Conspiracy and Sedition as Canadian Political Crimes

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> To my mind that old dream of the ancient prophet comes back; of the image with the head of gold, with the shoulders and arms and torso of silver, with the thighs and legs of brass, and the feet of clay. ...
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> *William A. Pritchard's Address to the Jury in R. v. Armstrong et al.*[1]

Like the image of the ancient prophet, the conspiracy offence has an imposing stature which can easily obscure a foundation of clay. 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 preconcert 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-endedness of common law conspiracy suggests endless possibilities in rendering a combination unlawful.

Although the terms "political crime" and "political trial" can be overworked in criticisms of our legal process there is a sense in which they are justly descriptive of some proceedings. A trial tends to be political when those in government feel directly threatened by the actions of the defendants.[2] It is true that all criminal offences are considered crimes against the state and, therefore, against all the people. In the vast majority of cases, however, the administration of justice enjoys detachment from the alleged social harm. Normally, we do not worry about a petty thief or a safe-cracker and as long as stealing and safe-cracking do not become endemic, we regard them

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1 *William A. Pritchard's Address to the Jury in The Crown* v. *Armstrong, Heaps, Bray, Ivens, Johns, Pritchard, and Queen* (1920), 4.

2 "[P]erception of a direct threat to established political power is a major difference between political trials and other trials." Becker (ed.), *Political Trials* (1971), xi.

more as nuisances than as threats. But in times of political turmoil or crisis, the distinction between "legal" and "political" issues becomes blurred. Both the pre-trial proceedings and the trials themselves become a battleground for social values in conflict. The conspiracy offence both accommodates and promotes this conflict.

When a threat to civil order is perceived, a conspiracy theory of disobedience and protest is more palatable to government than the belief that mass action is genuine. In times of internal disorder or crisis it is a natural tendency of government to identify a small group of persons as the source of discontent. Leaders or spokesmen are readily identified as promoters and agitators who have provoked their normally peaceful and contented followers to serve their own ends. The suggestion that widespread protest could, in fact, be a spontaneous movement would reflect adversely on the well-being of people and thereby on the quality of their government. Conspiracy can be, then, the interpretation suggested by the defensive reaction of government before the matter comes before the courts.

Seditious Conspiracy

An appropriate beginning to the analysis of this problem is to examine the definition of seditious conspiracy. The *Criminal Code* stipulates that "[e]very one who ... is a party to a seditious conspiracy ... is guilty of an indictable offence and is liable to imprisonment for fourteen years".[3] A seditious conspiracy is defined as "an agreement between two or more persons to carry out a seditious intention".[4] A seditious intention is not defined exhaustively in the Code but section 60(4) establishes a presumption of seditious intention when anyone "(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".[5]

The statutory presumptions established by section 60(4) originated with the repeal, in 1936, of the former section 98 of the *Criminal Code*[6] which provided that

> [a]ny association, organization, society or corporation, whose professed purpose or one of whose purposes is to bring about any governmental, industrial or economic change within Canada by use of force, violence or

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[3] R.S.C. 1970, c.C-34, s.62(c).

[4] *Ibid.*, s.60(3).

[5] *Ibid.*, s.60(4).

[6] Mackenzie, *Section 98, Criminal Code and Freedom of Expression in Canada* (1971-72) 1 Queen's L.J. 469, 483.

> physical injury to person or property, or by threats of such injury, or which teaches, advocates, advises or defends the use of force, violence, terrorism, or physical injury to person or property, or threats of such injury, in order to accomplish such change, or for any other purpose, or which shall by any means prosecute or pursue such purpose or professed purpose, or shall so teach, advocate, advise or defend, shall be an unlawful association.[7]

This section further provided for up to twenty years imprisonment for anyone even remotely connected with an unlawful association; membership itself was not required.[8] Additional provisions allowed special powers of search and seizure, punishment of property holders who permitted unlawful associations to gather on their premises, and the punishment of persons having anything to do with the publication and circulation of seditious literature.[9]

The history of section 98 in relation to freedom of expression has been recorded elsewhere.[10] The few prosecutions brought under the section suggest that its official use was by no means indiscriminate[11] but the volume of prosecutions is not the most important test of its effects. The psychological impact of such a law on freedom of speech and association inevitably is significant. The language of the section was susceptible to extended definition to include a wide range of conduct, and the possibility of police harassment, without prosecution, was unlimited.

It was principally from labour organizations that pressure for the repeal of section 98 originated. In 1936 it was repealed, partly because the section was susceptible to abuse and partly because it was felt that the existing law of sedition was adequate to meet the kind of situations that would normally arise under the section.[12] But repeal was accompanied by an amendment to the Code, now section 60(4), which stipulated the presumption of seditious intention.[13]

The history of section 98 reveals why there is not a statutory definition of sedition in Canada. It was certainly not an oversight on the part of Parliament. A definition was proposed in the Criminal Code Bill of 1891[13a] but it was ultimately decided to leave the defini-

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[7] S.C. 1919, c.46, s.1: "97A.(1)".

[8] *Ibid.*, "97A.(4)".

[9] *Ibid.*, "97A.(5) ... (6)", "97B.(1)". Ss.97(a) and (b) were incorporated in the 1927 Revision as s.98 (R.S.C. 1927, c.36).

[10] Mackenzie, *supra*, note 6.

[11] *Ibid.*, 480.

[12] *Ibid.*, 483.

[13] *Ibid.*

[13a] H.C. Deb., 2d sess., 7th Parl., 1891, vol.1, 106.

tion to common law. The Honourable Ernest Lapointe subsequently described the rationale for this position.

> This crime of sedition has been discussed in Great Britain on many, many occasions. The commissioners who wrote the English draft code inserted a definition of some kind as to what constitutes sedition and what constitutes seditious words or seditious intentions. But after prolonged debate in the British parliament it was decided that it would be better to keep the word 'sedition' not defined expressly but rather left there to meet all occasions and to apply to all cases where order is disturbed or where there may be danger in the land.[14]

Lapointe made it clear that the Government of Canada intended to follow the example of the British Parliament.[15] His remarks, made at the time of the repeal of section 98, suggested that the Government felt the existing laws of sedition were adequate to meet situations where "order is disturbed or where there may be danger in the land". The open-endedness of sedition was the principal reason for its adequacy. The courts were, then, left to define sedition in light of facts peculiar to different cases and historical circumstances.

Sedition: Stephen's Definition

Okotoks, Alberta, is an innocuous site for a seditious offence to occur. On August 27, 1915, one Oscar Felton sat in a hotel bar-room at Okotoks and enlightened the bartender and one other person present on his feelings about the war. He commented that he would like to see the Germans cross the Channel and wipe England off the map because England had put Russia into the war and was letting her get licked. This indiscretion earned Felton a conviction for speaking seditious words which were simply words spoken with a seditious intention. In affirming the conviction,[16] the Supreme Court of Alberta cited Stephen's definition[16a] of seditious intention:

> [A]n intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs and successors, or the Government and Constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to raise discontent or disaffection among Her Majesty's subjects, or to promote

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[14] H.C. Deb., 1st sess., 18th Parl., 1936, vol.4, 3897, 3900.

[15] Lapointe continued: "There were some who wanted to define the offence of sedition more specifically but the parliament of Canada of that time, in its judgment, thought it better to follow the English practice and to remain with the common law operation in that regard" (*ibid.*).

[16] *R.* v. *Felton* (1915) 25 C.C.C. 207 (Alta S.C.).

[16a] Stephen, *History of the Criminal Law of England* (1883), vol.2, 298.

> feelings of ill-will and hostility between different classes of Her Majesty's subjects.[17]

There were other cases similar to that of *Felton*,[18] though in 1916 the Alberta Supreme Court made a distinction between uttering "disloyal and unpatriotic sentiments" and uttering words which express a seditious intention.[19] It is questionable whether this distinction would have affected convictions for criticisms of the war or war effort. Stephen's definition admitted of highly subjective interpretations about what might excite disaffection against the Government or raise discontent among the population. Historical conditions can render words seditious which would be regarded as disloyal and unpatriotic utterances in normal times. In *Felton*, Harvey C.J. referred to the nervous tension, excitement, and "intense feeling against the enemy".[20] In *R.* v. *Cohen*,[21] Stewart J. remarked that the "circumstances ... of the times" must be taken into account in determining whether a remark is seditious.[22] The simple difficulty with taking into account the "circumstances of the times" in applying Stephen's definition of sedition is that the passions of the moment may play a role in the determination of guilt, and a verdict of guilty may be seen as an affirmation of loyalty.

The Winnipeg General Strike

When Stephen's vague definition of sedition is combined with the problems inherent in the conspiracy offence, the potential difficulties are endless. The seditious conspiracy cases which followed the Winnipeg General Strike illustrate these problems in the context of a serious political, social and economic crisis. The history of the strike has been well documented[23] but a brief outline of the historical context within which the cases occurred is necessary in this discussion.

On May 6, 1919, the Winnipeg Trades and Labour Council decided to take a vote in its affiliated unions on whether to strike in sympathy with the metal trades workers who had been on strike since April

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[17] *Supra*, note 16, 209.

[18] *R.* v. *Cohen* (1916) 25 C.C.C. 302 (Alta S.C.); *R.* v. *Manshrick* (1916) 27 C.C.C. 17 (Man. C.A.).

[19] *R.* v. *Trainor* (1917) 27 C.C.C. 232, 239.

[20] *Supra*, note 16, 212.

[21] *Supra*, note 18.

[22] *Ibid.*, 304.

[23] See particularly Bercuson, *Confrontation at Winnipeg* (1974); Bercuson and McNaught, *The Winnipeg Strike, 1919* (1974); Masters, *The Winnipeg General Strike* (1950).

30th. Labour had good reasons to be restless in the spring of 1919; inflation was rampant and had its most adverse effects on wage earners and others on fixed incomes. Since the beginning of the war, price increases had outstripped wage increases by more than four times and while war prosperity had brought large profits it was clear that labour was not a beneficiary. In addition, returning military personnel released into the labour market increased tension and uncertainty about future employment prospects.[24]

The vote of unions affiliated with the Council was overwhelmingly in favour of strike action and walk-outs began on May 15th. For the next several days, strike action proliferated in Winnipeg and what has been described as "the largest and most nearly successful general strike in North America"[25] was underway. During the first few days postal workers, railway employees, telephone workers, printers and telegraphers walked off their jobs. The City refused to negotiate until the strike was over and fired civic employees who had left their jobs. The Post Office fired all of its striking employees and all but sixteen city policemen were dismissed for refusing to sign a statement promising not to strike. Returning soldiers held a parade in support of the strike, thus beginning a series of parades which resulted in several clashes with special police organized by a citizen's committee.

The nationwide reaction of the press to these events was hysterical. *The Manitoba Free Press* was convinced that the strike had been "engineered by the Reds" as the starting point of a bolshevik revolution.[26] *The Winnipeg Citizen* was equally sure that the strike was an attempt to establish bolshevism,[27] and similar sentiments were expressed by newspapers across the country.[28] At a time when revolution and civil war in Russia were fresh in the consciousness of people, this commentary could only incite a state of grave apprehension.

The reports of the federal Minister of Labour, Senator Robertson, to the Prime Minister also indicated that the strike had at least in part emanated from the "Red element" and that it was "the duty of the Goverment to remove this menace".[29] Meanwhile the press con-

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[24] Masters, *ibid.* See also Katz, *Some Legal Consequences of the Winnipeg General Strike of 1919* (1970) 4 Man. L.J. 39.

[25] McNaught, *Political Trials and the Canadian Political Tradition* (1974) 24 U.of T.L.J. 149, 157.

[26] This and other newspaper excerpts relating to the strike are taken from the compilation of Balawyder, *The Winnipeg General Strike* (1967), 19.

[27] *Ibid.*

[28] *Ibid.*, part II.

[29] *Ibid.*, 35.

tinued to fan the flames by encouraging the view that insidious leadership had duped the workers for its own revolutionary ends. In Regina, *The Morning Leader* suggested that the leaders of the strike were opposed to all co-operation between capital and labour.[30] *The Victoria Daily Times* revealed that "Bolshevik pedagogues were at the back of the whole business".[31] *The Winnipeg Citizen* informed its readers that the workers were "tricked and betrayed into striking" by the bolsheviks in the Labour Temple.[32]

It was against this background that government and the administration of justice reacted. On June 6th, the twenty-sixth day of the strike, the Federal Government introduced a bill which provided for the deportation of persons convicted of seditious offences. It passed all three readings in the House of Commons in twenty minutes and, on the same day, passed the Senate and received royal assent.[33] The Labour Minister's report to the Prime Minister on June 17th indicated the additional steps which had been taken:

> The plan which had been carefully prepared for the taking into custody of the revolutionary leaders was put into effect last night and ten of them apprehended and transported by automobile to Stony Mountain Penitentiary.[34]

Eight of the ten were charged with seditious conspiracy. They were William Ivens, R.B. Russell, R.J. Johns, William Pritchard, George Armstrong, R.E. Bray, A.A. Heaps, and John Queen. Of the eight, seven were ultimately convicted.

The trial of the strike leaders has been described as "a struggle over the issue whether the strike was part of a seditious conspiracy or a legitimate dispute over wages and collective bargaining".[35] While it is not a purpose of this paper to review all the circumstances and merits of either position, the dispassionate vantage of time suggests the latter is more likely.[36] The point here is that the atmosphere of the period was highly prejudicial to, firstly, the decision of whether or not to prosecute and, secondly, the trial of the issue. In its attempt to avoid responsibility for the conditions which

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[30] *Ibid.*, 17.
[31] *Ibid.*, 18.
[32] *Ibid.*, 19.
[33] Masters, *supra*, note 23, 103-104.
[34] Balawyder, *supra*, note 26, 36.
[35] Masters, *supra*, note 23, 120.
[36] Masters concluded that "there was no seditious conspiracy and that the strike was what it purported to be, an effort to secure the principle of collective bargaining" (*ibid.*, 134). McNaught also reached the conclusion that there was not a seditious conspiracy, *supra*, note 25, 160.

led up to the events in Winnipeg, the Government found the conspiracy theory most attractive. The press provided a harmonious accompaniment to governmental thinking by vigorously promoting the spectre of a communist conspiracy. The danger was that the jury would only affirm the verdict.

The preliminary hearings and the trials of the defendants featured a deluge of political pamphlets, socialist and labour publications, and other literature. Long hours of testimony repeated the details of the strike events, particularly those of the parade of June 21 when two deaths resulted from a clash between strikers, special police, and Royal North West Mounted Police.[37] The most radical socialist statements made by the defendants in the preceding months were also introduced in evidence, together with their membership in socialist organizations.[38] Defence objections to some of this evidence (the political literature) were overruled.

The technical basis of the rules of evidence peculiar to the conspiracy charge is, in itself, a complex subject. For present discussion, it is sufficient to point out that acts done or words spoken in furtherance of a conspiracy may be given in evidence against all conspirators[39] and defendants in a conspiracy trial, upon proof of common purpose, are legally considered to have said or done everything that every other conspirator, whether charged or not, has said or done. As a matter of practice the prosecution can proceed with its evidence on the basis of this rule, subject to subsequent proof of the conspiracy. The effect of this rule in a trial arising out of an event such as the Winnipeg strike is staggering. There are few clear limits as to who may be considered a co-conspirator. Since a conspirator need not be charged, or even named, the prosecution can invite the jury to consider whether anyone, however remotely involved, was a conspirator and, if the jury so determines, evidence of that person's words and actions will be evidence against the accused.

An appeal to the Manitoba Court of Appeal,[40] on behalf of Russell, was based in part on the admissibility of documents, pamphlets and other political literature (including the *Communist Manifesto*) distributed by organizations with which the defendants, or some of

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[37] Masters, *supra,* note 23, 115.

[38] McNaught, *supra,* note 25, 160.

[39] Despite some doubt about the authorities most frequently relied upon as clearly establishing a conspiracy exception to the hearsay rule, the exception has been widely recognized as part of the law of evidence. See *Koufis* v. *The Queen* [1941] S.C.R. 481; *Cloutier* v. *The Queen* (1939) 73 C.C.C. 1 (S.C.C.); *Paradis* v. *The Queen* [1934] S.C.R. 165.

[40] *R.* v. *Russell* (1920-21) 33 C.C.C. 1 (Man. C.A.).

them, were associated. This literature, was found in Russell's possession, in the hands of others alleged to have been parties to the conspiracy and in the possession of other persons. Perdue C.J.M. decided that all of these writings were admissible against Russell. Those found in Russell's possession were *prima facie* evidence against him: "It will be inferred that he knows their contents and has acted upon them."[41] Documents found in the possession of other alleged conspirators were admissible against Russell "if they were intended for the furtherance of the conspiracy".[42] Citing *R.* v. *Parnell*[43] and *R.* v. *Murphy*,[44] Perdue C.J.M. continued:

> The parties to the conspiracy may never have seen or communicated with each other yet by the law they may be parties to the same common criminal agreement, with the same consequences to each other from acts done by one of them or documents found in possession of one of them... .[45]

Documents found in the hands of third parties were admissible as evidence "if they relate to the actions and conduct of the persons charged with the conspiracy or to the spread of seditious propaganda as one of the purposes of the conspiracy".[46]

It can be seen at once that there are few limits to the admissibility of evidence under such an interpretation. *Russell* would permit all kinds of political literature to be introduced as evidence, thus threatening the distinction between relevance and irrelevance, and with the accompanying danger that the jury will find critical appraisal of the evidence impossible. Books, pamphlets and speeches can be read into the record thus allowing maximum appeal to emotion and prejudice. From the mass of literature introduced at the trial of the others accused of conspiring with Russell, the prosecution centered on the word "revolution" and used it repeatedly in offering evidence and in addressing the jury.[47] The word "revolution" may have many meanings, but to the popular mind it connotes violence, bloodshed and chaos. In view of the disorder and disruption in Winnipeg and the clashes between police and marchers, the effect of the prosecution's appeal could only be prejudicial. Certainly the disorder undermined government, as all disorder does, but the critical issue of whether the accused caused this result, or intended and

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[41] *Ibid.*, 6.
[42] *Ibid.*
[43] (1881) 14 Cox C.C. 508.
[44] (1837) 8 Car.& P. 297, 173 E.R. 502.
[45] *Supra*, note 40, 6.
[46] *Ibid.*
[47] *Supra*, note 1, 72.

agreed to cause this result, may have been easily lost in the passions of the moment.

The Communist Leaders

Canada was as hard hit by the depression as any country in the western world. The combination of a sharp decline in foreign trade and severe drought created massive unemployment and with it the tragedy of widespread poverty. These conditions gave rise to political protest on a large scale as transient groups of unemployed moved back and forth across the country. Once again, the Government perceived communism as a serious threat.[48]

In August, 1931, eight leaders of the Communist Party of Canada were arrested, and seven were charged and convicted of being members of an unlawful association. A further count alleged a seditious conspiracy in that the accused

> did become and continue to be members of the Communist Party of Canada, section of the Communist International, and did conspire together to further the objects and aims of the said Party and that the objects and aims of the said Communist Party of Canada, Section of the Communist International, are of a seditious nature intended to incite His Majesty's subjects to attempt otherwise than by lawful means the alteration of the Government of the Dominion of Canada and to incite persons to commit crimes and disturbance[s] of the peace and raise discontent or disaffection among His Majesty's subjects and to promote feelings of ill will and hostility between different classes of such subjects.[49]

On appeal, it was felt that the conviction of this conspiracy count should be quashed. In delivering the judgment of the Ontario Court of Appeal,[50] Mullock C.J.O. stated that this charge failed for insufficiency because the count only alleged that the accused became parties to a seditious conspiracy. While the particulars furnished showed that the seditious conspiracy which was charged was membership in the Communist Party, the conviction for conspiracy could not stand because the function of particulars is to give further information to the accused of that which it is intended to prove against him, and not to supplement a defective indictment.[51]

It is interesting to note that had the charge embodied the information in the particulars, it would have been properly framed.

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[48] McNaught, "The 1930's" in Careless and Brown (eds.), *The Canadians 1867-1967* (1967), 238-41.

[49] *R.* v. *Buck* (1932) 57 C.C.C. 290, 291-92 (Ont.C.A.).

[50] *Ibid.*, 293.

[51] *Ibid.*

Undoubtedly this view was influenced by the unlawfulness of the Communist Party within the meaning of the now defunct section 98 of the *Criminal Code*.[51a] But a distinction should have been made — even for the purpose of determining whether the conspiracy count alleged an offence known to law — between adherence to a set of values, beliefs and principles, and a specific agreement to set in motion a plan whereby the aims of the Communist Party could be realized.

At the trial of Tim Buck and his co-accused, there was ample evidence of the unlawfulness of the Communist Party within the meaning of section 98 of the Code. This evidence included the theses and statutes of the Communist International; the report of the proceedings of the Communist International in 1921; excerpts from the party newspaper dating some seven years before the trial; and excerpts from a book entitled *The A.B.C. of Communism*, published in 1919.[51b] The political principles of an association were very much in issue on a charge under section 98, but the Court's view of what would have been a sufficient conspiracy count suggests that the evidence would have been admissible on that charge as well. Again, the danger lies in possible prejudice flowing from evidence of the political beliefs in question, and the possibility that a jury will infer a conspiracy from the fact of membership in a particular organization. This danger is all the more real when the organization is seen as an imminent threat because of existing social conditions and historical circumstances.

Although the *Buck* case does not shed much light on the conspiracy offence in particular, it does serve to illustrate how the legal issues in political trials must be crystallized and removed as much as possible from the influence of popular emotion. This protection is not easily assured when comments by both the prosecution and the Court define the jury's role as essentially letting Russia know Canada's position with respect to the communist menace.[52]

[51a] R.S.C. 1927, c.36.

[51b] See, *supra*, note 49, 310.

[52] Mackenzie, *supra*, note 6, 477, has described the summation of the prosecution and the judge's charge. Of the prosecution's summation, Mackenzie writes: "He reminded the jurors that they were sitting 'in the shadow of Remembrance Day' and urged them to give an 'unequivocal answer to Moscow...'. He asked the jury to understand 'the clear, cold, plain meaning of this thing which rose out of the Red soil of Russia'. He concluded, 'you will see behind this thin veil of defence. You will strike at this thing, and strike hard'."

The Doukhobors

The accommodation of a minority whose religion extends beyond matters of faith and worship to the totality of culture inevitably leads to conflict. Such has been the history of the Doukhobors dating back almost to their arrival in Canada in 1899. Pilgrimages, nude demonstrations and arson characterized the resistance of the particularly zealous Sons of Freedom sect to assimilation by, or association with, the mainstream of Canadian society. These activities made them continually subject to legal action.[53] The Freedomites' penchant for taking off their clothes prompted the Government to make nudity in a public place a serious criminal offence with a three year prison term as maximum punishment.[53a] Mass arrests and trials in the 1930's resulted in the establishment of a penal colony for six hundred Sons of Freedom who were convicted and sentenced to three years imprisonment on this charge.

In 1950, Freedomite prophet Michael Veregin and his associate Joe Podovinokoff were charged and convicted of seditious conspiracy because of their alleged promotion of arson and nudity, but their convictions were overturned because of a misdirection by the trial judge.[54] Another aspirant to Freedomite leadership was also convicted of seditious conspiracy in that he and four other Doukhobors had signed a document in which they refused to obey certain laws of Canada, one of which concerned the registration of births, deaths and marriages as required by provincial law. Lebedoff's appeal to the British Columbia Court of Appeal was dismissed.[55]

The theory that Freedomite activity was the outgrowth of an organized conspiracy was given ultimate expression in 1962, shortly after a special R.C.M.P. squad was formed to deal with escalating violent protest. In March, twenty Doukhobor men were convicted of conspiracy to commit arson. A few months later the complete seventy-member Fraternal Council of the Sons of Freedom was present in a New Westminster courtroom to face charges of conspiracy, together and with others over a seven year period from 1955 to 1962, to intimidate the Parliament of Canada and the British

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[53] Two secondary sources which were relied upon for factual material about the Doukhobors were Woodcock and Avakumovic, *The Doukhobors* (1968); and Kettle and Walker, *Verdict!* (1968), 67 *et seq.*

[53a] S.C. 1931, c.28, s.2.

[54] Holt, *Terror in the Name of God* (1964), 139.

[55] *R.* v. *Lebedoff (No. 2)* (1950) 98 C.C.C. 117 (B.C.C.A.).

Columbia Legislature.[56] The preliminary hearing lasted thirty-eight days. The evidence consisted of some five hundred documents and the oral testimony of ninety-eight witnesses which basically revealed a history of Freedomite criticisms of the Canadian Government. The Magistrate found that, amidst this morass of evidence, there was no evidence of a conspiracy.

Had the prosecution against the Fraternal Council been successful, the conviction would have had an ominous presence in the area of civil liberty. In this country we cherish the existence of certain freedoms subject to the limits of the criminal law. But where the criminal law does not establish clear limits, the extent of these freedoms is undefined, unknown and susceptible to arbitrary encroachment.

It is the fundamental nature of the conspiracy offence that it undermines the definition of criminal conduct. The charge brought against the Doukhobors was conspiracy to do an act or acts of violence in order to intimidate the Parliament of Canada and the legislature of British Columbia. "Act of violence" is itself undefined but the problems just begin there. The violent act is but the means; it must be for the purpose of intimidation. The charge is, then, "conspiracy to intimidate"; an agreement to overawe, influence perversely, or inspire with fear. The substantive offence is vague enough, but would at least require the completion of an act of violence. There is no such requirement for proof of the conspiracy. Any group of protesters and demonstrators could be charged with such an offence. Nor is the effect of such an offence limited to those occasions where a conviction is recorded and a precedent established. Vague offences provide an excellent pretext for the harassment of political dissenters, and those detained or arrested would have no effective civil recourse if charges were subsequently dropped.

Quebec 1970

Most Canadians are familiar with the events which occurred in Quebec during the autumn of 1970: the reaction of the F.L.Q. to the results of the Quebec provincial election in that year, the escalating activism and the kidnappings of James Cross and Pierre Laporte. The significance of these events was established for the Canadian

[56] S.51 of the *Criminal Code*, R.S.C. 1970, c.C-34 provides: "Every one who does an act of violence in order to intimidate the Parliament of Canada or the legislature of a province is guilty of an indictable offence and is liable to imprisonment for fourteen years."

people by the invocation of the *War Measures Act*.[57] A spectre of insurrection, raised by the Government and the media, overtook events and people with incredible rapidity. Nearly five hundred people were arrested by the authorities. As days passed and it became apparent that no real insurrection was underway, there was significant pressure on the Governments of Quebec and Canada to justify the use of the extraordinary powers under the *War Measures Act*. On November 4, 1970, the Quebec Justice Minister announced that several of the sixty-five suspects still in custody might be charged with treason and sedition.[58] The following day, Pierre Vallières, Charles Gagnon, Robert Lemieux, Jacques Larue-Langlois and Michel Chartrand were charged with participating in a seditious conspiracy aimed at changing the governments of Canada and Quebec by advocating the use of force contrary to section 62(c) of the *Criminal Code*.[59] In plain language, the charge was "conspiracy to advocate" violence. It was not necessary to prove actual promotion or incitement, but simply an agreement to advocate violence — two steps away from the object. The charge alleged that the conspiracy had taken place over a period of nearly three years.

The first week of the trial was taken up with the hearing of various motions including one to quash the charge itself. On Friday, February 12, 1971, Ouimet J. of the Court of Appeal granted the motion and quashed the conspiracy charge against all accused. In delivering his reasons, Ouimet J. stated that the charge was too vague because it covered such a lengthy period of time. He questioned whether a complete defence could be prepared to such a charge, and whether a "conspiracy by advocating" violence is possible.[60]

The insufficient details presumably could have been overcome by ordering particulars, but the other reasons given by Ouimet J. go to the heart of the conspiracy offence. The finding that the charge was too vague and the problem of preparing a defence suggests the possibility that some conspiracy charges may violate the right to a

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[57] R.S.C. 1970, c.W-2.

[58] By this time an additional requirement had been added to the definition of sedition. In *Boucher* v. *The King* [1951] S.C.R. 265, the court decided that an intention to incite violence against constituted authority or to create a public disturbance or disorder against such authority was necessary. This, at least, prevents charges resulting from expressions of disloyalty or lack of patriotism. However, an intent to incite violence or, in particular, public disorder, remains a vague requirement and by no means cures the amorphous nature of seditious offences.

[59] The case is not reported. But see *Globe and Mail*, Toronto, Nov. 6, 1970, 1.

[60] *Globe and Mail*, Toronto, Feb. 13, 1971, 1-2.

fair hearing as guaranteed by section 2(e) of the *Canadian Bill of Rights*.[61] It is arguable that the offence is inherently vague and thereby violates the right to a fair hearing. But certainly when the time period is long or when the charge alleges, as in this case, a "conspiracy to advocate", the argument is very plausible indeed.

By the time Ouimet J. had granted the motion to quash, the accused had been in custody for nearly five months, with the exception of Larue-Langlois who had been granted bail the previous December. Most of the others held and charged under the *War Measures Act* or with other offences under the *Criminal Code* were out on bail. Although there were similar charges pending against Vallières, Gagnon, Lemieux and Chartrand, it might be inferred that it was partially due to the seditious conspiracy charge that they were refused bail and kept in custody.

Less than one month after the motion to quash was granted, Vallières, Larue-Langlois and Gagnon were charged with seditious conspiracy over the same time period as in the previous indictment. Vallières' trial was postponed until the fall because of his ill health, and the trial of Gagnon and Larue-Langlois was scheduled to commence on April 26th. A motion to quash was brought again, but this time was dismissed. Bélanger J. held that the charges were explicit enough in accusing the two of conspiring to overthrow the government by force, violence, or threats of violence. Following a six-week trial, the two were acquitted. Vallières disappeared before his scheduled appearance and emerged the following January to renounce the F.L.Q. and express support for the Parti Québecois. In October, 1972, he was given a suspended sentence on counselling charges and the prosecution did not proceed with the seditious conspiracy count.[62]

Common Law Conspiracy and Political Dissent

The definition of conspiracy which Willes J. offered in *Mulcahy* v. *The Queen*[63] is in substance incorporated in the *Criminal Code*

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[61] S.C. 1960, c.44 (see R.S.C. 1970, Appendix III).

[62] "403 of the 465 persons arrested were released within two months without charges being laid. All charges laid under the War Measures Act were stayed by *nolle prosequi* in July 1971 at the request of the Quebec attorney-general. Eighty-six people had been charged under the act and 62 under sections of the Criminal Code. Only five of those charged under the act, and who pleaded not guilty, were convicted", McNaught, *supra*, note 25, 163.

[63] "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." (1868) L.R. 3 H.L. 306, 317.

under the heading "common law conspiracy". Section 423(2) provides that:

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

The section was first included in the 1953-54 revisions of the Code as a codification of common law conspiracy.[64] It must be read in conjunction with section 8(a):

> 8. Notwithstanding anything in this Act or any other Act no person shall be convicted
> (a) of an offence at common law.... .[65]

Speaking in the House of Commons on January 19, 1954, Justice Minister Garson indicated that the purpose of section 8(a) was to establish that a Canadian could no longer be charged with a common law offence; in effect, federal criminal legislation would be exhaustive as to offences. To that end, all common law crimes which had been successfully prosecuted between 1892 and the 1953-54 revisions were incorporated in the *Criminal Code*.[66]

The important concepts in the new codification of common law conspiracy were "unlawful purpose" and "unlawful means". In itself the latter should not cause much difficulty in that the cases do not draw a distinction between means and ends. It is an agreement to do an unlawful act which constitutes a conspiracy; it does not matter whether the act in question is the ultimate object or one of the steps along the way.[67] As to the "unlawful purpose", the principle of legality would suggest an interpretation which would not undermine codification by providing recourse to a potentially unlimited common law area of criminal conduct. Yet today we are left with little more than sporadic clues to the limits of section 423(2). The problem has its origin in the historical development of the conspiracy offence.

The historical roots of the modern law of criminal conspiracy can be traced with certainty to the decision in *The Poulterers' Case* in 1610.[68] Before this decision, the offence was confined to combinations to bring false indictments or appeals, or to maintain vexatious suits; the illegal objects of combination were defined specifically

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[64] S.C. 1953-54, c.51, s.408(2).
[65] R.S.C. 1970, c.C-34, s.8(a).
[66] H.C. Deb., 1st sess., 22d Parl., 1953-54, vol.2, 1253.
[67] Howard, *Australian Criminal Law* 2d ed. (1970), 272.
[68] (1610) 9 Co.Rep. 55b, 77 E.R. 813.

and narrowly. In *The Poulterers' Case*, several London poultry dealers agreed to falsely accuse the plaintiff of robbery. The defendants procured warrants, caused the plaintiff to be apprehended and bound over to the Assizes, and preferred a bill of indictment against him. The case actually decided that a conspiracy is punishable although the malicious prosecution was not complete and had not ended in acquittal.[69] It was indicated that although a writ of malicious prosecution will not lie unless the aggrieved party is indicted and acquitted, a conspiracy will be punished "although nothing be put in execution".[70]

The Poulterers' Case marked the beginning of a shift in emphasis from the false accusation which was the basis of the earlier civil action, to the nature of the agreement itself. Half a century later, *R.* v. *Starling*[71] established that a conspiracy was indictable though nothing is done to carry out its purpose. In *R.* v. *Best*[72] we see the oft-quoted phrase, the "gist is conspiracy" or conspiracy is the gist of the indictment. This shift in focus made possible the extension of the agreements which could henceforth be punishable. The extension included conspiracy to maintain falsehood generally; to perform acts harmful to the public; to pervert the administration of justice, to defame, to extort money, and even to accomplish an immoral purpose.[73] This process, once begun, had its logical culmination in the definition of Willes J. in *Mulcahy* which is in substance the wording of our *Criminal Code* section 423(2).

It is essentially the same problem that was raised by this course of development which is still with us today: defining the limits of "unlawful purpose". Early Canadian authorities indicated that in addition to crimes, "unlawful purpose" included some (and perhaps a great many) civil wrongs. In *R.* v. *Defries*, *R.* v. *Tamblyn*,[74] the *dicta* of McMahon J. suggested that a conspiracy to defraud is indictable even though it would have constituted only a civil wrong if the agreement had been carried out. In defining conspiracy under three heads, the language of Richards J.A. in *R.* v. *Gage (No. 2)*[75] was somewhat wider. Citing Fitzgerald J. in *R.* v. *Parnell*[76] it was pointed out that conspiracy is indictable:

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[69] *Ibid.*, 814. See also Bryan, *The Development of The English Law of Conspiracy* Reprint Ed. (1970).

[70] *Supra*, note 68, 814.

[71] (1664) 1 Sid. 174, 82 E.R. 1039.

[72] (1704-05) 6 Mod. 137, 87 E.R. 895, 897; Bryan, *supra*, note 69, 63-4.

[73] Bryan, *ibid.*, 66-74.

[74] (1894) 1 C.C.C. 207, 213 (Ont.H.C.).

[75] (1908) 13 C.C.C. 415; aff'd 13 C.C.C. 428 (Man.C.A.).

[76] (1909) 14 Cox C.C. 513.

> [W]here the end to be attained is in itself a crime; where the object is lawful but the means to be resorted to are unlawful; and where the object is to do an injury to a third party or to a class, though if the wrong were effected by a single individual it would be a wrong but not a crime.[77]

Just how far the definition under the third head extended is not clear. By virtue of the previously accepted principle that English criminal law was in force in Canada to the extent that it had not been expressly or implicitly repealed,[78] "unlawful purpose" was defined largely, though never exhaustively, by English authorities. Until recently it has not been clear that there are any limitations on the kinds of tortious conduct which might meet the "unlawful purpose" requirement.[79]

The kinds of offences which may fall within the ambit of "unlawful purpose" also remain undetermined. It has long been recognized that conspiracy to perform an act other than an indictable offence is criminal.[80] Indeed, subject to some limitations, "unlawful purpose" is not limited to crimes but extends to any conduct prohibited under penalty, whether by federal, provincial or municipal authority.[81] Arguably, "unlawful purpose" may extend beyond the duly enacted positive law to include a potentially unlimited area of behaviour which was criminal at common law.[82]

The problem, simply stated, lies in the proposition that the "wide embracing import" of the term "unlawful purpose" was not changed by the 1953-54 amendments to the *Criminal Code* which codified common law conspiracy.[83] The implication of the proposition is that common law offences may yet furnish the unlawful purpose in section

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[77] *Supra*, note 75, 438.

[78] R.S.C. 1927, c.36, ss.8-10; *Kowbel* v. *The Queen* [1954] S.C.R. 498, 503-504 *per* Estey J. quoting Sedgewick J. in *Union Colliery* v. *The Queen* (1902) 31 S.C.R. 81, 87; *Brousseau* v. *The King* (1917) 56 S.C.R. 22; *R.* v. *Cameron* (1935) 64 C.C.C. 224 (B.C. Cty Ct).

[79] See the discussion of the Court of Appeal and House of Lords decisions in *R.* v. *Kamara* [1972] 3 All E.R. 999 (C.A.); [1973] 2 All E.R. 1242 (H.L.), *infra*, p.640 of this article.

[80] See *R.* v. *Starling*, *supra*, note 71.

[81] *Wright, McDermott and Feeley* v. *The Queen* [1964] S.C.R. 192; *R.* v. *Thodas, Merrin and Chong* (1970) 73 W.W.R. 710 (B.C.C.A.); *R.* v. *Chapman and Grange* [1973] 2 O.R. 290 (Ont.C.A.); *R.* v. *Jean Talon Fashion Center Inc.* (1975) 22 C.C.C. (2d) 223 (Que.C.A.).

[82] The proposition is certainly arguable. The issue is fully discussed in MacKinnon, *Criminal Conspiracy in Canada: A Critical Study* (1975) unpublished thesis, U.of Sask.

[83] *Wright, McDermott and Feeley* v. *The Queen*, *supra*, note 81, 194 *per* Fauteux J.

423(2). Recent developments in England point to a renewed interest in vague, general categories of conduct which were unlawful at common law. Conspiracies to commit public mischief, to corrupt public morals and to outrage public decency have all been confirmed in recent cases as common law crimes still in existence.[84] The suggestion that "unlawful purpose" may extend to tortious wrongs further extends the possible objects of criminal conspiracy. Perhaps the most important authorities bearing on the issue of political dissent are the decisions of the English Court of Appeal and the House of Lords in *R.* v. *Kamara.*[85]

In *Kamara,* nine students, who were nationals of Sierre Leone, appealed their convictions for conspiracy to trespass, and unlawful assembly. These persons, together with others who did not appeal, conspired to occupy the London premises of the High Commissioner for Sierre Leone in order to publicize grievances against the government of that country. Upon their arrival at the Commission, they threatened the caretaker with an imitation firearm and locked him in a reception room with ten other members of the staff. The students then held a press conference on the telephone, but the caretaker was able to contact the police, who arrived, released the prisoners, and arrested the accused. Lauton J. delivered the judgment of the Court of Appeal dismissing the appeal from conviction. He recited the definition in *Mulcahy*[86] to the effect that a conspiracy is an agreement to do an unlawful act or a lawful act by unlawful means,[87] and continued:

> Whatever private views we may have about the desirability at the present time of having a definition of a crime in such wide terms, we feel bound to declare that the law is as stated by Willes J. in *Mulcahy's* case, and if we apply the commonly held opinion that a tort is an unlawful act, it must follow that an agreement to trespass is an indictable conspiracy, no matter what absurd results can be envisaged if prosecutors and judges do not use common sense.[88]

The Court of Appeal rejected two proposed limits to the offence. It was first suggested that an agreement to trespass should not be an indictable conspiracy unless there is an intent to injure or annoy and secondly, such an agreement should be held criminal only if it was likely to injure the public interest. It was felt that there was no

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[84] *R.* v. *Kamara, supra,* note 79; *Knuller (Publishing, Printing and Promotions) Ltd* v. *D.P.P.* [1972] 2 All E.R. 898 (H.L.); *Shaw* v. *D.P.P.* [1962] A.C. 220 (H.L.).

[85] *Supra,* note 79.

[86] *Supra,* note 63.

[87] *Supra,* note 79, 1003.

[88] *Ibid.,* 1004.

authority to support these limitations and the Court commented upon the difficulty of defining public interest. However, it was pointed out that:

> Perhaps as a matter of practice prosecutions should not be brought unless a combination of persons to trespass is likely to cause a breach of the peace or to affect the public interest in some other way or to be an outrageous interference with the rights of others.[89]

In this case the Court felt that the public interest was clearly involved because of the statutory duty of the British Government to protect diplomatic premises.[90]

The Court of Appeal certified two points of law raised in *Kamara* as being of general public importance and gave leave to appeal to the House of Lords. One point was whether an agreement to commit a trespass can be an indictable conspiracy and, if so, in what circumstances. Lord Hailsham dealt with the problem under three separate heads:

> (i) [I]s conspiracy limited to agreements to perpetrate conduct which if done by a single person would be punishable by criminal sanctions? And, if not, are agreements which involve the commission of a tort against individuals so limited? (ii) If conspiracies are not limited to conduct punishable by criminal sanctions, are all combinations the execution of which involves a tort or torts committed against individuals indictable as conspiracies? (iii) If all combinations involving tortious conduct are not indictable, is there any rational principle on which those which are indictable can be separated from those which are not?[91]

Briefly, Lord Hailsham's answers to the three questions were (i) no, in each case; (ii) undecided but doubtful; and (iii) yes. The basis upon which combinations involving tortious conduct which are indictable can be separated from those which should not be indictable requires a determination of whether the execution of the agreement has as its object, not merely a tort or other actionable wrong, but either (1) the invasion of the public domain, or (2) the intention to inflict on its victim injury which is greater than purely nominal damage.[92]

The House of Lords decision[93] places welcome limitations on the Court of Appeal ruling which would, in theory, "open the door to indictments for trivial breaches of the civil law".[94] The public element

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[89] *Ibid.*, 1005.
[90] *Ibid.*
[91] *Ibid.*, 1251.
[92] *Ibid.*, 1261.
[93] Lord Morris and Lord Simon agreed with the reasons of Lord Hailsham, *ibid.*, 1262.
[94] *Ibid.*, 1250.

of the first criterion would require that the civil wrong be more than a private matter and thereby provides at least some justification for the intervention of the criminal law. The second criterion may involve greater difficulty in determining what is "nominal" damage. Nevertheless, the House of Lords decision represents an important attempt to establish some boundaries to the ambit of "unlawful act" in the law of criminal conspiracy.

R. v. *Kamara* must, however, be viewed as suggesting endless possibilities in rendering a combination unlawful under section 423(2) of the *Criminal Code*. Conspiracy to trespass could be used as a weapon against many demonstrations, protest marches and sit-ins. Indeed, if the Court of Appeal decision in that case were followed, there would not be any limits on the breaches of civil law which could fulfill the unlawful purpose of a criminal conspiracy. Any interference with property rights, such as trespass or perhaps nuisance, could be elevated to an indictable conspiracy under such a doctrine.

Conclusion

In times of social unrest, the manifestations of discontent may be unplanned. The organization and direction of protest frequently proceeds on an *ad hoc* basis among different, limited groups of those involved. The danger of a conspiracy interpretation of protest and dissent is that it automatically imputes organization and planning to what may in fact be a spontaneous phenomenon.

Social conditions, and a defensive reaction to them by government, frequently influence a conspiracy interpretation of protest, dissent and disobedience. When a person is not socially or personally involved in the conditons which give rise to social unrest, he tends to have difficulty understanding the discontent of others, though their circumstances may be very different. Discontent and protest readily suggest a conspiracy to him and he often concludes that agitators or promoters are behind the whole thing. Thus public opinion frequently brings under the umbrella of conspiracy those who are personally identified in some way with the protest. The conspiracy theory lends itself to guilt by association.

The conspiracy offence has a most ominous and potentially dangerous presence in the area of political dissent. In part, the reasons lie in the unusual apprehension of danger resulting from the defendants' activities. Over-reaction by government and the press can create an atmosphere which tends to prejudice dispassionate decision-making in the administration of criminal justice. In part,

also, the reasons lie in the technical aspects of the offence itself. Vague definitions and rules of evidence peculiar to conspiracy facilitate the degeneration of a conspiracy trial into a trial of ideas rather than one of specific individuals and actual occurrences. A conspiracy is an agreement; not a hope, belief, idea or intention. Conceptually there is a clear distinction but because it is rarely possible to prove an agreement by direct evidence, the courts are frequently asked to infer it, in part, from beliefs and ideas. This has two potential effects: the jury can be impassioned by ideas which are repugnant to them, and a critical, discriminate appraisal of the evidence is prejudiced by the amount of evidence frequently tendered in political trials.

The flexibility of the conspiracy offence as a weapon against political dissent is further enhanced by the vague definition of sedition and the open-endedness of common law conspiracy. In this country we have had experience with seditious conspiracy charges, notably in historical circumstances in which a particular group has been perceived as a direct threat to government: labour leaders during the Winnipeg General Strike; communists during the depression; Doukhobors in the nineteen-sixties; and Quebec separatists in 1970.

The possible conspiracy charges arising from the open-endedness of common law conspiracy is a matter for speculation. The Supreme Court of Canada has expressed preference for well-defined limits to criminal conduct.[95] It is to be hoped that this sentiment will lead our courts to reject common law developments in this area and to remove the dubious heritage left to us by the historical evolution of the conspiracy offence.

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[95] *Frey* v. *Fedoruk* [1950] S.C.R. 517.