Issue Estoppel and Similar Facts

Hamish Stewart*

1. Introduction

On the trial of the accused for an offence, can the Crown lead evidence tending to show that the accused is guilty of a different offence of which he was previously acquitted? In Canada, the answer is pretty clearly “No”, and the Ontario Court of Appeal recently declined an opportunity to reconsider that answer.¹ But several Canadian commentators, supported by judicial reasoning from England and New Zealand, have argued that the answer should be “Yes.”² Their argument is that, first, there is nothing in the rules of evidence that makes evidence inadmissible simply because it shows that the accused previously committed another offence, whether or not he was convicted; and, second, that the doctrine of issue estoppel in criminal proceedings should not be construed so as to bar this kind of evidence. In this article, I argue that the Canadian answer should be a qualified “No.” The first step in the argument for admissibility is correct, but the second step should not be accepted, at least not fully. Although the rules of evidence do not bar this form of proof, under some circumstances the doctrine of issue estoppel should be retained; however, it should be limited to those facts that must have been decided in the accused’s favour in the previous trial. If issue estoppel is

* Associate Professor, Faculty of Law, University of Toronto. I am very grateful to Michael Code, Kent Roach and Simon Stern for their comments on drafts of this paper.

understood this way, then whether evidence relating to a prior acquittal is admitted as similar fact evidence will depend on whether the probative value of the evidence derives from a fact that was previously decided in the accused’s favour. If so, the evidence will be inadmissible; but if not, the evidence will be admissible.

2. Issue Estoppel and Similar Facts: The Canadian Position

Issue estoppel is related to but differs from res judicata. A plea of res judicata asserts that the cause of action is the same in both the prior and the current proceeding, so that the current proceeding should not continue, whereas issue estoppel may be raised where the causes of action in the two proceedings are different, but the same particular factual issue has arisen in both. In criminal proceedings, the principles of res judicata are given effect through the pleas of autrefois acquit and autrefois convict. Where those pleas are not available, issue estoppel arises where the accused has been finally acquitted of a criminal offence arising out of certain conduct, is charged with a different offence, and for some reason the facts surrounding the earlier charge become relevant. Issue estoppel “prevents the Crown from calling into question issues determined in the accused’s favour in an earlier proceeding”. 3

The requirements of issue estoppel are “(i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final, and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies”. 4 The second and third elements are unproblematic: if the accused was previously acquitted and either the acquittal was upheld on appeal or the Crown’s appeal rights expired, the acquittal is final. The parties — the Crown and the particular accused person — are the same. But the first requirement —

whether the factual issue is the same and, indeed, whether it has been decided — is often difficult to determine.

In Canada, the foundational case for the application of issue estoppel in criminal proceedings is *Grdic*. The accused had been charged with impaired driving and “over 80”. At that trial, he testified in support of an alibi. He said that he had been stopped by police on the day in question, but asserted that it was not at 6:30 p.m., as the police officer had testified, but at a different time. Thus, the theory of the defence was that the police had confused Grdic’s case with another. The trial judge acquitted, though he commented that “perjury has been committed in the court room”. The accused was then charged with perjury in relation to his testimony in the impaired driving trial. The trial judge at the perjury trial acquitted on the basis of issue estoppel, and in a 5:4 decision, the Supreme Court ultimately upheld the acquittal. Lamer J., for the majority, stated that the first trial had decided the issue of the accused’s whereabouts at 6:30 p.m. in his favour, and that issue estoppel therefore prevented the Crown from trying to prove, in the second trial, that the accused had been stopped by the police at 6:30. Issue estoppel would not have been available if the first judgment had been obtained by fraud and if the Crown could not prove the fraud with “fresh evidence”, that is, evidence that was not available by the exercise of reasonable diligence at the first trial.

On a charge of perjury arising in these circumstances, the Crown is estopped from re-litigating an issue decided in favour of the accused unless it is tendering, in addition to or in lieu of the evidence previously adduced, evidence that was not at the time of the first trial available by the exercise of reasonable diligence.

Wilson J., for the four dissenting members of the court, agreed that issue estoppel was in principle available in criminal proceedings, but would have held that the first trial had not clearly determined the factual issue on which the accused sought to found the estoppel and that the fraud exception was

---

in any event applicable as long as the Crown introduced some evidence that it had not introduced at the first trial.\textsuperscript{10}

In this article, I assume that the fraud exception would be available in the circumstances outlined by Lamer J., but I focus on cases where those circumstances do not arise: there is no indication of fraud in the first proceeding, or if there is, the Crown has no evidence to demonstrate it. If the fraud exception is inapplicable, issue estoppel prevents the Crown, in a later trial, from leading evidence tending to show that the accused committed the earlier offence. Accordingly, since \textit{Grdlic}, issue estoppel has been applied to prevent the Crown from leading evidence of other offences of which the accused had been acquitted, whether as similar fact evidence,\textsuperscript{11} as evidence of prior convictions under s. 12 of the \textit{Canada Evidence Act},\textsuperscript{12} or as evidence of consciousness of guilt.\textsuperscript{13} In each of these situations, the fact of the previous acquittal is taken as a conclusive determination in the accused’s favour that the offence did not occur. Issue estoppel applies even where the prior acquittal was not on the merits\textsuperscript{14} and where the prior proceedings were judicially stayed.\textsuperscript{15} In cases where the other acquittal occurred after the accused was convicted, courts of appeal have held that the subsequent acquittal has the effect of rendering the evidence retroactively inadmissible at the accused’s trial, thus requiring a new trial, unless the “no substantial wrong” proviso in s. 686(1)(b)(iii) can be applied to uphold the conviction.\textsuperscript{16}

The one situation where issue estoppel does not apply is where the accused is tried on several charges at the same time,

\begin{thebibliography}{99}
\bibitem{ibid} \textit{Ibid.} at pp. 820-21.
\bibitem{mahalingan} \textit{Mahalingan}, supra, footnote 1.
\bibitem{rvmra} \textit{R. v. M. (R.A.)}, supra, footnote 11.
\bibitem{doung} \textit{Duong}, supra, footnote 12; \textit{Mahalingan}, supra, footnote 1; \textit{G. (K.R.)}, supra, footnote 11.
\end{thebibliography}
the Crown satisfies the trial judge that the similar fact rule makes the evidence relating to each admissible as similar fact on the others, and the accused is acquitted on some counts and convicted on others. In this situation, the Supreme Court has held that issue estoppel does not apply, even though if each count had been dealt with in a separate proceeding, issue estoppel would apply.

3. Issue Estoppel: For and Against

There are at least three reasons why issue estoppel should apply in criminal proceedings. First, and perhaps most important, the accused should be able to rely on the acquittal to prevent the Crown from again alleging, in any context, the conduct for which he was acquitted. Notwithstanding the fact that the accused need only raise a reasonable doubt, "an acquittal is more than a finding of not guilty and is in law a declaration of innocence for all purposes". The criminal justice system must treat the acquittal as more than a verdict of "not proven"; it must take the acquittal as establishing innocence. There is no verdict other than acquittal that could have this effect; a fact finder at trial cannot return a verdict of "proved innocent", nor can a court of appeal formally declare the accused's innocence. Therefore, the Crown cannot continue to allege that the accused is guilty of an offence of which he has been acquitted. Second, as Richard Maloney has pointed out, using a prior acquittal as similar fact evidence does indeed involve inconsistent verdicts in the following sense. The acquittal is a final judgment that the accused is not guilty of the earlier offence; but in using the evidence relating to the acquittal as circumstantial evidence of the accused's guilt of another offence, the jury must be satisfied, to some degree, that the accused is guilty of the offence for which he was acquitted. Third, issue estoppel is a straightforward way of avoiding a

certain type of abuse of process: the repeated and unsuccessful alleging of the same criminal conduct against the accused. To see the point, consider a variation on Grdic. Grdic was acquitted of impaired driving and was also acquitted of having perjured himself at the impaired driving trial. Now, suppose that Grdic had testified at the perjury trial, entirely consistently with his testimony at the impaired driving trial. Could Grdic now be charged with perjuring himself at the perjury trial? If the criticism of the Canadian position is correct, these proceedings would not be barred by issue estoppel and could only be resisted on the ground of abuse of process. Such an argument might very well succeed; but for this particular class of abusive proceedings, issue estoppel is a more straightforward way of controlling the mischief of repetitious proceedings. 21

These rationales apply fully when the accused is acquitted of an offence and the Crown later seeks to use evidence of that offence as similar fact. Since the accused was previously acquitted, the Crown should not now be allowed to allege that he committed the previous offence, both because the previous proceedings settled that issue in his favour, and because repeated allegations of an issue determined in his favour have at least an air of abuse of process about them.

The argument against applying issue estoppel to similar fact evidence concerning offences for which the accused was acquitted is a straightforward, two-step claim. The first step states that the rules of evidence do not prevent the Crown from leading evidence tending to show that the accused committed an offence for which he is not on trial (assuming, as always, that the evidence is otherwise admissible), even if he was acquitted of that offence. There is, in general, no preliminary burden of proof that the Crown must satisfy to put evidence before the trier of fact, 22 and there is no requirement that the trier of fact find any particular facts beyond a reasonable doubt, apart from the elements of the offence themselves. 23 Thus, if the Crown

22. There are exceptions. If the accused made a statement to a person in authority, the Crown must prove the statement voluntary beyond a reasonable doubt. If there is a dispute about whether the accused made a statement to a person not in authority, the jury must be satisfied that he made it before they can use it as an admission of guilt.
wants to lead otherwise admissible evidence showing that the accused committed an offence that he is not charged with, there is no requirement that the Crown prove that the other offence occurred.

The first step of the criticism is correct, and nothing more need be said about it. The second, and crucial, step is that the rationales for issue estoppel do not apply where the accused was previously acquitted but the Crown seeks only to use the evidence concerning the allegation. The previous acquittal stands, so even if the accused is convicted at the second trial, there is no risk of inconsistent verdicts.\(^{24}\) Since the burden of proof is asymmetrical, the acquittal at the first trial means only that the trier of fact had a reasonable doubt; it does not mean that it was established to any degree of proof that the offence never occurred.\(^{25}\) Finally, allowing the acquittal to estop the Crown from asserting in other proceedings that the accused committed the offence is an affront to common sense. Suppose, the critics ask, that Smith, the notorious “brides in the bath” murderer, had been charged and acquitted of the murder of his first two wives.\(^{26}\) Call this “the Smith hypothetical”. According to the Canadian position, in the Smith hypothetical, the Crown would then be prevented from leading evidence concerning the deaths of his first two wives, despite its highly probative nature.\(^{27}\)

4. Defending and Refining the Canadian Position

The criticism of the Canadian position is powerful. Yet, if we

---

24. Stuesser, supra, footnote 2, at p. 495.
25. Ibid. at p. 500. Compare the reasoning in Dowling v. United States, 493 U.S. 342 at pp. 348-49 (1990). The accused had been acquitted of a robbery in which identity was in issue. The prosecution was allowed to use the evidence concerning that robbery as similar fact evidence on the accused’s trial for a different robbery on the theory that the trier of fact “might reasonably conclude that Dowling was the masked man who entered [the] home, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged at the first trial”.
26. R. v. Smith (1915), 11 Cr. App. R. 229. Smith was charged with murder only in relation to the death of his third wife, and the facts surrounding the deaths of his first two wives were admitted as similar fact evidence to rebut the claim of accident or to show a system or design.
take the principles of double jeopardy seriously, the criticism must ultimately yield to the finality of the first proceeding. If the Crown is permitted to re-allege an offence of which the accused has been acquitted as similar fact evidence, the accused has to defend himself against that allegation as surely as if he again stood charged with that offence. But the scope of issue estoppel need not be as wide as it currently is in Canada; if narrowed to apply only to factual issues that were or must have been decided in the accused’s favour, the criticism of the Canadian position loses much of its force. In the interests of fairness to the accused, finality, and giving legal meaning to an acquittal, issue estoppel prevents the Crown from re-asserting or re-litigating a fact that was decided in the accused’s favour in a previous proceeding. But this formulation suggests that the Crown is not prevented from proving everything that it sought to prove in the first proceeding; it is prevented from proving only those facts that were decided against it in the first proceeding. That is, after all, how issue estoppel differs from the special pleas of autrefois convict and autrefois acquit: issue estoppel concerns particular issues, while the autrefois pleas concern the entire proceeding. If issue estoppel is understood in this manner, the Canadian position is currently too wide in several respects and should be rationalized along the following lines.

First, issue estoppel should apply only where the accused was acquitted on the merits. That is, issue estoppel should not necessarily apply where the prior proceedings were judicially stayed. Although a judicial stay is final and is in that sense equivalent to an acquittal, it is unlike an acquittal because it is not legally equivalent to a finding of innocence. Rather, a stay is a response to a defect in the proceedings that cannot be remedied in any other way: unreasonable delay,28 a serious breach of the Crown’s disclosure obligations,29 abuse of process,30 entrapment,31 or officially induced error.32 The

29. In R. v. Taillefer (2003), 179 C.C.C. (3d) 353, [2003] 3 S.C.R. 307, 17 C.R. (6th) 57, the proceedings against the co-accused Duguay were stayed because of a serious breach of the Crown’s disclosure obligations combined with the fact that Duguay had served eight years of a sentence for manslaughter. It is likely that if Duguay had not been imprisoned, the remedy would have been
stay is the method of giving effect to the estoppel against the Crown; but in cases of delay, breach of disclosure, and other abuses of process, a stay has no bearing on whether the facts underlying the offence are established. Indeed, to obtain a stay of proceedings on the ground of entrapment or officially induced error, the accused must first be found to have committed the offence; otherwise, there is nothing to estop. If in a subsequent proceeding, the Crown wished to show that the that the accused had committed the offence that he had been entrapped into committing, and if that evidence was otherwise admissible, issue estoppel should not prevent that proof because that factual issue was decided against the accused, not in his favour, in the previous proceedings.

Nor should issue estoppel apply where the previous acquittal arose because of some technical defect in the previous proceedings. Consider Petersen. The accused was charged with two driving offences. After the accused had pleaded and the proceedings had been adjourned several times, the charge was dismissed because the trial judge formed the erroneous view that he lacked jurisdiction. Two new informations, alleging the same offences, were sworn against the accused. The Supreme Court of Canada held that the accused could raise the defence of autrefois acquit to the charge contained in the new information; the accused had been in jeopardy in the previous proceedings, and the Crown had neither appealed nor sought judicial review of the trial judge’s erroneous holding concerning jurisdiction. The court was undoubtedly correct to uphold the autrefois plea in these circumstances. But if the accused had been charged with some other offence to which the facts surrounding the driving offences had in some way been

---

34. The court’s decision was a straightforward application of the holding in R. v. Riddle (1979), 48 C.C.C. (2d) 365 at p. 379, 100 D.L.R. (3d) 577, [1980] 1 S.C.R. 380 to the effect that “an accused is in jeopardy from the moment issue is joined before a Judge having jurisdiction and the prosecution is called upon to present its case in Court”.
relevant, issue estoppel should not have prevented the Crown from putting those facts in evidence, as it could not be said that any of them in particular had been determined in the accused’s favour.

The idea of an acquittal on the merits should, however, be generously construed. In *M. (R.A.)*, the accused was charged with sexual offences against young children. He had previously been charged with sexually assaulting X, but that charge had been resolved by way of a guilty plea to simple assault and an acquittal on sexual assault. The Court of Appeal held that X's evidence that the accused had sexually assaulted her was inadmissible. This result is, I think, correct. The guilty plea was an admission that the assault charge could have been proved on the merits; the acquittal on the sexual assault charge resolved the issue of the sexual nature of the assault in the accused's favour. The Crown was not obliged to accept the guilty plea in the first proceedings, but could have tried to prove the sexual assault. Having accepted the plea to simple assault, it is not for the Crown now to say that the accused previously committed a sexual assault. *M. (R.A.)* is a classic scenario for the application of issue estoppel.

This generous construction should also apply where the prior acquittal can be attributed to the exclusion of evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*. If issue estoppel did not apply to such an acquittal, the s. 24(2) issue, as well as the substantive issue of the accused’s guilt, would have to be relitigated in the second proceeding in spite of having been already decided in the accused’s favour.

On the other hand, issue estoppel applies to particular factual issues. Thus, it may be the case that the accused’s acquittal on the previous charge does not prevent the Crown from proving everything that pertains to that offence, but only those facts that were, or must have been, decided in the accused’s favour. Suppose, for example, that in the previous proceedings, the

---

36. Compare *Ashe v. Swenson*, 397 U.S. 436 (1970). The accused had been acquitted of robbing a participant in a poker game. Identity was in issue. He was then charged with robbing a different participant in the same poker game. The court held that he could not be prosecuted the second time because the first trial had determined that he was not the robber. Note the contrast between this reasoning and the court’s subsequent decision in *Dowling, supra*, footnote 25.
accused was charged with sexual assault. At trial, he successfully raises a defence of mistaken belief in consent, based on some aspects of the complainant’s behaviour. That is, he wrongly, but honestly and after taking reasonable steps, believed that the complainant had communicated her consent to the sexual touching in issue. Subsequently, he has another sexual encounter with the complainant, and is again charged with sexual assault. At the second trial, he again raises a defence of mistaken belief in consent, based on the same kind of behaviour on the part of the complainant. Now, because of issue estoppel, the Crown cannot allege that the accused previously assaulted the same complainant; but the Crown can argue that, having previously misread the complainant’s behaviour as indicating consent when it did not, he should have taken additional reasonable steps to ascertain consent. This argument would depend on leading evidence from the first trial, but would not depend on challenging the previous acquittal; indeed, it would be perfectly consistent with the previous acquittal.

This hypothetical is meant to illustrate the so-called “Ollis exception” to issue estoppel, and to show that this exception is better understood as a situation to which issue estoppel does not apply because it does not involve the Crown’s alleging a fact previously determined in the accused’s favour. The idea of the Ollis exception is that some evidence in the first trial, though it contributed to exonerating the accused at the first trial, helps to show guilt at the second trial. In Arp, Cory J. summarized Ollis as follows: 38

\[ \ldots \text{the accused was charged with obtaining money by false pretences. He had obtained funds in exchange for a cheque that was later dishonoured. The accused was acquitted at his first trial on the basis that when he gave the cheque to the complainant, he expected to receive funds to cover it. The accused was later again indicted with obtaining money by false pretences, and at his second trial the Crown adduced the evidence of the first complainant as relevant to the accused’s guilty state of mind. The Court [for Crown Cases Reserved] held that the evidence was properly admissible.} \]

On this understanding of Ollis, the rationale for admitting the

38. Arp, supra, footnote 17, at para. 78; see also Sharpe J.A.’s description of Ollis, ibid., in Mahalingan, supra, footnote 1, at para. 57.
evidence from the first trial was that it showed that when the accused wrote the cheque at issue in the second trial, he knew he would not have the funds to cover it. This rationale does not involve challenging the original acquittal; the acquittal, and the reasons for it, can be fully accepted, yet the facts surrounding the original allegation have probative value in the second trial. On this reading, *Ollis* does not involve issue estoppel because it involves accepting, rather than challenging, the outcome of the first proceeding.

However, this reading of *Ollis* is not entirely in accord with the facts of the case itself. The first charge against the accused concerned a cheque for £5 dated July 5, 1899. The accused gave evidence that he was expecting to receive the sum of £183 in time to cover the cheque, and called a witness in support of that expectation. He was acquitted. The second trial related to cheques dated June 24, June 26, and July 6, 1899. Now, the accused’s defence at the first trial indicated that on July 5, 1899, the accused knew his account did not contain sufficient funds but thought that the funds would arrive in time for the cheque to be honoured, and that at some point after July 5, 1899, he learned that the expected funds would not materialize. It is hard to see how that knowledge was relevant to the accused’s knowledge of the first two cheques in issue at the second trial, as they first were written about two weeks previously; even the third was written only the next day.39 The facts of *Ollis* itself do not illustrate the so-called “*Ollis* exception”; indeed, on the approach to issue estoppel proposed here, *Ollis* was wrongly decided. But the idea for which the “*Ollis* exception” stands is valid: if the probative value of the evidence in the second proceeding depends on a factual issue that was not decided in the accused’s favour, then issue estoppel simply does not apply and the Crown may lead evidence concerning that factual issue — as long as the Crown does not seek to challenge those facts that were decided in the accused’s favour.

If the Canadian approach were rationalized along the lines suggested here, issue estoppel would protect a person from being twice vexed by an allegation of criminal conduct for which he had been acquitted, but would not prevent the Crown from using evidence concerning that previous allegation as long

---

39. *Ollis*, supra, footnote 37, at pp. 740-41 *per* Bruce J. dissenting.
as the Crown was not alleging facts that had been decided in the person’s favour. It has to be admitted, however, that if the Smith hypothetical were to arise, the Crown would be prevented from using evidence surrounding Smith’s previous acquittals as similar fact evidence, because the very issue on which they were probative as similar fact — were the deaths accidental? — was decided in his favour. But it must also be said that the Smith hypothetical is quite unlikely to occur in practice. The hypothetical assumes that the accused would be acquitted in the first two cases because the Crown’s case, without the similar fact evidence, would be weak. But this weakness would be readily apparent to any prosecutor applying the “reasonable likelihood of conviction” standard to the decision to proceed. It is most unlikely that the Crown would conduct two consecutive prosecutions of such a weak case; if it did, it would simply be forced to assume the consequences of having pursued two consecutive weak cases. And the proposed approach to issue estoppel has no effect on the Smith case as it actually unfolded.

5. The Arp Anomaly

Suppose that the accused is charged with two offences in one indictment, and the Crown succeeds in its application to have the evidence pertaining to each count admitted as similar fact evidence on the other count. How should the trial judge charge the jury as to its use of this evidence? Is it necessary for the jury to be instructed that it must be satisfied of the accused’s guilt on one offence beyond a reasonable doubt before it can use the evidence pertaining to that offence as similar fact on the other offence? If so, what is the point of allowing the Crown’s similar fact evidence in the first place? If not, how can the use of similar fact evidence in a multi-count indictment be reconciled with the position that acquittals cannot be used as similar fact evidence?

In Arp, Cory J. held that the principle of issue estoppel, as applied to previous acquittals, “has no application where the alleged similar acts are the subject of a multi-count indictment”. This holding has puzzled commentators, and with good reason. Some have taken it to support the suggestion that issue estoppel should not prevent the Crown from leading

40. Arp, supra, footnote 17, at para. 79.
acquittals as similar fact evidence. Others argue that Cory J. is just wrong on this point.

Cory J. must be correct to say that, in a multi-count indictment, issue estoppel does not require the Crown to prove the conduct constituting similar fact evidence beyond a reasonable doubt; yet if the jury acquits on one count and convicts on the other, his holding seems at odds with the basic idea behind issue estoppel, which is that the Crown cannot make a criminal allegation against the accused if the accused was acquitted of that allegation. But, bearing in mind the qualified scope of issue estoppel proposed in this article and the probative value of similar fact evidence, the Arp anomaly can be resolved with a jury instruction.

To see this point, consider two variants of the two-count indictment alleging similar sexual offences. In variant A, the trial judge rules that the Crown’s evidence relating to each allegation satisfies the test for similar fact evidence for each of the other allegations; in variant B, the trial judge rules that the Crown’s evidence relating to each allegation must stand on its own. In both variants, the testimony of all the witnesses is identical, though the trial judge’s instructions to the jury concerning the proper use of the evidence will be quite different. In variant A, Arp states that the Crown cannot be required to prove any one of these offences beyond a reasonable doubt before using them as similar fact evidence. In variant B, it is uncontroversial that the Crown must prove each offence beyond a reasonable doubt without the assistance of the evidence pertaining to the other. This difference has troubled some commentators because it looks as though in variant A the Crown gets to lift its case by its own bootstraps. But this appearance is deceptive. Even though the testimony of all the witnesses is the same in both A and B, the Crown’s case is much stronger in A than in B for the simple reason that more inculpating inferences — those based on the similar fact

41. Stuesser, supra, footnote 2, at pp. 496-97. See also Gorman, supra, footnote 2, written before Arp but consistent with Stuesser’s view.
42. Maloney, supra, footnote 20, at p. 281; see also Keith E. Wright, “Similar Fact Multiple Count Indictments — A Reply” (1994), 32 C.R. (4th) 301, written before Arp.
43. Given the discretionary element in rulings about similar fact evidence, assume, for the sake of argument, that neither of these rulings contains any reviewable error.
evidence — are available to the trier of fact. In variant A, the trier of fact is allowed to reason that it is objectively improbable that all the evidence relating to all the charges would be independently alleged, and therefore the accused is more likely to be guilty of all the offences, whereas in variant B this inference is not permitted. And this inference is often an extremely powerful one. Thus, if the accused is convicted of all charges in variant A, there is no problem about issue estoppel; because there is no factual issue that has previously been decided in the accused’s favour, the reasons for applying issue estoppel simply do not arise.

But what if the accused is acquitted of count 1 and convicted of count 2? In variant B, this verdict obviously presents no issue because each allegation stands on its own. But in variant A, this outcome is troublesome because it indicates that, notwithstanding the strength of the Crown’s case and the availability of the inferences based on similar facts, on count 1, the jury resolved some factual issue or another in the accused’s favour, and, because of issue estoppel, should therefore not have used the evidence relating to count 1 as similar fact evidence on count 2. How should the trial judge’s instruction to the jury deal with this possibility?

After _Handy_, a crucial step in both the admissibility and use of similar fact evidence is identifying the specific factual issue on which the evidence is probative of the improbability of coincidence, be it the identity of the offender, the unlikelihood that independent witnesses would tell similar stories, or any other relevant and probative inference. But if the trier of fact rejects the similar fact evidence, then it can have no probative value on that issue. To take a familiar example, if identity is in issue but the jury determines that the accused did not commit one of the previous acts, the jury cannot use that previous act as evidence of the accused’s guilt. Thus, in a multi-count indictment, the jury must be instructed that if it acquits on one count, it can no longer use the evidence pertaining to that count as similar fact evidence on the remaining counts because the evidence no longer has probative value as similar fact evidence. As Maloney aptly puts it, “the jury should be told that if they _acquit_ on count [1] then the evidence offered on that

---

count must play no further part in their deliberations on count [2 because their] ultimate doubt on count [1] makes it impossible to use the evidence offered on that count to reach a conclusion of guilt beyond a reasonable doubt on count [2]. The Arp anomaly can only be resolved by overruling the implicit holding in Arp that acquittal on one count does not affect the probative value of the evidence on other counts.

6. Conclusion

In Canadian criminal law, issue estoppel operates to prevent the Crown from leading evidence relating to an offence for which the accused was previously acquitted as similar fact evidence in a subsequent proceeding. This rule has been criticized as inconsistent with the principles of evidence and common sense. In this article, I have argued that the Canadian approach to issue estoppel should be modified so that the Crown is prevented from leading evidence concerning facts that must have been decided in the accused’s favour in the previous proceeding. With this modification, the Canadian position would be consistent with the policies underlying res judicata — in particular, with the principle that in criminal proceedings, a person should not have to defend himself twice against the same allegation of criminal wrongdoing — yet would not prevent the Crown from using evidence surrounding a previous allegation where it had probative value on an issue that had not been decided in the accused’s favour.

45. Maloney, supra, footnote 20, at p. 283, original emphasis.