

The Co-Conspirators' Exception to the Hearsay Rule¹

You cram these words into mine ears
against the stomach of my sense.

William Shakespeare

The Rule

The co-conspirators' exception to the hearsay rule permits the acts, declarations, statements or utterances of an accused's alleged co-conspirators, performed or made in furtherance of a conspiracy, to be presented as evidence against the accused as proof of his or her guilt. Declarations and acts are treated equally.

The Rationale for the Rule

The Rule is based upon principles of agency. Each member of a common unlawful scheme *impliedly* permits every other member of the unlawful scheme the right to act or speak on her behalf in pursuit of the common unlawful plan.

The Application of the Rule

It is not the rule that offends my senses; it is the application of the rule. Judges routinely claim to be able to hear prejudicial evidence in the course of making a legal ruling on evidence, then banish from their minds the prejudicial aspects of that evidence if a ruling

¹ Patrick J. Ducharme of Ducharme Fox LLP

is made in favour of the accused thus excluding the evidence. Of this claim I am depressingly suspicious. My suspicion soars, however, at the thought of jurors attempting to accomplish this same segregation of thought.

More likely to occur unfortunately is that jurors will find guilt not by evidence but by association. In nature, birds of a single species do, in fact, sometimes fly together. In law, guilt by association is presumptively improper.

Jurors will, of course, be instructed that *probable* guilt is not a sufficient basis to convict. They will be instructed that they have been allowed to hear all the evidence concerning the conduct and declarations of others, most, or all of whom, did not actually testify. And, they have been allowed to hear about events that occurred in the absence of the accused, and perhaps without any awareness by him of the events. But, they must forget that evidence presently. They will only consider that evidence later in their deliberations, if at all.

Before they even consider that evidence they first decide whether the accused is *probably* a member of the conspiracy that is alleged. And, they must do so based solely on evidence directly against the accused. In other words, they must set aside (banish, disregard, ignore) for the moment all the evidence that they have heard that is not directly admissible against the accused. Here, the trial judge will try to help them separate in their minds what evidence is usable and what evidence needs to be ignored. But by merely reciting the evidence that the jury must ignore, the judge, in fact, accomplishes the

opposite effect. The judge succeeds only in highlighting that evidence in the jurors' minds. If they conclude the accused is a probable member of the conspiracy, then they may consider the rest of the evidence they have heard to determine his guilt.

Does any reasonable person believe that this instruction cures the prejudice? Canada is a country with an unenviable record for wrongful murder convictions. Common sense suggests that the present paradigm for dealing with co-conspirators' evidence may play a significant role in future wrongful convictions. In this instance the words of McLachlin J. in *Rockey*² come to mind -- that juries cannot be expected to determine on their own the proper and improper uses of evidence. McLachlin J. wrote:

It has long been accepted that trial judges charging juries on out-of-court statements must instruct them on how they may use the statements-- whether as evidence of the truth of their contents or for some other purpose, such as credit. In this case the trial judge did not do this. It may be that it was apparent to everyone in the courtroom that the subsequent statements were tendered on the issue of consistency, as the majority of the Court of Appeal suggests. Nevertheless, the usual rule requires this to be stated expressly.³

With or without instructions on how to use out-of-court statements, we expect much of our jurors when we ask them to ignore prejudicial, out-of-court statements and conduct, until after they first conclude whether the accused is a probable member of a conspiracy.

² *R. v. Rockey* [1996] 3 S.C.R. 829

³ *Rockey*, supra Note 9 at para. 184.

This instruction is akin to asking a curious motorist after he or she has witnessed a horrific accident to look away from the accident in the interest of orderly traffic flow. The instruction instead likely only piques the jury's interest in the very evidence that they are asked to ignore.

Hearsay's Connection to the Co-Conspirators' Exception to Hearsay

The hearsay rule has a necessary and essential purpose. It requires witnesses to testify in court if their words are to be considered for their truth. Hearsay evidence is presumptively inadmissible. The rule against hearsay evidence values cross-examination of witnesses to test or challenge their credibility and reliability. Admissible hearsay is thus the exception.

The "traditional exceptions" are categorical exceptions to the general exclusionary rule against hearsay. The Supreme Court of Canada in *Starr*⁴ concluded that if the categorical exceptions do not offend the dual test of necessity and reliability there is no need for their removal from our law. One opposed to the introduction of the evidence must establish that the evidence does offend these criteria. The categorical exceptions now co-exist with present and future exceptions to hearsay based on the criteria of necessity and reliability. The co-conspirators' exception to hearsay is one of many recognised, traditional exceptions to hearsay.⁵

⁴ *R. v. Starr* [2002] 2 S.C.R. 144

⁵ Other traditional exceptions include *res gestae* statements, dying declarations or against pecuniary or proprietary interests or in the course of duty or of mental or emotional state and admissions against interest or by conduct. These, and others, are thought to ensure, by their nature and circumstances, elements of necessity and reliability.

The co-conspirators' rule permits acts or declarations by a person committed *during* a common unlawful plan, for the purpose of advancing the plan, to be admissible against all other persons involved. Although the rationale for the rule is based on agency principles, it is clearly and specifically an exception to the hearsay rule. As such, it *presumptively* respects and satisfies the principled approach, the more flexible approach, to admissible hearsay adopted by the Supreme Court of Canada in *Khan*.⁶ That flexible approach makes otherwise inadmissible hearsay evidence admissible provided the evidence is necessary and reliable.

Absent this presumption of admissibility, the party seeking the admission of this evidence would be required to satisfy the twin criteria of necessity and reliability.⁷ Consequently, whenever two or more persons embark upon a common unlawful plan, the acts or declarations of each are admissible against all, *provided that* they take place while the plan is ongoing and the acts and declarations are for the purpose of advancing the plan.

The Supreme Court of Canada in *Carter*⁸ provided the method by which evidence would be admissible under the co-conspirators' exception, and McIntyre J. 5 years later succinctly summarized the procedure under *Carter* as a 3-step process:

- i. The trier of fact must first be satisfied, beyond a reasonable doubt, that the alleged conspiracy in fact existed;

⁶ *R. v. Khan*, [1990] 2 S.C.R. 531.

⁷ *R. v. Khelawon*, [2006] 2 S.C.R. 298.

⁸ *R. v. Carter*, [1982] 1 S.C.R. 938.

- ii. If the alleged conspiracy is found to exist, then the trier of fact must review all the evidence that is directly admissible against the accused and decide, on a balance of probabilities, whether or not he is a member of the conspiracy;
- iii. If the trier of fact concludes, on a balance of probabilities, that the accused is a member of the conspiracy, then the trier of fact must go on and decide whether the Crown has established such membership beyond a reasonable doubt. In this last step only, the trier of fact can apply the hearsay exception and consider evidence of acts and declarations of co-conspirators, done in furtherance of the object of the conspiracy, as evidence against the accused on the issue of his guilt.⁹

The Supreme Court of Canada in 2005 again referred to this 3-step process with approval, provided the acts or declarations occur *while the conspiracy is ongoing and are in furtherance of the common object*.¹⁰ Obviously, where the trier of fact is a jury, all 3 steps are the responsibility of the jury, not the judge. What role, if any, the trial judge should play in screening the evidence that should go before the jury to fulfill its responsibilities in this 3-step process has been the subject of some debate. The trial judge's role will be discussed below.

⁹ *R. v. Barrow* [1987] 2 S.C.R. 694 at para. 73

¹⁰ *R. v. Mapara*, [2005] 1 S.C.R. 358.

In *Mapara*¹¹ the Supreme Court of Canada accepted that even *double hearsay* is admissible under the co-conspirators' exception because it meets the necessity and reliability requirements. *Necessity* the court said is satisfied based upon the combined effect of the non-compellability of co-accuseds and the undesirability of separate trials for co-conspirators. *Reliability* is satisfied by the *Carter* approach.

The court concluded that this approach is fair to accused persons while permitting effective prosecutions of conspiracies.¹² Only in "rare cases", where the accused is able to establish that application of the rule does not satisfy the indicia of necessity and reliability, will such hearsay evidence be excluded.¹³ The exclusion of this evidence in rare cases will likely be accomplished via a *voir dire*.

Ducharme J. in *Magno*¹⁴ offered this opinion:

The appellate courts' concern about the impact of *voir dire*s in this area is well-founded. Unfortunately, their prediction of their rarity appears to have been overly optimistic. I say this because there are at least three situations where a pre-trial determination will have to be made with respect to evidence alleged to fall within the co-conspirator's exception:

1. Where the defence can credibly raise the issue of whether the proposed evidence actually falls within the co-conspirators' exception;

¹¹ *R. v. Mapara*, [2005] 1 S.C.R. 358 at para. 8.

¹² *Ibid.* at paras. 18, 22-24, 28-31, and 36-37.

¹³ *Ibid.* at para. 37.

¹⁴ *R. v. Magno*, [2012] O.J. 3353 (Ont. S.C.J.)

2. Where the defence can question the necessity of admitting the hearsay evidence. This is most likely to arise when the hearsay declarant is available to testify. This situation was expressly not addressed in *Chang* and *Mapara*; and,
3. Where the defence “is able to point to evidence raising serious and real concerns about reliability” as described in *Chang*.

Ducharme J. explains that once the prosecution demonstrates the acts or declarations fall within the exception to the hearsay rule, the burden shifts to the defence to demonstrate its admission would be inconsistent with the principled approach. Where arguments by the defence fall within one of the 3 circumstances referred to above, “it is clear from *Chang* the trial judge must determine the issue and this will presumably necessitate a *voir dire* of some description.”¹⁵ Ducharme J. also explains his use of the phrase, “a *voir dire* of some description” in a footnote that suggests, “such *voir dire*s need not require *viva voce* evidence and may most efficiently be conducted by requiring the parties to submit a written record and written submissions as was done in the present case.”¹⁶

The Court of Appeal for Ontario in *Simpson*¹⁷ says that one of the “rare cases” when a *voir dire* may be necessary to determine the admissibility of hearsay declarations and acts is when the actual declarant or actor *is available* as a witness. LaForme J.A. writing for the court wrote:

¹⁵ *R. v. Magno*, supra Note 12 at para. 24.

¹⁶ *Ibid.* at footnote 17.

¹⁷ *R. v. Simpson*, (2007), 230 C.C.C. (3d) 542

There is no doubt in my mind that the availability of the declarant, in some circumstances, can support the “rare exception” in which the *Carter* test might yield to that required by *Starr*. In other words, the availability of the co-conspirator declarant as a witness, may require that the declaration be adduced through the testimony of the declarant.¹⁸

A Little History

Sir Walter Raleigh was tried for treason in 1603. The key prosecution evidence was a sworn confession by Lord Cobham, Raleigh’s alleged co-conspirator. Raleigh testified. He called Cobham’s confession a lie and insisted that Cobham had recanted his confession. He protested the admission of this hearsay. He demanded that Cobham be brought to testify. The court refused and Raleigh was convicted and later executed.

The public outcry against this unproven evidence fuelled the introduction of the hearsay rule instituted in England somewhere between 1675 and 1690.¹⁹ Ironically, a conspiracy trial inspired the hearsay rule. I say ironically because our modern day use of the co-conspirators’ exception to the hearsay rule renders the protections afforded by the hearsay rule virtually meaningless, particularly when the case is one tried before a jury.

The rule against hearsay considers out-of-court statements as unproven and unreliable. In contrast, evidence under oath, in court, and subject to cross-examination, provides triple

¹⁸ *Ibid.* at para. 36.

¹⁹ 5 *Wigmore*, Evidence §1364 at 18 (Chadbourne rev. 1974).

assurance of reliability. Testimony given under oath guarantees the truth under penalty of perjury. Cross-examination permits the exposure of inherent weaknesses such as bias, motive, perception, memory, narration or sincerity. *Vive voce* testimony also permits personal inspection and assessment of the demeanour and therefore the credibility of a witness. Thus, the defining features of the hearsay rule are: the purpose for which the evidence is presented; and whether or not there has been a meaningful opportunity to cross-examine the declarant under oath.

Under the co-conspirators' exception, however, the "evidence" of declarants, sometimes available to testify but not called as witnesses, not available to testify, or available to testify but *not compellable to testify* (as in the case of a co-accused) is nevertheless admissible. The co-conspirators' exception to hearsay raises some fundamental uncertainties with *reliability* because the rule:

1. Implicitly assumes that the accused has authorized others (his alleged co-conspirators) to speak and act on his behalf in furtherance of the conspiracy;²⁰
2. Presumptively considers the evidence compliant with the principled approach exception to hearsay. In the absence of evidence raising serious concerns about the necessity or reliability of the declarations or conduct a *voir dire* to determine necessity and reliability is generally unnecessary;²¹

²⁰ *R. v. Chang* [2003] O.J. No. 1076 at para. 55 (Ont.C.A.)

²¹ *Chang* at paras. 95 and 132; and *R. v. Magno*, [2012] O.J. 3353 (Ont. S.C. J.) at para. 22.

3. Applies to any crime alleged to be committed by more than one person, even if the accused are not charged with conspiracy. It assumes that any crime committed by more than one person necessarily involves a conspiracy (or agreement) to commit the crime and therefore all statements by each or any of them are admissible against the other(s).²²
4. Permits evidence of oral or written declarations or non-verbal conduct to be presented in evidence to prove the truth of the matters asserted or demonstrated sometimes not even requiring the declarant to appear in court under oath or solemn declaration and without the declarant submitting himself or herself to cross examination.
5. Permits extremely prejudicial evidence, and, potentially inadmissible evidence, to be presented to a jury on the conditional basis that the jury will not consider any of it until after they review and consider only the evidence that is directly admissible against each accused and decide, on a balance of probabilities, if he or she is a probable member of the conspiracy.
6. Renders unnecessary the requirement that all members of a conspiracy participate, or intend to participate, as equals in the ultimate commission of the unlawful object. Parties to a conspiracy need not personally commit, or intend to

²² *R. v. N.Y.*, [2012] O.J. No. 5165, at para. 88; *R. v. Koufis*, [1941], S.C.R. 481, at p. 488; *R. v. Wilder*, [2003] B.C.J. No. 2884 (B.C.S.C.), at para. 649

personally commit, the offence that each has agreed is to be committed.²³ An individual “may involve himself in the guilt of a conspiracy by his mere assent to an encouragement of the design, although nothing may have been assigned or intended to be executed by him personally.”²⁴

When Conspiracy Involves Only 2 Persons

The Court of Appeal for Ontario was required to consider a two-person conspiracy to traffic in cocaine in the case of *Bogiatzis*.²⁵ This case highlights the unique difficulties that occur when the court is dealing with just a 2-person conspiracy. The prosecution's case was dependent upon a series of meetings between 2 Crown witnesses. The accused was present for 2 of these meetings.

One of the prosecution's 2 witnesses did not support the Crown's theory of a conspiracy. In fact, he testified that there was no agreement between himself and the accused to traffic in drugs. He admitted to using the accused's name in his conversations with the police agent, but only to impress. He did not correct the police informant's mistaken impression that the accused was involved because it did not suit his plan.

The court ordered a new trial on the basis that the trial judge failed to properly instruct the jury on the limited use to be made of recorded conversations involving the co-conspirator Crown witness and the police informant but not the accused. The trial judge

²³ *R. v. Genser*, [1986] M.J. No. 134 (Man. C.A.), aff'd. [1987] 2 S.C.R. 685

²⁴ Wright, *The Law of Criminal Conspiracies and Agreements* (1887), pp. 55-56; Quoted with approval in *R. v. McNamara* (No. 1) at para. 649 (Ont.C.A.)

²⁵ *R. v. Bogiatzis*, (2010) 285 C.C.C. (3d) 437 (Ont. C.A.)

failed to ensure that the jury understood that to convict the accused they had to be convinced that he was part of an ongoing conspiracy to traffic in cocaine, not simply a party to one transaction. A finding that a conspiracy existed beyond a reasonable doubt would decide the entire case since there were only 2 alleged co-conspirators.

The Court of Appeal for Ontario will likely make further comment on 2-person conspiracies in the case of *Puddicombe*.²⁶ This case involves an appeal by an accused charged with her boyfriend's axe murder. The alleged crime occurred in the midst of a complicated love triangle where the accused's former lesbian lover actually confessed to the crime, then retracted her confession in her own trial for murder and was acquitted. The decision in this case is presently on reserve. The trial court's decision is still unreported.

The “In Furtherance” Requirement

One of the pre-requisites to admissibility of evidence under this exception is that the acts or declarations are performed in furtherance of the conspiracy or agreement. *Chang* referred to the “in furtherance requirement” as imbuing “co-conspirators’ declarations with *res gestae* type qualities.” It referred to “in furtherance declarations” as “the very acts by which the conspiracy is formulated or implemented and are made in the course of the commission of the offence.”²⁷ They are part of the *res gestae* in the execution of the plan of the agreement.

²⁶ *R. v. Puddicombe* – December 2009 decision of Benotto J. on appeal to Ontario Court of Appeal and reserved on Jan 30, 2013

²⁷ *Chang*, supra Note 17 at para. 123.

Parties to Conspiracy: It's All About the Agreement

Before the Supreme Court of Canada's recent decision in *J.F.*²⁸ there were two schools of thought on the question of how a person can be found responsible as a party to the offence of conspiracy. The first school was developed by the Court of Appeal for Ontario in *McNamara*²⁹ and *Vucetic*.³⁰ In both cases, the court embraced a more expansive view of party liability to conspiracy under section 21 of the *Criminal Code* that included aiding or abetting the furtherance of the conspiracy's unlawful object, as well as aiding or abetting the agreement itself.

An alternative and less expansive theory of party liability to conspiracy was embraced by the Court of Appeal for Alberta in the case of *Trieu*³¹ and the Court of Appeal for Quebec in *Bérubé*.³² In *Bérubé*, the party liability was not based upon knowing the object of the conspiracy and intending to assist the conspirators in attaining their unlawful criminal object. Instead, it was based upon the alleged acts of assistance or encouragement being performed for the purpose of aiding or assisting the act of agreeing. This narrower approach focuses on the essence of conspiracy, the agreement. Consequently, assisting or encouraging a person to become a member of a pre-existing conspiracy may be the basis of a conviction for conspiracy. Conspiracy is thus the act of assisting the agreement. The offence also includes aiding or abetting the formation of a new agreement because that is also the act of assisting the agreement.

²⁸ *R. v. J.F.*, [2013] S.C.J. No. 12

²⁹ *R. v. McNamara* (No. 1), (Ont. C.A.).

³⁰ *R. v. Vucetic*, (Ont. C.A.).

³¹ *R. v. Trieu*, [2008] A.J. No.410 ((Alta. C.A.).

³² *R. v. Bérubé*. [1999] J.Q. No. 2608 (Que. C.A.)

The Supreme Court of Canada in *J.F.* rejected the broader approach (the *McNamara/Vucetic* model) and approved the narrower approach (the *Trieu/Bérubé* model). As a consequence, party liability is now limited to cases where one aids or abets the initial formation of the agreement, or aids or abets a new member joining a pre-existing agreement. The court found that party liability to conspiracy is proven by an individual aiding or abetting the *actus reus* of a conspiracy, the conspirators' act of agreeing. One does not become a party to the offence of conspiracy by aiding or abetting the furtherance of the conspiracy's unlawful object.

The Trial Judge's Role

In the absence of evidence raising serious concerns about the necessity or reliability of a statement or conduct, the utterances and conduct under this exception are admissible. The jury will be instructed to consider the evidence pursuant to the 3-step *Carter* procedure. Because the co-conspirators' rule is a recognized, valid exception to hearsay, necessity and reliability are presumed in the absence of exceptional circumstances. The question is: what amounts to exceptional circumstances?

Iacobucci J. writing for the majority in *Starr* suggested that the circumstances would be rare. He wrote:

In some rare cases, it may also be possible under the particular circumstances of a case for evidence clearly falling within an otherwise valid exception nonetheless not to meet the principled approach's requirements of necessity and reliability. In such a case, the evidence

would have to be excluded. However, I wish to emphasize that these cases will no doubt be unusual, and that the party challenging the admissibility of evidence falling within a traditional exception will bear the burden of showing that the evidence should nevertheless be inadmissible. The trial judge will determine the procedure (**whether by *voir dire* or otherwise**) to determine admissibility under the principled approach's requirements of reasonable necessity and reliability.³³ [My emphasis added]

It is important to remember that any consideration of reliability by a trial judge in her capacity as gatekeeper on a *voir dire* as suggested here refers to threshold reliability, not ultimate reliability. Ultimate reliability is the responsibility of the trier of fact.

When the Supreme Court of Canada articulated what has come to be known as the principled approach to the admission of hearsay in *Khan*³⁴ the traditional exceptions to hearsay were still maintained because each was based on a concern for reliability and necessity and could be reconciled with the new principled approach. As the Supreme Court of Canada explained in *Mapara*,³⁵ the *Starr* decision provided the following framework for considering the admissibility of hearsay evidence:

- a. Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.

³³ *Starr*, supra Note 1, at para. 214.

³⁴ *R. v. Khan* [1990] 2 S.C.R. 531

³⁵ *Supra* Note 3 at para. 15

- b. A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability required by the principled approach. The exception can be modified as necessary to bring it into compliance.
- c. In “rare cases”, evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
- d. If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

Consequently, one basis for requesting that the court conduct a *voir dire* prior to the presentation of proposed evidence under the co-conspirators’ exception is where the indicia of necessity and reliability are lacking in the particular circumstances of the case.

Defence counsel should expect that:

- a. Prosecutors will likely argue that pursuant to *Carter* these issues should be left for the jury to decide;
- b. Prosecutors will likely argue that *Starr* did not conclude that these issues must be decided on a *voir dire* in light of Iacobucci J.’s comment that, “the trial judge will determine the procedure (whether by *voir dire* or otherwise).” They may suggest a more informal procedure where counsel present their positions by argument rather than evidence on a *voir dire* (as was done in *Magno*³⁶);

³⁶ *Supra*. Note 20. At footnote 17.

To these or any other arguments that prosecutors raise to suggest that trial judges should not interfere with a process that *Carter* says should be left solely to the jury, defence counsel will no doubt counter with argument that the evidence does not actually fall within the exception, or is not necessary because the declarant is available to testify, or that serious concerns exist about the reliability of the evidence as described in *Chang*.

Conclusion

The co-conspirators' exception to the hearsay rule is, from a defence lawyer's perspective, the legal version of an improvised explosive device. It is like a cluster of improvised explosive devices: extremely diverse, difficult to defend against and intended to inflict a great deal of pain in the form of significant volumes of otherwise inadmissible evidence heaped upon the accused and awaiting his explanation. It places the accused in a difficult position. Evidence is presented that is not challenged by cross-examination -- the most effective means of testing credibility and reliability. It may be false or contrived or delivered for reasons best known to the declarant or actor, but in their absence. Nevertheless, it begs a response. And, in that response, the accused is placed in the unenviable position of answering "no win" questions premised upon the alleged statements and conduct of absentee witnesses. Sometimes no answers will suffice to remove the prejudice created by the questions.

The co-conspirators' exception to the hearsay rule is, from the trial prosecutor's perspective, a highly effective bomb, the ingredients of which are sometimes as inexpensive as a paid informant, or a person as guilty of the alleged crime as the

prosecutor contends the accused to be, and, “paid” by the prosecutor’s decision to make the declarant or actor a Crown witness, not an accused. There is no downside to this evidence for the prosecution, because this bomb detonates equally upon the guilty and the innocent and avoids troublesome challenges such as cross-examination. This bomb may be detonated remotely, as in not requiring the actual attendance of the actor or declarant. And, best of all, the prosecutor benefits by a 3-step process that places all the evidence before the trier of fact even before the jury decides whether the accused is a member of the conspiracy.

This analogy to a roadside bomb may be disproportionate to the Rule’s actual impact but I doubt Sir Walter Raleigh would think so. In fact, he might be shocked at how little progress we’ve made since his unhappy demise.