

# DEVELOPMENTS IN THE LAW OF CRIMINAL CONSPIRACY

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## *Introduction*

The origins of criminal conspiracy can be traced back a thousand years<sup>1</sup> though a study of this crime is not an antiquarian pursuit. The conspiracy offence has survived its own haphazard development and overcome the lack of a widely accepted rationale. It remains a prosecutor's popular weapon, a defence counsel's nightmare and an academic's riddle. But it is changing. In the last few years some of the most difficult problems in the law of criminal conspiracy have been recognized and debated. It is my purpose to review these developments, to comment on improvements where they have been made, and to discuss current problems in this complex area of our criminal law.

### *I. The Definition of Conspiracy and the Meaning of Agreement.*

Canadian law owes its general definition of conspiracy to the words of Mr. Justice Willes in the English case, *Mulcahy v. Regina*.<sup>2</sup> "A conspiracy consists not only in the intention of the 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."<sup>3</sup> This definition is in substance incorporated into our Criminal Code under the heading "common law conspiracy"<sup>4</sup>. English law has since included a statutory definition in legislation reforming the law of criminal conspiracy:<sup>5</sup>

If a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy to commit the offence or offences in question.<sup>6</sup>

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<sup>1</sup> The origins of criminal conspiracy from the reign of Edward I can be traced in Wright's Criminal Conspiracies to which is added H.L. Carson, *The Law of Criminal Conspiracies as Found in the American Cases* (1887), pp. 5-8, 91-99. See also James Wallace Bryan, *The Development of the Law of Conspiracy* (Reprint ed., 1970); J.W. Cecil Turner, *Russell on Crimes*, vol. 1 (12th ed., 1964), pp. 200-210; Francis B. Sayre, *Criminal Conspiracy* (1921-22), 35 Harv. L.Rev. 293.

<sup>2</sup> (1868), L.R. 3 H.L. 306.

<sup>3</sup> *Ibid.*, at p. 317.

<sup>4</sup> Criminal Code, R.S.C., 1970, c. C-34, s. 423(2).

<sup>5</sup> Criminal Law Act, 1977, c. 45 (U.K.).

<sup>6</sup> *Ibid.*, s. 1(1).

The most important difference between the common law and statutory definitions is that under the statutory definition the object must be an offence. The words "unlawful act" used by Mr. Justice Willes in *Mulcahy* were said to have referred to at least some civil wrongs and perhaps to conduct which, though not proscribed by law, was viewed as particularly wicked.<sup>7</sup> The statutory definition also avoids reference to the "unlawful act—unlawful means" distinction which was referred to by Mr. Justice Willes and contained also in the Canadian definition of common law conspiracy. This distinction is unnecessary, as Professor Colin Howard has pointed out.<sup>8</sup> It is an agreement to do an unlawful act which constitutes a conspiracy; it does not matter whether the act in question is the ultimate object or one of the steps along the way.<sup>9</sup>

Unfortunately, neither the common law definition nor the statutory definition addresses the most difficult conceptual problem in the law of criminal conspiracy—the meaning of agreement itself.<sup>10</sup> The meaning of "agreement" or of frequently proffered synonyms for agreement (such as "common design") has been assumed by the courts. What we do know about its meaning comes from assertions about the circumstances from which an agreement may be inferred<sup>11</sup> or from metaphors which describe conspiracies according to the organization or hierarchy of the criminal enterprise which is alleged to have existed.<sup>12</sup> The result is that a basic problem remains unsolved: When is the relationship between two persons such that it can be said that there is agreement between them?

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<sup>7</sup> *R. v. Defries*, *R. v. Tambllyn* (1894), 1 C.C.C. 207, at p. 213 (Ont. H.C.); *R. v. Gage* (1908), 13 C.C.C. 415, aff'd. 13 C.C.C. 428 (Man. C.A.); Also, there is English authority to the effect that "lawful" is a wider concept than "legal" and the same reasoning may apply to "unlawful" as connoting a wider area of conduct than "illegal". Certainly the word "unlawful" has been used to connote conduct other than that proscribed by positive law, to describe a certain wickedness of a particular activity. *Woooh Pooh Yin v. Public Prosecutor*, [1954] 3 All E.R. 31 (P.C.); *R. v. Chapman*, [1958] 3 All E.R. 143 (C.A.).

<sup>8</sup> Colin Howard, *Australian Criminal Law* (3rd ed., 1977), p. 287.

<sup>9</sup> *Ibid.*, p. 272.

<sup>10</sup> See also Peter MacKinnon, *The Contract as Conspiracy: A Critique of Regina v. Sokoloski* (1978), 10 Ottawa L. Rev. 448.

<sup>11</sup> Conspirators need not have entered into direct communication with one another. They need not know the identity of one another, and they need not have met, or consulted, or even spoken to one another. *R. v. McCutcheon* (1916), 25 C.C.C. 310 (Ont. S.C.); *R. v. Fellowes* (1859), 19 U.C.R. 48 (Q.B.); *R. v. Murphy* (1837), 173 E.R. 502 (Q.B.); *Meyrick and Ribuffi v. R.* (1930), 21 Cr. App. R. 94 (C.C.A.).

<sup>12</sup> Conspiracies have been likened in their organization to wheels, chains and cartwheels, though there has been a judicial caution against the use of such metaphors. *Meyrick and Ribuffi v. R.* (1930), 21 Cr. App. R. 94 (C.C.A.); *R. v. Ardalan*, [1972] 2 All E.R. 257 (C.C.A.).

The question cannot be answered in the abstract. There are many different activities with respect to which we might ask "is there an agreement?" and the reason why we ask the question will tell us much about the kind of concurrence we feel is necessary or appropriate as a guide to action. A committee chairman may ask if those present are in agreement to determine if they are of one mind. In selling a house, a vendor may ask "do we have an agreement" to ascertain if the purchaser has accepted his offer. The committee chairman seeks a concurrence of opinion and the real estate vendor seeks to exchange his promise to sell for another's promise to purchase. The word "agreement" is used here to mean two different things. The reason why we enquire about the existence of an agreement also will tell us whether we want to know only that a state of agreement exists or if we consider it important that persons have reached an agreement. Do they happen to agree or have they made an agreement?

When we ask "is there agreement" in order to determine an issue of criminal liability, traditional theory demands that we insist upon an act of agreement. This act is an act of the intellect, though we will point to the outward manifestations of concurrence as evidence of the act—the verbal expression that an agreement has been reached or conduct which appears to have been coordinated as a result of an agreement. It is because the act of agreement is an act of the intellect, whatever its outward manifestations may be, that our law of conspiracy is open to the criticism that it imposes liability only for a blameworthy state of mind. It is in answering this criticism that the distinction between being in agreement and making an agreement is important. To punish people for being in agreement would be, indeed, to punish them for an opinion which they share, accidentally or otherwise—punishment only for a state of mind. Holding them liable for together reaching an agreement is distinguishable and the distinction is important.

But we must not ask only if an agreement has been reached. We must examine the kind of agreement made. Is it the kind of agreement with which the criminal law is and should be concerned? Does the nature of the agreement reflect the reason for the existence of the conspiracy offence? Two main types of rationale for the offence have been identified:<sup>13</sup>

The first type regards conspiracy as essentially auxiliary to the substantive offence. It is no more than an act of preparation in the same way as an attempt, and a concept of agreement is a clear and convenient basis of liability for preparation to commit crime. The offence takes its colour from the crime contemplated. The second type regards conspiracy as an act inherently heinous or culpable; in fact, almost as a substantive offence in its own right as well as an act directed to the commission of another offence.<sup>14</sup>

<sup>13</sup> Ian Dennis, *The Rationale of Criminal Conspiracy* (1977), 93 L.Q. Rev. 39.

<sup>14</sup> *Ibid.*, at p. 63.

The history of the conspiracy offence suggests that the law applicable to this crime has at least in part developed from the view that conspiracy is "an act inherently heinous or culpable" and almost "a substantive offence in its own right".<sup>15</sup> Prosecutions were at one time limited to combinations to bring false indictments or appeals, or to maintain vexatious suits.<sup>16</sup> Until the reign of James I, a charge of conspiracy to bring a false indictment required that the intended victim be both indicted and acquitted.<sup>17</sup> But in 1610, *The Poulterers' Case*<sup>18</sup> marked the beginning of a shift in emphasis from the false accusation which was the basis of the earlier conspiracy prosecution to the existence of the agreement itself. Half a century later, *R. v. Starling*<sup>19</sup> established that a conspiracy was indictable though nothing was done to carry out its purpose. In *R. v. Best*<sup>20</sup> we see the oft-quoted phrase, the "gist is the conspiracy" or conspiracy is the gist of the indictment. This shift in emphasis made possible the extension of the objects of conspiracy to the point where, as under the common law definition of Willes J., they included any unlawful act.

This historical background suggests that the severity of the modern conspiracy offence has been seen to depend at least as much on the fact that two or more have combined to seek an unlawful end as it does upon the nature of the object pursued. A combination or agreement has been assumed to threaten harm greater than that threatened by the intention or even the attempt of one alone to achieve the same unlawful purpose. The contemporary English view that the sounder rationale for the offence lies in its auxiliary nature<sup>21</sup> has not crossed the Atlantic Ocean with the same ease of passage as have other doctrines in our law of criminal conspiracy. In *R. v. Bengert*,<sup>22</sup> Mr. Justice Berger of the British Columbia Supreme Court referred to the conspiracy to traffic in cocaine in that case as "an assault upon the fabric

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<sup>15</sup> For a contrasting view of the rationale see *D.P.P. v. Nock and Alsford*, [1978] 2 All E.R. 643 (H.L.).

<sup>16</sup> Sayre, *op. cit.*, footnote 1, at p. 396.

<sup>17</sup> *Ibid.*, at p. 397.

<sup>18</sup> (1610), 77 E.R. 813.

<sup>19</sup> (1664), 83 E.R. 1039.

<sup>20</sup> (1704-05), 87 E.R. 897; Bryan, *op. cit.*, footnote 1, pp. 63, 64.

<sup>21</sup> In *D.P.P. v. Nock and Alsford*, *supra*, footnote 15, at p. 661, Lord Scarman stated that conspiracy was in the same category as attempts to commit a crime: "Both are criminal because they are steps towards the commission of a substantive offence. The distinction between the two is that, whereas a 'proximate' act is that which constitutes the crime of attempt, agreement is the necessary ingredient in conspiracy. The importance of the distinction is that agreement may, and usually will, occur well before the first step which can be said to be an attempt. The law of conspiracy thus makes possible an earlier intervention by the law to prevent the commission of the substantive offence."

<sup>22</sup> (1980), 15 C.R. (3d) 97 (B.C.S.C.).

of the law".<sup>23</sup> He referred to Justice Frankfurter's explanation<sup>24</sup> of the "special danger"<sup>25</sup> presented by criminal conspiracy: if the illegal object is sought by two or more acting together, the venture is more likely to be successful and the participants are less likely to be deterred from pursuing their unlawful ends; several participants can achieve more than one alone can accomplish; and other crimes are more likely to be committed as the conspirators pursue their objects. In other words there is strength in numbers. If Justice Frankfurter is correct,<sup>26</sup> intervention through the criminal justice process at the point at which an agreement to pursue a criminal purpose has been reached is justified. But Justice Frankfurter's comments also reveal the kind of agreement which is of concern in criminal law: a commitment to act together. It is this commitment, this decision of the conspirators to act in cooperation with one another to pursue a common and unlawful end, which presents the danger of conspiracy.

We should expect to find, therefore, that the meaning of "agreement" in the law of criminal conspiracy embodies this notion of co-operative pursuit. However, it already has been suggested that the nature of a criminal agreement has not been closely scrutinized in our jurisprudence, and neither the common law definition nor the English statutory definition is instructive on this problem.

Recent Canadian judicial decisions have not been consistent in asserting the need for co-operative pursuit of the unlawful purpose. In *R. v. Cotroni; Papalia v. R.*,<sup>27</sup> S, P, C and V were charged in Toronto with conspiring in Ontario and Quebec to obtain possession of \$300,000.00, knowing that money to have been obtained by extortion. S and P had extorted the money from B and R. C and V subsequently agreed with one another, and possibly with P, to extort the money from S. The Supreme Court ruled that there were two conspiracies, one between S and P and another between C and V. Because the conspiracy between C and V took place only in Quebec and nothing in furtherance of it was done in Ontario, C could not be convicted of the conspiracy alleged in the indictment. Echoing the words of Viscount Dilhorne in *Churchill v. Walton*,<sup>28</sup> Mr. Justice Dickson asked: "What did the four conspirators agree to do?"<sup>29</sup> The

<sup>23</sup> *Ibid.*, at p. 103.

<sup>24</sup> *Callanan v. U.S.* (1961), 364 U.S. 587, at pp. 593-594.

<sup>25</sup> *Supra*, footnote 22, at p. 103.

<sup>26</sup> Justice Frankfurter's observations may be true of some conspiracies—highly organized and complex ventures such as that in *Bengert*, but they may not be true of many or most situations in which two or more act together in pursuing a common purpose.

<sup>27</sup> (1979), 7 C.R. (3d) 185 (S.C.C.).

<sup>28</sup> [1967] 2 A.C. 224, at p. 237 (H.L.).

<sup>29</sup> *Supra*, footnote 27, at p. 198.

answer was "nothing". In general terms both conspiracies had as their objects possession of money—the same money—but the interests of the two conspiracies were antagonistic.

While Swartz and Papalia on the one hand and Cotroni and Violi on the other may be said in a very loose sense to have been pursuing the same end or object, they were doing so independently and not in pursuance of a criminal purpose held in common between them . . . One cannot pass off the antagonistic designs of the four protagonists as merely differences in the "terms" of the agreement, the "object" remaining constant, which is the Crown's theory. There was no common agreement and no common object.<sup>30</sup>

There had not been, in other words, "co-operative pursuit" of a common object.

In contrast is the Supreme Court's decision in *R. v. Sokoloski*.<sup>31</sup> If in *Cotroni* there were two conspiracies and not one, then in *Sokoloski* there may have been none at all, notwithstanding the court's determination that the buyer and seller of a controlled drug can be convicted of conspiracy to traffic in that drug. Sokoloski was alleged to have conspired with Davis to traffic in methamphetamine. The police had arrested Davis and were searching his home when Sokoloski phoned and enquired "did that stuff finally come in". The officer who had answered the phone and identified himself as Davis said that it had and arranged to meet him to exchange one pound of the drug for \$1,100.00. Two other facts were seen to be important in the case. Davis had gone to Toronto to buy the drug for Sokoloski, and Davis knew that Sokoloski bought it for the purpose of resale.<sup>32</sup>

The police unquestionably had detected a pre-arrangement to exchange drugs for money. Did they discover a conspiracy? It is difficult to understand why the fact that Davis had gone to Toronto to obtain the drug for Sokoloski was significant—transportation and delivery of the drug were incidental to the sale. Also, the trial judge was unable to find that Davis had agreed with Sokoloski that the drug would be resold; nor was there any suggestion that his involvement with the purchaser extended beyond this one transaction in a way which would identify both as parties to a common distribution scheme. The conspiracy was therefore based on the purchase and sale contract.<sup>33</sup> But a commercial contract is an inappropriate basis for the

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<sup>30</sup> *Ibid.*

<sup>31</sup> [1977] 2 S.C.R. 523.

<sup>32</sup> In the Supreme Court, Justice Martland observed that Davis knew that Sokoloski intended to resell the drugs. His Lordship also writes: "The evidence establishes that Davis agreed with the appellant, at the appellant's request, to obtain for him, and to transport and deliver to him a substantial quantity of drugs." *Ibid.*, at p. 535.

<sup>33</sup> In his minority judgment Chief Justice Laskin asserted that the issue raised in *Sokoloski* was "whether a person who purchases a controlled drug . . . may be found guilty of conspiracy with the seller to traffic in that drug by reason only of agreeing to purchase or agreeing to have the drug delivered to him by the seller". *Ibid.*, at p. 524.

finding of a criminal conspiracy. In the commercial world the interests of buyer and seller may be antagonistic, though their interests do not have to be defined in such stark terms to support an argument that there is not a cooperative pursuit of a common object. The meaning of agreement for the purposes of contract differs from the meaning of agreement for the purpose of conspiracy. In the former, agreement is the exchange of promises (in *Sokoloski*, the seller promises to sell and the purchaser promises to buy). In the latter it is a decision to jointly pursue a common object. The Supreme Court of Canada did not distinguish between the two.<sup>34</sup>

The lower court decision in *R. v. Cunningham*<sup>35</sup> illustrates a different kind of mistake which may be attributed to the problem of defining agreement in the law of criminal conspiracy. Four accused persons were committed for trial on charges of fraud and conspiracy to commit fraud. The evidence disclosed that each of the accused had applied separately for a credit card which he then used to obtain goods and cash advances of large sums of money. The defendants argued that a *prima facie* case of conspiracy had not been established because, although they may have informed each other of the method whereby money may be obtained using the credit cards, each individual had acted on his own for his own private benefit. In committing the defendants for trial on the conspiracy count, Judge Scott reasoned that the question was whether the evidence discloses a common design. The accused did not have to participate together in the fraudulent acts. "Each of the accused who consulted the others took part in the agreement, the mutual consultation and community of action which together constitutes the crime of conspiracy . . ."<sup>36</sup>

Judge Scott's observations and conclusion beg the question "Wherein lies the agreement?". Certainly an agreement does not exist

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However, in *Sheppe v. R.* (1980), 15 C.R. (3d) 381 (S.C.C.), at p. 384, the Chief Justice referred to *Sokoloski*: "Although on one view of the facts in that case it might appear that a conspiracy could arise from a mere exchange of promises, a contract of sale and purchase of a drug, I read the majority judgment as resting on a prior agreement, although in the implementation thereof a transaction of sale and purchase was carried out."

<sup>34</sup> However in *R. v. Jean and Piesinger* (1979), 7 C.R. (3d) 338 (Alta. C.A.), Moir J. rejected the Crown's position that whenever a person acquires property from a thief, there is a conspiracy between the receiver and the thief to jointly possess the stolen property: "Once the thief disposes of the property he has no further interest in it; and he is guilty of theft and the 'fence' is guilty of the offence of possession of stolen property knowing it to be stolen. Both the thief and the receiver commit an offence, but it does not appear to me that that can be the offence of conspiracy to have in 'their possession' the stolen property. The receiver or 'fence' has possession, and the thief is finished with the stolen goods which he had previously possessed." (At p. 357).

<sup>35</sup> (1977), 39 C.C.C. (2d) 169 (Ont. Prov. Ct).

<sup>36</sup> *Ibid.*, at p. 182.

only because it was not a coincidence that the accused used the same method to commit fraud. They may have consulted one another or advised one another, and each may have been aware that the others planned to engage in similar activity. They may have *been in agreement* on the best way of using credit cards to commit fraud. But consultation, advice, awareness and approval do not, either separately or cumulatively, make a conspiracy. Liability should require, and in theory does require, that there be an *act* of agreement. And the agreement must be to participate together in the co-operative pursuit of a common object. Of course the parties to an agreement may act separately by doing different things in order to accomplish their objective. But the objective must be common to all and each must decide to pursue it in co-operation with the others.

The decision of the Supreme Court of Canada in *Atlantic Sugar Refineries et al. v. Attorney-General of Canada*<sup>36a</sup> illustrates that the distinction between making an agreement and being in agreement may be very difficult to draw. Following a price war the defendant companies settled down to a policy of maintaining their traditional shares of the sugar market. In their defence to the allegation that they had conspired to unduly lessen competition in the supply of sugar, the companies argued that they had, separately, adopted a uniform course of action. Each company had concluded that its best advantage lay in preserving its share of the market. This was described as a "tacit agreement" by the trial judge,<sup>36b</sup> and by the Supreme Court of Canada,<sup>36c</sup> and the adjustments necessary from time to time to maintain uniform prices were independent decisions made by each company as a result of "conscious parallelism".<sup>36d</sup>

A tacit agreement is an unspoken agreement and there is no reason why an unspoken agreement to do something unlawful should not be indictable provided it can be concluded that an agreement was *made*, which it is only when the necessary consensus as to cooperative pursuit has been reached as a result of communication between the parties.<sup>36e</sup> The nature of commercial enterprise in an oligopolistic market is such that communication may be subtle and discrete, but it must be nonetheless present. If there was not a conspiracy in *Atlantic Sugar Refineries*<sup>36f</sup> it was because the parties, though in agreement, did not make an agreement — tacit or otherwise.

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<sup>36a</sup> (1980), 16 C.R. (3d) 128.

<sup>36b</sup> *Ibid.*, at p. 135.

<sup>36c</sup> *Ibid.*, at pp. 139, 140.

<sup>36d</sup> *Ibid.*, at p. 134.

<sup>36e</sup> Not communication among all the parties, *supra*, footnote 11, but between at least two of the parties.

<sup>36f</sup> The Supreme Court of Canada restored the trial judge's acquittal on the basis that the "tacit agreement" which existed on these facts did not amount to a conspiracy.



II. *Inconsistent Verdicts.*

A conspiracy as an agreement requires the concurrence of two or more persons. The definition itself suggests the unique problem of inconsistent verdicts in conspiracy cases: more than one person must be involved for the offence to occur. The convictions of participants may therefore be interdependent. In *D.P.P. v. Shannon*<sup>37</sup> the House of Lords recognized that the problem could no longer be met by the rule which empowered the courts to quash a conviction where there was an inconsistency or repugnancy on the face of the record.<sup>38</sup> Lord Morris observed that where A and B are charged with conspiracy together, and there are separate trials:

... it may well happen that the available evidence at the trial of one of them is not the same as the available evidence at the trial of the other. If A is first tried the jury cannot convict unless on the evidence they are satisfied that he did conspire with B. That necessarily involves that the jury are satisfied that B conspired with A. But that conclusion of the jury for the purposes of that trial cannot affect B or be evidence against B if and when he is later separately tried. If A has been fairly and properly tried with the result that on the evidence adduced he was properly convicted, I see no reason why his conviction should be invalidated if for any reason B on his subsequent trial is acquitted. The reasons for acquittal of B may have nothing to do with A.<sup>39</sup>

This observation by Lord Morris raises two difficulties. His Lordship's apparent belief that the problem of inconsistent verdicts is greater where the different verdicts result from the same trial than if they result from separate trials may divert attention from the central issue of logical consistency; and a test which focusses on the evidence against each accused may not always meet the problem of logical inconsistency. If A and B are jointly charged and tried for conspiring with one another, and the material difference in the evidence against A from that against B is A's confession that he and B agreed to perform an unlawful act, could A's conviction stand if B was acquitted on his defence that he was hoaxing A and did not intend to carry out the agreement? The short answer is that it could not and the reason

<sup>37</sup> [1975] A.C. 717.

<sup>38</sup> The rule did not result from an attempt logically to deal with the problem of inconsistency. It rested more on public policy considerations, in particular the courts' insistence that justice should be seen to be done, than on logic. The apparent absurdity in the conviction of only one conspirator and the acquittal of one or more others who allegedly conspired with him required either that an explanation be given as to why the result was possible, or that the repugnancy be removed from the record. Because the former was not possible on the limited material before the appeal court (the indictments, plea and verdict), the latter became the approach to the problem of inconsistency.

The history of the rule is reviewed in *Shannon*. The rule was applied by the Ontario Court of Appeal as recently as 1972. See *R. v. Funnell*, [1972] 6 C.C.C. (2d) 215, and *R. v. Ellis*, [1972] 6 C.C.C. (2d) 200.

<sup>39</sup> *Supra*, footnote 37, at pp. 753-754.

lies in the mutuality of an agreement. B's successful defence means that there is no conspiracy.

If A and B are tried separately, the same problem arises. If A is convicted on his trial on the strength of his confession to conspiring with B, and at a subsequent trial B was acquitted on his defence that he did not intend to carry out the agreement, then the conviction of A should be quashed because there was no conspiracy. Thus, whether alleged conspirators are tried jointly or separately, the courts cannot merely consider whether there is a difference in the evidence. They must examine what the difference is, and what defences were raised by both or several accused, in order to determine if there is a danger that logically inconsistent verdicts have resulted.

The new English legislation provides the following rule on inconsistency:

The fact that the person or persons who, as far as appears from the indictment on which any person has been convicted of conspiracy, were the only other parties to the agreement on which his conviction was based have been acquitted of conspiracy by reference to that agreement (whether after being tried with the person convicted or separately) shall not be a ground for quashing his conviction unless under all the circumstances of the case his conviction is inconsistent with the acquittal of the other person or persons in question.<sup>40</sup>

Clearly it is to logical consistency that this test is directed, though it is cast in such general language that it may not be a fresh point of departure from which to approach the problem of inconsistent verdicts in separate conspiracy trials. In England, *Shannon* will probably remain the most important authority on this issue. But there is a matter on which Lords Morris and Reid and probably Lord Salmon would take issue with the new rule: it leaves open the possibility that A could be acquitted and B convicted at their joint trial.<sup>41</sup> It may be that such a result should not be permitted to stand in conspiracy cases. If a jury is satisfied from the evidence against A that A and B agreed to perform an unlawful act, it is implicit in this finding that B too is a conspirator. It is true that the jury will be instructed to consider the evidence against each accused separately, and there may be different evidence against each accused. It is conceivable that a properly instructed jury could conclude that, on the evidence admissible against A, they were satisfied that A and B agreed to perform an illegal act, but on the evidence admissible against B, they were not satisfied that A and B agreed to perform the same act. Stated this way,

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<sup>40</sup> *Supra*, footnote 5, s. 5(8).

<sup>41</sup> Lord Morris and Lord Reid felt that if two persons are charged and tried together for conspiracy, both should be either acquitted or convicted. Lord Salmon reluctantly agreed that, in this situation, the judge should, except in the most exceptional cases, continue to direct the jury that they should convict or acquit both. His Lordship did not elaborate on what might be a "most exceptional case".

the inconsistency is not readily apparent, but is there not a logical contradiction in a result which suggests that "for the purpose of establishing A's involvement, we are satisfied that B agreed with A; for the purpose of establishing B's involvement, we are not satisfied that B agreed with A". The difficulty, again, lies in the mutuality of agreement. To be certain that A is in agreement with B, one must be equally certain that B is in agreement with A. A conclusion that A is guilty of conspiracy involves, first, the determination that there was a conspiracy and, second, that A is a party. The first step requires the determination that B intended to agree and did agree with A to perform an illegal act. This involves a conclusion as to B's state of mind and such a conclusion cannot be made on the basis of evidence admissible against A alone. The liability of A is dependent upon the liability of B.

The problem of inconsistent verdicts in conspiracy cases was addressed by the Supreme Court in 1979. In *R. v. Guimond*,<sup>42</sup> G and M had been jointly indicted for conspiracy to abduct the family of a credit union manager in order to export money from the credit union. Both were convicted on their joint trial. G's appeal to the Quebec Court of Appeal was dismissed and M's appeal was allowed on the basis that M should have had a separate trial. G had made a statement implicating M to the police and though the statement was admissible only against G, and the jury was so instructed, the Court of Appeal was of the view that the jury could not ignore G's statement when considering the liability of M. On his second trial in which the judge sitting alone excluded evidence of G's confession and in which G was not called as a Crown witness, M was acquitted. Mr. Justice Ritchie summarized the questions of law raised by these circumstances:<sup>43</sup>

- (1) whether when an appeal is taken by two persons who had been jointly tried and convicted of conspiracy, it is an error for the Court of Appeal to allow the appeal of one of them and direct a new trial for him alone, or whether under such circumstances a new trial should be directed against both jointly; and
- (2) whether the acquittal of Muzard at his second trial should be given the effect of a finding that there was no conspiracy and that his fellow conspirator must also go free.

The majority judgment of Mr. Justice Ritchie can be summarized as follows:<sup>44</sup>

- (1) When two alleged co-conspirators are tried separately the acquittal of one does not necessarily invalidate the conviction of the other.
- (2) Whenever it is apparent that the evidence at the joint trial of two alleged co-conspirators is substantially stronger against one than the other, the safer course is to direct the separate trial of each.

<sup>42</sup> (1979), 26 N.R. 91 (S.C.C.).

<sup>43</sup> *Ibid.*, at p. 95.

<sup>44</sup> *Ibid.*, at pp. 107-108.

- (3) In cases where the same or substantially the same evidence is admissible against jointly tried conspirators it would be illogical to acquit one and convict the other.

In dismissing G's appeal the majority is in effect stating that the fact that M was inappropriately tried jointly with G is not a sufficient basis to interfere with the verdict, reached in that trial, that G was guilty of conspiring with M. Nor is it important that M was acquitted on his subsequent trial alone. Upon closer examination, this amounts to holding that G's confession was properly used to determine that G was guilty of conspiracy—that there was a conspiracy to which G was a party—but was improperly used to determine that M was a party. But where two alone are alleged to have conspired, as was the case here, the determination that M was a party was essential to the conclusion that there was a conspiracy. If G's confession assisted the jury in concluding that there was a conspiracy, the fact that that confession was improperly used in determining that M was a party is fatal to the conviction of G as well. The conclusion that M was not properly proved to have been a party is a conclusion about the existence of the conspiracy. For this reason a new trial should have been ordered for G as well.<sup>45</sup>

The problem with conspiracy is that the liability of parties cannot be separated from the question whether or not a conspiracy existed. It is primarily for this reason that the rule that persons jointly indicted should be jointly tried applies with particular force when the charge is conspiracy.<sup>46</sup> Our law should recognize this and should reaffirm the earlier principle that if two alone are accused of conspiracy and tried together, both must be acquitted or convicted. Although this principle may have originated in an era when appeal procedure was by way of Writ of Error, it is well founded in logic.

### III. *The Unlawful Purpose.*

Two or more persons may jointly pursue the same ends which one alone may seek. If the goal is such that preventing its attainment justifies the intervention of the criminal process, that intervention rightfully may take place whether the goal is pursued by one or by many persons. The only question in this approach stressing the auxiliary nature of the conspiracy offence is whether intervention should take place on the basis of an agreement only or on the basis that,

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<sup>45</sup> In *Gauvin v. R.*, N.B.C.A., 1980 (not yet reported), the conspiracy conviction of the appellant was upheld notwithstanding the acquittal of his co-accused who was tried jointly with him. Limerick J. concluded that the conviction of Gauvin was not invalidated by the acquittal of his co-accused because there was evidence admissible against Gauvin which was not admissible against the co-accused.

<sup>46</sup> *R. v. Sternig* (1975), 31 C.R.N.S. 272, at p. 283 (Ont. C.A.).

pursuant to the agreement, steps have been taken to attain the object.<sup>47</sup> However, it has been argued in this article that the evolution of the crime reflects as much the alternative rationale that combination is in itself appropriately criminal whether directed to criminal objects or to ends which, though undesirable or immoral, are not necessarily criminal offences. According to this rationale, intervention through the criminal justice process is justified on the basis that the goal is pursued by at least two persons.

The appropriate interpretation of "unlawful purpose" depends upon the rationale accepted—on whether there are goals which should attract criminal liability when pursued by two or more persons acting together but which should not when pursued by only one. If there are, these goals may, with justification, be included as "unlawful purposes" within the law of criminal conspiracy. To determine if there are such goals, we must enquire whether harm threatened by conspirators pursuing an objective, not in itself criminal, is greater than the harm threatened either by the same persons attempting to achieve the same objective separately, or by one pursuing it alone. It may be that we feel more threatened by a conspiracy, but is that because the threat is greater?

We may return to Justice Berger's observation that the "special dangers" presented by conspiracy include the greater likelihood of success, the pursuit of more ambitious plans, and the risk that other crimes are more likely to be committed as the conspirators pursue their objectives.<sup>48</sup> If these are dangers presented by conspiracy, then intervention through the criminal process on the basis of an agreement is appropriate. If they are the *only* dangers presented by conspiracy, they may be met by more severe sentences and, undoubtedly in some cases, by the laying of additional charges. The dangers cited by Justice Berger do not support a broad interpretation of "unlawful purpose" to include non-criminal acts.

At common law there were potentially many circumstances in which an agreement could be held criminal though the agreed upon goal would not be criminal if pursued by one alone. In *R. v. Parnell*<sup>49</sup> Fitzgerald J. stated that the conspiracy is indictable:

... where the end to be attained is in itself a crime; where the object is lawful but the means to be resorted to are unlawful; and where the object is to do an injury to a

<sup>47</sup> Important as this question is, it has not received the attention it deserves because conspiracies are usually proved on the basis that an agreement can be inferred either from attainment of the object or from the steps which have been taken further to the agreement.

<sup>48</sup> *Supra*.

<sup>49</sup> (1881), 14 Cox C.C. 513.

third party or to a class, though if the wrong were effected by a single individual, it would be a wrong but not a crime.<sup>50</sup>

In England full advantage was taken of the vagueness of this statement to recognize that the objects of criminal conspiracy were open-ended.<sup>51</sup> For constitutional reasons the problem is more complicated in Canada, yet in our law any conduct prohibited under penalty, whether by provincial<sup>52</sup> or even municipal<sup>53</sup> authority may potentially constitute the unlawful purpose of a criminal conspiracy. In addition, Mr. Justice Fauteux's observation in *Wright, McDermott and Feely v. R.*<sup>54</sup> that the "wide embracing import" of the term "unlawful purpose" in section 423(2) was unchanged by the 1953-54 amendments to the Criminal Code<sup>55</sup> suggested that the objects of criminal conspiracy could include behaviour which was unlawful at common law but which was no longer prohibited in the Code.<sup>56</sup>

However, in *R. v. Celebrity Enterprises (No. 2)*,<sup>57</sup> the British Columbia Court of Appeal held that "an unlawful purpose must be a purpose which is unlawful by the law of Canada".<sup>58</sup> In itself this is an ambiguous pronouncement, but the charge in *Celebrity Enterprises* was "conspiracy to produce a public mischief with intent to corrupt public morals". Robertson J. pointed out that it was of no significance that conspiracy to corrupt public morals, if the charge in this case could be so construed, is an English common law offence. Section 8(a) of the Criminal Code provides that no person shall be convicted of an offence at common law and

If something that someone does is not something of which he can be convicted, that something cannot, in my opinion, be "unlawful" in the sense in which the word is used in s. 423(2) (e).<sup>59</sup>

The object must be an offence by Canadian law.

Our jurisprudence thus has represented two of the three possible interpretations of "unlawful purpose" in the law of criminal conspira-

<sup>50</sup> See also *R. v. Gage*, *supra*, footnote 7, at p. 438.

<sup>51</sup> See particularly *Shaw v. D.P.P.*, [1962] A.C. 220 (H.L.).

<sup>52</sup> *R. v. Thodes et. al.* (1970), 73 W.W.R. 710 (B.C.C.A.); *R. v. Chapman and Grange*, [1973] 2 O.R. 290 (Ont. C.A.); *R. v. Bendall et. al.* (1977), 36 C.C.C. (2d) 113 (Man. C.A.).

<sup>53</sup> *R. v. Jean Talon Fashion Centre Inc.* (1975), 22 C.C.C. (2d) 223 (Que. C.A.).

<sup>54</sup> [1964] S.C.R. 192.

<sup>55</sup> *Ibid.*, at p. 194.

<sup>56</sup> The observation was inconsistent with at least the spirit of Justice Cartwright's view in *Frey v. Fedoruk*, [1950] S.C.R. 517, expressing a preference for well-defined limits to criminal conduct.

<sup>57</sup> (1977), 42 C.C.C. (2d) 478 (B.C.C.A.).

<sup>58</sup> *Ibid.*, at p. 479.

<sup>59</sup> *Ibid.*, at p. 480.

cy. *Celebrity Enterprises* limited the term to federal or provincial offences, but the Supreme Court of Canada in *Wright, McDermott and Feeley* suggested that it was not so limited. A third possible interpretation would limit potential unlawful purposes to crimes as defined in Canadian criminal law. It is against this background that we must consider the significance of the recent Supreme Court decision in *Gralewicz v. R.*<sup>60</sup>

Gralewicz and his co-accused were charged with conspiracy to prevent members of the Seafarer's International Union of Canada from participating in the lawful activities of their union in accordance with section 110(1) of the Canada Labour Code.<sup>61</sup> Judge Brown of the Ontario Provincial Court found the information to be confusing and lacking in the fundamental requirements of specificity in relation to time, place and matter and that it did not meet the requirements of section 510 of the Criminal Code.<sup>62</sup> Since it could not be cured by amendment, he quashed the information. He also expressed his view that it did not allege an unlawful purpose as that term is used in section 423(2) of the Code.

In an application by the Crown for mandamus,<sup>63</sup> Carruthers J. asserted that "at the root" of the unlawful purpose in the information in the present case is section 110(1) of the Canada Labour Code:

Every employee is free to join the trade union of his choice and to participate in its lawful activities.

Gralewicz argued that section 110(1) could not fulfill the unlawful purpose requirement because it was declaratory and contained no prohibition. Even upon an interpretation of "unlawful purpose" to include any offence, this requirement could only be fulfilled by a statutory prohibition. Carruthers J. did not agree. He quoted Laidlaw J. in *R. v. Robinson*.<sup>64</sup>

"Lawful" means authorized by law. The prefix "un" may simply mean not and "unlawful" may be properly used to mean "not authorized by law".<sup>65</sup>

These words of Laidlaw J. represent the very broad common law interpretation of unlawful which, in the view of Carruthers J. was preserved by the Supreme Court of Canada in *Wright, McDermott and Feeley v. R.*<sup>66</sup>

<sup>60</sup> (S.C.C., Oct. 7th, 1980), unreported.

<sup>61</sup> R.S.C., 1970, c. L-1.

<sup>62</sup> (1978), 42 C.C.C. (2d) 153, at p. 155.

<sup>63</sup> *Ibid.*

<sup>64</sup> (1948), 92 C.C.C. 223 (Ont. C.A.).

<sup>65</sup> *Ibid.*, at p. 225.

<sup>66</sup> *Supra*, footnote 54.

To my mind it would be meaningless for the legislature to have gone to the trouble of setting up a freedom such as they have in section 110 if there was nothing that could be done to prevent a person from interfering with, restricting or, in some cases eliminating the exercise of that freedom. It is difficult for me to understand that such interference with what has been described in the act as a "basic freedom" could not be considered unlawful. Surely it must be the necessary intendment of the Canada Labour Code that it is unlawful to not permit "every employee . . . to join the trade union of his choice and to participate in its lawful activities".<sup>67</sup>

The Ontario Court of Appeal agreed.<sup>68</sup> Brooke J., in delivering the court's judgment, emphasized again Justice Fauteux's view that the meaning of the term "unlawful purpose" was as wide as it had been at common law.<sup>69</sup>

In the Supreme Court of Canada, Gralewicz relied on *Celebrity Enterprises* and the Crown on Justice Fauteux's dicta in *Wright, McDermott and Feeley*. In delivering the majority judgment reversing the Court of Appeal, Mr. Justice Chouinard observed that all Canadian cases in which conduct was held capable of being an unlawful purpose, including *Wright, McDermott and Feeley*, involved conduct prohibited by legislation. In the 1954 revision of the Criminal Code, the new section 8(a) provided that no person shall be convicted of an offence at common law.

It follows that common law conspiracy would have ceased to be part of Canadian criminal law had it not been retained as a statutory offence. But to make it a statutory offence does not necessarily mean that it was embodied with all the implications and uncertainties recognized by the decisions of the English Courts when no decisions in Canada had ever gone so far as those of the English Courts.<sup>70</sup>

Referring to the Supreme Court's preference for well-defined limits to criminal conduct,<sup>71</sup> His Lordship concluded:

It is difficult for me to see how the mere enactment of conspiracy as a statutory offence would have the effect of extending its scope beyond what it had been held to extend to at common law by the Canadian courts prior to it becoming a statutory offence while at the same time Parliament enacted section 8 to exclude common law offences from the ambit of the Criminal law of Canada. I am therefore of the opinion that in Section 432(2) (a) unlawful purpose means contrary to law, that is, prohibited by federal or provincial legislation.<sup>72</sup>

The decision is certainly welcome. It leaves little room to doubt that offences must be created by legislators and not by courts. Unfortunately the court did not consider whether potential unlawful purposes should be further limited to crimes. In *R. v. Sommerville and Kaylich*,<sup>73</sup> Mr. Justice Disberry had suggested that an unlawful

<sup>67</sup> *Supra*, footnote 62, at p. 160.

<sup>68</sup> *Re Regina v. Gralewicz et. al.* (1979), 45 C.C.C. (2d) 188.

<sup>69</sup> *Ibid.*, at p. 191.

<sup>70</sup> *Supra*, footnote 60.

<sup>71</sup> *Supra*, footnote 56.

<sup>72</sup> *Supra*, footnote 60.

<sup>73</sup> (1962), 40 W.W.R. 577 (Sask. Q.B.).



purpose should be "unlawful in the criminal sense".<sup>74</sup> Of course this view did not stand, but it has never been discredited. In the first cases interpreting "unlawful purpose" following the 1954 revisions, the courts were reluctant to suggest that any violation of provincial legislation might constitute such a purpose. In *Wright*,<sup>75</sup> and in *R. v. Thodas, Merrin and Chong*<sup>76</sup> the violations of provincial legislation were compared with Code offences of comparable severity. However, in *R. v. Chapman and Grange*<sup>77</sup> the Ontario Court of Appeal did not engage in this process of comparison in finding that section 112 of the Ontario Telephone Act<sup>78</sup> was an "unlawful purpose" in the law of criminal conspiracy.

Until the question is before the Supreme Court, the most appropriate test in determining whether non-criminal offences are sufficient "unlawful purposes" is found in *R. v. Jean Talon Fashion Centre*.<sup>79</sup> Rothman J. suggested that agreements may be indictable conspiracies when their objectives "could cause serious harm or injury to the public or threaten public safety or an important public interest".<sup>80</sup>

### *Conclusion*

The traditional focus of our criminal law has been on the individual. The concepts which have evolved measure his culpability in relation to his act and state of mind. However, when the act alleged is an agreement there is, by definition, collective attention directed to the pursuit of some goal, and individual responsibility must be determined in part by reference to collective action.<sup>81</sup> The theory of our criminal law does not readily accommodate this determination and it is perhaps for this reason that our law of criminal conspiracy is, above all, very confusing. The problem of definition remains and, in the absence of an accepted rationale for the conspiracy offence, will not soon be resolved. Our courts will continue to have difficulty in considering whether there exists an agreement of the kind which concerns the criminal law. The unsatisfactory jurisprudence on inconsistent verdicts also reflects the problem of definition.

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<sup>74</sup> *Ibid.*, at p. 587.

<sup>75</sup> *Supra*, footnote 54.

<sup>76</sup> *Supra*, footnote 52.

<sup>77</sup> [1973] 2 O.R. 290 (Ont. C.A.).

<sup>78</sup> R.S.O., 1970, c. 457.

<sup>79</sup> *Supra*, footnote 53.

<sup>80</sup> *Ibid.*, at p. 234.

<sup>81</sup> For an example of a discussion of individual responsibility and collective action, see *Strasser v. Roberge* (1979), 50 C.C.C. (2d) 129 (S.C.C.).

On the other hand, the decision of the Supreme Court in *Gralewicz* must be greeted with enthusiasm, though it represents an appropriate recognition that judges cannot create new offences, rather than an analysis of the objectives which rightfully can be "unlawful purposes" in the law of criminal conspiracy.

The time has come for a legislative solution—a code on criminal conspiracy to replace the existing Criminal Code provisions. The English example will be helpful, but we should not regard it as a desirable precedent for this country. The existing interest in a new Canadian Criminal Code should provide the impetus for a comprehensive background study resulting in new conspiracy legislation.

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