NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Bremner***, 2007 NSCA 53

Date: 20070504
Docket: CAC 265732
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Brian James Bremner (aka Marriott)

Respondent

Judges:	MacDonald, C.J.N.S.; Cromwell and Hamilton, JJ.A.
Appeal Heard:	January 17, 2007, in Halifax, Nova Scotia
Held:	Appeal allowed, trial judge's order discharging the accused on Counts 1 and 2 on the May 9, 2005 indictment set aside and the matter returned to the Supreme Court to be dealt with according to law per reasons for judgment of Cromwell, J.A.; MacDonald. C.J.N.S. and Hamilton, J.A. concurring.
Counsel:	James C. Martin and Susan Y. Bour, for the appellant Warren Zimmer, for the respondent

Reasons for judgment:

I. INTRODUCTION

[1] A person cannot be placed in jeopardy of conviction for the same matter more than once. The question in this case is whether two conspiracy charges against the respondent offend this principle. The trial judge found that they did. Respectfully, I disagree. In my view, the respondent had never before been in jeopardy for the two conspiracy charges he faced before the trial judge. I would, accordingly, allow the Crown's appeal and set aside the judge's order discharging the respondent.

II. TRIAL JUDGE'S DECISION AND ISSUES

[2] The appeal arises out of three conspiracy charges and two trials. I will call them conspiracies #1, 2 and 3 and the first and second trials. At the first trial, the respondent was convicted of conspiracy #1. He then faced the charges of conspiracies # 2 and 3 at the second trial.

[3] At the second trial, he argued that he had already been convicted of conspiracies #2 and 3 at the first trial. The legal label for the respondent's argument is the French expression, *autrefois convict*, which means simply that he has been convicted of the charges on another occasion.

[4] The trial judge at the second trial, Goodfellow, J., agreed and discharged the respondent. According to the judge, there had not been three separate conspiracies, but one larger one – a "dominant plan" – which included all three conspiracies. He held that the respondent's conviction at the first trial for conspiracy #1, which was one part of the larger conspiracy, precluded convictions for conspiracies # 2 and 3 which were part of the larger plan. He also found that the indictment at the first trial could have been amended to include conspiracies #2 and 3.

[5] The Crown appeals, submitting that the judge applied the wrong test and reached the wrong result. Boiled down to the basics, the Crown's position consists of one, straight-forward point: the respondent had never before been convicted, or

in jeopardy of being convicted, of the charges he faced at the second trial. He, therefore, cannot successfully plead that he had been.

[6] The issues to be determined are whether the judge erred in finding that:

1. the existence of a larger, dominant plan prevents convictions on more than one "sub-agreement" included as part of that larger plan?

2. conspiracies # 2 and 3 could have been included in the indictment for conspiracy #1 by way of amendment?

3. the existence of separate conspiracies was not a rational conclusion on the record before him?

[7] For the reasons which follow, I conclude that the judge erred in each of these respects. In my view, (1) the Crown is entitled to allege and prove, if it can, that there were separate, sub-agreements referable to a larger, overall plan; (2) the indictment at the first trial could not have been amended to include charges in relation to conspiracies # 2 and 3; and (3) the judge's finding that there were not separate conspiracies was inconsistent with the verdict of the jury at the first trial and it was, therefore, not a finding he was entitled to make.

III. ANALYSIS

[8] Before turning to my analysis of the issues raised on appeal, it will be helpful to set out the background facts.

A. The Charges, the "Dominant Plan" and the "Sub-agreements"

1. The Charges

[9] In May and June of 2002, the respondent was incarcerated at the Burnside Correctional Facility in Dartmouth. The Crown alleges that, on two specific occasions, one in late May and the other in mid-June of 2002, he instructed Bruce

Jackson and Wayne (Chop) Marriott to prepare and send to him "prison packages" of drugs. The respondent's instructions given in June resulted in the charge in relation to conspiracy #1 on which he was convicted at the first trial. The alleged May instructions form the basis of the charges in relation to conspiracies #2 and 3 presently before the court.

[10] The count in the indictment in relation to conspiracy #1 on which the respondent was convicted at the first trial is a follows:

> 1. **THAT** between the 17th day of June, 2002 and the 20th day of June, 2002, at or near Halifax, Province of Nova Scotia, he did, with Gary Michael Boudreau, Teddy Bremner, Wayne Marriott, Ronald James Snelgrove and Troy Shanks, conspire together to commit the indictable offence of trafficking in Cannabis (Resin), contrary to Section 465(1)(c) of the ***Criminal Code***;
>
> (Emphasis added)

[11] The counts in relation to conspiracies #2 and 3 which were in issue before the trial judge read as follows:

> 1. **THAT** on or between May 27, 2002 and May 31, 2002 at or near Halifax, Halifax Regional Municipality, Province of Nova Scotia, he did with Margaret Mary Sampson and Gary Michael Boudreau conspire together to commit the indictable offence of trafficking in Cocaine, contrary to section 465(1)(c) of the ***Criminal Code***;
>
> 2. **THAT** at the same time and place aforesaid, he did, with Margaret Mary Sampson and Teddy Bremner, conspire together to commit the indictable offence of trafficking in Cannabis (Resin), contrary to Section 465(1)(c) of the ***Criminal Code***;
>
> (Emphasis added)

[12] The following chart summarizes these charges:

Charge	Dates	Substance	Participants
Charge on which convicted - conspiracy to traffic (“Conspiracy #1")	17 - 20 June, 2002	cannabis (resin)	Gary Michael Boudreau, Teddy Bremner, Ronald James Snelgrove and Troy Shanks
Count 1 before trial judge - conspiracy to traffic (“Conspiracy #2")	27 - 31 May, 2002	cocaine	Margaret Mary Sampson and Gary Michael Boudreau
Count 2 before trial judge - conspiracy to traffic (“Conspiracy #3")	27 - 31 May, 2002	cannabis (resin)	Margaret Mary Sampson and Teddy Bremner

2. The “dominant plan”

[13] All of the charges arose out of a police operation, Operation Midway, which targeted mid-level drug dealers. It took place from May to July of 2002 and was based on the work of a police agent, Bruce Jackson.

[14] The operation focussed on a “retail” crack cocaine shop in Spryfield. There was evidence that Jackson was a “middle-man” who was responsible, along with Wayne Marriott, for the day-to-day operation of the shop under the direction of four others: the respondent, Gary Boudreau, Jimmy Melvin, Jr. and Stephen Fleming. These four allegedly were the exclusive suppliers of crack cocaine for the shop.

[15] The respondent’s position, adopted by the trial judge, was that there was only one, ongoing conspiracy among the various players to traffic in illegal drugs;

that this conspiracy pre-dated Operation Midway; that it concluded at the time of the arrest of the various parties; and that this dominant plan or overall scheme regularly included the preparation of "prison packages", that is, packages of drugs to be smuggled to persons in jail.

[16] There was evidence that Jackson had been running the crack shop well before the police operation started. There was also evidence about its ongoing operation and about how Jackson's duties included preparing prison packages of drugs to be smuggled into prison while the four leaders were in custody. Jackson's evidence at the first trial was the there had been "... many packages..." over the course of the operation, that he had put together "... four or five different packages for people..." during that time. There could be no serious dispute, if Jackson's evidence were believed, that there was an ongoing conspiracy, beginning well before Operation Midway, to operate the crack shop and to provide prison packages as needed. The trial judge concluded that "... what existed throughout this period was simply a continuing over-all scheme or dominant plan with changes in the manner and method of operation, personnel, victims, etc., all of which took place without the conspiracy coming to an end." (Reasons para. 53)

3. The "sub-agreements"

[17] The Crown does not dispute that there was a larger, overall plan. It submits, however, that it was entitled to, as it did, lay conspiracy charges in relation to sub-agreements that were made under the umbrella of this larger scheme.

[18] As the Crown points out, the charges in relation to conspiracies #2 and 3 at the second trial concern events which are alleged to have taken place during a different time frame (27 - 31 May, compared with 17 - 20 June) and to have involved different people. In the case of conspiracy #2, a different substance was involved. The evidence about conspiracy #1 at the first trial was that the respondent directed that Shanks should deliver the drugs. At the second trial relating to conspiracies #2 and 3, the Crown alleged that no specific directions had been given about delivery. The evidence at the preliminary inquiry into conspiracies #2 and 3 was that Jackson enlisted Ms. Sampson to smuggle the drugs

to Jackson's cousin in Springhill Penitentiary for ultimate delivery to the respondent.

B. First Issue: Did the judge err in finding that the existence of a larger, dominant plan prevents convictions on more than one "sub-agreement" included as part of the larger plan?

[19] In my view, the judge's fundamental legal error was asking himself whether there had been a larger, dominant plan rather than whether the respondent had ever before been in jeopardy on the charges he faced at the second trial. The Crown, exercising its prosecutorial discretion, did not proceed with a charge alleging the dominant plan, but rather with charges alleging sub-agreements. It was entitled to do this and a conviction on one sub-agreement did not bar a subsequent conviction for another so long as the respondent was not being put in jeopardy twice for the same matter. My analysis will address four areas: (1) prosecutorial discretion; (2) the distinction between the *autrefois* pleas and the larger subject of abuse of process; (3) the impact of charging "sub-agreements"; and (4) the requirement of jeopardy.

1. Prosecutorial discretion:

[20] "A judge does not have the authority to tell prosecutors which crimes to prosecute...". This statement by L'Heureux-Dubé, J. in **R. v. Power**, [1994] 1 S.C.R. 601 at 628 reminds us that, in general, the decision to proceed with charges, and the evidence to be presented by the Crown, are matters of prosecutorial discretion: see. e.g. **Cullen v. The King**, [1949] S.C.R. 658; **R. v. Power, supra**. The courts treat this discretion with deference and will intervene only where the prosecutor's conduct is unlawful or an abuse of process: see, e.g. **R. v. O'Connor**, [1995] 4 S.C.R. 411; **R. v. Regan**, [2002] 1 S.C.R. 297.

[21] This is a key principle in this present case. I detect in both the respondent's submissions and the trial judge's reasons the view that the Crown ought to have

charged the overall scheme, not the sub-agreements. However, the fact that an accused or a judge thinks that the Crown could or should have proceeded with a different charge is irrelevant to consideration of an *autrefois* plea. The question is whether the Crown is trying to prosecute the same matter for a second time, not whether it could or should have charged some other offence.

2. The special pleas of *autrefois convict* and *acquit* and the broader principles about abuse of process.

[22] As the trial judge recognized, the principle against double jeopardy is a fundamental aspect of our criminal law. The words of Rand, J. in **Cullen, supra**, are often cited: that no one is to be placed in jeopardy twice for the same matter is a "cardinal principle" which lies at "... the foundation of criminal law...".

[23] The principle against double jeopardy prevents double punishment for the same acts as well as the unwarranted harassment of an accused by multiple prosecutions: Martin L. Friedman, *Double Jeopardy* (Oxford, Clarendon Press,1969) at 3 - 4. To translate some well-worn Latin phrases, a person should neither be twice punished nor twice vexed for the same act. As Rand, J. pointed out in **Cullen** at 668:

> ... the reasons underlying that principle are grounded in deep social instincts. It is the supreme invasion of the rights of an individual to subject him by the physical power of the community to a test which may mean the loss of his liberty or his life; and there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy.

[24] This principle, embodied in section 11(h) of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, animates a number of other, more specific rules. Among those more specific rules are the "special pleas" of *autrefois convict* and *acquit* (that the accused has already been convicted or acquitted of the offence charged) and the rule set out in **Kienapple v. The Queen**, [1975] 1 S.C.R. 729 which bars multiple convictions for the same wrongful act. The double jeopardy principle is also reflected in the rules relating to *res judicata* and issue

estoppel (see, for example, **Gushue v. The Queen**, [1980] 1 S.C.R. 798) and the provisions in s. 725(1)(c) and (2) of the **Code** which foreclose further proceedings with respect to facts noted on the indictment which have been taken into account on sentencing: see **R. v. Larche**, 2006 SCC 56; [2006] S.C.J. No. 56 (Q.L.), particularly at para. 26.

[25] These more specific rules, despite their common origin, differ in their ambit and application. As McLachlin, J. (as she then was) put it in **R .v. Van Rassel**, [1990] 1 S.C.R. 225 at 233:

> ... The double jeopardy concept ... is a principle of general application which is expressed in the form of more specific rules, ... The case law shows that these principles differ in the way they are applied, despite their common origin. ... For these reasons, each of the defences ... must be considered separately.

[26] As noted, one of the underlying purposes of the double jeopardy principle is to provide protection against abusive charging practices. Although the special pleas of *autrefois acquit* and *convict* provide some check on abuse of prosecutorial discretion, they are by no means either the only or even the main vehicles which fulfill that function. Our law has evolved so that the special pleas are applied quite narrowly: they simply prevent an accused from being placed in jeopardy more than once for the same matter. Broader issues of allegedly abusive charging practices, such as the Crown splitting up one matter into a multitude of charges, are addressed more directly through the power of the court to prevent abuse of its process. As Laskin, C.J.C. said in his concurring reasons in **R. v. Rourke**, [1978] 1 S.C.R. 1021 at 1031:

> ... In a broad sense, pleas of *autrefois convict* and *acquit*, and of *res judicata* and issue estoppel may be said to be aspects of abuse of process; <u>they may be regarded as crystallized means of control, having a particular ambit of operation but not exhaustive of the scope of abuse of process</u>. (Emphasis added)

[27] Whether the prosecutor has abused the court's process, however, is judged according to an onerous standard. Abuse will be found only if trial fairness has been damaged or the prosecution is conducted in such an unfair or vexatious

manner that it undermines the integrity of the judicial process: **R. v. O'Connor, supra** at para. 73.

[28] It is therefore important to analyse the *autrefois* pleas according to their "particular ambit of operation". These specialized and specific rules should not be allowed to become an indirect way of controlling prosecutorial discretion while sidestepping the onerous requirements which justify the court intervening to stop abuse: see, for example, **Regan**, **supra**.

[29] This principle, like the first one, is relevant in this case because the respondent's submissions come close to suggesting that the way the charges were framed constitutes an abuse. For example, the respondent says this in his factum:

> It is interesting to note that the Crown, at the beginning of the [first] trial, withdrew the count of conspiracy to traffic in cocaine, however, nevertheless led the evidence of the cocaine going into the package at trial. This tactic may have been employed so as to hold the cocaine conspiracy in reserve for the second trial which was scheduled to commence May 10th before LeBlanc, J. This would ensure the Crown of a second opportunity of conviction in the event that things did not go well on the first trial. Clearly the Crown did not want to amend the Indictment before Moir, J., but rather left or perhaps created an artificial distinction between the two matters so that they could be prosecuted independently and thereby derive two convictions and two sentences against Mr. Bremner.
> (Emphasis added)

[30] Whether the Crown's approach to the case was "artificial" or was undertaken to "...derive two convictions and two sentences against [the respondent]..." is not relevant to the plea of *autrefois convict*. These factors could be relevant to whether the Crown proved the offences set out in the indictments or to whether the charging practice in this case was abusive. But these things are not in issue here. Whether the Crown can prove the charges is not, at this stage, in issue. No abuse of process is alleged.

3. The effect of charging "sub-agreements"

[31] The judge's critical finding was that all of these charges related to the same "overall scheme" or "dominant plan". It followed, he thought, that the respondent could not be prosecuted for more that one sub-agreement within that overall scheme. However, that line of reasoning is premised on an error of law. The Crown is entitled to allege and prove, if it can, that there were distinct sub-agreements within a wider conspiracy. That is what it did here. The respondent was never charged with, let alone convicted of, the wider, "dominant plan".

[32] This principle is well-illustrated by two English cases which have been approved and followed in Canada, **R. v. Greenfield**, [1973] 3 All E.R. 1050 (C.A.) and **R. v. Coughlan and Young** (1976), 63 Cr. App. R. 33.

[33] **Greenfield** illustrates the point that, no matter how many conspiracies the evidence may reveal, the critical question is whether the one alleged in the indictment has been proved. In **Greenfield**, there were some nine accused charged with conspiring with each other and unindicted persons between January of 1968 and August of 1971 to cause explosions in the United Kingdom. The prosecution led evidence of 25 explosions over that period. The defence sought to show that the Crown evidence was, in fact, consistent with more than one conspiracy. Certain of the accused appealed on the basis that the conspiracy charge was bad for duplicity. The appeal was dismissed.

[34] Lawton, L.J., for the court, said that the defence had attempted at trial to challenge the existence of the conspiracy charged. The Crown alleged that the appellants and the other accused had a common purpose to cause explosions. The accused had challenged this basic allegation by submitting that the evidence showed there was no such overall common purpose and by suggesting, in effect, that the evidence was at least equally consistent with the existence of other conspiracies as with the existence of the one charged. The Court held that the indictment was not bad for duplicity simply because the evidence disclosed that one or more of the accused was a member of a conspiracy other than the one charged. According to the court, the issue was whether the conspiracy charged in the indictment, not some other conspiracy, had been proved.

[35] **Greenfield** was cited with approval by Dickson, J. in **R. v. Cotroni**, [1979] 2 S.C.R. 256. There, a majority of the Court characterized the issue as being whether there was any evidence that two of the accused, Violi and Cotroni, were

parties to the conspiracy alleged by the Crown. Dickson, J. was of the view that the case involved a situation in which the Crown had charged one conspiracy, but supported proof of it during trial by offering evidence of more than one. The case, therefore, gave rise to the question of whether the Crown had proved the conspiracy charged. With respect to the appellant Cotroni, Dickson, J. held that the only evidence against him was with respect to a conspiracy not covered by the indictment.

[36] These cases illustrate, in the context of conspiracy charges, the elementary principle that the Crown must prove the charge as set out in the indictment. If the Crown alleges one, overall plan – the "over-arching scheme" or "dominant plan" referred to by the judge in this case – that is what the Crown must prove to obtain a conviction. Evidence about, or even proof of, other conspiracies is not fatal to that enterprise, but will be relevant to whether the Crown has proved the existence of the overall conspiracy alleged in the indictment.

[37] In the present case, the Crown at the first trial did not charge the respondent with the overall plan, but with one, discreet conspiracy to traffic in cannabis (resin) over a 4 day period in June. The Crown proved the existence of conspiracy #1 and the respondent's membership in it beyond a reasonable doubt to the jury at the first trial. The Crown also charged conspiracies #2 and 3, which it alleged were separate from #1 and which it alleged resulted from the alleged instructions given by the respondent in late May. Whether or not the evidence disclosed some other, wider conspiracy, the issue at the second trial was whether the Crown could prove the conspiracies which it had charged.

[38] The second English case, **Coughlan and Young**, illustrates the operation of the converse of the rule set out in **Greenfield**. It is directly relevant here.

[39] Coughlan and others had been convicted of conspiring to cause explosions in the United Kingdom. The acts relied on by the Crown were explosions in Manchester, not elsewhere, between April of 1973 and April of 1974. Coughlan was charged again with conspiracy to cause explosions in the United Kingdom with the acts relied on by the prosecution being explosions in Birmingham and area, not elsewhere, between August of 1973 and August of 1974. Coughlan pleaded *autrefois convict* to these charges. The plea was rejected at trial and that rejection was upheld on appeal.

[40] Lawton, L.J. for the court held that the Crown may allege and try to prove a separate conspiracy to cause explosions in Manchester and another to cause explosions in Birmingham, even though some or all of the conspirators were parties to a wider agreement to cause explosions throughout the United Kingdom. As he said at 35: "The wider agreement or conspiracy would not preclude the existence of sub-agreements or sub-conspiracies to cause explosions in particular places, and as a matter of law these sub-conspiracies or agreements could properly be charged as separate offences. Acquittal or conviction on a charge of one such offence would be no bar to the trial of the same accused on another." (Emphasis added)

[41] Thus, according to **Coughlan**, the prosecution is entitled to allege in an indictment, and prove if it can, that there were sub-agreements or sub-conspiracies. Evidence that there was, in fact, an overarching scheme or a dominant plan to which all of these sub-agreements are referable does not bar prosecution or conviction for those sub-agreements.

[42] This principle has been approved by the Supreme Court of Canada and, so far as I am able to tell, remains good law in the United Kingdom as well.

[43] In **R. v. Patterson, Ackworth and Kovach** (1985), 18 C.C.C. (3d) 137 (Ont. C.A.), aff'd [1987] 2 S.C.R. 291, Martin, J.A. said at 143 that "[w]here there is but one agreement, and not separate agreements as to the different unlawful objects, there can only be one conviction." However, he pointed out that **Coughlan** was not in conflict with this proposition: in that case, " ... there were also subsidiary agreements with respect to bombings in particular places, each of which could properly be the subject of a separate charge of conspiracy." Martin, J.A. at 144 also cited both **Greenfield** and **Coughlan** with approval for this proposition: where the evidence establishes the conspiracy alleged against the accused, "... it is immaterial that the evidence also discloses another and wider conspiracy to which the accused or some of them were also parties..." .

[44] This judgment was unanimously affirmed by the Supreme Court of Canada in a brief oral decision delivered without hearing from the respondent Crown. In addition, these passages from **Paterson** were cited with approval by the Supreme Court of Canada in **R. v. Douglas**, [1991] 1 S.C.R. 301 at 317 - 318. The same

principles were applied in **R. v. Stacey**, [1988] N.J. No. 2 (Q.L.); 68 Nfld. & P.E.I.R. 203 (T.D.). **Coughlan** also appears to remain good authority in the United Kingdom: **Alibhai & Others v. The Queen**, [2004] EWCA Crim 681 at paras. 103 - 104.

[45] I conclude, therefore, that the judge erred in law when he held that the evidence of an overall scheme or dominant plan prevented the Crown from charging and proving, if it could, the existence of more than one sub-agreement or sub-conspiracy referable to that overall scheme.

4. The Requirement of Jeopardy

[46] An accused who wishes to rely on the *autrefois* pleas must establish three elements. They may be referred to as the requirements of jeopardy, finality and identity. To succeed on the special plea, the accused must have been in jeopardy in the previous proceeding, there must have been a final disposition of it and the jeopardy must have been with respect to the same matter as that now before the court: **R. v. Moore**, [1988] 1 S.C.R. 1097; **Van Rassel**, **supra**.

[47] This principle is important in this case. It is clear, in my respectful view, that the trial judge applied the wrong legal test. The judge asked himself whether "... the conspiracy for which [the respondent] was convicted ... existed during the time frame of the present charge ... and that it was simply a continuing overall scheme or dominant plan ..."? Respectfully, this was not the relevant consideration. The question the judge had to answer was whether the respondent could have been convicted at the first trial of the conspiracy charges he faced before the trial judge. The fact that there was evidence of some other conspiracy to which all of the charges related was not what the law required the judge to determine.

[48] The factor of prior jeopardy is the "bedrock" principle of the *autrefois* pleas. As expressed by Professor Friedland, "Whatever the outside limits of the special pleas might be, the bedrock principle has always been that the accused cannot be retried if he was in peril at the first trial.": Martin Friedland, *Double Jeopardy*, *supra* at 69.

[49] The issues of jeopardy and identity are, of course, interrelated. The jeopardy has to have been with respect to the same matter. The main issue here concerns

identity. There is no issue in this case as to the first two requirements: the accused was not only in jeopardy but was convicted at the first trial and that conviction was a final disposition of those proceedings. The question is whether the jeopardy he faced in that proceeding, which concluded in a conviction, was with respect to the same matter he faced at the second trial.

[50] Section 609(1) of the **Criminal Code** establishes a two-part test for determining identity. (I need not decide whether the section is an exhaustive codification because no other test than that given in the section has been advanced as being more favourable to the respondent.) First, it must be shown that the "matter" on which the earlier charges were based is the same, in whole or in part, as that on which the current charges are based. Second, it must also be shown that the accused might have been convicted at the former trial of all the offences on which he or she has pleaded *autrefois convict* if all proper amendments had been made at the former trial. Section 609(1) of the **Code** provides:

> 609. (1) Where an issue on a plea of autrefois acquit or autrefois convict to a count is tried and it appears
>
> > (a) that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and
> >
> > (b) that on the former trial, if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count to which the plea of autrefois acquit or autrefois convict is pleaded,
>
> the judge shall give judgment discharging the accused in respect of that count.

[51] These provisions (then numbered s. 537 of the Code) were explained in **R. v. Van Rassel**, **supra**. **Van Rassel**, while citing the two-part test as set out in s. 609(1)(a) and (b), boiled it down to one, simple substantive issue: "... could the

accused have been convicted at the first trial of the offence with which he is now charged?": at 235.

[52] Section 609 as explained in **Van Rassel** therefore focuses on the question of prior jeopardy for the same matter. The key is whether the accused was, in fact, in jeopardy with respect to the present charges at the first trial, either on the indictment as it stood or as it could have been amended. The key question may be broken down into two issues: first, having regard to the record and the indictment at the first trial, was the accused in jeopardy of being convicted of the offence for which he is now charged; and second, having regard to the record at the first trial and all proper amendments to the indictment at the first trial, could the accused have been in such jeopardy?

[53] The answer to both questions is no. I will address the first issue here and the second in the next section.

[54] **R. v. Ko and Yip** (1977), 36 C.C.C. (2d) 32 (B.C.C.A.) illustrates the issue of whether, on the indictment and evidence at the first trial, the accused was in jeopardy of conviction for the subsequent charges. The accused were charged in two separate, and for present purposes, identical indictments with trafficking in heroin over a four-day period. The evidence on the first trial was that the accused agreed to sell one pound of heroin and gave the officer a small sample to be tested. Shortly after, the officer received the full pound. On the second trial, the same evidence was given but in addition, the full pound of heroin was introduced. Having been convicted on the first indictment, the accused pleaded *autrefois convict* to the second. The plea was rejected at trial.

[55] On appeal, however, the Court upheld the plea and discharged the accused on the second indictment. McIntrye, J.A. (as he then was) for the Court concluded that "... the matter on which the appellants were given in charge on the first trial is essentially the same as that on which they faced trial upon the second indictment..." and that at the first trial, "without the necessity of any amendments to the indictment, they might have been convicted in respect of all offences for which they could have been convicted on the second ..." at 36. In other words, having regard to the wording of the indictment at the first trial and the evidence adduced, the second indictment was with respect to the same matter on which the accused had previously been convicted. As McIntyre, J.A. put it at pp. 35 - 36:

> It was contended that the sale of the sample and the sale of the pound were two separate acts of trafficking, each complete in itself. ... To produce this result, however, it would have been necessary for the Crown to specify in the indictments, or in particulars properly given which would have become part of the indictments the acts alleged so that the two could be isolated and the accused have accurate notice of the charges they faced under each indictment. This was not done. ... It is clear that on the trial of the first indictment the accused could have been convicted in respect of both incidents and the indictment contained no words separating or limiting the two offences. (Emphasis added)

[56] Returning to the case on appeal, as the indictment stood at the first trial, the respondent was not in jeopardy of being convicted of the charges he faced at the second. The alleged conspiracies were based on different acts and declarations of the alleged conspirators, took place over different time periods, involved different people and, in one case, a different illegal substance.

[57] At the first trial, the Crown alleged that on June 17, the respondent instructed Jackson and Wayne Marriott to prepare a prison package and to arrange for it to be brought into the correctional facility by Troy (Honk) Shanks. According to Jackson, he quickly made the necessary arrangements and, on June 19, delivered three packages to Shanks. Shanks could only fit two of the packages in his rectum and so returned the third to Jackson. Later that day, Jackson said he drove Shanks to the Provincial Courthouse in Halifax and dropped him off, believing that Shanks was going to turn himself in, be taken into custody and ultimately sent to the correctional facility where he would give the packages to the respondent. Jackson testified that he gave the third package to Ms. Sampson to be smuggled into Springhill Penitentiary and, Jackson thought, ultimately given to the respondent on his arrival there. At the second trial, the Crown alleged that the respondent had placed his order in May, had not specified how it should be delivered and that Sampson and Marriott were the other conspirators.

[58] As noted, the indictment in relation to conspiracy #1 at the first trial specified the charge of conspiring to traffic in cannabis (resin) between June 17 and 20. While there was some general evidence at trial that other prison packages had been prepared earlier and that cocaine had been included in these packages, the judge and both Crown and defence counsel made it clear to the jury that these

earlier matters and the presence or absence of cocaine had nothing to do with the charge before the court. As the indictments were framed, conspiracies # 2 and 3 were not the same as conspiracy #1.

5. Conclusion on First Issue

[59] I conclude that the judge erred in law when he found that the existence of a larger dominant plan prevents conviction for more than one "sub-agreement" included as part of the larger plan.

C. Second Issue: Did the judge err in finding that conspiracies #2 and 3 could have been included in the indictment for conspiracy #1 by way of amendment?

[60] A review of the relevant powers of amendment that would have been available at the first trial shows that it would not have been legally possible to amend the first indictment to include conspiracies #2 and 3. In my respectful view, the trial judge erred in holding otherwise.

[61] On an *autrefois* plea, the question is whether, had the court at the first trial properly exercised its discretion to amend the indictment, the accused could have been in jeopardy at that trial for the charges he or she now faces. The question is not whether the Crown could have decided to word the first indictment differently to put in issue the matters now before the court.

[62] This principle is important in this case because the judge decided that "... the charge for which [the respondent] ... was convicted could have included the two conspiracy charges he now faces by virtue of amendment...": Reasons, para. 53. The judge, however, did not consider the powers of amendment open to the trial judge at the first trial or whether it would have been a proper exercise of his judicial discretion to make those amendments. Instead, the judge appears to have asked himself simply whether the Crown could have drafted the first indictment so as to have alleged the broader conspiracy. The fact that it could have done so,

respectfully, is irrelevant to the success or failure of the respondent's *autrefois* plea.

[63] I will turn first to the sorts of amendments which are considered in relation to a plea of *autrefois convict* and then to whether those sorts of amendments were available in this case.

1. What sorts of amendments are to be considered?

[64] Section 609(1)(b) of the **Code** requires the respondent to establish that he could have been convicted at the first trial of the two conspiracy counts before the judge for trial "... if all proper amendments had been made that might then have been made". The essence (although not the detail) of the provision is this: an accused is in jeopardy for all matters that could have been before the court had the available amendment powers been properly exercised.

[65] As Doherty, J.A. said in **R. v. Irwin** (1998), 123 C.C.C. (3d) 316 (Ont.C.A.) at paras. 10 - 11, the broad powers of amendment provided in the **Criminal Code** expand the scope of the special pleas. This is so because the pleas are applied not only to the indictment as framed at the first trial, but also in light of the range of jeopardy that would result from the proper exercise of those powers of amendment.

[66] The availability of amendments of the indictment, therefore, must be considered in determining whether the accused person was in jeopardy of conviction for the present charges on a previous occasion. As expressed by Professor Friedland, in relation to *autrefois acquit*, "Whatever the outside limits of the special pleas might be, the bedrock principle has always been that the accused cannot be retried if he was in peril at the first trial. ...[If] an amendment was not made by the trial judge which should have been made and the accused was acquitted, the accused should be able to argue successfully at the second trial that he was in jeopardy of conviction at the first."(at 69, emphasis added) The same principle applies to *autrefois convict*.

[67] The decision of the Supreme Court in **R. v. Moore, supra,** illustrates this point. After plea, it was noted that two counts in the information failed to set out an essential element of the charges. The trial judge ruled that he could not amend the defective counts and quashed them. The accused was then charged in a new

information with the same offences, this time properly set out. He pleaded *autrefois acquit*. A majority of the Supreme Court of Canada found the plea was properly made. As expressed by Lamer, J. (as he then was), the trial judge erred in quashing, rather than amending the information. It followed that the accused had been in jeopardy of being convicted when the judge wrongly quashed the information: at 1126. In other words, had all proper amendments been made, Moore would have been in jeopardy of being convicted at that trial of the offences for which he was now charged.

[68] All of this is summed up with admirable succinctness in **Van Rassel** which sets out the rule this way: "the new count must ... be implicitly included in that of the first trial ... on account of the evidence presented if it had been legally possible at that time to make the necessary amendments.": at 234.

[69] It is important to be clear that the amendments which are relevant to the *autrefois* plea are those which the court would have been permitted to make in the first proceeding. It is not relevant to consider whether the prosecutor could have framed the charge differently. I touched on this point earlier in relation to prosecutorial discretion. The question for the purposes of s. 609(1)(b) is not whether the prosecutor could have decided to lay some other charge; the question is whether the charge that was laid could have been amended by the court at the first trial so as to place the accused in jeopardy with respect to the offence which he or she now faces.

[70] This point is illustrated by **R. v. Owens**, [1970] 2 C.C.C. 38 (B.C.C.A) The accused was charged with attempted murder. The indictment did not specify the means of the alleged attempt. The accused was acquitted and subsequently argued that the acquittal afforded him a plea of *autrefois acquit* on new charges of discharging a firearm with intent to endanger life and related charges. The argument was that the Crown could have amended the attempted murder charge to specify the means employed in attempting the murder and thereby have made the other charges included offences.

[71] The Court rejected this submission, noting that there was no obligation on the Crown to word the indictment in the way the accused proposed. As the indictment had been drafted, these other offences were not included offences. It followed that the accused had not been in jeopardy of being convicted of them at

the attempted murder trial. (The Court also held that the court would not have permitted the amendment because its purpose was to, in effect, add fresh counts.)

[72] The point is this: the fact that the Crown could have chosen to word the indictment differently so as to include the present charges cannot be the basis of an *autrefois* plea.

2. Were amendments available here?

[73] The question is whether the judge at the first trial could properly have amended the indictment to include the charges which the respondent faced before the trial judge? As set out in **Van Rassel**, this is to be determined in light of the indictment and evidence at the first trial.

[74] The power of the Court to amend an indictment at trial is found in s. 601 of the **Code**. We are not here concerned with any alleged formal or substantive defects in the indictment at the first trial, so the relevant powers are set out in s. 601(2). That subsection permits amendments to make the indictment conform to the evidence where there is a variance between them. It provides:

> 601. (2) Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence, where there is a variance between the evidence and
>
> (a) a count in the indictment as preferred; or
>
> (b) a count in the indictment
>
> (i) as amended, or
>
> (ii) as it would have been if it had been amended in conformity with any particular that has been furnished pursuant to section 587.

[75] In deciding whether to allow the amendment, the court is directed by s. 601(4) to consider a number of factors. A critical consideration is whether the amendment would prejudice the accused in his or her defence. Section 601(4) provides:

> 601. (4) The court shall, in considering whether or not an amendment should be made to the indictment or a count in it, consider
>
> (a) the matters disclosed by the evidence taken on the preliminary inquiry;
>
> (b) the evidence taken on the trial, if any;
>
> (c) the circumstances of the case;
>
> (d) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and
>
> (e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

[76] In light of those principles, I return to the question of whether, considered in light of the indictment and the evidence presented at the first trial, the trial judge erred in holding that the two conspiracy counts before him could have been included in the indictment at the first trial by way of amendment.

[77] There are two sorts of amendments to the indictment alleging conspiracy #1 which must be considered. The first is an amendment to add the specific allegations about conspiracies #2 and 3. The second is an amendment to allege the overall scheme or dominant plan. In my view, neither amendment was legally possible. The first was not possible because there was no evidence at the first trial about the specific allegations made at the second. The second amendment was not possible because it would have been unfairly prejudicial to the accused.

(i) Adding the specific allegations

[78] As noted earlier, an amendment may be made to cure a variance between the allegations in the indictment and evidence heard at trial. It is clear, however, that no amendment may be made where the evidence adduced at trial is not capable of supporting the amended charge: **R. v. Tremblay**, [1993] 2 S.C.R. 932 at 955-6.

[79] It follows that it would not have been possible here to amend the indictment at the first trial to add the specific allegations contained in the indictment at the

second. At the first trial, there was no evidence – none – of those specific allegations. The Crown called evidence with respect to Operation Midway in general, the day-to-day operation of the crack shop and the relationship between Jackson and the suppliers and workers in the shop. However, no evidence was called pertaining to the May conspiracy as described in the indictment at the second trial and no evidence was called about any specifics of that alleged conspiracy.

[80] Therefore, in light of the evidence presented at the first trial, no amendment could have been made to add the specific allegations as set out in the indictment at the second trial.

(ii) Amendment to allege the wider conspiracy

[81] The respondent's position is that the indictment at the first trial could have been amended to allege a larger, overall dominant plan which would have included the specific matters alleged in the second indictment. In effect, the contention is as follows: the trial judge at the first trial could properly have permitted the Crown to amend an indictment to change it from one alleging a conspiracy to carry out one transaction over a 4 day period in June and involving only cannabis (resin) to one alleging a conspiracy relating to multiple transactions and involving both cannabis (resin) and cocaine. In my view, such an amendment was not legally possible at the first trial for two, related reasons.

[82] First, such an amendment would have fundamentally changed the nature of the allegations the respondent faced. **Van Rassel** makes clear that such changes are not the sorts of amendments considered in ruling on whether the accused has previously been in jeopardy for the current charges. As McLachlin, J. put it, the amendment must not be one that would alter the nature of the offence: at 235.

[83] Second, the trial judge at the first trial faced with such a request to amend, would have been obliged to consider the factors set out in s. 601(4). These include whether the accused has been misled or prejudiced in his defence and whether the amendment could be made without injustice: s. 601(4)(d) and (e). The proposed amendment would have foundered on either or both of these considerations. It would have drastically undermined the notice-giving function of the indictment, that is, the purpose of putting the accused on formal notice of his potential legal

jeopardy: **R. v. G.R.**, [2005] 2 S.C.R. 371; S.C.J. No. 45 (Q.L.) at para. 11. It would also have been prejudicial to the defence which, as is apparent from the conduct of the trial, focussed on the precise allegations set out in the indictment.

3. Conclusion concerning amendments

[84] The respondent's argument concerning amendments amounts to saying that the Crown should have charged some other conspiracy than the ones it did. That, respectfully, is not the test.

[85] The test is whether the charges at the second trial were implicitly included in the charge at the first trial "... on account of the evidence presented if it had been legally possible at that time to make the necessary amendments": **Van Rassel**. That test, in my view, is not met here. The acts which were the subject of the charges at the second trial were not implicitly included in the charge at the first trial. In fact, there was no specific evidence at the first trial about them. It was not legally possible to amend the indictment to allege the broader, dominant plan. Such an amendment would have altered the nature of the offence charged, seriously undercut the purpose of an indictment to give fair notice of legal jeopardy and been highly prejudicial to the defence.

[86] In short, the possibility that the first indictment could have been amended under s. 601(2) did not put the respondent in jeopardy at that trial for the charges he faced at the second trial.

D. Third Issue: Did the judge err in finding that the existence of separate conspiracies was not a rational conclusion on the record before him?

[87] A judge considering an *autrefois* plea is not permitted to make findings of fact inconsistent with a jury's verdict at the first trial. The judge, in effect, held that conspiracy #1 did not exist. This was a finding contrary to that of the jury at the first trial and was not one open to the judge.

[88] The jury at the first trial found the respondent guilty of conspiring to traffic in cannabis (resin) between June 17 and June 20, 2002 with Gary Michael Boudreau, Teddy Bremner, Wayne Marriott, Ronald James Snelgrove and Troy

Shanks. At the second trial, the trial judge found that "... the Crown's position that two separate conspiracies took place, the first one ending May 27, 2002 (sic) and the second commencing June 17, 2002 approximately twenty-four (24) days later is simply not supported by the evidence nor a rational conclusion through the weighing of the entire record." The respondent submits that the trial judge's conclusion was one of fact and that we are not entitled to interfere with it on appeal.

[89] I do not accept this contention. Respectfully, this purported finding was not one which was open in law to the judge in this case and it is based on the error of law just discussed. I would make three brief points.

[90] First, the finding amounts to a conclusion by the judge that the June conspiracy did not exist, even though it had been proved to the satisfaction of the jury at the first trial. It was not open to the judge to challenge the jury's conclusion. The existence of the June 17 - 20 conspiracy, as alleged in the indictment, was finally established by the conviction entered after the first trial. It was, as a matter of law, not open to the judge to conclude, as he did, that there had, in fact, been no separate conspiracy commencing June 17. 2002 as alleged and proved by the Crown at the first trial. That conspiracy was one of the "two separate conspiracies" which the judge found did not exist. It was not open to him to find that the jury's conclusion was in error, let alone not a "rational conclusion."

[91] Moreover, it was not, respectfully, the judge's role to decide whether the Crown had proved or could prove the existence of the May conspiracies as alleged in the indictment before him. His role was to decide whether that conspiracy was the same matter as the one charged and proved at the first trial. There was evidence adduced at the preliminary inquiry that, if believed, was capable of supporting a conviction for the May conspiracies as alleged in the indictment. It was, therefore, not open to him to find that the existence of such a conspiracy was "not a rational conclusion" based on the record.

[92] Finally, the judge's conclusion on this factual inquiry was premised on the judge's legal errors. In other words, this purported finding of fact is based on legal errors which were "extricable" from the factual findings and, therefore, open to review on appeal.

[93] For these reasons, I conclude that the judge erred in law by finding that the existence of two, separate conspiracies was not a rational conclusion on the record.

E. Summary of Conclusions

[94] In summary:

1. The judge erred in finding that a conviction of one sub-agreement which was part of a larger, dominant plan, precluded conviction for other sub-agreements which were also part of the larger plan.

2. The judge erred in finding that all of the charges could have been included in the first indictment by way of amendment.

3. It was not open to the judge to find, as he did, that the sub-agreements did not exist. The jury at the first trial found that one such sub-agreement existed. The judge could not contradict that finding. It was not the judge's function in considering the *autrefois* plea to decide whether the Crown could prove the charges it wished to proceed with in the trial before him.

IV. DISPOSITION

[95] I would allow the appeal, set aside the judge's order discharging the accused on counts 1 and 2 on the May 9, 2005 indictment and return the case to the Supreme Court to be dealt with according to law.

Cromwell, J.A.

Concurred in:
MacDonald, C.J.N.S.
Hamilton, J.A.