CONSPIRACY*

*Don R. Stuart***

I. HISTORY

A. *Common Law* [1]

The offence of conspiracy did not originate as a general offence at common law, but in a series of statutes dating from the time of Edward I. [2] These statutes specifically limited conspiracy to certain offences against the administration of justice, in particular, to conspiracies to procure false indictments, to bring false appeals, or to maintain vexatious suits. It was the Court of Star Chamber in the seventeenth century [3] that established that no other overt act than agreement was required. The extension to conspiracies to commit all crimes, both misdemeanours and felonies, was made by the Court of King's Bench in the latter part of the same century. [4]

The extension to apply the criminal sanction in the case of conspiracies to commit an illegal but non-criminal act was only made in the nineteenth century, with the exception of fraud cases where the extension was made much earlier. [5] Heavy reliance for such an extension was placed upon an ambiguous and, at the time it was written, inaccurate statement of a text writer, Hawkins:

> There can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law. [6]

and on Lord Denman's dictum in *The King v. Jones*, [7] actually retracted by the same judge seven years later, [8] that a conspiracy indictment must "charge a conspiracy, either to do an unlawful act, or a lawful act by unlawful means". [9]

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[1] Reliance is based exclusively on Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922), who himself relies on R. WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS (1873). *See also* D. HARRISON, CONSPIRACY AS A CRIME AND AS A TORT IN ENGLISH LAW (1924).

[2] Sayre, *supra* note 1, at 396.

[3] *Id.* at 398-99.

[4] *Id.* at 400.

[5] *Id.* at 404-05.

[6] W. HAWKINS, PLEAS OF THE CROWN 348 (1716).

[7] 4 B. & Ad. 345, 110 Eng. Rep. 485 (K.B. 1832).

[8] The Queen v. Peck, 9 A. & E. 686, at 690, 112 Eng. Rep. 1372, at 1373 (Q.B. 1839); Sayre, *supra* note 1, at 405 n.39.

[9] *Supra* note 7, at 349, 110 Eng. Rep. at 487.

Sayre explained the court's ready acceptance of the latter dictum in the nineteenth century as follows:

> Like the magic jingle in some fairy tale, through whose potency the bewitched adventurer is delivered from all his troubles, this famous formula was seized upon by judges laboring bewildered through the mazes of the conspiracy cases as a ready solution for all their difficulties. It would fit any conspiracy case whatever; it was, so to speak, ready to wear, and obviated the necessity of carefully thinking through or correctly analyzing the doctrine of conspiracy. As a consequence, judges gave to it the widest use . . . .
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> . . . It enabled judges to punish by criminal process such concerted conduct as seemed to them socially oppressive or undesirable, even though the actual deeds committed constituted of themselves no crime, either by statute or by common law. And in cases where the actual deeds were of doubtful criminality, it saved the judges from the often embarrassing necessity of having to spell out the crime. [10]

B. *Legislative Background in Canada*

The present general section on conspiracy in the Criminal Code [11] is as follows:

> 423.(1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy, namely,
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> (a) everyone who conspires with anyone 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 years;
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> (b) everyone who conspires with anyone 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
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> (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
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> (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;
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> (c) everyone who conspires with anyone to induce, by false pretences, false representations or other fraudulent means, a woman to commit adultery or fornication, is guilty of an indictable offence and is liable to imprisonment for two years; and
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> (d) everyone who conspires with anyone to commit an indictable offence not provided for in paragraphs (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.
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> (2) Everyone who conspires with anyone
>
> (a) to effect an unlawful purpose, or
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> (b) to effect a lawful purpose by unlawful means, is guilty of an indictable offence and is liable to imprisonment for two years.

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[10] Sayre, *supra* note 1, at 405-06.

[11] CAN. REV. STAT. c. C-34 (1970).

The legislative history of the complicated section 423(1) reveals that it is basically an amalgamation of sections that go back as far as the first Code of 1892, with only minor wording changes apart from changes in penalty. [12] The only significant changes in regard to conspiracy in the history of the Code both occurred in 1955.

The first was that three specific forms of conspiracy, set out in sections 423(1)(*a*) to (*c*)were brought within one section for the first time. [13] If this change was meant to be more than merely organizational and to codify common law conspiracy as the marginal note to the section suggested, [14] it was incomplete, as conspiracies to commit treason (section 46(*f*) and (*h*)), seditious conspiracies (sections 60-62) and conspiracies in restraint of trade (sections 424-25), each deriving from the common law [15] and each being codified in 1892, [16] were (and are) penalized in separate Code provisions. In 1960 the provisions in what was then section 411, penalizing further specific types of conspiracies in restraint of trade, were repealed and transferred in part to the Combines Investigation Act. [17] All these provisions codifying specialized conspiracies will be examined later from the point of view of substantive definition and desirability.

The most notable change made in 1955 was the enactment of the new section 408(2), which codified a variant of Lord Denman's loose and discredited catch-all phrase. [18] The reason for the new subsection is plain. The new section 8 specifically abolished common law offences in Canada, but common law offences which had previously been prosecuted in Canada were to be separately codified, as explained by Mr. Garson, Minister of Justice, in introducing the bill:

> What has happened is that the royal commission consulted with the provincial law enforcement officers and found that that resort had been had to common law offences, over the past sixty years, in only a very limited number of cases. These cases have now been incorporated in this bill, in codified form, as Criminal Code offences. [19]

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[12] Previous section numbers were as follows: Can. Stat. 1892 c. 29, §§ 234(*a*), 152, 188, 527; CAN. REV. STAT. c. 146, §§ 266(*a*), 178, 218, 573 (1906); CAN. REV. STAT. c. 36, §§ 266(*a*), 178, 218, 573 (1927); Can. Stat. 1953-54 c. 51, §§ 408(1)(*a*), 408(1)(*b*), 408(1)(*c*), 408(1)(*d*).

[13] Then § 408(1)(*a*)-(*c*).

[14] The writer has had no access to the work of the Commission headed by Chief Justice W. M. Martin that was set up in 1950: HOUSE OF COMMONS DEBATES, vol. 1, 944, col. 1 (1953-54)(Mr. Garson, Minister of Justice).

[15] The leading text on common law conspiracy is D. HARRISON, *supra* note 1, related to the Canadian context in TREMEEAR'S ANNOTATED CRIMINAL CODE 633-37 (6th ed. L. Ryan 1964).

[16] The legislative histories since 1892 of provisions penalizing conspiracies to commit treason and seditious conspiracies is eventful: Tremeear, *supra* note 15, at 118, 126.

[17] CAN. REV. STAT. c. 314 (1952), *as amended*, Can. Stat. 1960 c. 45. For a general if legalistic account of Canadian "combines" legislation see R. GOSSE, THE LAW ON COMPETITION IN CANADA 2-4 & 68-77 (1962), where he deals with its legislative history. *See also* Tremeear, *supra* note 15, at 654-66.

[18] See text *supra* between notes 7-9.

[19] HOUSE OF COMMONS DEBATES, vol. 1, 946, col. 2 (1953-54).

It was implicitly recognized that the existing Code provisions, the most general of which is now section 423(1)(*d*), penalizing conspiracies to commit indictable offences, were by no means as embracing as conspiracy at common law, so the time-honoured phrase, "unlawful purpose or lawful purpose by unlawful means", was enacted, the precise ambit being left to the courts to work out. Surprisingly, this highly ambiguous position was accepted by the House of Commons without a single comment. [20]

It is obvious that the interpretation of sections 423(1)(*d*) and 423(2) determines the existence and scope of any general doctrine of conspiracy in Canada. This is, therefore, attempted first in the next section, which explores general substantive principles.

II. Substantive Definition

A. *Generally (sections 423(1)(d) and 423(2))*

The Code does not set out the traditional common law requirements, which have nevertheless been asserted by Canadian judges. A good example is the statement of Judge Moore in *Regina v. Chapman*:

> Conspiracy has always been treated as a common law crime, the gist of the offence being in the combination . . . .
>
> Conspiracy has two essential elements. One, an agreement between two or more persons, and two, an unlawful purpose or criminal act. It is the unlawful purpose or the criminal object of the conspirators that makes the conspiracy criminal. The offence is completed as soon as the parties have agreed as to their unlawful purpose. [21]

Similarly, the majority of the Supreme Court of Canada in *The Queen v. O'Brien* [22] uncritically accepted the view of Mr. Justice Willes in the House of Lords in *Mulcahy v. The Queen*:

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties . . . [is] punishable if for a criminal object . . . . [23]

It is trite law that the offence is complete as soon as there has been agreement with the necessary *mens rea*. Since there is therefore no prox-

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[20] House of Commons Debates, vol. 3, 2514, col. 1 (1953-54).

[21] 20 Can. Crim. (n.s.) 141, at 145 (Ont. County Ct. 1972). This statement was not commented upon in the appeal judgment: *id.* at 149, [1973] 2 Ont. 290, 11 Can. Crim. Cas.2d 84, 34 D.L.R.3d 510 (1972).

[22] [1954] Sup. Ct. 666, at 668-69, 671, 674-75, 110 Can. Crim. Cas. Ann. 1, at 3, 6, 9.

[23] L.R. 3 H.L. 306, at 317 (1868). In contrast, Mr. Justice Locke, dissenting in *O'Brien*, considered that this statement of Mr. Justice Willes "was never intended as a definition of a criminal conspiracy" but merely of the statutory conspiracy offence charged: *supra* note 22, at 682, 110 Can. Crim. Cas. Ann. at 16.

imity requirement as in attempts, the net of responsibility for conspiracy is wider than that cast by the law of attempts. Two persons can be guilty of a criminal conspiracy whereas had they been acting on their own they would have been acquitted on a charge of attempt.

1. *Actus Reus*

Since the *actus reus* requirement is merely that of agreement, it is obvious that the distinction between *actus reus* and *mens rea* is particularly artificial in the case of the crime of conspiracy.

(a) *Agreement*

To repeat, it is clear law that once there has been agreement with the necessary *mens rea*, it is immaterial that there was no effort towards putting the common objective into effect. [24]

In some cases it might well be difficult to decide whether or not there has been a complete agreement. It is doubtful whether any satisfactory rule can be enunciated, and since most oral contracts are not formed as text books suggest by acceptance of a formal offer, it is unlikely that anything can be gained from examining the law of contracts. [25] In any case, the considerations relating to criminal law prosecutions are surely different. All that can be said is that there might be some cases where the courts will hold that there has not been sufficient certainty in human dealings to constitute an agreement. Thus, in the English case of *R. v. Walker*, [26] the conviction for conspiracy to rob was quashed as, although it was "perfectly clear" that the appellant had discussed with two others the proposition of stealing a payroll, there was no proof as to whether or not the appellant had pulled out at the stage of negotiations, or after a firm agreement had been reached.

Two important questions must be considered under this heading of "Agreement", although they both involve partially exploring the *mens rea* requirement.

The first question is whether or not there can be a sufficient agreement for the purposes of conspiracy if there is an express or implied reservation about carrying out the common object. Whatever the position in the law of contracts, [27] it is submitted that the stress on the subjective state of mind of the accused in the case of the criminal law should preclude a conviction

[24] *E.g.*, Regina v. Chapman, *supra* note 21; Mulcahy v. The Queen, *supra* note 23; Rex v. Cameron, 50 B.C. 179, at 187, 64 Can. Crim. Cas. Ann. 224, at 230 (County Ct. 1935); Rex. v. Harris, [1947] Ont. 461, at 466, 4 Can. Crim. 192, at 194-95; Regina v. Deal, 18 W.W.R. 119, at 124, 114 Can. Crim. Cas. Ann. 325, at 331 (Sask. 1956). Once agreement is proved, there is therefore no necessity to prove complicity in the subsequent unlawful acts of co-conspirators: Belyea v. The King, [1932] Sup. Ct. 279, at 295, 57 Can. Crim. Cas. Ann. 318, at 337.

[25] *Cf.* the contractual emphasis by J. C. SMITH & B. HOGAN, CRIMINAL LAW 176 (3d ed. 1973).

[26] [1962] CRIM. L. REV. 458 (C.C.A. 1961).

[27] J. C. SMITH & B. HOGAN, *supra* note 25, at 175-76.

in such a case, as was indeed the majority ruling of the Supreme Court of Canada in the kidnap case of *O'Brien.* [28]

O'Brien had, for the sum of 500 dollars, obtained the apparent agreement of one Tulley to assist him in kidnapping a woman. During the next month and a half, O'Brien pointed out the lady's residence to Tulley and also identified her. Tulley had also accompanied O'Brien in an abortive attempt to find the house to which he could take the kidnap victim, and had received three sums totalling 240 dollars from O'Brien. He then reported O'Brien's intentions to the prospective victim, which led to the arrest and prosecution of O'Brien. The majority of the court agreed that O'Brien should have a new trial for if it was proved that Tulley did not have any intention to carry through the common design as he alleged, O'Brien should be acquitted as he could not conspire with himself alone. The majority judges stressed subjective factors and the minority objective ones. For the majority, Mr. Justice Taschereau, for example, said:

> It is, of course, essential that the conspirators have the *intention to agree,* and this agreement must be complete. There must also be a common design to do something unlawful, or something lawful by illegal means. Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, I have no doubt that there must exist *an intention to put the common design into effect.* A common design necessarily involves an intention. Both are synonymous. The intention cannot be anything else but the will to attain the object of the agreement. I cannot imagine several conspirators agreeing to defraud, to restrain trade, or to commit any indictable offence, without having the intention to reach the common goal. [29]

In marked contrast, Mr. Justice Fauteux said, dissenting:

> An agreement is an act in the law whereby two or more persons declare their consent as to any act or thing to be done. Such a declaration takes place by the concurrence of the parties in a spoken or written form of words as expressing their common intention. Mental act or acts of the will, it has been said, are not the material out of which promises are made. Hence the law, in civil matters at least, does not allow one party to show that his intention was not in truth such as he had made it or suffered it to appear to the other party. That a different view should be adopted because of the criminal nature of the object of the agreement in this case where Tulley, willingly and with full appreciation of the matter, signified his agreement, promised and took the engagement, and thus encouraged the criminal design, is not only inconsistent with the economy of our criminal law but, in my respectful view, unwarranted under the authorities. [30]

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[28] *Supra* note 22, followed by Mr. Justice Lawton in R. v. Thomson, 50 Cr. App. R. 1 (Q.B. 1965).

[29] *Supra* note 22, at 668, 110 Can. Crim. Cas. Ann. at 2-3. *See also id.* at 670, 110 Can. Crim. Cas. Ann. at 5 (Rand, J.), and *id.* at 676-77, 110 Can. Crim. Cas. Ann. at 11 (Estey, J.).

[30] *Id.* at 690-91, 110 Can. Crim. Cas. Ann. at 25. *See also id.* at 686, 110 Can. Crim. Cas. Ann. at 21 (Locke, J., dissenting).

That the majority decision did not involve the recognition of a defence of withdrawal from a conspiracy is explicit in the judgment of Mr. Justice Taschereau:

> This is not the case of the conspirator, who after having completed the crime, withdraws from the conspiracy. If a person, with one or several others, agrees to commit an unlawful act, and later, after having had the intention to carry it through, refuses to put the plan into effect, that person is nevertheless guilty, because all the ingredients of conspiracy can be found in the accused's conduct. But, when the conspiracy has never existed, there can be no withdrawal. [31]

The second question is whether or not there has to be direct communication between the alleged conspirators. It seems to be clear on the case law [32] that this is not necessary and that a conviction for conspiracy can be returned on proof of an agreement to achieve a common objective, usually a specific offence or offences. Thus, there can be a "wheel" conspiracy, where only one person in the conspiracy communicates directly with each of the others, and "chain" conspiracy, where *A* communicates with *B*, *B* with *C*, and *C* with *D*. However, the common object requirement guards against several conspiracies being rolled falsely into one. As Lord Justice Roskill said for the English Court of Appeal in *R. v. Ardalan*:

> The essential point in dealing with this type of conspiracy charge, where the prosecution have brought one, and only one, charge against the alleged conspirators, is to bring home to the minds of the jury that before they can convict anybody upon that conspiracy charge, they have got to be convinced in relation to each person charged that that person has conspired with another guilty person in relation to that single conspiracy. As has been said again and again, there must not be wrapped up in one conspiracy charge what is, in fact, a charge involving two or more conspiracies. [33]

This question arose in *Regina v. MacDonald* [34] where the nine accused were acquitted on a charge of conspiracy to traffic in heroin. One of the accused, Hill, was found to have planted thirty-four separate caches of drugs. The Crown attempted to establish a "wheel" conspiracy to deliver and transport uncut drugs to agents to be diluted, capped and then sold to addicts. It was asserted that three of the accused were the hub and provided the link between Hill, who planted the drugs in the caches, and the other accused who picked them up. It was held, however, that the evidence was just as consistent with a number of limited conspiracies as with one over-all conspiracy. [35] The evidence did not link the alleged members of the hub with

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[31] *Id.* at 669, 110 Can. Crim. Cas. Ann. at 3-4.

[32] Regina v. MacDonald, 10 Can. Crim. Cas.2d 488 (B.C. 1963) applying *inter alia* Rex v. Meyrick, 21 Cr. App. R. 94 (C.C.A. 1929). The leading English authority is now R. v. Ardalan [1972] 2 All E.R. 257, 56 Cr. App. R. 320 (C.A.). The earlier English cases are discussed by Hunt, *Evidentiary Rules Peculiar to Conspiracy Cases*, 16 CRIM. L.Q. 307, at 313-16 (1974).

[33] *Supra* note 32, at 261, 56 Cr. App. R. at 329.

[34] *Supra* note 32.

[35] *Id.* at 502.

those actually picking up the drugs, and it was just as likely that Hill was supplying those who applied to him, making his arrangements on an ad hoc basis from day to day without any central organization implicit in the charge of one single conspiracy.

(b) *Between two or more persons*

Since an agreement is a requirement for a conspiracy, it is not surprising that the courts have always insisted on the additional requirement that there be at least two persons. You cannot conspire with yourself. This basic principle has led to several decisions which might appear technical in isolation but which are simply applications of the general principle. They will be considered in categories.

(i) *Husband and wife*

The majority of the Supreme Court of Canada in *Kowbel v. The Queen* [36] held that a husband and a wife could not be sole conspirators in view of their fictional unity at common law: "I have reached the conclusion that at common law, a husband and a wife could not be found guilty of conspiracy, because judicially speaking they form but one person, and are presumed to have but one will." [37]

Mr. Justice Fauteux dissented strongly, pointing out that some modern writers, such as Wright and Harrison [38] who had specialized in the study of criminal conspiracy, doubted whether such a fiction should be applied in modern times, [39] and whether marital status in criminal law still embodied "the legal notion of conjugal unity or subordination". [40] He also noted a dearth of English case law [41] and the lack of a specific provision for such criminal irresponsibility in the Code. [42]

It has been held that a husband and wife must have been validly married according to the law of the place of the trial [43] and that a husband and wife can be found guilty of conspiracy with another, [44] even if that other does not appear for trial. [45]

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[36] [1954] Sup. Ct. 498, 110 Can. Crim. Cas. Ann. 47.

[37] *Id.* at 499-500, 110 Can. Crim. Cas. Ann. at 48 (Tashereau, J., concurred in by Kerwin, J.). *See also id.* at 505 (Estey, J.), 506 (Cartwright, J.), 110 Can. Crim. Cas. at 54, 55.

[38] *Supra* note 1.

[39] *Supra* note 36, at 509, 110 Can. Crim. Cas. Ann. at 57-58.

[40] *Id.* at 511, 110 Can. Crim. Cas. Ann. at 60.

[41] *Id.* at 509, 110 Can. Crim. Cas. Ann. at 58. THE LAW COMMISSION (England), WORKING PAPER NO. 50, INCHOATE OFFENCES: CONSPIRACY, ATTEMPT AND INCITEMENT para. 35 (1973) [hereinafter cited as WORKING PAPER NO. 50], asserts that there is still no direct English case authority but cites Mawji v. The Queen, [1957] A.C. 126, [1957] 1 All E.R. 385 (Tanganyika).

[42] *Supra* note 36, at 510-11, 110 Can. Crim. Cas. Ann. at 59.

[43] Mawji v. the Queen, *supra* note 41, recognized a polygamous marriage for the purposes of that appeal.

[44] Rex v. Nerlich, 34 Ont. L.R. 298, 24 Can. Crim. Cas. Ann. 256, 25 D.L.R. 138 (1915); Regina v. Whitehouse, 6 Cox Crim. Cas. 38 (Q.B. 1832).

[45] Regina v. Chambers, 11 Can. Crim. Cas.2d 282 (Alta. Sup. Ct. 1973).

(ii) *One man companies*

It is clear law that conspiracy is one of the crimes that a company can commit,[46] but the prevailing view in both Canada[47] and England[48] is that an accused cannot be found guilty of conspiring with a corporation wholly controlled by himself (a "one man company"). In order to convict a corporation of such an offence someone whose guilty mind and act are held to be those of the company must be found, and if all that has happened is that the individual has made a decision on his own, he has not agreed with another.[49]

It was, however, held in *Regina v. Electrical Contractors Association of Ontario*[50] that it is not necessarily a defence to a conspiracy indictment against a corporation that only one human being intended to break the law. Mr. Justice Laidlaw delivered the judgment of the court:

> That person might act in more than one legal capacity. For instance, he might be a director of more than one corporation or he might have personal interests of the same kind as that of a corporation of which he is a director. Thus, he may be regarded as though he were two separate persons and with two separate minds.[51]

This decision seems overly technical and does not pay sufficient attention to the human realities once the corporate veil has been pierced. The decision was indeed not followed in England.[52]

(iii) *Agents Provocateur*

Reduction in law enforcement power would surely result if undercover agents who entrap, for example, a drug addict could themselves be convicted of conspiracies to commit crimes. The obviously correct answer is that they cannot be convicted of a conspiracy because they lacked the common intention to carry out the crime. This was confirmed in *Rex v. Kotyszyn*,[53] which also held that it followed that the victim of the entrapment could

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[46] *E.g.*, Rex v. Ash-Temple Co., [1949] Ont. 315, at 337, 93 Can. Crim. Cas. Ann. 267, at 279.

[47] Rex. v. Martin, 40 Man. 524, at 531-32, 550, 59 Can. Crim. Cas. Ann. 8, at 15, 32, [1933] 1 D.L.R. 434, at 440-41, 458.

[48] Regina v. McDonnell, [1965] 3 W.L.R. 1138 (Q.B.); the decision is supported by WORKING PAPER No. 50, *supra* note 41, at para. 34.

[49] WORKING PAPER No. 50, *supra* note 41, at para. 34.

[50] [1961] Ont. 265, 27 D.L.R.2d 193.

[51] *Id.* at 272, 27 D.L.R.2d at 200.

[52] Regina v. McDonnell, *supra* note 48, at 1145-46.

[53] [1949] Que. B.R. 472, 95 Can. Crim. Cas. Ann. 261, at 263, 265, 269, referred to with apparent approval by Mr. Justice Taschereau in *O'Brien*, *supra* note 22, at 668, 110 Can. Crim. Cas. Ann. at 3, but Mr. Justice Fauteux (dissenting) said that the question had not yet been authoritatively decided, *id.* at 693-94, 110 Can. Crim. Cas. Ann. at 28.

similarly not be convicted of conspiracy. Presumably their latter ruling would have been different if there had been two or more entrapment victims. The court in *Kotyszyn* even decided that the entrapment victim was not guilty of an intent to conspire. The judgments on this point appear to be unsatisfactory as none of them investigate the question of an attempt to commit the impossible, [54] but the actual decision seems to be desirable since, as argued more fully below, [55] social policy consideration seems to be against an extension of the inchoate crime of conspiracy by combining it with another inchoate offence.

2. *Mens Rea*

(a) *Generally*

We have seen [56] that Canadian judges have always been mindful of the fact that conspiracy has a common law origin. It has always been assumed that there is a *mens rea* requirement, usually expressed in the form of an intention to carry out the common object as in *O'Brien*. [57]

Whether or not the *mens rea* requirement for conspiracy can be extended to include recklessness has not been directly decided. A decision partially on point was *Regina v. Rese*. [58] The information charged the accused *inter alia* with a conspiracy to commit an indictable offence, "namely, . . . to unlawfully damage public property, namely bridges, . . . by painting thereon the sign commonly known as the 'Swastika'". [59] The procedural issue was whether or not there had been a sufficient allegation of a criminal conspiracy in that the word "wilful" had been omitted from the information. For the court, Mr. Justice Laskin concluded that the information was not fatally defective. An agreement to damage involved "deliberateness towards the proposed object", [60] but in view of the explicit extension of "wilfully" to recklessness by what is now section 386(1), the conclusion was compelled that "it is in any rational sense impossible to have an agreement to damage property which does not import wilfulness". [61] It is arguable that Mr. Justice Laskin was thinking along the lines that the *mens rea* for conspiracy need merely mirror that required for the full crime. On the other hand, it could also be argued that such a construction would be straining his language.

In *Churchill v. Walton*, [62] the House of Lords held that there was even a *mens rea* requirement in the case of a conspiracy to commit an offence of strict responsibility and that accordingly the normal rule that an honest

[54] *See* Regina v. Scott, 45 W.W.R. 479, [1964] 2 Can. Crim. Cas. Ann. (n.s.) 257 (Alta. 1963), confirming a conviction.

[55] See text *infra*, Part II A 3 (d)(i).

[56] See text *supra* at note 21.

[57] *Supra* note 22.

[58] [1968] 1 Can. Crim. Cas. Ann. (n.s.) 363, 2 Can. Crim. (n.s.) 99 (Ont.).

[59] *Id.* at 364-65, 2 Can. Crim. (n.s.) at 100.

[60] *Id.* at 366, 2 Can. Crim. (n.s.) at 102.

[61] *Id.* at 367, 2 Can. Crim. (n.s.) at 102.

[62] [1967] 2 A.C. 224, [1967] 1 All E.R. 497, [1967] 2 W.L.R. 682.

mistake of fact will excuse, whereas an honest mistake of law will not, applies:

> If what they agreed to do was, on the facts known to them, an unlawful act, they are guilty of conspiracy and cannot excuse themselves by saying that, owing to their ignorance of the law, they did not realize that such an act was a crime. If, on the facts known to them, what they agreed to do was lawful, they are not rendered artificially guilty by the existence of other facts, not known to them, giving a different and criminal quality to the act agreed upon. [63]

An early Canadian dictum of Mr. Justice Howard in *Segal v. Rex* [64] to the effect that conspirators "must know or be deemed to know that what they propose to do or accomplish is unlawful" [65] is to a contrary effect, but is itself a clear contradiction of what is now section 19 of the Code [66] which excludes ignorance of the law as a defence. The Law Reform Commission of Canada's Working Paper No. 2 [67] has already suggested that such a rule be maintained for real offences. [68]

(b) *Intent to commit an indictable offence (section 423(1)(d))*

This is the most non-controversial category of conspiracies. If the law of conspiracy were restricted to such offences, it could be argued that there should not be such a restriction as the distinction between indictable only offences such as theft under 200 dollars, [69] and summary conviction only offences such as common assault [70] does not always reflect true seriousness. [71] There is, however, an increasing tendency on the part of Parliament to enact hybrid offences, triable on indictment or summarily at the discretion of the Crown, [72] and such offences are presumably to be treated as indictable for the purposes of the law of conspiracy. [73]

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[63] *Id.* at 237, [1967] 1 All E.R. at 503, [1967] 2 W.L.R. at 690.

[64] 39 Que. B.R. 436, 45 Can. Crim. Cas. Ann. 32, [1925] 4 D.L.R. 762.

[65] *Id.* at 440, 45 Can. Crim. Cas. Ann. at 35, [1925] 4 D.L.R. at 765.

[66] Such a provision has always been in the Code: Can. Stat. 1892 c. 29, § 14; CAN. REV. STAT. c. 146, § 22 (1906); CAN. REV. STAT. c. 36, § 22 (1927); Can. Stat. 1953-54 c. 51, § 22.

[67] LAW REFORM COMMISSION OF CANADA, WORKING PAPER NO. 2, CRIMINAL LAW: STRICT LIABILITY 9-38 (1974).

[68] *But see* Stuart, *The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence*, 15 CRIM. L.Q. 160 (1973).

[69] Criminal Code, CAN. REV. STAT. c. C-34, § 283, 294(*b*) (1970).

[70] *Id.* § 245(1) (1970).

[71] As suggested for England by B. WOOTTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY 24 (1959).

[72] *E.g.*, assaults against a peace officer, Criminal Code, CAN. REV. STAT. c. C-34, § 246(2)(*a*) (1970), became hybrid offences in 1972: Criminal Law Amendment Act, 1972, Can. Stat. 1972 c. 13, § 22.

[73] Interpretation Act, CAN. REV. STAT. c. I-23, § 27(1)(*a*); Regina v. Seward, [1966] 4 Can. Crim. Cas. Ann. 166.

It has never been disputed that there can be a conspiracy to commit an indictable offence under another federal act, such as the Narcotic Control Act. [74]

(c) *Intent to commit a summary conviction only offence under a federal act (section 423(2)(b))*

The phrase "to effect an unlawful purpose, or . . . a lawful purpose by unlawful means" in section 423(2)(*b*) clearly seems wide enough to include conspiracies with an intent to commit a summary conviction offence under any federal act. The point has not arisen directly for decision in Canada, because there are few such offences and, as we shall see below, this is also not the widest definition of conspiracy.

In contrast, in England in *R. v. Blamires Transport Services Ltd.*, [75] the Court of Criminal Appeal held that the crime of conspiracy to commit a summary offence existed in some cases. In England, as in Canada, conspiracy is an indictable offence only. The accused in *Blamires* was charged with conspiracy to commit statutory summary offences by permitting drivers of trucks to drive hours beyond the maximum and to keep improper driving records. For the court, Mr. Justice Edmund Davies quoted Wright [76] as follows: "To permit two persons to be indicted for conspiracy to make a slide in the street of a town, or to catch hedge-sparrows in April, would be to destroy that distinction between crimes and minor offences which in every country it is held important to preserve." [77] Noting that Wright found many instances of prosecutions for conspiring to commit summary offences under statutes which regulated work and labour, [78] the court confirmed "a well-settled practice over a long period of accepting as valid conspiracy charges of the kind here impugned". [79]

(d) *Intent to commit a provincial offence (section 423(2))*

The leading interpretation of "an unlawful purpose" in what is now section 423(2)(*a*) is that of the Supreme Court of Canada in *Wright v. The Queen.* [80] Mr. Justice Fauteux, for the Court, gave the phrase the widest interpretation possible:

> Common Law conspiracy is one of the few Common Law offences which, upon the 1954 revision of the *Criminal Code*, Parliament thought advisable to perpetuate by codification. Martin's Criminal Code, 1955 ed., p. 35. Hence the law pertaining to this offence, its elements and the wide embracing import of the term "unlawful purpose", remains unchanged. While the

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[74] As, for example, in Regina v. MacDonald, *supra* note 33.

[75] [1963] 3 All E.R. 170, 47 Cr. App. R. 272, [1963] 3 W.L.R. 496 (C.C.A.).

[76] *Id.* at 173, 47 Cr. App. R. at 276, [1963] 3 W.L.R. at 498.

[77] R. WRIGHT, *supra* note 1, at 83.

[78] *Supra* note 76, at 173, 47 Cr. App. R. at 277, [1963] 3 W.L.R. at 499.

[79] *Id.* at 174, 47 Cr. App. R. at 279, [1963] 3 W.L.R. at 500.

[80] [1964] Sup. Ct. 192, [1964] 2 Can. Crim. Cas. Ann. (n.s.) 201, 43 D.L.R.2d 597.

> term, as shown in Harrison The Law of Conspiracy, encompasses more than criminal offences, sufficient it is to say, for the purpose of this case, that the purpose alleged in the charge, to wit, the obtention from a constable of information which it is his duty not to divulge, is an unlawful purpose. In the language of Lord Mansfield, in *Rex. v. Bembridge* (1783), 3 Doug. K.B. 327 at 332, 99 E.R. 679:
>
> > "A man accepting an office of trust concerning the public, especially if attended by profit, is answerable criminally to the King for misbehaviour in his office".
>
> The fact that the purpose or the breach of trust contemplated by the conspirators, whether as their ultimate aim or only as a means to it, be, if carried into effect, punishable either under s. 103 of the *Criminal Code* . . . or under s. 60 of the Ontario Provincial *Police Act*, adequately manifests the unlawfulness of the purpose within the meaning of the law attending Common Law conspiracies. [81]

The clear recognition that the unlawfulness can stem from the common law alone will be dealt with below. What is important for the present is that an alternative ground for the decision was expressly that an intent to commit a provincial offence would suffice. A decision to the contrary by Mr. Justice Disbery of the Saskatchewan Queen's Bench in *Regina v. Sommervill* [82] was specifically disapproved. [83]

There have been two fairly recent rulings to the same effect at the provincial level. In *Chapman*, [84] the Ontario Court of Appeal confirmed a conviction on a count of conspiracy to wire-tap and divulge private information in contravention of section 112 of the Telephone Act of Ontario, [85] which was held to have been constitutionally enacted. The decision in *Regina v. Layton* [86] produced an interesting difference of opinion. The "unlawful purpose" in that case was the production of a false prospectus contrary to certain sections of the Securities Act of British Columbia. [87] The main point of interest in the decision is that although one of the three judges of the British Columbia Court of Appeal dissented, the court unanimously accepted the English decision in *Blamires*, [88] implicitly in the case of the majority, in the sense that they held that not all conspiracies to commit provincial offences, being summary conviction offences, would be indictable. The dissent really came as to the application of the ruling in *Blamires* to the facts. Mr. Justice Robertson (Mr. Justice Bull concurring) held that the prohibitions and sanctions in the Securities Act were not "merely regula-

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[81] *Id.* at 193-94, [1964] 2 Can. Crim. Cas. Ann. (n.s.) at 202-03, 43 D.L.R.2d at 598-99.

[82] 40 W.W.R. 577, at 587, [1963] 2 Can. Crim. Cas. Ann. (n.s.) 178, at 188 (Sask. Q.B. 1962). The point did not arise in the appeal: 43 W.W.R. 87, [1963] 3 Can. Crim. Cas. Ann. (n.s.) 240 (Sask.).

[83] *Supra* note 80, at 194, [1964] 2 Can. Crim. Cas. Ann. (n.s.) at 203, 43 D.L.R.2d at 597.

[84] *Supra* note 21.

[85] ONT. REV. STAT. c. 457 (1970).

[86] [1970] 5 Can. Crim. Cas. Ann. (n.s.) 260 (B.C.).

[87] B.C. Stat. 1967 c. 45.

[88] *Supra* note 75.

tory or minor", but in respect of a "form of fraud", and was certainly "social legislation . . . of a serious nature, although not 'criminal' in the jurisdictional sense of that word as used in the B.N.A. Act, 1867". [89] It was noted that Harrison [90] even recognized an extension to conspiracies to infringe by-laws. The dissent of Mr. Justice Nemetz was based on a reading of *Blamires* as having a rationale based clearly on public safety, [91] whereas the present offence alleged was not of that type. [92] He noted that no fraud upon the public had been alleged, [93] and that to allow the Crown to indict the accused would constitute an undue extension of provincial securities legislation which had laid down a summary procedure for breaches. [94]

(e) *Unlawful non-criminal purpose and lawful purpose by unlawful non-criminal means (section 423(2)).*

The door was expressly left open by Mr. Justice Fauteux in the above-quoted passage from *Wright* [95] to allow section 423(2) to authorize the indictment of conspiracies to commit acts which are not criminal under the Code or prohibited by a provincial statute. Clearly the intent was to allow the full width of the common law, which extends beyond an intent to commit a common law offence, as was an alternative basis for the decision in *Wright* itself, to conspiracies with non-criminal objects. The only reported Canadian decision since 1955 to rest on the latter basis is that of Judge Moore, at trial, in *Chapman*, [96] although the Ontario Court of Appeal did not find it necessary to investigate this aspect as this was not the way the indictment had been framed:

> This makes it unnecessary to consider further the suggestion of [counsel] that eavesdropping was an "unlawful act" at common law . . . or whether eavesdropping constituted "the tort of breach of confidence", which [counsel], I think optimistically, described as a "disputed area."
>
> It follows also that I do not need to consider further the question of "public mischief", and conspiracy to commit it. [97]

Since, for reasons that will be explored later, [98] the writer strongly supports the recommendation in the English Law Commission's Working Paper No. 50 that the "object of conspiracy should be limited to the commission of substantive offences", [99] it will not be necessary to explore the nuances of the controversial other types of English common law conspiracy, which the

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[89] *Supra* note 86, at 276-77.
[90] *Id.* at 277 (Robertson, J.A.), quoting D. HARRISON, *supra* note 1, at 82.
[91] *Supra* note 86, at 294.
[92] *Id.* at 297.
[93] *Id.*
[94] *Id.* at 298.
[95] *Supra* note 80.
[96] *Supra* note 84, at 145-49.
[97] *Id.* at 158 (Arnup, J.A.).
[98] See text *infra*, part II A 3(a)(i).
[99] *Supra* note 41, at para. 62(a).

Law Commission's Working Paper lists [100] as conspiracies to defraud, defeat the course of justice, corrupt public morals, outrage public decency, or to injure, or conspiracies with a "public element".

One vital question that must be explored, however, is whether or not the courts can use the umbrella of the conspiracy offence to create new common law offences. The theoretical position in England is now clearly that they cannot. Notwithstanding the tremendous controversy and criticism [101] that followed the infamous decision in the Ladies' Directory case of *Shaw v. Director of Public Prosecutions* [102] to return a conviction on a charge of conspiracy to corrupt public morals, the House of Lords again convicted such accused on such a count in *Knuller v. Director of Public Prosecutions*, [103] in which the accused had published a magazine in which homosexuals were advertising for partners. The majority of the House of Lords further recognized the existence of another offence, that of conspiracy to outrage public decency. Lord Diplock dissented on both rulings [104] and Lord Reid as to the second. [105] However, each member of the House of Lords expressly qualified the decision in *Shaw* to the extent that they ruled that the courts have no residual power at common law to create new offences. Lord Simon, for example, said:

> [I]t has been suggested that the speeches in *Shaw's* case indicated that the courts retain a residual power to create new offences. I do not think they did so. Certainly, it is my view that the courts have no more power to create new offences than they have to abolish those already established in the law; both tasks are for Parliament. What the courts can and should do (as was truly laid down in *Shaw's* case) is to recognize the applicability of established offences to new circumstances to which they are relevant. [106]

This was in line with their earlier unanimous ruling in *Director of Public Prosecutions v. Bhagwan*, [107] an immigration case, in which it had been held that it was not

> a criminal offence for any person, whether or not acting in concert with others, to do acts which are neither prohibited by Act of Parliament nor at common law, and do not involve dishonesty or fraud or deception, merely because the object which Parliament hoped to achieve by the Act may be thereby thwarted. [108]

The obvious point [109] is that the denial of the existence of the judicial power to create new offences is largely nugatory in view of the fact that the

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[100] *Id.* at paras. 16-32.

[101] *E.g.*, Brownlie & Williams, *Judicial Legislation in Criminal Law*, 42 CAN. B. REV. 561 (1964).

[102] [1962] A.C. 220, [1961] 2 All E.R. 446.

[103] [1972] 2 All E.R. 898, [1972] 3 W.L.R. 143 (H.L.).

[104] *Id.* at 914-25, [1972] 3 W.L.R. at 160-71.

[105] *Id.* at 905-06, [1972] 3 W.L.R. at 149-50.

[106] *Id.* at 932, [1972] 3 W.L.R. at 180.

[107] [1972] A.C. 60.

[108] *Id.* at 80-81 (Lord Diplock).

[109] *See also*, WORKING PAPER No. 50, *supra* note 41, at para. 9.

present categories of conspiracies in England are so vague and wide that new situations can be made to fall under one of the rubrics. Good evidence of this is the rulings on the facts in *Shaw* and *Knuller*, the decision in *R. v. Hunter* [110] that conspiracy to prevent burial of a corpse was an offence, although a charge had apparently never been laid in modern times, and the decision of the House of Lords in *Kamara v. Director of Public Prosecutions* [111] to convict political demonstrators on a charge of conspiracy to trespass in a High Commission's premises. Lord Hailsham, speaking for the majority, [112] vaguely concluded that not all conspiracies to trespass were indictable, but ensnared was "a combination the execution of which has as its object not merely a tort or other actionable wrong, but also either the invasion of the public domain, [113] or the intention to inflict on its victim injury and damage which goes beyond the field of the nominal . . . ." [114]

3. *Social Policy and Comment*

(a) *Rationale and scope*

(i) *Conspiracies to commit statutory crimes*

Few would dispute the legitimacy of the main rationale of conspiracies to commit crimes, which is clearly preventive. Like other inchoate offences such as attempts, it exists to give the police power to intervene before the anticipated harm has occurred.

Comparing the *actus reus* required for attempts with that required for conspiracy, there is, of course, the curious paradox that some notion of proximity is required to convict an individual of the crime of attempt, but no meaningful overt act or requirement [115] need be satisfied to convict of conspiracy two or more persons who agree to commit an offence. Clearly, it is not difficult to postulate situations where a person who has not committed an attempt is much more dangerous to society than two persons who have agreed to commit the same type of offence at some future date. The fact that the theory is not logical when applied to all abstract situations is not a sufficient justification to change the law. The law of conspiracy clearly reflects the concern that the combination of two or more persons might be potentially very dangerous, thereby justifying a harsher attitude than with an individual. It would seem that at present an acceptable compromise with logic has been reached in the sense that the police are discouraged from resorting to conspiracy charges on a large scale by reason of the inherent difficulties of proof and the fact that it is an indictable offence only. The

[110] [1973] 3 All E.R. 286, [1973] 3 W.L.R. 374 (C.A.).

[111] [1973] 2 All E.R. 1242, 57 Cr. App. R. 880, [1973] 3 W.L.R. 198 (H.L.).

[112] Lords Morris and Simon concurring.

[113] This vague phrase "public domain" was applied as a "test" in the case of the conspiracy to effect a public mischief: Regina v. Withers, [1974] 1 All E.R. 100, at 106, [1974] 2 W.L.R. 26, at 32 (C.A. 1973).

[114] *Supra* note 111, at 1261, 57 Cr. App. R. at 910, [1973] 3 W.L.R. at 216.

[115] See text *supra* at note 24.

fact that so many indictable offences are tried summarily by provincial judges reduces the importance of the latter procedural point in Canada. The main point is that the police have the power to achieve a conviction if they unearth sufficient evidence of a dangerous conspiracy.

It could be argued that such considerations have equal validity whether or not the intention is to commit an indictable, federal summary conviction or a provincial offence. On the other hand, it is surely paradoxical that a federal summary conviction offence, although sometimes as serious as indictable only offences, [116] should become indictable and liable to a higher penalty [117] if the charge is one of conspiracy. Even more curious is a charge of conspiracy to commit a provincial offence. The federal government has chosen not to make the precise conduct impugned a federal offence, and the provincial legislature has not made the conspiracy a provincial offence. The combination of legislation from different constitutional preserves, in circumstances that were not before either legislature, results in an indictable offence with a higher penalty. A compromise as in *Blamires* [118] and *Layton* [119] to the effect that only some summary conviction and provincial offences can be the subject of conspiracy charges is clearly unsatisfactory as no clear yardstick for such a decision is possible. As the Law Reform Commission's Working Paper No. 2 [120] has already advocated for the *mens rea*/strict responsibility dilemma, the solution is surely the pragmatic one of making it clear in the new Code that conspiracy charges can be brought only under the Code in respect of Code offences—"real" offences in the Law Reform Commission's terminology. [121] Whether or not an exception should be made to preclude conspiracy charges in the case of summary conviction under the Criminal Code must surely await a procedural overhaul of the Code.

(ii) *Conspiracies to commit common law offences and conspiracies for non-criminal objects*

The devastating attack of the English Law Commission's Working Paper No. 50 [122] on conspiracies for non-criminal objects seems in the Canadian context to have validity too in respect of section 423(2)'s anomalous allowance of conspiracies to commit offences at common law, which, as we have seen [123] in England, have like Topsy, "just growed", and in practice have often been created or revived at the whim of judges.

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[116] See text *supra* at note 71.

[117] The penalty for common assault is a maximum of 500 dollars or six months imprisonment or both: Criminal Code, CAN. REV. STAT. c. C-34, § 245(1), 722(1) (1970). The maximum for a conspiracy to commit common assault is 2 years imprisonment: Criminal Code, *id.* at § 423(2).

[118] *Supra* note 75.

[119] *Supra* note 86.

[120] *Supra* note 67, at 15-19, 37-38.

[121] *Id.*

[122] *Supra* note 41, at paras. 8-14.

[123] See text *supra* between notes 101-14.

In reaching a conclusion that the law of conspiracy should not be extended beyond conspiracies to commit crime, the authors of the English Working Paper argue:

1. "It seems to us not merely desirable, but obligatory, that legal rules imposing serious criminal sanctions should be stated with the maximum clarity which the imperfect medium of language can attain"; [124]

2. The jury must not have a law-creating role as it often does in such conspiracy cases; [125]

3. It is difficult to see why the non-criminal conduct of an individual becomes more dangerous and criminal if somebody agrees with him; [126]

4. "Inchoate offences may widen the net to catch incipient criminal behaviour, but here, in a dubious area of non-criminality, a theoretically inchoate offence is used to stretch the substantive law"; [127]

5. Any gaps in the net of criminal responsibility are for Parliament to rectify and not for the law of conspiracy. [128]

The strong words of Sayre [129] have still not yet been successfully rebutted:

> It is hard to imagine a doctrine which would more effectively rob the law of predictability so far as it is applicable than the one that a criminal conspiracy includes combinations to do anything against the general moral sense of the community. Under such a principle every one who acts in co-operation with another may some day find his liberty dependent upon the innate prejudices or social bias of an unknown judge. It is the very antithesis of justice according to law. There will be a very real danger of courts being invoked, especially during periods of reaction, to punish, as criminal, associations which for the time being are unpopular or stir up the prejudices of the social class in which the judges have for the most part been bred. [130]

These arguments alone amply justify the need to abolish offences of conspiring to commit non-criminal objects. Additional arguments can be mounted. Modern penology suggests we should not be sanguine about the effects of applying the criminal sanction. Scientific evaluations [131] of the effectiveness of different forms of sentences—fines, probation, long or short-term prison sentences, or anything else—show that they are likely to be equally ineffective in deterring the offender from offending again. This

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[124] *Supra* note 41, at para. 9.
[125] *Id.* at para. 10.
[126] *Id.* at para. 11.
[127] *Id.* at para. 12.
[128] *Id.* at para. 13.
[129] *Supra* note 1; J. C. SMITH & B. HOGAN, *supra* note 25, at 190.
[130] Sayre, *supra* note 1, at 413.
[131] Outerbridge, *The Tyranny of Treatment . . . .?*, 10 CAN. J. CRIM & CORR. 378 (1968), 17 CHITTY'S L.J. 188 (1969); R. Hood, Research on the Effectiveness of Punishments and Treatments, 1967 (unpublished paper presented to the Council of Europe).

surely applies with more force in areas as controversial as this one. The writer conducted a field survey in 1969 of English police practices [132] and verified that English police do not charge the crime of conspiracy at all frequently, not even in the case of conspiracies to commit criminal offences where they usually preferred to await the commission of the full offence. The officers interviewed certainly did not view the law of conspiracy as being particularly effective in the fight against crime and certainly not in the enforcement of morals. The same is likely to be true in Canada, although a prosecutor has indeed argued that conspiracy charges are a useful weapon against organized crime. [133] Certainly the stress on the law of conspiracy in textbooks seems to have been vastly over-rated. The fact that the prosecution in *Knuller* [134] could only indicate that there had been in England "at least 30 and probably many more" [135] convictions of the crime of conspiracy to corrupt public morals in the decade that had elapsed since the case of *Shaw* almost certainly indicates a highly selective and therefore discriminatory pattern of prosecution for this offence.

In sum total, there is precious little to justify the retention in Canada of conspiracies to commit common law offences and conspiracies for non-criminal objects.

(b) *Mens rea*

In respect of conspiracies to commit criminal offences, it would seem for reasons advanced by the writer elsewhere [136] concerning the need to widen the *mens rea* concept, that the mental element of conspiracies to commit criminal offences should be the type of culpability required for the full crime or negligence, if the full crime is one of strict responsibility. The latter rider would, of course, disappear on enactment of the Law Reform Commission's recommendation [137] to remove strict responsibility from the Code. This is substantially the position reached, somewhat tortuously, by the English Law Commission's Working Paper No. 50. [138] The only difference is that the Working Paper No. 50 would require recklessness rather than negligence in the case of conspiracies to commit strict responsibility offences.

(c) *Actus reus*

The case law [139] does not suggest the need to codify beyond a requirement that there be an agreement between two or more natural persons.

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[132] D. Stuart, A Comparative Study of the Law and Police Practice in England Relating to the Prosecution of Inchoate and Preventive Crimes, 1974 (unpublished D. Phil. candidate thesis, Oxford University).

[133] Powell, *Conspiracy Prosecutions*, 13 CRIM. L.Q. 34, at 42-43 (1970).

[134] *Supra* note 103.

[135] *Id.* at 903, [1972] 3 W.L.R. at 147 (Lord Reid).

[136] Stuart, *supra* note 68.

[137] WORKING PAPER No. 2, *supra* note 67, at 15-19, 37-38.

[138] *Supra* note 41, at paras. 48-53.

[139] See text *supra* between notes 24-55.

Such a provision would, it is submitted, cater for all the problems that have arisen without changing the law. The exception is the common law immunity of husbands and wives.[140] If this is to be retained, a separate provision would be desirable. The social policy considerations here, such as the desire not to jeopardize the stability of marriages, are similar to those already grappled with by the Evidence Project of the Law Reform Commission, Study Paper No. 1,[141] before it recommended that spouses now be made competent and compellable and that the privilege of not disclosing marital communications be abolished. In this context, the English Law Commission's Working Paper No. 50, however, raises a pragmatic consideration leading to their provisional conclusion that the immunity should be retained:

> A change in the law to permit a spouse to be charged with conspiracy with his or her spouse might offer excessive scope for improper pressure to be applied to spouses in particular cases; where, for example, a husband refuses to confess to the commission of a crime, he would be open to the threat that his wife would be charged with conspiracy with him. Such a publicised change in the law in this respect could therefore bring practical disadvantages which might outweigh its possible advantages.[142]

It is hard to disagree with this statement. It seems that the present immunity, perhaps broadened to common law marriages, should be specially provided for in the Code.

(d) *Special problems*

(i) *Combined inchoate offences*

The Law Commission's Working Paper No. 50 seems to be wise in recommending that the crimes of attempting or inciting to conspire or conspiring to attempt should be rejected,[143] but unconvincing in advocating the retention of the crime of conspiracy to incite.[144] The fact that it is easy to arrive at preposterously wide definitions of offences by combining the present inchoate offences, and the fact that in these cases the general principles of defining each inchoate offence are applied to situations surely never imagined, clearly suggests that the criminal sanction should not be extended at all to combinations of inchoate offences. In practice it seems that the police wisely do not resort to such linguistic acrobatics, and, it is submitted that such academic fancies should not be enacted into the criminal law.

(ii) *Conspiracies to commit the impossible*

In respect of conspiracies to commit the impossible, it would seem that

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[140] See text *supra*, part II A 1 (b)(i).
[141] COMPETENCE AND COMPELLABILITY (1972).
[142] *Supra* note 41, at para. 36.
[143] *Id.* at paras. 44-46.
[144] *Id.* at para. 47.

the well-worn arguments advanced in relation to attempts to commit the impossible [145] have equal validity here.

In order to avoid regurgitation, it will suffice to say that it is now generally accepted that a court may convict on a count of an attempt to commit a crime which it was impossible to commit in the circumstances. An example would be where a would-be assassin throws a bomb which will never explode. The real debate is between those who wish and those who do not wish to impose criminal liability for attempts to commit acts which would only be criminal if the facts were as the accused wrongly supposed them to be. The classic example is of the man who "steals" an umbrella which he later finds out to be his own. In the interests of crime prevention in the wide sense, the present writer supports the majority academic view [146] in favour of criminal responsibility in such cases. Recently, however, the House of Lords in *Haughton v. Smith* [147] decided to the contrary.

The simple solution for conspiracy, in contrast to the complex one reached by Working Paper No. 50 [148] is to enact that it shall be no defence that the full crime was impossible to commit.

(iii) *Voluntary Desistance*

Again, what has traditionally been argued in respect of the law of attempts seems to have equal validity for conspiracy.

There is much to be said [149] for allowing a complete defence in the law of attempts where the accused has a *locus penitentiae* (an opportunity to repent) and does repent and avoids causing any harm, either through desisting or by intervening himself to prevent the harm from arising. [150] No argument of deterrence, reformation or prevention seems to require the

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[145] *E.g., Scott, supra* note 54; G. WILLIAMS, CRIMINAL LAW 633-53 (2d ed. 1961); Williams, *Criminal Attempts—A Reply*, [1962] CRIM. L. REV. 300; Smith, *Two Problems in Criminal Attempt*, 70 HARV. L. REV. 422, at 435-48 (1956); Smith, *Two Problems in Criminal Attempts Re-Examined—II*, [1962] CRIM. L. REV. 212; J. C. SMITH & B. HOGAN, *supra* note 25, at 198-205; Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571 (1961); Buxton, *The Working Paper on Inchoate Offences: (1) Incitement and Attempt*, [1973] CRIM. L. REV. 656.

[146] The most articulate exponent of the minority view is Professor Smith: *supra* note 145. J. C. SMITH & B. HOGAN, *supra* note 25, at 203, presents an admirably balanced account of both points of view; and Buxton, *supra* note 145, the most persuasive.

[147] [1973] 3 All E.R. 1109, [1974] 2 W.L.R. 1 (H.L.); *following* R. v. Percy Dalton Ltd., 33 Cr. App. R. 102 (C.C.A. 1949), *in preference to* R. v. Miller, 49 Cr. App. R. 241 (C.C.A. 1965) *and* R. v. Crispin, [1971] CRIM. L. REV. 229 (C.C.A.).

[148] *Supra* note 41, at para. 136.

[149] Wechsler, Jones & Korn, *supra* note 145, at 617-19.

[150] Society is not sufficiently advanced to allow the defence if any harm has resulted: R. PERKINS, CRIMINAL LAW 512 (1957); Wechsler, Jones & Korn, *supra* note 145, at 618. G. GORDON, THE CRIMINAL LAW OF SCOTLAND 169 (1967) poses the unreal difficulty of a man "avoiding guilt" by saving the life of a man he shot and wounded.

punishment of one who is truly repentant and has done no harm. Any dangerousness of character seems to have been negatived. There is also the somewhat unreal Benthamite [151] argument that this would also give a perpetrator a motive to withdraw or prevent the commission of the crime. This was, however, considered to be the most persuasive argument in favour of the defence by the English Law Commission's Working Paper No. 50, which leaves the matter open, [152] and, rather naively, urges the police and prosecuting authorities to consider whether such a defence would help in the administration of the law. [153] Clearly, the object of such a defence is to prevent the imposition of the criminal sanction in certain cases.

Since the aim of a modern court should be to investigate every detail of the accused's behaviour before punishing him, it is difficult to see any force in Mr. Justice Mann's protestations in *R. v. Page* [154] that the defence of voluntary desistance would involve "the necessity, in almost every case of an unsuccessful attempt to commit a crime, of determining whether the accused desisted from sudden alarm, from a sense of wrong-doing, from failure of resolution, or from any other cause". And Stephen's objection [155] that such a general defence would excuse a man who desists because he encounters more resistance than he expected or thought he was being discovered, is answered if voluntary is taken to mean that the accused's desistance from his conduct (or his subsequent intervention) is intended to be permanent and is not due to new and extraneous factors that increase the probability of detection or apprehension or make it more difficult for him to complete his act. [156]

Since conspiracy is committed by a mere agreement plus an intent, it would seem necessary that the conspirator who changes his mind need only take all reasonable steps to communicate this to each co-conspirator.

B. *Specialized Conspiracies*

1. *Under the Code (excluding trade conspiracies)*

Under section 423(1), fully reproduced above, [157] three forms of specialized conspiracies are codified: conspiracies to commit murder (section 423(1)(*a*)), conspiracies "to prosecute a person for an alleged offence, knowing that he did not commit that offence" (section 423(1)(*b*)) and conspiracies "to induce, by false pretences, false representations or other fraudulent means, a woman to commit adultery or fornication" (section 423(1)(*c*)).

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[151] PRINCIPLES OF MORALS AND LEGISLATION 417 (Harrison ed. 1826).

[152] *Supra* note 41, at paras. 137-43.

[153] *Id.* at para. 143.

[154] [1933] Vict. L.R. 351, at 354.

[155] J. STEPHEN, 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 226-27 (1883).

[156] *Cf.* the Reporter's note to the MODEL PENAL CODE § 5.01(4), which allows the defence of renunciation: Wechsler, Jones & Korn, *supra* note 145, at 614-15.

[157] See text *supra* at note 17.

None of the sub-sections deals with general substantive principles of conspiracy with the exception of prescribing a special penalty in each case. We have seen [158] that each has a history stemming back to the English common law before 1892.

Conspiracies to commit treason and seditious conspiracies are the other specialized forms of conspiracies under the Code (excluding trade conspiracies). In terms of section 46(1)(*f*), conspiracy with any person to do any one of the following will mean that he has committed treason with the maximum sentence of death or life imprisonment (section 47(1)(*b*)):

> (*a*) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;
> (*b*) levies war against Canada or does any act preparatory thereto;
> (*c*) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities whether or not a state of war exists between Canada and the country whose forces they are; [or]
> (*d*) uses force or violence for the purpose of overthrowing the government of Canada or a province. [159]

Under section 46(1)(*h*), anyone who conspires with any person to

> without lawful authority, [communicate] or [make] available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada. [160]

is also guilty of treason and liable to be sentenced to death or to life imprisonment if a state of war exists between Canada and another country (section 47(*c*)) or fourteen years imprisonment if no such state of war exists (section 47(1)(*d*)).

Under sections 60(3) and 62(*c*), a seditious conspiracy, which is defined as "an agreement between two or more persons to carry out a seditious intent", is an indictable offence with a maximum penalty of fourteen years imprisonment. In terms of section 60(4), "seditious intention" is broadly and not exclusively defined as follows:

> Without limiting the generality of the meaning of the expression "seditious intention", everyone shall be presumed to have a seditious intention who
> (a) teaches or advocates, or
> (b) publishes or circulates any writing that advocates, the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada. [161]

Again it is clear that these sections do not require any new substantive principles of conspiracy, and that conspiracies to commit treason are clearly

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[158] See text *supra* at note 12.
[159] Criminal Code, CAN. REV. STAT. c. C-34, § 46(1) (1970).
[160] *Id.* at § 46(1)(*e*).
[161] Criminal Code, CAN. REV. STAT. c. C-34 (1970).

defined to be the full offence of treason itself, while seditious conspiracy is considered a full substantive offence, since there is no unique crime of sedition. [162]

2. *Trade Conspiracies*

We have seen above [163] that a broad offence of conspiracy in restraint of trade is still in our Code. The relevant sections are as follows:

> 424.(1) A conspiracy in restraint of trade is an agreement between two or more persons to do or to procure to be done any unlawful act in restraint of trade.
>
> (2) The purposes of a trade union are not, by reason only that they are in restraint of trade, unlawful within the meaning of sub-section (1).
>
> 425.(1) No person shall be convicted of the offence of conspiracy by reason only that he
>
> (a) refuses to work with a workman or for an employer, or
>
> (b) does any act or causes any act to be done for the purpose of a trade combination, unless such act is an offence expressly punishable by law.
>
> (2) In this section, "trade combination" means any combination between masters or workmen or other persons for the purpose of regulating or altering the relations between masters or workmen, or the conduct of a master or workman in or in respect of his business, employment or contract of employment or service. [164]

Of far more practical significance now are the more specialized forms of trade conspiracy re-defined and transferred in part in 1960 [165] to section 32 of the Combines Investigation Act, [166] sub-section (1) of which is as follows:

> 32.(1) Everyone who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,
>
> (b) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof,
>
> (c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property, or
>
> (d) to restrain or injure trade or commerce in relation to any article,
>
> is guilty of an indictable offence and is liable to imprisonment for two years.

A detailed study of the substantive definitions in the above sections are beyond the scope of the present article and are a matter for specialized con-

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[162] § 62 creates three offences: speaking seditious words, §§ (*a*); publishing a seditious libel, §§ (*b*) and seditious conspiracy, §§ (*c*).

[163] See text *supra* between notes 14-16.

[164] Criminal Code, CAN. REV. STAT. c. C-34 (1970).

[165] See text *supra* between notes 14-17.

[166] CAN. REV. STAT. c. C-23 (1970).

sideration such as that by Gosse. [167] It also seems that the best consideration of the subject would be from an economic perspective. Two questions are, however, relevant for consideration here.

The first is as to the relationship between section 424 of the Code and section 32(1) of the Combines Investigation Act. It will be recalled [168] that other Code sections dealing with more specific forms of trade conspiracies were re-defined and transferred to the Combines Investigation Act in 1960, but that section 424 was retained unaltered in the Code. There was no explanation of this in the House of Commons Debates. [169] Gosse can only discover cases on what is now section 424 up to 1940, [170] and he concludes: "Further decisions appear to disregard it. Certainly section [424] cannot be considered as having any practical significance in the development of the law on what are now clauses in (a), (b) and (c), but its relationship to the now clause in (d) must still be in doubt." [171] In the more than ten years that have elapsed since Gosse made his comment the apparent overlap between section 424 of the Code and section 32(1)(*d*) of the Combines Investigation Act has apparently not led to practical difficulties and has not been judicially commented upon.

The second question is whether or not section 32 of the Combines Investigation Act codifies more than a specialized conspiracy by using the words "conspires, combines, agrees or arranges". The unanimous opinion of the Supreme Court of Canada in *Howard Smith Paper Mills Ltd. v. The Queen* was that only one offence of conspiracy has been enacted. [172] Mr. Justice Kellock [173] quoted an early judgment [174] to the effect that: "The crime is in the conspiracy, not in the unlawful acts comprehended in it." [175] The only judicial view to the contrary is that of Mr. Justice Laidlaw for the Ontario Court of Appeal in *Electrical Contractors Association of Ontario* [176] to the following effect:

> The scope of the section is not confined to conspiracy. It extends to and includes the wrong committed by a person who "combines", "agrees" or "arranges" with another person . . . . Without attempting to define the scope of the class of persons falling within the section it would appear to me sufficient to say that it is not limited to persons who agree one with the other, but it includes also persons who combine or arrange to do what is prohibited by the section. [177]

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[167] *Supra* note 17.

[168] See text *supra* at note 17.

[169] HOUSE OF COMMONS DEBATES, vol. 4, 4339-52 (1960) (Mr. Fulton, Minister of Justice).

[170] R. GOSSE, *supra* note 17, at 84-85.

[171] *Id.* at 85.

[172] [1957] Sup. Ct. 403, at 413, 421-22, 118 Can. Crim. Cas. Ann. 321, at 330, 340, 8 D.L.R.2d 449, at 458-59, 468.

[173] *Id.* at 413, 118 Can. Crim. Cas. Ann. at 330, 8 D.L.R.2d at 459.

[174] Rex v. Elliott, 9 Ont. L.R. 648, 9 Can. Crim. Cas. Ann. 505 (1905).

[175] *Id.* at 651, 9 Can. Crim. Cas. Ann. at 508.

[176] *Supra* note 50.

[177] *Id.* at 276-77, 27 D.L.R.2d at 204-05.

Even in the above judgment, it is extremely difficult to gauge what the words in the section mean, and it is surely confusing to use the very word "conspiracy" as an alternative version of the *actus reus*. The use of the word "conspiracy" could not have been dictated by the need to incorporate the phrase now in section 423(2)—"unlawful purpose, or . . . a lawful purpose by unlawful means"—as the objects specified in clauses (*a*) to (*d*) are not unlawful in terms of any statute or in common law. [178] The offence is entirely created by this statutory section.

3. *Social Policy and Comment*

(a) *Specialized conspiracies under the Code (excluding trade conspiracies)*

Social policy reasons for retaining the three forms of specialized conspiracies presently in section 423(1) [179] are difficult to determine. It would seem that conspiracies to murder (section 423(1)(*a*)) are codified separately mainly to avoid the death sentence in cases of conspiracies to commit capital murder, while conspiracies to "prosecute a person for an alleged offence, knowing that he did not commit that offence" (section 423(1)(*b*)) and conspiracies to fraudulently induce a woman to commit adultery or fornication (section 423(1)(*c*)) seem to be codified separately simply because the common law separated such conspiracies. Surely such conspiracies should be prosecuted under conspiracies to commit the appropriate full substantive offence relating to the obstruction of justice or the sexual offence in question.

Without becoming embroiled in the wider definitions of treason and sedition, [180] it is surely sufficient to argue that conspiracies to commit treason should not be considered as the full offence itself [181] but merely as an inchoate crime in relation to the full offence, and likewise there should be no such offence as seditious conspiracy except in so far as there is a conspiracy to commit a full offence known as sedition. In the case of both types of conspiracies the death sentence should be precluded to avoid anomalous extensions of the most extreme penalty.

(b) *Trade conspiracies*

Without a full study of a very technical area, it is difficult to argue that there should not be convictions for trade conspiracies for objects declared unlawful by section 32(1) of the Combines Investigation Act, but not in themselves criminal. The arguments already advanced [182] against the conspiracies for non-criminal objects apply, but with less force, to a specialized

[178] *See also* R. GOSSE, *supra* note 17, at 96.

[179] See text *supra* at note 157.

[180] The latter was discussed in HOUSE OF COMMONS DEBATES, vol. 4, 3698-714, 3921-22 (1953-54).

[181] See text *supra* between notes 158-60.

[182] See text *supra*, part II A 3(a)(ii).

form of statutory conspiracy. The prevailing social policy view that such sections are desirable to regulate the economy seem to be paramount.

In this sensitive area, reform must await a full consultation of all interest groups.[183] However, provisionally, it can be maintained that there seems to be little reason for the retention of section 424 (and its companion section 425) in the Code. It seems to overlap with section 32(1) of the Combines Investigation Act and seems to be ignored or to result in confusion in the abstract.[184] Either a separate act should be retained *inter alia* to deal with all the forms of trade conspiracies, as in practice at present, or, in line with the latest thinking of the Law Reform Commission,[185] the provisions relating to specialized trade conspiracies should be transferred into the Code, providing that a full *mens rea*[186] concept is desired.

Provisionally too, it can be suggested that the solution to the bad drafting of section 32(1)[187] is, as Gosse[188] suggests, to delete the words "conspires" and "combines" entirely from the section.[189] Bearing in mind that agreements and arrangements can obviously be express or implied, it is difficult to see that the section will in this way be any less embracing, and in fact there is the possibility[190] that this change will widen the section by allowing a single person to be charged in the absence of proof of *mens rea* for at least two parties. There is no danger of confusion with a normal conspiracy charge if all that can be said is that the accused has been charged with a contravention of section 32(1) or its equivalent.

III. Procedural Dimension

A. *Applying the Rules of Evidence to Conspiracy*[191]

1. *Rules*

(a) *Proof by inference*

Not surprisingly, in view of the nature of the offence of conspiracy, there is seldom direct evidence, and thus most conspiracy trials involve the process

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[183] In 1954 a labour union lobbied at a late stage to avoid a word change to what is now § 425: House of Commons Debates, vol. 4, 3916-17 (1953-54).

[184] See text *supra* between notes 168-78.

[185] Note 137 *supra*.

[186] R. Gosse, *supra* note 17, at 101-04 suggests that courts at present do not apply the full *mens rea* concept in "combines" cases.

[187] See text *supra* between notes 172-78.

[188] R. Gosse, *supra* note 17, at 96-97.

[189] *But cf.* the words of the Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890): "Every contract, combination in the form of trust or otherwise, or conspiracy . . . ." *See generally* P. Areeda, Antitrust Analysis (1967).

[190] R. Gosse, *supra* note 17, at 98.

[191] This section was influenced by the article by Hunt, *supra* note 32.

of drawing inferences. The leading and often quoted [192] dictum is that of Mr. Justice Rinfret for the Supreme Court of Canada in *Paradis v. The King*:

> Conspiracy, like all other crimes, may be established by inference from the conduct of the parties. No doubt the agreement between them is the gist of the offence, but only in very rare cases will it be possible to prove it by direct evidence. Ordinarily the evidence must proceed by steps. The actual agreement must be gathered from "several isolated doings", (Kenny — "Outlines of Criminal Law", p. 294) having possibly little or no value taken by themselves, but the bearing of which one upon the other must be interpreted; and their cumulative effect, properly estimated in the light of all surrounding circumstances, may raise a presumption of concerted purpose entitling the jury to find the existence of the unlawful agreement. [193]

It would seem that the dictum could be generalized to the proof of any essential element of the offence of conspiracy, and that there is also no necessity to speak of "a presumption".

It is clear law [194] that evidence relating to a time period before or after the agreement may, in an appropriate case, be relevant and admissible [195] and that an inference may be drawn from evidence not only of acts and declarations of the conspirators, but also from documents. [196]

(b) *The rule in Hodge's Case* [197]

In a conspiracy trial where the evidence is circumstantial only, the jury must be instructed, as is normal in such cases, along the lines of the ancient formula of Baron Alderson in *Hodge's Case*. The jury must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was

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[192] *E.g.*, Rex v. Miller, [1940] 2 W.W.R. 505, at 507 (B.C.). Regina v. Smith, 72 W.W.R. (n.s.) 548, at 554 (B.C. County Ct. 1970); Regina v. McDonald, 10 Can. Crim. Cas.2d 1, at 8, 20 Can. Crim. (n.s.) 369, at 376-77 (Alta. 1972).

[193] [1934] Sup. Ct. 165, at 168, 61 Can. Crim. Cas. Ann. 184, at 186 (1933). A similar statement was made by Mr. Justice Fauteux in The Queen v. Gagnon, [1956] Sup. Ct. 635, at 638, 115 Can. Crim. Cas. Ann. 361, at 365.

[194] Hunt, *supra* note 32, at 317-20, discusses several decisions.

[195] It is submitted that the admission in the trade conspiracy case of Rex v. Master Plumbers & Steam Fitters Co-Operative Ass'n, 14 Ont. L.R. 295 of evidence relating to a period prior to the incorporation of a conspirator company is no exception. Hunt, *supra* note 32, at 320, points out that this evidence was expressly limited to being an aid "in forming a judgment as to the motives which led to the incorporation and the ends and purposes intended to be accomplished by it": 14 Ont. L.R. at 308. It is highly doubtful whether a trier of fact could honestly make such a distinction.

[196] Hunt, *supra* note 32, at 320-23 discusses *inter alia* the leading case of Rex. v. Russell, [1920] 1 W.W.R. 624, 33 Can. Crim. Cas. Ann. 1, 51 D.L.R. 1 (Man.).

[197] 2 Lewin 227, 168 Eng. Rep. 1136 (Liverpool Sum. Assizes 1838).

the guilty person".[198] Indeed, the "rule" has been invoked in many conspiracy trials.[199]

The Appellate Division of the Supreme Court of Alberta in *Regina v. McDonald*[200] squarely faced the question of applying in a conspiracy trial the recent majority decisions of the Supreme Court of Canada in both *Regina v. Mitchell*[201] and *John v. The Queen*[202] to the effect that the rule in *Hodge's Case* does not apply to the question of intent or, presumably, any wider form of *mens rea*.[203] For the Alberta court, Mr. Justice Clement held that in cases of conspiracy the intent was so much a part of the agreement that it required separate consideration only when an accused tendered evidence to rebut the presumption that he intended the natural and probable consequences of his act.[204] It was only when the accused raised the separate issue of an intent that the limitation put on the use of the rule in *Hodge's Case* by the Supreme Court of Canada could be applied.[205] It is difficult to accept this decision since it is based on the view that there is a rebuttable presumption of intent, whereas the better view is surely that it is merely "generally . . . a reasonable inference"[206] or, in the classic words of Lord Denning, "not a proposition of law but a proposition of ordinary good sense".[207] However, the dilemma was clearly that in conspiracy the *actus reus* and *mens rea* are so intermingled that a literal application of the limitation on the rule in *Hodge's Case* dictated by the Supreme Court of Canada might have resulted in the rule being totally inapplicable to conspiracy trials.

The curious paradox must be noted that although the rule in *Hodge's Case* is often the stated reason for granting an acquittal,[208] the stated view of the Supreme Court of Canada in both *Mitchell*[209] and *John*[210] is that the rule in *Hodge's Case* requires no higher standard of proof.

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[198] *Id.* at 228, 168 Eng. Rep. at 1137 (italics omitted).

[199] *See, e.g.*, Regina v. DePauw, [1965] 4 Can. Crim. Cas. Ann. (n.s.) 335 (B.C.); Regina v. Smith, *supra* note 90; Regina v. Gunn, [1972] 1 W.W.R. 401, 5 Can. Crim. Cas.2d 503 (B.C. 1971); and Regina v. MacDonald, *supra* note 32.

[200] *Supra* note 192.

[201] [1965] 1 Can. Crim. Cas. Ann. (n.s.) 155, 46 D.L.R.2d 384 (Sup. Ct. 1964).

[202] [1971] Sup. Ct. 781, 15 Can. Crim. (n.s.) 257 (1970).

[203] The majority judgment of Spence, J. in *Mitchell*, *supra* note 201, at 167, 46 D.L.R.2d at 394-95, was confirmed by the majority through Ritchie, J. in *John*, *supra* note 202, at 791, 15 Can. Crim. (n.s.) at 263. Cartwright, J. in *Mitchell*, *supra* note 201, at 159, 46 D.L.R.2d at 387, and Laskin, J. in *John*, *supra* note 202, at 814-15, 15 Can. Crim. (n.s.) at 282, both dissented on this point.

[204] Regina v. MacDonald, *supra* note 192, at 15-16, 20 Can. Crim. (n.s.) at 384-85.

[205] *Id.* at 16, 20 Can. Crim. (n.s.) at 385, *applied in* Cassidy v. The Queen, 18 Can. Crim. Cas.2d 1, at 20, 26 Can. Crim. (n.s.) 316, at 328-29 (N.B. 1974).

[206] Regina v. Ortt, [1969] 1 Ont. 461, at 463, [1970] 1 Can. Crim. Cas. Ann. (n.s.) 223, at 225 (1968), *and see* Regina v. Giannotti, [1956] Ont. 349, 115 Can. Crim. Cas. Ann. 203.

[207] Hosegood v. Hosegood, 66 T.L.R. 735, at 738 (C.A. 1950).

[208] See the case examples given by Hunt, *supra* note 32, at 323-24.

[209] *Supra* note 201, at 167, 46 D.L.R.2d at 394 (Spence, J.).

[210] *Supra* note 202, at 791-92 (Ritchie, J.), 804 (Pigeon, J.), 814 (Laskin, J. dissenting), 15 Can. Crim. (n.s.) at 263 (Ritchie, J.), 274 (Pigeon, J.), 282 (Laskin, J. dissenting).

(c) *Linking the evidence* [211]

As is the case with all criminal trials, evidence in a conspiracy trial must be relevant (probative) to be admitted. It seems impossible [212] to arrive, philosophically, at a criterion of relevancy valid for all cases. As Thayer said so long ago, it is "an affair of logic and experience, and not at all of law". [213]

The problem may be particularly acute in a conspiracy trial, as indicated by Chief Justice Robertson for the Ontario Court of Appeal in *Rex. v. Piton*:

> Where there are no particulars of a charge of conspiracy given the task of a trial Judge is more than usually difficult, and it will often be necessary for him to rely upon prosecuting counsel to connect the matters of which he adduces evidence, with the accused and with the charge, and to oust anything that he cannot so connect. If irrelevant evidence is admitted and the jury is not told to disregard it, the result may be disastrous to the prosecution. [214]

The accused, who had been charged with conspiracy to defraud an insurance company and attempting to obtain money by false pretences, had to be acquitted, because although the prosecution had tendered much evidence to show that the circumstances surrounding the fire on the insured premises were very suspicious, they had not adduced evidence to connect either of the accused in any way to the fire.

The difficulty recognized by Chief Justice Robertson probably explains why the only reported decisions on what McWilliams [215] calls "tentative relevancy" appeared to be conspiracy cases. Evidence that does not appear to be relevant is admitted on the assurance from the prosecutor that the link will later become plain or be made. Chief Justice Hunter, for example, in *The King v. Hutchinson* [216] reasoned that:

> [W]here a piece of evidence which may for the time being appear to be irrelevant is made competent and relevant by the introduction of other competent and relevant evidence, no harm has been done. The most that can be said is that the natural order of proof has been inverted, but it would be an extraordinary thing if the evidence which at first sight was apparently irrelevant would have to be proved over again in order to bring it in in its more natural order. [217]

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[211] Hunt, *supra* note 32, at 325-27.

[212] *See also* P. MCWILLIAMS, CANADIAN CRIMINAL EVIDENCE 19 (1974).

[213] J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 269 (1898). See the pragmatic approach of the courts in the following four jury trials, where the courts have evinced a greater concern for relevancy: Hansen v. Saskatchewan Power Corp., 36 W.W.R. (n.s.) 640, at 641-43, 31 D.L.R.2d 189, at 190-92 (Sask. 1961); Regina v. Dilabbio, [1965] 2 Ont. 537, at 539, 46 Can. Crim. 131, at 133; St. Louis v. The Queen, 24 Can. Crim. (n.s.) 77 (Que. 1973); Regina v. Darwin, 13 Can. Crim. Cas. 2d 432, at 435 (B.C. 1973).

[214] 80 Can. Crim. Cas. Ann. 72, at 77 (Ont. 1943).

[215] P. MCWILLIAMS, *supra* note 212, at 21.

[216] 11 B.C. 24, 8 Can. Crim. Cas. Ann. 486 (1904).

[217] *Id.* at 32-33, 8 Can. Crim. Cas. Ann. at 495.

On occasion an appellate court will grant a new trial where the Crown did not in fact provide the missing link but where the evidence was nonetheless admitted. In *Regina v. Krueger*,[218] for example, where the charge was one of conspiracy to provide information intended for use in connection with bookmaking, a new trial was granted because police surveillance evidence related to very much more than that connected with the trial. The Court said: "It would place an intolerable burden on the Crown to insist that no evidence be heard except that which could be directly linked up with the offence charged. While some leeway is necessary, there is a point, however, beyond which it should not go."[219] The same court had earlier quoted in length from the judgment of Chief Justice Culiton in the then unreported case of *Regina v. Shumiatcher*[220] to the following effect:

> In a charge of conspiracy a heavy responsibility rests upon counsel for the prosecution as very seldom can conspiracy be proved by direct evidence but must be established by inference from proven facts and the conduct of the parties. This places a serious but necessary onus upon the prosecutor to lead only that evidence which in his opinion is properly relative to the case which he is attempting to prove. The Court is not ordinarily in a position to determine the relevancy or admissibility of evidence of isolated facts but must rely on the undertaking of the prosecutor that such evidence, when all the evidence is in, will properly find its place in the chain of evidence. This requires meticulous care by the prosecutor so as to avoid, particularly before a jury, evidence which in itself is prejudicial to an accused and which, in the final analysis is neither relevant nor admissible. Such a responsibility can only be discharged when the prosecutor has a clear conception of the agreement constituting the conspiracy which he is attempting to prove.[221]

Similarly, a check on the activities of a prosecutor were envisaged by Chief Justice Robertson in *Piton*,[222] where he said:

> No doubt there are cases where the prosecution properly develops a line of evidence in the reasonable expectation that the witnesses will establish the relevancy of that evidence to the charge and yet the evidence, in the result, falls short of that. It is quite another matter to introduce evidence that may create a suspicion adverse to the accused in the minds of the jury, where there is no expectation of being able to carry it further.[223]

It seems that as a matter of practice the notion of "tentative relevancy" may receive wide application, particularly by some judges; indeed, it is a common feature of trials that exhibits are filed initially "for identification only"—clearly an instance of "tentative relevancy".

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[218] 55 W.W.R. (n.s.) 624, [1966] 3 Can. Crim. Cas. Ann. (n.s.) 127 (Sask. 1965).

[219] *Id.* at 628-29, [1966] 3 Can. Crim. Cas. Ann. (n.s.) at 131.

[220] [1966] 2 Can. Crim. Cas. Ann. (n.s.) 76 (Sask. 1965).

[221] *Supra* note 19, at 627, [1966] 3 Can. Crim. Cas. Ann. (n.s.) at 130.

[222] *Supra* note 214.

[223] *Id.* at 77.

(d) *Evidence of acts and declarations of co-conspirators* [224]

Perhaps the evidential rule most frequently thought to be unique to conspiracy is that by which acts and declarations of one conspirator in furtherance of the common design may be given in evidence against all the conspirators. It was held, however, in *Rex v. Koufis* [225] by Mr. Justice Kerwin that the rule was not unique to the crime of conspiracy:

> It is well settled law that any acts done or words spoken in furtherance of the common design may be given in evidence against all (*Paradis v. The King*, [1934] S.C.R. 165). This rule applies to all indictments for crime, and not only when the indictment is for conspiracy . . . . [226]

As a consequence of this dictum the rule has been applied in non-conspiracy trials such as in *Tass v. The King*, [227] involving a manslaughter charge resulting from an abortion, and in civil trials. [228]

Two prosecutors have recently alleged that section 21(2) of the Code [229]—

> Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and only one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence —

is relevant to the rule. Powell [230] goes so far as to suggest that this section is "further authority" for the rule, while McWilliams [231] suggests that the rule may "be regarded not so much as a rule of evidence as a matter of criminal responsibility arising from a conspiracy". These views can be flatly rejected. Section 21(2) deals with the substantive question of criminal responsibility and with what the prosecutor has to prove to include a party to a common purpose in the net of criminal responsibility. By the words "ought to have known", the section extends beyond the normal subjective *mens rea* to the objective, inadvertent concept. It could well be argued that this section can further extend the ambit of the evidential rule under consideration, but the rule is separate, and in the cases applying this rule there has been no mention of section 21(2) or any attempt to apply its terms.

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[224] *See generally* Hunt, *supra* note 32, at 327-33; P. MCWILLIAMS, *supra* note 212, at 344-48; Powell, *supra* note 133, at 42-43, 61-63; TREMEEAR, *supra* note 15, at 646-49; and Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, at 984-90 (1959).

[225] [1941] Sup. Ct. 481, [1941] 3 D.L.R. 657.

[226] *Id.* at 488, [1941] 3 D.L.R. at 663.

[227] [1947] Sup. Ct. 103, [1947] 1 D.L.R. 497 (1946).

[228] According to Martland, J. in McDonald v. The Queen, [1960] Sup. Ct. 186, at 190, 126 Can. Crim. Cas. Ann. 1, at 13 (1959).

[229] CAN. REV. STAT. c. C-34 (1970).

[230] Powell, *supra* note 133, at 42.

[231] P. MCWILLIAMS, *supra* note 212, at 344.

The better and prevailing view, both in Canada [232] and the United States, [233] is that, as conspirators are partners in crime, they are considered to be agents of one another, and so the declaration of a conspirator in furtherance of the conspiracy charged is admissible against his partner.

No Canadian court appears to have really thought this rule out in the context of the general principles of the law of evidence, with most courts being content to reaffirm its applicability to both acts and statements. The purest view is probably that the rule indeed deals with an exception to the general hearsay exclusionary rule. [234] Evidence of acts as opposed to statements of co-conspirators will rarely involve a problem of hearsay and so should normally be admitted if relevant without reference to this rule. [235] It is also clear that the rule need not be applied when a co-conspirator is giving testimony from the witness stand as to facts within his knowledge, since no hearsay problem is involved. [236] The rule has as its proper ambit statements by a person engaged in a common enterprise which are admissible as admissions against the party on the basis of an implied agency if the statements were made in furtherance of the common design. [237]

One of the most instructive dicta on procedure, indicating that the notion of "tentative relevancy", which in this context becomes the concept of "conditional admissibility" according to McWilliams, [238] applies here too, is that of Mr. Justice Hope in *Rex v. Container Materials Limited*:

> Acts and declarations of one of a company of conspirators or documents in his possession are receivable in evidence against him and in the event of common design being proven to the satisfaction of the Court, they become evidence against his fellow-conspirators. A foundation should first be laid by proof sufficient in the opinion of the Judge to establish *prima facie* the fact of the conspiracy between the parties, or at least proper to be laid before the jury as tending to establish such fact. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy in furtherance of the original concerted plan, and with reference to the common object, is in contemplation of law the act and declaration of them all, and is therefore original evidence against each of them. Oft-times, for the sake of convenience, the acts or declarations of one are admitted in evidence before sufficient proof

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[232] Regina v. Gagnon, [1956] Sup. Ct. 635, at 639, 115 Can. Crim. Cas. Ann. 361, at 365; *applied in* Regina v. Rodrigue, 17 Can. Crim. Cas.2d 252, at 273-74 (Que. 1974); and Regina v. Smith, 72 W.W.R. (n.s.) 548, at 554-55 (B.C. County Ct. 1970); *and see* THE LAW OF EVIDENCE PROJECT OF THE LAW REFORM COMMISSION OF CANADA, STUDY PAPER 9. HEARSAY 10, 17 (1974) [hereinafter cited as STUDY PAPER 9. HEARSAY].

[233] Anderson v. United States, 94 S. Ct. 2253, at 2259 n. 6; *and see* Note, *supra* note 224, at 988-89.

[234] Note, *supra* note 224, at 988; STUDY PAPER 9. HEARSAY, *supra* note 232.

[235] Rex. v. Wilson, 4 Alta. 35, at 36 (1911) justifies the admission of acts as being part of the *res gestae*, but this ragboy concept is, of course, discredited: Stone, *Res Gesta Reagitata*, 55 L.Q.R. 66 (1939), for example, says: "No evidential problem is so shrouded in doubt and confusion."

[236] Note, *supra* note 224, at 984.

[237] STUDY PAPER 9. HEARSAY, *supra* note 232.

[238] P. MCWILLIAMS, *supra* note 212, at 345-46.

> is given of the conspiracy, the prosecutor undertaking to furnish such proof in its applicant stage of the case. The mode of proceeding rests in the discretion of the trial Judge.[239]

Glanville Williams,[240] with characteristic insight, points out that the trouble with the rule is that if it is narrowly interpreted to mean that their must be some independent evidence of a conspiracy before the declarations are admitted the rule is "useless", while on a wide interpretation it "runs counter to the spirit of the law of evidence". Apart from dicta like that in the *Container* case above, indicating that in Canada it is for a trial judge in a jury trial to rule on the question of admissibility, as in the United States,[241] there are several indications that Canadian courts do in practice adopt a very wide interpretation. There is certainly no indication in the case law that the initial proof which brings the rule into operation must be proof of the *actus reus* of agreement,[242] rather than the *mens rea* of intent.[243] In fact, what has to be proved initially has been judicially described in a bewilderingly varied manner: "common design",[244] "concert",[245] "participant",[246] or "common purpose".[247]

Further confirmation that the rule receives a very wide interpretation in Canada is provided by the following passage from McWilliams,[248] summarizing the case law:

> This evidence may be adduced for a variety of purposes *apart from providing the fact of the conspiracy itself*, namely:
> (a) to show the form and purpose of the conspiracy;
> (b) to show the means of effecting the purpose . . .
> (c) to prove or disprove complicity, that is membership, by showing communication, knowledge, assent and acts in furtherance . . .
> (d) to interpret otherwise colorless acts as being in furtherance of the conspiracy.

Finally, the dictum of Mr. Justice Wilson in *Regina v. Provincial Magistrate*[249] may be noted:

> [T]he acts and declarations of co-conspirators are admissible against each of them, and this [is] whether it is to establish the unlawful agreement or

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[239] 74. Can. Crim. Cas. Ann. 113, at 128, [1940] 4 D.L.R. 293, at 307 (Ont. Sup. Ct.).

[240] G. WILLIAMS, *supra* note 145, at 681-82.

[241] United States v. Dennis, 183 F.2d 201, at 230-31 (C.A. 1950), *aff'd*, 341 U.S. 494 (1951): an "intermediate view" approved by G. WILLIAMS, *supra* note 145, at 682.

[242] See text *supra*, part II A 1.

[243] See text *supra*, part II A 2.

[244] Rex v. Koufis, *supra* note 225; Rex v. Container Materials, *supra* note 239.

[245] Rex v. Langs, 59 B.C. 112, [1943] 2 W.W.R. 300, *quoted in* Regina v. Smith, *supra* note 232.

[246] Regina v. Bird, [1969] 1 Ont. 268, at 270, [1969] 2 Can. Crim. Cas. Ann. (n.s.) 182, at 184 (1968).

[247] Rex v. Simmington, 45 Can. Crim. Cas. Ann. 249, at 257 (B.C. Sup. Ct. 1926).

[248] P. MCWILLIAMS, *supra* note 212, at 347 (italics added).

[249] [1970] 2 Can. Crim. Cas. Ann. (n.s.) 183 (Man. Q.B. 1969).

> to prove acts done in furtherance of such agreement; evidence of telephone calls was admitted in *R. v. Kravenia* (1955), 112 C.C.C. 81, [1955] S.C.R. 615, 21 C.R. 232. Nor is it necessary that the one be proved before the Crown may embark upon proof of the other . . . .[250]

It seems to be settled law that for the declarations of a co-conspirator to be admissible against an accused, it is not essential that they should have been said in his presence, or even with his knowledge.[251]

Not surprisingly, in view of the nature of the rule, declarations that are not made in furtherance of the conspiracy, such as those that precede the conspiracy,[252] and those after its objects have failed or been achieved,[253] such as a confession, are not admissible against co-conspirators but are admissible only against the party who made them.

In *McDonald v. The Queen*[254] the majority of the Supreme Court, through the judgment of Mr. Justice Martland,[255] held that the rule is one which determines the admissibility of evidence as against a person who is a party to legal proceedings and therefore did not apply to a witness who was alleged to be a party to a conspiracy that was not the subject of the proceedings in question. On the other hand, the Supreme Court of Canada has twice ruled that it is not necessary that the co-conspirator be indicted at the same time.[256]

(e) *Abuse of process*

Under this heading could be considered the subject of judicial discretion to exclude technically admissible evidence and also the probably distinguishable question of whether the judge has a discretion to stay criminal proceedings on the grounds of an abuse of process. Both raise such vast and contentious issues beyond the scope of the present paper, and so, for the sake of completeness, the bare outlines of the present law will be given without comment.

Since the decision in *Regina v. Wray*,[257] it is clear that there is indeed a discretion given to trial judges to exclude evidence of technically admissible evidence that operates unfairly against the accused. However, a strong majority of the full Court through the judgment of Mr. Justice Martland defined "unfairly" very narrowly and thereby considerably reduced the ambit of the discretion:

> The allowance of admissible evidence relevant to the issue before the court

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[250] *Id.* at 185-86.

[251] *See* Kelly v. The King, 54 Sup. Ct. 220, 27 Can. Crim. Cas. Ann. 282 (1916).

[252] Rex v. Dwyer, 24 Ir. L.T.R. 111 *as cited in* Rex. v. Container Materials, *supra* note 239, at 129, which states, however, that they may be relevant to prove the origin, character or object of the conspiracy.

[253] See the cases cited by P. McWILLIAMS, *supra* note 212, at 346-47.

[254] *Supra* note 228.

[255] *Id.* at 190, 126 Can. Crim. Cas. Ann. at 13.

[256] Rex v. Koufis, *supra* note 225; Clouthier v. The King, [1940] Sup. Ct. 131, 73 Can. Crim. Cas. Ann. 1 (1939).

[257] [1971] Sup. Ct. 272, 11 Can. Crim. (n.s.) 235 (1970).

> and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.[258]

The existence of a discretion to stay proceedings on the basis of an abuse is notoriously uncertain in view of the decision in *Regina v. Osborne.*[259] Mr. Justice Hall (Justices Ritchie and Spence concurring) left the question open since there was in their judgment no abuse on the facts.[260] For example, in respect of the question of delay, this was mostly attributable to the accused and not the Crown.[261] Mr. Justice Pigeon (Justices Martland and Judson concurring) were very strongly opposed to such a discretion:

> It is basic in our jurisprudence that the duty of the courts is to apply the laws as it exists, not to enforce it or not in their discretion . . . .
>
> In our legal system it is not considered unfair or oppressive to have an accused undergo several trials on the same charge when his conviction is quashed even if this happens repeatedly. In other words, it is not considered desirable that a criminal should escape punishment for a misdeed because an error was committed in his trial that requires his conviction to be quashed. I fail to see why a totally different view should be taken if the error consists in not laying the correct charge so that instead of being irregularly convicted and then ordered to stand a new trial, he is acquitted of the incorrect charge and then brought to second trial on a fresh indictment for the correct charge.[262]

The original charge was in fact that of possessing fraudulent cheques, and the subsequent charge was changed to one of conspiracy to utter the same cheques. The seventh judge in *Osborne*, Mr. Justice Fauteux contented himself with the stoic observation after more than a year's deliberation that "I agree that the appeal should be allowed".

In the face of such indecision by the Supreme Court of Canada, trial judges in Canada have indeed continued to recognize that such a discretion does exist, construing the decision in *Osborne* to be inconclusive.[263]

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[258] *Id.* at 293, 11 Can. Crim. (n.s.) at 254. *Wray* is critically discussed by Sheppard, *Restricting the Discretion to Exclude Admissible Evidence*, 14 CRIM. L.Q. 334 (1972); Roberts, *The Legacy of Regina v. Wray*, 50 CAN. B. REV. 19 (1972); and Gibson, *Illegally Obtained Evidence*, 31 U. TORONTO FAC. L. REV. 23 (1973).

[259] [1971] Sup. Ct. 184, 12 Can. Crim. (n.s.) 1 (1970); *and see* the annotation by Haines, *Judicial ombudsmanship—A Problem in policy*, 12 Can. Crim. (n.s.) 11; Stenning, *Observations on the Supreme Court of Canada's Decision in R. v. Osborn*, 13 CRIM. L.Q. 164 (1971); and Barton, *Abuse of Process as a Plea in Bar of Trial*, 15 CRIM. L.Q. 437 (1973).

[260] [1971] Sup. Ct. at 194, 12 Can. Crim. (n.s.) at 5.

[261] *Id.* at 195, 12 Can. Crim. (n.s.) at 6.

[262] *Id.* at 190-91, 12 Can. Crim. (n.s.) at 10.

[263] Regina v. Kowerchuk, 3 Can. Crim. Cas.2d 291 (Alta. Prov. Ct. 1971), *rev'd only on the facts*, [1972] 5 W.W.R. 255 (Alta. Sup. Ct. 1971), *further appeal to the C.A. was dismissed without reasons*; *Re* Regina & Croquet, 8 Can. Crim. Cas.2d 241, 21 Can. Crim. (n.s.) 232 (B.C. Sup. Ct. 1972), *appeal dismissed*, 12 Can. Crim. Cas.2d 331, 23 Can. Crim. (n.s.) 374 (B.C. 1973); *Re* Regina & Atwood, 8 Can. Crim. Cas.2d 147 (N.W.T. Terr. Ct. 1972); *Re* Vroom, 14 Can. Crim. Cas.2d 10 (Ont. High

2. *Social Policy and Comment*

Holman doubts "whether any incident of the criminal law is more dangerous to innocence than an ordinary conspiracy trial".[264] Hunt ascribes much of the responsibility for this "perilous situation" to the rules of evidence and adds:

> Perhaps it would not be entirely correct[265] to say that there are different rules of evidence which are applied solely to conspiracy cases . . . . In any event, it may be safer and more accurate to say that the rules of evidence are applied to conspiracy cases in a very different way.[266]

The above discussion of evidential rules[267] indicates that Hunt's latter point could have been more clearly expressed by the statement that there are no unique evidential rules in conspiracy trials, but that the nature of these trials is such that often the same evidential rules will apply more harshly from the point of view of an accused.

No consideration of social policy seems to require that conspiracy trials be differentiated from the point of view of proof by inference,[268] the rule in *Hodge's Case*,[269] linking the evidence,[270] and abuse of process.[271] The fact that the Appellate Division of the Supreme Court of Alberta has recently applied the rule in *Hodge's Case* in a conspiracy trial, even though intent was in issue and thus in contradiction to the injunction of the Supreme Court of Canada,[272] surely just serves to add further grist to the mill of the Evidence Project of the Law Reform Commission of Canada who would like to see the rule in *Hodge's Case* abolished as a purposeless anomaly.[273] On balance the practical difficulties that would be experienced by the prosecutor if the court were not to allow "tentative relevancy" seems to outweigh the potential prejudice, and as we have seen, there can be judicial control, both at trial and at the appellate level.[274]

We have also observed[275] that the rule by which acts and declarations of one conspirator in furtherance of the common design may be given in evidence against all the conspirators—perhaps the main reason that has

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Ct. 1973); *Re* Sheehan, 14 Can. Crim. Cas.2d 23 (Ont. High Ct. 1973); Regina v. Thorpe, 11 Can. Crim. Cas.2d 502 (Ont. County Ct. 1973); and *Re* Regina & Rourke, 16 Can. Crim. Cas.2d 133 (B.C. Sup. Ct. 1974).

[264] Holman, *Evidence in Conspiracy Cases*, 4 AUST. L.J. 247 (1930).

[265] *Sed contra* TREMEEAR, *supra* note 15, at 646, which states that "there are many rules of evidence applicable only to prosecutions of conspiracy . . . ."

[266] Hunt, *supra* note 32, at 308.

[267] See text *supra* between notes 191-263.

[268] See text *supra* between notes 191-96.

[269] See text *supra* between notes 197-210.

[270] See text *supra* between notes 211-24.

[271] See text *supra* between notes 256-63.

[272] See text *supra* between notes 200-11.

[273] THE EVIDENCE PROJECT OF THE LAW REFORM COMMISSION OF CANADA, STUDY PAPER 8. BURDENS OF PROOF AND PRESUMPTIONS 53-54 (1974).

[274] See text *supra* between notes 215-24.

[275] See text *supra* between notes 224-37.

earned the conspiracy charge the label of "the prosecutor's darling" [276]—is in fact not unique to the crime of conspiracy. The rule is seen rather as an application of the general rule that statements made by persons engaged in a common enterprise are admissible as admissions against the party on the basis of an implied agency if the statements were made in furtherance of the common design. Even assuming the rule has a valid rationale in the wider context—and the Evidence Project of the Law Reform Commission of Canada apparently thinks it has [277]—its application to conspiracy trials can be seriously questioned. The danger of the rule in such trials, combined with the possibility of conditional relevancy as recognized in the *Container Materials Case*, [278] are particularly well expressed in the American context as follows:

> In view of the doubtful efficacy of an instruction to disregard previously presented evidence [279] the requirement of independent proof provides only a limited safeguard to the defendant. Moreover, many courts seem to find a *prima facie* case on extremely weak evidence. The danger also exists that such provisionally admitted evidence will itself be used to support the *prima facie* case, and thus "hearsay would lift itself by its own bootstraps to the level of competent evidence". Despite the logical inconsistency of such an approach, several courts have approved the practice. In these jurisdictions, the requirement of independent evidence is virtually meaningless. [280]

We have seen [281] that a wide application of the rule indeed leads to such abuses in conspiracy trials in Canada. Surely the rule is invalid for conspiracy trials when the common enterprise itself is the whole gravemen of the trial. The remedy seems to be to abolish the application of the rule in conspiracy trials rather than to add a further, technical requirement of corroboration, which will only partially alleviate the question of prejudice. [282]

B. *Charging and Trying the Substantive Offence with Conspiracy*

1. *Generally*

The leading Canadian dictum is probably that of Mr. Justice Sidney Smith in *Regina v. Graham*:

> The indictment in this matter contained nine counts. It was an indictment joining a count for conspiracy with counts on charges which themselves formed the subject of the conspiracy. In ordinary cases such joinder has been frowned upon by successive judges, but never held to be

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[276] Klein, *Conspiracy—The Prosecutor's Darling*, 24 BROOKLYN L. REV. 1 (1957), also quoted by Hunt, *supra* note 32, at 329.

[277] STUDY PAPER 9. HEARSAY, *supra* note 232, at 17.

[278] *Supra* note 239.

[279] See the empirical data presented by Sue & Smith, *How Not to Get a Fair Trial*, PSYCHOLOGY TODAY 89-90 (May 1974).

[280] Note, *supra* note 224, at 987.

[281] See text *supra* between notes 240-56.

[282] As suggested by Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, at 1163; *sed contra* Hunt, *supra* note 32, at 339.

> wrong. Where, as here, that which is alleged goes far beyond the performance of the individual acts, the end of the conspiracy being of a more far-reaching character than such acts themselves, the joinder is not to be criticized . . . .[283]

This dictum was relied upon by Mr. Justice Wilson in *Regina v. Sommers (No. 1)*[284] in denying a motion to split the trials of accused charged with conspiracy to give and accept bribes as well as the substantive charges. The conspiracy count would relate to a larger plot in part performance of which certain overt acts had been done.[285]

The strongest judicial objections to the joinder of conspiracy counts with substantive offences have been offered by English judges in the 1960's, particularly when the conspiracy counts have been widely framed. The English Law Commission's Working Paper No. 50 has well summarized these objections as being

> that the inclusion of a conspiracy count in this way — —
> (i) adds to the length and complexity of trials, and in particular complicates the task of summing up to a jury,
> (ii) tends to obscure questions of fact vital to the decision of the case,
> (iii) tends to produce inconsistent verdicts,
> (iv) allows evidence to be given which is relevant to the conspiracy count, but which may have, despite any warning against relying on it, a prejudicial effect on an accused in relation to one or more of the substantive counts.[286]

2. *Social Policy and Comment*

There seems to be some substance in the first two objections summarized by the Law Commission, but not in the latter two. There is no evidence, at least in the reported law, that a joinder of counts encourages inconsistent verdicts in Canada. Indeed, the Supreme Court of Canada in the leading case of *Koury v. The Queen*[287] was deeply split on the question of what constitutes inconsistency. In that case, the majority upheld a conviction on a count of fraud in the face of an acquittal on the count of conspiracy. The complaint seems to focus on jury trials; surely, therefore, the better remedy is more careful direction by the judge, especially when, as in *Koury*, the issue is complicated by reference to the law relating to aiding and abetting.[288] The fourth objection also seems to be invalid, as we have seen above.[289] Similarly, the Law Commission alleges that the same is true of England, that the rule that the declarations of one conspirator in furtherance of the common design may be given in evidence against all the conspirators, is merely an application of the general rule relating to admissions

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[283] 11 W.W.R. (n.s.) 565, at 567, 18 Can. Crim. 110, at 112 (B.C. 1954).
[284] 26 W.W.R. (n.s.) 241, 28 Can. Crim. 94 (B.C. Sup. Ct. 1958).
[285] This consideration probably also accounts for the majority decision in Poirier v. The Queen, 37 Can. Crim. 165 (Que. 1961).
[286] *Supra* note 41, at para. 54 (footnotes omitted).
[287] [1964] Sup. Ct. 212 (1963).
[288] *See also* article by McWilliams, quoted by Powell, *supra* note 133, at 68-69.
[289] See text *supra* between notes 224-51.

by persons engaged in a common enterprise. [290] If indeed this evidential rule is not to be applied in conspiracy trials, as suggested above, [291] the objection has some validity, but probably the best solution is to abolish the rule altogether.

If judges' objections have in fact been more vehement when conspiracy counts are framed more widely, as the English Law Commission [292] alleges, the problem is the width of the charge rather than the practice of joining of counts. Clearly, a conspiracy charge will involve the proof of essential elements different from any other substantive count. There being thus no possibility of a plea of *autrefois convict* or *acquit*, [293] it is surely valid to raise practical objections to splitting the counts as Mr. Justice Wilson did expressly in *Sommers (No. 1)*:

> I cannot see that I would be doing these accused persons any practical favour by creating a condition whereby they might, at the conclusion of a long, arduous and expensive trial on one set of charges, be confronted with the necessity of facing an equally protracted and costly trial in respect of another set of charges. And I think I may also properly consider the public cost of this partial duplication. [294]

In view of the validity of the first two objections summarized by the English Law Commission and the concern by some Canadian judges that it is not desirable that exactly the same evidence be used for two counts, although the device of concurrent sentences could rectify this, the mid-course adopted in conclusion by the English Law Commission has much to commend it:

> But we stress that the only justification for including both substantive counts and a related conspiracy in the indictment is to guard against the jury having to acquit a defendant because he has not been charged with what the evidence establishes he is guilty of, whether it be conspiracy or the substantive offence . . . .
>
> We invite views, however, as to whether or not it should be the practice for a judge to require justification from the prosecution on the grounds we have indicated for proceeding to trial on an indictment including substantive counts and a related conspiracy count. If there is no justification, the prosecution should be required to elect whether to proceed on the substantive counts or on the conspiracy, and, in the event of an acquittal of any defendant on the count or counts proceeded with, to undertake not to proceed against him on the count or counts left on the file. [295]

In the Canadian context, it would not seem necessary to legislate the practice suggested by the English Law Commission above, [296] assuming that

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[290] *Supra* note 41, at para. 54.

[291] See text *supra* between notes 277-82.

[292] WORKING PAPER NO. 50, *supra* note 41, at para. 54.

[293] *See* McDonald v. The Queen, *supra* note 228; Regina v. Osborn, *supra* note 259, and the text *supra* between notes 259-63.

[294] *Supra* note 284, at 243, 28 Can. Crim. at 99.

[295] *Supra* note 41, at paras. 57-58.

[296] *Supra* note 295.

the Law Reform Commission of Canada decides that there should be a discretion in the trial judge to stay a prosecution as an abuse of process. [297]

C. *Territorial Jurisdiction*

1. *Generally*

(a) *Nationally*

Canada, of course, applies the fundamental principle of English common law that all crime is local. [298] The obvious complication in Canada, arising from the fact that the country is divided into ten separate provinces, each with separate territorial jurisdiction, is overcome by regarding conspiracy as a continuing offence.

It is settled law that a court in Canada which has jurisdiction over the area in which the agreement was struck or in which any of the conspirators did an act in furtherance of the common object of the conspiracy, will have jurisdiction. In the leading case of *Regina v. Horbas*, [299] the Manitoba Court of Appeal held that they had the jurisdiction where the accused was charged with conspiracy to commit forgery, where it appeared that the alleged agreement had been made in Alberta and that the only act that had taken place in Manitoba was the acceptance by an accused of a parcel of forged documents sent from Edmonton, Alberta. Mr. Justice Freedman, speaking for the court said:

> It seems to us highly questionable whether it is proper, in determining the place or jurisdiction where an *actus reus* occurred, to employ the rules or principles applicable to the formation of a civil contract. It is undoubtedly the law that when A sends an offer by mail from one jurisdiction to B in another jurisdiction, and B there accepts that offer, mailing a notice of acceptance to A, the contract is deemed to have been formed in the jurisdiction of B, the place where the notice of acceptance was mailed. But that principle is not necessarily determinative of an inquiry whether a criminal act did or did not take place within a particular jurisdiction. On that inquiry other considerations, not applicable to the law of civil contract, may have to be invoked, including the fact that some criminal acts are of a continuing character and may rightly be deemed to occur in more than one jurisdiction. [300]

(b) *Internationally*

The general rule is that stated in section 5(2) of the Criminal Code, in

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[297] THE LAW OF EVIDENCE PROJECT OF THE LAW REFORM COMMISSION OF CANADA, STUDY PAPER 10. THE EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE 29 (1974), has recommended a carefully proscribed discretion.

[298] *See generally* R. SALHANY, CANADIAN CRIMINAL PROCEDURE 11-20 (2d ed. 1972).

[299] 67 W.W.R. 95 (Man. 1968).

[300] *Id.* at 98.

terms of which "no person shall be convicted in Canada for an offence committed outside Canada." [301]

The nature of the crime of conspiracy, being an inchoate crime that punishes the mere agreement, rather than the commission of a full offence, would suggest that section 5(2) could be extended by a charge of conspiracy to ensnare a conspiracy entered into in Canada, where the object of which was the commission of a crime outside Canada. The only Canadian case directly on point—that of *Regina v. Chapman* [302]—suggests that the extension is not so simple. In that case, Chapman had been charged *inter alia* with the offence of conspiracy to defraud. It was held that the Ontario court did indeed have jurisdiction, but apparently only on the basis that the profits of the fraudulent scheme, entered into in Canada, were received in Canada, although all the victims were in the United States. The court found it unnecessary to deal with the proposition based on the English case of *Board of Trade v. Owen*, [303] that a conspiracy entered into in Canada, wholly to be carried out outside Canada, may be indictable here only on proof that its execution would produce a "public mischief" in Canada. [304]

The widest extension of jurisdiction has recently been made in the English case of *Director of Public Prosecutions v. Doot.* [305] The House of Lords unanimously held that the English courts had jurisdiction over five Americans charged with conspiring to import a dangerous drug on evidence that indicated that while all were abroad they had formed an agreement to import marihuana from Morocco to the United States via England. Each accused had been found driving vans in England with marihuana concealed in them. So all that had occurred in England was that the conspiracy had been partly carried out there, although the agreement had been entered into entirely outside England.

2. *Social Policy and Comment*

It is surprising that the courts have not clearly distinguished the situation where all the elements of the crime of conspiracy were committed within one territorial jurisdiction, which therefore clearly gives jurisdiction to the court in that jurisdiction. Thus, in the case of *Chapman*, it seems unnecessary to have investigated the question of where the fruits of the full substantive offence were going.

The more difficult situation is where the agreement has been entered into wholly or partially outside the territorial jurisdiction and the only act that has occurred within it has been an act in furtherance of the common object of the conspiracy. The decision in *Doot* to claim jurisdiction seems

[301] CAN. REV. STAT. c. C-34 (1970). *See also* Cassidy v. The Queen, 26 Can. Crim. (n.s.) 316, at 329, 338, 7 N.B.2d 647, at 670, 654-55 (1974); Powell, *supra* note 133, at 39-41.

[302] 11 Can. Crim. (n.s.) 1 (Ont. 1970).

[303] [1957] A.C. 602, [1957] 1 All E.R. 411.

[304] *Supra* note 302, at 9.

[305] [1973] A.C. 807, [1973] 1 All E.R. 940, [1973] 2 W.L.R. 532.

correct and is clearly in line with the Canadian decisions in respect of a dispute involving purely Canadian territorial jurisdiction.[305] Each of the speeches in the House of Lords invokes the device of categorizing the crime of conspiracy as a continuing one to achieve the result sought,[307] but vital issues of social policy are also expressed. Lord Wilberforce says:

> A legal principle which would enable concerting lawbreakers to escape a conspiracy charge by crossing the Channel before making their agreement or to bring forward arguments, which we know can be subtle enough, as to the location of agreements, or, conversely, which would encourage the prosecution into allegation or fiction of a renewed agreement in this country, all this with no compensating merit, is not one which I could endorse.[308]

Lord Salmon also pondered:

> Suppose the conspirators came to England for the purpose of carrying out the crime and were detected by the police reconnoitring the place where they propose to commit it, but doing nothing which by itself would be illegal, it would surely be absurd if the police could not arrest them then and there but had to take the risk of waiting and hoping to be able to catch them as they were actually committing or attempting to commit the crime. Yet that is precisely what the police would have to do if a conspiracy entered into abroad to commit a crime here were not in the circumstances postulated recognised by our law as a criminal offence which our courts had any jurisdiction to try.[309]

It is probably desirable to amend section 5(2) to give a Canadian Court express jurisdiction over one who commits an act within Canada in pursuance of a conspiracy entered into outside the country.

D. *Framing the Charge*[310]

1. *Rules*

(a) *How many conspiracies?*

It is well settled[311] that a charge must allege just one conspiracy. If there are more, there should be separate counts for each conspiracy.[312]

The essential issue here, of course, is the possibility of duplicity in a count. An important clarification was recently made by Lord Justice Lawton in *R. v. Greenfield*.[313] It was held that duplicity in a count is a matter

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[306] Mewett, *Where is a conspiracy committed?*, 16 CRIM. L.Q. 146 (1974).

[307] *Supra* note 305, at 817-18 (Lord Wilberforce), 822-25 (Viscount Dilhorne), 826-28 (Lord Pearson), 835-36 (Lord Salmon), [1973] 1 All E.R. at 943-44, 946-49, 950-52, 958, [1973] 2 W.L.R. at 536, 540-43, 544-45, 552.

[308] *Id.* at 818, [1973] 1 All E.R. at 943, [1973] 2 W.L.R. at 536.

[309] *Id.* at 833-34, [1973] 1 All E.R. at 956-57, [1973] 2 W.L.R. at 550.

[310] Many of the sub-headings and ideas in this section are those of Powell, *supra* note 133, at 43-52.

[311] The English cases are discussed in R. v. Greenfield, [1973] 3 All E.R. 1050, 57 Cr. App. R. 849 (C.A.).

[312] Powell, *supra* note 133, at 43.

[313] *Supra* note 311.

of form and does not relate to the evidence called in support of the count. Whether or not the evidence indicated that the accused were in fact guilty of other conspiracies with which they had not been charged was irrelevant to the question of whether or not they had the common object required for the conspiracy with which they had been charged. [314] A Canadian authority on this point is the majority decision in *Regina v. Cipolla*, [315] while we have already seen [316] the leading English decision in *Ardalan* [317] which warns against several conspiracies being rolled falsely into one.

On the other hand, it is equally clear law that a charge of conspiracy can be in respect of an agreement to commit several offences. [318] In *Regina v. Graham*, [319] the British Columbia Court of Appeal even upheld a count which alleged that the accused "did unlawfully conspire . . . to commit certain indictable offences to wit, to steal automobiles *and* to receive and retain automobiles knowing the same to have been stolen . . . ." [320] and held that there could have been a conviction on the conspiracy count even if an agreement to commit only one of the particular offences detailed had been established.

(b) *Drafting the indictment*

The indictment must comply with the general Code requirements as to counts, in particular, section 510:

> (1) Each count in an indictment shall in general apply to a single transaction and shall contain and is sufficient if it contains in substance a statement that the accused committed an indictable offence therein specified.
> (2) The statement referred to in subsection (1) may be
> (a) in popular language without technical averments or allegations of matters that are not essential to be proved,
> (b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence, or
> (c) in words that are sufficient to give to the accused notice of the offence with which he is charged
> (3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count. [321]

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[314] *Id.* at 1054-55, 57 Cr. App. R. at 855-57.

[315] [1965] 2 Ont. 673, at 684, [1966] 1 Can. Crim. Cas. Ann. (n.s.) 179, at 192.

[316] See text *supra* between notes 32-35.

[317] *Supra* note 33.

[318] Cox v. The Queen, [1963] Sup. Ct. 500, 517-18; Rose v. The King, 88 Can. Crim. Cas. Ann. 114, at 121-22, 3 Can. Crim. 277, at 281 (Que.); Regina v. Addison, [1969] 2 Ont. 674, [1970] 1 Can. Crim. Cas.2d 127.

[319] 11 W.W.R. (n.s.) 153, 108 Can. Crim. Cas. Ann. 565 (B.C. 1954); the reasoning is doubted in Regina v. Krueger, [1966] 3 Can. Crim. Cas. Ann. (n.s.) 127, at 129 (Sask. 1965) (Woods, J.A.).

[320] Regina v. Graham, *supra* note 319, at 568, 108 Can. Crim. Cas. Ann. at 155 (italics added).

[321] CAN. REV. STAT. c. C-34 (1970). *See generally* R. SALHANY, *supra* 298, at 103-09.

The section is fairly easy to linguistically interpret and obviously strives to compromise between ensuring that the accused gets adequate notice of the offence with which he is charged while at the same time avoiding undue technicalities as was the case with the early common law. [322]

The leading case interpreting these provisions [323] was the unanimous decision in *Brodie v. The King* [324] to quash an indictment charging named and unknown conspirators with a seditious conspiracy, naming the place and time but not the fundamentals of the particular agreement. It was held that the indictment did not describe the offence "in such a way as to lift it from the general to the particular" [325] and that it should have not merely categorized the offence, but have specified the time, place and matter. [326] In the words of Mr. Justice Rinfret for the Court:

> It is not sufficient in a count to charge an indictable offence in the abstract. Concrete facts of a nature to identify the particular act which is charged and to give the accused notice of it are necessary ingredients of the indictment. An accused person may not be charged merely of having committed murder; the statement must specify the manner. In the same way, in the present case, the appellants could not be charged merely with having been "parties to a seditious conspiracy," or having "committed the crime of seditious conspiracy." The particular agreement . . . ought to have been specified in the charge prepared . . . . [327]

The learned judge did recognize that the "same certainty" [328] was not required when it came to stating the object of the conspiracy. This dictum was later used in *Rex. v. Imperial Tobacco Co.* [329] to uphold a count of a trade conspiracy to restrain tobacco trade over a nine year period! The clear words of Mr. Justice Rinfret have been frequently applied since in conspiracy trials. [330] It is interesting, however, to note the apparently contradictory view of the present Chief Justice Laskin, in ruling on behalf of the Ontario Court of Appeal in *Rese* [331] that an information which alleged an unlawful conspiracy to damage was not defective in failing to allege the word "wilfully" as the agreement necessarily imported wilfulness. Mr. Justice Laskin said, presumably obiter: "I am loath to countenance a lesser standard for charging such an offence than would be required if the object was charged as a substantive offence." [332]

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[322] *See* R. SALHANY, *supra* note 298, at 103-09.

[323] Earlier but identical Code provisions were in force.

[324] [1936] Sup. Ct. 188, [1936] 3 D.L.R. 81.

[325] *Id.* at 198, [1936] 3 D.L.R. at 88.

[326] *Id.* at 193, [1936] 3 D.L.R. at 85.

[327] *Id.* at 194-95, [1936] 3 D.L.R. at 86.

[328] *Id.* at 198, [1936] 3 D.L.R. at 89.

[329] 72 Can. Crim. Cas. Ann. 388, at 390 (Alta. Sup. Ct. 1939).

[330] *E.g.*, Regina v. Deal, 18 W.W.R. (n.s.) 119, at 124, 114 Can. Crim. Cas. Ann. 325, at 330-31 (Sask. 1956); Regina v. Harrison, 49 W.W.R. (n.s.) 738, [1965] 1 Can. Crim. Cas. Ann. (n.s.) 367, 45 Can. Crim. 54 (B.C. Sup. Ct. 1964); Regina v. Canadian General Electric Co. (No. 1), 17 Can. Crim. Cas.2d 433, at 440 (Ont. High Ct. 1974).

[331] *Supra* note 58. See also text *supra* between notes 58-62.

[332] *Supra* note 58, at 366, 2 Can. Crim. (n.s.) at 102.

It is also established that an objection to an indictment is far more likely to be successful if made at the start of the proceedings, and not, for example, for the first time on appeal. [333]

The better view is that if a prosecutor knows that the conspiracy was with another person or other persons, these unnamed conspirators should be inserted in the indictment. [334]

Furthermore, they must be named once the prosecutor has evidence of their identity, and he must make a motion to amend the indictment as soon as this knowledge is acquired. Such an amendment was held to be proper by Mr. Justice Hall in the leading case of *The King v. Johnston*, [335] who had earlier held that:

> On a charge of conspiracy, more than any other, an accused person is entitled to know the names of those with whom he is alleged to have conspired, inasmuch as the act or statement of such co-conspirator, even done or made out of the presence of the accused, may be used as evidence against him, as soon as the offence is proved and the connection of the several parties with it. [336]

This view, which has been followed, [337] seems to be preferable to the view of Mr. Justice Harvey in *Rex v. Clarke* [338] that the names of the co-conspirators are "in no way material" but are merely a matter of "particulars". [339] Perhaps the best basis for preferring the view of Mr. Justice Hall is the necessity for fair notice to the accused of what he is being charged with, rather than the evidential rule mentioned which, we have seen, [340] is not unique to the law of conspiracy, although it may apply more harshly here.

Clearly, there can be a conviction for conspiracy if the trier of fact is satisfied that there was a conspiracy with one or more conspirators, even if unnamed, and even if the named conspirators were acquitted. [341]

(c) *Particulars*

The fact that a motion to quash an indictment is denied does not mean, of course, that the defence may not obtain an order for particulars. The key

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[333] Regina v. Rodrigue, 17 Can. Crim. Cas.2d 252, at 256-57 (Que. 1973), and *see* the cases referred to therein, and *see* Regina v. Nordquist, 130 Can. Crim. Cas. Ann. 396 (B.C. 1961).

[334] P. McWILLIAMS, *supra* note 212, at 341.

[335] 6 Can. Crim. Cas. Ann. 232 (Que. K.B. 1902).

[336] *Id.* at 236.

[337] Rex v. Nerlich, 34 Ont. L.R. 298, at 305-06, 24 Can. Crim. Cas. Ann. 256, at 262-63, 25 D.L.R. 138, at 142-43 (1915); Regina v. Giguere, 41 Can. Crim. 308, at 312-13 (Que. Q.B. 1963); Regina v. Appel, 67 W.W.R. 652, at 658-59, [1970] 2 Can. Crim. Cas. Ann. 183, at 188-89, 9 Can. Crim. (n.s.) 73, at 78-79 (Man. Q.B. 1969).

[338] 1 Alta. 358, 14 Can. Crim. Cas. Ann. 57.

[339] *Id.* at 373-74, 14 Can. Crim. Cas. Ann. at 64. This statement was doubted in Appel, *supra* note 337, at 658-59, [1970] 2 Can. Crim. Cas. Ann. (n.s.) at 189, 9 Can. Crim. (n.s.) at 79.

[340] See text *supra* between notes 224-56.

[341] R. v. Anthony, [1965] 1 All E.R. 440, 49 Cr. App. R. 104 (C.C.A.); Rex. v. Clarke, *supra* note 338, and see below under E.

section, 516(1) of the Code, indicates that this is purely in the discretion of the trial judge, the statutory phrase being, "where it is satisfied that it is necessary for a fair trial". The function of particulars in a criminal trial was recently held by Mr. Justice Pennell in *Regina v. Canadian General Electric Co. Ltd. (No. 1)* [342] to be 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 . . . . The secondary purpose can be illustrated quite simply. When a conspiracy count involves an alleged widespread complicated conspiracy for the accomplishment of a purpose going beyond the performance of individual acts, the particulars furnished will assist the Judge in ruling on the relevancy of the evidence. To adopt a homely form of words a trial circumscribed by particulars will not wander all over the shop and will foreclose an unreal controversy. [343]

The same court, however, held that the Crown should not be encumbered with an order to particularize the precise dates and, "[t]o a lesser degree", [344] the precise times. It subsequently held [345] that thirty-eight pages of fairly general particulars sufficed, approval being given to the opinion of Mr. Justice Boyd McBride in *Rex v. McGavin Bakeries* [346] that: "The intention of [s. 516] is not, in my opinion, that a fair trial requires the Crown to give as particulars, details of all the minutiae of acts and omissions over nearly 17 years likely to be adduced in evidence in support of the charge." [347]

2. *Social Policy and Comment*

The above discussion indicates that the law in this area primarily revolves around the interpretation of Criminal Code provisions, and leaves much to the discretion of the trial judge. In general, it seems that trial judges have striven to achieve a balance between the requirement to adequately inform an accused about the nature of the charge against him and the need not to be unduly technical about indictments.

The current case law does not suggest any need to reform any of the statutory provisions. Furthermore, there seems to be no unique consideration of social policy that requires a separate codification of rules for the crime of conspiracy.

E. *Several Accused*

1. *Joint Trials*

Where persons are charged jointly with the commission of an offence,

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[342] *Supra* note 330.
[343] *Id.* at 443.
[344] *Id.* at 444.
[345] Regina v. Canadian General Electric Co. (No. 2), 17 Can. Crim. Cas.2d 445 (Ont. High Ct. 1974).
[346] 99 Can. Crim. Cas. Ann. 330, at 339 (Alta. Sup. Ct.).
[347] *Supra* note 345, at 448-49.

as will often be the case in conspiracy, the trial judge is given the discretion under section 520(3) of the Criminal Code [348] to order separate trials if "satisfied that the ends of justice require it".

The leading decision is the English case of *R. v. Grondkowski*, [349] often applied in Canada, [350] in which Lord Goddard held that there will usually be a joint trial where the prisoners were engaged in a common enterprise. [351] He went on to hold that:

> The discretion [to sever a trial], no doubt, must be exercised judicially, that is, not capriciously. The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interest of justice means only the interests of the prisoners. If once it were taken as settled that every time it appears that one prisoner as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it. There is no case in which this has ever been laid down, and in the opinion of the court it would be most unfortunate and contrary to the true interests of justice if it were. [352]

Applying this reasoning in a conspiracy trial in *R. v. Miller*, [353] Mr. Justice Devlin concluded that it must follow that "[t]he cases must be rare in which fellow conspirators can properly in the interests of justice be granted a separate trial". [354]

It seems that a separate trial will not be ordered if the trial judge has clearly separated the defences for the jury and instructed them to disregard inadmissible evidence against a particular accused. [355]

A separate trial might be a mixed blessing for a co-accused as he will be able to avail himself of the protection against self-incrimination under the Canada Evidence Act, [356] but will be a compellable witness for the prosecution against his co-accused. [357]

2. *Inconsistent Verdicts*

When a number of persons, named or unnamed, are indicted for conspiracy, it is clear that there can be a conviction provided there were at least two persons guilty. [358]

There is, however, a technical rule that where there are only two conspirators the acquittal of one, for whatever reason, renders the conviction

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[348] CAN. REV. STAT. c. C-34 (1970).

[349] [1946] 1 All E.R. 559, 31 Cr. App. R. 116 (C.C.A.).

[350] See the cases referred to by Powell, *supra* note 133, at 57; R. SALHANY, supra note 298, at 126-28.

[351] *Supra* note 349, at 560, 31 Cr. App. R. at 119.

[352] *Id.* at 561, 31 Cr. App. R. at 120.

[353] [1952] 2 All E.R. 667, 36 Cr. App. R. 169 (Q.B.).

[354] *Id.* at 670, 36 Cr. App. R. at 174.

[355] R. v. Grondkowski, *supra* note 349, at 561, 31 Cr. App. R. at 120.

[356] CAN. REV. STAT. c. E-10, § 5 (1970).

[357] P. MCWILLIAMS, *supra* note 212, at 550-51.

[358] See the cases cited *id.* at 348.

of the other invalid. In *Regina v. Funnell*,[359] the rule was held to stem from the ancient English decision in *The King v. Plummer*[360] which based the rule on the need for consistency on the face of the record. Although Mr. Justice Jessup for the court considered the law to be excessively technical and ripe for law reform, he felt constrained to apply so hallowed a principle of the common law.[361]

Just how technical this area of the law is, is apparent from the decision in *Regina v. McRae*[362] that when a charge alleging conspiracy between two persons is withdrawn against one, it does not render a conviction of the other invalid, there having been no decision on the merits.

3. *Social Policy and Comment*

The whole question of joint trials should surely be considered in detail as soon as possible by the Law Reform Commission. At the moment, it is by no means certain that a joint trial can adequately protect the co-accused from being wrongfully implicated by evidence which is in fact admissible only against another accused, particularly if one retains a healthy skepticism about the ability of a trier of fact, be he judge or jury, to irradicate from his mind inadmissible evidence.[363]

Glanville Williams makes the following interesting suggestions:

> Something can be done to alleviate the position if the judge sums up and takes a verdict for each defendant separately, as he has power to do; unfortunately, the practice is not obligatory. Wherever possible, each defendant should be separately represented, for juries tend to convict in a bunch those who engage the same counsel. It is also desirable that too many defendants should not be tried together.[364]

These and other suggestions must be considered when the whole subject of joint trials comes up for consideration, which, it is submitted, is a matter of some urgency.

The rule that a conviction of only one of two or more conspirators cannot be sustained is surely excessively technical, and if applied automatically and without regard to the evidence, seems absurd. There is much to be said for the provisional proposal of the English Law Commission that the rule be abolished.[365]

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[359] [1972] 2 Ont. 301, at 302, 6 Can. Crim. Cas.2d 215, at 217. *See also* Rex. v. Tracey, [1946] 2 W.W.R. 675, 2 Can. Crim. 171 (B.C.); Regina v. Gunn, [1972] 1 W.W.R. 401, at 411, 5 Can. Crim. Cas.2d 503, at 514 (B.C. 1971); Regina v. Appel, *supra* note 337, at 656, [1970] 2 Can. Crim. Cas. Ann. (n.s.) at 187, 9 Can. Crim. (n.s.) at 76; P. MCWILLIAMS, *supra* note 212, at 348-49.

[360] [1902] 2 K.B. 339, 71 L.J.K.B. 807.

[361] Regina v. Funnell, *supra* note 359, at 305, 6 Can. Crim. Cas.2d at 220.

[362] [1955] Ont. W.N. 453, 111 Can. Crim. Cas. Ann. 162.

[363] *See* R. SALHANY, *supra* note 298, at 126-27, and text *supra* at note 286.

[364] G. WILLIAMS, *supra* note 145, at 683 (footnotes omitted).

[365] *Supra* note 41, at para. 60.