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Double Jeopardy in Canada

Beneath the surface of the words "question of law alone" in section 676 of the *Criminal Code*

EXECUTIVE SUMMARY

Justice Cory of the Supreme Court of Canada acknowledged in 1997: "It is one of the principal safeguards which seeks to ensure that no innocent person is convicted." He recognized the well-known Marshall, Morin, and Milgaard wrongful conviction affairs "as a constant reminder that our system, with all its protections for the accused, can still make tragic errors."

Criminal law empowers the state to come down upon an individual through investigation, trial, conviction, and the imposition of a sentence. To help protect the individual as against the state, the longstanding rule against double jeopardy guarantees that, as stated in the *Canadian Charter of Rights and Freedoms*: "Any person charged with an offence has the right…if finally acquitted of that offence, not to be tried for it again."

Yet, in 1930 Canadian Parliament quietly passed an amendment to the *Criminal Code* which permits the Crown to appeal against an acquittal on a "question of law alone." Those words have not changed since; today they reside in section 676.

Left as a "thorny question" for the courts, interpreting the words "question of law alone" has come in Canadian jurisprudence to permit an appellate court to second-guess a trial judge's determination based on a complex array of evidence.

One could be forgiven for being anxious that this permits the Crown a "second kick at the can" (or, as the British say, a "second bite at the cherry"). One could also wonder if the words "or a question of mixed law and fact" have effectively been read into section 676. Further, that provision has often been treated by advocates and judges alike as a mere preliminary question that sees "law" and "fact" in the abstract.

In this research project, I ask: If judges or appellate advocates pursued a purposive interpretation of section 676, what principles could underscore the analysis?

I suggest the provision calls for a balancing exercise. Ultimately, I suggest, an appellate court must ask, "in light of the private and public interests weighing for and against the security of this acquittal at trial, am I justified in intervening on appeal?" Inspiration for the interests to be weighed can be drawn from our friends south of the border and across the pond.

DISCUSSION

1923: Parliament introduces a right of appeal for a person convicted, affirms the double jeopardy rule

In 1922, a Senate Special Committee investigated adding a right of appeal for convicted persons, taking the U.K. system as a model. Prior to this, Canadian criminal law did not provide for a right of appeal against a conviction, an anomaly in the Commonwealth.

In 1923, the right of appeal for convicted persons was introduced through Bill B, ***An Act to extend the Right of Appeal from Convictions for Indictable Offences***. In second reading at the Senate, a representative from the Senate Special Committee clarified that in the U.K., the Crown cannot appeal against an acquittal, and such a right was not included in Bill B.

Still in 1923, the Senate considered a different amendment to the *Criminal Code* which would have appended "or acquittal" after the words, "setting aside or affirming a conviction" in the provision granting appeal rights to both the Crown and a convicted person. The Senate Special Committee objected to this amendment on the basis that it "**might result in a prisoner who had been acquitted being brought up on appeal and tried over again," a "feature which might be extremely dangerous and ought not to be approved.**"

1930: Parliament provides a Crown right to appeal from an acquittal for a "question of law alone"

In 1930, the Crown was provided the right of appeal for a question of law alone through Bill 138, *An Act to amend the Criminal Code*. The original Bill included amendments relating to firearms and other weapons, seditious intention, selling information on horse races, and more. Only 38 sections deep was it proposed to grant the Crown a right of appeal against an acquittal.

While other unrelated sections of the Bill were intently debated on second and third reading in the House of Commons and the Senate, **the amendment to add appeals from acquittals was accepted without debate in those Parliamentary sessions**. An explanatory note on Bill 138 simply states: "The purpose of this amendment is **to restore to the Crown the right to appeal to the Court of Appeal on any ground of appeal which involves a question of law alone**. Section 1013 (1)…gives a right of appeal in such case to a person convicted on indictment but not to the Attorney General."

After the passage of Bill 138, section 1013(1) thus gave a right of appeal against one's conviction and section 1013(4) to the Crown against an acquittal. While the right of a convicted person covered questions of fact or law, the right of the Crown applied to a "question of law alone." In this respect, **these provisions have not meaningfully changed since 1930**; they are now sections 675(1)(a) and 676(1)(a) of the *Criminal Code*, respectively.

1932: A jurisprudential conundrum emerges

In 1932, Chief Justice Anglin of the Supreme Court of Canada said of section 1013 in *Belyea* that "we cannot regard that provision as excluding the right of the Appellate Divisional Court, where a conclusion of mixed law and fact, such as is the guilt or innocence of the accused, depends, as it does here, upon the legal effect of certain findings of fact made by the judge or the jury."

By contrast, in 1959, the Supreme Court in *Rose*, apparently undertaking a fresh interpretation, described the right of appeal from an acquittal as an "exceptional and limited right" and stated that the "Court of Appeal is therefore incompetent to hear the case if the question raised is not a pure question of law, but involves a mixed question of law and fact."

DISCUSSION

Today in Canada : Second-guessing on appeal the appreciation of evidence at trial, and the double jeopardy debate not being had

In 2011, Justice Cromwell for the Supreme Court of Canada recognized in *J.M.H.* that **separating a question of law from what is the jurisdiction of only trial courts is a "thorny question"**.

Today, it appears the vision of *Belyea*, not *Rose*, has prevailed, even though this **could be said to have read in the words "or a question of mixed law and fact" to section 676(1)(a)**. *J.M.H.* is a leading case on this question, summarizing circumstances in which an appeal court may interfere with an acquittal on the basis of error in a trial judge's appreciation of the evidence.

Further, section 676(1)(a), necessary to allow an appeal court jurisdiction to hear an appeal against an acquittal, **risks being treated as a mere preliminary consideration about "fact" and "law" in the abstract, with little said about why the question is posed to begin with**.

For instance, in *Shepherd* in 2009, arising form the appeal of an acquittal at trial, the Supreme Court of Canada interfered with the trial judge's determination on an officer's reasonable and probable grounds to gather a breath test for intoxication. The Court did this on the basis that "the application of a legal standard to the facts of the case is a question of law," citing *Araujo*, an appeal from an acquittal, together with *Biniaris*, an appeal from a conviction. With great respect for Chief Justice McLachlin and Justice Charron, the decision's authors, *Shepherd* could thus be said to erode the principles underlying the asymmetry between the rights of appeal of a person convicted and of the Crown against an acquittal.

One could ask: If something has been lost in the interpretation of section 676(1)(a), could it be found again in a purposive analysis? What factors would such an analysis entail?

Consulting contemporary U.S. and U.K. debate on double jeopardy and appeals from an acquittal

Helpfully, the U.K. legislature intently debated this very question ahead of its own introduction of a Crown right of appeal against an acquittal in 2003. In the U.S., while an equivalent law has not been passed, legal commentators have thoughtfully weighed in from both sides.

While there are other considerations, the following in my view are the most compelling reasons, spanning both private and public interests, to favour either symmetrical or asymmetrical rights of appeal.

Militating in favour of a *narrower* right of appeal against an acquittal:

1) To protect an acquitted from potential abuse by the state, the media, or the public, who may be erroneously convinced the acquittal was an error.
2) To reduce the possibility of a wrongful conviction, which weighs more heavily than a wrongful acquittal.
3) To preserve the finality of an acquittal, avoiding the anxiety, fear, and cost to the acquitted person from further investigations, charges, or trials.

Militating in favour of a *broader* right of appeal against an acquittal:

1) To achieve justice for the victim and to avoid letting a criminal go loose, free even to brag of their crime with impunity.
2) To promote the evolution of criminal law through appellate decisions, and not only ones that would favour accused.
3) To rectify potential abuses or failures at the trial level, such as bribery or witness intimidation, or in the event better evidence emerges later.

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