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Proposals to amend the Criminal Code
June 28, 1993
Clause 9, s.24.2, Conspiracy.

The Sub-Committee Report contained little on the offence of conspiracy and the Minister's proposals on the topic are, themselves, quite short. What is discussed here, therefore, is not only what is in the proposals, but also what is not.

1. Definition.

There is not a great deal of disagreement in opinion on the essential nature of a criminal conspiracy, but actually defining it may be rather more of a problem. It is common ground that there must be an agreement between one person and one or more other persons; that agreement must be that an offence be committed - not necessarily by both or all of the parties to the agreement; a contractual consensus ad idem as to all the details of the offence is not required so long as there is agreement as to the offence that is to be committed.

This is now contained in the present Criminal Code (s. 465) by the simple statement "a conspiracy to commit an offence". It is proposed to define that further as "an agreement that a common intention to commit the offence be carried out". This seems to be an accurate expression of the existing law.

However, the proposals would add a second definition, viz., an agreement

that, in furtherance of a common intention, whether or not the common intention is to commit an offence, one or more acts be done or omissions be made, by one of them or by any other person, that will involve the commission of the offence.

I find that convoluted and entirely unclear. Presumably, it refers to the situation where, if A

and B agree that something shall be done (which may or may not be a criminal offence) and agree that in the process, one or other of them (or a third person) shall do something "involving" (whatever that might mean) the commission of an offence, then they conspire to commit that offence. However, if either A or B is the one to do the act in question, it seems to me that the provision is quite unnecessary since that situation is already covered in s. 24.2 (1)(a) -- A and B agree that the offence "involved" is to be committed.

If it is C who is to do the act, then I have reservations. If A and B agree to buy cocaine from C, C is not, at that point a member of that conspiracy. But A and B know that, in order to purchase cocaine from C, C will have to sell it to them and the proposals seem to state that in conspiring to buy cocaine from C, A and B are guilty of conspiring to traffic in cocaine. This may be what is intended but I fail to see the logic behind the proposal. If, instead of cocaine, we choose the example of a controlled drug, the possession or purchase of which is not an offence, but the selling of which is, should A and B really be guilty of conspiring to sell a controlled drug? Perhaps, but it seems inconsistent with a number of decided cases such as Poitras and Madigan and seems rather to defeat the policy behind the Food and Drugs Act which has decided that buying or possessing merely a controlled drug should not be a criminal offence. What policy issue dictates that just because two people decide to buy the controlled drug, they are guilty of an offence when one person would not be?

In my view, s. 24.2 (1)(b) would be better deleted.

2. Spouses

Both the Sub-Committee and the proposals would repeal the common-law rule applied in Kowbel that spouses cannot conspire with only each other. In my view the rule is of doubtful authenticity anyway, but I see no modern justification for it, and I agree with the proposal.

3. The Offence

The CBA Task Force recommended that the offences that are the objectives of a criminal conspiracy should be limited to indictable offences, basically on the ground that a sledge-hammer approach to summary conviction offences is unwarranted. One can, however, think of several offences -- particularly under provisions relating to health, the environment, the economy and so on -- where a conspiracy charge may be the only practical way of proceeding. It would be a mistake to limit conspiracy to indictable offence, lest, in so doing, one excludes the possibility of prosecution in perfectly proper cases.

4. Abandonment.

The CBA Task Force had the extraordinary proposal of establishing the defence of abandonment in cases where the accused/conspirator has abandoned the conspiracy in a timely fashion before the projected offence has taken place. It is difficult to follow the logic of such a recommendation. The offence is committed at the moment the agreement has been entered into. What happens after that cannot alter the fact that an offence has been committed. In fact, there can be no such thing as an abandonment of a conspiracy -- only an abandonment of the intention to go through with it, but this cannot undo the intention that was there at the

time of the agreement. This may, of course, affect the punishment imposed, depending of the circumstances of the abandonment which may range from true contrition to being prevented by police interference. In my view, the proposals are correct in not enacting such a defence.

5. Impossibility.

I very much doubt the wisdom of enacting s.24.3 which applies to attempts and counselling as well as to conspiracy, although I have no argument with the thought behind it. It is just that it only adds to the confusion of what I had hoped was a dead and forgotten issue. There must, of course, be an agreement to commit an offence, and if what is agreed to is not an offence, then there can be no criminal conspiracy. But it does not matter in the slightest whether that offence can or cannot be committed, so long as what is agreed should be done is an offence. S, 24.3 resurrects the quite idiotic distinction between impossibility of fact and impossibility of law -- a distinction that would be better consigned to the oblivion it deserves.

6. Merger.

The proposals do not address the issue of merger or the issue of the prosecution for both the substantive offence and for the conspiracy where the conspiracy is actually carried out to fruition. The common law appears to be that whereas with attempts and counselling, those offences merge with the completed offence, conspiracy does not. The reason given (which is, I suppose, logically correct) is that with attempts and counselling the facts

necessary to support such offences, standing alone, are precisely the facts (or part of them) necessary to support a conviction for the full offence (either as the person actually committing it, or as the person counselling its commission). The facts that support a conspiracy can, however, stand alone, and remain separate even when the objective is fulfilled. Thus they do not merge in the completed offence.

It may be that this is a matter better left for any procedural reforms that are contemplated. However, there may well be Charter issues involved which have yet to be considered by the courts. The cases that sanction the practice of prosecuting for both the substantive offence and for the conspiracy (Sheppe , S.C.C. 1980), Kravenia, S.C.C. 1955, and Koury, S.C.C. 1964) all predate the Charter and it may be that arguments could be raised under s. 7 or s. 11(d) or (h) against the practice. On the other hand, perhaps it is perfectly acceptable that a person who has conspired and also committed the offence should, in some cases, face prosecution for both. I have no strong opinion one way or the other, and perhaps it is best left to the trial court to decide in specific cases if it results in an accused person's trial being unfair.

7. Accumulation of offences.

Since counselling and attempts exist as separate offences, the question should be raised as to whether a person can (or should) be guilty of some form of inchoate conspiracy offence such as:-

conspiring to counsel,
attempting to conspire, or
counselling to conspire.

In Dungey (1980), the Ontario Court of Appeal seems to have decided that an inchoate offence upon an inchoate offence is not possible, on the ground that it would extend criminal liability to a point where it would be too remote from the commission of the complete offence, which, it decided, was, on general policy grounds, undesirable. This has not yet been considered by the S.C.C. but it seems to me to state the issue far too broadly. If A and B agree that B will counsel C to commit, say, armed robbery, I fail to see any policy ground that would require one to say that A and B are not guilty of a criminal conspiracy. If A advises B to enter into an agreement with C to commit armed robbery, again I do not see any policy reason why A should not be guilty of counselling B to enter into a criminal conspiracy. On the other hand, it is, except possibly in one circumstance, discussed below, rather difficult to imagine an attempt to conspire, since any necessary step in the attempted conspiracy would almost certainly amount to counselling to commit an offence.

I am not sure if it is better to leave these problem to be settled by the Courts when there will be an occasion to consider the correctness of the decision in Dungey, or whether, if it thought desirable, there should be some provision expressly stating that a person may be convicted of at least counselling to conspire and conspiring to counsel.

8. Liability and conviction of involved parties.

Section 23.1 deal with this issue but only in relation to aiding, counselling and being an accessory after the fact. (This is beyond the scope of this paper, but s. 23.1 is quite wrong insofar as it deals with accessories after the fact. It is true that an accessory may be

prosecuted and convicted even though the principal has not been or cannot be charged, but it is not the law that an accessory can be prosecuted even though the principal has been acquitted, since there is then no offence to which he can be an accessory. Perhaps the change was deliberate, but it is difficult to see the reason for it).

In conspiracies, the law is not entirely clear. It does seem clear that if A, B and C are charged with conspiracy and C is acquitted then A and B may still be convicted; if it is alleged that A and B conspired but B is not prosecuted, it is clear that A may still be convicted. But if the allegation is that only A and B conspired, and B is acquitted, it would seem to depend on whether it is a joint trial or whether there are separate trials. If the former, then what authority there is seems to indicate the A must be acquitted, but if it is the latter then A may still be convicted, the reason being that in the former case, the facts found bind in regard to both A and B and B having been acquitted, it is res judicata that there is no conspiracy, but in the latter case, facts found in the separate trial of B are not res judicata vis a vis A, and there is thus no finding binding in his trial that there is no conspiracy. Again, I accept the logic, but I am not sure of the fairness in the result. But perhaps this, too, is something that should be addressed in any procedural revisions.

Nor am I quite sure what the position is if A and B conspire and A is an adult but B is, say, an 11 year old boy. B cannot be guilty of any offence, but I assume, without any authority, that this does not mean that he cannot enter into an agreement, in the criminal law context, and that A could be guilty of conspiring.

The case where B is, unknown to A, an undercover police officer, or someone else who has no intention of carrying out the agreement, is rather different. O'Brien (S.C.C.

1954) seems to be correct in holding, by a majority, that A cannot in that case be guilty of conspiracy since there is no agreement, the other person only pretending to agree. Whether that is a desirable result is not so clear. Or perhaps this is the one case where A ought to be guilty of an attempt to conspire. I think my preferred view would be that A should not be liable for any criminal offence but I am not entirely sure.

9. Punishment.

I do not really see anything wrong with the present scheme under the existing Code. In general, the severity of the maximum penalty for conspiring should relate to what the objectives of the conspiracy are. A conspiracy to murder, which would of necessity amount to first degree murder, seems properly fixed at life imprisonment, while conspiracy to commit any other offence carrying with it the potential of life imprisonment should be severe. In the case of any other indictable offence, one half of the maximum penalty for that offence seems about right. If conspiracy to commit a summary conviction offence is thought worth prosecuting, then presumably the penalty for any other summary offence is appropriate.

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