A VANILLA EXTRACT: AN ALTERNATIVE APPROACH TO PROSECUTING COMPLEX GROUP CRIMES

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Complex group crimes are often prosecuted using the offence of conspiracy. However, when the conspiracy is entirely co-extensive with the accomplished crime it no longer operates in an inchoate manner. Instead, it functions as a proxy mode of liability. Used in this way conspiracy can introduce unfairness and incoherence into the criminal justice system. This article advocates for the recognition of a new mode of liability referred to as Joint Criminal Enterprise ["JCE"] as an alternative to conspiracy for the prosecution of complex group crimes. JCE functions similarly to conspiracy by focusing primarily on the agreement between the parties. It incorporates conspiracy's insight that united group intentions have a crime enhancing function. The article begins by describing how conspiracy is presently used to prosecute complex group crimes and evaluates its benefits and weaknesses. It then considers the present alternatives of co-principal perpetration, aiding and abetting, and counselling and whether these modes of liability could adequately solve the complex group crime problem. The article then concludes with a distillation of JCE from historical and international sources to recommend it as the tool of choice to prosecute complex group crimes here in Canada.

Les crimes collectifs complexes font souvent l'objet de poursuites sur la base de l'infraction de complot. Toutefois, lorsque le complot correspond entièrement au crime accompli, il ne s'agit plus d'une infraction inchoative. Il représente plutôt un mode indirect de responsabilité. Utilisé de cette façon, le complot peut rendre le système de justice criminelle inéquitable et incohérent. L'auteur du présent article défend la reconnaissance d'un nouveau mode de responsabilité appelé « entreprise criminelle commune » [« ECC »] comme substitut au complot pour poursuivre les crimes collectifs complexes. L'ECC a le même mode opératoire que le complot, puisqu'elle met principalement l'action sur l'entente entre les parties. Elle intègre le point de vue relatif au complot selon lequel les intentions du groupe ont une fonction d'accroissement de la criminalité. L'auteur commence par décrire la façon dont le complot est actuellement utilisé pour poursuivre les

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crimes collectifs complexes et il évalue ses avantages et ses faiblesses. Puis il tient compte des solutions de rechange actuelles à la perpétration par des coauteurs, à l'incitation et aux conseils et de la question de savoir si ces modes de responsabilité pourraient adéquatement résoudre le problème du crime collectif complexe. L'auteur conclut ensuite son article par une synthèse de l'ECC depuis des sources historiques et internationales afin de la recommander comme principal outil pour poursuivre les crimes collectifs complexes au Canada.

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I. Introduction

In Canada the *Criminal Code* offence of conspiracy has transformed from its roots in the inchoate.[2] What began as an offence meant to apply prior to attempting criminality can now be used as a method of convicting offenders by proxy for the predicate offence that was the conspiracy's object.[3] This transformation has occurred because, unlike much of the common law world, Canada has not recognized a formal mode of liability that does explicitly what we have allowed conspiracy to do tacitly.[4] The

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2 *Criminal Code*, RSC 1985, c C-46, s 465(1) [*Criminal Code*].

3 I use the terms predicate offence or predicate crime to mean the offence which is the object of the conspiracy. For a conspiracy to traffic cocaine the predicate offence would be trafficking in cocaine.

4 By the term mode of liability, I am referring to what is sometimes called complicity, namely the area of the criminal law that addresses how and when a party will be held criminally responsible for another's criminal behavior by virtue of activity or

result of overburdening the offence of conspiracy has been to introduce unfairness into Canadian criminal law.

Conspiracy operates in this manner when it is co-extensive with its predicate offence meaning the conspiracy charge has no transcendent quality to it. It reflects nothing more than the agreement to do the very offence the evidence shows the offenders accomplished. Prosecutorial choice to pursue the crime in inchoate form has no bearing on penalty. If successful, the prosecution may avail itself of the sentencing tariff that would have attached had the offender been found guilty of the accomplished predicate offence itself. Conspiracy has come to function in this manner because Canadian criminal law faced several practical problems. Many stem from conspiracy's frequent use case which is to convict members who participate in complex group crimes such as gun and drug importation or distribution.

As the Law Reform Commission of Canada noted in 1985, conspiracy is often used for such crimes because the exact contributions of those involved are "hard to pin down."[5] Co-extensive conspiracies solve this problem by capturing offenders beyond the limits imposed by the *actus reus* requirements of co-principal and secondary participation. When conspiracy is charged, the court no longer has to examine the actual participation of the conspirator in the offence that was the conspiracy's object. It need only inquire whether they agreed to it. What acts in furtherance the accused may have committed serve to illustrate the nature of the agreement and their assent to it instead.[6]

For complex group crimes it also seems inaccurate to label the offender found committing the *actus reus* of the predicate offence the principal perpetrator, while the other often more sophisticated criminals in the group, the ones that order, finance, and organize the predicate offence, the secondary participants. While we have obviated the distinction between principal and secondary participation, the terminology still implies a distinction in fault. Among conspiracy's many virtues are that it allows everyone convicted to be designated principal perpetrators of the conspiracy and leaves their various roles in the group's crime to be

association: KJM Smith, *A Modern Treatise On The Law Of Criminal Complicity* (Oxford: Clarendon Press, 1991) at 1–2 [Smith, *A Modern Treatise*]. Given this has been expressed here in Canada using the term liability and not complicity, I have opted to follow the Canadian language: *R v Pickton*, 2010 SCC 32 [*Pickton*]; *R v Thatcher*, 1987 CanLII 53 (SCC) [*Thatcher*].

5 Law Reform Commission of Canada, *Secondary Liability: Participation in Crime and Inchoate Offences,* (Working Paper No 45) (Ottawa: Department of Justice Canada, 1985) at 43 [Law Reform Commission of Canada].

6 *R v Douglas*, [1991] 1 SCR 301, 122 NR 1 at 316 [*Douglas*].

reflected at the sentencing stage. By charging conspiracy the prosecution can more accurately reflect the circumstances of complex group crime, being that all of its members intended the crime and were crucial in bringing it about no matter how small their contribution.

Thirdly, given the use of sophisticated search and seizure powers, complex group crime is often foiled by law enforcement at the stage of attempt or at the precise moment it is accomplished. Canadian law simplified to respond to this reality and so conspiracy has been allowed to encompass the entire gamut from the purely inchoate to the attempted to the accomplished predicate offence. It makes no difference to modern Canadian conspiracy law what stage the offence has reached. Prosecuting offenders through a single offence that applies to each of the various steps in the unfolding of a crime from agreement, preparation, unfolding and accomplishment is an obvious benefit to the prosecution.

Canadian conspiracy law has taken on the powers just described because, unlike other common law jurisdictions, we have not recognized a mode of liability that can attribute fault equally to all members of the conspiracy for the accomplished predicate crime. I argue that the transformation conspiracy has undergone is an unwitting mimicry of the mode of liability embraced by much of the common law world for precisely this purpose. This mode of liability has been called "plain vanilla" or "simple" joint criminal enterprise ("JCE"). It is the far less controversial sister concept to the common intention doctrine found in section 21(2) of the *Criminal Code.* I argue that where the prosecution alleges that offenders, united in intention, came together each to their own role, to instigate, procure, encourage, plan, support, finance, assist, and do an accomplished complex group crime, a mode of liability should be the manner by which we convict its members for that offence, not an inchoate version of it.

I begin my argument with a discussion of conspiracy law in Canada. Building a case that the offence is frequently misused precisely because we have no alternative mode of liability, the paper then turns to the other methods for prosecuting the members of a complex group crime presently recognized in Canadian law. I describe what I see are significant hurdles to their use in complex group crimes. Finally, I turn to simple JCE. To argue for its recognition here in Canada will require an examination of the history of the common law prior to Canada's formation, as well as an examination of how other former colonies of the British empire have understood their legal inheritance. Despite the Supreme Court having interpreted section 21(2) of the *Criminal Code* as excluding simple JCE, the Court did not resolve whether the doctrine exists at common law. I argue that it does and it has been embraced by countries all over the world

with a similar legal tradition to our own. My goal is to demonstrate that simple JCE and conspiracy are twins with different functions. They are united at their core by their focus on shared criminal intentions, but by relying on conspiracy to do what simple JCE was designed to do we have introduced unnecessary unfairness into Canadian criminal law.

II. Conspiracy

The offence of conspiracy is an agreement to perform an illegal act or to achieve a result by illegal means that is committed upon the act of agreeing.[7] The accused must both intend to agree and intend to carry out the unlawful common design.[8] This latter *mens rea* component tracks the *mens rea* for the predicate offence.[9] However, the conspirator is not required to know how the offence will be carried out, be involved in any of its planning, or know the identity of the other members of the conspiracy.[10] None of the members need take any step to achieve the criminal goal either, what is referred to in many other jurisdictions as an overt act requirement.[11] The American view is that the overt act requirement distinguishes conspiracies that are in progress from conspiracies that are simply agreements in the minds of the conspirators not worthy of the law's attention.[12] The Canadian perspective in contrast considers the conspirator's agreement itself to be "an act in the external world" or "an act in itself."[13]

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7 *Ibid* at 316; *R v* Déry, 2006 SCC 53 at para 47 [*Déry*]; *Sheppe v The Queen,* [1980] 2 SCR 22, 31 NR 437 at 25 [*Sheppe*]; *Papalia v R*, [1979] 2 SCR 256, 93 DLR (3d) 161 at 276 [*Papalia*].

8 Justice Tascherea writing for himself but concurring in the result in *The Queen v O'Brien*, [1954] SCR 666, 2 DLR 311 at 668 [*O'Brien*]. See also *United States of America v Dynar*, 1997 CanLII 359 (SCC) at para 103 [*Dynar*].

9 *Dynar*, *supra* note 8 at para 108.

10 *R v Niemi*, 2006 CanLII 13949 (ONCA) at paras 64–70.

11 *R v JF*, 2013 SCC 12 at para 44 [*JF*]. See e.g. *Criminal Code Act*, 1995/12, §11.5(2)(c) (Austl) [Australian Commonwealth *Criminal Code*]; 18 USC tit 18 §371 (1994); Tex Penal Code Stat tit 4 §15.02(2) (2023); Utah Code Stat tit 76 §201 (2024) [Utah Code]; Colo Revised Statutes Ann tit 18 Criminal Code §18-2-201(2) (2021); Maine Criminal Code Stat tit 17 §151.4 (2018); Minn Stat §609.175(2) (1975); WY Stat §6-1-303(a) (2024); TN Code §39-12-103(d) (1989); OK Stat §21-423; Connecticut Gen Stat §53(a)-48(a) (1969); GA Code Stat §16-4-8 (2023) [Georgia Code]; IA Code tit 16 §706.1(3) (2024); Kentucky Revised Stat tit XL, c 506, §506.050(1) (1975). See also American Law Institute, *Model Penal Code*, (Philadelphia: American Law Institute, 1962) at §5.03(5) [*Model Penal Code*]; Joshua Dressler, *Understanding Criminal Law*, 9th ed (North Carolina: Carolina Academic Press, 2022) at 417, 424 [Dressler, *Understanding Criminal Law*]; *Hyde v United States,* 225 US 347 (1912) at 359.

12 See e.g. *United States v Yates*, 354 US 298 (1957); *United States v Arboleda*, 929 F (2d) 858 (1st Cir 1991).

13 Law Reform Commission of Canada, *supra* note 5 at 47; Justice Willes in *Mulcahy v R* (1868), LR 3 HL 306 at 317.

The offence of conspiracy is often justified in two ways. As an inchoate crime, it criminalizes the anticipatory stage of the commission of a criminal offence.[14] Under this view its aim is preventative, namely to allow law enforcement to intervene before an offence has even been attempted.[15] The second justification is that criminal agreements are thought to enhance both the risk of commission of criminal offences and their severity.[16] The conjoining of intentions to commit an offence by two or more persons creates moral pressure on the members of the group which each conspirator resolving on their own does not produce. This moral pressure means each conspirator is less likely to desist from the criminal conduct than they would be otherwise.[17]

Despite its reputation as a crime of the mind, conspiracy only criminalizes agreements of action. Criminal agreements must be to "do" an unlawful act, or to "perform" an illegal act, or "to achieve a result" by illegal means.[18] Nonetheless, the verbs do, perform, and achieve do not create any requirement that the conspirator must agree to participate in the essential acts that form the predicate offence. Any degree of assistance in the furtherance of the unlawful object will suffice.[19] This includes "mere assent to and encouragement of the design, although nothing may have been assigned or intended to be executed by [the conspirator] personally."[20] Agreeing to the unlawful object with no additional proof of the conspirator's participation in the predicate offence suffices to ground guilt. Many have observed that the *actus reus* requirement for conspiracy here in Canada has effectively vanished, there being nothing distinguishable between the mental and physical elements.[21] The degree to which this can be justified might depend upon how we understand the offence. Understood as an inchoate crime, the parallel nature of the

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14 *JF*, *supra* note 11 at para 21; Matthew R Goode, *Criminal Conspiracy in Canada* (Toronto: Carswell Company Ltd, 1975) at 82 [Goode, *Criminal Conspiracy*].

15 Jeremy Horder, *Ashworth's Principles of Criminal Law*, 10th ed (Oxford, UK: Oxford University Press, 2022) at 529 [Horder, *Ashworth's Principles*].

16 *Déry*, *supra* note 7 at para 49; *Dynar*, *supra* note 8 at para 89.

17 Peter Gillies, *The Law of Criminal Conspiracy*, 2nd ed (Sydney: Federation Press, 1990) at 5.

18 Justice Taschereau writing for himself but concurring in the result in *O'Brien*, *supra* note 8 at 668; *Douglas*, *supra* note 6 at 316.

19 *JF*, *supra* note 11 at para 54 citing *R v Genser*, 1986 CanLII 4942 (MBCA), aff'd 1987 CanLII 5 (SCC).

20 *R v McNamara* (1981), 56 CCC (2d) 193 (ONCA) at 453 citing Robert Samuel Wright, *The Law of Criminal Conspiracies and Agreements* (Philadelphia: Blackstone Publishing Company, 1887) at 56.

21 Law Reform Commission of Canada, *supra* note 5 at 46. Goode, *Criminal Conspiracy*, *supra* note 14 at 16. The jurisprudence, however, holds that the fact of agreement is the *actus reus*: *Papalia*, *supra* note 7 at 276.

actus reus and *mens rea* may be less justified considering the American and Australian overt act requirement. These jurisdictions differentiate between those criminal agreements that truly merit the criminal law's attention from those that do not by a supplemental act requirement.

The parallel *mens rea* and *actus reus* make more sense, however, if one considers conspiracy in light of its second justification, namely that agreeing with others to commit a crime has a crime enhancing function. This is certainly the only justification imaginable when the offence is co-extensive with its accomplished predicate. There, conspiracy's parallel *actus reus* and *mens rea* components reflect how group dynamics affect criminal behaviour. As will be discussed in more depth below when we turn to simple JCE, criminal agreements can be understood as a form of encouragement. The important distinction between conspiracy and simple JCE is that, while both are or can be defined by what appear to be parallel *mens rea* and *actus reus* components, the latter explicitly recognizes the agreement as having produced an *actus reus* effect on the predicate crime.

A) Conspiracy's procedural rules

Given the breadth and power of conspiracy, rules have developed to confine its application. Among them is the rule that the prosecution should not pursue both the conspiracy to accomplish the predicate offence and the accomplished predicate offence where the charges are co-extensive with one another. Expressions of distaste for this practice can be found throughout the common law world.[22] Many practical reasons have been identified to prohibit the addition of a co-extensive conspiracy charge such as prolongation of proceedings and the possibility of inconsistent verdicts.[23] There is also a concern that some defendants will be found guilty of the substantive offence by virtue of their association with their co-accused demonstrated by the conspiracy and not by a strict application of a mode of liability.[24] When the prosecution lays both the co-extensive

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22 *R v Boulton and others* (1871), 12 Cox CC 87; *R v Goodfellow* (1906), 11 OLR 359, 10 CCC 424 (ONCA) at para 17 [*Goodfellow*]; *Rex v Hayes and Pallante*, [1942] OR 52, 2 DLR 85 (ONCA); *Leroux v The King* (1950), 10 CR 294 (QCCA) at 300; *R v Dawson*, [1960] 1 WLR 163, 1 All ER 558; *Poirier v The Queen* (1961), 37 CR 165 (QCCA) at 168–169; *Regina v Jefferson and five others*, [1971] 2 OR 38, 6 CCC (2d) 3 (ONSC); *R v Hoar*, [1981] HCA 67, 148 CLR 32 at 38; *R v Figueroa*, 2002 CarswellOnt 1231 (Ont SC) at para 8; *Truong v R*, [2004] HCA 10, 223 CLR 122 at para 194; Goode, *Criminal Conspiracy*, *supra* note 14, ch 5.

23 UK, Law Commission of England and Wales, *Inchoate Offences: Conspiracy, Attempt and Incitement* (Working Paper No 50) (London: Her Majesty's Stationary Office, 1973) at 34–35 [Law Commission of England and Wales].

24 Paul Jarvis & Michael Bisgrove, "The Use and Abuse of Conspiracy" (2014) 4 Crim L Rev 261 at 263.

conspiracy and its accomplished predicate offence it also has the effect of hedging proof.[25] If an *actus reus* contribution to the accomplished predicate offence cannot be made out, the prosecution may nonetheless be successful on the co-extensive conspiracy charge.

To some this latter observation is a virtue. In the Law Commission of England and Wales' 1973 Working Paper on inchoate offences, the authors stated that conspiracy is charged "in case the evidence on the substantive counts against one or more defendants breaks down."[26] The Law Commission of England and Wales notwithstanding, most jurisdictions have adopted a rule that an individual may be charged with both conspiracy and its predicate offence only where it can be shown that the offences are factually different from one another. This is where the conspiracy count provides a "more rounded impression" as to the nature of the criminal enterprise,[27] or in the words of our Supreme Court where the conspiracy charge "transcended any dependence" on the substantive crime.[28] A substantive charge alone may not be sufficient when it cannot show "the wide-ranging, extensive and ongoing nature" of the organized criminality.[29] Where the accomplished crime is just one example of what was an on-going agreement to commit additional crimes, the charging of a conspiracy with its predicate retains an inchoate quality.[30] Conversely, where the conspiracy is inferred solely from evidence of the commission of the predicate crime and its purview is limited to that crime, the transcendence rule should fail.[31] Unfortunately, conspiracy is not always used with such circumspection here in Canada. It is frequently charged when the predicate offence has been accomplished and where it is co-extensive with it. The practice was recently criticized by Justice Schreck of the Ontario Superior Court,[32] and many examples of charging both the accomplished substantive offence and a co-extensive conspiracy can be

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25 *Goodfellow*, *supra* note 22 at para 17.

26 Law Commission of England and Wales, *supra* note 23 at 39.

27 Horder, *Ashworth's Principles*, *supra* note 15 at 532. The English Crown Prosecution Service guidance on the use of conspiracy for gang related drug offences states that conspiracy may be used in order to "demonstrate the overall criminality": Crown Prosecution Service, "Prosecution Guidance, Gang related Offences" (last modified 4 November 2021), online: <https://tinyurl.com/mudkfuhv> [perma.cc/4JAZ-RKC5]. For Canadian law on this point see *Sheppe*, *supra* note 7 at 28; *R c Collocchia*, 2000 CanLII 29873 (QCCA) at paras 41–48.

28 *Sheppe, supra* note 7 at 28.

29 *Elomar v R*, [2014] NSWCCA 303 at para 490 citing with approval the language of the trial judge.

30 See e.g. *R v Duncan et al*, 2016 ONSC 1319; *R v Withrow*, 2019 NSSC 270.

31 Goode, *Criminal Conspiracy*, *supra* note 14 at 176.

32 *R v Tagliabue*, 2024 ONSC 3709 [*Tagliabue*].

found.[33] What is equally clear, in my estimation, is that the procedural rule surrounding transcendence is breached here in Canada because we have no alternative mode of liability that can explicitly perform the function we've assigned to conspiracy.

Consider the *Powell* case.[34] There the conspiracy charge was entirely co-extensive with its predicate offence being an agreement to kidnap the victim for ransom which the evidence showed was accomplished. The Court was presented with a *Kienapple* application to stay the conspiracy charge given the offender had also been convicted of the substantive offence. The Court correctly noted that the legal components for the offence of conspiracy and those of the substantive offence were different and therefore dismissed the application. But while the results of these *Kienapple* applications are legally correct and are bounded by how defence counsel framed their objection, they miss the deeper concern with entering convictions for both the conspiracy and its predicate. Unlike the *Kienapple* rule,[35] the rule against pursuing co-extensive conspiracy offences does not lie in potentially overlapping legal tests but upon basic fairness principles, what some have described as a complaint of injustice rather than illegality.[36] Even if, as the Law Commission of England and Wales candidly noted, dual charging could be recommended given its ability to hedge prosecutorial proof, once that hedge has played out the practical benefit is gone and a stark reality is left.[37] An accused has been convicted twice for separate constructions on the same facts, and in a clear instance of there being nothing inchoate or transcendent about the additional crime they were convicted of.

Why is conspiracy used in this manner? The jurisprudence shows that co-extensive conspiracy charges are frequently laid for no other reason than to capture preparatory conduct or to illustrate that additional participants were involved in the criminal venture. Conspiracy used in this manner, however, does not comport with the transcendence rule. If a co-extensive conspiracy can be justified simply by its power to illustrate that the offence was conducted with other people, then when would

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33 See e.g. *R v Grewall, Grewall & Toor*, 2001 BCSC 48; *R v Poon and Wong*, 2006 BCSC 1156; *R v Chen*, 2006 MBQB 241; *R v Gomez*, 2013 ONSC 1858; *R v Olufeko et al*, 2015 ONCJ 623; *R v Vu*, 2015 BCSC 1073; *R v Igbinoba*, 2015 ONSC 7492; *R v Powell*, 2017 ONSC 6698 [*Powell*]; *R v Hadi*, 2022 ONSC 2903.

34 Reasons for judgement: *Powell*, *supra* note 33. Reasons on sentence and *Kienapple* application: *R v Powell*, 2017 ONSC 7437.

35 The *Kienapple* rule is predicated on preventing convictions for multiple offences where their respective elements are the same or substantially the same: *Kienapple v R*, [1975] 1 SCR 729, 44 DLR (3d) 351.

36 Goode, *Criminal Conspiracy*, *supra* note 14 at 183.

37 Law Commission of England and Wales, *supra* note 23 at 34–35.

conspiracy not be justified for an accomplished crime involving multiple accused save for spontaneous ones? This argument has been made many times. But more concerning is the fact that this function of conspiracy could be accomplished by a mode of liability. They too can demonstrate agreement and coordination with others as well as prior planning and preparatory acts. If this is the case, then fairness would suggest that they be the preferred route for establishing these factual expansions over a supplemental inchoate offence. Surely the transcendence rule must mean that the conspiracy transcends the predicate offence by giving a more rounded picture in a way that justifies the accused facing an additional criminal charge.

There is a choice for the law to make here. Proof of a co-extensive agreement can lead to either a finding of guilt with respect to the member having simply agreed, or it can lead to the member having thereby participated in the accomplished predicate crime. The law loses a degree of fairness when it chooses the former as it leads to redundant charging. As I hope to demonstrate, Canadian criminal law could police the transcendence rule with even greater vigilance if it were to accept simple JCE as a mode of liability. It performs all of the factual expansions often assigned to conspiracy but without the accused facing an additional charge.

As others have noted, it can be nothing more than habit that conspiracy is used in this manner and some jurisdictions have attempted to root it out.[38] Many American states prohibit convictions for predicate offences and co-extensive conspiracies,[39] as does the United States *Model Penal Code*.[40] Some jurisdictions allow the court to review the laying of both charges prior to trial.[41] Even prior to vetting by a court, many prosecution services mandate restraint when charging conspiracy and enjoin that a substantive charge is to be preferred whenever possible.[42] Possible under

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38 JJ Child et al, *Simester and Sullivan's Criminal Law*, 8th ed (London: UK: Bloomsbury Publishing, 2022) at 369 [Child *et al*, *Simester and Sullivan's*].

39 OR Rev Stat tit 16 §161.485(3) (1971); Utah Code, *supra* note 11 at §302; MO Rev Stat tit 38 §564-16(7); Georgia Code, *supra* note 11 at §4–8.1.

40 See *supra* note 11 at §1.07(1)(b).

41 See e.g. Australian Commonwealth *Criminal Code*, *supra* note 11 at §11.5(6).

42 England and Wales Judiciary, *Criminal Practice Directions 2015 Consolidated with Amendment*, (No 8 EWCA CRIM 495) (March 2019) at §10A.4; The New South Wales Office of the Director of Public Prosecutions, "Prosecution Guidelines" (29 March 2021) at ch 3, §3.2, online: <https://tinyurl.com/44je55vd> [perma.cc/VW8F-966M]; The Queensland Office of the Director of Public Prosecutions, "Director's Guidelines" (30 June 2016) at §10(vi), online: <https://tinyurl.com/4p4edy47> [perma.cc/K4GC-4KTQ]; Australian Capital Region Office of the Director of Public Prosecution, "The Prosecution Policy of the Australian Capital Territory" (1 April 2021) at §3.4, online: <https://tinyurl.

this standard is understood in much the same way as Canadian courts have approached the topic, namely where the conspiracy transcends dependence on the substantive offence. It bears observing, however, that many of these jurisdictions recognize simple JCE as a mode of liability. This allows them to be strict with the transcendence rule without compromising the prosecution's ability to prove complex group crimes.

B) Conspiracy sentencing

Those convicted of conspiracy are liable to the same sentence they would have faced had they been convicted of the predicate offence.[43] Courts routinely refer to the factors and tariffs applicable to sentencing for the predicate offence despite the accused having been found guilty of its inchoate form and *vice versa*.[44] But in instances of co-extensive accomplished conspiracies, the conviction for conspiracy means the prosecution has precisely not proven the accused's participation in the predicate offence. At most, the *mens rea* has been made out not its *actus reus*. Nevertheless, the law focuses directly on the role the offender played in the accomplished predicate and uses that role to either aggravate or mitigate their sentence.[45] It is common to find terms used in this process such as 'directing mind' and 'necessary role' to aggravate a sentence, and terms like 'minimal role', 'minor role' or 'simple courier' to distinguish offenders at the bottom end of the sentencing scale. While conviction for conspiracy does not require any demonstration of participation in the predicate offence, the sentencing for it frequently involves precisely the opposite. This makes sense for transcendent conspiracies as the evidence of acts helps to illustrate the nature of the ongoing enterprise. It takes on a different complexion, however, for co-extensive ones particularly if the prosecution has elected to pursue the accomplished crime in inchoate form over the substantive. The tangible harm of an accomplished co-extensive conspiracy is not in the agreement to have done it but the resulting offence

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com/3rt2upxy> [perma.cc/J7AL-YMHP]; The South Australia Office of the Director of Public Prosecutions, "Statement of Prosecution Policy and Guidelines" (October 2014) at 9, online: <https://tinyurl.com/4ucvt7h6> [perma.cc/MS2Z-WB8U]; Commonwealth Director of Public Prosecutions, "Prosecution Policy of the Commonwealth" (19 July 2021) at §2.23, online: <https://tinyurl.com/3dfdbtd6> [perma.cc/75HN-ZY2F].

43 *Criminal Code*, *supra* note 2, s 465(1)(c).

44 See e.g. *R v Lepage*, 2010 BCCA 249; *R v Bajada,* 2003 CanLII 15687 (ONCA)*; R v Saulnier*, 1987 CanLII 2414 (BCCA); *R v Ciancio and Lees*, 2007 BCSC 1502; *R v Lucas*, 2010 CanLII 29086 (ONSC).

45 See e.g. *Lake v Canada (Minister of Justice),* [2008] 1 SCR 761, 292 DLR (4th) 193 at para 44; *R v Noseworthy*, 2021 NLCA 2; *R v DiQuinzio*, 2014 BCCA 125; *R v Lawson*, 2005 CanLII 12513 (ONCA); *R v Gonzales*, 1990 ABCA 83 (CanLII).

that was committed. Sentencing for co-extensive conspiracies therefore can often involve the court in a process of falsely identified harms.[46]

This equivalency in sentencing has not always been the case. Punishment for conspiracy from its inception to the end of the 18th century shows much variation with punishments gradually lightening.[47] Sir James Fitzjames Stephen's draft criminal code which served as the basis for Canada's first *Criminal Code* capped the punishment for conspiracy to commit an indictable offence at seven years.[48] This remained the case until the revisions made to the *Criminal Code* in 1955 which introduced the language we see today in section 465(1)(c). This was an important step in the development of conspiracy away from its traditional inchoate function.

Perhaps in recognition of these concerns a rule has emerged that sentences for conspiracy should usually run concurrently with their predicate.[49] The rule has not been extended to quashing the conspiracy conviction altogether. This is because of a further rule known as the non-merger rule which holds that the convictions for the conspiracy and the predicate do not merge.[50] Here again, the rule is based on the law's view that a specific and separate public harm is created by criminal agreements.[51] But the non-merger rule loses its coherence when conspiracy is justified by its power to intervene early in crime but is charged nevertheless where it is co-extensive with the accomplished predicate.[52] In these cases the separate public harm rationale has vanished. It is equally difficult to justify the non-merger rule when conspiracy is considered in light of its second rationale that criminal agreements enhance both the likelihood and severity of criminal offences. This is because Canadian criminal law has largely confined this judicial observation to the offence of conspiracy when it need not be so confined. The crime enhancement function of shared group intentions could be illustrated through a mode of liability used to convict the members of the group for the predicate offence. If such a mode of liability were recognized, courts would no longer need to

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46 Peter Gillies, *Criminal Law*, 4th ed (Sydney: Law Book Company Ltd, 1997) at 254 [Gillies, *Criminal Law*]; Paul Marcus, "Conspiracy: The Criminal Agreement in Theory and in Practice" (1977) 65:4 Geo L J 925 at 937.

47 James Wallace Bryan, *The Development of the English Law of Conspiracy*, (Baltimore: John Hopkins, 1909) at 80–81.

48 For which no other sanction was provided for within the *Criminal Code*. See *Criminal Code,* 1892 (55-56 Vic, c 29) at §527 [*Sir Stephen's Draft Code*].

49 *United States v Lane*, 2017 ONCA 396 at para 74.

50 *Brodie v the King*, [1936] SCR 188, 3 DLR 81 at 199.

51 C. R. Snyman, "The History and Rationale of Criminal Conspiracy" (1984) 17:1 Comp & Int'l LJ S Afr 65.

52 Dressler, *Understanding Criminal Law*, *supra* note 11 at 419.

countenance sustaining an additional conspiracy conviction justified by its ability to reflect the harm of group crime enhancement.

Would it be enough to simply police the transcendence rule with more vigilance without going further to adopt a new mode of liability? I do not think so, particularly for complex group crimes. If we took only the first step, the prosecution would be forced back into the bind the metamorphosis of conspiracy was meant to address. By forcing the prosecution to elect the substantive offence over the co-extensive conspiracy, it would lose the critical focus on the group's shared intention and would encounter the problems of proof I hope to illustrate in the next section. The present state of the law in Canada is certainly not ideal, but it is a rational response to complex group crime with the tools presently at hand. If conspiracy is going to be relegated back to its inchoate function, the law needs to retain its crucial insights by importing them into a mode of liability.

C) Conspiracy in summary

Conspiracy's transformation into a proxy mode of liability offers multiple benefits to the prosecution of accomplished group crimes. Chief among them is that it bears no onus to prove the accused's *actus reus* contribution to the predicate offence. Without conspiracy, the prosecution would be required to show each accused's participation through a recognized mode of liability. For complicated group crimes like drug and gun importation and trafficking this can prove difficult to demonstrate for some of the more sophisticated members. So far, I have described conspiracy's use in such cases as being a hedge on prosecutorial proof which carries obvious pejorative connotations. But when this is done in aid of filling an accountability gap the method loses its grim pallor. What we need instead is a mode of liability to explicitly fill this accountability gap, not an inchoate offence turned into one.

I will now turn to whether the prosecution could lay only predicate offences and prosecute the members of a complex criminal group using currently recognized modes of liability. It is not the principal perpetrator that is our concern, those caught holding the drugs or the guns in the act of trafficking or bringing them across the border. It is the members of the group more tangentially involved in the offence, who are often not present when it is happening, but nonetheless intend its outcome and share in its rewards. The modes of liability we might use to capture offenders such as these are co-principal liability, aiding and abetting, and counselling.

III. Co-principal liability, aiding and abetting, and counselling

The main modes of criminal liability are found in sections 21 and 22 of the *Criminal Code*.[53] Section 21(a) refers to principal perpetration which has been judicially interpreted to include the form known as co-principal perpetration. Sections 21(1)(b) and (c) formalize aiding and abetting and section 22 formalizes counselling an offence. These sections were designed in conformity with the reformist impulses that led to the *Accessories and Abettors Act* whereby the distinction between a principal in the second degree and an accessory before the fact was removed.[54] Actually perpetrating the physical elements of an offence, or aiding and abetting someone else to do it, or counselling them to commit the offence have long been considered legally equivalent.[55] This means that all offenders captured by these modes of liability will bear the same responsibility as the principal.[56] Perhaps surprisingly given these equivalencies, causality plays little part in the realm of secondary perpetration.[57] This is often justified by the impracticability of tracing the secondary's contribution through the principal's actions.[58] Conspiracy and aiding and abetting share this first element in common.

Conspiracy, aiding and abetting, and counselling share additional points of commonality. They align regarding the limited degree of specific knowledge as to the manner and method of the principal's crime. It is a tenet of conspiracy law that the conspirator need not know the precise parameters of how the group intends on achieving its ends. Similarly, the counselling mode of liability can apply notwithstanding that the offence was committed in a way different from that which was counselled. The aider and abettor need not know how the crime will be committed either.[59] They must know the circumstances necessary to constitute the offence,[60]

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53 *Criminal Code*, *supra* note 2, ss 21, 22.

54 1861, (24 & 25 Vict c 94).

55 *Thatcher*, *supra* note 4 at para 72; Partially concurring reasons of Justice Lebel in *Pickton*, *supra* note 4 at para 51; *R v Akapew*, 2009 SKCA 137 at para 22.

56 *R v Vu*, 2012 SCC 40 at para 58.

57 Smith, *A Modern Treatise*, *supra* note 4 at 87; AP Simester, *Fundamentals of Criminal Law* (United Kingdom: Oxford University Press, 2021) at §7.2; *R v Dooley*, 2009 ONCA 910 (CanLII) at para 123 leave to appeal dismissed 2010 CanLII 56575 (SCC) [*Dooley*]. See also *R v Grewal*, 2019 ONCA 630 at para 38; *R v Alcantara*, 2015 ABCA 258 at para 11; *R v McRae*, 2016 BCCA 19 at para 50; *R v Rahimi*, 2015 SKCA 85 at para 43.

58 Horder, *Ashworth's Principles*, *supra* note 15 at 481.

59 *R v Briscoe*, 2010 SCC 13 at para 17 [*Briscoe*].

60 *R v Maciel*, 2007 ONCA 196 at para 88; *Giorgianni v R*, [1985] HCA 29, 156 CLR 473; *Johnson v Youden*, [1950] 1 KB 544; *Regina v Bryce*, [2004] EWCA Crim 1231, 2 Cr App R 35.

but facts like the time the offence will be committed and the location are not essential details for the secondary perpetrator to know.[61]

Important points of contrast, however, quickly emerge. The first is that the aider and abettor's *mens rea* differs from that of the conspirator in that it must be shown that they intended to assist the principal in the commission of the principal's crime. This means the aider and abettor is not united in intention with the principal.[62] They involve themselves in someone else's crime. Because of this, these modes of liability are considered derivative. It must be proven that someone committed the offence as a principal perpetrator before secondary perpetration can be established.[63] Counselling is unique in that, unlike aiding and abetting, it can apply irrespective of whether one counsels the principal perpetrator or a secondary party to the offence.[64] Nonetheless, it too is derivative of another's criminal conduct.[65] By contrast, a conviction for conspiracy is an assignment of principal perpetration albeit in relation to the agreement and not the predicate offence, but as we have seen that can make little difference for the offender at sentencing.

A) Co-principal and secondary participation's limitations

Despite some overlap with conspiracy law, there are limitations to co-principal and secondary participation that are of some consequence to their use in the prosecution of complex group crimes. In either of co-principal perpetration's two forms,[66] presence and a contribution to the crime is required.[67] But some members of groups that commit complex crimes purposefully absent themselves from the crime when it is underway. They employ subordinates and delegate their contribution to the offence

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61 *R v Yanover and Gerol* (1985), 9 OAC 93, 20 CCC (3d) 300 (ONCA) at 329; Child *et al*, *Simester and Sullivan's*, *supra* note 38 at 262–263; Horder, *Ashworth's Principles*, *supra* note 15 at 485.

62 Don Stuart, *Canadian Criminal Law: A Treatise,* 7th ed (Toronto: Carswell Company Ltd, 2014) at 671.

63 *Briscoe*, *supra* note 59 at para 15; *Dooley*, *supra* note 57 at para 123.

64 *R v Cowan*, 2021 SCC 45 at para 36 [*Cowan*].

65 *R v Hamilton*, 2005 SCC 47 at para 23.

66 The first is where two or more persons actually commit the offence in question. The second is where two or more individuals share an intention in common to commit an offence, are present during its commission and contribute to it, though they do not personally commit all of the essential elements: partially concurring reasons of Justice Lebel in *Pickton*, *supra* note 4 at paras 63–65.

67 *R v Strathdee*, 2021 SCC 40 at para 4; *R v Chizanga*, 2024 ONCA 545 at paras 88–90; *R v Mena*, 1987 CanLII 2868 (ONCA) at paras 30–34; *R v Ball*, 2011 BCCA 11 at paras 23–24; *R v Johnson*, 2022 ONCA 534 at para 63; *R v Anny*, 2021 ABCA 394 at para 36; *R v Abdulle*, 2020 ONCA 106 at para 28.

to other people. For members like these, co-principal perpetration has significant limitations.

The limitations of secondary participation derive from concerns regarding the secondary's awareness of the principal and, *vice versa*, the principal's awareness of the secondary. Some academics have observed that if the principal perpetrator is not aware of the encouragement, urging or advice, or has long forgotten it, the secondary party fails to participate in the commission of the offence.[68] The point being made is that if a party seeks to encourage, instigate or procure a crime from another, and the prosecution cannot prove that the principal party was aware of these actions or had long forgotten them by the time the crime was committed, it is difficult to find that the secondary had any influence on the principal. The preceding observations are distinct from any requirement to prove a positive effect on the outcome of the crime by the secondary's participation.[69]

Take the 1894 American case of *State v Tally*.[70] Tally frustrated the sending of a telegram that hoped to warn the victim that an attempt would be made on their life. The telegram was thwarted, the victim was murdered, but the killers were entirely unaware of Tally's help. Nonetheless, the court did not hesitate to convict Tally despite the principals being unaware of his contribution to their crime. Here Tally was an aider, not an abettor. His act to further the crime was clear. We might be comfortable holding the view that an aider's influence might escape the knowledge of the principal, but what about the abettor? It is likely that the law requires demonstration that the principal actually received this type of contribution and acted within its general scope.[71]

Professor Andrew Simester has applied this observation to complex group crimes. He asks whether secondary participation can capture abettors who join groups later in their existence after the formal criminal plans have been made. As he observes, the secondary's encouragement need not be shown to have made a difference in the crime, but that does not relieve the prosecution from proving that it was received by the principal

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68 Child *et al*, *Simester and Sullivan's*, *supra* note 38 at 242–243 citing *R v Calhaem*, [1985] QB 808 and *AG v Able and others*, [1984] QB 795; G. R. Sullivan "Doing Without Complicity" (2012) 2 J Commonwealth Crim L 199 at 209; Sanford H Kadish, "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine" (1985) 73:2 Calif L Rev 323 at 359.

69 *R v Jogee*, [2016] UKSC 8 at para 12 [*R v Jogee*].

70 102 Ala 25, 15 So 722 (1894).

71 Child *et al*, *Simester and Sullivan's*, *supra* note 38 at 242–243.

or that it was intended to encourage them.[72] If it is true, as conspiracy law tells us, that members of a complex criminal group join at different times and are not always aware of the other members, the identity of the principal perpetrators will often not be known to the other members of a complex criminal group and *vice versa*. Two questions arise from this observation.

The first points to the secondary's knowledge and is the easier of the two to resolve. One of conspiracy's many virtues is that it does not require that the conspiracy member know all the others who share the common intention. But can one aid and abet a complex group crime without knowing who the principal perpetrators of it will be? Courts in New Zealand and the United States have answered this question in the affirmative,[73] but it has received limited attention in Canada.[74] The consequence of taking a strict view of the aider and abettor's knowledge requirement would be to make the doctrine less amenable to complex group crimes.

The second question arising from Professor Simester's observation, however, points to the principal's awareness and is the harder of the two questions to answer. Can it be said that the principal was encouraged by a member they were entirely unaware of? If the abettor's contribution must reach the principal and the latter must act within its general scope, how can this be if the two are unknown to one another and join at different times? I shall discuss this question in greater detail in section IV. In effect, simple JCE offers a way to resolve this problem by aligning liability law with conspiracy law. It does so by importing conspiracy's observation that unified criminal intentions have a crime enhancing function on the principal perpetrator and raises it to an *actus reus* contribution.

Beyond these concerns of practical application, there are theoretical qualms with the application of secondary participation to complex group crimes. As we have seen, aiding and abetting requires the intention to aid or assist another's offence. But for complex group crimes it is precisely the united intentions of the members that define the delict. Conspiracy's great virtue is its focus on these united intentions and its power to elevate them as the central component of the analysis. The presence of a shared intention will not defeat the application of a secondary mode of liability,

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72 AP Simester, *Accessory Liability and Common Unlawful Purposes* (2017) 133(1) Law Q Rev 73 [Simester, *Accessory Liability*].

73 *Bouavong v R*, [2013] NZCA 484 at para 34 [*Bouavong v R*]; *White v United States*, 366 F (2d) 474 (10th Cir 1966); *US v Blitz*, 533 F (2d) 1329 (2nd Cir 1976) at 1342; *United States v Jackson*, 72 F (3d) 1370 (9th Cir 1995) at 1385; *United States v Cordova Barajas*, 360 F (3d) 1037 (9th Cir 2004).

74 *R v Arason,* 1992 CanLII 1008 (BCCA) at para 183; *R v Duncan*, 2004 CanLII 45468 (ONSC) at para 20.

but assuming for the moment it could apply as broadly as we needed it to, relying solely on secondary participation to prosecute complex group crimes could implicate the fair labelling principle. It recognizes that the labels we give to offending signal to the public the nature and gravity of the conduct proven in court.[75] While the principle has traditionally been applied to offence labels and not modes of liability, there seems no reason why the label given to the form of perpetration itself should not also be intelligible and understood by the public. While they may have no practical value, perpetration labels carry an expressive value which communicates to the community who the "real" culprit was.[76] Complex group crimes often generate keen interest in the media. Though legal practitioners may know better, words like secondary, abettor, and aider suggest a subordinate position in the commission of the offence that can often be entirely at odds with the proven facts. To say the other members of a complex group crime have assisted the principal's offence is often false. In truth, the members have worked together to see the group's offence accomplished. The other members do not stand outside the principal's intention. Indeed, sometimes in complex group crimes the substantive offence committed by the principal isn't really the principal's offence at all. Sometimes the member of the criminal enterprise caught physically moving the drugs or guns over the border is really undertaking the more prominent members of the group's importation not the other way around. Complex group crimes require a sophisticated understanding of perpetration that can nonetheless be communicated to the public in simple terms that accurately reflect what was proven in court.

B) Conclusion to parts II and III

In Canada, where a group forms a common intention to commit a complex criminal offence, and that offence was committed by one or some members of that group, and no continuing agreement transcends the offence, the prosecution has two options. Overlook that the predicate offence was actually committed and lay an inchoate charge in order to reflect the unanimity of intention of all the parties. Or lay the substantive charge and split the group up on principal and secondary modes of liability despite the unanimity of intention.

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[75] Victor Tadros, "Fair Labelling and Social Solidarity" in Lucia Zedner & Julian V Roberts eds, *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford, UK: Oxford University Press, 2012) at 68; James Chalmers & Fiona Leverick, "Fair Labelling in Criminal Law" (2008) 71:2 Mod L Rev 217.

[76] Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford, UK: Oxford University Press, 2012) at 80 [Sliedregt, *Individual Criminal Responsibility*].

The complications arising from proceeding by way of the substantive offence alone are clear. The prosecution must parse out the contributions of the various members of the group who did not perform acts coordinate with principal perpetration and determine where they fit in the liability taxonomy. The prosecution encounters the co-principal problems such as presence, as well as the problems found in the outer regions of secondary participation like subtle mastermind influences, members unknown to the principal, and latecomer contributions. Relying on secondary participation also involves false abstractions like demonstrating that the parties had the intention to aid another's crime when the evidence—often in the powerful form of intercepted communications—shows a common intention to commit it with mutual benefit.

If the prosecution elects instead to proceed by way of the inchoate offence of conspiracy it runs into another false abstraction. Despite the evidence showing the predicate offence was accomplished, it must proceed as if all the parties were criminal agreeors not doers. At the sentencing stage, the abstraction melts away and the offenders are sentenced as if they were doers and their doing can become the focus of the proceedings. Laying both charges saddles the accused with an additional charge that often has the effect of operating as a hedge on proof.

By now it should be clear why the offence of conspiracy is often charged when it is co-extensive with an accomplished group crime. It can transform into a proxy mode of liability by placing primary focus on the shared intentions of the accused. This is essential to prosecuting complex forms of these crimes, but by transforming conspiracy in this manner we have brought unfairness into the criminal law. What would be preferable would be a mode of liability that does the work presently assigned to co-extensive conspiracies but in a more doctrinally coherent and fair manner. It would be one that recognizes what conspiracy has rightly identified: (1) the main focus in accomplished complex group crimes should be on the agreement between the offenders, and (2) agreements to commit crime produce moral pressure on the principal perpetrator and increase the likelihood and severity of criminal offences. We turn now to that doctrine.

IV. Simple joint criminal enterprise

Among the modes of liability listed in section 21 of the *Criminal Code* is common intention. It refers to a mode of liability where parties to a common criminal intention may be held liable for additional foreseeable crimes committed by the members in the execution of the criminal goal. The concept may also be referred to as common purpose or joint criminal

enterprise.[77] Adding further to the inexact nomenclature is the fact that internationally the doctrine is known as extended joint criminal enterprise or parasitic accessorial liability.[78] Going forward I intend to refer to the common intention doctrine found in section 21(2) of the *Criminal Code* as extended joint criminal enterprise or extended JCE.

What is also apparent from a review of the international sources is that the term common intention can also refer to another mode of liability, one that is also alternatively styled common purpose, common design, or joint criminal enterprise.[79] What is being referred to here is a mode of liability that is also based on a shared common intention but that is used to find the members of the agreement guilty for the accomplished crime they agreed to. Unlike extended JCE this simple version of the doctrine doesn't extend liability to additional offences, instead it serves as a mode of liability attributing guilt to the very offence the parties of the common intention agreed to commit. This version of joint criminal enterprise is often referred to as "simple" or "plain vanilla" JCE.[80] Both doctrines I will refer to as joint criminal enterprise or JCE for short and will be distinguished by their simple or extended prefix.

A) What is simple joint criminal enterprise?

Simple JCE is a mode of liability that like the offence of conspiracy is based on parties that unite in common to achieve an unlawful purpose.[81] It is this common intention which serves to differentiate the mode of liability from aiding and abetting. Simple JCE requires shared intention in precisely the same way as conspiracy does. Where it differs is regarding the *actus reus*. For conspiracy, the *actus reus* is the fact of agreement which is sometimes criticized as blending the *actus reus* and *mens rea* together. On the opposite end of the spectrum is the *actus reus* requirement of co-principal perpetration, namely presence with a contribution to the crime. Simple JCE occupies a middle spot on this *actus reus* spectrum. Where precisely simple JCE lies is a matter of variance among the jurisdictions that have inherited it. Some have taken the position that, like conspiracy, the agreement itself is the *actus reus* component. It does this though by

77 See e.g. *R v McDonald*, 2013 ONCA 442.

78 JC Smith, "Criminal Liability of Accessories: Law and Law Reform" (1997) 113 Law Q Rev 453 [Smith, Criminal Liability of Accessories].

79 *McAuliffe v R,* [1995] HCA 37 at para 12 [*McAuliffe*]; *May v R,* [2012] NSWCCA 111 at para 255.

80 The latter term is taken from Lord Hoffman in the Privy Council's ruling in *Brown & Anor v The State,* [2003] UKPC 10 at para 13.

81 *McAuliffe*, *supra* note 79 at para 12; Judicial Commission of New South Wales' Model Jury Instructions: Judicial Commission of New South Wales, "Criminal Trial Courts Bench Book" (September 2032) at §2–740, online: <https://tinyurl.com/zdxahj28>.

deeming the agreement as an act of encouragement. Other jurisdictions have required an additional act in furtherance. All variants, however, permit the *actus reus* to fall short of the stricter requirements that define co-principal and secondary perpetration.

The power of simple JCE to prosecute complex group crimes is in these hybrid elements. Like conspiracy and unlike aiding and abetting and co-principal perpetration, it requires an agreement between the parties. Unlike conspiracy, its *actus reus* focuses on the effect the JCE member had on the accomplished crime or on the criminal enterprise more broadly. This focus on shared group intentions coupled with flexibility as to the *actus reus* component explains why simple JCE has become the mode of choice for accomplished complex group crimes in many jurisdictions throughout the world.

The doctrine was thought to be a species of abetment in England with the academic controversy revolving around whether simple JCE deserved recognition as a separate doctrine of secondary participation.[82] The English debate on simple JCE's place in the secondary liability taxonomy has had little effect in many other jurisdictions because of simple JCE's *mens rea* requirement. Given this difference between it and aiding and abetting, some jurisdictions have interpreted the doctrine as a mode of principal perpetration.[83]

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82 Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law*, 7th ed (Oxford, UK: Oxford University Press, 2013) at 437; David Olmerod, *Smith and Hogan's Criminal Law*, 13th ed (Oxford, UK: Oxford University Press, 2011) at 214, 229. See also Smith, Criminal Liability of Accessories, *supra* note 78 at 461–465. On the other side of the debate were those who were of the view that simple JCE was a unique species of secondary participation: AP Simester and JR Spencer, G R Sullivan and G J Virgo, *Simester and Sullivan's Criminal Law Theory and Doctrine,* 5th Ed (Great Britain: Hart Publishing, 2013) at 245. See also The Law Commission, "Participating in Crime" (2007) at §3.123–3.131, online: <https://tinyurl.com/u3m2b42t> [perma.cc/RX7P-NNAV] [English Law Reform Commission, Participating in Crime].

83 Simple JCE had been accepted as a valid mode of liability in England prior to the *R v Jogee*, *supra* note 69 and *Ruddock*, [2016] UKPC 7 decisions. In a case involving extended JCE, the Privy Council abolished JCE in all of its forms resulting in the doctrine no longer being recognized as a mode of liability in that jurisdiction. All liability must now be proven through the other modes of secondary participation. As AP Simester points out, the "reductionist move" in *Jogee* and *Ruddock* is out of the question for countries like Australia, Canada, and New Zealand that have had extended JCE enshrined into their criminal codes or have legislated further in the area: Simester, *Accessory Liability*, *supra* note 72. The New South Wales Law Reform Commission distinguished JCE from aiding and abetting as "a more direct form of participation": New South Wales Law Reform Commission, *Complicity* (Report #129) (Sydney: New South Wales Law Reform Commission, 2010) at 119 [New South Wales Law Reform Commission]. The High Court of Australia has determined joint criminal enterprise liability is "not derivative but

B) The deeming rule as *actus reus*

The leading proponent of recognizing simple JCE's distinctive features, features which he argued merited a separate position in the liability taxonomy is Professor Simester. His position, alluded to earlier in section III, is that simple JCE can fill the gap produced when trying to apply abetment to complex group crimes. In 2017, he wrote:

> Admittedly … the practical gap between "plain vanilla" joint enterprises and abetment is small. Most instances of a common purpose between S and P to commit crime A will support an inference of encouragement by S. Perhaps not all, though. … It is more natural, and better aligned with the history, to embrace such enterprises as a form of participation *per se*. Refusal to do so will inevitably generate hard cases likely to be finessed with artificial reasoning.[84]

The argument that reliance on abetment will produce hard cases when applied to complex group crimes is not new. The Supreme Court of New Zealand supported its construction of its 21(2) analogue in part because proof of acts of assistance and encouragement in complex groups are hard to prove.[85] Recall the observation of the Law Reform Commission of Canada that conspiracy is used because the exact contributions of those involved are often "hard to pin down."[86] These observations are in line with Professor Simester's concerns. Conspiracy solves the complex group hard case by applying an inchoate offence to it, one centered on common intention. But if intention held in common to commit a crime is a force as unique and dangerous as conspiracy law tells us it is, it should have operation beyond the inchoate world. The moral pressure group agreements produce on the principal can be formalized into a rule deeming it a unique species of encouragement.

Professor Simester is not the only English academic to bring conspiracy and liability law together.[87] As the English Law Reform

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primary": *R v Osland*, [1998] HCA 75 per Justice of Appeal McHugh at para 72, Justice of Appeal Callinan at para 217; *Handlen v The Queen*; *Paddison v The Queen*, [2011] HCA 51 at para 4. So too has the International Criminal Tribunal for the former Yugoslavia: *Prosecutor v Duško Tadić*, Case No IT-94-1-A, Judgement, (Appeals Chamber) 15 July 1999 at para 229(iv) [*Prosecutor v Duško Tadić*]. See also Sliedregt, *Individual Criminal*, *supra* note 76 at 136.

84 Simester, *Accessory Liability*, *supra* note 72.

85 Reasons of Justices McGrath, Glazebrook and Tipping in *Ahsin v R* [2014] NZSC 153 at para 94 [*Ahsin v R*].

86 Law Reform Commission of Canada, *supra* note 5 at 43.

87 Professor GR Sullivan has also observed that an agreement to commit a crime will frequently be synonymous with encouragement of the other members of the group sufficient to make the members of that agreement parties to the predicate offence: GR

Commission observed in 2007, it is the agreement itself that "emboldens and therefore (mutually) encourages."[88] The law has held this view on joint criminal intentions for hundreds of years. In their seventh report published in 1843, the Royal Commission for Revising and Consolidating the Criminal Law expressed the view that united criminal intentions increase the inclination to offend "by the addition of force and cunning … whilst the power of resistance is proportionately diminished."[89] Simple JCE uses these observations, shared in common with conspiracy, and can elevate them into an *actus reus* contribution to the predicate offence. It is here that simple JCE can solve the problems co-principal perpetration and secondary participation law pose for complex group crimes. Late-comers, masterminds, and members unknown to the principal participate by virtue of the deeming rule. Like conspiracy's false abstraction that doers are really agreeors, the deeming rule also presents courts with an abstraction but it is a correct one.

It is important to point out that the deeming rule has not been adopted in all the jurisdictions which have embraced simple JCE. Australian common law, for example, requires an act in furtherance by each member of the group.[90] The *ad hoc* war crimes tribunals have also identified an act in furtherance requirement.[91] Like Australian common law, the contribution need not be criminal in and of itself or involve the commission of the crime or crimes that are the object of the JCE.[92] Simple JCE also has no requirement that the JCE member be present when the

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Sullivan, "Law Reform in the Supreme Court: The Abolition of Joint Enterprise Liability?" in Beatrice Krebs, ed, *Accessorial Liability After Jogee,* (Oxford: Hart Publishing, 2020) at 24.

88 English Law Reform Commission, Participating in Crime, *supra* note 82 at §3.43.

89 Royal Commission for Revising and Consolidating the Criminal Law, Her Majesty's Commissioners for Revising and Consolidating the Criminal Law, 7th Report (London: William Clowes and Sons, 1843) at 30 [Royal Commission for Revising and Consolidating the Criminal Law].

90 Andrew Dyer, "The Australian Position Concerning Criminal Liability: Principle, Policy or Politics" (2018) 40:2 Sydney L Rev 289 at 294 [Dyer, The Australian Position]; *Huynh v The Queen*, [2013] HCA 6 at paras 5, 37 [*Huynh v The Queen*]; *DPP v Likiardopoulos*, [2010] VSCA 344, at paras 59, 73; *KA v R*, [2015] NSWCCA 111 at para 7; *Dickson v The Queen,* [2017] NSWCCA 78, at para 47 [*Dickson v The Queen*]; *R v Prochilo*, [2003] NSWCCA 265 at paras 57–58; separate and concurring reasons of Chief Justice Barwick, in *Johns (TS) v R*, [1980] HCA 3 at paras 10, 14 [*Johns (TS) v R*]; *Arafan v The Queen*, [2010] VSCA 356 at para 47.

91 *Prosecutor v. Momčilo Krajišnik*, Case No IT-00-39-A, Judgement, (Appeals Chamber), 17 March 2009 at paras 215, 218.

92 *Prosecutor v Duško Tadić*, *supra* note 83 at para 227; *Ibid* at para 218.

conduct constituting the physical elements of the offence is engaged in.[93] Rather what is required is participation "in some way in furtherance of the enterprise" which can be events "other than those pertaining to the offence itself."[94] This formulation of the *actus reus* clearly differs from co-principal perpetration and may very well be broader than aiding and abetting.[95] Depending on the breadth we give to the act in furtherance, it too could solve many of the problems secondary participation poses for complex group crimes.

C) The Canadian perspective

The question as to which version of JCE was legislated in section 21(2) of the *Criminal Code* was settled by the Supreme Court in 1988.[96] The provision was interpreted as referring to the extended version of JCE only. Similar interpretations have been made concerning the 21(2) analogues inherited by Australia and Bermuda.[97] In contrast, New Zealand has interpreted its version of 21(2) as providing for both extended and simple JCE, a conclusion now foreclosed to Canada.[98] What has not been addressed in this country, however, is the argument that simple JCE was a mode of liability we inherited from the British common law. At issue in the 1988 case was the statutory interpretation of section 21(2).[99] Whether simple JCE exists at common law is a new legal issue. The Court would not be invited to revisit its ruling. It would be called upon to answer a different question.[100] There are modes of liability in Canadian common law that were not included in section 21. As the continued vitality of the doctrine of innocent agency demonstrates, courts will read into the language of section 21 other modes of liability not explicitly contained in

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93 See e.g. *Qaumi, Farhad v R, Qaumi, Mumtaz v R, Qaumi, Jamil v R*, [2020] NSWCCA 163 (15 July 2020) [*Qaumi v R*]. Presence has been explicitly excluded as a requirement for conviction pursuant to JCE in the Australian Commonwealth *Criminal Code*, *supra* note 11 at § 11.2A(7).

94 *Huynh v The Queen*, *supra* note 90 at paras 5, 37; *Qaumi v R*, *supra* note 93 at para 112 quoting Chief Justice Bathurst in *Dickson v The Queen*, *supra* note 90 quoting from Justice Latham in *Sever v R*, [2010] NSWCCA 135.

95 Aiding and abetting requires the party to do or omit to do something that assists or encourages the perpetrator "to commit the offence.": *Briscoe*, *supra* note 59 at para 14. See also *Cowan, supra* note 64 at para 30.

96 *R v Simpson*, 1988 CanLII 89 (SCC) at para 14 [*R v Simpson*].

97 *Johns (TS) v R*, *supra* note 90; *Denis Alma Robinson v The Queen*, [2011] UKPC 3 at para 8.

98 *Ahsin v R*, *supra* note 85.

99 *R v Simpson*, *supra* note 96.

100 *Canada (AG) v Bedford*, 2013 SCC 72 at paras 42, 44; *Canada (AG) v Confédération des syndicats nationaux*, 2014 SCC 49 at para 24; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44; *R v Comeau*, 2018 SCC 15 at para 29.

the section.[101] This opens the door to the possibility that other modes of liability were inherited by Canada irrespective of whether they were made explicit in section 21.

The language in section 21 originated from *Sir Stephen's Draft Code*.[102] However, ambitious though it was it should not be understood as an attempt at comprehensiveness regarding modes of liability. That was not the goal of his work.[103] Nor was *Sir Stephen's Draft Code* the only attempt at expressing the concept of JCE during the 19th century or, indeed, prior to it. Matthew Hale formulated the rule in the 1600s.[104] Foster expressed it in the 1700s. The latter's language was adopted by Russell in the 1819 version of his *Treatise on Crimes and Misdemeanors*.[105] The rule was designed to make liable those who give "countenance, encouragement, and protection to the whole gang, and to ensure the success of their common enterprise."[106] In 1835, the First Law Commission in the former British colony of India produced the *Indian Penal Code* which also contained a formulation of JCE.[107] It has been interpreted to include both the simple and extended forms.[108] In 1843 the first Royal Commission for Revising

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[101] See e.g. *R v Berryman* (1990), 48 BCLR (2d) 105, 78 CR (3d) 376 (BCCA); *R v King*, 2013 ONCA 417.

[102] *Supra* note 48.

[103] Barry Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles" in Wing-Cheong Chan, Barry Wright, Stanley Yeo eds, *Codification, Macaulay and the Indian Penal Code* (London: Routledge, 2011).

[104] "If divers come to commit an unlawful act, and be present at the time of Felony committed, though one of them only doth it, they are all Principals.": Sir Matthew Hale, *Pleas of the Crown* (London: Richard and Edward Atkyns, 1694) at 215–216.

[105] Sir William Oldnall Russell, *A Treatise on Crimes and Misdemeanors* Vol I (London: Butterworth and Son, 1819) at 30-31 [*Treatise on Crimes and Misdemeanors*]

[106] "[… I]f several persons set out together, or in small parties, upon one common design […] and each takes the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent surprise, or to favour, if need be, the escape of those who are more immediately engaged; they are all, provided the fact be committed, in the eye of the law present for it; for it was made common cause with them, each man operated his station at one and the same instance, towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to ensure the success of their common enterprise.": *Ibid* at 30-31 quoting from Sir Michael Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry* 3rd ed (London: Edward and Robert Brooke, 1792) at 350.

[107] "When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.": *The Indian Penal Code*, 1860 Act No 45 at §34 [*Indian Penal Code*].

[108] *Lee Chez Kee v Public Prosecutor*, [2008] SGCA 20; Michael Hor, "Vicarious Liability" in Wing-Cheong Chan, Barry Wright, Stanley Yeo eds, *Codification, Macaulay and the Indian Penal Code* (London: Routledge, 2011).

and Consolidating the Criminal Law proposed its own version that was never enacted. It held the JCE member guilty "in respect of any act done by any one of or more of them in pursuance of, and accordance with, such resolution and design."[109]

As Professor Simester observes, the existence of simple JCE at common law has never seriously been doubted.[110] Many jurisdictions that inherited the formulation of the rule in *Sir Stephen's Draft Code* have accepted simple JCE as a valid form of liability either given or despite the language of their 21(2) analogues, including Australia and New Zealand.[111] Those that adopted the formulation of the rule in the *Indian Penal Code* have also recognized simple JCE, as has the United States whose criminal law does not explicitly derive from either *Sir Stephen's Code* or the *Indian Penal Code* but from English common law more broadly.[112] This is a strong foundation upon which to conclude that simple JCE is a mode of liability available at common law. Alternatively, Parliament could amend section 21 by including explicit provision for simple JCE. §11.2A of the Australian Commonwealth *Criminal Code* is a template for such an initiative.[113]

The natural Canadian perspective would be to view simple JCE as a species of principal perpetration. I say this because that is the way we are presently using conspiracy. As I have explained, we often use that offence as a proxy mode of liability for its predicate offence where the object of the co-extensive conspiracy was accomplished. In doing so we employ conspiracy as if it were simple JCE in the form that incorporates the

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[109] "If several persons assembled together shall have united in the resolution and common design to execute a criminal purpose, or any purpose whatsoever by criminal means, and shall endeavour to execute such design, all shall be deemed to be equally guilty in respect of any act done by any one of or more of them in pursuance of, and accordance with, such resolution and design.": Royal Commission for Revising and Consolidating the Criminal Law, *supra* note 89 at 116.

[110] Simester, *Accessory Liability*, *supra* note 72.

[111] *McAuliffe*, *supra* note 79; *Johns (TS) v R*, *supra* note 90; *Miller v The Queen* (2016), 259 CLR 380; Dyer, The Australian Position, *supra* note 90; New South Wales Law Reform Commission, *supra* note 83 at 17–18; Gillies, *Criminal Law*, *supra* note 46 at 173–175. New Zealand authority on the point seesawed for a period until the Supreme Court delivered its decision in *Ahsin v R*, *supra* note 85. It disagreed with the Court of Appeal's ruling in *Bouavong v R*, *supra* note 73 and preferred the earlier statement of the law in *R v Chen*, [2009] NZCA 445.

[112] The *Pinkerton* doctrine also allows for both simple and extended JCE: Dressler, *Understanding Criminal Law*, *supra* note 11 at 476–478.

[113] Referred to as "joint commission": Australian Commonwealth *Criminal Code*, *supra* note 11. It is the statutory adoption of the common law doctrine of joint criminal enterprise: *Masri v R*, [2015] NSWCCA 243 at para 1. For examples of the application of §11.2A to a complex drug importation scheme see *Director of Public Prosecutions (Cth) v Mario Rollo (a pseudonym)*, [2023] VCC 713; *McGlone v R*, [2019] NSWCCA 252.

deeming rule. We require no formal proof of an *actus reus* contribution to the accomplished offence or to the criminal enterprise. Like simple JCE, we focus on the agreement to commit the predicate offence. A conviction for conspiracy is an attribution of principal perpetration albeit in relation to the conspiracy. Regardless, the offender may be sentenced using the tariff for the predicate offence. Used in this way conspiracy has all the signs of a proxy mode of liability assigning principal perpetration for the accomplished predicate offence. This suggests simple JCE could be understood in the same manner.

V. Conclusion

Other countries that share our common law inheritance have incorporated conspiracy's powerful insights into the crime-enhancing function of group intentions into the realm of liability law. Given the Supreme Court declined to read simple JCE into section 21(2), perhaps Canadian law imagined it could not do likewise and had to innovate elsewhere. Conspiracy was allowed to transform from a purely inchoate offence into a proxy mode of liability. If conspiracy had not been so transformed, the prosecution would have to artificially separate complex groups that are clearly united in intention into principal and secondary participants. Though the distinction between principal and secondary is all but gone, there remains the sense that abettor, secondary, and aider are the wrong labels for members of a complex criminal group whose intentions are united with the principal and who share an interest in their offence. There are also problems of proof. In complex group crimes the parties are often unaware of each other. Often they come into the criminal agreement at different times. Often their influences, though powerful, are hard to demonstrate. In Canada we overcome these problems by rightly focusing on the common intention of the group as the most important feature. But because we do not possess a mode of liability built upon recognizing common intentions to commit the very offence the group agreed upon, prosecutors are forced to rely on an inchoate offence. When they do so, they are in effect applying simple JCE. In all the ways that truly matter, the prosecution can arrive at a proxy conviction for the accomplished predicate offence based on a focus on united criminal intentions and without direct proof of an additional actus reus contribution. Proceeding this way might achieve the same practical result as our counterparts in the rest of the common law world, but it leaves us labelling offenders as criminal agreers and not criminal doers in the face of evidence showing nothing nascent about the crime.

There would be little change to the prosecution's burden of proof if we did recognize simple JCE. If it were incorporated with the deeming rule, as is the present case with conspiracy, the prosecution would not

need to prove any further *actus reus* contribution. If adopted with an act in furtherance requirement, the flexibility we see demonstrated in the Australian jurisprudence suggests this would not prove a significant hurdle in most cases either. There would, however, be much clarity introduced. We could relegate conspiracy back to its inchoate function. We could rid informations and indictments of redundant charges to the advantage of increased fairness to the accused. Courts could police the transcendence rule with more vigour secure in the knowledge that the rounded impression that conspiracy was formerly used to illustrate is now achievable through a mode of liability. The route to sentencing would also be cleaner. If convicted of the substantive offence through simple JCE, the prosecution would have natural access to the sentencing tariff for the substantive offence not a transposed one.

Many other jurisdictions with a history similar to our own have recognized simple JCE at common law or gone further to refine it in statute. Canada's late discovery of the doctrine would allow it to benefit from the many decades of debate that have surrounded simple JCE to incorporate a version it considers best suited to the unique Canadian context. We should embrace it for the clarity and fairness it would bring to prosecuting complex group crimes.