"Source: Double Jeopardy, Pleas and Verdicts,

Working Paper 63, 1991.

Department of Justice Canada. Reproduced with the permission of the Minister of Public

Works and Government Services Canada, 2007."

## Table of Contents

| INT | ROI | DUCTION   | 1   |
|-----|-----|---|-----|
| CH  | АРТ | ER ONE: Present Law   | 3   |
| I.  | Dot | ible Jeopardy   | 3   |
|     | A.  | Introduction  | 3   |
|     | В.  | Sources of Double Jeopardy Protection                         | 4   |
|     |     | 1. The Special Pleas in Bar: Autrefois Acquit,                |     |
|     |     | Autrefois Convict, and Pardon                                 | 4   |
|     |     | 2. Protection against Unreasonably Splitting a Case           | 8   |
|     |     | 3. The Rule against Multiple Convictions                      | 9   |
|     |     | 4. Protection against Inconsistent Judgments (Issue Estoppel) | 13  |
|     |     | 5. Miscellaneous Criminal Code Provisions                     | 14  |
|     |     | 6. Constitutional Protection against Double Jeopardy          | 15  |
|     | C.  | Other Matters Affecting Double Jeopardy                       | 17  |
|     |     | 1. Effect of Foreign Convictions and Acquittals               | 17  |
|     |     | 2. Effect of the Federal-Provincial Division of Powers        | 19  |
|     | D.  | Procedural Matters  | 19  |
|     |     | 1. Double Jeopardy Issues Cannot be Raised                    |     |
|     |     | at the Preliminary Inquiry                                    | 19  |
|     |     | against Multiple Convictions Applies                          | 20  |
|     |     | against Multiple Convictions Applies                          | 2.0 |
| II. | Ple | as  | 22  |
|     | A.  | Introduction  | 22  |
|     | В.  | General Matters   | 22  |
|     |     | 1. Permitted Pleas  | 22  |
|     |     | (a) The Pleas of Guilty and Not Guilty                        | 22  |
|     |     | (b) The Special Plea of Justification for the Crime           |     |
|     |     | of Defamatory Libel   | 23  |

|      |     | 2. Impermissible Pleas   | 24<br>24<br>25 |
|------|-----|--|----------------|
|      |     | (c) Plea of Nolo Contendere                                    | 25             |
|      | C.  | Procedural Matters   | 26             |
|      |     | 1. Appearance in Court to Enter the Plea                       | 26             |
|      |     | 2. Calling on the Accused to Plead                             | 27             |
|      |     | 3. Who May Enter the Plea                                      | 28             |
|      |     | 4. Consequences of a Failure or Refusal to Plead               | 28             |
|      |     | 5. Adjournments to Facilitate the Taking of a Plea             | 28             |
|      |     | 6. Pleading Guilty to Included or Related Crimes               | 28             |
|      |     | 7. Judicial Control of Acceptance or Withdrawal of Guilty Plea | 30             |
| III. | Ver | dicts  | 31             |
|      | Α.  | Introduction   | 31             |
|      | В.  | General Matters  | 31             |
|      |     | 1. Permitted Verdicts  | 31             |
|      |     | (a) Verdict of Guilty or Not Guilty                            | 31             |
|      |     | (b) Special Verdict of Acquittal on Account of Insanity        | 32             |
|      |     | (c) Special Verdict for the Crime of Defamatory Libel          | 33             |
|      |     | 2. Impermissible Verdicts                                      | 34             |
|      | C.  | Procedural Matters   | 34             |
|      |     | 1. Verdicts Available Where "Included"                         |                |
|      |     | or "Alternative" Crimes Are Proved                             | 34             |
|      |     | 2. The Motion for a Directed Verdict                           | 37             |
|      |     | 3. When a Jury's Verdict May Be Taken                          | 39             |
| СН   | APT | ER TWO: The Need for Reform                                    | 41             |
| I.   | Ger | neral Principles   | 41             |
| II.  | Def | fects  | 43             |
|      | A.  | Lack of Comprehensiveness                                      | 43             |
|      | В.  | Confusing Procedures   | 44             |

|     | C.   | Anachronistic Provisions  | 45 |
|-----|------|---|----|
|     | D.   | Procedures That Produce Delay   | 45 |
|     | E.   | Shortfalls in the Protections Accorded to the Accused                 | 46 |
| СН  | APT  | TER THREE: Recommendations  | 49 |
| I.  | Do   | uble Jeopardy   | 49 |
|     | Α.   | General Matters   | 49 |
|     |      | <b>RECOMMENDATION 1</b> — Prosecution for Each Crime Permitted Unless | S  |
|     |      | Rules against Double Jeopardy Apply                                   | 49 |
|     |      | RECOMMENDATION 2 — Rule against Separate Trials                       | 50 |
|     |      | <b>RECOMMENDATION 3</b> — No Subsequent Trial for the Same            |    |
|     |      | or Substantially the Same Crime                                       | 53 |
|     |      | RECOMMENDATION 4 — Rule against Multiple Convictions                  | 55 |
|     |      | RECOMMENDATION 5 — Inconsistent Judgments                             | 59 |
|     |      | RECOMMENDATION 6 — Effect of Foreign Judgments                        | 61 |
|     |      | RECOMMENDATION 7 — Application of Rules against Double                |    |
|     |      | Jeopardy to Federal Offences  | 64 |
|     |      | RECOMMENDATION 8 — Abuse of Process                                   | 64 |
|     | В.   | Procedural Matters  | 65 |
|     |      | RECOMMENDATION 9 — Double Jeopardy Issues May Be Raised               |    |
|     |      | in Pre-Trial or Trial Motions   | 65 |
|     |      | RECOMMENDATION 10 — Effect of Pre-Trial or Trial Motions on           |    |
|     |      | Double Jeopardy Issues  | 67 |
|     |      | <b>RECOMMENDATION 11</b> — Evidentiary Matters to Determine Whether   |    |
|     |      | the Person Has Been Previously Acquitted                              |    |
|     |      | or Convicted of the Same Crime  | 67 |
|     |      | RECOMMENDATION 12 — Effect on Verdicts When the Rule                  |    |
|     |      | against Multiple Convictions Applies                                  | 67 |
| II. | Plea | as  | 69 |
|     |      |   |    |
|     | A.   |   | 69 |
|     |      | RECOMMENDATION 13 — Codification of Pleas                             | 69 |
|     |      | RECOMMENDATION 14 — Plea of Not Guilty or Guilty                      | 72 |
|     |      | <b>RECOMMENDATION 15</b> — Defences under the Plea of Not Guilty      | 72 |

| В.       | Procedural Matters  | 72 |
|----------|---|----|
|          | RECOMMENDATION 16 — Who Appears                             | 72 |
|          | RECOMMENDATION 17 — Failure to Appear at a Scheduled        |    |
|          | Appearance  | 74 |
|          | RECOMMENDATION 18 — Reading the Charge                      | 75 |
|          | RECOMMENDATION 19 — Who Pleads                              | 77 |
|          | RECOMMENDATION 20 — When to Arraign and Plead,              |    |
|          | and Postponement of Plea                                    | 78 |
|          | RECOMMENDATION 21 — Taking the Plea                         | 80 |
|          | RECOMMENDATION 22 — Failure to Plead                        | 83 |
|          | RECOMMENDATION 23 — Failure to Appear at Trial              | 83 |
|          | RECOMMENDATION 24 — Withdrawal of Plea of Guilty            | 85 |
|          | <b>RECOMMENDATION 25</b> — Plea of Guilty to Crimes Arising |    |
|          | out of the Same Transaction                                 | 85 |
|          | RECOMMENDATION 26 — Plea of Guilty to Crimes Committed      |    |
|          | in Other Jurisdictions                                      | 86 |
| III V    |   | 97 |
| III. Vei | dicts   | 87 |
| A.       | General Matters   | 87 |
|          | RECOMMENDATION 27 — Codification of Verdicts                | 87 |
|          | RECOMMENDATION 28 — Verdict of Not Guilty                   | 88 |
|          | RECOMMENDATION 29 — Verdict of Guilty                       | 88 |
|          | RECOMMENDATION 30 — Special Verdict of Not Liable           |    |
|          | by Reason of Mental Disorder                                | 88 |
| В.       | Procedural Matters  | 89 |
|          | RECOMMENDATION 31 — Conviction for Included Crimes          | 89 |
|          | RECOMMENDATION 32 — Definition of Included Crimes           | 90 |
|          | RECOMMENDATION 33 — Conviction for a Crime Specified        |    |
|          | as an Element of One of the Alternative                     |    |
|          | Ways in Which a Crime Charged Can Be                        |    |
|          | Committed   | 92 |
|          | RECOMMENDATION 34 — Alternative Conviction for Attempt,     |    |
|          | Furthering, or Attempted Furthering                         | 92 |
|          | RECOMMENDATION 35 — Motion for Verdict of Not Guilty        | 94 |
|          | RECOMMENDATION 36 — Taking a Jury Verdict                   | 95 |
|          |   |    |
| SUMM     | ARY OF RECOMMENDATIONS                                      | 97 |