affords to the person the ability to move on from the incident. There will be no further punishment, prosecution, or reopening of the proceedings. Rather it's the end point and either release or punishment will follow.

¹⁴ Michelle Edgely, "Truth or Justice? Double Jeopardy Reforms for Queensland: Rights in Jeopardy" (2007) 7:1 QUTLJ 108, at 122 (WL).

¹⁵ Robyn Lincoln, "Should the double jeopardy rule be in jeopardy?" *National Legal Eagle* (2003, Vol 9, Issue 2, Article 5) at pg.12, online: The National Legal Eagle

<<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1066&context=nle>>.

¹⁶ Martin Friedland, *Double Jeopardy*, (Oxford: Clarendon Press, 1969), at pg.4.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*, at pg.89.

By respecting the sanctity of the legal system, and of the accused's autonomy, the protections find a great balance between these competing factors. The maxim attempts to balance society's interest in insuring that the guilty are punished; with the defendant's interest in avoiding retrial²⁰. It's a classic battle of finality versus accuracy when a verdict is delivered. As a result of having a rule of double jeopardy, occasionally guilty persons will escape punishment²¹. It does however protect those accused that are truly innocent to never be tried again. From a general outlook, the system must allow these principles to be respected to help enforce the legitimacy of the process to how the legal process arrives to a final decision.

In respects to protection from multiple conviction and punishment, double jeopardy operates in both civil and criminal law²² realms. Attention is given more to the Criminal incarnation because of its properties of restricting ones liberty. Created through the common law, the English legal jurisprudence has formed and evolved double jeopardy protection into its current form through years of application. However, disconnects exist when looking at different legal systems at the value they place towards double jeopardy. The written form of double jeopardy did not come to surface until much later in recorded history. Not even after the English Civil war did the English Bill of Rights of 1689 have a written version of the double jeopardy provision²³. Some have argued that former Jeopardy principles did not make it on to a recorded piece of text that was not case law until the adoption of the fifth amendment of the constitution of the United States of America²⁴. This has fueled the argument that double jeopardy protection is a procedural protection and not a right given to the people of a state. Looking at the forms of

²⁰ Mary Elizabeth McGarry, "Double Jeopardy Problems presented by two-tier systems" (1980) 69:1 Geo LJ 1525, at pg. 1532.

²¹ Friedland, *supra* note 16, at pg.4.

²² Don Stuart, Ronald J. Delisle and Tim Quigley, *Learning Canadian Criminal Procedure*, 10th ed (United States: Carswell, 2010), at.1025.

²³ Kenneth G. Coffin, "Double Take: Evaluating Double Jeopardy Reform" (2010) 85 Notre Dame L Rev 771.

²⁴ U.S. Const. amend. V.

the double jeopardy throughout the different legal systems illustrates the differentiation of it as a right or as a procedural safeguard.

Regardless of different interpretations, double jeopardy in its modern form (right or protection) is concerned with the principle interest of those who have been previously acquitted from charges to avoid multiple trials for the same offence²⁵. Barring any subsequent trials, regardless of new evidence admitted after the verdict is the modern concern for protection of an accused. The landmark English case of *DPP v Connelly*²⁶ defined the powers of a court to bar a second prosecution for a charge which was included in the first indictment²⁷, defining the scope of *Res Judicata* as a plea from an accused rather than inherent protection enforced by the judiciary. The *Connelly* court set the limits for multiple trials, punishment, and held that the doctrine of issue estoppel²⁸ is applicable in criminal cases²⁹. Up until 1964, the non-constitutional application of double jeopardy was not so clearly defined and this judicial articulation set the standard for double jeopardy to be a special plea in Canada and all the other common law jurisdictions.

Canadian double jeopardy protections are firstly written in the federal *Criminal Code* of Canada. The special pleas are applicable in all provinces and territories, and operate in the same manner conceived by the House of Lords in *Connelly*, are found in S.607³⁰ of the *Canadian Criminal Code*. Subsection 1 allows an accused to plea *autrefois acquit*, *autrefois convict* or a pardon from a charge. This codified plea is set as a special plea to a judge, and must be done before pleading to an indictment. *Autrefois acquit* is used when a person has been discharged

²⁵ Carissa Byrne Hessick & F. Andrew Hessick, “Double Jeopardy as a limit on punishment” (2012) 97:1 Cornell L Rev 45, at pg. 59.

²⁶ *DPP v Connelly* [1964] AC 1254 HL. [hereinafter *Connelly*]

²⁷ See Friedland, *supra* note 16, at pg.15.

²⁸ Note: **Issue estoppel will be discussed below

²⁹ See Friedland, *supra* note 16 at pg.15.

³⁰ *Criminal Code*, RSC 1985, c C-46, s 607.

from jeopardy and is a bar on a subsequent trial. It is important to note that there are many technical procedural aspects to this pleading, but for the purposes of this study, knowing that after a trial and discharge, another trial on the same grounds cannot be granted if this is plead to a court.

The second codified protection is for multiple punishments, which was expanded and clarified in the decision of *R v Kienapple*³¹. The principle provides that where the transaction gives rise to two or more offences with substantially the same elements and an accused is found guilty of more than one of those offences, the accused should be convicted of only the most serious of the offences³². These two principles provide protections to the accused by not allowing the state to prosecute previously decided matters.

The final protection in the Canadian legal system tied to *Res Judicata* is the principle of Issue Estoppel, forged from the decision in *Connelly*. The use of this principle in criminal law alternately eases and heightens an accused's burden in attempting to escape a second prosecution by demonstrating that an issue essential to the current conviction has been previously determined in the accused's favor³³. This protection comes from the common law and is not a part of the criminal code of Canada. It is used as a defense, and not a plea, but still requires a final judgment from a previous case to stop proceedings in a subsequent matter. The disputed issue needs to be in the transaction of the new charge, and has to be decided in the favor of the accused.

³¹ *R v Kienapple* (1974), 15 CCC (2d) 524, [1975] 1SCR 729 (SCC).

³² *R v Kinnear* (2005), 30 CR (6th) 1, 198 CCC (3d) 232 (Ont CA), cited in Don Stuart, Ronald J. Delisle and Tim Quigley, *Learning Canadian Criminal Procedure*, 10th ed (United States: Carswell, 2010), at.1043.

³³ See Stuart, *supra* note 22, at 1048.

Together these three protections attempt to restrict further prosecution attempts by the Crown (government)³⁴ after a final decision. Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that a verdict of acquittal could not be reviewed, on error without putting a defendant twice in jeopardy³⁵. This bars appeals on the merits or for factual issues. Even if the prosecution erroneously excludes critical evidence that may have established the guilt of the defendant, the prosecution is still prohibited from retrial following an acquittal³⁶.

The Canadian *Criminal Code* however does give the Crown the ability to appeal on a point of law. Under s. 676³⁷ the Attorney General can appeal an acquittal on a point of law³⁸, which the double jeopardy protections do not apply to. This makes sense procedurally, because an accused should not be acquitted or held responsible because of a misinterpretation or application of law. Rather the system has a safeguard to protect from human errors, and even situations where Judges misguide juries.

Finally, double jeopardy in Canada is not just limited as a procedural right. Double Jeopardy is a codified criminal procedural right in the *Canadian Charter of Rights and Freedoms*, elevating the protection to a constitutional guarantee. The Supreme Court of Canada has used the procedural sections of the Charter to protect the rights of individuals caught up in the justice system – from the first contact with police to the final appeal by restricting

³⁴ **Note: As mentioned before, there have been countless discussions and judicial decisions on the attachment of jeopardy or what is deemed the same crime. As it is important to the double jeopardy jurisprudence, all that needs to be known for this entire paper is that, once jeopardy attaches, and a final decision is made about a matter, these rules are used to protect the finality of that decision. Double Jeopardy protection to the decision stops any other prosecution or Crown attempt to re-open a case. It provides a person reassurance that the matter is closed once a final judgment has been reached.

³⁵ Michele N. Morosin, “Double Jeopardy and International Law: Obstacles to Formulating a General Principle” (1995) 64 *nordic J In’t L* 261, at 268.

³⁶ See Morosin, *Ibid*, at 268.

³⁷ *Criminal Code*, RSC 1985, c C-46, s 676.

³⁸ *R v Huot*, [1969] 1 CCC. 256, 70 DLR (2d) 703 (2:1) (Man CA).

overarching powers of the police and crown prosecutors³⁹ to gain conviction by any means necessary. Under section 11 of the charter, the opening words define it to apply to any person charged with an offence, becoming the source of all of Canada's constitutionalized criminal procedure rights⁴⁰. This was the changeover in Canadian society of the double jeopardy defense from it being a mere procedural protection, to a constitutionally protected right that all person enjoy and expect.

These national safeguards within the charter do not stipulate any enforcement conditions, only requiring that the criminal verdict which bars further prosecution on the same acts has become final⁴¹. The historical sources of Canadian double jeopardy are much the same as the English⁴²; however differ greatly on the attachment of jeopardy for the protection to be protected by the constitutional guarantee. English law does not place the accused in jeopardy until the final judgment after a trial whether an acquittal or a conviction⁴³. Canadian criminal procedure allows the Crown to withdraw a charge, and relay the process. Jeopardy, for the most part does not attach until a formal indictment is issued. The crown's right to withdraw a charge before plea is not unfettered, rather it cannot be used to circumvent the ruling of the trial judge⁴⁴ which amounts to an abuse of process⁴⁵, allowing jeopardy to attach and dismissal to be a bar for subsequent trial. This differentiation exists because of the Canadian belief that the process should be fair towards the accused, so that any abuse of process should not go unpunished and a person should be afforded an acquittal.

³⁹ Keith Archer, et al, *Parameters of Power*, 3rd Ed (Ontario, Canada: Thompson Canada Ltd, 2002), at pg. 168.

⁴⁰ Ed Morgan, "In the Penal Colony: Internationalism and the Canadian Constitution" (1999) 49 U of Toronto LJ 447, at 451.

⁴¹ Sabine Swoboda, "Paying the Debts – Late Nazi Tribunals before German Courts" (2011) 9:1 JICJ 243 (QL).

⁴² Jay A. Sigler, *Double Jeopardy: The development of a legal and social policy* (New York: Cornell University Press, 1969), at pg. 133.

⁴³ *Ibid*, at pg. 126.

⁴⁴ *R v Scheller* (No.1) (1976), 32 CCC (2d) 273, 37 CRNS 332 (Ont Prov Ct).

⁴⁵ Ulrich Gautier, "The power of the Crown to reinstitute proceedings after the withdrawal or dismissal of charges" (1980) 22 Crim LQ 463, at 470.

All in all, the need for final judgment⁴⁶ is the qualifying factor afforded to the accused; for the double jeopardy constitutional protection to stand. This constitutional codification illustrates how the English common law protection is valued in Canada as an important procedural protection given to all persons. It is a key aspect of the constitutional allocation of power and liberty⁴⁷, and shows Canadian societies' commitment to the balance of state interests and individual autonomy. This is seemingly limited to the Canadian and American example because of the elevated status of the protection within the constitutions. The constitutional protections illustrate how Canadians do not want government interests to outweigh the procedural rights of a person standing trial. Allowing a second trial based on new factors is not feasible, nor is it accepted as common practice in Canada. Even with the inclusion of a rights bypass in the Charter contained in s.1, a breach of the s.11(h) double jeopardy protections cannot be justified by any conceivable reasonable limits (Oakes test) analysis⁴⁸. The rules which govern the attachment of Jeopardy (which is not the concern of this paper) are fair and for the most part straightforward to understand. The crowns ability to appeal an acquittal is limited to very specific guidelines, and the person's interests are constitutionally protected. If a person is tried twice, they have the special pleas to bar any subsequent proceedings.

⁴⁶ *Canadian Charter of Rights and Freedoms*, s 11 (h), Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11.

⁴⁷ Ben Fitzpatrick, "Double Jeopardy: One idea and two myths from the Criminal Justice Bill 2002" (2003) 67 JCL 149 (QL).

⁴⁸ See Stuart, *supra* note 22, at 1040.

III. The English did what now?

It seems unthinkable to get a second chance at important things that occur. How different the world would be if you could take that failed exam over again, get the goal that lost you the championship, or even the chance to get the one that got away. The common law was designed to operate with a model of finality, so things cannot be done over again. Once a charge is laid and a decision made (good or bad for the accused), it would signal the end of that charge. Until recently, the same would have been true in England⁴⁹. The protection that the age old Double Jeopardy maxim had afforded to countless individuals throughout centuries has recently been changed, and adapted to meet the advances in human technology. The pleas of *autrefois acquit* and *autrefois convict* had become firmly embedded principles of the English common law⁵⁰, but have been given an exception so the state can recharge individuals in specific instances.

The state prosecution is given the ability to return to court with new evidence from a closed decision for review, and potentially have that case re-opened and the charges can be brought based on new evidence. There is also no statute of limitations, so it can occur three months after the original trial or thirty years after. In English terms this new exception based defense is known as “modern Double Jeopardy”, (emphasis placed on the double). The crown prosecution service in England has been given the ability to take new evidence adduced after trial and apply for a continuation. For a system based on respecting the trial process and finality, this new power given to the crown prosecutors puts the values of the legal system into question. The principle that no one should be tried twice for the same offence has been a part of the bedrock of the English Criminal Justice system for centuries⁵¹. There must come a stage when a

⁴⁹ Kyden Creekpaur, “What’s wrong with a Little more Double Jeopardy? A 21st Century Recalibration of an ancient individual right” (2007) 44 Am Crim L Rev 1179.

⁵⁰ See Coffin, *supra* note 23, at pg. 776.

⁵¹ Tome Epps, “Doubts over a second bite” (2002) LS Gaz R 15 Sep, 19.

defendant is entitled to draw a line under the allegations and move on⁵² with their lives, and not be at the mercy of the state.

As discussed earlier, double jeopardy protection affords protections for multiple prosecutions and punishments for the same act. It was used to protect people from the crown, and was adapted into legal systems and rights systems around the world. This change in the maxim came about quickly from public pressure, and has begun a swing towards the state having unfettered prosecuting powers against their people; something the original notion of double jeopardy afforded to protect. The primary objective of criminal law is to bring criminals to justice for harms done and criminal law has its authority from victims' rights⁵³. With the nature of criminal punishment based on requiring a criminal act to be carried out, victims' rights, and protections is the driving enforcement tool used by criminal law. This idea is the driving force behind the decision to reform the criminal justice, bypassing defendant rights and finality, the state is on a mission to correct all the harms done.

Near the end of the 20th century there were a string of cases which brought these reforms into the public spotlight in the United Kingdom. In the late 1980's Billy Dunlop was accused and acquitted of the murder of Julie Hogg. Many years later he went on to admit to the crimes, but because of the double jeopardy maxim, he could not be convicted. A string of other similar crimes occurred (following the Hogg murder, discussed below) which brought public pressures to address this discrepancy in the legal system. These events ultimately began a push to reform the criminal justice system, with an investigation initiated by Sir William Macpherson into the

⁵² *Ibid.*

⁵³ G.J. McAleer, *To Kill Another: Homicide and Natural Justice* (New Brunswick, NJ: Transaction Publishers, 2010) at 65.

murder of Stephen Lawrence⁵⁴ for presentation to the Law Commission of England. This evidently led the Law Commission to co-publish a White Paper report entitled “*Justice for All*” to be presented to the English parliament outlining their findings and presenting recommendations to change and evolve criminal procedure and evidence rules. The reports general goal was to find a way to have fair balance between the rights of the prosecution and the defense⁵⁵. A relaxation of the double jeopardy principle had to be specific so it did not run afoul to all offences. The White paper nominated ‘very serious’ offences including murder, rape and armed robbery⁵⁶ to be applicable to a double jeopardy exemption.

The Labour government at the time was on a crusade to appear “[t]ough on crime”. Not only did they implement the White paper recommendations on double jeopardy, but they also reformed the rules of *Hearsay* and *Character Evidence*. The Act attempted to remove traditional safeguards that protected the accused by allowing certain types of *hearsay* evidence into trial, and to allow *character evidence* which traditionally is inadmissible to be admissible. The tough on crime moniker did not want to allow technicalities in the rules of criminal procedure to let the guilty walk. The *Criminal Justice Act 2003* was seen to be a comprehensive overhaul of the criminal justice process and at the heart of the new English reforms was a recalibration of the balance between accuracy and finality⁵⁷. The public pressure forced the hand of the government to abandon the idea that judgment finality is sometimes achieved at the cost of accuracy⁵⁸, and that the law could provide the adequate justice to victims and the community it governs. The

⁵⁴ U.K., The Inquiry into the matters arising from the death of Stephen Lawrence, *Commission Report of an Inquiry by Sir William Macpherson of Cluny*, (London, UK: The Secretary of State for the Home Department by Command of her Majesty, 1999) Cmnd 4262, see also U.K., H.C., “Justice for All”, Cmnd 5563 in *Sessional Papers*, (2002).

⁵⁵ U.K., Law Commission of the United Kingdom, *Double Jeopardy and Prosecution Appeals: Report on two references under section 3(1)(e) of the Law Commissions Act 1965* (LAW COM Paper No. 267), (London: CM 5048, 2001), see also U.K., H.C., “Justice for All”, Cmnd 5563 in *Sessional Papers*, (2002).

⁵⁶ Rowen Johns, Commonwealth (Austl.), *Double Jeopardy*, NSW Parliamentary Library Research Service, Briefing Paper No 16/03 (2003).

⁵⁷ See Creekpaur, *supra* note 10 at 1182.

⁵⁸ *Ibid.*

relaxation of Double Jeopardy suggests the reinvigoration of a more overt crime control agenda⁵⁹.

To be able to retry an acquitted person would in essence void the previous judgment. The question then becomes how a government can make rules to by-pass judgments, while still giving them any force and affect in law. The sanctity of acquittals is the primary obstacle to any meaningful double jeopardy reform⁶⁰. This then goes against the heart of the protection in the common law, where the state can harass an individual until they “get it right”. The power to prosecute multiple times involves the danger that government with its vastly superior resources might wear down the defendant, so that even though innocent he may be found guilty⁶¹.

As mentioned above, the White Paper recommendations limited the double jeopardy exemption to very specific violent crimes. This however was drafted to include most offences that carry a penalty with up to a maximum of 25 years in prison. It is important to keep in mind before any of the reforms were implemented through the *Criminal Justice Act 2003* the English legal system did have legal mechanisms for crown prosecutor appeals to judgments similar to the Canadian crown appeals process. Under the *Criminal Justice Act 1972*, s.36 a point of law arising out of a trial on indictment which resulted in an acquittal can be brought to the court of appeal⁶². This power however is not a review of fact, and that is exactly what the new double jeopardy reforms would allow the Crown Prosecution Service⁶³ to do. These rules are in addition to the procedures laid out for acquittals which in some instances allow the state to retry an individual. It is also in addition to the previous rules regarding tainted acquittals and how those

⁵⁹ Ben Fitzpatrick, “Double Jeopardy: One Idea and Two myths from the Criminal justice Bill 2002” (2003) 67 JCL 149 (QL).

⁶⁰ Justin W. Curtis, “The Meaning of Life (or Limb): an originalist proposal for double jeopardy reform” (2007) 41 U Rich LRev 1007, see also U.K., H.C., “Justice for All”, Cmnd 5563 in *Sessional Papers*, (2002).

⁶¹ See Creekpaur, *supra* note 10 at 1191.

⁶² See Law Commission of the United Kingdom, *supra* note 55 at 17.

⁶³ Hereinafter “CPS”

types of decisions can be retried. But what has brought the attention of legal commentators and scholars to this exemption on new and compelling evidence is the bypass function the state has for a previous verdict and how it is achieved even with a judgment in place.

In practical application the changes to double jeopardy still provide protections for the accused and respect the finality of the judgment to a degree. The *Criminal Justice Act 2003* sets out the procedure for a retrial when there is compelling “new” evidence of guilt and the court is satisfied that it is in the interests of justice to quash the acquittal; and that power should apply equally to acquittals which have already taken place before the law is changed⁶⁴. These changes also do not compromise the integrity of the burden of proof on the prosecution; rather, the burden is raised (more than beyond a reasonable doubt) to a higher standard so it can justify a retrial.

Crown prosecutors may have a second bite at the apple only if new and compelling evidence comes to light that creates doubt on the validity of the acquittal verdict⁶⁵. If new evidence is brought forward after an acquittal, the Department of Public Prosecutions (DPP) has the ability to reopen a case by applying for a quashing order of the original verdict and application for retrial on the grounds of new evidence for the qualifying offences⁶⁶. For non-qualifying offences (contained in schedule 5 of the Act), the common law or “old” Double Jeopardy maxim still applies. The investigation process needs to take place to determine if such an application is needed to lobby the Court of Appeal to quash the original verdict and order a new trial based on the new evidence.

To grant a new trial and quash the existing acquittal, the evidentiary standard to be met is not merely beyond a reasonable doubt (the standard in criminal trials). Rather the Court of

⁶⁴ See Law Commission, *supra* note 55.

⁶⁵ See Curtis, *supra* note 60, at 1001.

⁶⁶ *Criminal Justice Act, 2003*, (U.K.), 2003, c 44, Sch 5, Part 1.

Appeal is looking at the evidence to determine if it is highly probable that the defendant is guilty of the offence⁶⁷. What is troubling about this, is the standard requires to make a quasi-judgment about the evidence presented, thus almost making a concluding to the findings. By adhering to this standard the court of appeal is granting a retrial on evidence that points to guilt. It is granting a conclusive finding before the trial, indirectly leading the decision for a potential jury, and pointing to guilt of the accused without the trial process. This is a very dangerous standard, because it not only voids double jeopardy, but it also puts the presumption of innocence into question, making the trial only a formality because the Court of Appeal had already ruled on the weight of the new and compelling evidence.

If a quashing order is granted than a new charge will be laid, and it is treated as a continuation of the original trial. The original evidence presented in the first trial cannot be used; rather, the retrial is based on the newly admitted evidence. Any new evidence has to meet the standard that it was not adduced in the proceeding in which the person was acquitted; it can only have been adduced after the trial. The right to trial by jury will be restricted because juries will be informed of a defendant's previous conviction and people could find themselves locked up on suspicion that they may commit a crime⁶⁸, which is a direct result of the prejudice from potential juries. But the type of evidence that would be admitted would have to be reliable, substantial and highly probative of the case against the acquitted person⁶⁹.

There is mention that a defendant may elect to have a Judge only trial, so that the charges will be weighed on the merits of the new evidence and not the character of the person. The new evidence standard is primarily targeted at blood and tissue samples from decades old trials that

⁶⁷ Ben Fitzpatrick, "Double Jeopardy: One Idea and Two myths from the Criminal justice Bill 2002" (2003) 67 JCL 149 (QL).

⁶⁸ Victoria MacCallum, "Law commission puts 'traditional liberties' in jeopardy" (2001) LS Gaz R, 15 Mar, 10.

⁶⁹ Rowen Johns, Commonwealth (Austl.), *Double Jeopardy*, NSW Parliamentary Library Research Service, Briefing Paper No 16/03 (2003), Accord U.K., H.C., "Justice for All", Cmnd 5563 in *Sessional Papers*, (2002).

resulted in acquittals before DNA testing was available⁷⁰. It is a function used to clear up discrepancies from the past to almost correct the judgment made. The DNA-test based rationale is perhaps more persuasive⁷¹ as new and compelling evidence, because it uses the notion that the original trial was incomplete without this evidence, and is in the interest of justice to present the new evidence to come to a more accurate conclusion.

Not only did the English parliament believe that this should be the practice for the criminal justice system going forward, but made sure to apply the new exception to cases from the past to correct the injustices that influenced these changes. It was used as a retroactive correction (grandfathered justice). By no means does this legislation allow incomplete initial investigations if further evidence could be adduced later⁷². Rather the “new and compelling” evidence standard greatly narrows the range of acquittals for retrial, and thus insures that most acquittals will stand final⁷³.

“New” Double Jeopardy provides for multiple layers of procedural and substantive safeguards to ensure that the relaxed double jeopardy standards are not susceptible to abuse⁷⁴. The Department of Public Prosecutions must have a full investigation to allow the new evidence to be brought forward. The policing process must occur before it can be determined that the evidence has weight to quash the original acquittal. Here the DPP serves as a gatekeeper again: giving personal consent before the quashing application may proceed to court⁷⁵.

After the investigation, the evidence is presented to the court of Appeal, and their job as mentioned before is to weigh the evidence. However, added to the previously discussed “new

⁷⁰ See Curtis, *supra* note 60, at 1001.

⁷¹ See Fitzpatrick, *supra* note 67.

⁷² Sue Allen, “Double jeopardy reform will have ‘dangerous’ effect, warns Society” (2000) LS Gaz R, 10 Feb, 5 (1).

⁷³ See Creekpau, *supra* note 10, at 1192.

⁷⁴ See Curtis, *supra* note 60, at 1022.

⁷⁵ See Creekpau, *supra* note 10, at 1198.

and compelling” aspect to the evidence, the Court of appeal must also determine if quashing the acquittal is in the interest of Justice⁷⁶. The Court of Appeal balance the two competing factors with the idea that, if there was to be a retrial would it be fair, and will adhere to the principles of the adversarial system while serving the interest of justice.

It is not just a clear cut “open & shut” system to grant this double jeopardy exemption. Added to these safe guards are the DPP and CPP can only apply once to quash any acquittal to the Court of Appeal⁷⁷. And any decision by the Court of Appeal can be appealed to the House of Lords by either the accused or the Crown⁷⁸. These legal “levies” are both used as safeguards for the trial process, but also there to serve justice. It’s a recalibration with some fairness to both crown and accused.

The *Criminal Justice Act 2003* came into effect in 2006, and right away the government used the retroactive clause to bypass Double Jeopardy protections, and attempt to convict previous accused. However with the creation of the new and compelling and interest of justice standards the Court of Appeal was not quashing previous acquittals as easily as the government had hoped.

The most notable application by the DPP was for the retrial of *R. v Dunlop*⁷⁹ in which the DPP where having a difficult time justifying to the court that a confession of guilt after the original trial was new and compelling evidence. The court of appeal was hesitant to grant a retrial, in the name of public interest because it would be difficult to hold a fair hearing without bias because of all the attention. Billy Dunlop was eventually convicted because the confession was deemed sufficient, but it was without caution on behalf of the court.

⁷⁶ Criminal Justice Act, 2003, (U.K.), 2003, c 44, s 77.

⁷⁷ See Creekpau, *supra* note 10, at 1199.

⁷⁸ *Criminal Justice Act, 2003*, (U.K.), 2003, c.44, s 81.

⁷⁹ *R v Dunlop* (2007) 1 WLR 1657.

Contrast that with the case of *R v Meill*⁸⁰ and the court again was very hesitant to admit a past confession as new and compelling evidence. It again would be difficult to do justice because it would confuse a jury on the probative value of the new evidence. Doubts may be raised regarding the credibility both of a confession and the person to whom it was supposedly made, but post-acquittal confession evidence still may be compelling depending on the circumstances⁸¹.

In *R v C*⁸² which was originally tried in 2002, the victim was incapacitated which did not allow her to give testimony at the trial, so there was no evidence to convict. In 2009 she was finally capable to give an account of the events, and the DPP claimed that this was “new and compelling” evidence, which reopened the matter and lead to the conviction of *C*. The new evidence that is presented needs to be considered with very high standards to the evidentiary rules, if not then there would be wide spread application and easy permission for retrials.

The difference between the types of evidence that potentially may trigger a retrial is still difficult to assess. From its creation to now about 10 years after the passing of the CJA, it seems the DNA evidence will more likely prove ‘new and compelling’ than confessions or belated allegations⁸³. Testing the difference has been limited to the case application because it is not used in a widespread fashion. The three mentioned cases are of a handful the Court of Appeal has dealt with in the new Double Jeopardy era. There is no one version that is used as precedent; rather all applications by the DPP are judged on a case by case basis. By integrating a public interest requirement it allows the Court of Appeal to weigh each case on its merits, and successful quashing orders essentially pass if the new evidence can demonstrate guilt and error of judgment from the first trial.

⁸⁰ *R v Meill* (2007) EWCA Crim 3130.

⁸¹ David Hamer, “The Expectation of Incorrect Acquittals and the New and Compelling Evidence Exception to Double Jeopardy”, (2009) 2 CRIM LR 63.

⁸² *R v C* (2002) EWCA Crim 2487.

⁸³ Jon Scott, “Double Jeopardy: Two Stabs at Justice” (2006) LS Gaz R, 9 Nov, 18.

Many critiques believed that changing double jeopardy and quashing previous judgments would erode the status of an acquittal so that trials ending in acquittal would be seen as merely provisional⁸⁴. It does put the sanctity of the acquittal into question; however it does not give the Court of Appeal a job that is foreign to them. If you compared the application for a quashing order to a crown appeal, it then becomes evident that they share the same purpose. The only difference of course is that it's an appeal of law vs. fact. Just because a DPP investigation has concluded that evidence they found is new and compelling, doesn't automatically guarantee the acceptance by the Court of Appeal. The legislative purpose of the CJA seems to favor DNA evidence, but it gives the discretion to the legal system, while injecting some sort of public interest dimension into the decision. If you look at it as more of an appeal then disregarding Double Jeopardy, then it might not seem so bad.

The Labour Party's 'tough on crime' attitude required a recalibration of rules that are not rights in the UK, to achieve their overall goal of a victim oriented justice system. A high price is paid when erroneous acquittals are allowed to remain⁸⁵, so these changes in the UK protect from a guilty person attempting to manipulate the "game" to secure his freedom⁸⁶. This came at the cost of the legitimacy of the UK system itself. Finality of a trial, as codified in the rule against double jeopardy represents an enduring and resounding acknowledgment by the state that it respects the principle of limited government and the liberty of the subject⁸⁷. As important as victims are in the criminal justice process, bypassing specific safeguards to get the correct judgment might make sense in a specific case. However, a second chance at prosecution would

⁸⁴ Victoria MacCallum, "Government states case for ending double jeopardy" (2000) LS Gaz R, 2 Nov, 4(3).

⁸⁵ See Curtis, *supra* note 60, at 1021, see also U.K., H.C., "Justice for All", Cmnd 5563 in *Sessional Papers*, (2002).

⁸⁶ See Coffin, *supra* note 23, at 798.

⁸⁷ *Ibid*, at 804.

enhance the likelihood of wrongful convictions⁸⁸, and having due process rights serves as a vital safeguard against the unjustified curtailment (by the state) of the defendants moral rights⁸⁹.

The English Parliament reiterated that for such reforms to benefit society the criminal justice system and its processes should be flexible and responsive to social and cultural changes and therefore need to be continually updated and modernized⁹⁰. There is a strong argument that this application of the new double jeopardy would be for only a handful of cases⁹¹. Practical application is limited and protected by the legal system based on the difficult evidentiary burdens needed to be met before a retrial is ordered.

The end result is a system that allows retrials for very serious crimes. The UK criminal justice system is attempting to tip the scale in favor of victim oriented justice. There is no mistake that criminal justice is indeed a crude balance of interests⁹², but compromising the essence of the criminal justice system to correct cases from the past, might be steep. Double Jeopardy relaxation in the UK should not simply be analyzed in terms of what it can produce, but in terms of what it actually says about the relationships between citizens and the state⁹³. The state in this case needs the ability to correct “wrongs” instead of protecting against injustice. Ultimately these reforms created a new thought to the criminal justice and procedures in other common law jurisdictions, and this is the new norm of common law double jeopardy.

⁸⁸ See Coffin, *supra* note 23, at pg. 805.

⁸⁹ Richard L. Lippke, “The Case for Reasoned Criminal Trial Verdicts” (2009) 22 Can JL & Juris 313-330 at para. 16.

⁹⁰ See Lincoln, *supra* note 15, at pg.12.

⁹¹ *Ibid.*

⁹² See Fitzpatrick, *Supra* note 47.

⁹³ *Ibid.*

IV. Do you come from a land down under?

The Double Jeopardy principle was derived and applied through the common law and was also an import of the English throughout the British Empire legal systems. Its existence and application has been essential to the operation of the criminal justice system in common law countries. Throughout the existence and use of the common law legal system it has not been uncommon for the commonwealth to adopt and adapt legal norms from other common law jurisdictions. For a time, most colonial appeals would make their way to the English main land to be heard by the Privy Council or the House of Lords. So it should not come as a surprise that the New Double Jeopardy laws developed in the United Kingdom, sparked similar reforms in Australia. The formula and conditions were very similar publically in Australia to allow this type of reform discussion to emerge.

Mirrored reforms are not uncommon, and the beauty of the common law is in the similarities. States tend to align, and adapt rules that succeed within the framework of their own common law legal rules. Following the introduction of the CJA in the UK, Australian law confronted the same issue regarding relaxation to double jeopardy protection, so the guilty should not be able to escape punishment for a serious crime⁹⁴. The Australian legal system has double jeopardy protection for an accused embedded in their justice system; however double jeopardy lacks the force in Australia of a fully formed constitutional right⁹⁵ or national legal protection. Unlike Canada and the United Kingdom where criminal law is governed by the national government; the criminal law is created and implemented by the regional states of Australia and because of this difference in governance, the reforms to double jeopardy have taken place in some, but not all of the states of Australia.

⁹⁴ Michelle Edgely, "Truth or Justice? Double Jeopardy Reforms for Queensland: Rights in Jeopardy" (2007) 7:1 QUTLJ 108, at 109.

⁹⁵ *Ibid*, at 111.

As in the case of the United Kingdom, the public outcry from the outcome of *R v Carroll*⁹⁶ induced the revision of the double jeopardy rule⁹⁷. Following an acquittal of murder charges in the 1980's, evidence taken at the time was re-examined years later with new technologies to better analyze crime scene evidence. The Australian public believed the decision to be an injustice at the time of the original trial, and the subsequent trail for perjury (even though double jeopardy rules were meant to protect the accused) was issued to make up for the original decision because such injustices should not benefit from such protections. The Australian justices presiding over the *Carroll* case believed that making an exception to the double jeopardy protection based on new evidence lacked cogency and would deprive the double jeopardy rule of much of its content⁹⁸.

Even though Double Jeopardy is not a constitutional protection, affording it the same overruling process as normal legislation, the *Carroll* court was not in a position to overrule the age old maxim. Rather public pressure helped the theory into fruition. Significant shifts in political attitudes and practices ripple through the legal system requiring refinements in some areas and basic rethinking of others⁹⁹. In general the prosecution has no right of appeal against an acquittal on indictment, and can appeal against a dismissal of a charge to the Supreme Court¹⁰⁰. A special exception to double jeopardy would have to come from ordinary legislation. In *R v JS*¹⁰¹ the Australian Court of Appeal ruled that verdict finality was not protected by the constitution of Australia, making double jeopardy limited to the rules of legislative reform.

⁹⁶ *R v Carroll* [2002] HCA 55 (Austl). [*hereinafter Carroll*]

⁹⁷ Kelly Burton, "Reform of the double jeopardy rule on the basis of fresh and compelling evidence in New South Wales and Queensland" (2004) 11:5 JCULR 84.

⁹⁸ *Ibid.*

⁹⁹ David Weisbrot, "The historical necessity of law reform" (2006) 9:2 FJLR 129.

¹⁰⁰ U.K., Law Commission of the United Kingdom, *Double Jeopardy: A consultation paper* (Law Commission Consultation paper No 156, 1999), at 111.

¹⁰¹ *R v J.S.* (2007) 230 FLR 275 (Austl).

Considerations for reform transpired through research and briefing papers to help the respective state governments understand the limitations of the current protections and how to work around the existing rules. Reforms would have to be carried out through the respective state legislatures. Most of the consultations agreed with the creation and adoption of the new evidence exception (similar to the UK) as a fair public interest exception to overrule previous acquittals in the interest of preserving justice. Rather than the state governments reforming as a means of crime control like the UK labour party, the Australian reforms came about through public pressure.

The older English double jeopardy rule is embedded in s.17 of the *Criminal Code 1889*¹⁰² and in s.156 of the *Criminal Procedures Act 1986* (NSW)¹⁰³. Newly discovered evidence is not admissible to rebut a plea of *autrefois acquit or autrefois convict*: the distinction is clear between a new fact and an undiscovered fact¹⁰⁴. Creating exceptions to these would have to be crafted carefully not to be so broad that it might encompass other or all types of offences. What is important to note is that the Australian legal system has an abuse of process defense¹⁰⁵, which can be pleaded when the Crown is essentially harassing the accused/acquitted. The recommendations from the UK were used as a basis, but there was hesitation to adopt such rules as Crown appeals seen in Part 9 of the *CJA*, and inclusion of all types of violent crimes to the double jeopardy exception.

The New South Wales¹⁰⁶ government adopted reforms, which were modeled on the Criminal Justice Bill introduced by the Blair government in the United Kingdom in 2002¹⁰⁷. The

¹⁰² *Criminal Code 1889* (Qld.).

¹⁰³ *Criminal Procedures Act 1986* (N.S.W.), s 156, See especially Kelly Burton, "Reform of the double jeopardy rule on the basis of fresh and compelling evidence in New South Wales and Queensland" (2004) 11:5 JCULR 84.

¹⁰⁴ Ian Parsonage, "Issue Estoppel, Perjury and Criminal Procedure" (1977) 8 Syd LR 505, at 515.

¹⁰⁵ **Note: The defense was used to dismiss the second case against *Carroll*

¹⁰⁶ *Hereinafter* "NSW"

NSW bill would create a new and compelling evidence exception to double jeopardy for murder, manslaughter or any offences carrying life imprisonment¹⁰⁸. It was believed that there is a public interest in ensuring that criminals are convicted or the offences they commit¹⁰⁹. Consequently it encourages the efficient operation of the criminal justice system and efficient use of community resources because the same cases are not repeatedly brought before the courts¹¹⁰. Rather only the most serious offences can be brought to justice.

In 2006 the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006(NSW)* was passed¹¹¹ which dealt specifically with amending double jeopardy protections. The adoption of the CJA exceptions by the NSW government after extensive debate was limited to serious violent offences¹¹²; not all violent offences like in England. But all the procedural safeguards (such as permission of the DPP to reopen a case and only one retrial) were drafted word for word into the Australian State legislation. This change to the original exceptions illustrates how controversial they were in the first place, and limiting it to serious violent offences seemed to best serve the citizens of New South Wales.

The end result of the legislation was to correct previous injustices, and it included the new and compelling evidence as the standard for which the DPP could petition to reopen a case. The council for Australian Governments consultation papers we're heavily favoring the CJA proposals. However the impetus for reform was home stemming from the community disgust and media campaign generated in the after math of the *Carroll*¹¹³ verdict. In creating their own form

¹⁰⁷ Rowen Johns, Commonwealth (Austl.), *Double Jeopardy*, NSW Parliamentary Library Research Service, Briefing Paper No 16/03 (2003) at pg. 9.

¹⁰⁸ *Ibid.*, at 9.

¹⁰⁹ See Burton, *supra* note 97.

¹¹⁰ *Ibid.*

¹¹¹ See Edgely, *supra* note 14, at 130.

¹¹² *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (N.S.W), s 100(3).

¹¹³ Vicki Waye & Paul Marcus, "Australia and the United States: Two common criminal justice systems uncommonly at odds, Part 2" (2010) 18:2 Tul J In't & Comp L 335, at 357.

of corrective justice, the legislation was to first allow the law to catch up with advances in forensic science¹¹⁴ by creating the new compelling evidence standard. The second exception created applies to specific offences involving a maximum sentence of 25 years or more, where an acquittal is tainted because of the commission of an administration of justice offence¹¹⁵.

This Australian state example illustrates the issues with reforming the fundamental rules of the criminal justice system. Even though the Council of Australian Governments¹¹⁶ recommended uniform changes to their double jeopardy laws in relation to the CJA, it did not mean the people believed in such overarching reforms. The primary evils associated with multiple prosecutions; in particular the dangers associated with the government previewing defense strategy and potential infringement on jury verdicts, are not present when the accused has already been convicted¹¹⁷. By strictly limiting the exception to types of evidence and to specific types of crimes helps balance the interest of the justice system.

The exception rule to double jeopardy was also adopted in the state of Queensland. Following the above mentioned consultation recommendations; the Queensland government drafted legislation to allow a reinvestigation and subsequent retrial request as per the English counterpart. The Queensland rule however was a variation to both the UK and NSW. The *Criminal Code (Double Jeopardy) Amendment Act 2007* (Qld) amended the state's criminal code allowing two exceptions to the double jeopardy protection. The first being a tainted acquittal exception¹¹⁸ (applying to offences carrying 25 year sentences) and the second dealing with new evidence¹¹⁹. The Queensland variation limited the application of the evidence exception to

¹¹⁴ See Burton, *supra* note 97, at 6.

¹¹⁵ See Edgely, *supra* note 14, at 109.

¹¹⁶ Hereinafter "COAG"

¹¹⁷ Carissa Byrne Hessick & F. Andrew Hessick, "Double Jeopardy as a limit on punishment" (2012) 97:1 Cornell L Rev 45, at pg. 61.

¹¹⁸ *Criminal Code (Double Jeopardy) Amendment Act 2007*(Qld), s 678(c).

¹¹⁹ *Criminal Code (Double Jeopardy) Amendment Act 2007*(Qld), s 678(b).

murder only. It did not broaden the scope by allowing violent crimes; rather it applied to the one type of criminal charge.

The state of South Australia followed in 2008 passing the *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008* (S.A.), which created a compelling evidence exception¹²⁰ to the crimes of homicide, violent crimes, and drug charges¹²¹. Variations to the exception are based on the legislature's intention to utilize such exceptions to make the criminal justice system efficient and still keep it fair and balanced. The state of Western Australia recently amended their criminal code as well, adding the *Criminal Appeals (Double Jeopardy) Bill 2011*. This variation of the double jeopardy rule specifically applies to "serious crimes" in the state. The bill defines¹²² the crimes to offences that carry a 14 year or more imprisonment¹²³. All four criminal code amendments attempt to address the issues that the UK exception illustrated. However the differences in the types of crimes it applies to shows the hesitation and controversy with such a rule being used to overrule an acquittal. While each doctrine aims to prevent inconsistent verdicts and to preserve finality, they are slightly different in purpose¹²⁴.

Double Jeopardy lacks the force in Australia of a fully formed constitutional right, and a cautious approach should be taken when whittling away at a long-evolved process protection¹²⁵. Interestingly, both the Australia Capital territory and the state of Victoria have adopted human rights charters, and reserved their position in relation to the council's determination¹²⁶ of reform. It still seems troubling to these two influential states in Australia to be changing the rules to

¹²⁰ *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008* (S.A.), s 332(1).

¹²¹ *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008* (S.A.), s 331(1).

¹²² Austl., Commonwealth, Law institute of Victoria, *Policy: Double Jeopardy* (Criminal Law Taskforce Report) (Melbourne : Law institute of Victoria, 2010).

¹²³ *Criminal Appeals (Double Jeopardy) Bill 2011* (W.A.), s 46A(1).

¹²⁴ See Waye & Marcus, *supra* note 113, at 354.

¹²⁵ See Edgely, *supra* note 14, at 111.

¹²⁶ See Waye & Marcus, *supra* note 113, at 358.

better serve the criminal justice system. Even though we have seen variations of the rule, the mere idea of creating an exception seems to be against a right to the people of these two regions.

However in late 2011, the state of Victoria passed a double jeopardy exception statute¹²⁷. This was in response to pressure from surrounding state legislatures and public pressure within the state of Victoria. The passing of this exception would allow the police force to immediately apply to the Court of Appeal with permission of the DPP to address the acquittals of three men responsible for the Walsh Street murders¹²⁸. The case involved two police officers being killed and the alleged persons responsible were acquitted due to lack of evidence. The Victoria act created a fresh and compelling evidence exception¹²⁹, a tainted acquittals exception¹³⁰ and administration of justice offences¹³¹. The exceptions apply to a wide range of serious and violent crimes¹³² and provide adequate procedural safeguards similar to all the surrounding Australian states for an accused. Victoria's adoption of the exceptions was done in light of its rights charters, providing justification of this exception as fair with the existing procedural safeguards drafted into the legislation.

The new legislations adopted by the Australian states still leave the procedural safeguards in place for the protection of a re-accused. It is not a simple application process to quash and acquittal; rather the legislation creates thresholds to be met to achieve their end goal. Furthermore, the defense of "abuse of process" is still vital to the criminal justice model in Australia. Ultimately, after the Australian DPP decides on a reinvestigation, the permission of Court of Appeal justices still needs to occur for the acquittal to be quashed, identical to the

¹²⁷ *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011* (Vic.).

¹²⁸ Geoff Wilkinson. (2011, Nov 08) New Laws a second chance to prosecute constables' murders, Herald Sun, online: <<http://www.heraldsun.com.au/news/victoria/new-laws-a-second-chance-to-prosecute-constables-murders/story-fn7x8me2-1226188138574>>, (accessed on July 11th, 2012).

¹²⁹ *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011* (Vic.), s.327C.

¹³⁰ *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011* (Vic.), s.327B.

¹³¹ *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011* (Vic.), s.327.

¹³² *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011* (Vic.), s.327M(2).

procedure in England. Many commentators believe that freedom from state harassment can plausibly be portrayed as the defining characteristic of autonomy¹³³, regardless of all the checks the mere existence of the rule goes against a person's right to freedom.

The limitation brought about by the evidence exception is crafted in such a manner that does not compensate for investigative fault or discovery at the time of the original investigation. Rather, the exception defines fresh as "was not" adduced in the proceeding in which the person was acquitted¹³⁴, leaving only undiscoverable evidence, or technological impossibilities to be rectified after the trial. As per the UK legislation, it leaves the Australian legislation to be applied retrospectively. Because of the newness standard for evidence to be present for the new law to be applicable, the *Carroll* case, which in part generated the reforms, may not of itself qualify for a retrial under the exception¹³⁵. The major piece of evidence relied on by the DPP was discovered and used during the first trial, even though it couldn't be analyzed correctly.

The promotion of these reforms has been closely tied to technological advance in criminal investigation, such as DNA profiling¹³⁶, and this form of corrective justice is applied to close down the investigative "handicap" that existed in past decades because of technology limitations. Because the legislation requires that the new evidence essentially proves guilt (not just reasonable doubt) for the crime acquitted, there does not seem to be a strong reliance to any other types of evidence than DNA to reach this legal standard. In the Australian case of *Rogers*¹³⁷, a confession was made regarding a robbery charge, but was later deemed inadmissible because of criminal issue estoppel, which was because of a resolution in a subsequent case. The reliance on this type of evidence is difficult to meet the threshold of fresh and compelling. The

¹³³ See Edgely, *supra* note 14, at 125.

¹³⁴ See Burton, *supra* note 97, at 13.

¹³⁵ See Waye & Marcus, *supra* note 113, at 359.

¹³⁶ *Ibid.*

¹³⁷ *R v Rogers* (1994), 181 CLR 251 (Austl.).

reliability or even applicability of issue estoppel principles could present difficulties for the crown in using the double jeopardy exception. Public interest in finality is undoubtedly important¹³⁸, but it seems that DNA is the only compelling standard to meet this exception. The four state legislations also require a public interest element to be determined by the Court of Appeal, and does not seem compelling or in the interest of the community to squash an acquittal because of a confession or statement.

DNA evidence is also not to be portrayed as the perfect standard for evidence. The term compelling is stringently defined as reliable and substantial¹³⁹, however there have been examples of cases in Queensland and NSW where DNA evidence has been bungled¹⁴⁰. Samples can be stored for long periods of time in different places, passing the sample through several hands before the DNA analysis are finalized¹⁴¹. Juries have difficulties reconciling conflicting interpretations of the evidence¹⁴², and this will add to the already prejudicial effect present with a retrial of quashed acquittal. If the Australian justice system is attempting to provide finality and justice, having such a vague standard stacks the deck against someone who falls into this exception. If the goal of the legislation is to provide fairness, how “fair” does this sound?

One of the traditional rationales for double jeopardy rule is that it decreases the risk of wrongful conviction of the innocent, and the reforms would not undermine this procedural value¹⁴³. DNA evidence has been used to convict people of offences as well as overturn convictions¹⁴⁴ like in the Australian court of appeal case *Burton*¹⁴⁵. It is difficult to see a

¹³⁸ See Edgely, *supra* note 14, at 122.

¹³⁹ See Burton, *supra* note 97, at 15 (AustLII).

¹⁴⁰ *Ibid*, at 15.

¹⁴¹ *Ibid*, at 15.

¹⁴² *Ibid*, at 15.

¹⁴³ Charles Parkinson, “Double Jeopardy Reform: The New Evidence exception for Acquittals” (2003) 26:3 UNSW LawJI 603, at 611.

¹⁴⁴ See Burton, *supra* note 97, at 15.

¹⁴⁵ *R v Burton* [2001] QCA 133, (Austl).

justification in using this exception in the way Australian legislators have drafted it. The UK reforms place heavy emphasis on DNA being the standard for new and compelling evidence, and the Australian adaptation does the same. Disconnect seems to lie in its design as a retrospective rule. Its procedural flaw seems to fall with its application and legal standard needed to be met. If the legislative design was to catch up with present time, then why the two stage limit set on admissibility? The nature of the criminal adjudication system is based off a human system and therefore fallible¹⁴⁶. The guilt is determined based on the exception, so it takes away the proceeding and bypasses the trial. If this guilt is needed before hand, and DNA seems to be the best possible evidence, it still leaves room for errors and wrongful convictions.

The Australian systems adoption and application of the new evidence exception illustrates not only the issues with the UK model, but also the various states unsure application of the rule. Because of the variations to the charges, the different state legislatures seem to have a different understanding on what the UK reforms wanted to achieve, and how difficult it is to bypass a criminal procedural safeguard. The reforms would be more important for its symbolic significance (that the criminal law will not allow acquitted persons to escape justice where new evidence of guilt emerges) than for its practical impact¹⁴⁷. Without a defined evidential standard, the hesitation for fully adopting these standards would make sense because it gives the state power to not only quash but set investigative standards. The same result can be achieved through appeals mechanisms; instead of quashing orders and retrials. Throughout Australia there are only three identified cases that would fit within the narrow legislative criteria for a retrial¹⁴⁸. The beauty of the Australian reforms is the ability to repeal the legislation itself if the public interest is not met through these changes to the criminal justice system.

¹⁴⁶ See Parkinson, *supra* note 143, at 612 (AustLLI).

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

V. It's as Scottish as golf

Tony Blair started a political and cultural revolution when he was elected into office during the 1990's. Not only was his government responsible for the drafting and passing of the Criminal Justice Act, but also ushered in a time of political independence for the member nations of the United Kingdom. As the double jeopardy exception was passed by the UK parliament, it did not have applicability in Scotland. Due to the "devolution process" carried out by the Blair government, the creation of the Scottish parliament also meant a degree of legal independence from the Westminster parliament in London. Functions conferred on the Scottish Parliament and Executive¹⁴⁹ including, but not limited to: education, law, courts, prisons, judicial appointments, economic development, agriculture, and local governments¹⁵⁰. Through various forms of political agreements (or constitutional conventions), the UK parliament agreed to only pass laws which were applicable to the Scottish people with consent of the Scottish parliament. This level of autonomy was returned and respected by the English, and is the very reason that the CJA did not apply within the Scottish territory.

After the passing and implementation of the UK exception in 2006, the Scottish government undertook a consultation process review of the "Scots Law", to see if such exceptions were needed in Scotland. The commission of the consultation paper was not only in relation to the reforms that took place in UK law, but was also because of the dismissal of the "Worlds End Murder" case. The *Sinclair*¹⁵¹ case (which is the formal case distinction) was dismissed because of lack of evidence, causing public outrage. The Scottish public believed that

¹⁴⁹ *Scotland Act 1998* (U.K.), c 46.

¹⁵⁰ Peter Leyland, *The Constitution of the United Kingdom: A contextual Analysis* (Portland, Oregon: Hart Publishing, 2007), at 189.

¹⁵¹ *Sinclair v HMA* [2007] HCJAC 27 (Scot).

the families of Helen Scott and Christine Eadie deserved justice, and Sinclair was acquitted unfairly.

As with England and Australia, the shift towards creating an exception to double jeopardy was with a highly public case which got the public involved with the criminal justice process. Regardless of the end goal of the governments, the court of public opinion had a heavy influence in the reform process. With devolution, the Scottish parliament still wanted the ability to make laws for the people instead of just following the UK model. With the creation of the Scottish exception through the *Sinclair* case, the law was home grown or self-generated¹⁵² instead of compliance to the *Criminal Justice Act*.

The Scottish law commission outlined its findings in 2009, and stated that even though the double jeopardy maxim is a fundamental recognition of the importance of an individual in relation to the executive arm of government¹⁵³, but any application for a retrial should be subject to consideration by the appeal court of the likelihood that the new evidence would substantially improve the chances of a conviction¹⁵⁴. The report also outlined the two exceptions that were adopted in the other common law jurisdictions of tainted acquittals and new evidence.

The Commission and government did not consider further abolition of double jeopardy¹⁵⁵. Simple legislation enacted could amend the current protection with the intention for an exception to apply to specific circumstances. The calibration of the evidence standard was of concern to the law commission. It illustrated the issue with statements of confession, claiming that not all confessions or admissions are credible, and safeguards would no doubt be necessary

¹⁵² See Leyland, *supra* note 150, at 191.

¹⁵³ U.K., Scottish Law Commission, *Discussion paper on double jeopardy* (Discussion paper No. 141) (Edinburgh: The Stationery Office, 2009), at 2.34 – pg.13.

¹⁵⁴ *Ibid*, at para 7.54 , pg.83.

¹⁵⁵ *Ibid*, at para 7.4, pg.72.

to ensure that the statements were properly established and true¹⁵⁶. The exception might well cover evidence that emerged as a result of scientific discovery, such as DNA in recent years or fingerprint evidence in the past¹⁵⁷. Any general exception to the rule on the basis of new evidence would devalue the concept of finality which is reflected in the pleas of *res judicata*¹⁵⁸.

In 2011, the Scottish parliament passed the Double Jeopardy Act¹⁵⁹, which created the two exceptions of new and compelling evidence exception and tainted acquittals exception. There did not seem to be much concern again with the tainted acquittal exception because it was seen as an extension of courts powers in the trial process. The new evidence exception was a Scottish variation of the UK legislation. Under the act, an acquittal may be set aside for new evidence¹⁶⁰ of the same offence or any subsequent offence. This variation does not set out limitations as seen in the other jurisdictions. The standard for evidence is also left to judicial interpretation, only leaving the wording “new and compelling” as the standard. As the law commission stated, through examples in England, it concluded that scientific evidence may be the only type that meet the requirements of s.4 of the act.

This legal variation leaves the types of retrials open to any offence, and an acquitted defendant should not have to live as a virtual prisoner¹⁶¹. While attempting to match the English counterpart and unify the law of double jeopardy exceptions in the UK, the Scots law created an open standard, almost abolishing the protection, essentially going against the recommendations of the commission to limit the exception to more serious categories of offences¹⁶². The legislation also eliminated the public interest standard and created a more confined interest of

¹⁵⁶ *Ibid*, at para 7.28 , pg.78.

¹⁵⁷ *Ibid*, at para 7.47, pg.81.

¹⁵⁸ *Ibid*, at para 7.32 , pg.78.

¹⁵⁹ *Scotland Act 1998* (U.K.), c 46.

¹⁶⁰ *Scotland Act 1998* (U.K.), c 46, s (4), ss (3)(a).

¹⁶¹ Kevin Jon Heller, “What happens to the acquitted? (2008) 21 LJIL 663, at 678.

¹⁶² U.K., Scottish Law Commission, *Discussion paper on double jeopardy* (Discussion paper No. 141) (Edinburgh: The Stationery Office, 2009), at para 7.43, pg.80.

justice standard¹⁶³. The legislation seemingly signals the high court to only quash acquittals when the previous decision was a miscarriage of justice and the evidence points to guilt of the accused.

¹⁶³ *Scotland Act 1998* (U.K.), c 46, s (4), ss (7)(d).

VI. The Kiwi's take a stand, without doing the Haka

New Zealand also underwent a reform process to their criminal justice system around the same time as England and Australia. Oddly all the reforms followed the same sequence of events. In 1999 following the *Moore*¹⁶⁴ case, the New Zealand law commission ordered a consultation on the current state of double jeopardy and if a possible exception could be created. It was done in light of the findings brought out in the UK, and began a long process that culminated in the creation and acceptance¹⁶⁵ of the double jeopardy exception.

Moore was charged with murder in the early 1990's, and was acquitted of all counts. Conversely, Moore was prosecuted on charges of perjury and interfering with the administration of justice in 1999, for statements made during the original murder trial. The statements that were brought to light in 1999 put his acquittal for murder into question. Following the case, the law commission published a discussion paper outlining not only some of the findings of the English law commission, but a practical summary of the legal issues brought about by the case¹⁶⁶. The judgment made reference to Moore being acquitted of murder and the goal of the law commission was to prevent this from happening again. The commission addressed the issues with double jeopardy and how people should not be subject to multiple prosecutions, however rebutted the idea with the fact that an accused can reasonably expect to be subjected to the criminal prosecution system only once for an offence, provided he or she has not deliberately perverted the first process¹⁶⁷.

¹⁶⁴ *R v Moore* [1999] 3 NZLR 385 (N.Z.). [hereinafter *Moore*]

¹⁶⁵ *Criminal Procedures Act 2011* (N.Z.) 2011/81.

¹⁶⁶ N.Z. Commonwealth, Law Commission of New Zealand, *Acquittal following prevention of the course of justice: a response to R v Moore* (New Zealand Law Commission Discussion Paper: Preliminary Paper No. 42, 2000).

¹⁶⁷ *Ibid*, at pg.7.

A follow-up New Zealand law commission report however urged the government not to abandon the double jeopardy protection for the new English exceptions¹⁶⁸. The New Zealand Bill of Rights¹⁶⁹ protects individuals from multiple prosecutions, and the law commission illustrated that their commitment to these rights, which are also a reflection of the government's commitment to the UN human rights committee. However the committee does make reference that a case can be reopened if it is justified by exceptional circumstances¹⁷⁰. The commission wanted to limit the exception to the most serious types of crimes of their society; such as homicide and violent crimes¹⁷¹.

The recommendations listed the two exceptions created by the English legislation, being evidence and interference with the administration of justice. This variation of the double jeopardy principle makes both exceptions the qualifying factors however for the exception to apply, under the final wording of the Criminal Procedures Act; it defines the evidence exception to apply to acquittals¹⁷². Nevertheless, the Act defines a person acquitted as someone who has been charged with a breach of administration of justice¹⁷³ after the first charge was dismissed. The New Zealand law commission attempted to address the breach of the administration of justice, and believed that for a retrial to occur on the original charge, the accused must be found guilty of the administration of justice charge¹⁷⁴, thus proving the original acquittal to be incorrect and bypassing the Bill of rights¹⁷⁵ clause.

¹⁶⁸ N.Z., Commonwealth, Law Commission of New Zealand, *Acquittal following prevention of the course of justice* (New Zealand Law Commission Report No. 70, 2001).

¹⁶⁹ *New Zealand Bill of Rights 1990*, (N.Z.), 1990/109, s 26.

¹⁷⁰ N.Z., Commonwealth, Law Commission of New Zealand, *Acquittal following prevention of the course of justice* (New Zealand Law Commission Report No. 70, 2001), at para 9, pg. 4.

¹⁷¹ *Ibid*, at para 39, pg. 15.

¹⁷² *Criminal Procedures Act 2011* (N.Z.) 2011/81, s 154.

¹⁷³ *Criminal Procedures Act 2011* (N.Z.) 2011/81, s 151(1).

¹⁷⁴ *Ibid*, at para 44, pg. 16.

¹⁷⁵ *New Zealand Bill of Rights 1990*, (N.Z.), 1990/109, s 26 (2).

It specifically focused the exception to apply to violent cases, yet allowed the general application of the double jeopardy principle to be applicable without compromising the integrity of the original acquittal. It uses the bypass to prove that the original acquittal was a breach and in doing so does not undermine the criminal justice system. Without the protection against harassing successive prosecutions, all other criminal procedural guarantees become meaningless, and given a sufficient number of attempts the government will always prevail¹⁷⁶. The procedural safeguards exists identical to the English model, empowering the High Court of New Zealand to judge the new evidence on its merits and to see if reopening a trial is in the best interest of justice.

The drafting of this new evidence and administration of justice exception was carried out in 2004 under a revised Criminal Procedure Act¹⁷⁷. However the act was not passed until 2011. The one important clause of the New Zealand exception is its restrictions to past acquittals. Because of the Bill of Rights restrictions listed above, the double jeopardy exception was limited to offences after 2008¹⁷⁸. This seems to be a very creative legal way to not only bypass the double jeopardy protections, but to also uphold them as a right. Unfortunately for this legislation it is inapplicable to the *Moore* case. Statute of limitations bars any form of corrective justice.

The wording in s.154 also does not define what the court would consider as new and compelling. It is a relatively new statute so the application has been limited so far, and only time will tell how useful this will be for the New Zealand criminal justice system. New Zealand society has codified their double jeopardy protections in a quasi-constitutional Bill of Rights. This signifies their commitment to upholding the sanctity of the justice process and verdicts. Legislators will continue to enact more and tougher anticrime measures and those accused of

¹⁷⁶ Susan R Klein, "Double Jeopardy's Demise" (2000) 88:3 CLR 1001, at 1050.

¹⁷⁷ *Criminal Procedures Bill* (N.Z.), 2004/158-2.

¹⁷⁸ *Criminal Procedures Act 2011* (N.Z.) 2011/81, s 151(6).

crimes will continue to constitute a politically powerless and disfavored group¹⁷⁹ without defined procedural protections. This variation should be used as an example illustrating a solution in finding a balance of respecting declared rights versus enacting laws for the better operation of criminal justice protections.

¹⁷⁹ See Klein, *supra* note 176, at 1049.

VII. Is there a storm coming Mr. Trudeau?

Double Jeopardy is a complex procedural protection, and has been forged to protect citizens of Canada. Following the reforms of the other common law jurisdictions, it would be important to evaluate if such an over haul is needed within Canada. The simple answer to reform would be to amend the constitution removing the protection from s.11 (h) of the Charter of Rights. Canadian law guarantees this protection to all, and it is a legal procedural right to anyone within the borders of Canada. To amend the constitution and remove the protection, the general amending formula under s.38¹⁸⁰ must be used. Amendments to the Canadian Constitution must be ratified by resolution of both houses of the federal parliament and the legislatures of at least seven provinces containing at least 50 percent of the population¹⁸¹. Two attempts at major amendments to the Canadian constitution in the 1980's, failed because of the amendment procedures. The Charlottetown and Meech Lake constitutional conference were public rejections of amendments and illustrated the Canadian public's distaste for mega constitutional politics¹⁸² and amending their given rights.

Any type of reform to double jeopardy in Canada would need a public element. Charter rights are given as rights of the people and require the government to respect them at all costs. Public backing would need to be paramount and pressing for such constitutional changes to even be considered. The four common law jurisdictions looked at in the previous sections all had one common factor fueling their reforms; public involvement and understanding. Law reform does occur when the public is to a degree not happy with the current state of the system. Drastic or swift change usually comes from the outcome of a legal case that gains the attention and is seen

¹⁸⁰ *Canadian Charter of Rights and Freedoms*, s 38, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11.

¹⁸¹ See Archer, *supra* note 39, at pg. 104.

¹⁸² *Ibid*, at pg. 115.

as a pressing issue in the public eye. This becomes especially tricky when the reforms need to be for rights entrenched in a constitution.

Canadian law does not have that “one case” which has generated media scrutiny and could get the public behind reforms to the double jeopardy rule. The need for that one case can get the issue the attention nationally, which could start a debate. Unfortunately that has not happened, nor does there seem to be any cases currently which have the potential of doing this. Charter cases that gain public attention for reform are rare. The most notable case in the Charter era which fueled constitutional rights reform came from the *Rodriguez*¹⁸³ case. The decisions controversial nature did spark questions around the limitations of s.7¹⁸⁴ of the Charter, and a need to either expand the understanding of the right, or even amend it. However, since the rendering of the decision in 1993, the debate surrounding this case left the public spotlight without the desired resolution. This subject was rehashed almost twenty years later in the 2012 British Columbia case of *Carter*¹⁸⁵, gaining public and political attention to the issues with s.7. For any reform of s.11 (h), there would need to be court cases that veer the public eye onto the topic, and illustrate the issue with the double jeopardy protection, and why the Canadian model would need to mimic the other common law jurisdictions.

Putting aside the constitutional issues¹⁸⁶ and looking at the double jeopardy protection as a criminal procedural protection, any reform of this would need to determine if the Canadian criminal justice system is really in need of a retroactive removal of double jeopardy protection, and replacing it with a variation of the UK exception. If Canada would create a variation to the United Kingdom’s Criminal Justice Act, it would then place the power to review decisions in the

¹⁸³ *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 579.

¹⁸⁴ *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.

¹⁸⁵ *Carter v Canada (Attorney General)*, (2012) BCSC 886.

¹⁸⁶ **Note: This would be the case if there was not a protection to double jeopardy in the constitution

hands of the provincial Crowns, and the final decisions to reverse decisions to the Courts of appeal. This essentially would delegate more powers of prosecution to the government. From arrest to investigation, to the trial, and then possibly a retrial; it might seem to an accused that the government could have unfettered amounts of procedural powers to prosecute. The individuals' interests rather than the sovereign's should be considered when determining the circumstances under which successive prosecutions may occur¹⁸⁷. Upon receiving new and compelling evidence, the Attorney General would apply to the court of Appeal to reinvestigate a case, thus getting a second chance at their desired verdict. What is troubling about this would be the attack on a person due process rights (or what is commonly known as their day in court), because by giving defendants/accused due process rights, serves as a vital safeguard against the unjustified curtailment of their moral rights¹⁸⁸. Breaching this right by subjecting an individual to a follow up trial or multiple trials; steers away from the notion of "their one day in court". The idea of investigating and laying charges is nothing foreign to the job of Crown counsel, however the troubling aspect of allowing an exception to double jeopardy in Canada would be going against the sanctity of a verdict, and allowing multiple investigations or trials.

This change to the understanding of the rule evolved from the ideas of different legal jurisprudence, and transplanting the idea is not as simple as it was when adapting the original double jeopardy protection from the common law. As a matter of fundamental policy in the administration of the criminal law it must be accepted by the crown in a subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence¹⁸⁹. This ideal was modernized and upheld by the ruling in *Connelly*, and this change and evolution started from the

¹⁸⁷ Robert Matz, "Dual Sovereignty and the double jeopardy clause: if at first you don't convict, try, try, again" (1996) 24:2 Fordham Urb. LJ 353, at pg. 372.

¹⁸⁸ Richard L. Lippke, "The case for reasoned criminal trial verdicts" (2009) 222 Can. JL & Juris 313, at para. 16.

¹⁸⁹ Martin Friedland, *Double Jeopardy*, (Oxford: Clarendon Press, 1969), at pg.129.

British. The error in English law was introduced in 1964 (in *Connolly*) not with the 2003 Criminal Justice Act¹⁹⁰ by allowing the courts to define and stretch the understanding of criminal procedural protections. In considering the contemporary meaning of double jeopardy, many courts have claimed that changing times cannot affect the original protection against double jeopardy, whose contours are the product of history¹⁹¹. Due to pre-existing Charter limits, the only logical course of action would be to expand the rule.

One of the general principles of the Charter is that it is a living tree, which must be allowed to grow and develop in ways that its drafters could not foresee¹⁹². However as a guaranteed right, it is difficult to evolve double jeopardy in Canada to meet evolutions in society and legal jurisprudence. The Charter is a direct illustration of the values of Canadian society, and regardless if other common law jurisdictions question the relevance of this procedural protection, Canadians believe the double jeopardy clause actually does provide such protections¹⁹³. For this to evolve and develop to allow an exception allowing multiple trials and prosecutions does not seem to be something that the original drafters of the Charter would have wanted to expand to allow.

The UK transition was fueled by societal values and public pressure that does not seem to exist in Canada that can easily translate to Canadian values. It seems problematic from a Canadian perspective to allow the legislature to deprive defendants of any protection from successive prosecution¹⁹⁴. The ever changing UK values are many, and collectively contribute to the change in their legal approach to double jeopardy. But it must be added that legislatures

¹⁹⁰ G.J. McAleer, *To Kill Another: Homicide and Natural Justice* (New Brunswick, NJ: Transaction Publishers, 2010) at pg. 71.

¹⁹¹ See Sigler, *supra* note 42, at pg. 1.

¹⁹² See Archer, *supra* note 39, at pg. 155.

¹⁹³ Carissa Byrne Hessick & F. Andrew Hessick, "Double Jeopardy as a limit on punishment" (2012) 97:1 Cornell L Rev 45, at pg. 58.

¹⁹⁴ Anne Bowen Poulin, "Double Jeopardy Protection from successive prosecution: A proposed approach" (2003) 92 Geo LJ 1185, at pg.1226.

exercise little self-restraint, adding statutory provisions targeting conduct that is either criminal or prohibited and creating overlapping¹⁹⁵ offences, so any type of protection or ban can only make the criminal justice process stronger. The Canadian protections did evolve from common law principles that were created from UK common law principles. The reason that this impasse exists between the two is the differences in interpreting double jeopardy as a procedural protection versus it being a procedural right of an accused. Canada and the United States recognize double jeopardy as a right, where others believe it to be a procedural and not a substantive protection¹⁹⁶. Taking away a valued right in Canada would be difficult, because the public is not interested in giving up rights to the government.

This policy unfortunately has more long term implications, rather than something that is case by case. The primary policy issue revolves around the decision whether the community is well served by a restriction upon the prosecutor's power to initiate and pursue the prosecution of criminal suspects¹⁹⁷ or to allow them the ability to go back and reintroduce proceedings. The number of modern crimes far exceeds that at the time the rule was created, and the crimes are now defined by the legislature¹⁹⁸, so how can the legislature define how many times it can charge you for all the crimes they have created? The Charter protection limits the legislature's ability to impede on a person's autonomy, thus finding a balance between the protection of the public and the protection of one's self rights in that society.

The changes around the world subscribed to the notion that a double jeopardy exception was needed to balance victims' rights, and not let people get away with crimes. The English governments "tough on crime" approach helped usher in reforms to double jeopardy and other

¹⁹⁵ *Ibid*, at pg. 1188.

¹⁹⁶ George C. Thomas III, *Double Jeopardy: the history, the law* (New York: New York University Press, 1998) at pg. 47.

¹⁹⁷ See Sigler, *supra* note 42, at pg. 155.

¹⁹⁸ See Poulin, *supra* note 194, at pg.1199.

areas of criminal procedure, to make the system look tougher, and to better serve the needs of their society. There is no doubt that government reports and empirical evidence was used to convince the public and legislature that because of increased crime rates and acquittals, some tougher procedural safeguards were needed. On the merits, the idea of bringing closure to victims is an admirable cause, however given the fact that the committees who produced the reports outlining the need for double jeopardy reform admitted that the exception would be used in very limited circumstances¹⁹⁹, makes quick adoption of such an exception in Canada highly unlikely. The “tough on crime” wave that really helped create a public acceptance of the exception around the world would be difficult for Canada in the present time period with reports issued from Statistics Canada²⁰⁰ that the reported crime rate in Canada has been on a decline since 1991²⁰¹, and violent crimes have also been in decline since 2006²⁰². Attempting to reform the criminal procedure rules to make them more victims oriented as opposed to protecting an accused would be difficult to do so when crime rates are declining across the country.

With declining rates, it would also be difficult to create reforms allowing prosecutors multiple attempts to convict. Independent of any sentence imposed, the second trial represents a separate and discrete burden on the defendant and an opportunity for the prosecution to improve its position in relation either to conviction or to sentencing²⁰³. Ultimately adopting the exception against the rights within the Charter, would illustrate that a person’s liberty mean nothing in the

¹⁹⁹ Robyn Lincoln, “Should the double jeopardy rule be in jeopardy?” *National Legal Eagle* (2003, Vol 9, Issue 2, Article 5) at pg.12, online: The National Legal Eagle <<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1066&context=nle>>.

²⁰⁰ Statistics Canada, 2012. “Police Reported Crime Statistics, 2011.” *The Daily*, July 24. Statistics Canada Catalogue no. 85-002-XIE. p. 1, Table 252-0051. <<http://www.statcan.gc.ca/daily-quotidien/120724/dq120724b-eng.pdf>> (accessed July 27th, 2012).

²⁰¹ **See **APPENDIX A** - Statistics Canada, 2012. “Police Reported Crime Statistics, 2011.” *The Daily*, July 24. Statistics Canada Catalogue no. 85-002-XIE. p. 1, Table 252-0051. <<http://www.statcan.gc.ca/daily-quotidien/120724/dq120724b-eng.pdf>> (accessed July 27th, 2012).

²⁰² **See **APPENDIX B** - Statistics Canada, 2012. “Police Reported Crime Statistics, 2011.” *The Daily*, July 24. Statistics Canada Catalogue no. 85-002-XIE. p. 2, Table 252-0052. <<http://www.statcan.gc.ca/daily-quotidien/120724/dq120724b-eng.pdf>> (accessed July 27th, 2012).

²⁰³ See Poulin, *supra* note 194, at pg.1209.

face of a verdict. This also presents an issue with the importance of finality in the criminal justice process. The wording of s.11 (h) requires a final decision for the protection to ban multiple trials and punishments, and changing the meaning of final judgment in a Canadian context would then dilute the protection, bringing uncertainty to what final really meant. Given that Charter protections require some form of understanding before application, in the case of double jeopardy, when you change the meaning of a final judgment, it would then allow different scenarios of finality, thus making the Charter right difficult to enforce.

The variations to this rule attempted to create safeguards to allow the exception to be applied without completely compromising values of the criminal justice system. Initiation of an investigation and new trial, will put into question not only the finality of the original judgment, but also could affect the investigation process and the fairness in the second trial. It is possible that scrapping the double jeopardy protection may discourage investigative and prosecutorial efficiency²⁰⁴. Fairness and impartiality may suffer, making it difficult to secure impartial juries to ensure fairness in a new proceeding when there has already been a dress rehearsal for the trial²⁰⁵. The presumption of innocence is also put into question because the new exception to double jeopardy requires the new evidence to be able to convict the accused, going against the basis that a person is innocent until proven guilty. Evidence presented in preliminary hearings only need to meet the standard for which an issue exists, requiring a trial. Whereas, the new double jeopardy exception requires an evidentiary standard which demonstrates that an accused is highly likely to be convicted of the crime. The legal system values the ability of an accused to rebut the evidence and charges against them, and double jeopardy would not have been codified in the Charter if we as a society did not believe this.

²⁰⁴ See Lincoln, *supra* note 15, at pg.12.

²⁰⁵ *Ibid.*

Given the burdens of the accused to go to trial, it makes it difficult to ignore or set aside, because it directly attacks the basis of the criminal justice system in Canada. By barring subsequent trials, the original investigation would need to be thorough enough to issue a charge document with enough evidence for a trial. As stated in section two, the Crown may withdraw a charge for multiple reasons, including insufficient evidence without jeopardy attaching, and this alone could allow for a better investigative process. The state can build a case with proper evidence against an accused. Reliance or even consideration of creating such an exception to double jeopardy serves only the purpose of a retrial because the state did not have enough evidence to convict.

The basis for creating the exception to double jeopardy is to make sure the guilty are brought to justice. To do this it requires greater powers of the Crown and courts to review previous decisions. This review process is not any different from an appeal, but what the UK exception did was allow the court to overrule a decision based on new evidence that has surfaced which is in the interest of justice. The court must address the actual proof and theory on which the prosecutor will rely in the approaching trial and compare it with the charge in the first trial²⁰⁶. This is not so different from the Canadian criminal appeals process; however the inability to review facts and even introduce new facts is certainly the basis of a judge and jury being a trier of fact.

From a Canadian perspective, there does not seem to be much support for retroactive application of such rules or even allowing such an exception to exist in the criminal procedural rules. So one would have to wonder what the overarching purpose of the UK parliament in allowing such an exception to be created? Given the vast amount of opinions, writing and jurisprudence on the subject matter, it is difficult to ignore the possibility that double jeopardy in

²⁰⁶ See Poulin, *supra* note 194, at pg.1231.

very limited and rare cases allows for a miscarriage of justice. Allowing such an exception would thus allow the State to go back and correct the situation, regardless if it was a mistake on their behalf or if evidence did not exist at the time. The UK parliament elevated retributory justice as a systemic value at the expense of the erosion of the presumption of innocence and the rule against double jeopardy²⁰⁷. This corrective justice model does not have room in Canadian criminal law. It is not in the countries values to compromise rights for complete accuracy of verdicts.

The corrective justice model created by the double jeopardy reforms gives the state a “re-do” of charges. But the debate against this change illustrates many aspects that double jeopardy attempts to protect in the justice process. The fear in allowing an exception will increase wrongful convictions because of the evidence standard. The creation of this correction seems to be compensating for improvements in police investigation techniques, and recent advancements in forensic science that may provide the kind of new evidence that would warrant a case to be re-tried²⁰⁸. Based on the logic, allowing a retrial will correct the mistake and implement techniques and technologies of today, towards cases and investigations of yesterday. One would concede that the law, the criminal justice system, and its processes should be flexible and responsive to social and cultural changes and therefore need to be continually updated and modernized²⁰⁹. On the other hand, double jeopardy exceptions seem to be situated towards the two exceptions: new and compelling evidence and breach to the administration of justice. Allowing variations of the two types of exceptions could provide the same types of protections that they provide in the other common law jurisdictions, while still respecting the double jeopardy maxim, and Charter protections.

²⁰⁷ See Coffin, *supra* note 23, at pg. 798.

²⁰⁸ See Lincoln, *supra* note 15, at pg.12.

²⁰⁹ *Ibid.*

VIII. What can we learn from the (*)?

The acceptance of double jeopardy reform around the world attempted to create a backdoor exception to allow retrials by integrating evidence and administration of justice offences to lift the protections. Regardless of the block by the Charter for a subsequent trial, principles from both of these exceptions could be used to help strengthen the criminal justice process in Canada, without bypassing ones Charter protection.

1) New and compelling evidence exception

This reform is the cause of the controversy. It allows a review of fact and reinvestigation that could bring about another trial. Not only is the evidence exception qualified with the requirement that it be a new piece of evidence, but also it has to be compelling enough to bypass the existing verdict to reopen and prosecute. For new evidence to be compelling it must initially be both reliable and substantial²¹⁰.

As mentioned countless times this evidence standard was employed to make up the technological gap by allowing DNA evidence to be analyzed and made admissible after the original trial. The new evidence standard is primarily targeted at blood and tissue samples from decades old trials that resulted in acquittals before DNA testing was available²¹¹. Allowing DNA evidence after the fact seems to be fueling the argument that the reforms are to correct the mistakes. Public confidence in the administration of justice is fostered by demonstrating that

²¹⁰ Justin W. Curtis, "The Meaning of Life (or Limb): an originalist proposal for double jeopardy reform" (2007) 41 U Rich L Rev 991, at pg. 1001.

²¹¹ *Ibid*, at pg. 1001.

participants in the criminal justice system are willing to take action to prevent future miscarriages of justice²¹²; not go back and correct a verdict because new evidence has surfaced.

If certain types of evidence are not available during the original trial, then on its surface the trial was carried out according to the criminal justice practice, and was fair at the time. As time progresses the integration of technology will strengthen investigations, but would not necessarily make previous acquittals incorrect. By retroactively allowing the use of technology, as much as it could help convict factually guilty people, it also runs the risk of convicting factually innocent people as well.

It is a two sided argument protecting the victim versus protecting the accused, but compromising a solid procedural right in Canada has little to no backing for implementation. This is not to say that the merits of the double jeopardy reforms are not admirable; nevertheless, from a wider policy perspective, it would then put into question all types of decisions, diluting the judgments of the judiciary. The development of DNA technology has helped to further the search for the truth by assisting police and prosecutions in the fight against crime²¹³. Using these methods going forward is far more beneficial than attempting to apply it to the cases of the past. A report commissioned by the department of justice outlined the use of DNA technology to be one of the best enhancements to the criminal justice system which will not only generate more accurate verdicts, but limit cases of wrongful convictions. Wrongful convictions are a serious concern of the double jeopardy exception, and technology to achieve accurate information about the accused will allow the justice process to function more smoothly. In Canada the wrongful conviction cases of David Milgaard and Guy Paul Morin provide powerful examples of how

²¹² Canada, Department of Justice Canada, *Report on the prevention of miscarriages of justice* (Ottawa: FPT Heads of Prosecutions Committee Working Group, 2004) (Chair: Rob Finlayson), online: <<http://www.justice.gc.ca/eng/dept-min/pub/pmj-pej/pmj-pej.pdf>>, at pg. 2.

²¹³ *Ibid*, at pg. 107.

DNA evidence can be used to exonerate innocent people²¹⁴. Relying on such techniques is exactly what the evolution of the law should address, and incorporation of DNA evidence procedural practices will better serve the country in years to come.

The UK double jeopardy exception does elevate this type of evidence as a compelling factor to trigger the exception, but in the case of Canada, as great as retroactive application of the rule may seem, in reality DNA evidence constitutes circumstantial evidence²¹⁵; making the decision to re-prosecute, difficult to justify. Using this technique from now on, and making investigators aware of the benefits, couple with existing crown practices for initiating an indictment will serve the same purpose. Without the need to go back and prosecute individuals acquitted in the past in Canada, the present day application seems to serve the system better, while still respecting the protections of double jeopardy and the Charter.

If Canadian law enforcement and crown prosecutors implement DNA investigative practices, the concerns brought up by legislators who created the double jeopardy exception would cease to exist. The use of technology was an ideal course of action to correct decisions at the beginning of the twenty first century. The Canadian model however, needs to steer away from this dangerous corrective justice practice. Focus should be placed on using advanced technologies and new police investigative practices to achieve the same result of discovering accurate evidence for present day trials, similar to the double jeopardy exception procedures attempt to embrace. The Canadian government also strengthened the use of this by creating the DNA databank by passing *DNA Identification Act*²¹⁶, which consists of two collections, a crime scene index, and a convicted offender's index whom post-conviction DNA data bank orders have

²¹⁴ *Ibid*, at pg. 107.

²¹⁵ *Ibid*, at pg. 107.

²¹⁶ *DNA Identification Act*, SC 1998, c 37.

been made²¹⁷. This cataloged DNA database will aide in better verification of offenders through pre-collected samples, and make up the technological gap that investigators had which the exception attempts to close.

As for eyewitness evidence, to allow a retrial based solely on this type of evidence is questionable because reliability of the information comes into play. Courts have long recognized the frailties of identification evidence given by independent, honest and well-meaning eyewitnesses²¹⁸. When the prosecution's case depends substantially upon the accuracy of eyewitness identification, a trial judge is required to instruct a jury on the need for caution when dealing with such evidence²¹⁹, and instruct about the various factors that can affect the reliability of eyewitness identification evidence reminding the jury that mistaken identification has been responsible for miscarriages of justice by reason of the wrongful conviction of persons who have been mistakenly identified by one or more honest witnesses²²⁰.

Finally the UK Court of appeal has allowed retrials through the double jeopardy exception because the acquitted individual made confessions after trial. There are bodies of literature and case law dealing with confessions, but relying on this type of evidence as a compelling factor is also troubling. There are cases where confessions have been proven false by DNA evidence, and other such independent sources of evidence²²¹, so allowing this to be the sole compelling factor leaves more questions about the evidence than it would attempt to answer at another trial. Confessions may not be reliable or true in certain cases, and courts are reluctant to admit certain confessions because of how they were obtained, or the intentions of the person

²¹⁷ Canada, Department of Justice Canada, *Report on the prevention of miscarriages of justice* (Ottawa: FPT Heads of Prosecutions Committee Working Group, 2004) (Chair: Rob Finlayson), online: <<http://www.justice.gc.ca/eng/dept-min/pub/pmj-pej/pmj-pej.pdf>>, at pg. 108.

²¹⁸ *Ibid*, at pg. 49, see also *R v Nikolovski* (1996), 11 CCC (3d) 403 (SCC), at 412.

²¹⁹ *Ibid*.

²²⁰ *Ibid*, at pg. 50, see also *R v Sutton*, [1970] 2 OR 358, [1970] 3 CCC 152 (CA).

²²¹ *Ibid*, at pg. 58, see also *R v Oickle*, [2000] 2 SCR 3 at para. 35.

making the statement. The UK Court of Appeal in the Dunlop retrial was hesitant to allow proceedings based on his confession alone. Because of the many contextual factors that go along with a confession, it is difficult to see how a statement alone could be compelling.

Ultimately applying and evolving Canadian investigative practice would better serve the interest of justice. The department of justice in their report make the findings that using all the above mentioned factors would not only make decisions more accurate, but also avoid the need for such an evidence exception to double jeopardy because the steps taken before initial proceedings would provide the same investigative conclusion than allowing facts after the investigation. This however is not perfect, and statistically there could be the rare case which could bypass all these methods and be barred by the Charter after final judgment, but the exception to double jeopardy is also applied in the rare case, so from a Canadian standpoint, implementing the procedural practices would work, but there is no need for the evidence exception.

2) Interference with the Administration of Justice

The second exception to double jeopardy, which was created by the reforms dealt with situations where an accused had either tampered with the verdict or presented falsified information at any stage of the trial process. Professor Martin Friedland is a leading expert in criminal law and double jeopardy and argued in his book that Canadian legislation would be desirable to deal with cases of tainted acquittals²²². In theory this would allow a court to overturn decisions for interfering with the administration of justice. It would not run afoul to the double

²²² Martin L. Friedland, *My life in crime and other academic adventures* (Toronto: University of Toronto Press, 2007) at pg. 87.

jeopardy Charter protection, and specifically the protection afforded by common law issue estoppel because it would allow a charge for an offence separate to the original charge.

Canadian case law has recognized these types of situations, and attempted to separate it from the principles of *res judicata*. In *Gushue*²²³ the court blocked a plea for issue estoppel because it was shown that the accused lied and committed perjury during the trial. The charge for perjury could not be estopped because it had different requisites to the original crime, and this Supreme Court ruling allowed new evidence to be admitted regarding the case even if it was not available at the first trial. The *Gushue* case has allowed the state to retry cases for crimes of the past, but on grounds of legal procedural infractions. Regardless of the category of the charged offence, the ruling has allowed for something similar to an evidence exception to charge individuals after the original trial.

In *Gill*²²⁴ after a tainted jury verdict, the Supreme Court allowed the crown to reintroduce charges for homicide. The charges for the murder evidently were dropped, however Gill was properly tried and convicted of obstruction of justice²²⁵. Both cases bring up the realistic situation of justice tampering, and currently these types of administration of justice principles are protected in the common law. In its current state as legal precedent, Canadian courts do not see these types of situations as a breach of the Charter protection prohibiting from a breach of double jeopardy. Implementations of these types of charges have happened in all the previous legal systems analyzed in this study, and in the cases of tainted acquittals, the English legislation could serve as an excellent model for Canada²²⁶.

²²³ *Gushue v R* [1980] 1 SCR 798, 16 CR (3d) 39, 50 CCC (2d) 417 (SCC). [*hereinafter Gushue*]

²²⁴ *R v Gill* [1989] 1 SCR 295.

²²⁵ See Friedland, *supra* note 222, at pg. 87.

²²⁶ *Ibid.*

There does not seem to be any indication that these types of administration of justice charges could upset or even breach the *Kineapple* principle or Issue Estoppel defenses. Legislative implementation of such exceptions would be the best course of action so that the exception could be implemented and applied in a uniform fashion, and not have different legal interpretations dilute this protection of the criminal justice process.

IX. Conclusion

Both the law and technology in many of these areas discussed in this report continue to evolve²²⁷. The changes worldwide to double jeopardy attempted to fulfill a societal objective, rather than a legal objective. Ushered in on the promise of crime control and convicting the guilty, what it seems to have done is create a notion that really no one is truly acquitted. For Canada, this change has brought about a dilemma regarding the Canadian interpretation and application of double jeopardy. All the common law nations follow and uphold this protection as the basis of the adversarial trial process. For all of the major common law jurisdictions to revise a centuries old protection in such a short period of time, highlights some sort of fault that may exist within its old form. Fortunately for the North American common law jurisdictions, double jeopardy is a constitutionally codified procedural protection. Attempting to implement such changes is not as simple as passing legislation. The values of the Canadian people of the past and the values of the future include such a protection against double jeopardy.

The changes are to make up for the gaps in investigative practice of the past. However the merits of the exception could still be implemented and followed without massive and complex changes to the rule of double jeopardy²²⁸. Implementations of new investigative practices, coupled with technological advances will all provide more accurate evidence to be used at the trial process. As complex as Canadian criminal procedure may be, it has the ability to serve the interest of justice and deliver accurate charges without having a backup plan to bypass double jeopardy. Canadian law is also evolving to allow subsequent charges after a final verdict

²²⁷ Canada, Department of Justice Canada, *Report on the prevention of miscarriages of justice* (Ottawa: FPT Heads of Prosecutions Committee Working Group, 2004) (Chair: Rob Finlayson), online: <<http://www.justice.gc.ca/eng/dept-min/pub/pmj-pej/pmj-pej.pdf>>, at pg. 154.

²²⁸ Robyn Lincoln, "Should the double jeopardy rule be in jeopardy?" *National Legal Eagle* (2003, Vol 9, Issue 2, Article 5) at pg.13, online: *The National Legal Eagle* <<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1066&context=nle>>.

for crimes that are much more severe than the original charged. An Alberta judge ruled that two prosecutions revolving around the same event did not represent double jeopardy²²⁹ because the crimes had different requisite, even though charges were laid after a final decision.

Allowing the Canadian system to adapt to changing times and technologies seems to be a better fit in respecting the rights of its citizens. Fluid evolution rather than forced change would be more realistic and closer to the values of the Charter. Permitting the state to go back and prosecute does not serve a greater purpose from a Canadian point of view. Rather, it would be more beneficial to take the values of the double jeopardy reforms and enhance our current criminal justice system with the issues that have been highlighted. Even implementing the administration of justice offence exceptions, that case law has accepted; could help balance the need for an overall exception to double jeopardy. If Canadian legislators ultimately create such exceptions, this could then be a starting point of the debate to use the administration of justice offence to bypass the original decision, and all a variation to the evidence exception, similar to the legislation implemented in New Zealand. Canada is a tough fit for the “new double jeopardy” because of the constitutional nature of the protection, paralleling the US constitutional protections.

Making the system strong for today, will allow more accurate trials, and people of the future to not question the decisions of yesterday. In the grand scheme, the other common law jurisdictions also have the ability to repeal the double jeopardy exception and either go back to the old model or create something more radical than the current incarnation. Regardless double jeopardy is seen as a procedural right in Canada, and just because the others jumped, does not mean Canada has to as well.

²²⁹ Geoffrey Scotton, “Alberta Double jeopardy case said setting a legal precedent – Pled to assault, charged with murder when the victim died” (1999) *The Lawyers Weekly*, Apr 23, 18(47).

Appendix A

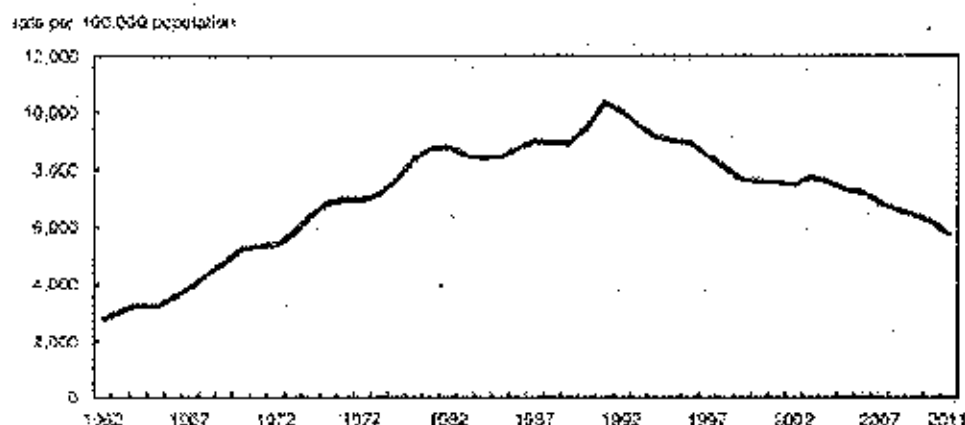
Police-reported crime statistics, 2011

Released at 8:30 a.m. Eastern time in *The Daily*, Tuesday, July 24, 2012

The police-reported crime rate, which measures the overall volume of crime, continued its long-term downward trend in 2011, declining 6% from 2010. The Crime Severity Index, which measures the severity of crime, also fell 6%.

Chart 1

Police-reported crime rate, Canada, 1962 to 2011



Canadian police services reported almost 2 million Criminal Code (excluding traffic) incidents in 2011, about 110,000 fewer than in 2010.

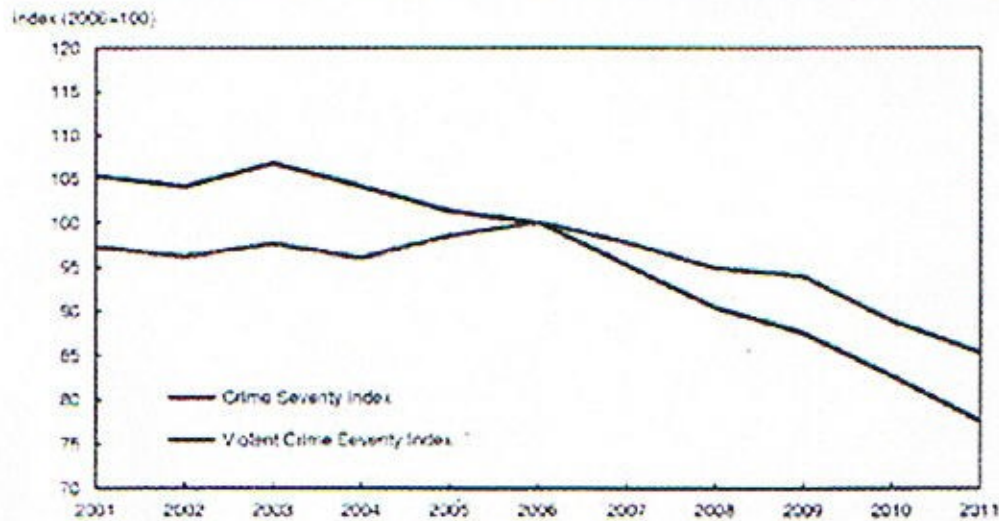
The drop in crime was seen throughout the country and for most offences, including attempted murders, major assaults, sexual assaults, robberies, break-ins and motor vehicle thefts.

Offences that showed an increase in 2011 were homicide, sexual offences against children, child pornography, criminal harassment, impaired driving and most drug offences.

Since it peaked in 1991, the crime rate has generally been decreasing and, in 2011, was at its lowest point since 1972. The Crime Severity Index (CSI) was 26% lower than it was a decade earlier in 2001.

Appendix B

Chart 2
Police-reported crime severity indexes, 2001 to 2011



Violent crime

Police reported over 424,400 incidents of violent crime in 2011, about 14,800 fewer than in 2010. As in previous years, violent crimes accounted for about 1 in 5 offences reported by police.

Both the rate and severity of violent crime fell 4% in 2011. It was the fifth consecutive annual decline in the severity of violent crime.

Despite the overall drop in violent crime, Canada's homicide rate rose 7% in 2011 to 1.7 homicides per 100,000 population. Police reported 598 homicides in 2011, 44 more than in 2010. Despite annual fluctuations, the homicide rate has generally been declining since peaking in the mid-1970s.

The national increase in homicides in 2011 was driven by increases in Alberta and Quebec. Manitoba had the highest homicide rate among the provinces for the fifth consecutive year.

The rate of robbery declined 3% in 2011, continuing a downward trend. Police reported over 29,700 robberies, 700 fewer than in 2010. Rates declined for attempted murder (-3%) and for most types of assault, including sexual assault (-3%).

Increase in sexual offences against children

Police reported more than 3,600 incidents of sexual violations against children in 2011, a 3% increase.

Among the specific offences in this category, the rate of luring a child via a computer rose 10%, while the rate of invitation to sexual touching increased 6%. The rate of sexual interference remained stable, while the rate of sexual exploitation dropped 7%.