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CONSPIRACY

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CONSPIRACY

I. HISTORICAL PERSPECTIVE

Criminal conspiracy, as it is generally understood today, is an agreement between two or more persons to commit an offence. Historically, however, conspiracy had an entirely different meaning.

A. English Approach

The offence of conspiracy originated in England between 1250 and 1300 A.D.[1] in a series of statutes known as the Three Ordinances of Conspirators[2]. These statutes were the result of reformers' efforts to correct the abuses of ancient criminal procedure,[3] and specifically limited conspiracy to certain offences against the administration of justice:[4]

> The earliest meaning of conspiracy was thus a combination [agreement between two or more persons] to carry on legal proceedings in a vexatious or improper way, and the writ of conspiracy, and the power given ... to proceed without such a writ, were the forerunners of our modern actions for malicious prosecution. Originally, therefore, conspiracy was rather a particular kind of civil injury than a substantive crime, but like many other civil injuries, it was also punishable on indictment, at the suit of the King, and upon a conviction the offender was liable to an extremely severe punishment which was called "the villain judgment".[5]

Conspiracy under the Three Ordinances was thus entirely different from the offence of conspiracy as it is known today.

Poulterer's case, (1610), 77 E.R. 813, which was decided by the Court of Star Chamber, was the first step by which "the early rigidly defined crime of conspiracy was, through judicial, analogical extension, gradually expanded..."[6]. It was decided in *Poulterer's case*, *supra*, that no overt act other than "confederating together"[7] was required to constitute an indictable offence.

Soon after, a second important step in broadening the crime of conspiracy was taken by the English courts. Until that point, the offence had been limited to conspiracies to defeat the administration of justice. In the 17th century, the Court of King's Bench extended the offence to include all conspiracies to commit crimes

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1 Sayer, *Criminal Conspiracy*, (1921-1922) 35 Harvard @ L.R. 393 @ 394-396

2 The First Ordinance of 1293, 21 Edw. 1, the Second Ordinance of 1300, 28 Edw. 1, c.10, the Third Ordinance of 1304, 33 Edw. I.

3 Sayre, op.cit.n.1 @ 394

4 Stuart, *Canadian Criminal Law*, 2nd ed. Carswell, 1987 @ 562.

5 Stephen, *The Criminal Law of England*, Vol.II, 1883, New York@ 228-229.

6 Sayre, op.cit.n.1 @ 398.

7 Ibid.

(both misdemeanors and felonies).[8] In 1716, conspiracy was extended even further, to encompass 'immoral' acts as well as crimes. The following "unfortunately ambiguous statement", made by Hawkins in his Pleas of the Crown[9], was the catalyst which initiated this extension:

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

This erroneous statement[10] resurrected the "indefensible doctrine"[11] that conspiracies to commit immoral acts, as well as illegal acts, should be punishable. In time, this statement came to be regarded as authoritative, partly due to its ambiguous nature and partly due to the "17th and 18th century confusion of law and morals":[12].

> The truth of the matter is that judges found the Hawkins conception of criminal conspiracy entirely too convenient an instrument for enforcing their own individual notions of justice to be lightly discarded. It enabled judges to punish by criminal process such concerted conduct as seemed to them socially oppressive or undesirable, even though the actual deeds committed constituted of themselves no crime, either by statute or by common law. And in cases where the actual deeds were of doubtful criminality, it saved the judges from the often embarrassing necessity of having to spell out the crime.[13]

In *Jones' Case,* (1832), 4 B. & Ad. 345, at p.349, Lord Denman held that a criminal sanction would be applicable where there had been a conspiracy "either to do an unlawful act or a lawful act by an unlawful means". Although Lord Denman retracted this statement seven years later,[14] judicial reliance on it persisted:

> Like the magic jingle in some fairy tale, through whose potency the bewitched adventurer is delivered from all his troubles, this famous formula was seized upon by judges labouring bewildered through the mazes of conspiracy cases as a ready solution of all their difficulties. It would fit any conspiracy case whatever: it was, so to speak, ready to wear and obviate the necessity of carefully thinking through or directly analyzing the doctrine of conspiracy. As a consequence, judges gave to it the widest use ...[15]

In 1973 and 1976, the English Law Commission[16] recommended that conspiracy should not be extended beyond conspiracies to commit crimes, based upon the following arguments:

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8 Ibid @ 398-400.

9 Hawkins, *Pleas of the Crown,* 6th ed., Book I, ch.72, @ 348.

10 Sayre, op.cit.n.1 @ 402.

11 Ibid.

12 Ibid.

13 Ibid @ 406.

14 In *Peck,* (1839) 9 A. & E. 686

15 Sayre, op. cit. n.1 @ 405.

16 Working Paper No.50, *Inchoate Offences: Conspiracy, Attempt and Incitement* (1973), Report No. 76, *Conspiracy and Criminal Law Reform,* (1976) pp. 6-8, 123.

1. It seems to us not merely desirable, but obligatory, that legal rules impqsing serious criminal sanctions should be stated with a maximum clarity which the imperfect medium of language can attain.
2. The jury must not have a law-creating role as it does in such conspiracy cases.
3. It is difficult to see why the non-criminal conduct of an individual becomes more dangerous and criminal if somebody agrees with him.
4. Inchoate offences may widen the net to catch incipient criminal behavior, but here, in a dubious area of non-criminality, a theoretical inchoate offence is used to stretch the substantive law.
5. Any gaps in the net of criminal responsibility are for Parliament to rectify and not for the law of the conspiracy.[17]

This recommendation to abolish conspiracies for non-criminal objects was enacted in Part. I of the Criminal Law Act, 1977 (U.K.), c.45. s. 5(1). However, although the offence of conspiracy at common law was abolished, three types of conspiracy at common law were retained. Section 5(2) and (3) of the Criminal Law Act, 1977 (U.K.) specifically preserved the common law offences of conspiracy to correct public morals, conspiracy to outrage public decency and conspiracy to defraud. The English Law Commission has since recommended that:

> We remain committed to the principle that all common law offences should eventually be abolished in accordance with the general aims of codification and replaced by appropriate offences in statutory form. For the present these types of conspiracy[18] will continue to exist as common law offences.[19].

The offence of conspiracy is presently contained in Part I of the Criminal Law Act, 1977 (U.K.) c.45, (as amended by s.5 of the Criminal Attempts Act 1981 (U.K.) c.47). Section 1(1) of Part I states the following general definition of conspiracy:

> (1) Subject to the following provisions of this part of this Act, if a person agrees with any other persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either --
>
> (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
> (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible, he is guilty of conspiracy to commit the offence or offences in question.

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17 Stuart, op.cit.n.4 @ 366.

18 Conspiracy to corrupt public morals, to outrage public decency, and to defraud. Note that the following offences constituted conspiracy at common law: 1.Conspiracy to commit any offence punishable by law; 2. Conspiracy to commit a public mischief; 3. Conspiracy to injure individuals by wrongful acts otherwise than by fraud; 4.Conspiracy to trespass; 5. Conspiracy to defeat or pervert the course of justice; 6. Conspiracy to defraud;7. Combination against the government; 8. Conspiracy to corrupt public morals (including conspiracy to outrage public decency). -- as outlined in Crankshaw's *Criminal Code*, 8th ed., vol. 3, Carswell, 1981, @ pp. 11-12 to 11-18.

19 The Law Commission, No. 177, *A Criminal Code for England and Wales*, Report and Draft Code Bill, 1989. (Hereafter referred to as U.K. Draft Bill).

B. Canadian Approach

1. Present Codification

General liability for conspiring is established in s.465 of the *Criminal Code*:[20]

> S. 465 (1) Except where otherwise provided by law, the following provisions apply in respect of conspiracy:
>
> (a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and liable to a maximum term of imprisonment for life;
>
> (b) every one who conspires with any one to prosecute a person for an alleged offence, knowing that he did not commit that offence, is guilty of an indictable offence and liable
>
> (i) to imprisonment for a term not exceeding ten years, if the alleged offence is one for which, on conviction, the person would be liable to be sentenced to death or to imprisonment for life or for a term not exceeding fourteen years, or
> (ii) to imprisonment for a term not exceeding five years, if the alleged offence is one for which, on conviction, that person would be liable to imprisonment for less than fourteen years; and
>
> (c) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, upon conviction be liable; and
>
> (d) every one who conspires with anyone to commit an offence punishable on summary conviction is guilty of an offence punishable on summary conviction.
>
> (2) [Repealed, R.S. 1985, c.27 (1st Supp.), s.61(3).]
> (3) Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada.
> (4) Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) in Canada shall be deemed to have conspired in Canada to do that thing.
> (5) Where a person is alleged to have conspired to do anything that is an offence by virtue of subjection (3) or (4), proceedings in respect of that offence may, whether or not that person is in Canada, be commenced in any territorial division in Canada, and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.
> (6) For greater certainty, the provisions of this Act relating to

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20 R.S.C. 1985 c. C-46 (hereafter referred to as the *Criminal Code*).

(a) requirements that an accused appear at and be present during proceedings, and
(b) the exceptions to those requirements, apply to proceedings commenced in any territorial division pursuant to subsection

(7) Where a person is alleged to have conspired to do anything that is an offence by virtue of subsection (3) or (4) and that person has been tried and dealt with outside Canada in respect of the offence in such a manner that if the person had been tried and dealt with in Canada, he would be able to plead *autrefois acquit, autrefois convict* or pardon, the person shall be deemed to have been so tried and dealt with in Canada. R.S. 1985, c.27 (1st Supp.) s. 61.

In addition to the general conspiracy provision in s.465, the *Criminal Code* contains three specialized conspiracy provisions. These are found in ss. 46(2)(c)&(e) and s.46(4) (Conspiracy to Commit Treason), s.59(3) (Seditious Conspiracy) and s.466(1) (Conspiracy in Restraint of Trade):[21]

Section 46(2)(c). Every one commits treason who, in Canada, conspires with any person to commit high treason or to do anything mentioned in paragraph (a);[22]

Section 46(2)(e) Every one commits treason who, in Canada, conspires with any person to do anything mentioned in paragraph (b);[23] and manifests that intention by an overt act.
Section 46(4) Where it is treason to conspire with any person, the act of conspiring is an overt act of treason.

Section 59(3) A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention[24].

Section 466(1) A conspiracy in restraint of trade is an agreement between two or more persons to do or to procure to be done any unlawful act in restraint of trade.

The following federal statutes also contain conspiracy provisions: The Competition Act, R.S. 1985, c. C-34, as amended, s.45, The Divorce Act R.S. 1985, c.3, 2nd supplement, The National Defence Act, R.S. 1985, c. N-5, ss.72(3), 81, 89.

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21 See also ss.7(3.2)-(3.5), 467, 469(a), and 536(2).

22 Paragraph (a) provides that "everyone commits treason who, in Canada, uses force or violence for the purpose of overthrowing the government of Canada or a province."

23 Paragraph (b) provides that "everyone commits treason who, in Canada, without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada."

24 "Sedition" has been defined (in part) as "advocating, without legal authority, the use of force to achieve governmental change within Canada".-Martin's Annual criminal code, 1992, Canada Law Book Inc.

2. Historical Development

The early legislative background of conspiracy has been summarized as follows:[25]:

> The legislative history of the complicated s. 423(1) [now s. 465(1)] reveals that it is an amalgamation of sections dating from our first Code of 1892[26]. Conspiracies to commit treason[27], seditious conspiracies[28] and conspiracies in restraint of trade[29], each deriving from the common law and each being codified in 1892, were and are penalized in separate Code provisions. In 1960, the provisions in what was then s.411, penalizing further specific types of conspiracies in restraint of trade, were repealed and transferred in part to the Combines Investigation Act[30].

In 1955, s.408(2)was inserted. Section 408(2) was a variation of Lord Denman's statement in *Jones' Case, supra,*[31] (as discussed on p. 2). It provided that:

> Everyone who conspires with anyone
> (a) to effect an unlawful purpose, or
> (b) to effect a lawful purpose by unlawful means,
> is guilty of an indictable offence and is liable to imprisonment for two years.

The courts quickly authorized the use of s.408(2) to preserve common law conspiracies which extended beyond conspiracies to commit crimes:

> The door was expressly opened by Mr. Justice Fauteux for the Supreme Court of Canada in *Wright* ,1964,[32] to allow s.408(2) to authorize the indictment of conspiracies to commit acts which are not criminal under a federal statute nor prohibited by a provincial statute. Clearly the intent was to allow the full width of the common law which extends beyond an intent to commit a common law offence to conspiracies with non-criminal objects.[33]

However, in *Gralewicz v. R.* [1980], 2 S.C.R. 493, the Supreme Court of Canada "finally and firmly slammed the door on all conspiracies other than conspiracies to commit statutory offences. Section 8 [now s. 9 -abolition of common law offences] and unacceptable certainty were given as reasons."[34]

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25 Stuart, op.cit.n.4 @ 564.

26 S.C. 1892, c. 29, s.234(a) (conspiracy to murder), s.152 (conspiracy to bring a false accusation), s.188 (conspiracy to defile), and s.527 (conspiracy to commit an indictable offence).

27 S.46(2)(c)&(e).

28 Ss. 60-62.

29 Ss. 424-425.

30 Then R.S.C. 1952, c. 314, by S.C. 1960, c.45, now entitled the Competition Act, R.S., 1985, c. C-34, as amended, s.45.

31 As discussed on p.2 of this paper.

32 *Wright, McDermott and Feeley v.. The Queen,* [1964], S.C.R. 192, [1964] 2 C.C.C. 201.

33 Stuart, op.cit.n.4 @ 565.

34 Ibid @ 566.

Section 408(2) (which became s.423(2) in 1971) was repealed in 1985[35] effectively abolishing common law conspiracies in Canada.[36]. Thus, the approach taken in the *Criminal Code* differs from that taken in the Criminal Law Act, 1977 (U.K.). The English Statute, while abolishing common law conspiracies, retains the offence of conspiracy to corrupt morals and to outrage public decency. On this issue, the following commentary has been offered:

> There seems to be little doubt that Canada has made the wise choice and has spared the courts from grappling with the mysteries of conspiracies to corrupt public morals or outrage public decency ... the way is at last clear to direct our efforts to refining the general doctrine of conspiracy to commit an offence which has been declared as such by a legislature.[37]

Note that s.423(1)(e) [now s.465(1)(d)] was also enacted in 1985 to complement s.423(1)(d) [now s.465(1)(c)]. By these two subsections, it is now clear that there can be a conspiracy to commit either an indictable offence or an offence punishable on summary conviction. Thus, "the interpretation of [s.465(1)(c) & (d)] determines the existence and scope of our general doctrine of conspiracy."[38]

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35 S.C. 1985, c.19, s.62(3).

36 See Working Paper # 45, Law Reform Commission of Canada, *Secondary Participation in Crime and Inchoate Offences*, 1985, (hereafter cited as L.R.C.C. W.P.No.45) @ 45 for probable reasons behind this repeal.

37 Stuart, op.cit.n.4 @ 566-567.

38 Ibid @ 566.

II. THE NATURE OF CONSPIRACY

A. General Overview

1. Justification for Conspiracy

The nature of conspiracy has been described as follows[39]:

> Nature of the offence: Conspiracy is an inchoate or prepatory offence complete upon agreement of two or more persons to commit an offence. It is not necessary that a party to the conspiratorial agreement do any overt act in furtherance of the agreement,[40]

This may be contrasted with the inchoate crime of attempt under s.24, which does require an overt act beyond preparation. Thus, "[t]wo persons can be guilty of a criminal conspiracy, whereas, had they been acting on their own, they would have been acquitted on a charge of attempt".[41]

Whether liability should be imposed for conspiratorial agreements which have not progressed beyond mere preparation has been the subject of some debate. The underlying rationale for doing so has been explained as follows:

> [There is an] assumption that a combination of persons acting in concert present a much greater danger to society than does a single person. Thus, conspiratorial overt acts between two or more persons are criminalized whereas similar overt acts by a single person are not, unless the conduct by the single person amounts to procuring, counselling or inciting an offence which is not later committed.[42]

The Law Reform Commission of Canada,[43] in concluding that there is a need to retain the offence of conspiracy, has offered the following analysis:

> Should there be criminal liability for mere agreement? Now while objection to the imposition might contend that this comes close to criminalizing mere intent, this is not so. Two parities who resolve to commit a crime and then agree together to do it have gone beyond mere resolution; they have done an act in the external world: the act of agreeing between themselves. They have done this, thinking presumably that doing it together will be easier; this could surely qualify as an act in furtherance of that crime. Nonetheless, is it a substantial act? The act of agreeing is even more remote

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39 Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2d ed. 1987, (noted up to December 1991) Canada Law Book Inc. ch.19 @ 19-1. Citing the following authorities in support of this proposition: *Mulcahy v. The Queen*, (1868), L.R. 3, H.L. 306, *Belyea v. The King; Weinraub v. The King*, [1932] S.C.R. 279, 57 C.C.C. 318,

40 -except in the case of a s.46(2)(e) form of treason.

41 Stuart, op.cit.n.4 @ 566.

42 Ewaschuk, op.cit.n.39 @ 19-2, citing I.H. Dennis, *The Rationale of Criminal Conspiracy*, 93 L.Q.R. 39 (1977). Ewaschuk notes that a further rationale for the offence of conspiracy has been said to lie with the need to prevent the completion of criminal conduct.

43 L.R.C.C. W.P. No.45, op. cit. n.35 @ 47.

> from the complete offence than is the act of mere preparation. Thus, further objection to subjecting it to criminal sanction might be mounted on the ground of its relative harmlessness as compared with joint plotting, planning and organization of crime. Here again, however, strength in numbers, division of labour and so on make even mere agreement a source of danger -- organized crime, after all, begins with agreement.

The Australian Review Committee[44] has offered the following overview:

> Conspiracy is a crime which is regarded by many criminal lawyers with suspicion and distaste, not only because of the wide and imprecise scope of the offence itself, but also because the evidentiary rules peculiarly applicable to that offence may cause unfairness in particular cases. However, all the submissions received by the Review Committee express the opinion that the offence of conspiracy is one that must be retained, although one submission, that of the New South Wales Bar Association, reached this conclusion with reluctance. The Review committee has no doubt that conspiracy should be retained in the law of the Commonwealth as an offence. The most compelling justification for making conspiracy a crime is that it enables law enforcement bodies to take early action to prevent the commission of a serious substantive crime. A good example is provided by the importation of narcotic drugs. It is obviously desirable that the law should enable the police to intervene and charge persons who have planned to import, say, heroin before the actual importation takes place. The law needs a mechanism of that kind. Further, there are some cases in which it is not possible to prove that a particular defendant was a party to the commission of a substantive offence although evidence is available to show that he or she joined in a conspiracy to commit that offence. In the United Kingdom, Canada and New Zealand, where the criminal law has quite recently been reviewed, it has been recommended that the offence of conspiracy be retained. The Review Committee recommends that crimes of conspiracy remain Commonwealth offences.

B. Elements of Conspiracy

In *R. v. Montoute,* (1991) 62 C.C.C. (3d) 481 (C.A.) at p. 526, Harradence J.A. outlined the essential requirements of conspiracy:

> With respect, I would adopt the "no frills" definition set out by Mr. Justice David Doherty of the Supreme Court of Ontario in his paper delivered to the National Criminal Law Programme at the University of Alberta in July, 1990. He said, commencing at page 8:
>
> > In the absence of any statutory hint as to meaning to be given to the words "conspiracy", one goes to the case law and the textbooks in search of that meaning. The explanations offered in those resources run at two levels. Near the surface, runs the well-worn, and in most cases, adequate explanation of a conspiracy as an agreement to achieve a common purpose entered into by two or more people at least two of whom intend to carry out the plot and achieve the common purpose. This definition captures the essential requirements of conspiracy:

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44 In commentary accompanying the Australian Crimes Act (1990) @ 362.

(1) An agreement to achieve a particular object;
(2) An intention to achieve that object;
(3) The agreement and the intention must be proved as against at least two persons.

This "no frills" definition does not correspond exactly with the view of Stuart[45], which is as follows:

> [U]nder present Canadian law there would seem to be three general requirements [for conspiracy]:
>
> 1. Agreement for a common purpose,
> 2. Between two or more persons, and
> 3. Purpose prohibited by statute.

Ewaschuk's[46] "Constituent Elements of Conspiracy" do not correspond exactly with either of the above definitions. His view is that:

> Conspiracy requires
> (a) *knowledge of* the general nature of the conspiracy,
> (b) *agreement* to pursue the unlawful object of the common design, and
> (c) *intention* to adhere to the agreement. *i.e.*, the intention to achieve the unlawful object (of the common design).
>
> Furthermore, the agreement and intention must generally be proved as against at least two persons whether or not the two are jointly charged before the court.[47]

Clearly, there is some overlap and some disagreement among the various text writers and judicial authorities as to which elements are most essential. As it appears that all may be considered essential (to some degree) each will be considered below:

1. "Agreement to Achieve a Common Purpose/Particular Object"

a. Agreement as the *actus reus* of conspiring

In *Papalia v. R., R. v. Cotroni,*[48], Dickson, J., for the Supreme Court of Canada stated that: "the *actus reus* [of conspiracy] is the fact of agreement". However, it has been noted that "the *actus reus* of conspiracy (agreeing) would seem to reduce the "act" requirement almost to a vanishing point"[49]. This is because the act of agreeing may be seen to inherently involve a mental stance. This issue will be discussed in detail at pp.14-16, with respect to the *mens rea* of conspiracy.

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45 Stuart, op.cit.n.4 @ 568.

46 Ewaschuk, op.cit.n.39 @ 19-5.

47 Authorities cited by Ewaschuk in support of this conclusion are *R. v. Montoute, supra, R. v. McNamara et al.* No. 1 (1981), 56 C.C.C. (2d) 193 (Ont.C.A.), @ 452, affd [1985] 1 S.C.R. 662, 19 C.C.C. (3d) 1, *subnom. Canadian Dredge and Dock Co. Ltd. et al v. R., R. v. Longworth, Freeman, Newton & Wolfe,* (1982) 67 C.C.C. (2d) 554, (C.A.)

48 {1979} 2 S.C.R. 256 @ 276.

49 L.R.C.C. W.P. No.45, op. cit. n.35 @ 46

b. Achievement of a Common Purpose

In *Papalia v. R.; R. v. Cotroni, supra*, Dickson J. stated that the "fact of agreement" involves a consensus or meeting of minds on the part of the conspirators to effect an unlawful common purpose:

> On a charge of conspiracy the agreement itself is the gist of the offence: *Paradis v. The King* (1933), 61 C.C. C. 184 at p. 186, [1934] 2 D.L.R. 88 at p.90 [1934] S.C.R. 165 at p.168. The *actus reus* is the fact of agreement: *Director of Public Prosecutions v. Nock*, [1978] 3 W.L.R. 57 at p.66 (H.L.). The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme while others mays drop out. So long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy. In *R. v. Meyrick & Ribuffi* (1929) 21 Cr. App. R. 94 at p.102 (C.C.A.) the question asked was whether "the acts of the accused were done in pursuance of a criminal purpose held in common between them", and in 11 Hals., 4th ed. at p.44 it is said:
>
> > It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, consensus to effect an unlawful purpose.
>
> There must be evidence beyond reasonable doubt that the alleged conspirators acted in concert in pursuance of a common goal.

c. Tacit Agreement

In *R. v. McNamara* (No. 1) (1981), 56 C.C.C. (2d) (Ont.C.A.) affd. on other grounds (1985) 19 C.C.C. (3d) 1, (*subnom. Canadian Dredge and Dock Co. v. R.*) (S.C.C.), it was held that passive acquiescence, or mere knowledge, or discussion of a plan of criminal conduct is insufficient to ground a charge of conspiracy. The conspirators must agree to do something. However, even "[t]he agreement to do a single act in furtherance of a general conspiracy is sufficient to attract liability for criminal conspiracy so long as the conspirator knows the general nature of the conspiracy and intends to adhere to it".[50] As well, in *Paradis v. The King* [1934] S.C.R. 165, it was held that agreement may be established by inference from the conduct (*i.e.* acts and declarations) of the parties. In *Atlantic Sugar Refineries Company v. A.G. of Canada* [1980] 2 S.C.R. 644 at 655-656, the Supreme Court of Canada held that an offer, tacitly accepted by a course of conduct, could constitute a conspiracy. However, acceptance of such a tacit offer must be communicated. As well, if one of the parties expressed some reservations during discussions as to the common plan, it may be determined that such discussions

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50 Ewaschuk, op.cit.n.39 @ 19-8, citing in support of this proposition.*R. v. McNamara et al, supra., R. v. Crown Zellerback Canada Ltd., Bartram Paper Products Company Ltd. and Columbia Paper Co. Ltd.* (1955), 13 C.C.C. 212 @ 218, affd. 118 C.C.C. 16, 25 C.R. 217 (C.A.)

were mere negotiations, as opposed to an agreement.[51] The approach of the courts on this issue has been summarized as follows:

> Our courts have stressed that something more is required than mere acquiescence or knowledge of a plan, that the agreement need not be formal and can be expressed or implied. It would seem that all of this can be captured by saying that there must be a firm decision as to a joint venture.[52]

d. Ongoing Agreements

It has been held that a conspiracy may involve agreements to commit a number of different offences on an ongoing basis. Such agreement may be viewed as subordinate agreements within the same conspiracy, rather than as separate, individual conspiracies.[53]

e. Agreement for the Purpose of Contract

There has been some debate in the jurisprudence and among text writers as to whether a mere agreement (*i.e.* a commercial contract) to buy or sell an illegal service or commodity is an appropriate basis to ground a charge of conspiracy. The key question has been whether such a transaction is properly characterized as an agreement to achieve a common purpose. The following argument supports the view that some commercial transactions are not sufficient to ground a charge of conspiracy:

> [The characterization of conspiracy as an agreement to pursue a common objective] means presumably ... that conspirators must agree on more than the terms of their agreement concerning what each will do. They must agree on the achievement of some end to which the implementation of the agreement concerning their conduct will be a means. It is the agreement about the object which gives the character of "conspiracy" to the agreement concerning what each will do.
>
> If this is correct, it suggests that there is nothing about a transaction of sale in itself which takes it out of the realm of conspiracy law. If there is a common object, goal, design or purpose, it should be immaterial that its pursuance happens to involve a transaction of sale between the parties. Suppose, for example, that A and B agree that V should be killed. The death of V can than provide a common design for an agreement relating to the performance of the murder. If this latter agreement happens to involve one party paying the other to carry out the murder there will nonetheless be a conspiracy. *What stands outside the realm of conspiracy law is a commercial agreement under which the price is the dominant reason for selling.* A "contract killer" may therefore not conspire with the persons who purchase his services. (Emphasis mine.)[54]

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51 *R. v. Walker*, [1962] Crim.L.R. 458, *R. v. O'Brien*, (1974), 59 Cr.App.R. 222 (C.A.), *R. v. Lessard*, (1982), 10 C.C.C. (3d) 62 (Que.C.A.), @ 84-85.

52 Stuart, op.cit.n.4 @ 571.

53 *R. v. Bengert et al (No.5)* (1980) 53 C.C.C. (2d) 481, (B.C.C.A.) leave to appeal to S.C.C. refused C.C.C. *loc cit* 34, N.R. 350*n*, *sub nom R. v. Robinson et al.*

54 E. Colvin, *Principles of Criminal Law*, 2nd ed. Carswell, 1991 @ 348

A strong advocate of this view is P. McKinnon. In his view:[55]

> [a] commercial contract is an inappropriate basis for the finding of a criminal conspiracy. In the commercial world the interest 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 purpose of contract differs from the meaning of agreement for the purpose of conspiracy. In the former, agreement is the exchange of promises ... in the latter, it is a decision to jointly pursue a common object.[56]

The case of *Sokoloski v. R.* [1977] 33 C.C.C. (2d) 406 S.C.C. relates directly to this issue and has generated much debate. In that case, a drug seller was apprehended by police while he was still in possession of the drugs which he had intended to sell. Both the seller and prospective purchaser were charged with a conspiracy to traffic in a controlled drug, contrary to the Food and Drug Act.[57] While the seller could have been convicted of trafficking, the purchaser could be convicted of no substantive offence under the Act. Although there was some evidence that the purchaser and seller had agreed that the drugs were to be resold by the purchaser, the trial judge was unable to make such a finding. He therefore acquitted them both, viewing the transaction between the two men as a mere contract for the sale of drugs. The Ontario Court of Appeal disagreed and substituted convictions for both accused. A majority of the S.C.C. (5-4) agreed with the Court of Appeal, holding that there had been a conspiracy to jointly manufacture, sell, transport or deliver the drugs, even absent proof of an agreement. This decision rested on the fact that the seller was aware that the purchaser intended to resell the drugs (even if there was no proof that he agreed to the purchasers intention). Laskin C. J. speaking for the minority, strongly disagreed with the majority judgment. Laskin stated that the agreement between two men to buy and sell was merely "a reflection of different promises and their bilateral contract"[58], as there was no proof of an agreement upon which a charge of conspiracy could be supported. He also stated it was "an abuse if not also a distortion of the concept of conspiracy in our law"[59] to convict the purchaser, who could not be guilty of any substantive offence.

Even though the majority judgment has given rise to much criticism from text writers[60], "its impact as a precedent has been limited in comparison with the discussions it has generated. This may be because the reasoning was not presented in detail and because the conclusions were not expressed with clarity."[61]

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55 P. McKinnon, *Developments in the Law of Criminal Conspiracy*, (1981) 59 Canadian Bar Review, 301 @ 306-307.

56 Ibid @ 306-307.

57 R.S.C. (1970) c. F-27 s.34(1).

58 @ 500.

59 @ 498.

60 See P. McKinnon, op.cit.n.55, Stuart op.cit.n.4 @ 573-575, Colvin, op.cit.n.54 @ 535.

61 Colvin, op.cit.n.54 @ 353.

The case of *Sheppe v. R.*, (1980) 51 C.C.C. (2d) 481 (S.C.C.) may be viewed as indicating that the Supreme Court of Canada is ready to temper its holding in *Sokoloski v. R., supra* [62]. As per Laskin C.J. for the full court, in *obiter:*

> Although on one view of the facts in that case [*Sokoloski v. R., supra*] 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.

Since Laskin's *obiter* remark in *Sheppe v. R., supra,* there has been further indication that the courts may be prepared to disregard (or reinterpret) *Sokoloski v. R., supra.* In *Kelly (* 1984) 41 C.R. (3d) 56 (Sask.C.A.) it was held that a conspiracy charge could not succeed against a drug purchaser who intended to resell the drugs, even where the seller was aware that the purchaser intended to do so. In arriving at this determination the court cited *Sheppe v. R., supra* , [63] and adopted the analysis of P. McKinnon[64]..

Note however, that in *Genser v. R.* (1986) 27 C.C.C. (3d) 264 (Man.C.A.) it was held that common design to resell could be inferred from mere knowledge of intention to resell. It should also be noted that the cases of *Genser v. R., supra* , and *Sokoloski v. R., supra,* (among others[65]) have been distinguished as being a "purchase of drugs exception"[66].

2. "Intention to Adhere to the Agreement" -*Mens Rea*

a. Intention or "Purpose"

While the "mental element in conspiracy has proved remarkably elusive"[67] a number of judges and text writers have attempted to identify the *mens rea* of conspiring. In the U.K., it has been held that "the *mens rea* of the offence [of conspiracy] is the intention to do the unlawful act, the *actus reus* is the fact of agreement."[68] Ewaschuk[69] has similarly stated that:

> The mental element (*mens rea*) of conspiracy is the actual intention to agree to pursue a common unlawful object knowing the general nature of the conspiracy[70] .

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62 Stuart, op.cit.n.4 @ 575.

63 @ 66.

64 P. McKinnon, op.cit.n.55.

65 See Ewaschuk, op.cit.n.39 @ 19-1, 19-2.

66 Ibid.

67 Colvin, op.cit.n.54 @ 351.

68 Lord Scarman of the House of Lords in *D.P.P. v. Nock,* [1978] 2 All E.R. 654 @ 658.

69 Ewaschuk, op.cit.n.39 @ 19-8.

70 Ewaschuk, op.cit.n.39 citing *R. v. O'Brien,* [1954] S.C.R. 666 in support of this proposition.

The Law Reform Commission[71] has stated that "the seminal decision on the *actus reus* and *mens rea* of conspiracy" is *R. v. O'Brien*, [1955] S.C.R. 666. It was held in that case, at p.668, that:

> It is, of course, essential that the conspirators have the *intention to agree*, and this agreement must be complete. There must also be common design to do something unlawful, or something lawful by illegal means. Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, I have no doubt that there must exist *an intention to put the common design into effect*. A common design necessarily involves an intention. Both are synonymous. The intention cannot be anything else but the will to attain the object of the agreement.

Note that the *mens rea* requirement in *R. v. O'Brien, supra*, is separated into two parts. There must be an intent to agree as well as an intent to carry out the common object. It should be noted that judges have not always distinguished between these two forms of *mens rea*[72]. As well, Stuart has commented that " a requirement of an intent to carry out the common objective seems very difficult to separate from an intent to agree."

An explanation which has been offered as to why the *mens rea* of conspiracy has been so elusive relates to the fact that the *actus reus* (the act of "agreement") of conspiring inherently involves a state of mind:[73]

> The statement that someone has "agreed" to something is usually understood to mean not only that there has been an outward signification of agreement, but that this signification was made in order to communicate acceptance of the terms. Thus, where someone has signified agreement to something under a mistake or as a pretense, it can be said that he did not *really* agree to it. It is, of course, possible to say that an agreement is constituted by signification alone and that the mental stance towards this signification is a separate issue. Yet this would perhaps be less common usage.[74]

Whether the *actus reus* of agreement is constituted by outward signification alone, or whether it encompasses the mental acceptance of the agreement, has a direct bearing on the scope of a conspiracy. This is because the latter, more natural conceptualization of "agreement", implies that the *mens rea* requirement is "purpose"[75], while the former implies that intention is sufficient.

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71 L.R.C.C.. W.P.No.45, op. cit n.35 @

72 M. R. Goode, *Criminal Conspiracy in Canada*, 1975 @ 28-29.

73 Colvin, op.cit.n.54 @ 49, 50, 188 & 351.

74 Ibid @351

75 Note the difference between "intention" and "purpose": "My purpose in doing something is my reason for doing it, in the sense of what I am trying to do or what I want to accomplish by doing it. Hence, to specify a purpose is to give an explanation, whereas to specify an intention is not necessarily to do so. We do things *with* an intention, but *for* a purpose, since the intention may only accompany the action, whereas the purpose must be a reason for it.- White, *Intention, Purpose, Foresight, and Desire* (1976) 92 L.Q.Rev. 569 @ 574 as quoted by Colvin, op.cit.n.54 @ 122.

Under the more natural conceptualization, it is insufficient that the accused had knowledge of the general nature of the conspiracy[76] and intended to be a party to the agreement. The accused must also have agreed to be a party to the agreement for the *purpose* of making the offence occur.

Under the less natural conceptualization, knowledge of the general nature of the conspiracy and intention to be a party to the "agreement" are sufficient. The scope of conspiracy is thus widened, as an accused may be held to have conspired to commit resultant or consequential offences which he or she knew would occur as a result of the first offence .

It has been suggested that "[t]his may be the view underlying the perplexing decision of the Supreme Court of Canada in *Sokolski v. R., supra* ".[77] As discussed on page 13, in that case a charge of conspiracy to traffic in drugs succeeded, absent proof of any agreement, because the accused drug seller was aware that the purchaser intended to resell the drugs:

> No attempt was made to explain how the transportation, delivery and resale [of the drugs] could be part of an agreement when no agreement had been made with respect to them. Under the [more natural conceptualization] of agreement, the conclusion would obviously have been wrong. Under the [less natural conceptualization] however, the conclusion does at least make some sense. From this perspective there is little difficulty in holding that an agreement may encompass more than that on which the agreement has actually been made. It may encompass consequences and incidents of doing what has been agreed. Such consequences and incidents are "intended" if it is known that they will occur. The transportation, delivery and resale were all intended in this sense.[78]

b. Recklessness, Negligence and Strict Liability Offences

It has been held, in *R. v. Lessard*, (1982) 10 C.C.C.(3d) 62 (Que.C.A.), that:

> To establish conspiracy the Crown must prove an agreement and an intention to agree to all the substantial elements necessary for the eventual execution of the conspiracy. Recklessness is *not* sufficient *mens rea* to establish an intent to agree. Recklessness is sufficient only in respect of the method of execution of the agreement.[79]

There is no Canadian decision on the issue of whether *mens rea* is required to convict a person of conspiracy to commit an absolute or strict liability offence, or one which extends to negligence. In England, in *Churchill v. Walton*, [1967] 1, All E.R. 497 (H.L.) the House of Lords unanimously insisted on *mens rea* for conspiracies to commit absolute responsibility offences. Stuart has commented that: "The decision is a powerful precedent ... it has been well received and it should be followed in Canada."[80] Further commentary on this issue is as follows:

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76 See page 19 for detailed discussion of this requirement.

77 Colvin, op.cit.n.54 @ 352 -- see also pp. 351-354 for a thorough analysis of this issue.

78 Ibid. @ 353.

79 Ewaschuk, op.cit.n.39 @ 19-8, paraphrasing the judgment of Bisson J. in *Lessard, supra* .

80 Stuart, op.cit.n.4 @ 579.

> Should there be an extension in conspiracy beyond intent? As was the case for the law of attempts, opinions differ. On the one view since conspiracy is an adjunct to the full crime if the full crime requires recklessness, negligence or absolute responsibility, it would be logical to extend intent to agree at least to recklessness and similarly in the case of an intent to carry out the unlawful object. Why not convict one who attended a meeting and must have realized his conduct at the meeting would be construed by others as agreeing to the course of criminal conduct decided upon and holding the same party liable for foreseen, unplanned consequences? On the other view a reckless conspiracy is a perversion of language. There is very little in the way of an *actus reus* requirement for conspiracy. The law is perilously close to punishing a bare intention. If we are to insist, as it is submitted above we should, that there be a decision to jointly pursue an unlawful object it seems imperative to restrict the *mens rea* to that of an actual intent. Recently the English Law Commission revised their earlier views to reach this position.[81]:
>
> > We think that the law should require full intention and knowledge before a conspiracy can be established. What the prosecution ought to have to prove is that the defendant agreed with another person that a course of conduct should be pursued which would result, if completed, in the commission of a criminal offence, and further that they both knew any facts which they would need to know to make them aware that the agreed course of conduct would result in the commission of the offence.
>
> In Canada there would seem to be little reason to do anything more than to insist on the *O'Brien* requirement of an intent to agree and an intent to pursue the common objective in all cases.[82]

The U.K. Draft Bill[83] currently proposes the requirement of intention that the offence be committed[84] - except where an offence includes as one of its elements a circumstance in respect of which recklessness will suffice.[85]. In such a case, "recklessness as to that circumstance will suffice also for a charge of conspiracy to commit the offence."

c. Defining "Conspiracy"

While the *Criminal Code* offers no definition of conspiracy, each of the five reform proposals (as discussed in part III of this paper) does so. Under the English, Australian and New Zealand reform proposals, both "agreement" and "intention" are specified components of the definition[86]. In the U.S. Model Penal

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81 Report No. 76, op.cit.n.16 @ 17.

82 Stuart, op.cit.n.4 @ 579.

83 U.K. Draft Bill, op.cit.n.19 @ 241.

84 S. 48(1)(b).

85 S. 48(2).

86 In the U,K, Draft bill, clause 48(1)(b), intention that the offence be committed is required. In the Australian crimes Act, clause 7D(1)(c)(ii) and the New Zealand Crimes bill, clause 61(1)(b), intention that the agreed upon act be done (or omitted) is required.

Code "agreement" and "purpose" are specified.[87] In the L.R.C.C. Draft Code[88] only "agreement" is specified within the definition[89], but a residual rule in clause 2(4) provides that the culpability requirement is "purpose" for all offences, unless otherwise specified.

It is necessary to look to case law for a present definition of conspiracy in Canada, as the *Criminal Code* is silent on the matter. In 1868, Willes J. in *Mulcahy v. R.* (1868), L.R. 3 H.L. 306 at 317 (H.L.), offered what has been termed[90] "the classic definition of conspiracy at common law":

> A conspiracy consists not merely in the ***intention*** of two or more, but in the ***agreement*** of two or more to do an unlawful act, or to do a lawful act by unlawful means. [emphasis mine]

As discussed, the requirement that the agreement be "to do an unlawful act, or to do a lawful act by unlawful means" is no longer applicable.[91] However, the definition in *Mulcahy v. R. supra,* remains relevant with respect to the roles of intention and agreement in criminal conspiracy:

> As the *Mulcahy* definition indicates, the theory of liability for conspiracy rejects any idea that bare intention to commit an offence is criminalized. The theory is that liability attaches to the act of agreeing to commit an offence. The centrality of agreement to the law of conspiracy was stressed by Dickson J. in the decision of the Supreme Court of Canada in *Papalia v. R.; R. v. Cotroni [supra]*[92]. His words suggest that "conspires" is to be treated as a synonym for "agrees":
>
> > The word "conspire" derives from two Latin words, "con" and "spirare", meaning "to breathe together". To conspire is to agree. The essence of criminal conspiracy is proof of agreement. On a charge of conspiracy the agreement itself is the gist of the offence ...
>
> It follows that nothing need be done in pursuance of the agreement. Further acts can be useful in proving a conspiracy by inference, but the conspiracy itself is complete at the moment of agreement. Moreover, it is not required that the agreement have any particular content, such as detailed plans, which would facilitate the commission of the offence. It will suffice that the agreement embodies an intent to commit an offence.[93]

The words of Dickson J. clearly suggest that the terms "conspiracy" and "agreement" are synonymous (although he qualifies this definition with the statement that conspirators must have "acted in concert of pursuance of a

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87 Clause 5.03(1).

88 Law Reform Commission of Canada, Report on Recodifying Criminal Law, Report No. 31, 1987, -Hereafter referred to as L.R.C.C. Report No. 31.clause 4(5).

89 See p.33, observation #1.

90 Colvin, op.cit.n.54 @ 347.

91 See page 7.

92 Op. cit n.48 @

93 Colvin, op.cit.n.54 @ 347.

common goal")[94]. It has been suggested however, that "conspiracy" is more precisely defined as a "special form of agreement to work together towards a common objective."[95]

The conceptualization of conspiracy as an agreement to jointly pursue a common objective has been specifically approved of in *R. v. Lessard,* (1982) 10 C.C.C. (3d) 61 at p. 87 (Que.C.A.) and in *R. v. Kelly,* (1984) 41 C.R. (3d) 56 at pp. 66-67 (Sask.C.A.) and in *R. v. Montoute, supra,*[96] , at p.326. Similarly, other judges have referred to "common design" or "common purpose".[97]

Note Colvin's approval of this conceptualization of conspiracy:

> This conceptualization of conspiracy is attractive. It breathes some life into the word "conspires". If all that the legislature (and the judiciary beforehand) meant was "agrees", then why was this term not used? The word "conspires" does suggest cooperative planning to achieve an agreed objective.[98]

As discussed on pp.12-14, such a definition could be interpreted to preclude a mere commercial contract from being an appropriate basis for a finding of conspiracy.

3. "Knowledge of the General Nature of the Conspiracy"

In addition to the *mens rea* requirements outlined above, a conspirator must have knowledge of all of the substantial elements necessary to the eventual execution of the common scheme. In *R. v. McNamara, supra,* it was held that:

> [It is not] necessary for the Crown to prove that the appellants knew the identities of the other parties to the common design, or the precise details of the agreement. If the jury found that the requisite guilty knowledge was brought home to the appellants, the jury could readily draw the ultimate conclusion that the appellants were participants in the conspiracy.

This quote has been interpreted to mean that it " ... must be shown that the conspirator was aware of the *general nature* of the common scheme".[99]

4. "Between Two or More Persons"

Despite the fact that the basis for conspiracy lies in the agreement and intention between at least two persons to commit an offence, s.465 has been held to impose liability individually:

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94 As quoted on p.11 of this paper. .

95 Colvin, op.cit.n.54 @ 347.

96 (1991) 62 C.C.C. (3d) 481 (C.A.)

97 *i.e. R. v. O'Brien,* [1954] S.C.R. 666 @ 668, *R. v. Genser,* (1986) 27 C.C.C. (3d) 264 @ 267-268, affd. [1987] 2 S.C.R. 685.

98 Colvin, op.cit.n.54 @ 348.

99 Ewaschuk, op.cit.n.39 @ 19-6.

> A conspiracy necessarily involves at least two parties. Nevertheless, as Dickson J. has stressed, even on conspiracy charges, guilt is something individual and personal.[100] One person alone can therefore be charged and convicted of conspiring with others. It is not necessary that the others be brought to trial. Moreover since evidence which is available and admissible against one conspirator may not be available and admissible against another, it is possible that A may be convicted of conspiring with B even though B is acquitted of conspiring with A.[101]

Although there had been a rule to the effect that acquittal of one conspirator rendered a conspiracy conviction invalid, it has been specifically disapproved of in *Guimond v. R.* (1979) 8 C.R.(3d) 185 (S.C.C.). Furthermore, it is not even necessary that all co-conspirators be known[102] or named.[103] Further rules relating to parties to a conspiracy are as follows:

a. Numerous Parties

A number of cases have held that there can be a quote "wheel of conspiracy"[104]. The metaphore of a wheel, hub, spokes and rim is used to describe a conspiracy where only one person of the parties communicates directly with all of the others. It is not necessary for a person who joins such a conspiracy to know the identity of, or communicate directly with, the other co-conspirators as long as they act in pursuance of a common goal.[105] Also, there can be a "chain" of conspiracy, where A communicates with B, B with C, C with D, and so on.[106] Further metaphors have been devised to describe various other modes of conspiracy, such as the "forked" conspiracy and the "pyramid" conspiracy.[107] It has been noted, however, that:

> [M]etaphores [such as a "wheel" or "chain" of conspiracy] cannot substitute for substantive requirements.[108] The common venture requirement guards against several conspiracies being falsely rolled into one. As Roskill L. J. said for the English Court of Appeal in *Ardalan v. R.* (1972):
>
> > The essential point in dealing with this type of conspiracy charge, *i.e.*, "wheel" or "chain" conspiracies, where the prosecutors have brought one, and only one, charge against the alleged conspirators, is to bring home to the minds of the jury that before they can convict anybody upon that conspiracy charge, they have got to be convinced in relation to each person charged that that person has conspired with another guilty person in relation to that

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100 *Papalia v. R.; R. v. Cotroni*, [1979] 2 S.C.R. 256 @ 276.

101 *i.e.. Guimond v. R.* [1979] 1 S.C.R. 960.

102 Stuart, op.cit.n.4 @ 575.

103 *R. v. B.(T.L.)* (1989) 52 C.C.C. (3d) 72 (N.S.C.A.)

104 *i.e.* see *MacDonald* (1963) 10 C.C.C.(2d) 488 (B.C.C.A.) applying, *inter alia, Meyrick* (1929) 21 Cr.App.R. 94 (C.C.A.), *Ardalan v. R.*, [1972] 56 Cr.App.R. 32 (C.A.) -- leading U.K. authority.

105 Ewaschuk, op.cit.n.39 @ 19-5.

106 Stuart, op.cit.n.4 @ 572.

107 Ewaschuk, op.cit.n.39 @ 19-18.

108 See P. McKinnon, op.cit.n.55 @ 31.

> single conspiracy. It has been said again and again, there must not be wrapped up in one conspiracy charge what is, in fact, a charge involving two or more conspiracies.[109]

Note that H. Groberman[110] is of the opinion that only core participants common to all agreements should be liable in such a conspiracy. In his view, secondary participants should be charged separately:

> The law at present does *not* support Mr. Groberman's thesis. As long as a party has knowledge of the general nature of the overall scheme, intends to adhere to it, and agrees to participate in it even in a secondary role, the party thereby joins the general conspiracy.[111]

b. Spousal Immunity Rule

Although there is no specific provision in the *Criminal Code,* it has been held that a husband and wife cannot conspire by themselves. This is because, in legal fiction, they are regarded as a single entity and "are presumed to have but one will"[112]. However, it is possible that a husband and wife (as a single entity) can conspire with other parties.[113] The following commentary summarizes the various arguments for and against the preservation of this rule:[114]

> The spousal immunity rule for conspiracy has been widely condemned as "anachronistic and foolish"[115]. The rules seem inconsistent in themselves and with the lack of immunity given husbands and wives elsewhere in the criminal law. It is difficult to see why marriage should be a haven exempt from the criminal law. It has, however, been argued that there are countervailing social policy considerations such as the desire not to jeopardize the stability of marriage. The English Law Commission[116] [in 1976] raised an important pragmatic consideration, leading to their conclusion that the immunity be retained:
>
> > A change in the law to permit a spouse to be charged with conspiracy with his or her spouse might offer excessive scope for improper pressure to be applied to spouses in particular cases; where, for example, a husband refuses to confess to the commission of a crime, he would be open to the threat that his wife would be charged with conspiracy with him. Such a change in the

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109 *Ardalan v. R.*, supra, @ 329.

110 H. Groberman, *The Multiple Conspiracies Problem in Canada*, 40 U.T. Fac. L.Rev. 1 (1982).

111 Ewaschuk, op.cit.n.39 @ 19-19 citing the following authorities in support of this proposition: *R. v. McNamara et al (No. 1), supra, R. v. Dixon et al* (1984) 16 C.C.C. (3d) 31 (B.C.C.A.).

112 *Kowbel v. R.* [1954] S.C.R. 498, see also *R. v. Rowbotham* (1988) 41 C.C.C. (3d) 1 (Ont.C.A.), see also s.2(2)(a) of the Criminal Law Act, 1977, (U.K.) c 45

113 Even where the third party is an unindicted co-conspirator -- *R. v. Chambers et al,* (1973), 11 C.C.C. (2d) (Alta. S.C.T.D.).

114 Stuart, op.cit.n.4 @ 578-579.

115 M. R. Goode, op.cit.n.72 @ 99-100.

116 English Law Commission Report No. 76, op.cit.n.18 @ 20-21.

> law in this respect could, therefore, bring practical disadvantages which might outweigh its possible advantages.[117]

> If the immunity survives it should be broadened to cover some notion of common law marriages.

In the view of Colvin,[118] "the criminal law is ripe for review" in this respect, as the doctrine of unity of personality of a husband and wife has been largely eroded in family law.[119] Note that the U.K. Law Commission is now recommending abolishing the spousal immunity rule for the following reasons:[120]

> It hardly needs to be said that in view of changed attitudes to marriage in modern society this "antique fiction" cannot sustain the rule. In our earlier Report on conspiracy, we recommended retention of the exemption for alternative reasons, principally the importance of maintaining the stability of marriage by non-interference with the confidential relationship of husband and wife. We are now persuaded, particularly having regard to subsequent developments in the law, that this argument is insufficient to sustain the rule. First, the exemption is an anomaly. Husbands and wives are capable in law of being accessories to each others offences. Where, say, a wife agrees that her husband shall commit an offence, that agreement cannot ground liability for conspiracy by either party, but it will ground liability in the wife for aiding and abetting if the husband actually commits the offence. The distinction makes no sense. Secondly, as a result of s.80 of the Police and Criminal Evidence Act 1984, husbands and wives are now competent witnesses for the prosecution against each other in all cases and the privilege against disclosure of marital communication has been abolished. Thirdly, the exemption is criticized on consultation. The Scrutiny Group on preliminary offences said that they saw no reason of social policy for maintaining the rule relating to spouses. In the light of these considerations we recommend that the exemption for agreements with spouses should not be retained.

Note that law reform proposals in both Australia[121] and New Zealand[122] provide explicitly for abolition of the spousal immunity rule. The Supreme Court of Canada, in *R. v. Salituro,* unreported, November 28, 1991, has demonstrated some inclination towards abolishing this rule.

c. Incapacitated Persons to a Conspiracy

Certain incapacitated persons are exempt from liability for conspiracy:

> Persons deemed incapable of committing crimes include children under 12 years of age, insane persons and persons with diplomatic immunity (unless waived by their home countries). A person defined as a victim of a crime [where a statute expressly

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117 Ibid.

118 Colvin, op.cit.n.54.

119 Ibid. @ 348.

120 U.K. Draft Bill, op.cit.n.19 @ 241.

121 Australian Crimes Act (1990), Clause 7D(1)(a).

122 New Zealand Crimes Bill (1989), Clause 61(4).

> protects a certain class of persons] is also deemed *not* to have conspired to commit that crime, and, consequently, is immune from prosecution for such offence.[123]

However, it has been held that a party who conspires with a person lacking legal capacity may nonetheless be convicted, as long as there was an agreement to pursue an unlawful common objective between the two parties.[124]

d. "Would-Be" Conspirators

In *R. v. O'Brien,* [1954] S.C.R. 666, it was held that, where one of the parties is only pretending to agree (has no real intention to conspire), neither party can be convicted of conspiracy.[125] Colvin argues that this is a "questionable decision"[126], with respect to the party who was not pretending since:

> ... the other party does express consent to what is understood to be an agreement. This might well be thought of as a significant consideration in relation to an inchoate defence, where the actor's state of mind is the primary rationale for legal intervention. Indeed, s.465 imposes liability on everyone who "conspires" with anyone. Surely, the person who acts with intent does "conspire", even if his efforts are frustrated.[127]

e. Corporate conspiracy

A corporation can be found guilty of conspiracy based on the actions and intentions of the company's directing mind.[128] The necessary *mens rea* may be found in an officer, servant or agent authorized by the company to act on its behalf.[129] Case law in both Canada and the U.K. favours the view that a person who wholly controls a corporation cannot be convicted of conspiring with himself.[130] As well, this approach has been supported by the English Law Commission, Report No. 76.[131] However, in *Electrical Contractors Association of Ontario v. R.,* (1961) 27 D.L.R. (2d) 193 (Ont.C.A.), at p. 240, Laidlaw J. held that:

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123 *Ewaschuk,* op.cit.n.39 @ 19-15 citing the following statutory and judicial authorities in support of this proposition: *Code s.13 and 16, R. v. Murphy and Bieneck* ,(1981) 60 C.C.C. (2d) (Alta T.D.), *Diplomatic and Consular Privileges and Immunities Act, Diplomatic Immunities (Commonwealth Countries)Act, Privileges and Immunities (International Organizations) Act, Privileges and Immunities (North Atlantic Treaty Organizations) Act, Visiting Forces Act.*

124 *R. v. Murphy, and Bieneck, supra.*

125 However, note the case of *R. v. Hunter et al,* (1985) 23 C.C.C. (3d) 31 where there was a conspiracy, even though one of the co-conspirators intended to later "rip off" the others.

126 Colvin, op.cit.n.54 @ 350.

127 Ibid.

128 *i.e. R. v. St. Lawrence Corp. Ltd. et al,* [1969] 3 C.C.C. 263 (Ont.C.A.), *Ash-Temple Co.,* [1949] O.R. (C.A.) @ 337.

129 *R. v. Fane Robinson Ltd.,* (1941) 76 C.C.C. 196 (Alta.C.A.).

130 *Martin v. R.,* (1932) 59 C.C.C. 8 @ 15 (Man.C.A.), *McDonnell,,* [1966] 1 Q.B. 233.

131 Report No. 76, op.cit.n.18 @ 63.

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

This decision was expressly not followed in the English case of *McDonnell*, [1966] 1 Q.B. 233 As well, the case has been criticized as seemingly "overly technical and not paying sufficient attention to the human realities once the corporate veil had been pierced".[132]

5. "Purpose prohibited by statute"

As discussed on pp.6-7, the repeal of s.423(2) (the common law conspiracy provision) has shut the door to prosecutions for conspiracies to do a lawful act by unlawful means. Conspiracy under the present *Criminal Code* is complete upon agreement to commit an *offence*. Sections 465(1)(c) and (d) provide that there can be a conspiracy to commit either an indictable offence or an offence punishable on summary conviction. The scope of our general doctrine of conspiracy must now be determined by the interpretation of ss. 465(1)(c) and (d). It has been noted that:

> An untested question is whether this includes conspiracies with intent to commit any summary conviction offence, whether this be by virtue of federal or provincial legislation.[133]

The following analysis has been offered:[134]

> [The abolition of s.423(2)] recognizes that there is no place for common law conspiracy in our criminal law. For that conclusion it should be applauded. However, [s.465] replaces unlawful purpose with conspiracy to commit an offence punishable on summary conviction, which is not without its own interpretational problems. What is included within "offences punishable on summary conviction"? is [s.465(1)(d)] simply codifying *Gralewicz*, 54 C.C.C. (2d) 301, that is, including within conspiracy all federal and provincial offences, or is it going further, that is, limited conspiracy to *Criminal Code* and other federal offences? At first glance it would appear that [s.465(1)(d)] intends to limit conspiracy to federal offences. But does it? Provincial offences are generally referred to as offences punishable on summary conviction or by summary proceedings. The word "offence" is not defined in the Code and the Interpretation Act [R.S.C. 1970 c. I-23, s.27] is of little help. Indeed case law shows that the word "offence" in the Code can, at least in some instances, include provincial offences. Therefore, [s.465(1)(d)] does not succeed in removing the uncertainty in the law as to the scope of conspiracy. If [s.465(1)(d)] is only reacting to and codifying the case law, then, it is suggested, it does not go far enough. Conspiracy should be limited to *Criminal Code* offences. There are three main reasons for this. First, as Mr. Justice Rothman pointed out in *R. v. Jean Talon Fashion Center Inc.*, some provincial offences are very minor:

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132 Stuart, op.cit.n.4 @ 577.

133 Ibid @ 580.

134 O. Fitzgerald, L. Douglas, *Counselling and Conspiracy*, Ottawa L.R. vol.16 no. 1, p.331 @ 339-340.

> It must, I believe, be allowed that not all agreements to infringe provincial statutes or municipal by-laws can be serious enough to justify indictment for criminal conspiracy. The violation of some statutes may involve very minor infractions, and many municipal by-laws are purely regulatory in nature.

> Criminal law and criminal sanctions should be used with restraint; they should be limited to serious, harmful conduct and to situations where there is serious public interest to protect. Second, for the sake of certainty and comprehensiveness, the *Criminal Code* should be self-contained. Third, and perhaps most important, it should be Parliament's role alone to create criminal offences. To allow the courts to criminalize provincial offences by using the conspiracy offence is to give the courts the criminal law making power which they have already stated is not theirs.

A major argument for not interpreting s.465(1)(d) to encompass conspiracies to commit provincial offences has been described (in part) as follows:[135]

> There would seem to be no justification for penalizing any conspiracies to commit a crime more fully than the completed offence. The ideal solution, and this would have to await a Code overhaul, is to create a conspiracy offence that can attach to each crime chosen for inclusion in the Code itself *and to no other*. The maximum penalty should not exceed that for the full offence. The procedure should likewise be the same.[136]

Note that the English Law Commission[137] made the recommendation that the maximum penalty should not exceed that of the main offence. The Law Reform Commission of Canada[138] has proposed restricting conspiracy to "crimes" (*i.e. Criminal Code* offences) and suggests that the penalty for conspiracy be half the penalty of the crime.

C. Merger

Unlike the inchoate offence of attempt (which merges with the substantive offence once it is committed), an accused can sometimes be convicted of both conspiracy and the completed offence.[139]. For example, in *Sheppe v. R.*, [1980] 2 S.C.R. 22, the accused was convicted of trafficking and conspiracy to traffic. The procedural defence of *res judicata* was not available to the accused because the conspiracy had a wider effect than the substantive offence. Note that the courts at present are reluctant to apply this principle.

> Historically this was justified by reference to the idea that a conspiracy is harmful independently of its inchoate character. With the increasing stress on conspiracy as an inchoate offence, the judiciary has tended to frown on the practice of joining substantive and conspiracy counts. It is, however, still accepted as proper where the conspiracy was wider than the substantive offence which has been charged.[140]

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135 Stuart, op.cit.n.4 @ 583.

136 Ibid. @ 584.

137 Report No. 76, op.cit.n.18.

138 L.R.C.C. Report No. 31, op.cit.n.88, clause 4(5)..

139 *R. v. Kravenia*, (1955) 112 C.C.C. 81 (S.C.C.), *Sheppe v. R.* [1980] 2 S.C.R. 22.

140 Colvin, op.cit.n.54 @ 336.

The following analysis has been offered:

> Our procedural offences are not focusing on the heart of the problem. The true issue is not whether evidence has been used twice to achieve convictions but rather whether the fundamental nature of the conspiracy offence is best seen, as it has already been argued, as a purely preventive, incomplete offence, auxiliary to the full offence and having no true independent rationale to exist on its own alongside the full offence. On this view it inexorably follows that once the completed offence has been committed there is no justification for also punishing the incomplete one. This has been recognized by a peremptory rule inserted in the Model Penal Code.[141] Why should our code contain procedural rules[142] confined to insuring that a person cannot be convicted of attempts and the full substantive offence and that attempts is always an included offence to the full offence? The matter is so fundamental that our courts should not await legislation.[143]

Note that the L.R.C.C. has made the following recommendations in this regard:

> In our view, no one should be liable to conviction for both an inchoate offence and the full offence in question. If the offence is completed and the person contributed to it, he should be liable as a party. If it is not completed, or if he makes no actual contribution to it, he should at most be liable to an inchoate offence. Accordingly, a person charged with an offence but proved only to have conspired to do it should be convicted not of the offence, but of conspiracy. A person charged with conspiracy but found to have been involved with the full offence presents a problem. On the one hand he clearly should not be acquitted and should at least be convicted of conspiracy. On the other hand, it would hardly be fair to convict him of the full offence and subject him to the full penalty when that was not the charge he had to meet. Our tentative view is that he should be liable for conspiracy and subjected to the penalty for half the offence.[144]

D. Attempted Conspiracy and Conspiracy to Attempt

1. Attempted Conspiracy

In *Kotyszyn,* (1949) 95 C.C.C. 261 (Que.K.B.) it was held that an entrapment victim was not guilty of either conspiracy or of attempt to conspire, since there was no common intention to carry out the crime. The issues raised by this holding may be summarized as follows:

> The argument in favour of rendering the person who has the unlawful purpose guilty of conspiracy in such a case is that it would assist the police in their endeavors to prevent the commission of serious drug offences; an argument against it is that it might open the way to the use of agents provocateurs. If the law is not amended to enable a charge of conspiracy to be laid in this situation, there is an argument in

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141 Model Penal Code, American Law Institute (1962) (hereafter referred to as U.S.A. Model Penal Code) s. 107.

142 Sections 660, 661.

143 Stuart, op.cit.n.4 @ 588.

144 L.R.C.C. W.P. No. 45, op.cit.n.35 @ 48 - these recommendations were adopted in L.R.C.C. Report No. 31, op.cit.n.88.

> favour of the view that it should expressly be made clear whether a charge of attempted conspiracy would lie in such a case.[145]

In *Dungey v. R.*, (1980) 51 C.C.C. (2d) 86 (Ont.C.A.), it was held that there is no such offence as an attempt to conspire to commit another offence. Dubin J. stated that it was "neither necessary nor desirable to extend the law" in that way because such an "attempted conspirator" would most probably be found guilty of inciting the substantive offence. A further rationale offered by Dubin J. was that, if the purpose of the offence of conspiracy is to prevent the commission of the full offence, there is no point in punishing an act which falls short of conspiracy.[146] Stuart has commented that:

> Social policy considerations militate against an extension of the incomplete crime of conspiracy by combining it with another incomplete offence. ... The nature of criminal responsibility in respect of offences not yet committed is already wide enough. In practice police and prosecutors rarely resort to such linguistic acrobatics. Academic fantasies should not become part of the criminal law.[147]

Note that in 1977, the English legislature adopted the recommendations of the English Law Commission[148] to abolish the crime of attempting or inciting to conspire.[149] However, the English Law Commission[150] has most recently recommended that attempt to conspire should be restored as an offence. It was further recommended that:

> We do not find it necessary to make any express provision concerning charges of conspiracy to conspire and conspiracy to attempt. We cannot envisage any circumstances in which it would be necessary to bring such charges in preference to charges of conspiracy to commit a substantive offence[151].

2. Conspiracy to Attempt

In *R. v. May*, (1984) 13 C.C.C. (3d) 257 (Ont.C.A.), leave to appeal to S.C.C. refused [1984] 2 S.C.R. vii, it was held that two or more persons may conspire to attempt to commit a substantive offence, where the attempt itself is a substantive offence (as opposed to an inchoate offence).[152]

E. Counselling and Conspiracy

The interrelationship between counselling (under ss. 22 and 464 of the *Criminal Code*) and conspiracy has been described as follows:

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145 Commentary accompanying Australian Crimes Act (1990) @ 86.

146 @ 95.

147 Stuart, op.cit.n.4 @ 578 and 592.

148 Working Paper No. 50, paragraphs 44-46.

149 Criminal Law Act 1977 (U.K.) c 45, s.5(7).

150 U.K. Draft Bill, op.cit.n.19, paras. 13.15, 13.48, clause 49(6)(b).

151 Ibid, para. 13.30.

152 In that case the substantive offence was conspiracy to attempt to obstruct justice under s.139 of the *Criminal Code*.

> Doubtless most conspiracies begin as a suggestion by one person to another. The suggestion probably then develops into an urging and finally an agreement is reached. Probably, somewhere along the way, one person is guilty of incitement. However, incitement merges into what is achieved by the incitement and it is suggested, though it seems of no practical importance that if A begins by urging B to commit an offence, from the moment B agrees, A becomes guilty of the conspiracy with B and ceases to be liable for inciting B. However, there seems to be no reason why two people could not conspire to incite a third person to commit an offence. If one of them then actually incites that third person, the first two appear to remain guilty of conspiracy and also of incitement -- the one as the person who actually incites and the other as a party to that offence ... [153]

F. Defences

As discussed, it may be a good defence to a charge of conspiracy that the accused was incapacitated (child under 12, insane), had immunity, was a victim, merely pretended to agree, or that the agreement was between spouses or between a wholly controlling director of a corporation and that corporation.[154] Whether abandonment and impossibility should be available as defences are matters of greater controversy:

1. Abandonment

There is no *Criminal Code* provision regarding the defence of abandonment (also termed "voluntary desistance")[155] with respect to conspiracy. In *R. v. O'Brien*, [1954] S.C.R. 666 Taschereau J., for the Supreme Court of Canada in *obiter* expressly opposed such a defence.[156]:

> If a person, with one or several others, agrees to commit an unlawful act and later, after having had the intention to carry it through, refuses to put the plan into effect, that person is nevertheless guilty because all the ingredients of conspiracy can be found in the accused's conduct.

In *R. v. Kosh*, [1965] 1 C.C.C. 230 (Sask.C.A.), at p.235, Culliton C.J.S. stated that:

> In my view, once the essential element of intent is established, together with overt acts towards the commission of the intended crime, the reason why the offence was not committed becomes immaterial. Once these elements are established, it makes no difference whether non-commission was due to interruption, frustration or a change of mind.

Colvin has offered the following commentary and suggestions for reform:

> The denial of the defence is clearly correct where the only reason for abandoning the design was difficulty of execution. Even a "change of mind" should not confer

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153 Mewett & Manning ,*Criminal Law*, Butterworths, 1985 @ 188-189.

154 See pp. 22-23.

155 Stuart, op.cit.n.4 @ 584.

156 @ 3-4.

> entitlement to a defence if it involved merely a decision not to go through with the offence on that occasion, leaving open the question of future criminal activity. The claim of a defence would, however, seem to be strong where there was a full renunciation of the criminal purpose behind the inchoate offence. In the case of a conspiracy, there would presumably also have to be some effort to undo the impact of participation in a group enterprise. The U.S.A. *Model Penal Code,* contains a set of provisions establishing defences of renunciation to the various inchoate offences.[157] Such a development would be welcome in Canada, either by amendment to the *Criminal Code* or the development of common law defences under the authority of s.8(3) of the *Criminal Code* [158]

Note that the U.K. Draft Bill proposes enacting a provision for abandoned intention[159], as does the Australian Crimes Act (1990)[160], the New Zealand Crimes Bill (1989)[161] and the U.S.A. Model Penal Code[162]. The Law Reform Commission of Canada[163] has recommended that there be no explicit provision regarding abandonment for the offence of "furthering" but has not specifically addressed the issue of abandonment with respect to conspiracy.[164].

2. Impossibility

Impossibility is said to arise in three main forms: 1) impossibility due to inadequate means (i.e. an inadequate dose of poison fails to kill); 2) impossibility because there are no means by which the objective could be accomplished (i.e. "sleeping" victim is actually already dead); 3) legal impossibility (i.e. accused mistakenly believes his actions are illegal).[165] At common law, the defence was not available under the first form of impossibility, but was allowed for the third. The defence was sometimes allowed under the second form of impossibility, in cases where the actions of the accused did not constitute an offence.[166]

While section 24(1) excludes the defence of impossibility for the inchoate offence of attempts, there is no such exclusion in the *Criminal Code* with respect to conspiracy. Although the question has not been fully argued in any Canadian

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157 U.S.A. *Model Penal Code,* op.cit.n.141 @ ss.5.01(4), 5.02(3), and 5.03(6).

158 Colvin, op.cit.n.54@354.

159 U.K. Draft Bill, op.cit.n.19 @ clause 48(5).

160 Clause 7D(2)(b).

161 Clause 61(4).

162 Clause 5.03(6).

163 L.R.C.C. W.P. No. 45, op.cit.n.35 @ 35 and Report No. 31, op.cit.n.88 @ 48.

164 It was recommended that abandonment be dealt with as mitigating factor going to sentence. Much of the analysis offered by the Law Reform Commission of Canada in support of this recommendation is equally applicable to conspiracy. This analysis has been quoted on page 20 of Working Paper No. 9. (S. Samuels, G.D. McKinnon, *Parties,* Working Paper No. 9, Canadian Bar Association, National Criminal Justice Section, Committee on *Criminal Code* Reform, 1992).

165 Colvin, op. cit. n. 54 @356-7.

166 Ibid., i.e *D.P.P. v. Nock,* [1978] A.C. 979 (H.L.).-aquittal of accused on a charge of conspiring to produce cocaine, where substance did not actually contain cocaine

case[167], a limited form of the defence was held to be available, in *R. v. Chow Sik Wah and Quon Hong,* [1964] 1C.C.C. 313 (Ont C.A):

> In a prosecution for conspiracy a conviction may not be registered if the operation for the commission of which the accused allegedly conspired would, if accomplished, not have made the accused guilty of the substantive offence.[168]

The Criminal Attempts Act, 1981 (U.K.) c 4, s.5(1) now provides that any type of impossibility is no longer a bar to a conviction for conspiracy. The Australian Crimes Act (1990)[169] explicitly precludes a defence of impossibility. The New Zealand Crimes Bill (1989) also explicitly precludes a defence of impossibility, where at the time of the agreement the commission of the offence is impossible, but clause 61(3) qualifies this so that an agreement to commit an act which is mistakenly believed to be an offence will not constitute a conspiracy.[170] . The U.S.A. Model Penal Code[171] explicitly provides for such a defence where there has been an agreement to commit an act which is mistakenly believed to be an offence. In 1985, the Law Reform Commission of Canada[172] discussed whether impossibility should be available as a defence to secondary liability or for the defence of attempt. It was recommended that "impossibility of law and inherent impossibility of fact be a defence to attempt, helping, inciting and conspiring." In 1987 in Report No. 31, the Law Reform Commission of Canada did not provide for such a defence. See page 21-22 of Working Paper No.9.[173] for analysis offered in support of these recommendations.

G. Jurisdiction

Section 465(3) expressly provides that a conspiracy in Canada to commit an offence in a foreign country is an offence in Canada. In *Bolduc v. A.G. of Quebec et al,* [1982] 1 S.C.R. 573, it was held that the unlawful act of conspiracy must be an offence in the foreign country as well as in Canada, under s. 465(3) (*i.e.* the rule of "double criminality"). Furthermore, the court held that s.465(3) does not create an offence. Rather, it establishes a presumption of territorially which makes such a conspiracy punishable in Canada. .[174]

Section 465(4) codifies the common law[175], expressly providing that a conspiracy in a foreign country to commit an offence in Canada is an offence in Canada. It seems that the rule of "double criminality" is not applicable in such a case.[176] Section 465(5) has been explained as follows:

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167 Stuart, op.cit.n.4 @ 586, citing Goode, op.cit.n.72.

168 @ 315.

169 Clause 7D(4)(d).

170 Clause 61(2)

171 Clause 5.04(2).

172 L.R.C.C. W.P. No. 45, op.cit.n.35 @ 50.

173 Op.cit.n.164.

174 C.E.D. (Western) 3d ed. v.10, 1983, updated to 1991 -- citing *Bolduc v. A.G. of Quebec et al,* [1982] 1 S.C.R. 573,.

175 See *D.P.P. v. Doot et al,* [1973] A.C. 807 (H.L.).

176 *Ewaschuk,* op.cit.n.39 @ 19-17.

> A court having jurisdiction in respect of similar offences has jurisdiction to try a person *found* in the court's territorial division, where the person has conspired anywhere in Canada to commit an offence in a foreign country, or has conspired in a foreign country to commit an offence anywhere in Canada.[177]

H. Evidentiary considerations

There are numerous evidentiary rules, related to conspiracy, which may be found in the case law. An in depth examination of such rules is beyond the scope of this paper. However, it may be noted that the fact that direct evidence is seldom available in conspiracy trials and that most conspiracy trials often involve many accused, have led to a harsher application of existing rules of evidence[178]. An especially harsh and controversial rule is the co-conspirator's rule. The co-conspirator's exception to the hearsay rule allows acts and declarations of one conspirator (in furtherance of the common plan) to be given in evidence against all co-conspirators:

> Opinions differ as to what if anything should be done about the rule. It is at least clear that the present operation of the rule contributes in large measure to the complexities of a conspiracy trial.[179]

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177 Ibid.

178 Ibid. @ 569.

179 Ibid. @ 570.

III. CODIFICATION

A. Canada -- Draft Criminal Code

As discussed in Working Paper No. 9[180], chapter 4 of the Draft Criminal Code[181] sets out a new scheme which unifies the law of secondary liability with the law of inchoate offences. Within chapter 4, provisions respecting attempts, counselling and secondary liability are unified under the concept of "furthering". However, conspiracy is left for separate consideration. The rationale behind this approach may be found in the Law Reform Commission's earlier Working Paper No. 45[182] :

> Conspiracy has been left for separate consideration. For, unlike other topics in this paper [*i.e.* parties, attempts, counselling] conspiracy covers two quite different phenomenon. On the one hand, it applies to simple agreements between two or more people to commit offences. On the other hand, it also applies to (and is used by law enforcers to attack) organized crime where large-scale criminal enterprises are systematically conducted, where the exact contributions of those involved are often hard to pin down, and where the basic concept of agreement may, in fact play little part.
>
> With regard to its first application, which is to simple agreements to commit crimes, conspiracy is analogous to attempt, incitement and participation. Like those other categories, it poses questions as to rationale, *actus reus*, *mens rea* and penalty. For these reasons, it is appropriately discussed in this regard within this Paper.
>
> Conspiracy is unique with regard to its use against organized crime. It raises basic value questions as to collective responsibility, difficult practical questions about procedure and particularly evidence, and hard policy questions as to prosecution and penalty. These enormous questions cannot simply be discussed within a more general Paper such as the present one, but merit separate treatment. Accordingly, this Paper confines itself to looking at the first aspect of conspiracy -- agreements to commit offences.

The proposed conspiracy provision is contained in clause 4(5) which is as follows:

> 4(5). Conspiracy. Everyone is liable for conspiracy who agrees with another person to commit a crime and subject to half the penalty for it.

Commentary by L.R.C.C. accompanying clause 4(5) is as follows:

> The law on conspiracy is principally contained in s.423 [now s.465] of the Criminal Code. There are also three specific provisions: Section 46 (treason), and ss.60(3) [now s.59(3] (sedition) and 424(1) [now s.466(1)] (restraint of trade). There are also specific sections in other federal statutes. Basically conspiracy consists of any agreement between two or more persons to commit an offence. Clause 4(5) roughly retains but simplifies the law. It replaces the various provisions contained in [s.465] and other sections of the Criminal Code by one single rule. It restricts conspiracy to

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180 Op.cit.n.164 @ 23-27.

181 L.R.C.C. Report No. 31, op.cit.n.88.

182 W.P. No.45, op.cit.n.35 @ 43.

> agreements to commit crimes, on the ground that the Criminal Code should control the ambit of the crimes within it, that criminal law in this as in all other contexts should be, as far as possible, uniform across Canada and that if an act does not merit criminalization, that neither does an agreement to do it. A conspirator who goes further than agreement may become liable, of course, for committing or furthering, or for attempting or attempted furthering as the case may be.

Observations:

1. Conspiracy is defined. While the *actus reus* is explicitly specified (the act of agreement) , no *mens rea* requirement is specified under clause 4(5). However, it may be presumed that "purpose" is required as clause 2(4) contains a residual rule which provides:

> Where the definition of a crime does not explicitly specify the requisite level of culpability, it shall be interpreted as requiring purpose".

   Note that, reform proposals from the U.K., U.S.A, Australia and New Zealand all explicitly specify *mens rea* requirements (i.e. intention, purpose, recklessness) beyond "agreement".

2. The proposal that the penalty for conspiracy be half the penalty of the crime negates the necessity for the various penalty provisions in the *Criminal Code*. Use of the term "crimes" modifies ss.465(1)(c) and (d) (which provide that there can be a conspiracy to commit either an indictable offence or an offence punishable on summary conviction).

3. Conspiracy to commit murder under s.465(1)(a) and conspiracy to prosecute a person for an alleged offence under s.465(1)(b), as well as the specialized provisions found in ss. 46, 59(3) and 466(1)of the *Criminal Code* are absent from clause 4(5) of the Draft Code. However, most of these specific conspiracy provisions have been retained indirectly in modified form. This occurs because clause 4(5) provides that any person who agrees with another person to commit any crime listed in the Draft Code will be liable for conspiracy to commit that offence. For example, under clause 6(3) murder is an offence, so conspiracy to commit murder will also be an offence. Under clause 26(1) treason is an offence, and so may be seen to encompass (generally speaking) conspiracy to commit treason and seditious conspiracy (ss.46(2)(c)&(e) and s.46(4) and s. 59(3) of the *Criminal Code*.). Note that there is no provision in the Draft Code respecting conspiracy in restraint of trade, as found under s.466 of the *Criminal Code*. This may relate to the fact that:

> Conspiracy in restraint of trade is a common law offence. As [s.466] does not create an offence and with the repeal of s.465(2) (common law conspiracy), it is entirely possible that the offence of conspiracy in restraint of trade can no longer be charged nor punished and that resort must be had to the substantive offences in other parts of the Code, such as ss.422 to 425 or to the offences under Part IV of the competition act, R.S.C. 1985, c. C-34.[183]

4. Clauses 5(2)(c)(1) and 5(2)(d)(1) of the Draft Code establish rules respecting jurisdiction which reflect ss.465(3) to (6) of the *Criminal Code*. (There is no provision corresponding to s.465(7)):

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183 Martin's Criminal Code, 1992, Canadian Law Book Inc.

5(2) Jurisdiction Rules. Subject to diplomatic and other immunity under law, the Code applies to, and the courts have, jurisdiction over...

(c) conduct engaged in outside Canada which constitutes...
(i) a conspiracy to commit a crime in Canada,
where the conduct took place on the high seas or in a State where the crime in question is also a crime in that State.

(d) conduct engaged in inside Canada which constitutes...
(i) a conspiracy to commit a crime outside Canada
if the crime in question is a crime in Canada and in the place where the crime is to be committed.

Note that the rule respecting "double criminality"[184] has been codified

5. See Part IV of this paper regarding various other issues which have not been addressed under clause 4(5).

B. Other Anglo-American Jurisdictions

1. United Kingdom

Clause 48 of the U.K. Draft Bill[185] provides as follows:

(1) A person is guilty of conspiracy to commit an offence or offences if --
(a) he agrees with another or others that an act or acts shall be done which, if done, will involve the commission of the offence or offences by one or more of the parties to the agreement; and
(b) he and at least one other party to the agreement intend that the offence or offences shall be committed.

(2) For the purposes of subsection (1) an intention that an offence shall be committed is an intention with respect to all the elements of the offence (other than fault elements), except that recklessness with respect to a circumstance suffices where it suffices for the offence.
(3) Subject to section 52, "offence" in this section means any offence triable in England and Wales; and
(a) it extends to an offence of murder which would not be so triable; but
(b) it does not include a summary offence, not punishable with imprisonment, constituted by an act or acts agreed to be done in contemplation of a trade dispute.

(4) Where the purpose of an enactment creating an offence is the protection of a class of persons, no member of that class who is the intended victim of such an offence can be guilty of conspiracy to commit that offence.

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184 As discussed on pp.30-31

185 U.K. Draft Bill, op.cit.n.19.

(5) A conspiracy continues until the agreed act or acts is or are done, or until all or all save one of the parties to the agreement have abandoned the intention that such act or acts shall be done.

(6) A person may become a party to a continuing conspiracy by joining the agreement constituting the offence.

(7) It is not an offence under this section, or under any enactment referred to in section 51, to agree to procure, assist or encourage as an accessory the commission of an offence by a person who is not a party to such an agreement; but --

(a) a person may be guilty as an accessory to a conspiracy by others; and

(b) this subjection does not preclude a charge of conspiracy to incite (under section 47 or any other enactment) to commit an offence.

(8) A person may be convicted of conspiracy to commit an offence although --

(a) no other person has been or is charged with such conspiracy;

(b) the identity of any other party to the agreement is unknown;

(c) any other party appearing from the indictment to have been a party to the agreement has been or is acquitted of such conspiracy, unless in all the circumstances his conviction is inconsistent with the acquittal of the other;or

(d) the only other party to the agreement cannot be convicted of such conspiracy (for example, because he was acting under duress by threats (section 42), or he was a child under ten years of age (section 32(1)) or he is immune from prosecution).

Observations:

1. Subsections (1)(a) and (b) define conspiracy, unlike the *Criminal Code.*

2. Unlike the *Criminal Code* and the Draft Code, the *mens rea* requirement for conspiracy is explicitly specified under subsections (1)(a) and (b). Intention that the offence be committed is required. Note that recklessness with respect to a circumstance of the offence will suffice, where it suffices for the offence.

3. The substantive offences which may be the object of a conspiracy, under subsection (3) do not correspond exactly with those found in the *Criminal Code,* or proposed in the Draft Code.

4. Subsection (4) provides an exemption for victims. This reflects Canadian case law.[186]

5. Unlike the *Criminal Code,* subsection (5) provides a defence for abandoned intention.

6. Subsection (6) specifies how a continuing conspiracy may be joined. Although there is no parallel in the *Criminal Code,* this does reflect Canadian case law.

7. The spousal immunity rule has been explicitly rejected.[187]

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186 As discussed on pp.22-23 of this paper.

187 In the commentary accompanying clause 48 as quoted on p.22 of this paper.

8. It has been recommended that attempt to conspire be restored as an offence[188]

9. Subsection (8) provides for the imposition of individual liability. While there is no parallel in the *Criminal Code*, it does basically reflect Canadian case law.[189]

2. United States

Sections 5.03 to 5.05 of the U.S.A. Model Penal Code, [190] provide that:

> Section 5.03
> (1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
> (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
> (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.
>
> (2) Scope of Conspiratorial Relationship. If a person guilty of conspiracy, as defined by Subsection (1) of this Section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.
>
> (3) Conspiracy with Multiple Criminal Objectives. If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.
>
> (4) Joinder and Venue in Conspiracy Prosecutions.
>
> (a) Subject to the provisions of paragraph (b) of this Subsection, two or more persons charged with criminal conspiracy may be prosecuted jointly if:
> (i) they are charged with conspiring with one another; or
> (ii) the conspiracies alleged, whether they have the same or different parties, are so related that they constitute different aspects of a scheme of organized criminal conduct.
>
> (b) In any joint prosecution under paragraph (a) of this Subsection:
> (i) no defendant shall be charged with a conspiracy in any country [parish or district] other than one in which he entered into such conspiracy or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired; and
> (ii) neither the liability of any defendant nor the admissibility against him of evidence of acts or declarations of another shall be enlarged by such joinder; and

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188 See pp.26-27.

189 See pp.19-20.

190 Model Penal Code, op.cit.n.141.

(iii) the Court shall order a severance ... e a special verdict as to any defendant who so requests, if it deem... essary or appropriate to promote the fair determination of his gui... nce, and shall take any other proper measure to protect the fairness of the trial.

(5) Overt Act. No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

(6) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(7) Duration of Conspiracy. For purposes of Section 1.06(4):

(a) conspiracy is a continuing course of conduct that terminates when the crime or crimes that are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired; and
(b) such abandonment is presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation; and
(c) if an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein.

Section 5.04.
Incapacity, Irresponsibility or Immunity of Party to Solicitation of Conspiracy.

(1) Except as provided in Subsection (2) of this Section, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:

(a) he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic that is an element of such crime, if he believes that one of them does; or

(b) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.

(2) It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or an an accomplice under Section 2.06(5) or 2.06(6)(a) or (6)(b).

Section 5.05.
Grading of Criminal Attempt, Solicitation and Conspiracy; Mitigation in Cases of Lesser Danger; Multiple Convictions Barred.

(1) Grading. Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense that is attempted or solicited or is an object of the conspiracy. An attempt, solicitation or

conspiracy to commit a [capital crime or a] felony of the first degree is a felony of the second degree.

(2) Mitigation. If the particular conduct charged to constitute a criminal attempt, solicitation or conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section, the Court shall exercise its power under Section 6.12 to enter judgment and impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution.

(3) Multiple Convictions. A person may not be convicted of more than one offense defined by this Article for conduct designed to commit or to culminate in the commission of the same crime.

Observations:

1. Clause 5.03(1) explicitly defines conspiracy. The *mens rea* requirement is "purpose":

> The purpose requirement is meant to extend to result and conduct elements of the offense that is the object of the conspiracy, but whether or how far it extends to circumstance elements of the offense is meant to be left open to interpretation by the courts.[191]

2. Clause 5.03(2), provides a rule whereby a party to a conspiracy need not know the identities of all other conspirators. This reflects Canadian case law.[192]

3. Clause 5.03(3), respecting conspiracies with multiple criminal objectives has no counterpart in the *Criminal Code*, but is reflective of Canadian case law.[193]

5. Clause 5.03(6) is a variation of the defence of abandoned intention. Clause 5.03(7) supplements clause 5.03(6) and clarifies when a conspiracy may terminate.

6. Clause 5.04(1)(b) provides for individual liability and is reflective of Canadian case law[194], although there is no such provision in the *Criminal Code.* There does not appear to be a precise counterpart in Canadian case law to clause 5.04(1)(a).

7. Clause 5.04(2) provides a defence for one form of impossibility.

4. There are no counterparts to subsections (4) and (5) of clause 5.03 in the *Criminal Code.*

8. Subsections 5.05(1) and (2), respecting sanctions, differ from both the *Criminal Code* and the Draft Code.

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191 See commentary accompanying the USA model penal code, op. cit. n.141 @79

192 See footnotes 102 and 103 and accompanying text on pp.19-20.

193 *Papalia v. R.: R. v. Cotroni, supra,* op. cit. n.48.

194 See footnotes 100-103 and accompanying text.

9. There is no counterpart in the *Criminal Code* for subsection 5.05(3), which provides that a person may not be convicted of more than one inchoate offense for conduct designed to culminate in the commission of the same crime. Note that Section 1.07(1)(b) prohibits conviction of both the inchoate offense and the substantive offense that is its object.

3. Australia

Clauses 7D to 7I of the Australian Crimes Act (1990) provide as follows:

Conspiracy-7D

(1) Where:

(a) a person agrees with another person or other persons (whether or not the other person or one of the other persons is the first-mentioned person's spouse) that an act be done or omitted to be done; and

(b) the doing of the act or the omission to do the act in accordance with the agreement would involve the commission of an offence against a law of the Commonwealth by any one or more of the parties to the agreement; and

(c) the person and:

(i) the other person; or

(ii) at least one of the other persons;as the case may be, intends that the act be done or the omission be made; the person is guilty of conspiracy to commit the offence.

(2) A conspiracy continues until:

(a) the agreed act or omission is done or made; or

(b) all, or all except one, of the parties to the agreement have abandoned the intention to continue with the agreement.

(3) A person may become a party to a continuing conspiracy by joining the agreement.

(4) A person may be convicted of conspiracy to commit an offence against a law of the Commonwealth even though:

(a) another party to the relevant agreement cannot be convicted of the offence or of conspiracy to commit the offence; or

(b) no other person is charged with conspiracy to commit the offence; or

(c) the identify of any other party to the agreement is unknown; or

(d) at the time of the agreement or at a time while the agreement continues, the commission of the offence was impossible; or

(e) another person who appears to have been a party to the agreement has been acquitted of conspiracy to commit the offence, unless in all the circumstances the conviction of the person should be inconsistent with the acquittal of the other person.

Conspiracy by bodies corporate-7E.

(1) Subject to subsection(2), a body corporate may be convicted of conspiracy to commit an offence.

(2) A conspiracy to commit an offence cannot exist between:

(a) a body corporate and:

(i) a director of the body corporate; or

(ii) another person having responsibility for the management or control of the body corporate; or

(b a body corporate and a wholly owned subsidiary of the body corporate.

Powers of court-7F.
Where a person is charged with conspiracy to commit an offence, the court may, if it considers that the interests of justice so require, discharge the jury or take such other steps as are necessary to enable the presentment of an indictment or the laying of an information against the person for the offence itself.

Other enactments-7G.
The conviction of a person under section 7D is not precluded by the fact that the conduct in question constitutes an offence both under that section and under another law in force in Australia, but the person is not liable to be convicted both of an offence against that section and an offence against that other law in respect of the same conduct.

Procedures-7H.
The same procedures and limitations (if any) apply in relation to a prosecution for conspiracy to commit an offence against a law of the Commonwealth as would apply in relation to a prosecution for the offence itself.

Penalty for conspiracy-7I.
The penalty for conspiracy to commit an offence against a law of the Commonwealth is, unless otherwise provided in that law, the same as the penalty for the offence itself.

Observations:

1. Clause 7D(1) defines conspiracy.
2. Clause 7D(1)(a) abolishes the spouse's exception.
3. Clause 7D(1)(a) explicitly provides for "omissions".
4. The scope of conspiracy under clause 7D(1)(b) is limited to "offences against a law of the Commonwealth".
5. The *mens rea* of conspiracy is explicitly specified under clause 7D(1)(c). Intention that the agreed upon act be done is required.
6. Clause 7D(2) provides a defence of abandoned intention and clarifies when a conspiracy terminates.
7. Clause 7D(3) specifies how a conspirator joins a continuing conspiracy.
8. Clause 7D(4) provides rules respecting the imposition of individual liability.
9. Clause 7D(4)(d) provides that impossibility is not a defence.
10. Clause 7E provides rules respecting corporate conspiracies.
11. There are no counterparts for clauses 7F, 7G, and 7H in the *Criminal Code*.
12. The penalty provision in clause 7I differs from both the *Criminal Code* and the Draft Code.

4. New Zealand

Clauses 61 to 64 of the New Zealand Crimes Bill (1989) provide that:

61. Conspiracy -

(1) A person conspires to commit an offence where --

(a) That person agrees with any other person that an act will be done or omitted to be done, and that act or omission, if it occurs, will constitute that offence; and

(b) That person and at least one other party to the agreement intend that the act will be done or omitted to be done.

(2) Subject to subsection (3) of this section, a person may conspire to commit an offence even though, at the time of the agreement, the commission of the offence is impossible.

(3) A person may not be convicted of conspiracy to commit an offence in respect of any act or omission that, through a mistake of law, he or she wrongly believed to constitute an offence.

(4) Spouses may conspire with each other, either with or without others.

(5) A conspiracy continues until the agreement is carried out, or until all of the parties, or all of the parties except one, have abandoned the intention that it be carried out.

62. Conviction for conspiracy

(1) A person may be convicted of conspiring to commit an offence even though --

(a) No other person has been charged with or convicted of conspiracy with him or her; or

(b) The identity of any other party to the agreement is unknown; or

(c) Any other person alleged to have been a party to the agreement has been or is acquitted unless his or her conviction would be inconsistent with that acquittal.

(2) A person who conspires to commit an offence may be convicted of conspiring to commit any other offence that is committed in carrying out the agreement if he or she knows that the commission of that other offence is a probable consequence of the carrying out of the agreement.

(3) A person may not be convicted of conspiring to commit an offence if, as a matter of law, that person is not capable of being a party to the offence.

63. Conspiracy to commit an offence outside New Zealand --

1) A person may be convicted of conspiring to commit an offence, even though the act or omission that would constitute the offence is committed outside New Zealand, if the act or omission to which the parties agreed would have constituted an offence if it had occurred in New Zealand.

(2) This section does not apply in respect of an act or omission that is not an offence in the place where it occurs.

64. Punishment for conspiracy

(1) Every person who conspires to commit an offence is liable, --

(a) In the case of an offence punishable by imprisonment for more than 7 years, to imprisonment for 7 years; or

(b) In any other case, to imprisonment for the maximum term for the offence.

(2) This section does not apply to any offence in respect of which this Act or any other Act makes express provision for the punishment of those who conspire to commit the offence.

Observations:

1. Clause 61(1) defines conspiracy. Agreements may be in respect of "omissions" as well as acts. Intention that the act be done is the specified level of *mens rea*.

2. A defence of impossibility is specifically precluded in clause 61(2). However, clause 62(3) qualifies this (i.e. an agreement to commit an act which is mistakenly believed to be an offence will not constitute a conspiracy). This is similar to the approach taken in the U.S.A. Model Penal Code, clause 5.04(2).

3. Clause 61(4) explicitly rejects the spousal immunity rule.

4. Clause 61(5) provides a defence of abandoned intention.

5. Clause 62(1) provides for imposition of individual liability.

6. Clause 63(1) is similar to s.465(3) of the *Criminal Code*. Clause 63(2) reflects the "double criminality" rule found in Canadian case law [195] and in the Draft Code.

7. The sanctions provided in clause 64 differ from both the *Criminal Code* and the Draft Code.

8. There is no counterpart in the *Criminal Code* for clause 64(2).

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195 See p.29.

IV. ISSUES FOR CONSIDERATION

A. Should the offence of conspiracy be retained? [pp.8-9]

B. Should all or some of the recommendations proposed by the Law Reform Commission be adopted? [pp.39-34]

C. Whether or not the recommendations are adopted, the following issues should be considered:

1. Should "conspiracy" be explicitly defined (all jurisdictions have proposed definitions of conspiracy) ? [pp.17-19]

2. *Should* the *actus reus* of conspiracy be explicitly articulated (the act of "agreement") within such a definition ? Should there be provisions respecting tacit agreement and passive acquiescence?[pp.17-19]

3. Should there be a rule respecting whether a commercial agreement to buy or sell an illegal service or commodity, is an appropriate basis to ground a charge of conspiracy? [pp.12-14]

4. Should the *mens rea* of conspiracy be explicitly articulated within such a definition? As discussed, reform proposals all specify *mens rea* requirements (i.e. intention, purpose, recklessness) beyond "agreement". [pp.17-19]

5. If the *mens rea* of conspiracy should be explicitly articulated, what level should be required? Should there be a provision respecting the holding in *R. v. Lessard, supra*[196] , to the effect that "recklessness is not sufficient *mens rea* to establish an intent to agree and that recklessness is sufficient only in respect of the method of execution of the agreement." (Note clause 48(2) of the U.K, Draft Bill, which provides that recklessness with respect to a circumstance of the offence will suffice, where it suffices for the offence). Is it necessary to clarify whether *mens rea* is required to convict a person of conspiracy to commit an absolute or strict liability offence or one which extends to negligence? [pp.14-17]

6. Is it necessary to explicitly state that conspirators must have knowledge of the general nature of the common scheme, but not of precise details, nor of the identities of other parties to the common scheme? [p.19]

7. Is it necessary to codify rules respecting "wheels", "chains" and "pyramids" of conspiracy? [pp.20-21]

8. Is it necessary to specify how an ongoing scheme may or may not be modified (i.e. where a conspiracy is an ongoing scheme, changes in methods of operation, victims or members will not bring it to an end [p.11-12]

196 (1982), 10 C.C.C. (3d) 62 (Que.C.A).

9. Should there be a rule respecting conspiracies with multiple criminal objectives (i.e. that a conspiracy may consist of many offences within one overall or continuous agreement)? [p.12, p.36-Model Penal Code clause 5.03(3)]

10. Should there be a provision respecting the defence of abandonment? [p.28-29]

11. Should there be a provision respecting the defence of impossibility? [pp.29-30]

12. Should the spousal immunity rule be codified or modified (*i.e.* to include common law spouses) or abolished (as recommended the United Kingdom)? [pp.21-22]

13. Should there be a rule, similar to clause 48(4) of the U.K. Draft Bill, to the effect that where the purpose of an enactment creating an offence is the protection of a class of persons, no member of that class who is the intended victim of such an offence can be guilty of conspiracy to commit that offence? [pp.22-23, p.35]

14. Is it necessary to codify or modify the holding in *R. v. O'Brien, supra,*[197] (that neither party can be convicted of conspiracy where one of the parties was only pretending to agree)? [p.23]

15. Should there be a provision to the effect that a person who wholly controls a corporation cannot be convicted of conspiring with himself? [pp.23-24, p.39-Australian Crimes Act,7E(2)(b)]

16. Is it necessary to codify a rule respecting individual liability? Such a rule would provide that a person may be convicted of conspiracy whether or not another person can be charged or convicted of the substantive offence or of the conspiracy (i.e. because that other person is unknown, has a defence, has immunity, is under 12 years of age, is defined as a victim, etc.)
[pp.19-20, U.K. Draft Bill-clause 48(8), Australian Crimes Act-clause 7D(4), New Zealand Crimes Bill, clause 62(1)]

17. Should the uncertainty with respect to the scope of conspiracy under s.465(1)(d) be clarified (*i.e.* whether s.465(1)(d) includes conspiracies to commit provincial offences)? Should s.465 be restricted to conspiracies to commit "crimes" as proposed by the Law Reform Commission of Canada? [pp.24-25, p.33-#2]

18. Should there be a rule relating to merger (*i.e.* whether an accused can be convicted of both conspiracy and the completed substantive offence)? [pp.25-26]

19. Should there be provisions respecting attempted conspiracy or conspiracy to attempt? [pp26-27]

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197 [1954] S.C.R. 666.

20. Should provisions respecting jurisdiction (ss..465(3) to (7))be modified to incorporate the "double criminality" rule? [pp30-31]

21. Is it necessary to retain s.465(1)(a) (conspiracy to commit murder) or s.465(1)(b) (conspiracy to prosecute a person for an alleged offence) or the specialized provisions of the *Criminal Code* ? [pp.31, 33-#3]

22. Are the penalty provisions in the *Criminal Code* adequate? Should the Law Reform Commission's proposal that the penalty for conspiracy be half that of the offence be adopted? [pp.24-25, p.32-#2]

23. Should there be a provision, such as is found in the New Zealand Crimes Bill, clause 62(2), which states that "a person who conspires to commit an offence may be convicted of conspiring to commit any other offence that is committed in carrying out the agreement if he or she knows that the commission of that other offence is a probable consequence of the carrying out of the agreement"?[p.41]