"Conspiracies and Attempts"

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CONSPIRACIES AND ATTEMPTS

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I. INTRODUCTION

The crime of attempt and the crime of conspiracy are inchoate crimes designed to enable the state to strike preemptively at criminal conduct before that conduct has reached the point where a substantive offence has been committed. Although the two crimes serve the same purpose, they present different problems and issues for consideration. Consequently, this course deals with the offences separately.[1]

The paper is based on a review of the reported Canadian and English case law up to May 1, 1986. Some reference is made to other jurisdictions (e.g. Australia), however, a detailed review of the law in those jurisdictions has not been undertaken.[1a]

II. CONSPIRACY

A. Criminal Code Provisions

There is no definition of the word conspiracy in the Criminal Code.[2] Several sections of the Code which create crimes make it an offence to agree or to conspire to commit a particular act or acts. For example, Section 109 makes it an offence for a justice to accept or agree to accept money with intent to

interfere with the administration of justice. For other examples, see Section 110, (frauds upon the government), Section 109, (bribery of a judicial officer), and Section 383 (payment of secret commissions). These sections equate an agreement to do the prohibited act with the actual doing of the prohibited act. The substantive offence created by those sections is committed upon the making of an agreement to do the prohibited thing.3

In contrast to the examples referred to above, most of the sections of the Criminal Code which create crime speak in terms of the actual doing of the prohibited act, and do not expressly prohibit agreements to do those acts. Agreements of this nature are made crimes by section 423 of the Criminal Code. Section 423 underwent significant amendment in December of 1985.4 For comparison purposes, the previous sections and the present sections are set out side by side below:

423.(1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy, namely

R.S.C. 1970 Chap C-34	S.C. 1985 C. 19, S. 62 (in force as of December 1985)
(a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and is liable to imprisonment for fourteen	(a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and is liable to a maximum term of

years;	imprisonment for life;
(b) everyone who conspires with any one to prosecute a person for an alleged offence, knowing that he did not commit that offence, is guilty of an indictable offence and is liable:	
(i) to imprisonment for ten years, if the alleged offence is one for which, upon conviction, that person would be liable to be sentenced to death or to imprisonment for life or for fourteen years, or	
(ii) to imprisonment for five years, if the alleged offence is one for which, upon conviction, that person would be liable to imprisonment for less than fourteen years; and	No change.
(c) [Repealed. 1980-81-82, c. 125, s. 23]	
(d) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a), (b) or (c) is guilty of an indictable offence and is liable to the same punishment as that to which an accused who is guilty of that offence would, upon conviction, be liable.	No change.
	(e) every one to conspires with anyone to commit an offence punishable on summary conviction is

	No. equivalent.	guilty of an offence punishable on summary conviction.
(2)	Every one who conspires with anyone;	
(a)	to effect an unlawful purpose, or	Repealed.
(b)	to effect a lawful purpose by unlawful means, is guilty of an indictable offence and is liable to imprisonment for two years.	
	1953-54, c. 51, s. 408.	Repealed.

Before looking at each subsection, it must be stressed that while section 423 makes it an offence to conspire to commit crimes, it does not define conspiracy.[5] One must explore the case law in search of a definition.

Section 423(1)(a) makes it an offence to conspire to commit murder. The recent amendments increase the maximum penalty from 14 years to life imprisonment. As a general rule, conspiracies to commit indictable offences are punishable by the same maximum term of imprisonment as is the substantive offence involved.[6] The amendment to section 423(1)(a) makes the punishment for conspiracy to commit murder, consistent with this general rule.

Section 423(1)(a) prohibits conspiracies made in Canada where the murder is to take place outside of Canada. It does not, however, appear to extent to cases where both the agreement and the location of the intended murder are outside Canada.[7] This interpretation of the territorial parameters set out in section 423(1)(a) is consistent with those found in section 423(3) and 423(4). (See infra)

Section 423(1)(b) was not affected by the amendments. That section prohibits malicious prosecution and parallels the earliest conspiracy statutes which punished false indictments.[8]

Section 423(1)(d) is also unchanged. This is the section which prohibits all conspiracies to commit indictable offences. Most conspiracy charges including those alleging conspiracies to breach other federal statutes are laid pursuant to this Section.

The major change made by the recent amendments is the repeal of section 423(2). The section, commonly referred to as common-law conspiracy, prohibited agreements to effect an unlawful purpose by unlawful means, and agreements to effect a lawful purpose by unlawful means. The breadth of the prohibition created by the former section 423(2) was uncertain.[9] The section was much criticized as an unwarranted and vague extension of the criminal

law sanction into areas which were otherwise not subject to criminal legislation.[10] The section was seldom resorted to by the prosecution and it can be safely said that it will not be missed in our Criminal Code.[11]

The section has been partially replaced by section 423(1)(e). That section makes it an offence to conspire or to commit an offence punishable on summary conviction. The crime created by section 423(1)(e) is itself a summary conviction offence. The new section clearly applies to all summary conviction offences created by the Criminal Code.[12] On its plain reading, it would also appear to apply to all summary conviction offences created by other federal legislation. The section should not, however, be taken as including summary conviction offences or their equivalent created by provincial legislation. In Ontario, for example, there is no such thing as a summary conviction offence, therefore, on a literal reading of section 423(1)(e), it can have no application to offences created by provincial legislation in Ontario.[13] Furthermore, it seems an unwarranted extension of the criminal law power to make all agreements to violate provincial regulatory offences, criminal offences. If it is necessary that such agreements be prohibited, the provincial legislation empowered to regulate conduct in the area in question can prohibit the making of such agreements. If section 423(1)(e) is interpreted as referring only to offences created by federal

legislation, then it is a marked improvement over the former section 423(2). If, however, as some have suggested, the reference in 423(1)(e) to summary conviction offences includes provincial offences,[14] then one of the problems which plagued the old section remains, that is, does it reach all provincial offences or only those offences which have a criminal law like content.[15] The words of section 423(1)(e) do not admit of any differentiation between types of summary conviction offences. If the section reaches provincially created summary conviction offences, then it must reach all of them. This is not desirable and, as argued above, can be avoided by limiting the section to federally created summary conviction offences.

B. The Elements of the Offence

Conspiracy, like all true criminal offences, consists of the doing of a prohibited act (the actus reus) by a person or persons who have the requisite culpable mental state [the mens rea].[16] The Criminal Code does not define either aspect of the crime of conspiracy. Juries are repeatedly told that the crime consists of an agreement by two or more persons, who have an intention to carry out the agreement. Until recently, Canadian courts did little to amplify these instructions. The absence of any statutory or judicial definition of the concept of an agreement as it applies to the crime ot conspiracy gives the

offence an uncertain breadth which poses problems to both prosecutors and defence counsel. Prosecutors cannot be certain as to the propriety of an allegation of conspiracy nor as to how that allegation should be framed when there is uncertainty as to what constitutes the actus reus of the offence.[17] Similarly, those defending accused charged with conspiracy can hardly mount an effective defence when it is not clear what the Crown must prove in order to establish the allegation.[18] It therefore becomes essential to provide as concise as is possible definition of the word agreement as it applies to conspiracy.

(1) The Actus Reus

As indicated above, the essence of the effect of conspiracy is an agreement by two or more people to commit a crime. Acts in furtherance of the commission of the crime agreed upon, or the commission of the crime itself, do not form part of the actus reus of the agreement, although they no doubt provide evidence of its existence.[19] Consequently, if A and B agree to commit robbery, but in the end are able to appropriate the victim's property without resort to violence or threats of violence, they are still guilty of conspiracy to commit robbery even though they eventually committed theft.[20] It is important to note, however, that the object of the agreement must be the commission of an offence.[21] If the conduct agreed upon by the

parties is not criminal, then the actus reus has not been committed even though the parties may believe their conduct to be criminal.[22]

The act of agreeing is itself a mental process, and must be distinguished from other closely related activities which do not constitute the actus reus of a conspiracy. An intention by one party to join with other parties in the commission of an offence is not an agreement.[23] Similarly, if B unilaterally decides to assist C in the commission of an offence, there is no agreement.[24] Participation in a joint venture or common design is not the equivalent of an agreement, although it affords evidence of the existence of an agreement.[25]

The act of agreement must also be distinguishable from those acts which proceed the formation of the agreement. Discussions and negotiations and consultation may culminate in an agreement, and certainly afford evidence of an agreement but they do not constitute an agreement.[25a] It will be a question of fact whether a particular relationship has passed beyond the preliminary stages of discussion and negotiation to agreement. If an agreement to effect a criminal object to arrive at, the actus reus exists even if all of the details of the plan have not been agreed upon.[25b]

By way of a further "negative" definition of agreement, it can be safely said that the agreement need not be express. An implied or tacit agreement between two or more parties constitutes the actus reus of a criminal conspiracy.[26] There must, however, be some communication either by word or deed between the parties which provides the basis of the agreement. It flows from the conclusion that the agreement may be tacit or implied, that the notion of agreement as developed in contract law cannot be effectively transplanted into the criminal field.[27]

The immediately preceding paragraphs are of some assistance in determining what constitutes a criminal agreement. They are, however, of limited assistance in that they are negative definitions. From them we learn that certain conduct does not constitute an agreement. We learn that certain things are not essential to the existence of an agreement. The more difficult, and the more important task is to provide a positive definition of a criminal agreement. There are two possible positive definitions. According to one, if B and C agree to a course of conduct which if carried out will to the knowledge of both B and C result in the commission of crime "X", then B and C have conspired to commit the crime "X". This definition can be described as the "mutuality of conduct" approach to the concept of agreement. This approach finds statutory recognition in England where by virtue of

Section 1(1)(a) of the Criminal Law Act, 1977 (as amended by the Criminal Attempt Act, 1981) conspiracy is defined as:

> "if a person agrees with any other person or persons that a course of action shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties of the agreement if the agreement is carried out in accordance with their intentions, is guilty of conspiracy to commit the offence or offences in question".[28]

The other definition focuses on the object of the agreement, rather than the conduct directed toward the achievement of the object. This view is concisely put by Professor McKinnon when he describes the act of agreeing as requiring:

> "an agreement to participate together in the cooperative pursuit of a common object".[29] [emphasis added]

This approach is conveniently described as the "mutuality of object" approach to the concept of agreement.

The difference between the two approaches set out above is best demonstrated by an example. Assume B and C agree that B will provide C with certain drugs. B knows that C intends to export those drugs to another country. On those facts alone, according to the mutuality of conduct approach, B and C have

conspired to export the drug. If, however, the mutuality of object approach is used, then the Crown would have to prove beyond a reasonable doubt that B had actually agreed to the exporting, that is that it was a common object vis-a-vis B and C. In most cases, this would require proof that B had some stake in, or interest in the exporting. A recent Australian case describes this requirement as demanding "a commitment" to the plan.[29a]

Clearly, the mutuality of conduct approach casts the net of criminal conspiracy much wider than does the mutuality of object definition. The mutuality of object approach however does not effect potential liability as an accessory to the commission of the substantive offence, if that offence is committed. In the example above, if the drugs are in fact exported by C, B would in all likelihood be a party to the commission to that offence, by virtue of Section 21 or 22 of the Code.[30] The rationale for the crime of conspiracy rests in the special danger that joint wills pose to the commonwealth.[31] The mutuality of object approach focuses on that aspect of the joint behaviour and is consistent with the raison d'etre of the crime.

Canadian case law affords support for both approaches and until recently made no distinction between the two. One interpretation of the majority judgment of the Supreme Court of

Canada in R. v. Sokoloski[32] provides a classic statement of the mutuality of conduct approach to a definition of agreement.[32a] Subsequent appellate decisions in British Columbia have adopted that interpretation of the case.[33] The later decision of the Supreme Court of Canada in R. v. Cotroni[34] however provides strong support for the mutuality of object approach. Cotroni makes no reference to Sokoloski. The Court has not considered the question since Cotroni.

There remains however uncertainty as to the appropriate approach. R. v. Kelly[35] decision of the Saskatchewan Court of Appeal represents the full flowering of the mutuality of object approach. In that case S offered to sell narcotics to K. K agreed to purchase those narcotics. S knew that K intended to resell those narcotics. The Court held that K could not be convicted of conspiracy to traffic in narcotics with S. The Court held that while S had committed the substantive offence of trafficking, and K intended to commit that offence, there was no agreement to act in concert towards the pursuit of that offence as a common goal. Kelly has been criticized,[36] but given a definition which emphasizes the need for a mutual criminal object it seems correctly decided. S had no interest in, or concern with K's subsequent conduct. The scope of the agreement is limited to the immediate transaction between S and K and does not encompass K's plans for the drugs once they are in his possession. The

immediate transaction, while an act of trafficking by S does not involve object which is mutual between S and K.

The case of R. v. Hunter[37] stands in contrast to the approach taken in Kelly. In that case H and G agreed that H would acquire cocaine and that G would arrange for its distribution. G in turn arranged for the distribution through one Anderson. In fact Anderson intended to "rip off" H and G and to distribute the cocaine for his own benefit only. The Court had no difficulty finding a conspiracy to traffic in narcotics between H and G. With respect to Anderson the Court said

> "The evidence established is that he (Anderson) intended to 'rip off' Hunter and Goshinman and there is no evidence that he intended to distribute the cocaine for their benefit or in furtherance of an agreement with them. On the contrary he obviously intended to distribute it for his own benefit....In my view Anderson's intention to 'rip off' is entirely separate from the agreement that the evidence established existed between him, Hunter and Goshinman to achieve the common design of the illegal distribution of cocaine."[38]

The result in Hunter suggests that one may conspire with another although one's goal is entirely opposed to that of one's alleged fellow conspirator. The result seems in direct conflict with Cotroni, although that case was cited earlier in the Hunter judgment on a different point. The Court in Hunter viewed the

fact situation set out above as raising a problem relating to Anderson's mens rea. While this is no doubt true the Court does not recognize the facts as also raising an actus reus problem. If Hunter is taken as speaking to the actus reus required for conspiracy it holds that the actus reus rests in an agreement to commit the same criminal offence, regardless of whether that offence is to be committed as part of a mutual or common goal or as part of a scheme to defeat the goal of the other alleged conspirators. This result stretches even the mutual conduct notion of agreement since Anderson's intended conduct was adversarial to that agreed by H & G.[39]

Appellate decisions in Canada subsequent to Cotroni while revealing some confusion as to the distinction between the two approaches, have in the M supported the mutuality of object approach.[39a] In R. v. Mcnamara et al[40] the Ontario Court of Appeal appears to have taken the mutuality of object approach one step further. In that case the Court held

> "Conspiracy is more than common intention. It cannot exist without the consent of the wrongdoers and their agreement to cooperate in the attaining of the evil end."[41]

According to McNamara the parties must not only agree to a specific "evil end" as opposed to merely a course of conduct

which produces that end, but they must also agree to cooperate in the achievement of that end. This suggests that a person who agrees to the "evil end" but is to play no part in achieving it is not a conspirator.

The requirement of mutual cooperation referred to in McNamara was in turn extended by the trial Judge in R. v. Taylor et al.[42] In that case he held that Taylor's agreement to assist in steps preparatory to the commission of a robbery with knowledge that a robbery was intended by the other parties to the agreement did not make Taylor a party to the agreement to rob when he did not intend to participate in the robbery. Taylor is criticized by Mr. Frankel a proponent of the mutuality of conduct approach to conspiracy;[43] however even on the mutuality of object approach the directed verdict in Taylor seems inappropriate. If a person agrees to do things which are preparatory to the commission of a robbery with knowledge that others who are privy to the agreement will commit the actual robbery then surely there is ample evidence for the jury to determine whether that person had also agreed to the commission of the robbery. The participation requirement cannot be limited to participation in the actual actus reus of the crime.[44] His agreement to do acts which are preparatory to the actual offence combined with his knowledge of the ultimate intended end provides evidence that he has consented to the

agreement to rob, and also agreed to cooperate in the attaining of that end.

Given the state of the case law a definitive definition of agreement cannot be provided. The better view and the one which holds away in most recent cases[45] is that a conspiracy only exists where the parties agree to act in concert in pursuit of a common criminal objective. Knowledge by one party that the other party intends a particular criminal objective should not suffice.[45a] Knowledge of the criminal object is not the same as adherence to that object. One agrees to an object, only where both parties adopt that object as their object so that there exists a common purpose between the parties to the agreement.

It is readily apparent that the approach to the definition of agreement favoured above limits those acts which will constitute the actus reus of conspiracy to cases where the parties have the required common and mutual object. The approach does not however necessarily narrow the ambit of criminal liability where a substantive offence has been committed. A person who agrees to conduct which he knows will necessarily result in the commission of a substantive offence by the other party to the agreement will in all likelihood be an accessory to the commission of that substantive offence and liable for the offence under section 21(1) or 21(2) of the Criminal Code.[46] A

limited definition of the actus reus of conspiracy will not foreclose the prosecution of offenders who enter into agreements which facilitate the commission of crimes, but rather it will change the focus of the prosecution from an allegation of conspiracy to an allegation of accessorial liability for the substantive offence. This change in focus would have the salutory affect of discouraging conspiracy charges where the essence of the case is the commission of a substantive offence in furtherance of a common design.[47]

(2) Defining the Object of the Agreement

Assuming the actus reus of conspiracy requires that the parties have a mutual object one must then ask how is the nature and scope of that object determined. Some agreements have a very general criminal object with few or any details or specifics provided. Others may agree to a very precise and particular agreement. Upon reflection it is apparent that the question is not what is the object of the agreement entered into by the accused but rather what is the object alleged by the Crown. The criminal law is concerned not with what actually happened, but with proof beyond a reasonable doubt of what the Crown alleges happened.

The real questions for the purpose of prosecuting and defending conspiracy allegations are

> What is the object alleged by the Crown;?
>
> Has the object alleged by the Crown been established vis-a-vis each accused beyond a reasonable doubt?

One determines the object alleged by the Crown primarily by an examination of the pleadings i.e. the indictment, any particulars provided by the Crown or ordered by the Court, and by examining any further description of the object provided by the Crown in her opening address. Given the requirements of section 510 of the Criminal Code[48] and the availability of particulars pursuant to section 516 of the Criminal Code[49] the object alleged by the Crown will seldom be the commission of an indictable offence Simpliciter.[50] Normally the criminal objective will be described in terms of time, place, means and participants.[51] Some indictments despite a reference to the factors referred to above allege a very far reaching agreement. Indictments containing very generalized conspiracy allegations are common in cases involving conspiracies in relation to drugs, and in also conspiracies alleging fraud.[52] If the Crown alleges a far reaching conspiracy then the Crown must prove that each accused adhered to that far reaching agreement.[53] Proof that X agreed to one aspect of the

far reaching scheme will not suffice to convict on the broader charge. Some cases suggest that participation in part of the larger scheme combined with knowledge of the existence of the larger scheme will suffice to support a conviction as a party to the larger scheme.[54] This may be the case if the actus reus involves only agreement to a mutual course of conduct, but if there must be a mutual object then mere knowledge of the wider object will not suffice.[55] Rather the accused must agree to that under object and have a stake in that wider adopt it as his object.

It will often be very difficult for the Crown to determine whether a particular accused was party to the wide scheme or just to part of it. In those cases the Crown is well advised to lay alternative conspiracy counts with one count alleging the wide conspiracy and the other alleging a conspiracy with a more specific object.[56] If alternate charges are laid, an accused who is found to have been party to only one aspect of the larger criminal object will not escape conviction. On the other hand, if the Crown chooses to charge a conspiracy with a more specific criminal object then an accused cannot escape liability by arguing that he was party to an agreement that encompassed that specific object but went well beyond it.[57] It is no defence to charge a conspiracy to say that one was party to a much larger

conspiracy than that alleged by the Crown as long as the agreement alleged is in fact proved.

The object of a criminal conspiracy involves the commission of an offence as described in the indictment. Different agreements will have different degrees of specificity. One group may agree to go out and "do bad" while another may agree to a specific detailed plan relating to a very specific criminal object.[58] Both types of agreements are subject to prosecution as criminal conspiracies, however, if the Crown charges the very general conspiracy, the Crown must prove participation in that general conspiracy.[59] On the other hand, if the Crown alleges a very specific conspiracy, then the details which establish that specificity must be brought home to each accused for a conviction to follow.[60] If two or more groups of people agree to the commission of the same offence during the same time period with some of the people being parties to more than one of the agreements, it does not follow that all of the individuals are parties to a single conspiracy.[61]

Gerakiteys[62] provides an example. G and H, along with nine others, were charged with a single conspiracy to defraud nine insurance companies. On the evidence, it was apparent that G and H were at the center of the alleged conspiracy. The other nine individuals were approached separately by H to file the necessary

claims with each of the nine targeted insurance companies. On the evidence, it appeared that the nine individuals approached by H were unaware of the other individuals being approached to file claims with other companies. His Honour Judge Brennan of the Australian High Court indicated that the identity and scope of a conspiracy was to be found in what the conspirators agreed to. He held that none of the nine individuals had agreed to anything other than the making of an individual false claim. Therefore, they could not properly be charged with the wider conspiracy. Judge Brennan was, however, of the opinion that G and H could properly be charged with the wider conspiracy. Chief Justice Gibbs, however, went one step further and held that even with respect to G and H there was no overall conspiracy to defraud the nine insurance companies, but rather nine conspiracies to approach individuals to defraud a particular insurance company. His Honour pointed out that the Crown had alleged a general and overall conspiracy, and therefore had to establish that general and overall conspiracy to convict anyone of the offence charged. In his opinion an agreement between G and H to approach nine other independent of each other, was a different than an agreement between G and H to defraud all nine insurance companies.

Once it is recognized that the object of the particular conspiracy alleged is determined by reference to the pleadings and the Crown's opening, it must also be recognized that not every

term of the alleged agreement must remain static for the conspiracy to continue to have the same object.[63] As long as the nature and scope of the agreement remain the same, the terms may change without changing the object of conspiracy. If X and Y agree to bribe a judicial officer, and subsequently Z also agrees to the same thing with X and Y, there may be a change in the terms or sepcifications of the agreement, i.e., a party has been added, but there has been no change in the object. The same result occurs if one party drops out during the continuation of the agreement.[64] Whether a change in the term of the agreement affects the object of the agreement will depend on the nature of the change, and the nature of the object alleged by the Crown. If the variation in the term alters the nature of the object agreed upon, then the variation has produced a different agreement.[65] Further, whether the Crown is required to prove a particular term alleged as part of the object of the agreement will depend on whether that term is essential to proof of the object itself.[66]

C. Agreements with More than One Crime as Their Object: Multiple Object Conspiracies

One conspiracy may involve the commission of several crimes, and a conspiracy count which alleges more than one criminal object is not per se duplicitous. For example, an indictment which alleges in one count a conspiracy to steal and to

possess stolen property does not offend S.510(1) of the Code. Canadian Case Law suggests that the actus reus with respect to any two conspirators need encompass only one of the criminal objects alleged.[67] If X agrees to commit theft with the knowledge that the agreement also encompasses the possession of stolen property by others who are party to the agreement, then the weight of authority suggests he is guilty of conspiracy to commit theft and to possess stolen property.[68] The exact nature of the "knowledge requirement" referred to above will be dealt with in more detail in the mens rea part of this paper.

In R. v. Patterson et al,[69] Martin, J.A. for the Ontario Court of Appeal, accurately summarized the current state of the law. He said:

> "A single conspiracy may have more than one illegal object and it is proper to allege in one count a conspiracy to commit several crimes. If the prosecution proves a conspiracy to do any one of the prohibited acts alleged in the indictment as the objects of the conspiracy, that is sufficient to support a conviction".[70]

One can, however, question the validity of this proposition if a mutual object is required. If the Crown alleges as the object of a conspiracy several crimes, then it seems that the crimes as a whole should be taken as the unlawful object

alleged and that proof of agreement to that overall unlawful object should be required. If proof that an accused agreed to a single transaction of fraud is not sufficient to establish his participation in an agreement to commit several acts of fraud, then why should proof that an accused agreed to one crime suffice to convict him of a conspiracy alleging several criminal objects of which the crime he agreed to is only one. An agreement to commit several crimes even though one may flow from the other is very different from an agreement to commit all of those crimes.

The current state of the Canadian law creates a problem. Assume X, Y and Z are charged with conspiracy to steal and possess stolen property. Assume the Crown establishes that X and Y agreed to commit theft, and that X and Z agreed to possess stolen property after the theft was completed. Also assume that Y was to play no role beyond the commission of the theft. Y's object is limited to the theft, while Z's object is limited to the possession. They have no mutual object. If Y and Z were charged with conspiracy to commit theft, or conspiracy to possess stolen property, they would have to be acquitted. Why then should they be convicted if charged with conspiracy to commit theft and to possess stolen property. The fact that each has agreed to one part of the criminal plan with the same person, i.e. A, does not give Y and Z any mutual object.[70a]

A further problem with the conspiracy allegation that alleges more than one criminal object occurs with respect to sentence. The accused are liable to whatever maximum punishment can be opposed for the substantive offence. The substantive offences alleged as put of a single criminal object of the agreement may carry different penalties. If the jury simply returns a verdict of guilty, how is the trial judge to determine which substantive offence is to provide the bench mark for sentencing with respect to the conspiracy. This problem becomes particularly acute where one of the substantive offences alleged as the object of the conspiracy carries a minimum punishment (e.g. importing a narcotic).[71]

A rule which would require that an accused actually agree to each criminal object alleged in an indictment charging a single conspiracy with multiple criminal objects would not make the prosecution of such criminal enterprises any more difficult. The Crown would be entitled to lay one count of conspiracy alleging agreement with respect to all of the criminal objects and subsequent alternative counts of conspiracy alleging agreements encompassing one or more of the criminal objects alleged in the broader count. In the example used above, the Crown could charge X, Y and Z with conspiracy to steal and possess stolen property, a second count would charge X and Y with conspiracy to steal, and a third count would charge X and Z with conspiracy to possess stolen

property. An indictment so framed would allow the jury to render a verdict which truly reflected the scope of each accused's agreement.

One must distinguish cases where the indictment alleges a single agreement to commit more than one criminal offence, from cases where the indictment alleges an agreement to commit a single offence, but evidence of an agreement to commit other offences is relevant to proof of the agreement to commit the single offence alleged.[72] In the latter situation, the subsidiary or second agreement does not form part of the object of the conspiracy alleged in the indictment. Evidence relating to that second or subsidiary conspiracy will be admissible if it is relevant to any of the facts to be proved in connection with the conspiracy alleged. Admissibility of the subsidiary conspiracy will be determined according to the normal rules of evidence which provide for the admissibility of "other crimes" evidence if it is relevant for a purpose other than to show the criminal propensity of the accused.[73]

D. The Completion and Termination of the Actus Reus

A criminal agreement may come into existence before or during the commission of the offence which is the object of the agreement.[74] Most cases allege an agreement which existed prior

to the actual commission of the substantive offence. However in theory, although it may be difficult to prove, if X commences the commission of a criminal offence and Y joins him during the commission of that offence, the two can be said to have conspired if by their mutual acts there is affirmation of an agreement to commit the crime which is under way.[75]

The actus reus of conspiracy is complete at the point where the agreement is made. It does not terminate at that point.[76] The actus reus of conspiracy continues as long as the agreement remains alive. Consequently individuals may adhere or join an ongoing conspiracy. They are participants in the same actus reus as those who agreed at the inception unless their joining of the agreement changes the very object or purpose of the agreement.[77]

Since the actus reus of conspiracy is complete upon the making of the agreement, assuming one has the necessary mental state, subsequent withdrawal from the agreement does not provide a defence to an allegation of conspiracy.[78] It may of course make proof of participation in the agreement difficult and failing that it will no doubt mitigate sentence.

Having determined that the actus reus of conspiracy is complete upon the making of the agreement and yet continues while

the agreement remains alive the question becomes what "kills" or terminates an agreement? This determination is a factual one and will depend in large measure on the objects of the conspiracy alleged. The following events will however terminate a conspiracy;

> Abandonment of the object of the conspiracy by all but one of the conspirators[79]
>
> A change in the law which makes the object no longer unlawful.[80]
>
> Detection and police intervention.[81]
>
> The successful completion of the objects of the conspiracy.[82]

The fixing of the termination point of a conspiracy has several important ramifications for example;

> Acts and declarations which occur after the termination of the agreement are not admissible pursuant to the co-conspirator exception to the hearsay rule.
>
> Once an agreement is terminated it cannot be "joined" by new parties.
>
> Acts which occur after the termination of conspiracy cannot be used to support a claim or venue (see below)
>
> In rare cases where a limitation period applies it will run from the termination point of the conspiracy.

In some cases it would be difficult to determine the exact termination point of a conspiracy. If the criminal object alleged is itself a continuing offence eg. possession of stolen property, then it becomes difficult to say that the object of the agreement is achieved at the point possession is taken.[83] It may well continue as long as possession continues. Furthermore the particulars or specifics provided by the Crown may give the conspiracy a prolonged life. For example the Crown may allege an agreement to commit an ongoing series of offences, or the same offence a number of times. In such cases the agreement is not terminated by the successful commission of the substantive offence on one occasion. American case law dealing with cases where the prosecution has alleged an ongoing conspiracy require that there be a "continuity of cooperation to produce the object" for the conspiracy to remain in effect.[84] Consequently if A and B agree to put A in possession of stolen property and there is no evidence of cooperative conduct beyond the initial fixing of A with possession then according to this rule the conspiracy is terminated at that point although A clearly continues to commit the substantive offence of possession as long as he has the property.

(1) <u>The mens rea</u>

The mens rea of conspiracy consists of

- knowledge of the existing facts or an awarenoss of the intended future existence of the facts which constitute the criminal object contemplated by the agreement.[85]

- An intention that the object of the agreement will be achieved.[86]

It is easier to begin with an analysis of the second of the two requirements described above.

a. The Intention to Achieve the Object of the Conspiracy

In R. v. O'Brien[87] the majority of the Supreme Court of Canada held "there must exist an intention to put the common design into effect".[88] If an indictment alleges that X and Y agreed to commit an indictable offence the Crown must prove in order to convict either A or B or both, that both A and B intended to carry out the agreement; that is that they intended to achieve the criminal object of the agreement. If B only pretended to agree then he is not guilty of conspiracy. Nor is A. Consequently if one of the parties to a two party conspiracy is an undercover police officer, then the other party cannot be convicted of conspiracy, since the undercover officer did not intend to achieve the criminal object of the conspiracy.[89] It should follow that if one of the parties to a two party conspiracy

does not intend to mutually achieve the object of the conspiracy with the other party, but rather intends to achieve his own purposes, perhaps to the detriment of the other party that there is no conspiracy between the two parties. This would seem to be the essence of the judgment in Cotroni.[90] At least one case subsequent to Cotroni has however held that the intention of one party to "rip off" the other parties to the agreement does not provide a defence to the party who intended to cheat its supposed fellow conspirators.[91] This result is just, but it is submitted incorrect.

The party to the two party conspiracy who intends to achieve the unlawful object will be guilty of incitement but not attempted conspiracy.[92]

If the conspiracy involves more than two parties then all of those who had the necessary intention to achieve the unlawful object can be convicted despite the fact that one of them did not have that intention. For example if X, Y and Z are alleged to have conspired to commit arson and Z is not brought before Courts but the evidence establishes that he and Y fully intended to achieve the unlawful object, although X did not, then Y is properly convicted.[93]

The requirement that the parties intend to achieve the unlawful object of the agreement does not mean that they must know that the object was against the law. As with all criminal offences ignorance of the law is no excuse.[94] What they must intend to achieve is the object. Its characterization as criminal or non-criminal is not relevant to their liability.

Suppose two individuals enter into an agreement. They know that as a result of that agreement the commission of an offence is probable although the specific purpose of the offence is not the commission of an offence. They foresee the commission of the offence as a possible or probable but not certain consequence of their agreement. They can be said to be reckless as to this eventuality.[95]

On one view, if recklessness as to the consequences of one's act will suffice for liability on a substantive offence, then recklessness as to the product of the agreement will suffice to establish the mens rea of conspiracy to commit that offence.[95a] Others have argued[96] and some Courts have held, that recklessness has no place in the law of conspiracy.[97] This view is consistent with the mutuality of object approach to the definition of the scope of the actus reus. These writers and cases argue that a true agreement requires a decision to mutually work towards a specific goal. In R. v. Salvage and Morgan the

Court of Appeal, Criminal Division in England held that on a charge of conspiracy to obstruct justice, it was not enough to show that the acts were done intentionally, and that they would tend to pervert the course of justice, but rather it must be shown that the parties had the specific intention to achieve that goal when they entered into the agreement which produced the acts in question.[98]

The decision of the Quebec Court of Appeal in R. v. Lessard provides another example on the rejection of any notion of recklessness as applicable to the mens rea conspiracy. In that case Lessard had agreed with members of a motorcycle gang that they would "do something" and in the same discussion there had been talk about burning a particular building owned by the employers with whom Lessard and others were in a contract dispute. The parties agreed to do something and Lessard recognized that it could involve arson. The Court held that Lessard's agreement that something should be done, combined with his knowledge that it could involve arson was not sufficient to render him a party to an agreement to commit arson. The Court specifically rejected recklessness as a basis for liability.[99]

Several arguments compel the conclusion reached in Lessard. First, the Supreme Court of Canada has clearly established that it has no role in allegations of attempt to commit

substantive offences.[100] If an accused cannot be convicted of attempted murder based on a reckless disregard for the effect of this acts, then it seems inconsistent that he should be convicted of conspiracy to commit that same murder because he entered into an agreement with that same state of mind.[101] Secondly, the concept of recklessness as a basis for criminal liability is an expansion of the traditional requirement of true intention as a basis for fixing criminal liability. The expansion is arguably merited where the individual's conduct has produced the public harm occasioned by a substantive offence. The further removed one's conduct is from the actual completion of the offence, the less cogent becomes the argument that an intention short of a true criminal intention should support the imposition of a criminal sanction.[102] Third the notion of a reckless agreement is a peculiar one. How can there be a meeting of minds with respect to a possible or probable future event. A consensus or meeting of the minds indicates a determination that a particular object should be achieved.[103]

The requirement of proof of an intention to achieve the object of the agreement, and the sufficiency of a state of mind short of an actual intention to achieve the criminal object raises particular difficulties where the conspiracy alleged involves more than one criminal object. Assume X, Y and Z are charged with conspiracy to import and traffic in heroin. Must the Crown prove

an intention to achieve both objects as against each accused? Case law suggests a less stringent requirement. It has been held in many cases that knowledge of the broader scope and nature of the agreement combined with participation in, and an intention to achieve one facet of the overall agreement provides a sufficient basis for the finding of necessary intent.[104] These cases equate knowledge of the broader scheme with an intention to achieve the objects of the broader scheme, and are in reality recognition that recklessness as to the overall purpose of the agreement will suffice.

Two judgments of Mr. Justice Martin support the view that the requisite of mens rea in multiple object conspiracies goes beyond mere knowledge on the part of a particular accused that his specific criminal object is part of a larger scheme.[105] Those cases suggest that there must be an actual interest into the achievement of the greater goal from which agreement to that goal can be inferred. This approach which fixes on a requirement of a stake in the overall operation as the key indicator of an intention to agree to the overall conspiracy is consistent with the American approach.[106] It should be noted however that American Courts are quite quick to find that individual participants have a stake in the outcome, and therefore the requisite intention where the operation is one where success at

one level of the overall operation is dependent upon success at the other levels[107] (eg. the typical drug conspiracy case).

Closely aligned to the problem of recklessness as it relates to the mens rea, in conspiracy cases is the question of conditional agreements. Assume X and Y enter into an agreement to commit robbery, but only if the circumstances indicate that they can successfully commit the robbery. In one sense they have a conditional intention to rob. If however this state of mind would not suffice to establish culpability for conspiracy there would be virtually no situation where the requisite intention could be established since very few criminals intend to proceed regardless of whether they have any chance of success with their criminal endeavour.[108] In the example above the parties have a clear and firm intention to proceed with the criminal object, subject to abandoning that object if it is frustrated by some outside source. In truth there is no condition to their intention but only a recognition that their intention may be frustrated.[109] If the same two parties however agree to commit a bank robbery, and at the same time agree that if it is necessary they will shoot the teller then they have formed a conditional intention with respect to an agreement to murder. If recklessness as to the object of the agreement will suffice then the parties may have entered into a conspiracy to commit murder. However if a firm intention to achieve a criminal object is required then there is no conspiracy

to commit murder, since at the time of the agreement the parties have not resolved to murder but have only recognized it as a possibility.[110]

b. Knowledge of the Circumstances

In order to have the necessary mens rea one must have knowledge of, or be aware of the proposed future existence of facts which constitute the actus reus of the substantive offence which is the object of the alleged conspiracy. If X, Y and Z agree to sell stock, and agree to represent that the stock has a value of $10.00, but X is unaware that the value of the stock is only $1.00 then while Y and Z may be guilty of a conspiracy to defraud, X is not since he was unaware of the fact i.e. the dishonesty of the representation, which made the agreement criminal. This knowledge requirement exists even in cases where the substantive offence which is the object of the agreement is a strict or absolute liability offence.[111]

Willful blindness as to the existence of the circumstances which makes the object of the agreement unlawful will in all likelihood suffice to support a conviction for conspiracy.[112] Willful blindness is akin to but not the same as recklessness. Justice McIntyre recently explained the difference

> "Willful blindness is distinct from recklessness because while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, willful blindness arises where a person has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability and recklessness is justified by consciousness of the risk and by proceeding in the fact of it, while in willful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is a reason for inquiry."[113]

Willful blindness is consequently virtually identical to actual knowledge. It does no injustice to equate a person who agrees to make representation knowing there is a need to inquire as to its accuracy but not wishing to know whether it is accurate in fact, and the person who actually knows that it is inaccurate.[114]

Knowledge of the circumstances which make the agreement unlawful admits of a fairly easy analysis where the object of the conspiracy is a single and specific offence. Once again however analysis becomes difficult where the Crown alleges a multiple object conspiracy. As indicated above the case law has developed to the point where it is clear that the Crown must prove knowledge of the general nature and scope of the agreement alleged. A particular accused must know if he is charged with the multiple

object agreement that the agreement goes beyond his particular participation, if his participation is limited to one aspect of the overall transaction. Wilful blindness as to the overall nature and scope of the agreement should suffice.[115]

Knowledge of the facts which constitute the illegal nature of the object is a requirement to a finding of guilt on a charge of conspiracy. Knowledge alone however is not sufficient.[116] A person may have full knowledge of a particular agreement, and yet not be a party to it having not agreed to the object. Knowledge must exist simultaneously with an informed consent to the achievement of the object. If two people are alleged to have entered into a conspiracy but one of the persons lacked the requisite knowledge of the facts which made the object a crime then neither party is guilty of conspiracy.[117]

(2) Who Can Conspire

It takes two to conspire.[118] Conspiracy cannot flow from a unilateral act,[119] although only one person may be convicted.[120] Allegations of conspiracies between related companies or individuals and companies which are controlled by those individuals raise particular problems. In such cases while there may be two legal entities there is in fact one controlling mind. Conspiracy rests in the meeting of two or more minds. It

seems the height of legal fiction to hold that an accused can conspire in his individual capacity with a corporation which he totally controls and directs.[121] The fiction is perhaps justified on a "tit for tat" basis in that the accused who wishes the advantages of the corporate vale must also take the disadvantages.[121a]

Husbands and wives cannot conspire alone to commit a crime.[122] They can however both be convicted as long as a third party is found to have conspired with them. This bit of judge made law seems somewhat antiquated and has not been carried into the civil law.[123] It is also worthy of note that the rule that a husband and wife cannot conspire has not been found to be applicable in cases where husband and wife are alleged to be parties to a substantive offence by virtue of the "common purpose" rule in section 21(2) of the Criminal Code.[124]

If two persons are said to have conspired but one has a legal "excuse" eg. duress, which precludes his conviction, the party without the excuse can still be convicted of conspiracy although in some cases the nature of the excuse may negate the existence of any true agreement.[124a]

If one of the parties to an alleged agreement is found to be insane, this may preclude the conviction of the other party

to the alleged conspiracy if the mental condition of the insane party prevented the formation of an agreement. Not all mental states encompassed by the law of insanity would have that effect.[125]

Personal defences applicable to only one conspirator such as diplomatic immunity or pardon will not prevent the conviction of the other alleged conspirator.[126]

Some substantive offences cannot be committed by particular individuals either as the perpetrator or as a party. These persons are said to be exempt from conviction for the substantive offence. For example a prostitute cannot be convicted of living of the avails of prostitution. In effect the prostitute is the victim of the offence. The Alberta Court of Appeal has held that a person who cannot be liable either as a party or a perpetrator or the substantive offence cannot be convicted of conspiracy to commit that offence.[127] The English Court of Appeal reached a different conclusion in R. v. Burns et al. In that case Burns could not be convicted of the substantive offence of kidnapping his child since the relevant legislation exempted fathers from the offence created. The Court of Appeal however held that he could be guilty of conspiracy, noting that parliament had not accepted the Law Commission's recommendation

that exempt parties not be liable for conviction on conspiracy charges.[128]

It may be that the decision of the Alberta Court of Appeal and that of the Court of Appeal in England are not irreconcilable. The Alberta case dealt with a situation where the alleged conspirator was the subject of the protection of the substantive offence i.e. the victim. In the English case the exempted party was not the person protected by the legislation but was exempt for other policy reasons. Consequently it is arguable that a determination of whether an exempt party is liable for conviction on a charge of conspiracy to commit the offence will depend on the reason for which the party is exempt from conviction for the substantive offence.

If the exempt party is immune from prosecution for conspiracy, the other party may properly be convicted of conspiracy even if it is a two party conspiracy as long as the exemption does not flow from the first party's inability in the eyes of the law to possess a sufficient mens rea to conspire.[128a]

(3) Jurisdiction and Venue

(i) Introduction

There are two different problems which arise in connection with a Court's jurisdiction to try a particular case. The first problem and is properly captured in the question

> "Does a Canadian Court have authority to prosecute the offence".

This is a jurisdictional question.

The second problem arises only if the first is answered in the affirmative, and is concerned with the question of which Canadian Court has jurisdiction to try a particular conspiracy. This question involves a determination of venue

(ii) Jurisdiction

(a) Without Reference to the Deeming Provisions

An agreement entered into in Canada to commit an offence in Canada is triable in Canada by virtue of the normal rules of

territorial jurisdiction to which statutory recognition is given in section 5(2) of the Criminal Code.[129] Statutory provisions have been enacted to give Canadian Courts jurisdiction over international conspiracies.[130] Before examining the effect of those provisions one must first understand the scope of the Canadian Court's jurisdiction without reference to those provisions. Conspiracies with an international flavour had raised particularly difficult problems in connection with that jurisdiction. English Courts had taken a narrow view of the scope of English Court's jurisdiction to deal with such agreements.[130a] The problems and inadequacies engineered by the restrictive interpretation taken in England have been laid to rest in this country by the Supreme Court of Canada's decision in Libman v. The Queen.[131] In that case, the accused caused telephone calls to be made from Toronto to residents of the United States in an attempt to fraudulently induce those persons to purchase shares in certain Central American mining companies. The victims were instructed to send the necessary funds to banks in Central American. The accused would then travel outside of Canada to reap the profits of their fraud. Some of the profits were returned to Canada by the accused. The agreement to defraud was made in Canada, however, the targets of the agreement were outside of Canada and the proceeds of that agreement were to find their way to Canada only indirectly.

Mr. Justice LaForest for the Court conducted an extensive and critical examination of the earlier English and Canadian case law. He concluded

> "As I see it all that is necessary to make an offence subject to the jurisdiction of our Courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics it is sufficient that there be a 'real and substantial link' between an offence and this country, a test well known in public and private international law...this does not require legislation. It was the Courts after all that defined the manner in which the doctrine of territoriality applied, and the test proposed simply amounts to a revival of the earlier ways of formulating the principle."[131a]

Consequently His Lordship held that the substantive offence of fraud was triable in Canada. On the facts there was no question that the initial agreement had been made in Canada. Therefore, the case involved an agreement made in Canada to commit fraud in Canada. Justice LaForest noted that one need resort to the expanded concepts of jurisdiction enacted in connection with conspiracy charges only in cases where the agreement or the substantive offence contemplated by the agreement did not occur or were not to occur within Canada. Those expanding provisions were not necessary to give the Court jurisdiction in Libman.[132]

(b) The Expanding Provisions

S.423(3) to (5) set out special jurisdictional and venue rules applicable to international conspiracies. These sections provide:

> (3) Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada.
>
> (4) Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) in Canada shall be deemed to have conspired in Canada to do that thing.
>
> (5) Where a person is alleged to have conspired to do anything that is an offence by virtue of subsection (3) or (4), proceedings in respect of that offence may, whether or not that person is in Canada, be commenced in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

These sections are applicable where the "normal" rules relating to jurisdiction do not reach the agreement.

For example, where X and Y agree in Canada to commit fraud and where the fraud would be triable in Canada, employing the "substantial contact" test then the conspiracy charge will be triable in Canada without resort to the special provisions in S.423(3) and following. S.423(4) deems conspiracies entered into in a foreign jurisdiction to have been entered into in Canada, where the offence which is the object of the agreement is to be committed in Canada.

Section 423(3) which gives Canadian Courts jurisdiction over conspiracies, entered into inside of Canada, to commit offences outside of Canada. The section requires dual criminality. The act agreed upon must be an offence both in Canada and in the country where the agreement occurred.[133] In R. v. Bolduc the Supreme Court of Canada held that the same conduct must be unlawful in both places. The Court held that by the same conduct one meant the acts which constitute the essence of the offence alleged. To determine whether the dual requirement of criminality was met one had to discern the essence of the object alleged and then examine legislation in both countries to determine whether that conduct was prohibited. It was not necessary that the object have the same criminal label in both countries.[134]

For the Crown to gain the advantage of section 423(3), it is necessary that the Crown allege an agreement to breach for a foreign law in the foreign country, and that the Crown specifically refer to the applicable subsection in the indictment.[135] The degree of specificity required in describing the foreign law will vary from case to case. The defence could, if the foreign law was not adequately specified, apply for particulars. In most cases it would seem appropriate to require that the Crown specify the foreign law although the Crown may do so in the alternative if there is more than one foreign law relied on by the Crown.[136]

In some cases it may be difficult to determine whether an agreement was entered into in Canada or in another country. Where the agreement can be said to have been entered into in both countries then Canadian Courts will take jurisdiction without resort to the special provisions in section 423(3) or (4).[137]

In complex cases it may be necessary to combine the statutory provisions in section 423(3) with the Supreme Court of Canada's pronouncement in Libman. If X and Y enter into an agreement in the United States to commit an offence and if that agreement contemplates commission of the substantive offence which is the object of the agreement in several jurisdictions, then according to Libman a Canadian Court could take jurisdiction if a significant portion of the activities, constituting the offence contemplated by the agreement were to take place in Canada.[138]

Despite the broadened jurisdictional rules effected by s.423(3), and the Supreme Court's pronouncement in Libman, some conspiracies remain beyond the pale of the Canadian Courts. A conspiracy to traffic in cocaine in the United States made over the telephone with X in Canada and Y in the U.S., is not triable in Canada.[139] Quare: does it matter if the proceeds of the sale are to be returned to Canada?

A conspiracy alleging an agreement to commit a crime in Canada is not made out unless it is established beyond a reasonable doubt that the place agreed on as the situs of the substantive offence is located in Canada.[140] If it is alleged the offence was to take place in another country, similar proof must be tendered to show that the place agreed upon was in that country.

If the prosecution cannot establish where the offence was to occur, but can establish that the agreement was made in Canada and the offence was to occur either in Canada or in an other location outside of Canada can the Crown frame the indictment so as to convict the accused? It is submitted that the Crown could properly allege an agreement to commit an offence in one of a group of named locations. If one or more of those locations was outside Canada, the Crown would have to allege and prove the foreign law which would be breached if the breached agreement was carried out in that jurisdiction.[141]

If the alleged agreement does not admit of any specificity with respect to location, there is arguably no agreement but only discussion or negotiations which have not yet reached the agreement stage, e.g. X and Y agree to get into the cocaine trafficking business, there is discussion about possible deals involving sales in Canada, or sales on one of several other

countries but no location or group of locations is actually selected. On these facts, there is arguably no agreement.

III. VENUE

Once it is determined that a Canadian Court has jurisdiction over the conspiracy alleged then one must decide the place of trial, that is the appropriate venue. This often involves considerations of whether all accused are properly tried in one province even though some may never have been in that province or done anything in connection with the alleged agreement in that province. Two principles are relevant to the determination of venue. The first is found in section 434 of the Criminal Code. That section prohibits trial in one province (subject to certain exceptions) of an offence committed entirely in another province.[142] The second principle emerges from the case law, and provides that an offence is not committed entirely in one province where there is a continuity of operation extending over more than one province, or where there is an overt act referrable to or done in furtherance of a criminal plan done in one province, or where the act of the accused done in one province generates the socially undesirable effect in another province.[143] In any of those circumstances the offence will be triable in more than one province. All of the accused will be triable in any of the venues. For example if X, Y and Z meet in Vancouver and agree to operate a

fraudulent scheme aimed at the public in Manitoba, and further agree that Z will travel to Alberta and make the necessary telephone calls in furtherance of the scheme from that province, then any or all of X, Y and Z may be tried in British Columbia, or Alberta, or Manitoba.[144]

With respect to venue in cases of conspiracies made prosecutable in Canada by operation of S.423(3) or (4) see S.423(5).[144a]

IV. CONSPIRACY DISTINGUISHED FROM FORMS OF COMPLICITY IN THE COMMISSION OF SUBSTANTIVE OFFENCES

Under Canadian criminal law one may be liable for the commission of a substantive offence if one is the actual perpetrator of that offence or if one aids, abets, counsels, or procures, the commission of the offence by the perpetrator.[145] Further one may be liable for the commission of the substantive offence if one has entered into a common design, the product of which is the substantive offence.[146] Other papers will deal with the principles governing liability for substantive offences. This paper seeks only to draw some of the distinctions between that type of liability and the crime of conspiracy.

The principle distinction between accessoral liability for a substantive offence and conspiracy is that with the exception of common design liability, the former is a unilateral

act which does not require combination with another.[147] An agreement may constitute aiding and abetting if the substantive offence is committed but the result does not necessary follow.[148] Conspiracy may be a form of aiding and abetting. Evidence that X and Y agreed to the commission of the substantive offence may provide a basis for a finding that X encouraged, and therefore abetted Y in the commission of that substantive offence. In cases where the substantive offence is committed by one person and another person is present but takes no part, the existence of a prior agreement between those parties will play a central role in the determination of whether the party who was passively present at the commission of the offence can be said to be an aider or abettor.[149] Passive presence in and of itself will not constitute aiding or abetting, however, passive presence combined with participation in a prior agreement to commit the offence will suffice to establish liability as an aider and abettor.[150]

Lastly, aiding and abetting requires no prior agreement. The essence of aiding and abetting is conduct done for the purpose of encouraging, assisting, or facilitating the commission of a substantive offence by another.[151]

If an accused is charged with both conspiracy and the substantive offence and it is alleged that he was a party to the substantive offence by virtue of having entered into the agreement then it would seem that the accused cannot logically be acquitted

of one offence and convicted of the other. Case law however is to the contrary. For example in Rex v. Lenton[152] the accused was convicted of the substantive offence and acquitted of the conspiracy charge. The Court of Appeal held there was no inconsistency in the verdicts as there was evidence from which the jury could find that the accused initiated the commission of the crime by an unsolicited act of counselling and was therefore a party to the substantive offence. In Koury v. The Queen[153] the accused was acquitted of conspiracy and convicted of the substantive offence. While it is difficult to understand the result in Koury it would appear that the evidence was capable of bearing the interpretation that Koury aided and abetted pursuant to a common design but did not enter into an agreement. The distinction drawn in Koury is an extremely subtle one.

Can an accused be held liable as a conspirator by virtue of having aided and abetted the formation of the conspiracy? At first this seems an extremely esoteric notion. It has received little consideration in the case law although the Ontario Court of Appeal in MacNamara et al[154] held that one who encouraged the achievement of the object of a conspiracy, with knowledge of the existence of the agreement could be a party to that agreement even though the person did not agree to the achievement of the object of the conspiracy. The recent decision of the House of Lords in Anderson[155] offers an example where the concept of aiding and abetting a conspiracy may come into play. Anderson was alleged to

have conspired with others to achieve a criminal object. In his defence Anderson contended that he was only pretending to go along with the others in order to receive money from them. He intended to do certain acts in furtherance of the scheme but did not intend to go "all the way" with the agreement. He intended to let the others attempt to achieve the ultimate goal. The House of Lords held that Anderson was guilty of conspiracy as defined in section 1(1) of the Criminal Law Act. In an interesting comment on the case in [1984] Criminal Law Review[156] the author suggests that Anderson may well have aided and abetted the conspiracy.

In R. v. Taylor et al[157] a trial involving the infamous Squamish Five the trial judge directed a verdict of acquittal with respect to Taylor at the end of the Crown's case on the basis that Taylor had only agreed to assist in certain acts which were prepatory to the commission of a robbery and not to the robbery itself. The trial judge rejected the notion that one could be liable as a conspirator on the basis of aiding and abetting a conspiracy amongst others.

If the mutuality of conduct approach is taken to the definition of a criminal agreement then the concept of aiding and abetting adds little to potential liability for the offence of conspiracy. If however the mutuality of object approach is taken then aiding and abetting has a significant role to play in the law

of conspiracy, since one can envisage cases where a person agrees to do certain acts which facilitate the conspirators in their achievement of their criminal object, and yet at the same time that person does not share in that criminal object. The fact situation in Anderson described above provides a classic example.[157a]

Concepts relevant to the law of conspiracy are also applicable to the determination of liability for the commission of substantive offences committed in furtherance of a common design. Section 21(2) provides that where one forms an intention in common with another to carry out an unlawful purpose, one is liable for any and all offences committed in the course of carrying out the common design if one knew or ought to have known that the offence committed would be a probable consequence of the carrying out of the unlawful purpose.[158] Section 21(2) is premised on the existence of a criminal agreement from which flows a substantive offence. Until recently the weight of authority indicated that the substantive offence committed in furtherance of the unlawful purpose (sometimes referred to as the ancillary crime) must be a different crime than that contemplated by the common intention.[159] In R. v. Simpson and Ochs the British Columbia Court of Appeal however held that the two offences could be the same.[160]

Section 21(2) requires the existence of a common intention to carry out an unlawful purpose. In most cases this

will constitute a criminal conspiracy. However, a common intention can exist without an agreement.[161] In those cases if a substantive offence is committed as a result of the common purpose and if that substantive offence meets the criteria of section 21(2) the parties to the common purpose although not conspirators can properly be convicted of the substantive offence.

Another feature which is common between liability for conspiracy and liability as a party to an offence committed as a result of a common design is the application of the so called co-conspirator exception to the hearsay rule. The rule which makes acts and declarations of one party to a common design, done in furtherance of the common design, admissible against other parties to the common design applies whether the accused are charged with conspiracy or with the commission of substantive offences.[162] Furthermore, the rule applies whether the alleged complicity in the substantive offence is based on aiding, abetting, counselling or the "common purpose" rule in section 21(2).[163]

One who counselled another person to be a party to an offence is guilty of that offence if that person commits the offence in the manner counselled or in a different manner.[164] The counsellor is properly charged and convicted as a principal to the substantive offence.

If one counsels the commission of an offence which is not committed by the person counselled then the counsellor commits the indictable offence of counselling.[165] One counsels, if one influences, advises or recommends the commission of a criminal offence.[166] The counsellor need not initiate the criminal scheme. A person who accepts an offer from another to commit an offence and offers to pay him for his trouble procures the commission of that offence.[167]

Counselling, like aiding and abetting is a unilateral act and does not require an agreement. Counselling may afford evidence of the existence of a conspiracy but the former can exist without the latter. Similarly a conspiracy may exist although neither party has counselled the other.[168]

Counselling is an appropriate alternative charge in a situation where two accused are charged with conspiracy and one of the accused is taking the position that he only pretended to agree with the other. The "non-pretender" could properly be convicted of the offence of counselling contrary to section 422(a) of the Criminal Code.[169]

V. CONSPIRACY AND THE CRIME OF ATTEMPT

Everyone who attempts to commit an offence is guilty of an offence.[170] The criteria required to establish the crime of attempt are set out in section 24 of the Criminal Code. Attempt unlike conspiracy is a unilateral crime and involves no notion of agreement or common design. In some cases an agreement to commit an offence may be sufficiently proximate to the offence to constitute an attempt to commit the offence.[171] Whether a particular agreement does constitute an offence is purely a question of proximity to be determined on the facts of a particular case. This factual determination is made a question of law by the legal fiction pronounced in section 24(2) of the Criminal Code.

Attempt also differs from conspiracy in that it merges into the completed offence.[172] One cannot be convicted of attempting to commit an offence and committing the same offence. Conspiracy does not merge with the completed offence and at present there appears to be no legal impediment to the conviction of an accused for both conspiracy and the substantive offence which was the object of the conspiracy.[173]

Prior to the decision of the Ontario Court of Appeal in Regina v. Dungey,[174] case law appeared to recognize the existence of the offence of attempted conspiracy in situations where one

party in effect tried to reach an agreement with another party to commit a crime, but for one reason or another failed to reach that agreement. In Dungey Mr. Justice Dubbin held that the "double barrelling" of the inchoate crime of conspiracy with the inchoate crime of attempt unduly broadened the potential scope of criminal liability. He held that conviction for an attempt to conspire was tantamount to conviction for an attempt to attempt.[175] In the result the Court unanimously held that there was no such offence as attempted conspiracy.

The reasoning in Dungey however has no application where the substantive offence is defined in such a way so as to make what was otherwise be prepatory steps the equivalent to, or a method of committing the substantive offence. For example section 127 of the Criminal Code makes the offence of attempting to obstruct justice a substantive offence.[176] There is consequently no bar to a conviction for conspiracy to attempt to obstruct justice.

VI. CONSPIRACY IN THE DEFENCE OF IMPOSSIBILITY

The fact that the object agreed upon by the conspirators cannot be achieved is no defence to a charge of criminal conspiracy in Canada.[177] This broad statement must however be qualified in one way. If X and Y agree to commit a certain act

which they believed to be criminal but which is in fact not criminal then they are not guilty of any offence. For example, if X and Y agree to smuggle a person into Canada believing that they are acting in contravention of the immigration laws when in reality that person is entitled to enter Canada then there is no conspiracy to breach the immigration laws.[178] This is sometimes referred to as the defence of legal impossibility, however this is a misnomer. There is no question of impossibility but rather the conduct agreed upon is simply not prohibited and therefore the object of the agreement is not criminal. There can be cases where it is difficult to determine whether the parties have agreed upon an illegal object, and elected to use means which are insufficient to achieve that object, and cases where the parties have agreed to something which is not illegal despite their belief. For example, if X and Y agree to manufacture an illicit drug, and agree to use a certain technique to produce that drug when that technique cannot possibly produce the result, have they agreed to do something which is not illegal and therefore not properly charged as a conspiracy or have they agreed to an unlawful object and chosen inadequate or inappropriate means to achieve that object? If the former characterization is accepted where is no crime.[179] If the latter is accepted the parties are guilty of conspiracy.[180] It is submitted that the latter characterization is the preferable one. The parties have agreed to an object which is in fact unlawful, as opposed to the immigration example referred to above

where the object was not unlawful. The parties in the drug example have simply chosen inappropriate means to achieve that unlawful goal. The drug example seems indistinguishable from a case where X and Y agree to rob a safe, but in the end are unable to "crack" the safe.[181]

VII. THE TRIAL OF CONSPIRACY CHARGES

One can pile quote upon quote warning of the dangers innerent in the trial of conspiracy allegations.[182] Historically conspiracy trials have had a strong political flavour.[183] There exists in many circles a strong view that conspiracy trials somehow give the prosecution an unwarranted advantage which it does not have in trials involving substantive offences.[184] Many counsel who have defended conspiracy charges argue that the trials lack the finite definite boundaries which one normally associates with criminal prosecutions.[185] They argue that in many cases the charge remains vague and uncertain and that consequently evidentuary and procedural rulings are made on a speculative basis. These counsel would no doubt agree with the words of Judge Ferguson in R. v. Partridge when he described the jury as being left

> "...to wander through the wilderness of the evidence in the expectation that if they did

not find one conspiracy proved they may find another."[186]

The unsatisfactory nature of conspiracy trials is attributed to one or more of the following:

- the Crown's unfettered right to lay, and prosecute conspiracy charges in situations where the Crown's case is in essence, that the accused committed the substantive offence which is the object of the conspiracy

- the combining by the Crown of conspiracy charges which counts charging the substantive offence which is the object of the conspiracy

- the relaxation of rules relating to the framing of indictments in conspiracy cases particularly when those indictments refer to more than one criminal object and, or more than one transaction

- the allowing of a wide variance between the offence alleged and the offence proved as in cases where the Crown alleges a widespread multiple transaction agreement and eventually it proves with one or more of the accused participation in a more limited agreement

- the relaxation of the normal rules of evidence as they relate to relevance and hearsay, and in particular the process whereby the Crown is allowed to adduce evidence which at the time of its admission appears either irrelevant, or inadmissible as hearsay or as evidence of "other crimes"

Each of the complaints outlined above has a measure of validity although one wonders whether they merit the extreme reaction found in some comments.[187] Presently the Courts cannot control the Crown's decision to prosecute on a conspiracy charge where the Crown's case is in essence that the accused committed the substantive offence which is the object of the conspiracy.[188] If however the mutuality of object approach is taken to the definition of conspiracy then there is no advantage to the Crown pursuing a conspiracy charge in that situation. Indeed as demonstrated in R. v. Jean and Piesinger[189] the Crown may be at serious disadvantage by pursuing a conspiracy charge. An appropriate and strict definition of the concept of agreement would consequently overcome any advantage the Crown might have by laying a conspiracy charge and when the essence of its case is the commission of the substantive offence.

With respect to the second complaint outlined above, that is the prosecution of an accused for both conspiracy and the

substantive offence, there has traditionally been no bar to double prosecution.[190] If both counts appear on the same indictment the Court can sever one count from the other however they can not prevent a subsequent prosecution on the severed count regardless of the verdict at the end of the first trial. Some authors have suggested that this problem could be overcome if the crime of conspiracy merged with the substantive offence upon commission of the substantive offence.[191] This approach is consistent to that taken with conspiracy's close cousin the crime of attempt. An application of the doctrine of merger to conspiracy charges is contrary to a wealth of Canadian case law and could be achieved only by a statutory amendment to the Criminal Code or by a pronouncement of the Supreme Court of Canada.[192]

Still others have suggested that convictions for both conspiracy and the substantive offence which is the object of the conspiracy offend the principle of res judicata as enunciated by the Supreme Court of Canada in Kienapple v. The Queen.[193] Cases dealing with res judicata decided prior to Kienapple held that convictions for both offences did not offend the principle of res judicata or section 11 of the Criminal Code.[194] In R. v. Sheppe the Supreme Court of Canada rejected an argument that a conviction for possession of heroin for the purposes of trafficking following a prior conviction for conspiracy to commit the same offence offended the Kienapple doctrine. The judgment however contains a

hint that in an appropriate case the Court might reach a different conclusion. In rejecting the application of the Kienapple doctrine Chief Justice Laskin noted:

> The present case is not one where the two convictions were for the same cause or matter or involved the same or substantially the same elements to establish criminality. The trafficking transaction had no element of culpability that was in any way common with the charge of conspiracy, which depended upon proof of a prior illegal agreement and as I pointed out earlier transcending any dependence on trafficking transactions.[195]

The words of the Chief Justice in Sheppe suggest that in a case where proof of the conspiracy rested entirely on proof of a single transaction for which an accused had already been convicted of a substantive offence, then the defence of res judicata as explained in Kienapple could have application.

At this point it is doubtful that the Charter will expand the concept of res judicata. Krug v. The Queen,[196] the only decision of the Supreme Court of Canada on point suggests that section 7 and section 11(h) do not broaden the Kienapple principle. It is arguable that the case stands for the proposition that multiple convictions which do not offend the rule in Kienapple, do not offend section 7 or section 11(h) of the Charter.

Nor does the Judgment of Mr. Justice Lemar in Reference Re Section 94(2) of the Motor Vehicle Act,[197] a landmark decision dealing with section 7 of the Charter suggest that section 7 of the Charter prohibits convictions for both conspiracy and the substantive offence. In summarizing the views of the majority of the Court with respect to section 7 His Lordship said:

> Consequently the principles of fundamental justice are to be found in the basic tenets and principles not only of our judicial process but also of the other components of our legal system.
>
> ...
>
> Whether any given principle may be said to be a principle of fundamental justice within the meaning of section 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system as it evolves.
>
> ...
>
> Consequently those words cannot be given any exhaustive content or simple enumerative definition but will take on concrete meaning as the Courts address alleged violations of section 7.[198]

Convictions for both conspiracy and the substantive offence rest on the well established principle that the agreement to commit a crime is a culpable act separate and apart from the commission of the crime.[199] This is a rationale which is well imbedded in our legal system and one which has strong historical roots in our jurisprudence.

One other attack may be made on prosecutions for both conspiracy and the substantive offence. It can be argued that in some cases such prosecutions constitute an abuse of the process in that they subject an accused to the emotional and economic hardships of multiple proceedings for what is in fact a single course of criminal conduct. This argument has application only where the Crown seeks to prosecute an accused in two separate trials, one involving the conspiracy allegation and the other the substantive offence. If successive prosecutions could be said on the facts of the particular case to be so outrageous and shocking as to bring the administration of justice into disrepute, then the Court would have the power to stay the second prosecution.[200]

Although as indicated above the Crown is empowered to prosecute for both conspiracy and the substantive offence, the Courts will customarily impose concurrent sentences if an accused is convicted of both unless the conspiracy allegation goes far beyond the particulars of the substantive offence.[201]

VIII. JUDICIAL CONTROL OF CONSPIRACY PROSECUTIONS DURING THE TRIAL

The Court has minimal control over the prosecution's determination as to when a conspiracy charge should be prosecuted,

and when that conspiracy charge should be prosecuted in conjunction with allegations relating to the substantive offences which were the object of the conspiracy. Once however the issue is joined then the trial judge has available to him several devices to control the conduct of the trial in order to ensure a fair trial.

(a) Severance of Counts

Counsel for the accused will often argue that the joinder of conspiracy counts with counts alleging substantive offences will result in

- evidence being heard which is inadmissible against certain accused or on certain counts

- a multiplication of issues and evidence which will leave the trier of fact unable to render a just verdict on each count

- evidence which would otherwise be available to an accused will become unavailable e.g. a co-accused who would have been a compellable witness on a separate trial of an accused is no longer compellable since he is now jointly charged

- the weight of evidence against the particular accused, or on a particular count could be such that it would be improperly but unavoidably taken into consideration by the trier of facts in assessing the case against other accused on other counts. The spectre of guilt by association looms large in cases where conspiracy charges involving several accused are joined with allegations of substantive offences committed by all or some of the alleged conspirators.

The Courts have been sympathetic to applications for severance where an indictment contains a conspiracy allegation as well as an allegation relating to one or more substantive offences.[202] The same Courts have been less sympathetic to applications to split indictments which charge various conspiracies.[203] In both situations the Court will have to determine whether "the interests of justice" mandate severance.[204] The interests of justice go beyond the interests of a particular accused, and include concern for the overall administration of criminal justice. The interests of justice include a concern that a multiplicity of proceedings could result in inconsistent verdicts. This principle has strong application in cases where the indictment alleges a broad conspiracy and also by way of alternative a more narrow conspiracy. Unless the two are tried together there is the possibility that the accused could escape

liability on the larger conspiracy by arguing participation in a more precise conspiracy, thus necessitating a second trial on the crime which the accused admitted to, in order to avoid liability on the broader charge. It does little for the reputation of the administration of justice when an accused walks away from a courtroom based on a defence that he committed a crime but a different one than the one with which he was charged.[205] The Crown is left with the choice of either letting an admitted criminal go free or mounting a second prosecution. The second alternative will result in an expenditure of time and energy which could have been avoided had there been an alternative charge in the first indictment.

IX. SEVERANCE OF ACCUSED

Section 520(3)(b)[206] provides that the Court may where it is satisfied that the interests of justice so require direct that one accused be tried separately from other accused on the same count. As with a motion for severance of counts this application may be brought at any time during the trial, or by way of pre-trial motion brought in the trial court.[207] The appropriate time to bring the application will depend in part on the practices followed in any given jurisdiction.

In most cases accused charged with conspiracy will be tried together as prima facie persons jointly charged should be jointly tried where the case for the Crown is that the accused acted in concert.[208] This general rule was however qualified by the Supreme Court of Canada in Guimond v. The Queen.[209] In that case Mr. Justice Ritchie for the Court said:

> I am of the opinion also that whenever it is apparent that the evidence at the joint trial of the two alleged co-conspirators is substantially stronger against one than the other the safer course is to direct separate trials of each and this is particularly the case when the prosecution is tendering in evidence a damaging statement made by one under circumstances which made it inadmissible against the other.[210]

Severance of one's client from other accused charged with the conspiracy can have two advantages. First, if one's client is subsequently tried alone then evidence which was admissible against other accused but is not admissible against him cannot be tendered. Second and of practical importance, if one's client is a "bit player" in a large conspiracy, and the Crown is required to go through one long trial where the main participants are tried there is a good possibility that the Crown will be prepared to reach "a separate piece" with the minor participant without going through a second long trial.[211]

X. CONTROL OVER THE FORMAT OF THE INDICTMENT

Section 510 of the Criminal Code sets out the criteria for a valid indictment.[212] This section applies to conspiracy charges as well as all other criminal allegations. Although some authorities suggest that the specificity requirement in section 510(3) should not be enforced as rigorously in conspiracy cases as in other cases.[213]

(a) S. 510(1)

The single transaction requirement of section 510(1) also raises special problems in conspiracy cases where the Crown alleges a single conspiracy involving an agreement to commit more than than one criminal offence.[214] Compliance with section 510(1) is determined by an examination of the wording of the indictment, and not the evidence led in support of the indictment.[215] If the indictment alleges a single conspiracy which encompasses the planned commission of several crimes, the indictment conforms with section 510(1). If in the course of the trial evidence is led which is capable of supporting the inference of more than one agreement or an agreement other than that alleged the count does not become duplicitous.[216] The admission of such evidence raises question of proof rather than questions of the propriety of the pleadings. If evidence is led of an agreement other than that

alleged, then unless that evidence is somehow relevant to the agreement alleged the Crown is in the same position as it is in any case where improper evidence has been led. The trial judge may order a mistrial if the effect of the evidence is serious enough; or he may content himself with a direction that the evidence led of the other agreement is not relevant, and will not be taken into consideration.[217]

An indictment which fails to comply with the requirements of section 510 is bad and will be quashed[218] subject to the Court's power to amend the indictment pursuant to Section 529(3)(b).[219] If the indictment alleges more than one conspiracy the Court can invoke section 519 and split the count into two charges each alleging a separate conspiracy.[220]

Problems can arise where an allegation of conspiracy is framed in very general terms but in terms which comply with section 510. In such a case, there may be evidence suggesting two agreements, both of which are encompassed by the very general words in the indictment. R. v. Cotroni provides an example.[221] In such a case, defence counsel should move for particulars to determine which of the two agreements is in fact relied on by the Crown.[222] A difficult problem arises if particulars are not requested or ordered. Assume B and C and X and Y are charged with conspiracy to commit theft. The indictment is not particularized.

At the end of the case, there is ample evidence to support the conclusion that B and C conspired to commit theft with each other and that X and Y conspired to commit theft with each other. Both allegations come within the terms of the indictment. However, the evidence does not support the inference that there was a single agreement to commit theft. Also, assume that both thefts occurred in the same province and are therefore within the jurisdiction of the trial Court. Justice Pigeon in Cotroni appears to hold that all four accused could properly be convicted of conspiracy to commit theft in the fact situation outlined above.[223] Justice Dickson who spoke for the rest of the majority in Cotroni while less clear on the point, seems to come to the same conclusion.[224] Despite this high authority, there is something inherently wrong with convicting four accused on one count of two different crimes.[225]

Courts in British Columbia have grappled with the problem outlined above in several cases decided after the decision in Cotroni. In R. v. Burns et al,[226] Judge Anderson held that where the Crown alleged a general agreement and where the evidence supported two smaller agreements both of which came within the ambit of the wider agreement that none of the accused could be convicted. In R. v. Lyons et al, the British Columbia Court of Appeal went so far as to hold that the accused could lead evidence of a second agreement encompassed within the broad wording of the

agreement charged in order to establish a defence to the wide agreement.[227] In Lyons the accused were charged with conspiracy to import cocaine. No particulars were provided. In the course of this case the Crown led evidence of attempts to import from both Peru and Bolivia. Defence counsel moved for a directed verdict on the basis that the Crown's case was consistent with the existence of two separate conspiracies to import and not an overall conspiracy to import. The trial judge rejected this argument. The Court of Appeal upheld his ruling. Mr. Justice Hinkson however held that the defence were at liberty to lead evidence establishing that there were in fact two separate agreements, and clearly implied that if that evidence raised a reasonable doubt as to whether there were one or two conspiracies then the accused would have to be acquitted on the broad indictment with which they were charged.[228] It seems that if the defence did attempt to gambit referred to by Justice Hinkson that the Crown could move to split the court into two conspiracies under the authority granted by s.519. If the Crown takes this tact however it loses the benefits of the wider allegation.

The so-called "different conspiracy" defence can also arise where the Crown alleges a very specific agreement. It is no defence to say that one was involved in a much broader conspiracy as long as the very specific conspiracy alleged is contained within that broad conspiracy.[229] However, it is a defence should

the Crown fail to prove participation in the specific agreement alleged. Thus in R. v. Carruthers et al[230] the Crown alleged an agreement between four "pimps" to live off the avails of all of the prostitutes under the control of various pimps. The trial judge allowed a directed verdict (probably improperly) on the basis that the Crown had proved an agreement among the four that each would live off the avails of his own prostitutes, but not an agreement that each would live off the avails of all of the prostitutes.

(b) S.510(3)

With respect to section 510(3) which requires that the accused be given reasonable information with respect to the act or omission to be proved against him, the Courts have held that the word "reasonable" strikes the key note of the section.[231] Reasonableness is determined on a case by case basis. Courts have held that the rather amphorous nature of a conspiracy permits of less precision when charging the offence than when charging other offences.[232]

Two judgments of the Ontario Court of Appeal demonstrate this objective case by case approach to the question of whether a conspiracy indictment meets the requirements of section 510(3). In R. v. Bach the accused were charged with conspiracy to utter

counterfeit American $10 bills. No further specifics were provided. The Court of Appeal upheld the validity of the indictment stating:

> It was the theory of the Crown in this case that the conspiracy was not simply to utter counterfeit bills in any particular place but rather to utter the counterfeit bills at large. Having regard to that theory of the Crown and the nature of the offence alleged we are of the opinion that the indictment was not defective.[233]

The same Court in Regina v. Miron and D'Amour was faced with an indictment that charged the accused with conspiracy to commit armed robbery. The object of the agreement was not initially specified beyond reference to the indictable offence of armed robbery. Mr Justice Jessup again for the Court held:

> We are of the opinion that as originally drawn this indictment did not comply with section 510(3)... The Crown's case was not that the appellants had agreed to rob someone not yet selected it was that an agreement had been reached to rob a specific person.[234]

In Miron the conviction was saved because the Crown had in the course of the trial amended the indictment to specify the victim.

These cases establish that the adequacy of the indictment will in part depend on the theory of the Crown If the Crown's case is one of a specific agreement then it must plead the

specitic agreement. The difficulty with these cases is that they put the accused in a position where the adequacy of the indictment cannot be determined until the theory of the Crown is known.

Canadian Courts have seldom found conspiracy indictments so deficient in detail as to require that they be quashed.[235] The decision of the British Columbia Court of Appeal in Regina v. Bengart et al[236] provides an example of the traditional approach. Counsel may however wish to make an application to quash, if for no reason other than as a preliminary motion to an application for particulars. Relevant questions in determining whether an indictment contains a requisite degree of specifity are:

- how many accused are charged, how many unindicted co-conspirators are listed
- is there also an allegation that there are unknown conspirators
- is the location of the conspiracy set out and if so how far reaching is that location
- what is the time period encompassed by the charge
- what specifics are provided with respect to the indictable offence which is alleged to be the object of the conspiracy
- how many indictable offices are alleged to be the objects of the conspiracy

- is the manner in which the offence which was the object of the agreement set out
- are any of the overt acts said to have been done in furtherance of the conspiracy set out and if so is an exhaustive list provided
- are the various positions of each accused set out
- is the manner in which the agreement was made specified

XI. PARTICULARS

Section 516 of the Criminal Code which provides that the Court may order particulars where it is necessary for a fair trial applies to conspiracy cases.[237] An application for particulars may be made at trial or to a judge of the trial Court prior to the commencement of the trial.[238] The appropriate time to bring the application will depend in part upon the rules developed in each jurisdiction.

Particulars may be oral or written.[239] A distinction is drawn however between oral particulars, and the Crown's articulation of its theory or the evidence it will rely on to prove its case. In Bengart, the Crown in its opening alleged that the trafficking scheme involved importation and distribution of cocaine and that these processes centered around one of the accused. The British Columbia Court of Appeal noted that neither

the description of the operation, nor the role of the particular accused in that operation provided by the Crown in its opening constituted particulars of the indictment. On the other hand, the Crown's opening may be referred to in order to determine the nature of the allegation made in the indictment. In cases where the wording of the indictment is capable of more than one interpretation then the opening address by counsel may be referred to in order to determine the true nature of the allegation made.[240]

It is often said that particulars which are provided bind the Crown, and become part of the indictment. This statement is no doubt accurate but can be misunderstood. The Crown is not required to prove all particulars provided beyond a reasonable doubt; but rather must prove the essential elements of the offence beyond a reasonable doubt.[241] The Crown is bound by particulars in that it cannot prove that the offence was committed in a manner different than that which is particularized in the indictment. R. v. Lynch et al provides a good example of the effect of particulars.[242] In that case the Crown provided particulars as to the fraudulent means to be employed in a conspiracy to defraud the public. In the course of its case the Crown attempted to introduce evidence of a fraudulent means other than those specified in the indictment. The trial Judge excluded the evidence. The Court of Appeal held that he was correct in doing so.

A properly worded indictment may avoid the difficulty encountered by the Crown in Lynch. If the Crown provides particulars of certain overt acts, or fraudulent means relied on, the Crown can frame these as indicative of, but not exhaustive of the means employed by the accused in furtherance of the agreement. Thus, the indictment would indicate that the fraudulent means "included" the means to be set out in the particulars. This wording would arguably give the Crown room to adduce evidence of other fraudulent means. Defence counsel can counter this type of draftsmanship by moving for further particulars and seeking an exhaustive list of the fraudulent means to be proven by the Crown. Defence would argue that it is hardly asking a great deal to expect the Crown to be able to provide an exhaustive list of particulars before the trial starts.

It should also be noted that in Lynch no attempt was made by Crown counsel at trial to amend the indictment pursuant to section 529(2) of the Code. That section would seem to allow for amendment by way of the addition of further particulars to the indictment during the course of the trial. These additional particulars could be added so that the indictment would conform to the evidence adduced at trial.[243] Quare: Does s.529(2) help if defence counsel object to the tendering of the evidence which is not encompassed by the particulars.

The purpose of particulars in a criminal case is succinctly put by Mr. Justice Pennell in R. v. Canadian General Electric Company Limited (No.1), he said:

> The function of particulars in a criminal trial is twofold. Primarily their function is to give such exact and reasonable information to the accused respecting the charge against him as will enable him to establish fully his defence. The second purpose is to facilitate the administration of justice.[244]

The second purpose is of particular importance in conspiracy cases. Without detailed particulars, the object of the alleged agreement, and the scope of the alleged agreement may be uncertain. If those mattes are uncertain then the trial judge cannot hope to maintain the reins of relevancy on the evidence introduced by the Crown. Mr. Justice Spencer in R. v. Barudin et al alluded to this difficulty when ordering particulars to an indictment which charged a conspiracy to import and traffic in narcotics in British Columbia and the United States. His Lordship said:

> In a long and complicated conspiracy trial it not infrequently occurs that the shape of the Crown's case changes as evidence is ruled admissible or inadmissible. In my judgment the accused Chambers is entitled to know now the scope of the Crown's case to be alleged against him before the jury.[245]

Particulars will most often be sought with respect to one or more of the following:

- the object of the agreement. It should seldom suffice for the Crown to charge conspiracy to commit a named indictable offence without any further amplification or explanation of the details relating to the planned offence.[246]

- particulars as to the other alleged conspirators. Specifically, if there is reference to an unknown persons clause, particulars should be sought identifying the unknown persons by reference to the overt acts which it is alleged were committed by unknown persons and which it is alleged will be admissible against a named accused.[247]

- specifics as to the period and places encompassed by the agreement. In this regard reference should be had to section 529(4.1) which renders variations between the evidence and the indictment as to time and place irrelevant to the validity of the indictment.[248]

- specifics as to the role played by the various accused in the formation and operation of the alleged agreement.

In all cases where particulars are sought, it must be remembered that the purpose of particulars is not to provide the accused with a summary of the evidence to be relied on by the Crown; nor is its purpose to limit definitions of criminal conduct provided by the Code.[249]

The question of applying for particulars in a conspiracy case raises tactical problems. On the one hand, the provision of particulars should make the charge more precise and consequently the trial more controlled. Particulars can also be the first step toward a "different conspiracy" defence. On the other hand, detailed particulars in a narrative form can amount to a statement of the case for the Crown. The Crown will no doubt be in a position to know what evidence it will lead, and will therefore be able to provide particulars which should conform to the evidence to be led. In cases tried with a jury, where the Crown has provided lengthy narrative type particulars, the jury will retire at the end of the case with the indictment which in effect contains a detailed summary of the Crown's evidence. One worries that they may go through that detailed summary satisfy themselves that the Crown has proven all of the things in that summary and

consequently convict, without coming to the heart of the question; which is was there an agreement involving each particular accused to commit the criminal offence alleged.

Detailed particulars may provide problems for an accused in a second situation. If the Crown has charged a general conspiracy with a wide object, and one's defence will be participation in a different and lesser conspiracy, then particulars might well remove that defence by limiting the agreement alleged and consequently removing the defence outlined above.

Counsel for an accused can only make an educated determination of whether to apply for particulars, when she has had full disclosure of the case for the Crown.[250] In the context of that full disclosure, counsel can determine whether further and better particulars are necessary in order to clearly delineate the allegation being made, while at the same time determining whether that further and clearer delineation is of assistance to the defence.

From the Crown's point of view, the danger inherent in detailed particulars lies in the effect they may have on the object of the agreement alleged. To the extent that particulars become part of the object of the agreement alleged they make the case for the Crown more difficult in that they must be proven

beyond a reasonable doubt. One or two examples will demonstrate the difficulties which the Crown can encounter. In R. v. Gill[251] the Crown charged conspiracy to procure abortions and named L and R as the subject of those abortions. The Crown proved a general agreement to procure abortions rather than an agreement with L and R as its subjects. The British Columbia Court of Appeal quashed the conviction. In R. v. Maria[252] the Crown charged conspiracy to defraud one V and one P. The jury returned a special verdict indicating the accused had conspired to defraud only P. The Queensland Court of Appeal quashed the conviction.[253] The British Columbia case of R. v. Carouthers et al[254] summarized above provides a third example of the difficulties which may arise upon particularization of a conspiracy indictment.

The case law does not admit of any concise articulation of when particulars will become part of the object of the agreement. All that can be said is that the Crown should in its indictment carefully distinguish between the object of the agreement and particulars provided with respect to that agreement. The indictment as framed in Co and Patton[255] provides an instance where the Crown successfully limited the object of the conspiracy to one of defrauding the named victim while at the same time providing detailed particulars as to the means to be employed by the conspirators. In that case the Supreme Court of Canada held that it was necessary only to prove the existence of an agreement

to defraud and that this could be done by proof of one of the particulars.[256]

XII. NON-STATUTORY TECHNIQUES TO CONTROL THE CONDUCT OF CONSPIRACY PROSECUTIONS

In addition to the techniques referred to above, which are provided for in the Criminal Code, the trial judge has other means available to him to ensure that prosecution of a conspiracy charge proceed along definite and controlled lines.

(i) The Pre-Trial Conference

Most jurisdictions have some form of pre-trial conference involving counsel and a judge of the trial court.[257] In complicated conspiracy cases these pre-trial conferences could be used to limit and define:

- the issues
- the nature of the Crown's case and the object of the agreement
- the defences to be advanced[258]

Some will no doubt regard any suggestion that the defence should have to give some indication of its position prior to trial as sacriligious; however if the Crown is in fact seeking

a well controlled trial premised on a specific and well articulated allegation, then it should not be unreasonable that the defence give some indication of its eventual position. If the defence is content to "sit in the weeds" then the Crown should be able to take the position that it will provide only that which it is strictly required to provide to the defence. If the defence wants to rely on its strict right to conceal its position from the Crown, then it hardly seems unreasonable that the Crown should rely on its right to do no more than the statute requires.[259]

(ii) The Use of Aids to Assist the Jury

The trial judge has a wide latitude to allow counsel to use various types of aids in presenting its case. Fairness to both sides and the assistance and the value to the trier of fact of the device to be used should be the criteria by which a trial judge exercise that discretion.[260] The use of charts, summaries and similar material can very effectively and concisely present the strengths (or weaknesses) of the evidence which may have taken weeks to present to the jury. Various appellate courts have supported the use of such demonstrative aids in complicated cases.[261] A trial judge may also allow jurors to take notes during the trial.[260a]

In R. v. Nitra,[262] the trial judge provided the jury with a relatively detailed written instruction with respect to the law of conspiracy. The Australian Federal Court did not take exception to this procedure. No Canadian case appears to have considered the propriety of written directions to the jury. Some cases have acknowledged the trial judge's right to provide the jury with the pertinent sections of the Criminal Code but have commented on the extreme caution which must be exercised where that procedure is followed.[263] Presumably the same extreme caution would be required with written instructions. They should certainly be vetted with counsel before they are presented to the jury.

(iii) Special Verdicts

It is customary in criminal trials, including complex conspiracy cases, that the jury returns a general verdict of guilty or not guilty with respect to each accused on each count.[264]

The use of the special verdict whereby the jury are asked to answer certain specific questions is not precluded by the Criminal Code. Indeed, section 613(1)(c) appears to acknowledge the potential for such a verdict.[265] Special verdicts have been returned in criminal cases on rare occasions in other jurisdictions.[266]

Given the multi step jury instruction now used in conspiracy cases,[267] it is arguable that in particularly complex cases it would be appropriate to have the jury return answers to those three questions rather than a general verdict. For example, in a case, where there is no doubt that a conspiracy existed but the question is whether each accused was a party to that conspiracy, the trial judge could instruct the jury that they must first consider the evidence admissible directly against each accused; he could outline that evidence to them; and then direct them to answer the question

> Are you satisfied based on that evidence that accused X is probably a member of the conspiracy

If the jury returned with an affirmative answer to that question they then could be instructed on the further question of whether they were satisfied beyond a reasonable doubt that he was a member to that conspiracy. At that stage they would be entitled to consider acts and declarations in furtherance of the conspiracy done by others they have found to be conspirators at the first stage.[268] If they returned a negative answer to that question they would then be directed to acquit the accused.

Arguably, this approach could avoid the conviction of an accused against whom there is very little direct evidence but who

stands in danger of being convicted on the basis of the overwhelming evidence against others.

The writer sees some value in this approach in certain very specific cases, however the Ontario Court of Appeal has recently commented adversely on the use of special verdicts in criminal cases.[269]

(iv) Pre-Trial Disclosure

To date, an accused gains pre-trial disclosure through the preliminary inquiry and/or through the auspicous of the Crown Attorney's office.[270] The disclosure flowing from the second of those two sources depends in large measure on the particular jurisdiction and the administrative guidelines which may or may not exist and which may or may not be followed in a given case. Full disclosure of the material to be relied on by the Crown, and on other material in the possession of the Crown relevant to the case will go a long way to avoid many of the difficulties which develop in a complicated conspiracy trial.

Once an indictment is before a trial court, a judge of that Court may force a reluctant Crown to provide disclosure.[271] Prior to the enactment of the Charter, the cases had established that a judge of the trial Court could order production of

statements and documents. It is submitted that this power was wide enough to require production of witnesses' statements, officers notes relating to conversations with witnesses, all documents relevant to the investigation whether or not the Crown intended to produce them, and all statements made by an accused and documents seized during the investigation.[272] The effect of the Charter on an accused's ability to gain pre-trial disclosure is still somewhat uncertain. In R. v. Arviv the Ontario Court of Appeal recognizes that a denial of adequate disclosure could constitute a violation of section 7 of the Charter, although in that case the Court held that the elaborate and extensive disclosure provided by the Crown avoided any such constitutional violation.[273]

It is submitted that the fundamental justice requirement of Section 7 as well as the fair trial requirement in S.11(d) provide the basis for the development of a rule of pre-trial disclosure which requires that the Crown provide access to all relevant statements, documents and other material in its possession to counsel for the accused sufficiently prior to trial to allow the accused to prepare their defence.[274] This requirement of full disclosure should be limited only in cases where the Crown can satisfy a judge of the trial court that there are valid reasons to limit this disclosure.[275] If disclosure is not made and the Crown seeks to adduce evidence which was not disclosed to the defence, then the trial judge should have the authority under Section 24(2) to exclude that evidence.[276]

XIII. EVIDENTIARY ISSUES

Conspiracy may be proved by direct evidence, circumstantial evidence or a combination of the two. With the advent of extensive electronic surveillance more and more conspiracies are susceptible to direct proof by way of intercepted communications. Most often, however, proof of the agreement is a matter of inference to be drawn from the conduct of the alleged conspirators and the circumstances in which that conduct occurred.[277] If the Crown can prove that X and Y acted concurrently towards a common goal, the inference may be drawn that they did so as a result of an agreement to achieve that goal. The inference is not an automatic one but is clearly a strong one.[278] The acts done by a particular accused from which his involvement in a prior agreement may be inferred need not be in and of themselves criminal.[279] The acts may well be innocuous taken alone, but when viewed in combination with acts of others provide the necessary basis for the inference of guilt.[280]

In many conspiracy cases the principal piece of circumstantial evidence on which the Crown relied is the commission of the substantive offence which is the object of the alleged conspiracy. Some courts have commented on the cogency of this type of evidence[281] while others have recognized an inherent danger in proving one crime by leading evidence of the commission

of another.[282] As courts adopt the "mutuality of object" approach to the actus reus of conspiracy, it becomes more dangerous for the Crown to charge conspiracy where its case depends entirely on proof of the substantive offence. It will not be enough for the Crown to prove involvement in the substantive offence in order to establish the conspiracy. Rather the Crown will have to establish involvement which flows from an agreement to achieve the mutual object. This added requirement may well result in the acquittal of an accused on a conspiracy charge, when that accused is clearly guilty of the substantive offence.[283]

(i) The Agency Exception to the Hearsay Rule

If two or more persons act in concert then the acts and declarations of any one of those persons done in furtherance of the common design during the achievement of the common design are admissible against all who have agreed to act in concert.[284] This evidentiary rule is founded on agency principles and is best articulated by the authors of Corpus Juris Secundum. They state

> "The exception is founded on principles which apply to agencies and partnerships for it is reasonable that where a body of men assume the attribute of individuality, whether for commercial business or for the commission of a crime, the association should be bound by the acts of one of its members in carrying out the design."[285]

The rule set out above applies in all cases where a common design exists and it is not limited to conspiracy cases nor to criminal matters.[286] It applies equally to acts and declarations.[287] For example, a document found in the possession of one of the co-conspirators may be admissible against other co-conspirators pursuant to this rule.[288]

One must also distinguish between acts or declarations which constitute the agreement, and acts and declarations in furtherance of the agreement. The former are admissible without reference to the rule, since they constitute the subject matter of the event. They are in effect the res gestae of the charge.[289]

One must also distinguish between the accused who makes the act or declaration in question and the other alleged conspirators. With respect to the accused who makes the act or declaration it will be admissible against him.

- to prove the existence of the agreement
- to prove participation by that accused in the agreement[290]

As against the other alleged co-conspirators the act or declaration will be admissible to prove their participation in the agreement only if four conditions are met. They are:

- the Crown on all of the evidence establishes beyond a reasonable doubt the existence of the agreement alleged

- the Crown establishes that each co-accused is probably a party to the agreement alleged on the basis of evidence directly admissible against this co-conspirator.

- the Crown establishes that it is probable that the other alleged conspirator whose acts and declarations are in question is a party to the agreement based on that other co-conspirator's own acts and declarations.

- the acts and declarations in question are in furtherance of the common design.

Each of these four requirements should be considered separately. The first requirement, i.e. the existence of the conspiracy alleged, was commented on by Justice MacIntyre in the leading case of R. v. Carter[291] as follows:

> "In charging the jury on this question [the existence of the conspiracy] the trial judge should instruct them to consider whether on all the evidence they are satisfied beyond a reasonable doubt that the conspiracy charged in the indictment existed. If they are not satisfied then the accused charged with participation in the conspiracy must be acquitted."[292]

The above quote makes it clear that the first question to be determined is the existence of the conspiracy, and that all relevant evidence may be determined in deciding whether the trier of fact is satisfied beyond a reasonable doubt that the agreement exists. Having said this, it is important to note that while proof of the existence of the agreement beyond a reasonable doubt is a condition precedent to the use of acts and declarations by one conspirator against another, it is not a condition precedent to the admission of that evidence at trial. The order in which evidence is tendered is a matter for the trial judge. In many cases it will be impossible to neatly separate the evidence so that it is adduced in the same order that the jury will have to ultimately consider it.[293]

The second requirement, i.e. proof that an accused is a probable party to the conspiracy by his own acts and declarations, is self-explanatory. On this point the jury must be instructed that they can consider only the acts and declarations of the particular accused, however they may put those acts in declarations in the context of acts and declarations done by other alleged co-conspirators.[294] In other words, the acts and declarations of a particular accused may be considered along with the other evidence which constitutes the "overall conspiratorial web"[295] in order to determine whether on those acts and

declarations it has been established that the accused is probably a party to the conspiracy.

The third requirement, i.e. proof that the alleged co-conspirators were probably a party to the conspiracy, raises the same issues as does the second requirement. These alleged co-conspirators may be co-accused or they may be people who were never charged. Indeed their actual identities may be unknown. Some authorities even suggest that the alleged co-conspirator may be a person who was acquitted of the charge at a prior proceeding.[296] In R. v. Gunn and Ponak, the British Columbia Court of Appeal reached the contrary conclusion.[297] The Supreme Court of Canada in affirming the conclusion of the majority of the British Columbia Court of Appeal expressly refrained from considering the question of whether an acquitted alleged co-conspirator's acts and declarations were admissible.[297a] From a logical point of view there appears to be no reason why a person whose guilt has not been proven beyond a reasonable doubt, could not be found to have been a probable member of the conspiracy. The recent judgment of the Supreme Court of Canada in R. v. Grdic, however, establishes

> "as a matter of fundamental policy in the administration of criminal law it must be accepted by the Crown in a subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence."[298]

In light of this startling pronouncement from our highest court, an alleged co-conspirator who is acquitted must be taken as having been innocent of the charge.[299] Consequently his acts and declarations should not be admissible in a subsequent trial against his alleged co-conspirators.

The fourth requirement, that is that the acts and declarations be in furtherance of the conspiracy, requires that the conspiracy be ongoing at the time the acts and/or declarations are said or performed.[300] In addition, the acts or declarations must be done or said for the purpose of advancing the objective of the conspiracy.[301] They cannot be a mere narrative, or a statement about the conspiracy,[302] although a declaration which has a narrative quality to it may still be said in furtherance of the conspiracy.[303]

It is for the trier of fact to determine whether an act or declaration is done or said in furtherance of a conspiracy.[304] If that act or declaration is capable of being construed as in furtherance of the agreement, then it should be left to the trier of fact to determine whether that was indeed the case. Some declarations are clearly not in furtherance of a conspiracy (e.g. a confession by one of the accused,[304a] a plea of guilty entered by one of the accused to the charge[304b]) and the jury should be so instructed.[305]

Acts and declarations of a co-conspirator, if admissable at the trail of an accused, which do not meet the in furtherance requirement and are therefore not admissible to show that another co-conspirator was a party to the agreement may, however, be admissible against the accused on the first issue, that is the existence of an agreement. This point is clearly made by the Victoria Court of Appeal in Minuzzo. The court in that case classified evidence into three categories.

-(1) acts and declarations of the accused
-(2) acts and declarations of co-conspirators
-(3) acts and declarations of co-conspirators in furtherance of the agreement

The court pointed out that categories 2 and 3 were overlapping, and that evidence which fell into category 2 but not category 3 was relevant on the question of the existence of the agreement, but was not admissible to show an accused's participation in the agreement.[306]

As indicated above, an act or declaration will generally speaking only be capable of being in furtherance of the agreement if the act occurs or the declarations is made before the termination of the agreement. The achievement of the object of the agreement usually terminates the agreement.[307] There may

however, be cases where acts and declarations which occur shortly after the achievement of the object of the conspiracy are still said to be in furtherance of the conspiracy. In R. v Backrach,[308] the accused were charged with conspiracy to procure an abortion. The Crown sought to lead evidence of certain acts which occurred immediately after the procurement of the abortion. It was argued that these acts were not admissable against co-conspirators who had not been privy to them because the object of the agreement had been achieved. The Court of Appeal disagreed and held,

> "Evidence of what took place after the abortion was all part of the performance of one conspiracy: The care of the woman immediately after the criminal act was necessary for the fulfillment of their design to do wrong and escape detection and punishment"[309] (emphasis added)

Bachrack raises a difficult problem. Clearly not every act done to avoid detection after the completion of the crime which is the object of the agreement can be said to be an act in furtherance of the conspiracy. If that were so, then all conspiracies could remain alive until they were discovered and prosecuted. On the other hand, acts which are very closely connected in time and place to the achievement of the object are understandably viewed as part of the conspiracy and done in furtherance of the conspiracy. In Baron and Wertman,[310] the Ontario Court of Appeal sought to refine the "Backrach" approach.

The accused, Wertman, was charged with conspiracy to murder. She faced trial alone with Baron as chief crown witness. Most of the evidence led by the crown consisted of acts done by Baron after the murder in an attempt to destroy the body. The trial Judge described the conspiracy as one to kill and dispose of the body in a way which would avoid detection. This description made Baron's acts admissable against Wertman.

Justice Martin for the Ontario Court of Appeal disapproved of the view, that would hold that all conspiracies included as part of their object the escaping of detection. He did however, reject the idea that a conspiracy terminated at the precise moment its criminal objective was completed. His Lordship held that depending on the facts of each of case, certain acts which were done after the commission of the substantive offence which was the object of the conspiracy, but which were proximate to the commission of the substantive could be viewed as done in furtherance of the agreement. He described the concealing of a body following a murder as such an act.[311]

Baron and Wertman therefore, provides some specificity to the principal first enunciated in Backrach.[312] Acts done immediately after the achievement of the object, but closely tied to that achievement may be said to be in furtherance of the conspiracy; however, acts done well after the achievement of the

object to avoid detection or to "cover up" the crime will not be viewed as acts in futherance of the conspiracy.[312a]

The extension of the life of the conspiracy beyond the object of the conspiracy for the purposes of the co-conspirator exception to the hearsay rule must be distinguished from cases where the courts find a subsidiary conspiracy which is relevant to the proof of the main conspiracy alleged. In R. v. Vrany[313] Justice Zuber held that the transportation of drugs within Canada did not come within the ambit of a conspiracy to import herein because the object of the agreement was completed upon importation.[314] He did hold however, that the transportation of the drugs within Canada immediately after their importation was an act done in furtherance of the achievement of a subsidiary object which was of the conspiracy charged. Participation in the achievement of the subsidiary object was therefore admissible against the participants to show their complicity in the agreement to import.

If an act is done after the completion of the conspiracy and therefore does not come within the ambit of the exception evidence of that act or declaration may be admissable on the first issue to be determined, that is the existence and nature of the conspiracy. It will also be admissible against the doer of the act to show his participation in the conspiracy.[315]

A related problem involves acts and declarations done in furtherance of the conspiracy at a time when a particular accused was not a party to that conspiracy. Assume X and Y conspired to commit a robbery, X does an act in furtherance of that agreement, Z joins the ongoing conspiracy after X has performed that act. What is the evidentary value against Z of X's act? The act is clearly admissable against all conspirators to show the "origin nature and object" of the conspiracy.[316] In addition, authority holds that the act is admissable against Z pursuant to the agency exception because all accuse who joined an ongoing conspiracy are said to ratify or adopt prior acts done in furtherance of the agreement.[317]

In the example above, if the original conspiracy involved X, Y and Z, and Z withdrew from the conspiracy before X's act in furtherance, the act would still be admissable against Z to show the origin in nature and object of the conspiracy, but it seems doubtful that the act could be used to show Z's participation in the agreement pursuant to the exception to the hearsay rule, since he no longer was a member of the conspiracy at the time it occurred. Nor would the ratification theory refer to above have application.[318]

The full force of the agency exception to the hearsay rule is readily apparent. It may make admissable against an

accused acts and declarations done by another in the absence of and without the knowledge of the accused. The accused's conduct may in and of itself be entirely lawful; yet if he agreed to a criminal conspiracy then he will be as guilty as those who performed the unlawful acts in pursuit of that criminal goal.[319] The accused may find himself in court with alleged conspirators he has never met and whose existence he was totally unaware.[320] Without the rule however, it would be virtually impossible to hold those who plan a scheme but are wise enough to get others to perform the "dirty work" responsible for that plan.[321]

(ii) Can the Defence Introduce hearsay Evidence of the Acts and Declarations of Co-conspirators which may assist an accused?

Defence counsel were at times wish to illicit a statement from a witness as to an act or declaration by an alleged co-conspirator made or seen by that witness as the particular statement or declaration may be beneficial to his client. For example,

> X and Y are charged with conspiracy to extort. Z the witness has a conversation with W, an unindicted alleged co-conspirator, in which W says "that X is really stupid... he does not know what is going on at all".

Can counsel for X introduce this statement through the witness?

Defence counsel cannot rely on the agency exception to the hearsay rule since in so doing he would be admitting that his client was a party to a conspiracy. Counsel could however, argue one of the following:

- Since the Crown has illicited from the witness other acts or statements made by the co-conspirator then all of the acts done or statements made by the co-conspirator during the alleged existence of the conspiracy should on the basis of fairness be admitted so that all acts and declarations of the co-conspirator can be seen in their total context.[322]

- If the comment by the co-conspirator which the accuse seeks to illicit is part of the continuum of conduct involving in part acts and declarations made by the accused, on which the Crown relies, then the proposition put forward in Mota and discussed above indicates that the co-conspirator's evidence is admissable to put the conduct of the accused in its proper light.[323]

- It could be argued that all of the acts and statements of the co-conspirators during the continuance of the alleged conspiracy relative to the general subject matter of the alleged agreement form part of the res gestae and are therefore admissable. Professor Gilles favours this approach.[324]

- Lastly, it could be argued that the statement of the co-conspirator is admissable as evidence of his state of mind. Since the Crown alleges that the co-conspirator conspired with the accused, then the co-conspirator's state of mind is relevant to the existence of the conspiracy and eventually relevant to the accused's guilt. The statement referred to above constitutes evidence that W did not agree with the accused and is therefore relevant to the accused's ultimate guilt on the charge.[324a]

(iii) Can the Accused's Exculpatory Statements made during the existence of the alleged conspiracy be admitted through other witnesses?

A statement made by X, an accused during the continuum of the alleged conspiracy, to a witness to the effect that he had nothing to do with alleged conspiracy is prima facie self serving and inadmissable through the witness. If however, the Crown has illicited from that witness other statements made by the accused during the continuum of the conspiracy approximately the same time relative to the alleged conspiracy then the exculpatory statements made by the accused to X can be illicited on all or some of the basis set out above.[325]

XIV. APPLICATION OF THE AGENCY RULE AT TRIAL

A. Order of Adducing Evidence

The Crown must show both that the agreement alleged exists and that the accused was a party to that agreement. The Crown does this by adducing both direct and circumstantial evidence, the latter consisting in large part of acts and declarations of alleged conspirators and acts and declarations of the particular accused.[326] The acts and declarations of the accused are admissable against that accused to show the existence of the agreement and his complicity in it. The acts and

declarations of the other alleged conspirators are not admissable against an accused to show that the accused is a party to the offence unless the criteria set out above are met. The acts and declarations of a co-conspirator are therefore initially admissable to show the existence of the agreement alleged, and that the alleged co-conspirator was a party to that agreement. They will take on added evidentary force against a particular accused only if the accused can be said based on his own acts and declarations to have probably been a conspirator, and only if the acts and declarations in question are in furtherance of the agreement. Logic suggests that the Crown should first establish that the accused was a probable conspirator before it adduces the evidence of acts and declarations of a co-conspirator who is not on trial. Reality however prevents this neat "pigeon holing" of the evidence. It has long been accepted that the Crown has a wide latitude in leading its evidence, and may lead evidence of co-conspirators' acts and declarations before it leads evidence to establish that a particular accused was a party to the agreement.[327] At the conclusion of the Crown's case the Court must sort out the evidence to determine whether probable participation has been shown against an accused through his own acts and declarations, and to determine what if any of the other acts and declarations of the co-conspirators are admissable on the ultimate determinatin of the accused's liability. Some argue that this process of "conditional admissability"[328] is unique to

conspiracy cases and presents a particular danger to an accused.[329] This is not the case. In many cases evidence will be led which goes to prove the commission of a crime, which does link the accused to the crime. At some point in the Crown's case there must, however, be evidence led which links the accused to the crime. Conspiracy cases are not unique in this regard.

It is arguable, that if the Crown is in possession of direct evidence against the accused who are on trial, that the Court may require the Crown to lead that evidence first before leading evidence of acts and declarations of co-conspirators who is not on trial. This has not however been the practice to date.[330]

B. Trial Judge's Function in a Conspiracy Case

(i) At the close of the Crown's case

(a) Generally

In a criminal case an accused may move for a directed verdict at the close of the Crown's case.[331] The motion will succeed if there is no evidence on which a properly instructed jury could convict the accused of the offence charged. In a conspiracy case there must be

- some evidence of the existence of the agreement alleged

- some evidence directly admissable against the accused showing his participation in the agreement.

In determining the two issues outlined above, the so-called rule in Hodge's case has no application.[332] If the evidence is reasonably capable of supporting the inferences required to establish the two facts set out above then the case must go to the trier of fact.

(b) The Process in a Conspiracy Case

In a conspiracy case where a motion for a directed verdict is brought the trial Judge should consider the following issues in the following order:

-(1) on all of the evidence heard could a reasonable trier of fact properly instructed conclude that the Crown had proven the existence of the agreement alleged?[333] This determination will require that the trial Judge reach a conclusion as to the nature of the object of the conspiracy alleged in the indictment.[334] If he has satisfied that there is no evidence from which a jury could infer that an agreement with the object alleged in

the indictment existed then the trial Judge should direct a verdict with respect to all accused.[335]

-(2) If the trial judge is satisfied there is a calse to answer on the first issue, he should then consider whether on the evidence directly admissible against each accused a reasonable trier of fact properly instructed could conclude that there was evidence that the accused was probably a party to the agreement alleged. If there is no such evidence the trial Judge should direct a verdict of acquittal with respect to that particular accused.[336]

(ii) At the End of the Case

(a) The Process of Adjudication

The direction to be given by the trial Judge at the end of the case is set out in Regina v. Carter.[337] The relevant extract appears below.

> "In charging the jury on this question the trial Judge should instruct them to consider whether on all of the evidence they are satisfied beyond a reasonable doubt that the conspiracy charged in the indictment existed. If they are not satisfied then the accused charged with participation in the conspiracy must be acquitted. If however, they conclude that a conspiracy as alleged did exist they

> must then review the evidence and decide whether on the basis of the evidence directly receivable against the accused, a probability is raised that he was a member of the conspiracy. If this conclusion is reached they then become entitled to apply the hearsay exception and consider evidence of the acts and declarations performed and made by the co-conspirators the furtherance of the objects of the conspiracy as evidence against the accused on the issue of his guilt. This evidence taken with the other evidence may be sufficient to satisfy the jury beyond a reason able doubt that the accused was a member of the conspiracy and that he is accordingly guilty. They should be told however that this ultimate determination is for them alone, and that the mere fact that they have found sufficient evidence directly admissable against the accused to enable them to consider his participation in the conspiracy probable and to apply the hearsay exception does not make a conviction automatic. They should be clearly told that it is only after they have become satisfied beyond a reasonable doubt on the whole of the evidence on both issues, that is, the existence of the conspiracy and the accused membership in it, that they may convict, and that it is open to them if they think its right or if they are not satisfied, to acquit the accused, even after reaching their initial determination of probable membership in the conspiracy which enabled the application of the hearsay exception. The trial Judge should point out to the jury as well the evidence directly admissable against the accused on the threshold issue of his membership in the conspiracy to assist them in that determination."

Carter and other cases would seem to lend support to the following five step format to be used in instructing the trier of fact in conspiracy cases:[338]

STEP ONE

The trial Judge should instruct the jury that there are two issues

- did the agreement alleged in the indictment exist?
- if it did, who were the parties to that agreement?

STEP TWO

The trial Judge should direct the jury to consider first the question of the existence of the agreement alleged. In doing so they should be told to look at all of the evidence both inculpatory and exculpatory which is relevant to that issue. If they conclude on the basis of all of that evidence beyond a reasonable doubt that the alleged agreement existed they should then proceed to consider the question of who were parties to that agreement. If they are not satisfied beyond a reasonable doubt then they should acquit all accused. It is important in this stage of the instruction that the trial Judge clearly instruct the jury as to the nature of the agreement alleged. He must make it clear to them what the object of the agreement alleged is, since in this phase of their deliberation the jury must determine whether they are satisfied beyond a reasonable doubt that the Crown has proved the existence of the specific agreement alleged.

STEP THREE

If the jury have not acquitted all accused at the end of Step 2 they should be told to look at each accused individually, and to decide on the basis of evidence which is directly relevant to and admissable against that accused whether the accused was probably a member of the conspiracy: This requires that the trier of fact determine whether it is more likely than not that as a accused was a member of the conspiracy. If the jury are not so satisfied with respect to one or more of the accused they should acquit each accused with regard to whom they are not satisfied. In this phase of the instruction the trial Judge should outline to the jury all of the acts and declarations which are potentially admissible against each being accused on this issue. This should be done separately for both accused. He should also outline to the jury any evidence which might exist which is exculpatory on this point. Finally, he should direct the jury that they can consider these acts and declarations done by a particular accused in the context of all of the evidence including acts and declarations of others to determine what inference should be drawn from the accused acts and declarations.

STEP FOUR

The jury should then be instructed to repeat step 3 with respect to any of the named but unindicted co-conspirators against whom the trial Judge has concluded that there is some evidence

from which reasonable trial of fact properly instructed could conclude that the person was a conspirator. If there is no such evidence then the trial Judge should direct the jury as a matter of law that the particular alleged co-conspirators are not co-conspirators, and he should in fact remove from the jury's considerations acts and declarations done by that alleged co-conspirator. In this phase of the instruction the trial Judge should also deal with any allegation that a person or persons unknown were parties to the conspiracy. If there is no evidence to support the finding of unnamed co-conspirators the jury should be instructed to ignore that part of the allegation. If there is evidence of acts and declarations done by unnamed co-conspirators the trial Judge should direct the jury to determine whether based on those acts and declarations the unnamed persons were probably parties to the conspiracy.

STEP FIVE

The jury should then be instructed to consider the case against each accused who remains after step 3 taking into account evidence which is directly admissable against that accused and also the evidence of acts and declarations done in furtherance of the agreement by any other individual who the jury has decided in steps 3 and 4 were probably co-conspirators. The jury should be told that to decide based on all of that evidence whether they are satisfied beyond a reasonable doubt that a particular accused was

party to the agreement. It must be made clear to the jury that a finding of probable participation at Stage 3 does not necessitate a conviction, and that a conviction can flow only if based on all of the evidence admissable in step 5 they are satisfied beyond a reasonable doubt of the accused participation. During this phase of the instruction the trial Judge should tell the jury what acts and declarations are capable of being in furtherance of the conspiracy. He should define the in furtherance requirement for them and tell them that it is for them to determine whether a particular act or declaration was in furtherance of the conspiracy. If there are acts and declaration of co-conspirators which are clearly not in furtherance of the agreement and which may have some potential prejudice to an accused (eg. a confession by a co-conspirator) the trial Judge should tell the jury that such evidence is not capable of being viewed as in furtherance of the agreement.

XV. CONSPIRACY TRIALS AND THE RULES OF EVIDENCE REQUIRING CORROBORATION

It is now clearly established that there is no specific or particular direction that is required with respect to the evidence of an accomplice.[339] Unindicted co-conspirators are accomplices. The jury must be told to view their evidence with caution, and the jury should be told what specific factors if any,

they should consider in assessing credibility (eg. an agreement that a Crown not to prosecute the co-conspirator).

Two specific issues relating to corroboration require further consideration. The first arises in a case like the one described below. Assume X and Y are charged with conspiracy to commit murder. Z is an unindicted co-conspirator. If Z testifies then the jury will no doubt be instructed to view his evidence with caution because of his complicity in the alleged crime. Assume however, that Z does not testify but that the Crown calls B who was not involved in the conspiracy to give evidence of acts and declarations done by Z in furtherance of the conspiracy. The Supreme Court of Canada has held that if B is not an accomplice himself then there is no need to give any particular warning to the jury as to the inherent danger in relying on his evidence, even though his evidence consist in part of the acts and words of 2, a co-conspirator.[340] Potentially Z's words have more force coming from the mouth of B, than if they came from Z himself!

The second issue concerns the conspiracy charges where the substantive offence which is the object of the agreement carries a statutory requirement of corroboration.[341] These cases remain unaffected by decisions which have eliminated the common law requirement of a specific warning to the jury with respect to

certain types of witnesses. If an accused is charged with conspiracy to commit a substantive offence which substantive offence requires corroboration, there is no requirement of corroboration in order to convict the conspiracy charge.[342] Consequently if X and Y are charged with perjury they cannot be convicted on the evidence of Z only. The can, howevwer, be convicted of conspiracy to commit perjury based on the same evidence.

XVI VERDICTS

(i) Included Offences

Conspiracy to commit crime "X" is not an included offence on a charge which alleges the commission of crime "X".[343] The two offences are entirely distinct. It should be noted however that the present provisions of the Criminal Code may well allow a plea to a conspiracy charge where the accused is charged with a substantive offence assuming the Crown is agreeable to that plea.[344]

(ii) Conspiracy to Commit a lesser Offence as an included Offence in a conspiracy charge

Consider this example, X and Y are charged with conspiracy to commit robbery. X takes the stand and testifies in

his own defence. He admits agreeing to steal a sum of money from the victim but states that he understood that the money was to be taken from the pocket of the victim's jacket while it was hanging in a coat room. In fact Y planned to take it from X by force. If X's evidence raises a reasonable doubt then one has a situation where X has agreed to a theft and Y has planned a robbery. Can X be convicted of conspiracy to commit theft? The Quebec Court of Appeal has answered the question in the affirmative[345] and the Ontario Court has accepted that analysis without comment.[346] The English Court of Appeal has reached a different conclusion.[347] If one approaches the question from the vantage point of the "mutuality of object" definition of a conspiracy then there is clearly no agreement between X and Y since they have not reached a consenus to pursue a mutually held goal.

(iii) Combinations of Verdicts where more than one Accused is Charged with Conspiracy

Prior to 1974 it was firmly established that if two accused were tried together for conspiracy and there were no other alleged conspirators then the trier of fact could not acquit one and convict the other.[348] There had to be two acquittals or two convictions and a reasonable doubt about the guilt of either accused required the acquittal of both.

It had also been held that if the two accused were alleged to have conspired together, and with no one else, were tried separately that the acquittal on the merits of the second person tried necessitated the quashing of the earlier conviction of the first person.[349] The House of Lords in D.P.P. v Shannon[350] rejected the state of the law described above. The Supreme Court of Canada in Guimond[351] appears to have accepted in part at least, the approach taken in Shannon.

The present law is somewhat unclear, however it can be safely said that where the two alleged conspirators are tried separately the acquittal of the accused on the second trial no longer necessitates the quashing of the earlier conviction rendered against the accused at the first trial.[352] The first conviction will be quashed only if on an examination the entirety of the record of both trials the Court concludes that the verdicts are inconsistent and therefore demonstrate a miscarriage of justice.[353] Where the two accused are tried jointly the law remains somewhat unclear. In Shannon the law Lords split on the correctness of the "both or neither" charge to the jury. Lords Morris and Reed favoured the traditional rule,[354] as did Lord Salmon save in the "most exceptional circumstances".[355] Lords Simon and Vicount Dilhorne favoured following the rule only where the evidence admissable against the two accused was not substantially different. In the case where one of the two had

confessed the evidence against the convessor would generally be significantly different, and in view of Lord Simon and Viscount Dilhorne it would be appropriate in that case that one accused be convicted and the other acquitted.[356]

In Guimond, Mr. Justice Ritchie referred to this difference of opinion in the House of Lords but chose not to deal with them directly. Rather he indicated that the problem should not arise since in cases where the evidence was substantially more powerful against one accused than another, there should be separate trials.[357] Chief Justice Laskin in dissent in Guimond expressed a strong preference for the preservation of the law as it stood prior to Shannon.[358]

Since Guimond Canadian authority has been somewhat split. None of it has attempted a detailed analysis of the opposing views articulated in Shannon.[359]

Since the decision in Shannon, the English Parliament has given statutory recognition to the opinion of Lords Simon and Viscount Dilhorne in Sections 5(8) and 5(9) of the Criminal Law Act.[360]

XVII CHARTER IMPLICATIONS AND THE LAW OF CONSPIRACY

Criminal law and procedure cannot be discussed without reference to the Canadian Charter of Rights and Freedoms (herein referred to as the Charter). That document has had an extensive effect on criminal law and procedure. As the courts develop and interpret the words of that document the effect will become pervasive.

One issue which has strong application to conspiracy cases, which raises constitutional questions is the agency exception to the heresay rule. As noted above, that rule permits the Crown to induce evidence of statements made by co-conspirators, and to use that evidence against the accused, without calling that co-conspirator as a witness. The trier of fact may thus use the words of the co-conspirator against an accused when the accused has not had the opportunity to confront the maker of those statements (i.e. the co-conspirator) by way of cross-examination. The accused may of course cross-examine the witness who is testifying to the words said by the co-conspirator, but this is hardly a full substitute for a cross-examination of the actual maker of the statements.

The rules of evidence be they judge made or creatures of statute are clearly subject to the provisions of the Charter.[361] A rule of evidence which does not accord with the principles of fundamental justice and which results in the deprivation of life, liberty or security of the person will be rendered inoperative by the combined fact of section 7 and section 52 of the charter.[362] Similarly a rule which denies effective and full cross-examination will be contrary to the provisions of section 11(d) which guarantee a fair hearing to a person charged with an offence.[363] Several courts have recognized that section 7 and/or section 11(d) of the charter may modify or render inoperative existing rules of evidence,[364] however to a large extent those courts have held that the particular rules challenged in the cases before them did not offend the relevant charter provisions.[365] The decision in R. v. Williams[366] is particularly instructive. In that case the Ontario Court of Appeal recognized that the Charter may serve to modify existing statutory and common law rules relating to heresay evidence where their strict application may result in the denial of a fair trial. The court concluded in that case however that the application of the established rules did not operate to deny an accused a fair trial.[367]

No Canadian case to date has challenged the agency exception to the heresay rule as unconstitutional. If such a challenge were mounted the following observations are pertinent:

- while the charter, unlike the American constitution, contains no express guarantee of a right to confront witnesses called against an accused, other provisions of section 7 and section 11(d) are clearly wide enough to embrace a right of confrontation.[368]

- all forms of heresay evidence violate to one degree or another an accused's right to confront those giving evidence against him.[369]

- not all types of heresay evidence will offend other provisions of the Charter.[370] Where the heresay evidence tendered has substantial guarantees of trustworthiness, apart from those engendered by a right of confrontation, and where it is impossible or impracticable to produce the actual maker of the statement, then in all likelihood heresay evidence will not offend any constitutional guarantee.[371] Necessity and reliability should be the parents of any rule which permits heresay evidence in a criminal trial.

Absent Canadian authority it is helpful to examine the American case law dealing with the constitutionality of the co-conspirator exception to the heresay rule. In doing so however it must be remembered that the rule is applied differently from State to State, and in many cases the existing co-conspirator rule

is more limited than the rule as developed in Canada.[372] For example many states require direct evidence admissable against an accused of his participation in the conspiracy before the trier of fact is permitted evidence of acts and declarations of co-conspirators.[373]

Although the Sixth Amendment right to confront witnesses brought against an accused is said to have been a product in part of perceived prosecutorial abuses in conspiracy cases[374] American courts have by and large admitted statements made by co-conspirators in furtherance of and during the existence of the conspiracy.[375] On the other hand the United States Supreme Court has established certain criteria for the admission of heresay evidence generally.[376] That criteria requires that the witness not be available to testify, and that be strong indicatia that the heresay evidence is reliable.[377]

A detailed review of the American case law can be found in "Federal Rules of Evidence 801(d)(2)(e) and the Confrontation Clause: Closing the Window of Admissability for Co-Conspirator Heresay".[378] That article makes a strong argument in favour of the limitation of the agency exception to the heresay rule to cases where the co-conspirator cannot be produced at trial, and the evidence is not crucial to the prosecution's case or devastatingly prejudicial to the defendant.[379] The author argues

that these limitations are necessary because co-conspirator's statements lack the necessary indicatia of trustworthiness to permit their admission except in the most limited cases. Whether Canadian courts would go so far as does the author of the above-referred to article is doubtful. However it is submitted that in a case where there is crucial evidence from a co-conspirator, who is not to be called by the Crown, but is available as a witness, a strong argument can be made that the evidence should be excluded by virtue of section 7 and/or 11(d) of the charter.[380] The argument would be strongest in a case where the co-conspirator was not charged, but was not to be called by the Crown and was available to give evidence. The argument could also be made where the Crown had jointly indited co-conspirators thus rendering a co-conspirator a non-compellable witness at the instance of his co-accused.[381] It could be argued in that case that the Crown had effectively made a co-conspirator unavailable to give evidence, and unavailable to be cross-examined by an accused and that consequently his statements should not be admissible against the accused pursuant to the agency exception to the heresay rule.

The argument outlined above is a speculative one and would no doubt involve an "uphill" battle. Given the Supreme Court of Canada's apparent willingness to effect sweeping changes

in our criminal law and procedure under the auspices of the Charter, it is an argument worth making in the appropriate case.

THE END

FOOTNOTES

1. Conspiracy was described as a "form of attempt" by Lord Scarman in Nock v. D.P.P (1978) 67 Cr. App. R. 116 at 1227. See also R. v. Dungey (1979 51 C.C.C.(2d) 86 (Ont. C.A.)

1a. There has not been a great deal of academic writing on the subject in the last five years. The principle contemporary texts are:

P. Gillies: The Law of Criminal Conspiracy; Sydney (1981);

M. Goode: Criminal Conspiracy in Canada; Toronto, Carswell (1975);

MacFarlane: Drug Offences in Canada; Toronto, Canada Law Book (1986), see chap. 8;

D. Stuart: Canadian Criminal Law; Toronto, Carswell (1982) c.11;

A. Mewett, M. Manning: Criminal Law (2nd ed.); Toronto, Butterworths (1985) c. 6.

2. R.S.C. 1970, c. C-34 and amendments thereto.

3. S. 127 which prohibits attempts to obstruct justice provides another example where the substantive offence is defined to include prepatory offences. See R. v. May (1984), 13 C.C.C. (3d), 257 (Ont. C.A.) leave to appeal to S.C.C. refused.

4. The amendments to s. 423 were part of the extensive amendments effected by S.C. 1985 c.19. The amendments to s. 423 are found in s. 62 of the amending statute.

5. The absence of a definition of the crime, in supposed codigying legislation is very difficult to understand.

6. See s. 423(1)(d). Other inchoate offences carry maximum which are less than, and in most cases half of, the maximum provided for the completed offence. See s. 421 and s. 422.

7. See Bolduc v. A.G. Quebec (1982), 68 C.C.C.(2d) 413 (S.C.C.) Affirming (1980) 20 C.R. (3d) 372. Note: Bolduc did not involve s. 423(1)(a), and the comments on the section are brief and by way of obiter.

8. See Ordinance of Conspirators 1293, 21 Edw. 1.

9. E. 9 see:

Regina and Gralewicz et al (1980) 54 C.C.C. (2d) 289 (S.C.C.)

Aff. (1979) 45 C.C.C.(2d) 188 (Ont. C.A.)

R. v. Celebrity Enterprises (No. 2) (1977), 42 C.C.C. 478 (B.C.C.A.)

R. v. Jean Talon Fashion Centre (1975), 22 C.C.C.(2d) 223 (Que. S.C.)

R. v. Bendall et al (1977), 36 C.C.C.(2d) 113, (Man. C.A.)

Wright et al v. The Queen, [1964] 2 C.C.C. 201 (S.C.C.)

10. For a recent criticism of the former s.423(2) see W. Wilson "The Political Use of Criminal Conspiracy" (1984), 42 U.T. Fac. L.R., p. 60 at p. 74. See also: Law Reform Commission; Working Paper #45, Secondary Liability, at p. 47.

11. Gralewicz, supra. n.9, provides an example where the Crown unnecessarily resorted to s.423(2) to allege a conspiracy to violate the Canadian Labour Code. The alleged object of the conspiracy included conduct which was clearly criminal extortion and which could have supported a charge under s.423(1)(d).

12. Interestingly, there is no provision for conspiracies to commit hybrid offences. These presumably must be treated as conspiracies to commit indictable offences. See Interpretation Act, s.27. S. 421(e) makes attempts to commit hybrid offences, indictable or summary at the option of the Crown.

13. The Provincial Offences Act S.O. 1979 c.4 does away with the concept of summary conviction offences insofar as offences created by Provincial Legislation are concerned.

14. The authors of "Counselling, and Criminal Conspiracy" (1984), 16 OTTAWA L.R. 331 at 337-339 see the new legislation as encompassing Provincial offences and are critical of the wording for that reason.

15. See cases set out above at note 9.

16. The basic elements of criminal liability are discussed by all of the text written at length. For example, see Stuart, supra note at chapters 2 and 3. Several recent judgments of the S.C.C. also consider these basic principles, e.g. see

- City of Sault Ste Marie, [1978] 2 S.C.R. 1299

Sansregent v. The Queen (1985), 18 C.C.C. (3d) 223

Reference Re S.94(2) of the Motor Vehicles Act (1985), 23 C.C.C. (3d) 289 at 310 (S.C.C.)

17. The danger for the prosecution lies in charging one offence and proving another. This can happen where he alleges a conspiracy to do "X" and proves a different conspiracy; or where he alleges a conspiracy to do "X" but proves complicity in the substantive offence only. As to the former case see the criticism by Judge Murphy in R. v. Gerakiteys (1984) 12 A. CRIM. R. s.4 and with respect to the latter see R. v. Jean and Piesinger (1979), 7 C.R. (3d) 338 at 357. AFF. without reference to this point (1980), 51 C.C.C. (2d) 192

18. Many of the criticisms of the law of conspiracy take aim at the vague nature of the offence and uncertainty that the vagueness causes in the conduct of the trial and the charging of the jury. e.g. see Stuart supra n. 1a at p.557, Wilson supra n.10, see also R. v. Partridge (1930), S.R. (N.S.W.) p.10. Goode supra n.1a at p.12-13. The Law Reform Commission in Working Paper #45 supra n.10, in a brief treatment of the law of conspiracy makes the remarkable assertion that "agreeing is an easily understood concept." One must assume the authors have some insight which has escaped others. Sad to say, the authors don't tell us what the word means but only that it must be "positive".

19. Goode supra n.1a p.6-8

- Brodie v. The Queen, [1934] S.C.R. 165 at 168

U.S.A. v. Kissel (1910), 218 U.S. 601 at 608

20. R. v. Trudel (1984), 13 C.C.C. (3d) 342 (Que. C.A.)

21. If the allegation is made pursuant to s.423(1)(d) the object of the agreement must be an indictable offence. If the object is a summary conviction offence the

allegation is made pursuant to s.423(1)(e). Common law authorities dealing with criminal conspiracies which do not involve the commission of a crime have no relevance in Canada e.g. see Gillies n.1a at Chaps.4,5,7

22. R. v. Chow Sik Wah (1964), 42 C.R. 87 (Ont. C.A.). The term legal impossibility is sometimes applied to cases where the parties' object, does not involve the commission of a crime. The term is misleading. There is no impossibility involved. Rather the object is not criminally prohibited.

23. R. v. Scott (1978), 68 Cr. App. R. 164 (C.A. CRIM DIV.) As with all crimes, liability for conspiracy cannot rest in intent alone. See also R. v. Mulcahy et al (1868), L.R. 3 H.L. 306 at 317.

24. G. Williams Criminal Law: The General Part (1961) at p.666-668. The essence of conspiracy is bilateral, or multilateral. It has been said that one person can no more conspire, than one bird can flock.

25. R. v. Leigh (1775), 174 E.R. 687.

Atlantic Sugar Refining Co. Ltd. v. The Queen (1980) 16 C.R. (3d) 128; reversing (1978), 41 C.C.C. (2d) 209 (Que. C.A.)

G. Williams Text Book of Criminal Law (2nd ed) London, Stevens & Co. (1983), Chap. 18

G. Williams, supra, n.24 at p.667.

25a. R. v. Walker, [1962] Crim. L.R. 458 (C.A.)

R. v. Mills, [1963] L.R. 181 (C.A.)

R. v. O'Brien (1974), 59 Cr. App. R. 222 at 225 (C.A. Crim. Div.)

R. v. Lessard (1983) 10 C.C.C. (3d) 61 at 84-87 (Que.C.A.)

25b. Mills supra n.25a; Goode supra n.1a at 15; see also A.G. Reference (No.1 and 2 of 1979 [1979] 3 W.L.R. 577, an attempt case where the details of the criminal plan were not formulated

26. G. Orchard "Agreement in Criminal Conspiracy" 1974 Crim. L.R. 297

Atlantic Sugar Refining Co. Ltd. v. The Queen supra n.25

27. Ibid. see also P. McKinnon "The Contract as Conspiracy: A Critique of R. v. Sokoloski. 10 OTTAWA L.R. 448 see also Goode supra n.1a p.10-12

28. Criminal Law Act 1977 S. 1(i)(a). As to the scope of the section see G.Williams; Textbook of Criminal Law (2nd ed.) chap. 18; and Smith and Hogan. CRIMINAL LAW (5th ed.) p. 230-236. See also Ru Hollinshead et al (1984) 80 Cr. App. R. 285 (C.A.) Reversed [1985] CRIM. L.R. 301.

29. P. Mackinnon "Developments in the law of Conspiracy" (1980) 59 CAN. BAR. REV. 301, 308; cited with approval in R v. Lessard (1983), 10 C.C.C. (3d) 61 at 87 (Que. C.A.)

29a. R v. Henderson (1984),14 A. CRIM. R. 274 (S. AUST. C.A.)

30. For a recent decision considering the scope of accessorial liability under s. 21 see R v. Moore (1984), 15 C.C.C. (3d) 541. It is clear that the assistance need not be rendered during the actual preparation of the offence. Quare: Do the words "for the purpose of aiding" used in S. 21(1)(b) import a mutuality of object requirement to the concept of aiding.

31. This rationale for the crime is recognized and criticized by Gillies supra n. 1a at p. 3-4. The rationale perhaps accounts for the fact that the common law never recognized fraud as a crime but did hold that conspiracies to defraud were indictable. The citizen could protect himself from one cheat, but not from groups of cheats acting on an agreement.

32. [1977] 2 S.C.R. 523, 33 C.C.C. (2d) at 504-505.

32a. The different interpretations of Sokoloski are set out in R v. Kelly (1984), 13 C.C.C. (3d) 283, 41 C.R. (3d) 56 (Sask. C.A.). Justice Cameron prefers the view that Sokoloski turned on the existence of an agreement to transport and sell, not on the existence of a mere buyer-seller relationship.

33. e.g. see:

R v. Topley (1977), 3 B.C.L.R. 304

R v. Bengart (No. 13) 15 C.R. (3d) 62 (B.C.S.C.) AFF (1980), 53 C.C.C. (2d) 481 (B.C.C.A.) leave to appeal to S.C.C. 34 N.R. 350 m.

34. R v. Cotroni (1979), 45 C.C.C. (2d) 1, 7 C.R. (3d) 185 (S.C.C.)

35. supra n. 32(a).

36. see comment by Professor Deslile at 41 C.R. (3d) 56.

37. R v. Hunter et al. (1983), 23 C.C.C. (3d) 331 (Alta. C.A.)

38. Ibid.

39. Chief Justice Dickson's analogy to dogs fighting over a bone in Cotroni, becomes one dog waiting to steal the other's bone in Hunter.

39a. For example passages in R v. Longworth et al. (1982), 67 C.C.C. (2d) 554, (ONT. C.A.) support both views although taken as a whole the judgment appears to favour the materiality of object approach.

40. (1981), 56 C.C.C. (2d) 193 at 452-455 (ONT. C.A.) AFF on other grounds, without reference to this point (1985), 19 C.C.C. (3d) 1 (S.C.C.)

41. Ibid. at 452-452.

42. (1984), 40 C.R. (3d) 222 (B.C.S.C.)

43. See Annotation to Taylor found in 41 C.R. (3d) after the Taylor judgment.

44. This limitation defeats the prime purpose of conspiracy i.e. to allow the state to impose liability on those who plot and scheme but do not necessarily do the "dirty deed" themselves. See the judgment of the House of Lords in R v. Anderson (1985), 81 Crim. App. R. 253, where the Court holds that an agreement to take part in steps prepatory to the commission of an offence will suffice under s. 1(1) of the Criminal Law Act 1977.

45. e.g. see:

R v. Kelly (1984), 13 C.C.C. (3d) 285 (Sask. A.C.)

R v. Lessard (1983), 10 C.C.C. (3d) 61 (Que. C.A.)

R v. Urquhart - unreported, noted at 14 W.C.B. 220 (N.S.S.C. App. Div.)

R v. Gauthier (1983), 51 N.B.R. (2d) 90 (N.B.S.C. App. Div.)

R v. Dixon (1984), 16 C.C.C. (3d) 431; per Lambert J.A. in dissent; the majority did not deal with the point (B.C.C.A.)

P. McKinnon "The Contract as Conspiracy: An Intrigue of R v. Sokoloski" (1978), 10 OTT. L.J. 448.

P. Gillies "The Indictment in Criminal Conspiracy" (1978), 10 OTT. L.J. 273 at 274-278.

Goode supra n. 1a at pp. 10-14.

A. Harno "Intent in Criminal Conspiracy" (1941), 89 U. Penn. L.R. 624 at 633 and following

Direct Sales Co. v. U.S. (1940), 319 703 at 705-713.

U.S. v. Falconi 109 F. (2d) 579 at 581 (end CIR. Ct. App.) AFF on other grounds 311 U.S. 205.

45a. U.S. v. Falconi et al. 109 F. (2d) 579 (1940), U.S. Fed. CT. App., App. 2nd cir.

G. Williams: Criminal Law: The General Part p. 668.

R. v. Hawkesley, [1959] Crim. L.R. 211 (Q.B.)

R v. Scott (1978), Cr. App. R. 164.

46. S. 21(2) the so called "common design" provisions renders an accused liable for crimes which he knew or ought to have known would be the product of the design. Liability clearly extends to substantive crimes other than those agreed to by the accused.

47. For an example where substantive offences were clearly committed by the accused, but where an allegation of conspiracy failed because of the absence of a material criminal object see R v. Jean and Piesinger (1979), 7 C.R. (3d) 338 (Alta. C.A.) AFF without reference to this point, [1980] 1 S.C.R. 400.

48. R.S.C. 1970 chap. C-37 and amendments thereto.

49. Ibid.

50. In several cases where the indictment was so framed, the Courts have quashed the indictment e.g. see:

R v Miron (1974), 28 C.R.A.S. 261 (Ont. C.A.)

R v Marcoux and Defosses (1974), 13 C.C.C. (2d) 122 (B.C.S.C.)

R v Schumiatcher (1962), 133 C.C.C. 69 (Sask. C.A.) 38 C.R. 411

Brodie The King, [1936] S.C.R. 188

see also comments of Dickson J. in Cotroni supra n. 34 at p. 18 (C.C.C.)

51. All of these facts serve to raise the charge from the general to the particular and hence to provide compliance with s. 510(3).

52. e.g. see:

R. v. Schumiatcher supra n. 50 and
R. v. Barudin et al. (1983), 33 C.R. (3d) 319

R. v. Dass (1979), 49 C.C.C. (2d) 194 (Man.C.A.) leave to appeal to S.C.C. refused.

53. see:

dissent of Lambart J.A. in R. v. Dixon supra n. 45

see also:

R. v. Gerakiteys (1984), 12 A. Crim. R. 54 (Aust. H.C.)

54. e.g. see:

R. v. Bengart et al supra n. 33 (B.C.C.A.)

R. v. Graham et al. (1954), 108 C.C.C. 153 (B.C.C.A.)

R. v. Meyrick and Ribuffi (1929), 21 Crim. App. R.

R. v. Ardalan, [1972] 2 All E.R. 257 (C.A.)

R. v. McNamara et al. supra n.40 (Ont.C.A.)

55. e.g. see:

R. v. Longworth et al. supra n. 39a

R. v. Gauthier supra n. 45

J. Goberman: "The Multiple Conspiracy Problem in Canada" (1982), 40 U. Tor. FAC.L.R.

see also:

American Authority such as

U.S. v. Peoni 100 F. 2d 401 at 403 (2nd C.R. 1938)

U.S. v. Rush 666 F. 2d (2nd C.R. 1981)

H. Galvin "Multiple Conspiracies" 42 Brook. L.R. 243 (1975)

56. R. v. Walters et al. (1979), 71 Cr. App. R. 115 at 119 (C.A.)

R. v. Cole (1984), 9 A. C.R.P.M.R. 306

57. R. v. Paterson et al (1985) 18 C.C.C. (3d) 137 (Ont. C.A.)

58. Very general conspiracies must still be alleged in a manner which complies with s. 510.

59. See cases referred to above at n. 55 and in particular dissent of Lambart J.A. in Dixon

60. R. v. Carothers an unreported decision of B.C. Cty. Ct. released January 24, 1979

R. v. Gill, [1969] 3 C.C.C. 115 (B.C.C.A.)

R. v. Maria, [1957] O.S.R. 512

61. e.g. see:

Griffiths, [1966] 1 Q.B. 589

R. v. McDonald (1963), 10 C.C.C. (2d) 488 (B.C.C.A); McDonald is a typical case where the Crown alleged a

"wheel" conspiracy but failed to prove a rim joining the spokes.

62. supra n. 53

63. R. v. Cotroni supra n. 34at pp. 190, 198 (C.R.)

R. v. Simmonds, [1969] 1 Q.B. 685 51 Cr. App. R. 316 at 332

64. The combines cases are replete with examples of conspiracies which had a M membership, see also Cotroni supra n. 36.

65. Cotroni is an example of a case where a new agreement resulted from a drastic change in the "terms" of an existing agreement see also R. v. Handleman (1980), 57 C.C.C. (2d) 242 at 252 (Ont. C.A.).

66. For a case where the agreement was described very specificly see D.P.P. v. Nock (1978) 62 C.R. App. R. 116 (H.L.); compare Nock to Harris (1979) 69 C.R. App. R. 122 (C.A.) where the agreement was more broadly described. As to what terms of the agreement which have to be proved to establish the agreement see:

R. v. Cox and Patton, [1963] 2 C.C.C. 148 (S.C.C.)

R. v. Bengart (1980), 15 C.R. (3d) 114 (B.C.C.A.) have to appeal to S.C.C. refused 53 C.C.C. (2d) 481.

See also:
R v. May supra n.3 where it was held that the allegation of specific overt acts in the Crown's opening did not change the broad nature of the conspiracy alleged

68. R. v. Bloomfield et al. (1973), 21 C.R.N.S. 97 (N.B.S.C. App. Div.)

R. v. Graham et al. (1954), 108 C.C.C. 153 M (B.C.C.A.)

R. v. Addison ex parte Money, [1970] 1 C.C.C. 127 (Ont. C.A.)

R. v. Patterson et al. (1985), 18 C.C.C. (3d) 137 at 143-144 (Ont. C.A.)

69. supra n. 68

70. Ibid

70a. See R. v. Nitra (1983), 10 A. CRIM. R. 370 (Aust. Fed. Ct.) where an example that is much like the one referred to above is discussed. The Court concludes that none of the alleged conspirators can be convicted.

71. To my knowledge there is no case where the Courts have faced the exact issue referred to above. It could arise in cases involving a conspiracy to traffic and import, since conspiracy to import carries a minimum sentence of 7 years (see R. Randall and Weir (1983) 7 C.C.C. (3d) 363 at 376, N.S.S.C. APP. DIV.) but conspiracy to traffic does not.

72. R. v. Vraney et al (1979) 46 C.C.C. (2d) 14 (ONT. C.A.). R. v. Henderson (1984) 14 A. CRIM. R. 274 (S. Aust. C.A.) see also: R. v. McDonald (1959) 126 C.C.C. 1 at P.10 (Cartwright J. in dissent).

73. Ibid; often the evidence is admitted as similar fact evidence, on this topic generally see:

R. v. Sweitzer (1982) 68 C.C.C. (2d) S.C.C.

R. v. Dickinson (1984) 40 C.R. (3d) 384 (ONT. C.A.).

R. v. McNamara et al (1981) 56 C.C.C. (2d) 193 (ONT. C.A.)

74. R. v. Rice (1902) 5 C.C.C. 509 (ONT. C.A.) G. Orchard "Agreement in Criminal Conspiracy" [1978] Crim. L.R. 297.

Johnson v The Queen (1976) 136 C.L.R. 619 at 627.

75. G. Orchard supra n. 74. The prison break by two prisoners who are initially acting independently but impliedly agree to assist each other during the escape is the common example used.

76. U.S. v. Kissel, 218 U.S. 601 at 607 (1910)
R. v. Connelly and McGreavy (1894) 1 C.C.C. 468 at 505 (ONT. C.A.)
R. v. Dass (1979) 47 C.C.C. (2d) 194 at 205 (MAN.C.A.)
Harvey Green (1975) 62 Cr. App. R. 74 (C.A.)
D.P.P. v. Doot [1973] 2 W.L.R. 532 (H.L.) Orchard supra n. 74

77. See supra n.

See also:

Telman v. U.S. 67 F. (2d) 716 at 718 (5th CIR 1933)

78. One cannot abandon a completed crime. This is a rule of general application which is not limited to conspiracy cases. As to the defense of abandonment see:

Henderson v. The King [1948] S.C.R. 226

R. v. Miller and Cockriell (1976) 31 C.C.C. (2d) 177 at 199 (S.C.C.)

79. e.g. see:

U.S. v. Kissel supra n. 76 R v Handleman (1980) 57 C.C.C. (2d) 242 at 252 (ONT. C.A.)

80. R. v. West [1948] 2 K.B. 709 (C.A.)

81. This is a form of frustration which terminates the agreement. Frustration born out of factual impossibility will not terminate the agreement, unless all of the parties (save one) are aware that it is impossible to achieve the goal.

82. R. v. Tanney (1976) 31 C.C.C. (2d) 445. (ONT. C.A.)

R. v. Vraney supra n. 72

83. As to the nature of continuing and non-continuing offences see Bell v. The Queen (1983) 8 C.C.C. (3d) 97 (S.C.C.)

per McIntyre (majority) at P. 111

per Dickson C.J.C. (concurring in result) at P. 101 to 104.

84. Kissel supra n. 76

Fiswick v. U.S. 329 U.S. 211 (1946)

85. R. v. Segal (1925) 45 C.C.C. 32

Churchill v. Walton [1976] 2 A.C. 224 (H.L.)

86. R. v. Rousseau (1985) 21 C.C.C. (3d) 1 (QUE. C.A.)

R. v. O'Brien [1954] S.C.R. 666 at 668, 670, 676

R. v. DeLay (1976) 25 C.C.C. (2d) 575 (ONT. C.A.)

87. supra n. 86

88. supra n. 86 at 668 (S.C.R.)

89. McFarlane supra n 1a at p. 217

Smith and Hogan 5th edition at p.252

90. supra n. 34

91. R. v. Hunter et al (1985) 23 C.C.C. (3d) 331

92. R. v. Dungey (1979) 51 C.C.C. (2d) 86

Gillies supra n 1a at P. 17-18

93. R. v. Miller et al (1984) 12 C.C.C. (3d) 54 (B.C.C.A)

R. v. Kingswell (1984) 14 A. Crim. R. (N.S.W.C.A.)

94. Criminal Code S.19. As with most propositions American authority to the contrary exists, see:

People v. Powell 63 N.Y. 88 (1875)

People v. Flack 125 N.Y. 324 (1891)

95. As to the concept of recklessness in criminal law generally see:

Leary v. The Queen [1978] 1 S.C.R. 907

R. v. City of Sault Ste Marie (1978) 40 C.C.C. (2d) 353 at 362 (S.C.C.)

Sansregret v. The Queen (1985) 18 C.C.C. (3d) 233 (S.C.C.)

95a. This view has held sway in conspiracy to defraud cases in England and Australia see:

R. v. Weaver (1931) 45 C.L.R. 321 at 358

R. v. Allsop (1977) 64 Cr. App. R. 29

see also:

R. v. Sauve et al (1979) 55 C.C.C. (2d) 149

R. v. Kerr (1912) 15 Cr. App. R. 165 at 168

Gillies supra n. 1a at p. 85

Goode supra n. 1a at p.39

96. HARNO Intent in Criminal Conspiracy 89 U. Pa. L.R. 624 at 634 - 635 (1941)

Smith & Hogan supra n. at P. 234 G.

Williams Textbook of Criminal Law 2nd ed. at P. 429-431.

NOTE: Williams and Smith and Hogan based their conclusions on the precise language used in S.1(1) of the Act.

97. R. v. Lessard (1982) 10 C.C.C. (3d) 61 at 86 (QUE. C.A.)

98. (1981) 73 Cr. App. R. 333 (C.A.)

99. supra n. 97

100. R. v. Ancio [1984] 1 S.C.R. 225
10 C.C.C. (3d) 385

101. If criminal conduct is viewed as a continuum in most cases conspiracy occurs before attempt. If the mens rea plays a predominant role at the attempt stage because the Act is not yet complete, then it must play an equal or even stronger role at the conspiracy state where the conduct is even further from a completed offence.

102. As to the rationale for imposing criminal liability for recklessness see:

J.H.Buzzard, "Intent" [1978] Crim. L.R. 5.

J.C. Smith, "Intent a Reply" [1978] Crim. L.R.14

"Codification of the Criminal law: General Principals the Mental Element in Crime," (1970) LAW COMMISSION WORKING PAPERS.

103. see supra n.

104. R. v. Cipolla 46 C.R. 78 at 89, 102 (ONT.C.A.) Appeal to S.C.C. dismissed.

R. v. Griffiths (1965) 49 Cr. App. R. 279 (C.A.)
Goode P. supra n 1a P. 227

R. v. Dass supra n. 52

R. v. Ardalen [1972] 2 All E.R. 257 (C.A.)

R. v. Bengart et al supra n. 33

R. v. McNamara et al supra n. 40

105. R. v. Longworth et al supra n. 39

R. v. Patterson et al supra n. 57

106. The "stake in the outcome" language appears in Falconi supra n. 45

See also:

R. v. Gauthier (1983) 51 N.B.R. (2d) 90 See also cases referred to above n. 45

107. e.g. see U.S. v. Bruno 105 F. 2d 921 (2nd O.R. 1939) Rev. on other grounds 308 U.S. 287 (1939)

108. Smith and Hogan Supra n. 19 at p. 235

R. v. Easom [1971] 2 Q.B. 315

R. v. Husseyn (1977) 67 Cr. App. R. 131

A.G. References 1 an 2 (1979); [1979] 3 W.L.R. 577

109. see:

J.C. Smith [1977] Crim. L.R. 606-607

see also:

R. v. Jackson et al [1978] Crim. L.R. 442

R. v. Reed [1982] Crim. L.R. 819

Goode supra in 1a at 14-15

110. see n. Smith & Hogan supra n. 108

Contra Williams: note at 127 N.L.J. 1165.

111. R. v. Segal supra n. 85

Churchill v. Walton supra n. 85

R. v. Purnell [1978] 6 W.W.R. at 15

R. vs. Sequire (1929) 49 C.C.C. 226 (Ont. C.A.)

Stale v. Spock 426 F. 2d. 105 (1st Cir; 1969)

112. R. v. Nimegeers (1980) 6 Sask. R. 45 at 52 (Sask. C.A.)

R. v. Weaver supra n. 95.

113. R. v. Sansregret supra n. 95 at pp. 233-235.

114. A person who represents that "X" is the truth is a liar if he knows "X" to be false, or if he does not know "X" to be true. In either case, he is misrepresenting his knowledge as to the truthfulness of fact "X".

115. Supra n. 54.

116. R. Randall and Weir (1983), 7 C.C.C. (3d) 363 N.S.S.C. (App. Div.).

Williams: Criminal Law: The General Part at p. 688.

117. R. v. Segal supra n. 85.

118. Supra n. 24.

119. It is the bilateral or multilateral nature of conspiracy which justifies its existence as a distinct inchoate crime.

120. See infra "Verdicts".

121. See:

R. v. Martin (1933), 1 D.L.R. 434 at 440 (Man. C.A.).

R. v. McDonnell, [1966], 1 All E.R. 193 (Bristol Assize).

R. v. Marquardt 18 C.R.R.S. 162 (B.C.C.A.).

Goode supra n. 1a. at p. 109 and following contains a full discussion of corporate liability for conspiracy.

121a. As to corporate criminal liability generally, see CANADIAN Dredge and Dock v. The Queen (1985) 19 C.C.C. 1, and see commentary at (1985) 45 C.R. (3d) 357.

122. KOWBEL v. The Queen, [1954], S.C.R. 498; 100 C.C.C. 47, and see case comment at (1955) C.B.R. 75.

123. Re Midland Bank Trust Co. Ltd. (No. 3), [1979], 2 All E.R. 193.

Interestingly, England has given statutory effect to this anomoly. See s.2(2)(a) of Criminal Law Act 1977.

124. KOWBEL supra n. 122 at 500.

Goode supra n. 1a. at p. 100.

124a. Gillies supra n. 1a. at p. 50.

Farnsworth v. Zerbst 98F. 2d. 541 at 544 (5th C.R. 1938).

Behn v. The King (1936) 38 W.A.L.R. 94.

125. Matusevitch v. the Queen (1977) 51 Aust. L.T.R. 657 (Aust. H.C.)

Smith and Hagan (5th ed) at p. 250-251.

126. R. v. Cosgrove [1948] Tas. S.R. 99 at 105.

Farnsworth v. ZERBST supra n. 124(a).

127. R. v. Murphy and Bieneck (1981) 60 C.C.C. (2d) 1 (Alta. C.A.).

See also:
R. v. Tyrrel [1984] 1 Q.B. 710

R. v. Whitechurch (1980) 24 Q.B.D. 420.

Gillus supra n. 1a at p. 50-52.

Lythgoe v. State 626 P.Rpt. (2d) 1082 (Alaska S.C. 1981).

U.S. v. Holte 236 U.S. 140 (1914).

128. R. v. Burns et al (1984) 79 Cr. App. R. 173 generally see J.C. Smith "Victims as Partners to a Crime" [1962] Crim.L.R. 683.

128a. R. v. Duguid (1906) 75 L.J.K.B. 470.

R. v. MacKenzie (1910) 6 Cr.App. R. 64.

see also:
R. v. Cardinal [1983] 1 W.W.R. 689 (adult can be liable as aider and abettor to 13 year old rapist).

129. The section condifies the common law.

see:
MacLeod v. A.G. for N.S.W. [1891] A.C. 455.

130. Criminal Code s. 423(3) and following. These are discussed in MacFarlane supra n. 1a at p. 238.

130a. Recent examples which refer to the earlier jurisprudence include:

A.G. Reference No. 1 for 1983 (1983) 77 Cr.App. R. 9.

R. v. Tomsett [1985] Crim.L.R. 369.

131. Libman v. The Queen (1985) 21 C.C.C. (3d) 206 (S.C.C.).

131a. Ibid.

132. The approach taken in Libman was foreshadowed by Justice Corey's lucid judgment in Re. Bigelow and The Queen (1982) 69 C.C.C. (2d) 204 leave to appeal to S.C.C. refused 45 N.R. 534.

133. Bolduc v. The A.G. Quebec (1982) 68 C.C.C. (2d) 413, [1982] 1 S.C.R. 573.

Gunn v. The Queen (1982) 54 C.C.C. (2d) 163 (MAN.C.A.) rev. on other grounds [1982] 1 S.C.R. 522.

134. Bolduc supra n. 133.

135. Gunn supra n. 133.

R. v. Dass (1979) 47 C.C.C. (2d) 194 at 206 (MAN.C.A.).

R. v. Baldini (1984) 51 A.R. 89 (Alta.C.A.).

Contra: R. v. Lai and Lau (1985) 24 C.C.C. (3d) 238 (B.C.C.A.).

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125. Matusevitch v. the Queen (1977) 51 Aust. L.T.R. 657 (Aust. H.C.)

Smith and Hagan (5th ed) at p. 250-251.

126. R. v. Cosgrove [1948] Tas. S.R. 99 at 105.

Farnsworth v. ZERBST supra n. 124(a).

127. R. v. Murphy and Bieneck (1981) 60 C.C.C. (2d) 1 (Alta. C.A.).

See also:
R. v. Tyrrel [1984] 1 Q.B. 710

R. v. Whitechurch (1980) 24 Q.B.D. 420.

Gillus supra n. 1a at p. 50-52.

Lythgoe v. State 626 P.Rpt. (2d) 1082 (Alaska S.C. 1981).

U.S. v. Holte 236 U.S. 140 (1914).

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133. Bolduc v. The A.G. Quebec (1982) 68 C.C.C. (2d) 413, [1982] 1 S.C.R. 573.

Gunn v. The Queen (1982) 54 C.C.C. (2d) 163 (MAN.C.A.) rev. on other grounds [1982] 1 S.C.R. 522.

134. Bolduc supra n. 133.

135. Gunn supra n. 133.

R. v. Dass (1979) 47 C.C.C. (2d) 194 at 206 (MAN.C.A.).

R. v. Baldini (1984) 51 A.R. 89 (Alta.C.A.).

Contra: R. v. Lai and Lau (1985) 24 C.C.C. (3d) 238 (B.C.C.A.).

136. See Gunn supra. n. 135 and Bolduc supra n. 134.

The indictments are set in the judgment.

See also:
R. v. Commisso et al unreported judgment released May 10th 1979, Ont.Dist.Ct. In that case the Crown alleged an argument to breach Federal and or state laws.

137. R. v. Dass supra n. 135, R. v. Bengart supra n. 33.

138. Arguably, if the effects of the offence were felt in Canada that could satisfy the "substantial contact" test".

139. R. V. Gauthier (1983) 51 N.B.R. (2d) 90 (N.B.S.C. App.Div.).

140. R. v. Baldini (1984) 51 A.R. 89 (Alta.C.A.).

141. The Crown could lay alternate charges, or it is submitted the Crown could lay one count alleging the locale in the alternative.

142. See section 434 for the basic rule relating to venue. Some of the exceptions are found in s. 434, s. 435, s. 665 and s. 666. Insofar as the exception found in s. 435 is concerned, it should be noted that conspiracy to commit murder is a s. 427 offence. S. 435 is therefore not applicable.

143. Re. Bigelow and the Queen supra n. 132.

R. Cassidy 18 C.C.C. (2d) 1 at 8 (N.B.S.C. App.Div.).

R. v. Trudel ex parte Horbas [1969] 3 C.C.C. 95 (Man.C.A.) have to appeal to S.C.C. refused.

C.M. Powell "Conspiracy Prosecutions" 16 Crim.L. Q. 34 at 39.

R. Ritchie, "The Crime of Conspiracy" (1938) 16 C.B.R. 202 at 205-207.

Goade supra n. 1a. Chap. 4.

144. Ibid.

144a. See also R. v. Lai and Lau supra n. 135.

145. See Criminal Code s. 21, 22.

146. See Criminal Code s. 21(2).

147. The bilateral or multilateral nature of conspiracy is discussed above.

148. Whether the act of agreeng constitutes an act of aiding and abetting will depend on whether it constitutes an act of encouragement or assistance done with the necessary intent.

See:
R. v. Kraveria (1954) 20 C.R. 206 reversed on another pt. 112 C.C.C. 81 (S.C.C.).

149. Dunlop and Sylvester v. The Queen [1979] S.C.R. 881, 8 C.R. (3d) at 363-368.

P. Gillies, Criminal Complicity (1980) at p. 61 and following.

R. v. Clarkson [1971] 1 W.L.R. 1402 at 1405-1408.

150. Ibid.

151. Ibid.

See also:
D.P.P. v. Maxwell [1978] 3 All E.R. 1140 (H.L.).

152. [1947] O.R. 155.
88 C.C.C. 1 (Ont.C.A.).

153. Koury v. The Queen [1964] S.C.R. 212. [1964] 2 C.C.C. 97.

See also:
R. v. Smith [1965] 4 C.C.C. 208 (Ont.C.A.).

R. v. Sweetland (1957) 42 Cr.App. R. 62. contra: (on the facts of the cases)

see:
R. v. Cooper and Compton [1947] 2 All E.R. 701.

R. v. Beach and Owens [1957] Crim.L.R. 687.

154. (1981) 56 C.C.C. (2d) 193 at 453-455; Affirmed without considering this point, 19 C.C.C. (3d) 1 (S.C.C.).

155. R. v. Anderson (1985) 81 Cr.App. R. 253. [1985] Crim.L.R. 651.

Affirming (1984) 80 Cr.App.R. 64.

156. [1984] Crim.L.R. 550; Smith and Hogan (5th ed) suggest that those who agreed to aid and abet someone else commit an offence are not guilty of conspiracy to commit that offence. That result however turns on the wording of s. 1(1) of the Act.

157. (1984) 40 C.R. (3d) 222 (B.C.S.C.).

157a. supra n. 155, R. v. Hollinshead et al (1984) 80 Cr.App. R. 285, provides an example as well. "H" provided "black boxes" to others. The boxes had only one use - the defrauding of the electric company. "H" had no involvement beyond supplying the boxes. The Court of Appeal acquitted "H" on a charge of conspiracy to defraud holding that H's agreement to sell the boxes to "X" who in turn would distribute them to others who would use them to cheat the utility company did not amount to fraud. "H" had no role to play in, or interest in the fraud. It is submitted however, if he was aware that others had agreed to cheat the company using these boxes when he sold them to "X", he was clearly an accessory to their agreement and a party to the fraud if it was committed. See case comment [1985] Crim. L.R. 30. The House of Lords reversed [1985] Crim.L.R. 653, holding that an agreement to supply the boxes knowing of their intended use, made "H" an conspirator whether he was to be party to that fraud or not. See commentary at [1985] Crim.L.R. 653. The House of Lords approach does not rely on aiding and abetting but rather on a "mutuality of conduct approach" to the determination of conspiratorial liability.

158. For a recent case considering the scope of the liability created by s. 21(2) see: R. v. Moore (1984) 15 C.C.C. (3d) 541 (Ont.C.A.).

The classic description of the application of s. 21(2) remains

R. v. Trinneer [1970] S.C.R. 638.
[1970] 3 C.C.C. 289.

159. Eg. see R. v. Turkiewicz and Barrow (1979) 50 C.C.C. (2d) 406 (Ont.C.A.).

160. (1983) 6 C.C.C. (3d) 516, (B.C.C.A.) leave to appeal to S.C.C. granted.

161. See R. v. Douglas (1977) 33 C.C.C. (2d) 395 (Ont.C.A.).

162. R. v. Koufis [1941] S.C.R. 481.

163. See R. v. Gagnon (1956) 115 C.C.C. 361 at 365 (S.C.C.). The applicability of the co-conspirator exception to the hearsay rule, to all forms of joint criminal ventures destroys the argument, often made, that conspiracy charges give the prosecution an unfair evidentiary advantage: See Smith and Hogan (5th ed) at p. 249.

164. Criminal Code s. 22.

165. Criminal Code s. 422. It should be noted that the present sections 22 and 422 eliminate the prior references to procuring and inciting and use only word counselling. The change is cosmetic only.

166. R. v. Glubisz (No. 2) 9 C.R. (3d) 340 (B.C.C.A.)

D. Stuart Criminal Law (1982) at p. 583.

167. R. v. Glubisz supra n. 166 at p. 309.

A.G. Reference (No. 1 of 1975) [1975] Q.B. 773 (C.A.) generally see V. Rose, Parties to an Offence (1982) Chap. 4.

168. R. v. Lenton (1946) 88 C.C.C. 1 at 5-6 (Ont.C.A.).

169. R. v. Walia (No. 1) 9 C.R. (3d) 293 (B.C.C.A.).

170. Criminal Code s. 24.

171. This will be determined by reference to the proximity requirement set out in s. 24(2) of the Code.

172. Criminal Code s. 588
s. 589 (1)(b).

173. R. v. Beeman [1979] 2 S.C.R. 16.
Aff. 40 C.C.C. (2d) 76 (B.C.C.A.).

Sheppe v. The Queen (1980) 15 C.R. (3d) 381 (S.C.C.)
Aff. 40 C.C.C. (2d) 76.

Note: Chief Justice Lasken in Sheppe, was careful to note, that in the facts of Sheppe, the conspiracy alleged went beyond the single transaction on which the substantive offense was based. It is still open to argument in the highest Court, that where the scope of

the conspiracy is the same as that of the substantive offence, that there should not be two convictions.

174. (1979) 51 C.C.C. (2d) 86 (Ont.C.A.) Early authority to the contrary is referred to in:

G. Williams Criminal Law The General Post at p. 615, 669.

English Law Commission Working Paper #50.

Inchoate Offences (1973) p. 27-29.

175. Ibid.

176. See R. v. May (1984) 13 C.C.C. (3d) 257 (Ont.C.A.).

177. R. v. Northern Electric (1955) 111 C.C.C. 241 at 263 (Ont.H.C.).

Howard Smith Paper Mills v. The Queen (1957) 118 C.C.C. 321 at 324.
[1957] S.C.R. 403.

R. v. Gunn (1980) 54 C.C.C. (2d) 163 (Man.C.A.). reversed without reference to this point see supra n. 133.

As to the different position prior to the amendment of s. 1(1)(b) of the Criminal Law Act 1977 in 1981.

D.P.P. v. Nock [1978] A.C. 979 at 996 (H.L.).

R. v. Harris (1979) 69 Cr.App.R. 122 (C.A.).

R. v. Bennett (1978) 68 Cr.App.R. 168 (C.A.).

See also:
R. v. Nitra (1983) 10 A.Crim.R. 370

(Aust.Fed.Ct.) for a discussion of the English authorities.

s. 1(1)(b) of the Act, enacted in 1981 reverses Nock and imposes liability even where the conspirators choose inadequate means to achieve their end. The Nock principle remains applicable to common law conspiracies in England.

See also:
R. v. Nitra (1983) 10 Aust.Crim.R. 370 (Aust.Fed.Ct.).

178. R. v. Chow Sik Wah et al [1964] 1 C.C.C. 313 (Ont.C.A.).

See also:
R. v. Burgess (1976) 33 C.C.C. (2d) 126 (B.C.C.A.) (an attempt case).

179. D.P.P. v. Nock supra n. 177.

180. The same problem arises in attempt cases. In Canada, it has been held that the offence is made out, if in the facts, the accused believed them to be, the offence could have been committed.

See:
Criminal Code s. 24(2), and

see:
Detering v. The Queen (1982) 70 C.C.C. (2d) 321 (S.C.C.).

181. As noted above, in n. 177, the English Parliament has overruled Nock by providing that a person is guilty of conspiracy "if a person agrees with any other person or persons that a cause of conduct shall be pursued when if the agreement is carried out in accordance with their intentions either will necessarily amount to or involve the commission of any offence ... or would do so but for the existence of facts which render the commission of the offence ... impossible.

182. Eg. see R. v. Partridge (1930) 30 S.R. (N.S.W.) 410 at 413.

and see comments of:
Lambert J.A. in R. v. Dixon et al supra n. 45,

And see:
the comments of Judge Murphy in

R. v. Gerakiteys (1984) 12 A.Crim.R. 54 (H.C.).

See also:
Krulewitch v. U.S.A. 366 U.S. 440 at 453.

R. v. Jean and Pusinger supra n. 47.

R. v. Boulton (1971) 12 Cox. C.C. 87 and 93.

G. Williams: Criminal Law the General Part at p. 684.

G. Williams "The Added Conspiracy Count" (1978) 128 N.L.J. 24.

183. See supra n. 10.

184. Ibid.

185. Mr. Humphry's famous comparison of electricity to conspiracy is referred to in MacFarlane supra n. 1a at p. 216.

186. Supra note 182, cited with approval in R. v. Schumiatcher [1966] 2 C.C.C. 76 at 120.

187. For example, it is clear that the rules of evidence operate no differently in conspiracy cases than in other cases alleging joint crime. See Gillies supra n. 1a. at p. 11, yet writers and judges continue to refer to "special" rules, eg. R. v. West [1948] 1 K.B. 709 at 720. This writer's personal opinion is that most of the difficulties encountered in conspiracy cases stem from the Court's failure to precisely define the elements of the offence, and a failure to require precision in the allegation made by the Crown in the indictment.

188. The tactic has been criticized see R. v. Hayes [1942] O.R. 52.

R. v. Baron and Wertman (1976) 31 C.C.C. (2d) 525.

R. v. Jean and Piesinger supra n. 47.

189. Supra n. 47.

190. R. v. Brown [1945] O.R. 869 at 874.

R. v. McDonnell [1966] 1 Q.B. 233.

191. See Wilson supra n. 10a.

Goode refers to this as "moral double jeopardy" supra n. 1a. at p. 183.

192. R. v. Koury [1964] S.C.R. 212 at 216.

R. v. Feeley et al [1963] 3 C.C.C. 201 (S.C.C.) and

R. v. Kravenia [1955] S.C.R. 615 at 621 (S.C.C.)

stand firmly in the way of any judicial pronouncement barring convictions for both offences.

193. (1974) 26 C.R.N.S. 1.

194. See supra n. 192.

195. See supra n. 173 at p. 386.

196. [1985] 2 S.C.R. 255
48 C.R. (3d) 97.

197. See supra n. 16.

198. Ibid.

199. See cases referred to supra n. 192.

200. A very circumspect judicial power to stay criminal proceedings which are an abuse of the Court's process is now firmly recognized in Canada.

Jewitt v. The Queen (1984) 21 C.C.C. (3d) 7.

201. Goode supra n. 1a. at p. 184-185. As to the principle to be applied in determining whether sentences imposed for two crimes should be consequtive or concurrent, see:

R. v. Haines (1975) 29 C.R.N.S. 239 (Ont.C.A.) and

see:
R. v. Chisholm [1965] 4 C.C.C. 289 (Ont.C.A.).

202. The power to sever is found in s. 520 of the Criminal Code. As to its application in conspiracy cases

see:
R. v. Jefferson (1972) 6 C.C.C. (2d) 33 (Ont.H.C.)

R. v. Jones (1974) 59 Cr.App.R. 120 at 124.

English Practice Direction found in 64 Cr.App.R. 258.

R. v. Porrier (1961) 37 C.R. 165 (Que.C.A.).

Severence is however not automatic: see Gillies supra n. 1a. at 186-189.

D. Maclean: "The Conspiracy Indictment" 21 Crim.L.Q. 121.

Joinder is criticized in R. v. Arseneau (1977) 36 C.C.C. (2d) 65 (N.B.S.C.App.Div.).

R. v. Purnell [1978] 6 W.W.R. 1.

203. R. v. McNamera et al supra n. 40 at 260-266.

204. See s. 520 of the Criminal Code.

205. As to the application of s. 520 to the severence of counts generally see

R. v. Assaf (1978) 7 C.R. (3d) 267 (Ont.C.A.).

R. v. Simpson (1977) 35 C.C.C. (2d) 337 (Ont.C.A.).

R. v. Keshane (1974) 20 C.C.C. (2d) 542.

206. This provision was introduced in the S.C. 19 1985 C. 19, s. 119 in December 1985, but simply codifies the existing law.

207. R. v. Deol et al (1979) 51 C.C.C. (2d) 41 (Alta.Q.B.).

R. v. Barudin (1983) 33 C.R. (3d) 319.

R. v. Pope (1978) 9 B.C.L.R. 123 (B.C.Ct.Ct.).
45 C.C.C. (2d) 348 (a case dealing with particulars).

Re. Cole and the Queen (1980) 70 C.C.C. (2d) 460, (Ont.H.C.),

goes a step further and holds that a motions court judge can order particulars. Cole was not followed by Sutherland J. in R. v. Morin (1985) 23 C.C.C. (3d) 550.

208. Eg. see R. v. Sternig (1975) 31 C.R.N.S. 272 at 283 (Ont.C.A.).

See:
R. v. Moghal [1977] Crim.L.R. 373.

The cases are collected by G. Ewaschuk at p. 247 of Ewaschuk: Criminal Pleadings and Practise (1983).

209. [1979] 1 S.C.R. 960.
44 C.C.C. (2d) 481.

Guimond takes a different approach than earlier cases eg,

R. v. Baron and Wertman (1976) 31 C.C.C. (2d) 525 (Ont.C.A.).

R. v. Lake (1977) 64 Cr.App.R. 172.

210. Ibid at 497.

211. Some counsel however suggest that an accused against whom there is little evidence stands a better chance of acquittal if he is tied with those accused against whom there is a strong case. They argue that the jury may find a reasonable doubt based on a comparison of the relative strengths of the cases.

212. S. 510(1) requires that the charge on general refer to a single transaction; and that it specify an offence; s. 510(3) requires that the charge contain reasonable information to identify the transaction referred to; Generally see:

R. v. City of Sault Ste. Marie [1978] 2 S.C.R. 1299.

R. v. Wis Developments Corp. Ltd. et al (1984) 12 C.C.C. (3d) 129 (S.C.C.).

R. v. Raphael (1972) 7 C.C.C. (2d) 325 (Ont.C.A.).

R. v. Canavan and Busby [1970] 5 C.C.C. 15 at 19 (Ont.C.A.).

R. v. Barnes (1975) 26 C.C.C. (2d) 112 (N.S.S.Co.App.Div.).

Ewaschuck supra n. 208 at p. 180-220.

213. R. v. Phillips (1906) 11 C.C.C. 89 at 91 (O.H.C.).

R. v. Addis (1964) 48 Cr.App.R. 95 at 101.

214. As long as the criminal objects are encompassed in one agreement, the count is not bad merely because it alleges more than one criminal object; see:

R. v. Rose [1947] 30 L.R. 618 at 625 (Que.S.C.).

R. v. Graham (1954) 108 C.C.C. 153 at 156. (B.C.C.A.).

R. v. Rese [1968] 1 C.C.C. 363 (Ont.C.A.).

R. v. Dass (1979) 47 C.C.C. (2d) 194 (Man.C.A.).

Nor does the phraseology commonly used which alleges conspiracy "the one with other or others of them" 33 offend s. 510; see:

R. v. Bergart supra n. 33; see also MacFarlane supra n. 1a. at page 230-236.

215. R. v. Cotroni et al (1979) 7 C.R. (3d) 185 at 198 (S.C.C.).

R. v. Cipolla [1965] 2 O.R. 673 (Ont.C.A.). Aff. 46 C.R. 197 (S.C.C.).

D. McLean "The Conspiracy Indictment" (1978) 21 Crim.L.Q. 96 at 109.

R. v. Handleman (1980) 57 C.C.C. (2d) 242 at 252 (Ont.C.A.).

Lyons v. The Queen (1982) 69 C.C.C. (2d) 318 (B.C.C.A.).

Aff. without reference to this point (1984) 15 C.C.C. (3d) 417.

216. Ibid: earlier authority supporting the contrary position is no longer reliable eg.

R. v. MacDonald and eight others (1963) 10 C.C.C. (2d) 488 (B.C.C.A.).

217. If the trial judge continues with the trial, he will of course have to determine whether the evidence establishes the conspiracy charged. If he has a reasonable doubt as to whether the Crown has proved the agreement charged, or some other agreement then he must acquit. MacFarlane supra n. 1a. provides an admirable review of the case law in Canada, Australia, England and the United States.

See also:
R. v. Burns et al (1979) 51 C.C.C. (2d) 27 (B.C.Ct.Ct.).

R. v. Carothers et al (unreported released Jan. 24, 1979, B.C.Ct.Ct.

218. S. 529 of the Criminal Code.

219. Note Wis Developments supra n. 212, which deals with the power of amendment, deals with the summary conviction

provisions and not with s. 529 which applies to indictments; generally as to the power of amendment see Ewaschuk supra n. 208 at p. 231 and following.

220. See R. v. Cotroni et al supra n. 215.

R. v. Bass [1970] 3 C.C.C. 422 (Ont.C.A.). Aff. S.C.C. [1970] S.C.R.

221. Supra n. 215.

222. See s. 516 of the Criminal Code.

223. Supra n. 215 at p. 208.

224. Ibid at p. 199-200; see also Ewaschuk supra n. 208 at p. 191.

225. See R. v. Nitra (1983) 10 A. Crim. R. 370

(Aust.Fed.Ct.) where the Court holds that on a single charge of conspiracy to do "X" and "Y"; that A & B cannot be convicted of conspiracy to do "X" and W and Z of conspiracy to do "Y".

226. Supra n. 217.

227. Supra n. 215.

228. Ibid at p. 9.

229. R. v. Paterson et al (1985) 18 C.C.C. (3d) 137 and 143 (Ont.C.A.).

R. v. Greenfield [1973] 1 W.L.R. 1151.

230. Supra n. 217, see also:
R. v. Gill [1969] 3 C.C.C. 175 (B.C.C.A.).

R. v. Schumiatcher [1966] 2 C.C.C. 76 at 120-123.

231. Eg. see Little and Wolski v. The Queen [1976] 1 S.C.R. 20.

R. v. Borak [1979] 1 W.W.R. 709 (B.C.C.A.).

see also s. 512 of the Criminal Code.

232. Supra n. 213.
see also:

R. v. Adduono et al (1940) 73 C.C.C. 152 (Ont.C.A.).

233. R. v. Bach (1974) 28 C.R.N.S. 259 (Ont.C.A.).

234. R. v. Miron and D'Amour (1974) 23 C.R.N.S. 261 (Ont.C.A.).

235. Brodie v. The King [1936] S.C.R. 188;

R. v. Goodfellow (1906) 10 C.C.C. 424 (Ont.C.A.);

R. v. Buck (1932) 57 C.C.C. 290 (Ont. C.A.);

provide examples of insufficient conspiracy indictments see also:

R. v. Achtemchuk (1978) 40 C.C.C. (2d) 515 (Alta.S.C.).

236. Supra n. 33.

237. As to particulars in conspiracy cases see:

Cox and Patton v. The Queen (1963) 2 C.C.C. 148;

Rex v. McGavin Bakeries Ltd. (1956) 99 C.C.C. 330 (Atla.S.C.).

238. R. v. Pope supra n. 207,

Re. Cole and The Queen supra n. 207;

R. v. Morin supra n. 207.

239. R. v. Gouederou et al (1974) 16 C.C.C. (2d) 238 (Ont.C.A.).

Aff. without reference to this point [1976] S.C.R. 308.

240. R. v. Bengart et al, supra n. 33;

see also:
R. v. Lyons, supra n. 215.

R. v. Abbas Ali Khan (1982) 36 O.R. (2d) 399 at 404 (Ont.C.A.).

241. Cox and Patton v. The Queen supra n. 237;

see also Ewaschuk supra n. 208, at page 221, where the author states "... the Crown must prove the material particulars it alleges in the Count". See also R. v. Rosen (1985) 16 C.C.C. (3d) 481 (S.C.C.).

see also D. McLean "The Conspiracy Indictment" (1978) 21 Crim.L.Q. 96.

For an example of a material particular see:

R. v. Mullen (1983) 39 O.R. (3d) 796 (Ont.C.A.).

242. (1978) 40 C.C.C. (2d) 7 at p. 24-25 (Ont.C.A.)

see also:
R. v. Schumiatcher [1966] 2 C.C.C. 72;

and see D. McLean Conspiracy: "Admissible Evidence and Method of Proof" (1978) 21 Crim.L.Q. 186 at 294.

243. Criminal Code s. 529(2).

244. R. v. Canadian General Electric Co. Ltd. et al (No. 1) (1974) 17 C.C.C. (2d) 433 at 443 (Ont.H.C.).

see also:
R. v. Dixon (1984) 16 C.C.C. (3d) 431 per Lambert J.A. (in dissent on another point) 443.

245 R. v. Barudin et al. (1983), 33 CR (3d) 319 at 325 C.B.C.S.C.

246 R. v. Cotroni supra. no. 34

247 R. v. Gerson (1947), 89 C.C.C. 138 at 142 (Ont. C.A.)

R. v. Nerlich (1915), 24 C.C.C. 256 at 262 (Ont. C.A.)

248 The Crown will often not be able to provide precise times or places, since the conspiracy will be the product of an ongoing relationship between the parties and may not have a precise starting point see:

R. v. Canadian General Electric Co. Ltd. supra n. 244 at p. 444.

249 Rex v. McCaven Bakeries supra n. 238

R. v. Govederor supra n. 239

R. v. Buck et al. 57 C.C.C. 290 (Ont. C.A.)

R. v. Abbas Ali Khan (1982), 36 O.R. (2d) 399 at 404 (Ont. C.A.)

As to Particulars generally see R. Salhaney: Canadian Criminal Procedure 4th ed. (1984), at p. 217.

250 As to disclosure, the basic rule holds that disclosure prior to trial rests with the Crown, subject to the limited rights of disclosure provided for in the Code (S. 531, 533). As to Crown counsel's duty see:

Re Cunliffe and Law Society of B.C. (1984), 13 C.C.C. (3d) 560 (B.C.C.A.)

at trial the trial judge controls the extent and nature of disclosure judge see:

R. v. Savion (1980), 52 C.C.C. (2d) 276, (Ont. C.A.);

R. v. Lalonde (1971), 5 C.C.C. (2d) 168 (Ont. C.A.);

Kritman v. The Queen (1984), 13 C.C.C. (3d) 522 (Alta. Q.B.).

Recent authority favours full disclosure subject to the Crown demonstrating a reason for withholding disclosure see:

R. V. Dorion (1985), 67 N.S.R. (2d) 130 at 141 (N.S.S.C. App. Div.).

251 [1969] 3 C.C.C. 115 (B.C.C.A.)

252 St. R. Qd. 512 (2d. C.A.),

Maria is of doubtful value in Canada given the Supreme Court of Canada's judgement in

R. v. Vezina (1985), 23 C.C.C. (3d) 481, where it was held that where the Crown alleges a fraud on "X", it is not fatal to their case if they prove that the fraud was perpetrated on a different person, as long as there is no prejudice to the accused.

253 Ibid

254 Supra n. 217

255 Supra n. 237 at p. 152-154 (S.C.C.)

256 Ibid; As to what particulars form part of the object of the conspiracy and hence are material and must be proved, no precise statement can be made;

see:
Gillies supra n. 1a at p. 36-37.

257 S. 553.1 of the Code, S.C. 1985 C. 19 S. 127, not yet in force provides for pretrial conferences at the request of either party (S. 553.1 (1)). It makes the conference mandatory in jury cases (553.1 (2)).

258 The current practice in the Supreme Court of Ontario provides for pretrial hearings where these issues are canvassed. As to the value of pretrial conferences in complex conspiracy cases see:

R. v Landy et al (1981) 72 Cr. App. R. 237 at 243 (C.A.)

259 A requirement that the defense outline its position is perhaps an incursion on its accused's right to remain silent as articulated in

R. v Dubois (1984) 11 C.C.C. (3d) 453 (S.C.C.) reversing 39 C.R. (3d) 281 (Alta. C.A.)

but it is a minimal one. The defense should not be required to disclosure material in its possession on which it may rely or which it may use to cross-examine crown witnesses.

260 R. v Bengart et al supra n. 33 at P. 521

R. v Scheel (1978) 42 C.C.C. (2d) 31 (ONT. C.A.)

Smith v The Queen [1972] V.R. 46 at 59-60 (Vic. S.C. Approved (1970) 121 C.L.R. 572 at 577 (H.C.)

260a. The practice is common in some provinces (Quebec) and was recently approved in

R. v Andrade (1985) 18 C.C.C. (3d) 41 (ONT. C.A.)

261. Ibid.

262. (1983) 10 A. Crim. R. 370 (Aust. Fed. Ct.); The British Columbia Court of Appeal commented on the danger of the practice in

R. v Wong (1978) 41 C.C.C. (2d) 196,
and held that it should be used only in special circumstances.

263. R. v Tennant and Naccarato (1975) 23 C.C.C. (2d) 80 (ONT. C.A.)

R. v Vawryk and Appleyard (1979) 46 C.C.C. (2d) 290 (MAN. C.A.)

R. v Stanford (1975) 27 C.C.C. (2d) 520 (QUE. C.A.)

suggests that it is "prudent" to provide the jury with the relevant statutory provisions.

264. This can require literally dozens of separate verdicts, see:

R. v McNamara et al (1981) 56 C.C.C. (2d) 193 at 260 (ONT. C.A.); AFF. without reference to this point 19 C.C.C. (3d) 1 (S.C.C.)

265. Note the special verdict referred to in S.613(1)(c) is not the special verdict of not guilty by reason of insanity. See S.613(1) and S.613(1)(d).

266. e.g. see:
R. v Williams [1953] 1 Q.B. 660

R. v Maria [1957] ST. R. Qd. 512

267. see infra "At the End of the Case: The Process Of Adjudication".

268. Ibid.

269. R. v Tuckey et al (1985) 46 C.R. (3d) 97 (ONT. C.A.).

This case was not a conspiracy case;

R. v Hobart et al (1982) 65 C.C.C. (2d) 218 (ONT. C.A.)

approved in
R. v Carter (1982) 67 C.C.C. (2d) 568 at 573 (S.C.C.)

also suggests that a separation of the issues by the jury is not appropriate.

270. Supra n. 250; The matter is currently under review in Ontario by a committee composed of representatives of the defense bar, and the Attorney General's Department.

271. supra n. 250

272. see R. v Savion supra n. 250

273. Re Regina and Arviv (1985) 19 C.C.C. (3d) 395 (ONT. C.A.) leave to appeal to S.C.C. refused.

See also:
R. v Diotte (1983) 42 O.R. (2d) 159, (ONT. C.A.)

where the Court held that the alleged non-disclosure did not violate the Charter.

274. Recent cases dealing with access to the packet in wire tap cases are instructive in

R. v Louis Martel. Justice Mitchell of the P.E.I.S.C. said in reference to S.7

> "...those principles require that an accused prisoner, such as the applicant has the right to fully examine and challenge the admissibility of the evidence tendered against them (emphasis added)

Louis Martel is as yet unreported (April 2, 1986) but was relied on by P.E.I.S.C. App. Div. in

Joseph Martel v The Queen (unreported April 30th, 1986). Ontario trial courts have reached the same conclusion.

See:
R v. Ross (unreported referred to at 15 W.C.B.)

See also:
R. v Fiumara (1985) 12 C.R.R. 271 (ONT. CTY. CT.)

where non-disclosure of the accused's statement to the police was held to violate S. 7 of the Charter.

275. R. v Dorion supra n. 250

276. The Court would have to be satisfied that the admission of the evidence would bring the administrtion of justice into disrepute. In many cases an adjournment to give the defense an opportunity to meet the new material would suffice.

277. e.g. see Paradis v The Queen (1934) 61 C.C.C. 184 at 186 (S.C.C.); [1934] S.C.R. 636 at 638

R. v Gagnon [1956] S.C.R. 636 at 638 and see:

Goode supra n. 1a at P.237-239

D. Hunt "Evidentiary Rules Peculiar to a Conspiracy Case" 1974 16 Crim. L. Q. 307

278. R. v Douglas (1977) 33 C.C.C. (2d) 395 at 406 (ONT. C.A.)

279. This is obvious and not peculiar to conspiracy cases, e.g. see:

R. v Cassidy (1974) 18 C.C.C. (2d) 1 N.B.S.C. App. Div.)

see also:
C. Powell "Conspiracy Prosecutions" (1970) 13 Crim. L. Q. 34 at 61

280. The trial judges metaphor in

R. v Hutchinson (1904) 8 C.C.C. 486 (B.C.S.C.) to building a wall brick by brick is an apt one.

281. R. v Cassidy supra n. 279

R. v Purnell [1978] 6 W.W.R. 1 (Alta. C.A.)

Note: The agreement may be wider than the substantive offence committed.

See:
R. v Trudel (1984) 13 C.C.C. (3d) 342.

282. R. v Poirier (1961) 37 C.R. 165 (QUE. C.A.)

R. v Baron and Wertman (1976) 31 C.C.C. (2d) 525 at 553 (ONT. C.A.)

R. v Goodfellow (1906) 10 C.C.C. 424 (ONT. C.A.)

283. R. v Jean and Piesinger (1979) 7 C.R. (3d) 338 at 357-358 (Alta. C.A.) AFF. (1980) 51 C.C.C.

(2d) 192 is the classic example.

284. This exception to the hearsay rule is sometime referred to as the co-conspirator's exception to the hearsay rule. It is better described as the joint venture exception to the hearsay rule.

285. Corpus Juris Secundum Vol. 22A p. 1123

See also:
Goode supra n. 1a P.245 and following where the author provides a detailed review of the authorities, and a critique of its rationale.

See also:
R. v Carter (1982) 31 C.R. (3d) 97
[1982] S.C.R. 938
67 C.C.C. (2d) 568

S. D. Frankel's commentary on Carter at 31 C.R. (3d) 107

R. v Tripodi (1961) 104 C.L.R. 1 at 6 (H.C.)

286. See Hunt supra n. 277 and

see:
R. v Gagnon (1956) 115 C.C.C. 361 at 365 (S.C.C.)

R. v Pretty (1982) 18 Alta. L.R. (2d) 251 at 158 (Alta. C.A.)

287. Goode supra n. 1a at P. 246. As pointed out in

R. v Cloutier (1939) 73 C.C.C. 1 at 7 (S.C.C.) a statement is an act.

288. R. v Miller et al (1984) 12 C.C.C. (3d) 54 (B.C.C.A.)

See also:
R. v Cassidy supra n.279

289. See R. v Cook (1984) 39 C.R. (3d) 300 (ONT. C.A.)

290. R. v Hobart et al (1982) 25 C.R. (3d) 214 at 225-227 (ONT. C.A.)

R. v Baron and Wertman supra n. 282

R. v Carter supra n. 285

291. Supra n.285

292. Ibid at p. 575

293. Ibid, see also:
R. v Carrier (1977) 12 Nfld. & P.E.I. 189 (Nfld. C.A.)

294. Ibid; as to putting these acts and declarations in the context of the rest of the evidence.

See:
R. v Filiault and Kane (1984) 15 C.C.C. (3d) 352 (S.C.C.) Approving 63 C.C.C. (2d) 321 (ONT. C.A.)

See also:
R. v Mota (1979) 46 C.C.C. (2d) 273 at 281 (ONT. C. A.)

295. R. v Ryan (1984) 14 Aust. C.R. 97 at 102 (N.S.W.C.A.)

296. State v Hacker 400 A. 2d 567 (1979, N.J. Sup. CT.)

U.S. v Weiner 578 F. 2d 757 (1978, 9th CIR.)

U.S. v Stanchich 550 F 2d. 1294 (1977 2nd CIR.)

See also:
R. v Mitchell [1964] Crim. L.R. 297

Behn v The King (1936) 38 W.A.L.R. (W.A.S. CF)

Note: In Mitchell and Behn the acquittals were not "on the merits".

297. (1971) S.C.C.C. (2d) 503 at P. 514-516 (B.C.C.A.)

See also:
R. v Anthony [1965] 2 Q.B. 189

297a. (1972) 8 C.C.C. (2d) 185 (S.C.C.)

298. Grdic v The Queen (1985) 59 N.R. 61 (S.C.C.)

299. The proposition is startling because it ignores the onus of proof and equats a failure to satisfy that onus with a positive finding of innocence.

300. The pendency requirement is subject to some elasticity see infra. n.307 and following

301. see infra. n. 302

302. R. v Dass (1979) 47 C.C.C. (2d) 194 (MAN.C.A.)

R. v McNamara et al supra n. 40 at p.440-441

R. v Hook (1975) 22 C.C.C. (2d) 118 (Alta. C.A.)

R. v Lynch et al (1978) 40 C.C.C. (2d) 7 at 923 (ONT. C.A.)

R. v Chow Tai and Limerick (1978) 43 C.C.C. (2d) 215 at 276 (B.C.C.A.)

R. v Cook and Cain (1980) 53 C.C.C. (2d) 217 at 222-223

303. R. v Yanover and Gerol (1985) 20 C.C.C. (3d) 300 at 330 (ONT.C.A.)

304. See R. v McNamara et al supra n. 302

Dass supra n.302 appears to be to the contrary. If it is, it is incorrect.

304a. R. v Baron and Wertman supra n.282

304b. R. v May (1984) 13 C.C.C. (3d) 257 (ONT. C.A.)

305. R. v Baron and Wertman supra n.282

306. R. v Minuzzo (1983) 10 Aust. Crim. L.R. 190 (VICT. C.A.)

307. See supra n.82;

R. v Baron and Wertman supra n.282

308. R. v Bachrack (1913) 21 C.C.C. 257 11 D.L.R. 522 (ONT. C.A.)

309. Ibid: see also Hunt supra n.277 at P.318

310. Supra. n.282

311. Ibid at P. 349-350

312. See also R. v Tripp (1971) 5 C.C.C. (2d) 297 (B.C.C.A.) were statements made after the frustration of the agreement were excluded;

but see:
R. v Smith and Lang (1970) 72 W.W.R. 548 (B.C.S.C.)

312a. Acts done after the conspiracy is terminated will be admissible against the doer both to show the agreement and her participation in it, if they are logically relevant to those issues.

313. R. v Vraney et al (1979) 46 C.C.C. (2d) 14 (ONT.C.A.)

leave to appeal to S.C.C. refused [1980] 1 S.C.R. xiii

See also:
R. v Henderson (1984) 14 A. Crim. R. 274 (S. Aust. C.A.)

314. Ibid

315. See R. v Percy (1945) 84 C.C.C. 327 at 329 (N.S.S.C. App. Div.)

R. v DePauw [1966] 4 C.C.C. 335 (B.C.C.A.)

R. v Andrews et al (1979) 8 C.R. (3d) 1 at 20-21 (B.C.C.A.)

Gillies supra n. 1a at 169-171

316. Supra n. 315

317. R. v Simington et al (1926) 45 C.C.C. 249 at 256-258 (B.C.S.C.)

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R. v Container Materials Ltd. (1940) 75 C.C.C. 113 at 128

R. v Gouroff (1979) A. Crim. R. 367 at 370-372 (VICT. C.A.)

318. See supra n.317 and see:

Gillies n.1a at P171

319. R. v McNaughton (1976) 33 C.R.A.S. 279 at 288

R. v Kelly (1917) 27 C.C.C. 140 at 204 (MAN. C.A.)

Powell supra n.279 at P.38

R. v Simington et al supra n.317

320. See the classic statement in:

R. v Parnell (1881) 14 Cox. C.C. 508 at 515

321. For this reason conspiracy prosecution play a predominant role in the prosecution of organized crime.

For an early Canadian comment on the value of conspiracy charges in cases involving organized criminal activity see R. Ritchie "The Crime of Conspiracy" (1938) 16 CAN. BAR. REV. 202

322. R. v Savion (1980) 13 C.R. (3d) 259

R. v Lyons et al supra n.215

323. R. v Mota (1979) 46 C.C.C. (2d) 273

R. v Filiault and Kane supra n. 294

324. Gillies n.1a at P.162-163

Corpus Juris Secundum Vol. 22A P1184, 1189

324a. Cases like:

R. v O'Brien [1954] S.C.R. 666 and those which apply it support this argument. See supra n. 86.

325. See supra n. 322-324

326. The acts and declarations are a type of circumstantial evidence and subject to the strengths and weaknesses of circumstantial evidence.

327. Supra n.293

328. The phrase appears in texts like:

McCormick On Evidence 3rd ed. (1984) 149-151

329. E.g. Goode supra n.19 at 254-255

330. Pretrial conferences at which the Crown outlines the evidence on which it will rely may facilitate a more active judicial role in the determination of the order of proof.

331. See Titus v The Queen (1983) 2 C.C.C. (3d) 321 (S.C.C.)

See also:
R v. Paul [1977] 1 S.C.R. 181

U.S. v Sheppard [1977] 2 S.C.R. 1067

R. v Andrews (1979) 8 C.R. (3d) 1

The accused is entitled to a ruling on the point before he elects as to whether to call a defense:

R. v Angelantoni (1975) 28 C.C.C. (2d) 179 (ONT.C.A.)

332. R v Paul supra n.331

R. v Mackey (1971) 4 C.C.C. (2d) 192 (ONT.C.A.)

R. v Downie (1972) 10 C.C.C. (2d) 335 (MAN.C.A.)

Earlier authority to the contrary is no longer good law, e.g.

R. v Knox [1968] 2 C.C.C. 348 The trial judge in

Carothers supra appears to have followed that earlier authority supra n.217

333. U.S. v Sheppard supra n.331

334. See Carothers supra n.217 and

see:
Cotroni supra n.34,

see also:
R. v Dixon et al supra n.45

335. If there is no proof of the agreement alleged it must follow that there can be no proof of participation.

336. Supra n.331

337. Supra n.285

338. R. v Baron and Wertman (1976) 31 C.C.C. (2d) 525 (ONT. C.A.)

R. v Bird [1969] 1 O.R. 268 (ONT. C.A.)

R. v Hobart et al (1982) 25 C.R. (3d) 214 (ONT. C.A.)

R. v Finley and Grelette (1985) 23 C.C.C. (3d) 48 (ONT. C.A.)

R. v Morris (1982) 68 C.C.C. (2d) 115. AFF. on another point (1983) 7 C.C.C. (3d) 97 (S.C.C.)

R. v Dixon supra n.45

339. Vetrovec v The Queen (1982) 27 C.R. (3d) 304 [1982] 1 S.C.R. 811

R. v Lai and Lau (1985) 24 C.C.C. (3d) 237 at 251 (B.C.C.A.)

340. Cloutier v The King (1939) 73 C.C.C. 1 (S.C.C.)

341. There are relatively few substantive offences which still require corroboration, however see S. 325(2) (forgery) and S.123 (perjury).

342. R. v Ferguson and Petri [1969] 1 C.C.C. 353 (B.C.C.A.)

R. v Kyling (1970) 2 C.C.C. (2d) 79 (S.C.C.)

R. v Jones (1971) 3 C.C.C. (2d) 153 (ONT. C.A.)

343. Criminal Code S.589; and see cases referred to above at n.193 to 197

344. S.534(4) as amended in December 1985 permits a plea to an "offence arising out of the same transaction whether or not it is an included offence". Thus one could, if the Crown was agreeable, plead guilty to a charge of conspiracy to commit murder, in answer to an indictment charging murder.

345. Robillard v The Queen (1975) 36 C.R.N.S. 308 (QUE. C.A.)

R. v Trudel (1984) 13 C.C.C. (3d) 342 (QUE. C.A.)

346. R. v Woodburn (released May 26, 1977) unreported (ONT. C.A.)

347. R. v Barnard (1979) 70 Cr. App. R. 28 at P.33:

Barnard is commented on in [1980] Crim. L.R. 235.

348. Forsythe v The Queen (1943) 79 C.C.C. 129 (S.C.C.)

R. v McRae (1955) 21 C.R. 13 at 14. (ONT. C.A.)

Rex v Plummer [1902] 2 K.B. 339

349. R. v Tracey (1946) 2 C.R. 171 (B.C.C.A.)

R. v Funnell (1972) 6 C.C.C. (2d) 215 (ONT. C.A.)

R. v Ellis (1972) 6 C.C.C. (2d) 220 (ONT. C.A.)

350. [1975] A.C. 717
[1974] 2 All E.R. 1009

351. (1979) 44 C.C.C. (2d) 481
[1979] 1 S.C.R. 960

352. D.P.P. v Shannon supra n.350 (per all five law lords)

Guimond v The King supra n.351

See also:
R. v Baron and Wertman, supra n.338 at p. 552 (ONT. C.A.)

353. This principle is applicable to all cases where to verdicts are so inconsistent as to be incapable of rationalization on the evidence. It is not peculiar to the law of conspiracy. Generally see:

R. v McLaughlin (1974) 20 C.C.C. (2d) 59 (ONT. C.A.)

McDonald v The Queen [1960] S.C.R. 186

Koury v The Queen [1964] S.C.R. 212

R. v McShannock (1980) 55 C.C.C. (2d) 53 (ONT. C.A.)

354. Supra n. 350 at p. 1034 - 1035

355. Supra n. 350 at p. 1049

356. Supra n. 350 at p. 1046,
p. 1041

357. Guimond v The Queen supra n.351

358. Ibid.

359. R. v Canapina (unreported), released Jan. 9th, 1979 (ONT. C.A.) and in R. v Baron and Wertman supra n.338

the Ontario Court of Appeal preferred the traditional approach as set out by Lord Morris, However in

R. v Gavvin (1980) 30 N.B.R. (2d) 414 the New Brunswick Court of Appeal favoured Lord Simon's approach.

360. Criminal Law Act 1977 as amended by the Criminal Attempt Act 1981;

As to the application of the Amendment see

R. v Roberts (1983) 78 Cr. App. R. 41 (C.A.)

R. v Longman (1980) 72 Cr. App. R. 121 at 123 (C.A.)

361. See S. 52 and S. 32 of the Charter

362. This was the result in Reference Re S.94(2) of the Motor Vehicle Act (1985) 23 C.C.C. (3d) 289 (S.C.C.)

363. This was the result in R. v Oakes (1983) 2 C.C.C. (3d) 339, (ONT. C.A.); AFF. S.C.C. Feb. 28, 1986 as yet unreported.

364. For example see:
R. v Coombs (1985) 23 C.C.C. (3d) 356 (Nfld. S.C.)

R. v Bird and Peeble (1984) 40 C.R. (3d) 41 (MAN.Q.B.)

Appeal quashed without reference to merits 12 C.C.C. (3d) 523 (MAN. C.A.)

R. v Oquatag (1985) 18 C.C.C. (3d) 440 (N.W.T.S.C.)

R. v Williams (1985) 18 C.C.C. (3d) 356 (ONT. C.A.)

R. v Wiseman et al (1985) 22 C.C.C. (2d) 12 (ONT. DIST. CT.)

R. v Corbett (1985) 17 C.C.C. (3d) 129 at 146 (B.C.C.A.)

Re Potma and The Queen (1983) 2 C.C.C. (3d) 383 leave to appeal to S.C.C. refused.

R. v Sidhu, as yet unreported released Nov. 20th, 1984, (ONT. CTY. CT.)

R. v Jones (1983) 25 Alta. L.R. (2d) 359 (Alta. Prov. CT.)

365. The "rape shield" laws found in S.246.6 have had mixed constitutional reviews.

Coombs, and Oquatag hold they are unconstitutional,

Bird, and Wiseman upheld the evidentiary rules in the section.

366. Ibid S.364.

367. Ibid.

368. As to the scope of S.7 see Lemar J. in

Reference Re. S. 94(2) of the Motor Vehicle Act (1985) 23 C.C.C. (2d) 289 at 299-303; and see Wilson J. at P. 322-323.

369. The absence of the ability to challenge the maker of the statement is one of the main reasons hearsay is regarded as unreliable

McCormick Evidence (3rd ed. 1984) at P. 726-729.

370. R. v Williams supra n. 364

371. These are the criteria on which the exceptions to the hearsay rule are built.

See:
McCormick supra n.369 at 753 and following.

372. For a review of the American position see the Note 'Co-Conspirators Exception to the Hearsay Rule" (1974) 40 Brook L.R. 1231

And see G. Hinde: "Federal Rule of Evidence 801(d)(2)(e) and the "Confrontation Clause"" (1985) 53 Ford. L.R. 1291

373. Hinde supra n.372

374. Hinde supra n.372 at 1291-1292

375. Delaney v U.S. 263 U.S. 586 (1924)

Dutton v Evans 400 U.S. 74 (1970): Dutton is thoroughly analyzed by Hinde supra n.372 at P.1301 and following

U.S. v Alfonso 738 F. 2d. 369 (10th CIR. 1984)

376. Ohio v. Roberts 448 U.S. 56 (1980)

377. Ibid: see discussion of Roberts by Hinde supra n.372 P.1304 and following.

378. supra n.372

379. Ibid at P.1325 and following

380. Of some assistance is the decision in Sidhu supra. n.364, where the trial judge would not let the Crown read into evidence, the testimony of a witness given at the preliminary inquiry when the witness had been deported prior to trial.

See also:
R. v Ross (1984) 42 C.R. (3d) 49 (B.C. Co. CT.)

where the Court stayed proceedings as violating S. 11(d) of the Charter when the Crown failed to produce the informant as a witness where the defense was entrapment.

381. It would be argued that the Crown has chosen to make the co-accused available for cross-examination by jointly indicting him.

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