CONSPIRACY: THE LAW'S PRE-EMPTIVE STRIKE

by

Brian A. Grosman, Q.C.

The crime of conspiracy is the creation of the common law and is peculiar to it. Its essence consists of an agreement between two or more persons to do an unlawful act or a lawful act by unlawful means. In Canada, this common law crime has been codified in s. 423 (2) as follows:

> "(2) Every one who conspires with any one
> (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."[1]

The offence is complete as soon as the agreement is made. This is so because the law recognizes that once people go so far as to agree to act unlawfully there is a serious risk that they will carry out their agreement. The agreement is in itself made an offence in order to preserve the Queen's peace by preventing the offence which the conspirators have agreed to perpetrate before it reaches even the stage of an attempt. This has been the basis of the law of conspiracy since the earliest times. In 1610 an English Court commented upon the usefulness of such charges.

> ". . . the usual commission of oyer and terminer gives power to the commissioners to enquire, &c. de omnibus coadunationibus, confoederationibus, et falsis alligantiis . . . in these cases before the unlawful act executed the law punishes the coadunation, confederacy or false alliance, to the end to prevent the unlawful act . . . and in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it."[2]

A party to a conspiracy must intend to participate in the common purpose with a view to achieving its objective. For the most part, in order to establish or prove the offence of conspiracy, the agreement is proven by the fact that certain overt acts took place. That may not always be necessary in order to prove the offence of conspiracy today. Sophisticated electronic surveillance devices make proof of the agreement no longer dependent upon the establishment of subsequent confirming acts. Evidence by way of tape recordings may be sufficient proof to establish the agreement without any reference to subsequent activities.

There is a further question of who is implicated as a co-conspirator and what evidence is required in order to establish such implication. The Attorney General in arguing the case of *R* v. *Stone* in England said:

> ". . . as the overt act charged was conspiracy of which proof was before the Court, the act of each conspirator in the prosecution of such conspiracy was evidence against all."[3]

This is so even if the conspirators are not in direct communication with each other and the agreement is made over a period of time and the conspirators are geographically dispersed. Further, it was more recently established in the English House of Lords in the case of *D.P.P.* v. *Doot et al* that:

> "An agreement made outside the jurisdiction of the English Courts to commit an unlawful act within the jurisdiction was a conspiracy which could be tried in England, if the agreement was subsequently performed, wholly or in part, in England."[4]

In order to constitute the offence it is only necessary to establish that the agreement involved was to effect an "unlawful purpose", not necessarily an "illegal purpose", thereby making it arguable that the unlawful purpose may be beyond that prohibited by a federal, provincial or municipal enactment. The ambit of such a power may create certain mischief, as "illegal" and "unlawful" are not viewed by the Courts as synonymous.

It was in the famous case of *Shaw* v. *D.P.P.*[5] that this extended use of the criminal conspiracy offence was taken to mean more than "illegal purpose" to distinguish "unlawful purpose" as quite a different type of activity. "Unlawful" seemed, in this case, to be equated with what the Court judged to be wrongful and yet not necessarily illegal. The House of Lords in *Shaw* recognized conspiracy to corrupt public morals, an offence unknown to the law.

In *Shaw* the accused published a booklet which advertised the names, addresses, photographs and specialties of prostitutes, who paid for the advertisements. He was charged that he had conspired with the advertisers and other persons by means of the "ladies directory" to debauch and corrupt the morals of youth and other subjects of the Queen. The accused was convicted of a conspiracy to commit a wrongful act calculated to cause public injury. The act itself was not illegal but rather seen by the Court as wicked, or wrongful and, as such, deserving of punishment. The concept runs directly contrary to the principles of criminal law which assert that before a man can be convicted of a criminal offence he must be proven to have offended against a specific offence and proof of that must be established by the prosecution beyond a reasonable doubt. The argument goes, how else is a man to protect himself if the Court can create a new wrong quite outside the known criminal law provisions. Nonetheless, the decision in *Shaw* has been followed by subsequent cases.[6]

Thus, the concept of common law conspiracy goes beyond the law's reluctance to limit the application of criminal law to precise acts of commission but rather raises instead a broad and ill-defined net with which to snare those who agree together to commit activities that a Court is prepared to rule are unlawful. The obvious danger with this approach is that a Court may place a rather arbitrary definition upon what constitutes unlawfulness for the purpose of a conviction of common law conspiracy. Lord Diplock has warned that common law conspiracy should not be used to create new offences not previously recognized by the criminal law.[7] The Courts generally have not supported such a limitation.[8]

If one keeps in mind the ambit of the offence of common law criminal

conspiracy, one can imagine its wide-ranging application and potential when it comes to controlling political crime, disorder and terrorist activities, otherwise ill-defined by law. It has been said of the offence that:

> "Vague in definition and unpredictable in application, the offence is uniquely adaptable to the turmoil of what is, or what is perceived to be, a threat to existing order or stability. When such a threat . . . real or imagined . . . is recognized, it is usually seen as arising from the pre-concert of several persons. The ingredients of conspiracy are readily inferred and it remains only to find an appropriate label by which it may be characterized as unlawful. Sedition and treason are the principal political conspiracies, though the open-mindedness of common law conspiracy suggests endless possibilities in rendering a combination unlawful."[9]

In times of political crisis or turmoil, social and political values are in direct conflict and those wielding state and judicial power are in a position to define acts of confrontation and dissent as unlawful if they are perceived as directly threatening political and social stability. In this sense crisis creates law and the offence of criminal conspiracy constitutes its catalyst.

A conspiratorial theory applied to what are seen as the seeds of political disorder is natural to those concerned and in power. Criminal conspiracy is seen as a useful tool to strike swiftly at those viewed as co-conspirators in an attempt to isolate them from potential mass support. Conspiracy charges pre-empt further disruptive developments and subjects those charged to the control of the Courts at the earliest possible stage of a potential disruption.

A charge of conspiracy to commit sedition or treason is so broadly based that it provides a useful legal construct aimed at early containment. A conspiracy to commit sedition, for example, is founded upon an agreement between two or more persons to carry out a seditious intent as set out in s. 60 of the Criminal Code.

"60 (1) Seditious words are words that express a seditious intention.

(2) A seditious libel is a libel that expresses a seditious intention;

(3) A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention;

(4) Without limiting the generality of the meaning of the expression 'seditious intention', every one shall be presumed to have a seditious intention who

(a) teaches or advocates, or

(b) publishes or circulates any writing that advocates, the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada. 1953-54, c. 51, s. 60".[10]

One of the most notorious applications of the vague definition of sedition combined with the open ended possibilities of the conspiracy offence took place

during the Winnipeg general strike. Many of those in power felt, as did the Manitoba Free Press at the time, that the strike was the result of a conspiracy of communist elements and the first stage of an imported Bolshevik revolution planned for the prairies. The developments surrounding the strike have been well documented elsewhere.[11] It was clear there was near hysteria in the reaction of press and government to what was seen as a real threat to Canadian social and political values.

Eight men were charged with seditious conspiracy and seven were convicted of the offence. The law was used to limit threatening activities so that the Courts could immediately exert judicial control over all those alleged to be co-conspirators. The evidence of one conspirator can be used against all the others charged. Similar proceedings were taken in 1931 against eight leaders of the Communist Party of Canada.

At about the same time, charges were laid against the Sons of Freedom Sect of the Doukhobors. As late as the 1950's and 60's charges of seditious conspiracy were laid against some of the Doukhobor sects' leadership. Twenty Doukhobors were convicted of conspiracy to commit arson and others of the sect were charged with conspiracy to intimidate the Parliament of Canada and the British Columbia legislature.

During the Quebec crisis, in the fall of 1970, five men were charged that they had conspired to advocate violence contrary to s. 62 (c) of the Criminal Code. The proof of an agreement to advocate violence is sufficient to establish such an offence even if violence never occurred and there was no evidence of the accuseds' participation. Mr. Justice Ouimet granted a defence motion to quash the charge on the basis that it was too vague. The problem with this particular charge was that the unlawful activities took place over a lengthy period of time and the particulars relating to the nature of the agreement were not available. On the other hand, Vallieres, Larue-Langlois and Gagnon, were successfully charged with seditious conspiracy to overthrow the government by force or threats of force but were acquitted on these charges after a lengthy trial.

Criminal conspiracy charges have been used in times of social unrest as anticipatory self-defence on the part of government authorities who feel there is a real danger threatening institutional and social stability. However, the open-ended nature of the offence of common law conspiracy may inhibit the Courts from convicting those charged with the offence unless allegations are specific and the evidence persuasive. Nonetheless, the development of the law in this area will encourage authorities to use criminal conspiracy charges as a social defence provided by law in an attempt to contain political unrest before it escalates into violent confrontation.

Footnotes

1. Criminal Code R.S.C. (1970), c. C-34.
2. The Poulterer's Case (1610) 9 Co. Rep. at 56b, 57a.
3. (1796) 6 Term Rep. 527 and 528.
4. [1973] 1 All E.R. 940.

5. [1962] A.C. 220.
6. *Knuller Publishing, Printing and Promotions Limited et al* v. *D.P.P.*, [1972] 2 All E.R. 898 (H.L.).
7. [1972] A.C. 60 at 79 (H.L.).
8. [1972] 3 All E.R. 999 at 1004.
9. R.P. MacKinnon, *Criminal Conspiracy in Canada*, LL.M. thesis, University of Saskatchewan, (1975), p. 59.
10. Criminal Code R.S.C. (1970), c. C.-34.
11. D.C. Masters, *The Winnipeg General Strike* (Toronto, 1950).

COUNTERREVOLUTIONARY STRATEGY IN PLURAL SOCIETIES: SOUTH AFRICA'S "RACIALLY PRISMATIC" APPROACH

by

Calvin A. Woodward

Introduction

Revolutions in plural societies are inevitably affected by the domestic configuration and dynamics of communal relations. Thus in the Russian Revolution, the "national question" influenced Bolshevik strategy before and after the overthrow of the Czarist regime: in China, regional and ethnic-related proclivities have historically made it difficult for both revolutionary movements and incumbents to mobilize national political power. In a large number of emergent states where revolution occurred in the form of a protracted internal war, insurgents were variously helped and frustrated by tensions and divisions between ethnic groups coexistent within the revolutionary arena. Similar dynamics were involved in the majority of contemporary colonialist revolutions. Generally, these transfers of power were preceded by a period during which an imperial force held sway by employing the well-known strategy of "divide and rule"; what independence movements had primarily to achieve before they could effectively confront the colonial power was the construction of an alliance between those ethnic groups which had been politically divided.

These dialectics of revolution in communally plural societies are naturally complex; also, they may be mainly case-specific. However, from the vantage of counterrevolutionary strategy, the central task is nearly always to prevent the forces of revolution from securing and coordinating a substantial inter-ethnic opposition to the incumbent. Traditionally, two techniques have been used in this regard. One has involved the purposeful application of reform to develop a common base of interests on the part of an incumbent elite and the vanguards of