Canada's Prohibition against Anti-Competitive Collusion: The New Rapprochement with U.S. Law

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Noting that Canadian cartel law has been revitalized by the Supreme Court of Canada's recent decision in *R.* v. *Nova Scotia Pharmaceutical Society*, the authors compare the current state of Canadian law with that of the United States. Although the rule of reason/*per se* distinction characteristic of American law is not precisely reproduced in Canada, the authors conclude that there is now a very close analogy between the approaches in the United States and Canada. Used with some caution, United States case law on *per se* cartel offences should now be persuasive authority in Canada. In particular, the authors offer an interpretation of the Canadian concept of "moderate market power," arguing that in naked price-fixing and market division cases, the presence of more than *de minimis* market power can usually be inferred from the behaviour in issue. In these egregious cases, no elaborate evidence respecting relevant market definition or structure is required. In sum, rather than having bright line distinctions between (1) rule of reason and *per se* offences and (2) presence and absence of market power, Canadian cartel law is characterized by a sliding scale. But naked price fixing and market division lie far toward the *per se*-offence/more-than-*de minimis*-market-power side of the scale.

Having explored the contours of the criminal offence of cartelization under the *Competition Act*, the authors conclude by analysing the relationship among criminal, civil and administrative law remedies for anti-competitive collusive behaviour. They argue that there is now greater scope for civil law enforcement through injunctive relief and damages, and note that the Competition Tribunal has signalled an era of active administrative control of abuse of dominant position. The criminal sanction therefore usually should be reserved for those activities that are most inherently anti-competitive: naked price-fixing and market division.

À la lumière du nouvel essor que l'arrêt *R.* c. *Nova Scotia Pharmaceutical Society* a donné au droit canadien en matière de complots, les auteurs nous livrent une étude comparative du droit canadien et du droit américain en la matière. Bien que la distinction américaine entre la règle *per se* et la règle de la raison ne soit pas reprise telle quelle en droit canadien, les auteurs en arrivent à la conclusion que les droits canadien et américain se rapprochent beaucoup. La jurisprudence américaine qui traite d'infractions *per se* en matière de complots peut donc, avec une certaine prudence, être citée désormais devant les tribunaux canadiens. Plus particulièrement, les auteurs offrent une interprétation de la notion canadienne de « puissance commerciale moyenne » et prétendent que dans la jurisprudence où il est question de fixation de prix non déguisée ou de partage du marché, l'existence d'une puissance commerciale plus que minime peut se déduire du comportement des parties. Dans ces cas flagrants, il n'est guère utile de présenter des preuves relativement à la définition et à la structure du marché. En somme, en droit canadien il n'existe pas de distinction claire et nette entre (1) la règle *per se* et la règle de la raison et (2) la présence ou l'absence de puissance commerciale, mais plutôt une gradation de l'un à l'autre. Par contre, la fixation de prix non déguisée et le partage du marché se situent davantage du côté des infractions *per se* et d'une puissance commerciale qui est plus que minime.

À la suite de leur analyse de l'infraction relative aux complots de la *Loi sur la concurrence*, les auteurs examinent le rapport entre les recours criminels, civils et administratifs. Selon eux, les recours civils en injonction et en dommages ont maintenant une portée plus large. Ils constatent également que le Tribunal de la concurrence semble vouloir jouer un rôle actif, au niveau des contrôles administratifs, en matière d'abus de position dominante. Il faudrait donc limiter les sanctions criminelles aux pratiques les plus anti-concurrentielles: la fixation de prix non déguisée et le partage du marché.

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Synopsis

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Introduction

Since the beginnings of antitrust law, the prohibition of cartel activity has been its central feature. Indeed, it has been the one prohibition to attract universal praise from across the spectrum of economic thought — be it structuralist

or Chicago-School consumer welfare.[1] But whereas this prohibition has spawned considerable enforcement activity in the United States, Canadian law until very recently remained largely ineffective.[2] The law's formulation seemed at best tentative and at worst vacuous. And unlike in the United States, Canada only had a criminal law instrument to address anti-competitive collusion. Courts imposed an extremely high burden of proof on the prosecution and were prepared to entertain the most brazen of defences — *e.g.* that price-fixing was undertaken for the "public benefit."[3]

However, it would now seem that Canadian competition law has come of age, and with it our approach to cartels. The modernization of the *Competition Act*[4] expanded the range of instruments available to address collusive behaviour. Civil and administrative remedies are now available. And perhaps most importantly, the Supreme Court of Canada has not only upheld the constitutional validity of the new scheme — something that was seriously in doubt — but has also placed interpretation of that scheme on a sound economic footing. In particular, the *R.* v. *Nova Scotia Pharmaceutical Society* decision has ensconced a "partial rule of reason" approach to criminal prosecutions that should also clarify the approach to parallel civil law actions, as we hope to explain in this article.[5]

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[1]For instance, Robert Bork, who is largely critical of American antitrust interventionism, asserts that "without doubt thousands of cartels have been made less effective and other thousands have never been broached because of the overhanging threat of this rule [the *per se* illegality of anti-competitive collusion]. Its contributions to consumer welfare over the decades have been enormous" (*The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978) at 263). Richard Posner is similarly lavish in his praise: "[T]he elimination of the formal cartel ... is an impressive, and remains the major, achievement of American antitrust law" (*Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press, 1976) at 39). However, for a rare contrasting view see C. Leslie, "Achieving Efficiency through Collusion: A Market Failure Defense to Horizontal Price-Fixing" (1991) 81 Cal. L. Rev. 243. For a description of approaches to antitrust law drawn from "Chicago-School economics" — of which Bork and Posner are leading exponents — and a contrast with "traditional" or "structuralist" approaches, see E.M. Fox & L.A. Sullivan, "Antitrust — Retrospective and Prospective: Where are We Coming From and Where are We Going" (1987) 62 N.Y.U. L. Rev. 936.

[2]From 1970 to 1983, there were 29 convictions and 17 non-convictions in cases prosecuted under the conspiracy provision. See P.K. Gorecki & W.T. Stanbury, *The Objectives of Canadian Competition Policy, 1888-1983* (Halifax: The Institute for Research on Public Policy, 1984) at 22.

[3]See the dissenting opinion of Laskin C.J.C. in *R.* v. *Aetna Insurance Co.*, [1978] 1 S.C.R. 731 at 734-35, 75 D.L.R. (3d) 332 [hereinafter *Aetna* cited to S.C.R.], rev'g (1975), 12 N.S.R. (2d) 362, 62 D.L.R. (3d) 447 (N.S.S.C.(A.D.)), aff'g (1974), 12 N.S.R. (2d) 416, 52 D.L.R. (3d) 30 (N.S.S.C.(T.D.)). It should be noted that Laskin C.J.C.'s criticism of the judgment at first instance was not shared by the majority, which took a somewhat different view of the evidence adduced at trial. The *Aetna* case is discussed more fully below, *infra* note 28 and accompanying text.

[4]*Competition Act*, R.S.C. 1985, c. C-34, as am. by R.S.C. 1985 (1st Supp.), c. 27, ss. 187, 189, R.S.C. 1985 (2d Supp.), c. 19, Part II, R.S.C. 1985 (3d Supp.), c. 34, s. 8, R.S.C. 1985 (4th Supp.), c. 1, s. 11, R.S.C. 1985 (4th Supp.), c. 10, s. 18, S.C. 1990, c. 37, ss. 29-32, S.C. 1991, c. 45, ss. 547-550, S.C. 1991, c. 46, ss. 590-594, S.C. 1991, c. 47, ss. 714-717, S.C. 1992, c. 1, ss. 44-46, 145, S.C. 1992, c. 14, s. 1, S.C. 1993, c. 34, ss. 50-51 [hereinafter the *Act*].

[5]*R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36, 43 C.P.R. (3d) 1 [hereinafter *Nova Scotia Pharmaceutical* cited to S.C.R.]. The Supreme Court of Canada dismissed the appeal from the Nova Scotia Supreme Court, Appeal Division (1991), 102 N.S.R. (2d) 222, 80 D.L.R. (4th) 206 (N.S.S.C.(A.D.)), setting aside a judgment of the trial division (1990), 98 N.S.R. (2d) 296, 73 D.L.R. (4th) 500 (N.S.S.C.(T.D.)), allowing the appellants' motion to quash the indictment. The decisions of the Supreme Court of Canada and the lower court are

Given NAFTA and the long history of American antitrust enforcement, it would be an aberration for Canadian antitrust law to be fundamentally different from that in the United States. Increasingly, antitrust enforcement requires cooperation and parallel review in the two jurisdictions.[6] Furthermore, the United States' case law, for all its twists and turns, complete with attendant controversy, offers a remarkable pool of experience and sophisticated analysis. It would be inconceivable for Canadians to ignore this resource.[7]

It is thus opportune, given the new vitality of Canadian cartel law, to consider how it now stands in relation to U.S. law. In particular, the "partial rule of reason" approach formulated by Gonthier J. in *Nova Scotia Pharmaceutical* draws explicitly on the distinction in American law between anti-competitive conduct that is *per se* illegal and conduct that is subject to a rule of reason.[8] The object of this paper is to show that the Canadian and American approaches are now very similar and that, with appropriate caution, U.S. case law is now available as persuasive authority in Canadian collusion litigation. We also aim to identify, more or less in schematic form, where criminal prosecution now stands in relation to parallel civil and administrative remedies, noting that there is now wide scope for private enforcement through civil litigation.

This paper is divided into three parts. The first part sketches out the background to the contemporary Canadian cartel prohibition. The second part reviews the American approach for purposes of comparison. The third part sets out an interpretation of the Canadian "partial rule of reason" approach, placing it within the context of criminal, civil and administrative remedies and drawing on the American experience.

I. The Background to the Contemporary Canadian Cartel Prohibition

A. *The Monopoly of Criminal Law in Canadian Antitrust*

The emphasis in Canada upon criminal prosecution for competition law offences is something of a historical anomaly.[9] Although the original *Anti-*

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well described elsewhere in this special issue (see P.S. Crampton & J.T. Kissack, "Recent Developments in Conspiracy Law and Enforcement: New Risks and Opportunities" (1993) 38 McGill L.J. 569). Moreover, particular aspects of this decision will be discussed below.

[6]See G.N. Addy, "International Coordination of Competition Policies" (Paper delivered to the HWWA-Institut für Wirtschaftsforschung-Hamburg, Hamburg, 9-11 October 1991) [unpublished]. See also C. Goldman *et al.*, "International Mergers and the Canadian Competition Act" (Working Paper for the Ontario Centre for International Business, International Business and Trade Law Programme, 1993) at 54. Although the *Competition Act*, *supra* note 4, s. 1.1, explicitly aims to "maintain and encourage competition in Canada," a number of its provisions have extraterritorial effect: ss. 45(5) and (6) ("export cartels"); s. 46.1 ("foreign directives"); s. 82 ("foreign judgments"); s. 83 ("foreign laws and directives"); s. 84 ("refusal to supply by foreign supplier").

[7]It might be argued that a rapprochement of American and Canadian antitrust law is not only expedient but is also compelled by the existence of a "market" for antitrust enforcement. For an analogous argument see R. Daniels, "Should Provinces Compete? The Case for a Competitive Corporate Law Market" (1991) 36 McGill L.J. 130. Whereas situs of incorporation decisions may be driven in some measure by forum-shopping for the best corporate law regime, it would be difficult to make out the case that differing antitrust regimes are a significant factor influencing decisions to locate businesses in Canada or the United States. However, significantly different antitrust regimes could become a trade irritant, as is evidenced by American complaints concerning allegedly feeble antitrust enforcement by Japan.

[8]*Nova Scotia Pharmaceutical*, *supra* note 5 at 650.

[9]For a brief review of the history of Canadian competition legislation, see B. Dunlop, B.

Combines Act of 1889,[10] which enacted the antecedent of the current cartel prohibition, was criminal law legislation, successive federal governments in the early part of this century attempted to put competition law on an administrative law footing. The *Combines Investigation Act* of 1910, the *Combines and Fair Prices Act* in conjunction with the *Board of Commerce Act* of 1919, and the *Dominion Trade and Industry Commission Act* of 1935 were all designed to allow for administrative supervision of competition through a board structure and through behavioural remedies.[11] This flurry of legislative activity gave rise to an important line of cases restricting the scope of the federal trade and commerce power. In the *Re Board of Commerce Act*[12] and *Reference re Dominion Trade and Industry Commission Act*,[13] the Privy Council and Supreme Court of Canada respectively found the relevant pieces of legislation *ultra vires* Parliament as trenching upon provincial property and civil rights jurisdiction.[14] By contrast, the 1923 *Combines Investigation Act*,[15] which marked a return to the criminal law approach, was upheld by the Privy Council as a valid exercise of the criminal law power.[16] Interestingly enough, parallel efforts in the United States to emphasize the civil law and administrative enforcement of antitrust legislation encountered no such constitutional difficulties.[17] In Canada, the criminal law remained the only significant enforcement mechanism up to the 1970s.

The original cartel prohibition — section 1 of the 1889 *Anti-Combines Act* — was a model of equivocation and clumsy grammar:

> 1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully, —
>
> (a) To unduly limit the facilities for transporting, producing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or —
>
> (b) To restrain or injure trade or commerce in relation to any such article or commodity; or —
>
> (c) To unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; —

McQueen & M. Trebilcock, *Canadian Competition Policy* (Toronto: Canada Law Book, 1987) at 42-47.

[10]*An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*, S.C. 1889, c. 41 [hereinafter *Anti-Combines Act*].

[11]*Combines Investigation Act*, S.C. 1910, c. 9 (subsequently R.S.C. 1970, c. C-23); *Combines and Fair Prices Act*, S.C. 1919, c. 45; *Board of Commerce Act*, S.C. 1919, c. 37; *Dominion Trade and Industry Commission Act*, S.C. 1935, c. 59.

[12][1922] 1 A.C. 191, 60 D.L.R. 513, [1922] 1 W.W.R. 20 (P.C.) [hereinafter *Board of Commerce* cited to A.C.].

[13][1936] S.C.R. 379, [1936] 3 D.L.R. 607, 66 C.C.C. 177.

[14]The provincial legislatures have authority over property and civil rights within a province pursuant to the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(13).

[15]S.C. 1923, c. 9.

[16]*Proprietary Articles Trade Association* v. *Canada (A.G.)*, [1931] A.C. 31 (P.C.). The Federal Parliament has jurisdiction over criminal matters pursuant to the *Constitution Act, 1867*, s. 91(27).

[17]See specifically *Clayton Act*, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§12-27 (1988)) and *Federal Trade Commission Act*, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§41-51 (1988)). For a comparative account of the development of Canadian and U.S. competition legislation, see B. Cheffins, "The Development of Competition Policy, 1890-1940: A Re-evaluation of a Canadian and American Tradition" (1989) 27 Osgoode Hall L.J. 449.

> (d) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity; or in the price of insurance upon person or property, —
>
> Is guilty of a misdemeanor and liable, on conviction, to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to imprisonment for any term not exceeding two years; and if a corporation, is liable on conviction to a penalty not exceeding ten thousand dollars and not less than one thousand dollars.[18]

Soon after its adoption, the provision was made part of the *Criminal Code* and in 1900, the word "unlawfully" was eliminated from the introductory clause and eventually the split infinitives were fused together.[19] Although in 1960 the provision was re-incorporated into the *Combines Investigation Act*,[20] it remained essentially unchanged until the reform of 1975.[21]

B. The Record of Criminal Law Enforcement

The antitrust jurisprudence of the Supreme Court of Canada has always been preoccupied with the meaning of the word "unduly." The prevailing interpretation of that word can be traced back to a decision rendered at the beginning of the century by the Ontario Court of Appeal. In *R.* v. *Elliott*,[22] the president

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[18]*Supra* note 10, s. 1.

[19]Section 1 of the 1889 *Anti-Combines Act* was re-enacted as s. 520 of the *Criminal Code*, S.C. 1892, c. 29, sch. II. Interestingly enough, in 1899, a unique amendment to the *Criminal Code* amended s. 520 to strike out the words "unduly" and "unreasonably" — the only successful attempt to eliminate the word "unduly" (*An Act to amend the Criminal Code, 1892, with respect to Combinations in restraint of Trade*, S.C. 1899, c. 46). Less than a year later, however, *An Act further to amend the Criminal Code, 1892*, S.C. 1900, c. 46, all but undid the previous year's work by reincorporating all uses of the word "unduly" so as to produce the following wording:

> 520.(1) Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars and not less than one thousand dollars, who conspires, combines, agrees or arranges with any person or with any railway, steamship, steamboat or transportation company —
>
> (*a*) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or
>
> (*b*) to restrain or injure trade or commerce in relation to any such article or commodity; or
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> (*c*) to unduly prevent, limit, or lessen the manufacture or production of any article or commodity, or to unreasonably enhance the price thereof; or
>
> (*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.
>
> (2) Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees.

From 1892 until 1960, the provision remained in the *Criminal Code*.

[20]*Supra* note 11.

[21]By virtue of *An Act to amend the Combines Investigation Act and the Criminal Code*, S.C. 1960, c. 45, s. 21, the then s. 411 of the *Criminal Code* was repealed and reintroduced as s. 32 of the *Combines Investigation Act* (*ibid.*), in which form it remained until the 1975 and 1986 amendments.

[22](1905), 9 O.L.R. 648 (C.A.) [hereinafter *Elliott*].

of the Ontario Coal Association was charged under section 520 of the *Criminal Code*[23] with having used the association to achieve control over the sale of coal at both wholesale and retail levels so as to fix prices. The Court ruled that a prevention or lessening of competition does not constitute an offence unless it is done "wrongly, improperly, excessively, inordinately."[24] This definition of the word "unduly" was adopted by the Supreme Court of Canada throughout the century and was usually supplemented by a test of "virtual monopoly."[25] The effect of this interpretation was to impose a heavy burden of proof upon the prosecution to demonstrate monopolistic market power and anti-competitive effect — what in American law would be recognized as a full-blown "rule of reason." In Canada, unlike in the United States, such a rule of reason was applicable to *every* conspiracy in restraint of trade, including horizontal price-fixing.[26] However, a stubborn line of lower court cases, while recognizing the need to prove "undue" restraint of competition, did attempt to play down and even ignore the virtual monopoly test.[27]

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[23]Section 520 of the *Criminal Code* became s. 32 of the *Combines Investigation Act*, *supra* note 11. In *Nova Scotia Pharmaceutical*, *supra* note 5 at 648, Mr. Justice Gonthier proceeds to a summary of the evolution of the conspiracy provisions of Canadian competition legislation.

[24]*Elliott*, *supra* note 22 at 662, Osler J.

[25]*Weidman* v. *Shragge* (1912), 46 S.C.R. 1, 2 D.L.R. 734 [hereinafter *Weidman* cited to S.C.R.], gave rise to two somewhat different approaches to the term "unduly." Although Duff J. may not have intended to formulate a strict test, his reasons were the basis of the "virtual monopoly" approach: "I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing competition in that trade, comes under the ban of the enactment" (*ibid.* at 37). Anglin J., on the other hand, chose simply to reiterate the approach in *Elliott*: "[D]oes it ..., however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive, or oppressive restrictions upon that competition the benefit of which is the right of every one? *The King* v. *Elliott*" [*supra* note 22] (*Weidman*, *ibid.* at 42-43). These two "definitions" of "unduly" were both employed in subsequent Supreme Court of Canada decisions: *Stinson-Reeb Builders Supply Co.* v. *R.*, [1929] S.C.R. 276 at 278, [1929] 3 D.L.R. 331, Mignault J.; *Container Materials Ltd.* v. *R.*, [1942] S.C.R. 147 at 158-59, [1942] 1 D.L.R. 529, Kellock J. [hereinafter *Container Materials* cited to S.C.R.]; *R.* v. *Howard Smith Paper Mills Ltd.*, [1957] S.C.R. 403 at 410, 426, 8 D.L.R. (2d) 449, Kellock J. and Cartwright J. (Cartwright J. stressed the virtual monopoly idea, however) [hereinafter *Howard Smith Paper Mills* cited to S.C.R.]; *Aetna*, *supra* note 3 at 748, Ritchie J.; *Atlantic Sugar Refineries Co.* v. *Canada (A.G.)*, [1980] 2 S.C.R. 644 at 659, 115 D.L.R. (3d) 21, Pigeon J. [hereinafter *Atlantic Sugar* cited to S.C.R.].

[26]This approach was abandoned in the *Nova Scotia Pharmaceutical* case (*supra* note 5) discussed below. In particular Mr. Justice Gonthier stated that: "The application of s. [45(1)(*c*)] of the Act does not presuppose such a degree of market power, as [s. 45(2)] clearly enunciates. Parties to the agreement need not have the capacity to influence the market. What is more relevant is the capacity to behave independently of the market, in a passive way" (*ibid.* at 654).

[27]See *R.* v. *Northern Electric Co.*, [1955] O.R. 431 at 469, [1955] 3 D.L.R. 449 (H.C.), McRuer J.: "However, I do not think it is essential to the Crown's case to show a monopoly or virtual monopoly"; *R.* v. *Abitibi Power & Paper Co.* (1960), 36 C.P.R. 188 at 238, 36 C.R. 96 (Que. Q.B.) [hereinafter *Abitibi Power* cited to C.P.R.], Batshaw J.: "I conclude, therefore, that it cannot be accepted as our law that only those conspiracies are illegal that completely eliminate or virtually eliminate all competition"; *R.* v. *Electrical Contractors' Assn.*, [1961] O.R. 265 at 279, 37 C.P.R. 1 (C.A.), Laidlaw J.A.: "The fact that the co-conspirators did not have the power to completely or substantially control the business in question is immaterial. Such power of control is not an element of the offence and the absence of such control is not an answer to a charge under s.

The evidentiary straightjacket imposed by the Supreme Court's interpretation of the term "unduly" is well illustrated by the decision rendered by the same court in *Aetna*.[28] In this case, the Court maintained the decision of the trial judge, who had found that Aetna Insurance and 72 co-conspirators did not lessen competition unduly by fixing the price of fire insurance on property located in Nova Scotia.[29] Using the Nova Scotia Board of Underwriters as a price-fixing vehicle throughout the 1960s, the accused had adopted rates to be charged for fire insurance. The price-fixing agreement was plain and involved competitors who together collected between seventy-one per cent and eighty-three per cent of the premiums in Nova Scotia.

Mr. Justice Ritchie, in expressing the view of the majority, confirmed the need for evidence of a virtual monopoly and followed the approach of the trial judge, who had inquired into the effects of the agreement upon competition in the insurance industry in Nova Scotia.[30] Ritchie J. rejected the contention of the Attorney General of Canada that the agreement lessened competition substantially, *inter alia*, because he found that the members of the Board when making price decisions had regard to the prices of competing insurers, that competitors had expanded within the market and that competition had not been virtually eliminated. The position of the majority of the Court of Appeal, that once a price-fixing agreement affects an important part of an industry it limits compe-

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411(1)(*d*)"; *R.* v. *McGavin Bakeries Ltd. (No. 6)*, [1951] 3 W.W.R. (N.S.) 289 at 317, 13 C.R. 63 (Alta. S.C.(T.D.)), McBride J.: rejecting the contention "that the common design of an unlawful agreement under s. 498(*d*) must be a monopoly or virtually a monopoly"; *R.* v. *Aluminum Co.* (1976), 29 C.P.R. (2d) 183 at 193 (Que. Sup. Ct.), Rothman J.: "I conclude that s. 32(1)(*c*) does not require the Crown to establish that the agreement would eliminate all competition or create a monopoly"; *R.* v. *Chatwin Motors Ltd.* (1978), 37 C.P.R. (2d) 156 at 160 (B.C.S.C.), Ruttan J., following *Abitibi Power* (*ibid.*): "it is sufficient to establish that the agreement would have the effect of lessening competition substantially [as opposed to] the virtual extinction or elimination of competition" (aff'd (1978), 7 B.C.L.R. 171, 40 C.P.R. (2d) 106 (C.A.), aff'd [1980] 2 S.C.R. 64, 23 B.C.L.R. 130); *R.* v. *Canadian Coat & Apron Supply Ltd.*, [1967] 2 Ex. C.R. 53 at 63, 2 C.R.N.S. 62, Gibson J.: "'Undueness' is not a term of art and must be applied in all cases in its meaning as a word of the vernacular. It is not restricted in its application to those agreements only, which if carried into effect would give the parties to it the power to carry on their business virtually without competition, that is a virtual monopolization situation"; *R.* v. *Browning-Ferris Industries of Winnipeg (1974) Ltd.* (1980), 56 C.P.R. (2d) 257 at 261 (Man. Q.B.), Hunt J.: "It is not incumbent upon the Crown to prove a monopoly." See also *R.* v. *British Columbia Television Broadcasting System Ltd.* (1980), 52 C.P.R. (2d) 47 (B.C.S.C.) [hereinafter *British Columbia Television Broadcasting*]; *R.* v. *Canadian General Electric Co.* (1977), 15 O.R. (2d) 360 at 397-98, 75 D.L.R. (3d) 664 (H.C.); *R.* v. *Anthes Business Forms Ltd.* (1974), 19 C.C.C. (2d) 394 at 442-43, 16 C.P.R. (2d) 216 (Ont. H.C.), aff'd (1975), 10 O.R. (2d) 153, 20 C.P.R. (2d) 1 (C.A.), aff'd [1978] 1 S.C.R. 970, 28 C.P.R. (2d) 33n; *R.* v. *B.C. Professional Pharmacists' Society* (1970), 64 C.P.R. 129 at 146-47 (B.C.S.C.).

[28]See *supra* note 3.

[29]*Ibid.*

[30]The accused were charged with price-fixing in the city of Halifax. Yet Mr. Justice Ritchie and the trial court assumed that the Province of Nova Scotia was the relevant geographic market for the purpose of evaluating the economic consequences of the agreement. Interestingly, in the last paragraph of his opinion, Mr. Justice Ritchie mentions that the outcome might have been different had the geographic market consisted in the city of Halifax: "As I have indicated at the outset, I am of opinion that the charge here laid is one relating to the fire insurance industry as a whole within the Province and it is not made out by proving that a particular group within the industry have agreed with each other to abide by rates promulgated by the Board" (*ibid.* at 752).

tition unduly by itself, was deemed to be inconsistent with the statutory requirement of "undueness."

Beyond confirming the virtual monopoly approach, the *Aetna* case created a second major obstacle to the enforcement of the cartel provision.[31] Despite a vigorous dissent by Laskin C.J.C., the majority held that the Crown must prove not only intent to enter into a price-fixing agreement, but also intent to lessen competition unduly. This "double intent" requirement created an extraordinarily high evidentiary burden for the Crown.[32]

Thus, beginning with the decision of the Court of Appeal of Ontario in *Elliott*, the main line of conspiracy cases has treated the cartel provision as requiring elaborate proof of concentrated market structure, substantial anti-competitive effects, and intent to produce those anti-competitive effects. Ultimately, the restricted ambit of the law gave impetus to legislative reform.

C. *Reform Efforts*

The 1969 *Interim Report on Competition Policy* of the Economic Council of Canada marked a significant turning point in the approach to competition law and set the agenda for subsequent reform.[33] The improvement of economic efficiency was taken to be the sole objective of competition law and complete reliance on the criminal law was taken to be one of the main obstacles to achieving that objective.[34] A principal recommendation of the *Interim Report* was that large areas of jurisdiction, including review of mergers and monopolies, be transferred to an administrative tribunal having the power to control impugned behaviour. Of course, this reform agenda ultimately depended upon a change in the Supreme Court of Canada's interpretation of the federal trade and commerce power — a change that was confirmed in the 1989 *General Motors of Canada Ltd.* v. *City National Leasing* decision.[35] The reorientation

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[31]At the time, the relevant provision was s. 32(1)(*c*) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23.

[32]In *Aetna*, *supra* note 3, there were two somewhat contradictory statements by Mr. Justice Ritchie concerning the intent requirement. At one point, he stated: "It is not seriously contested that one of the purposes envisaged in the organization of the Board was that its members should agree among themselves to provide insurance at the same rate or price, but the sole question is whether this agreement was entered into in order to prevent or lessen competition 'unduly'" (*ibid.* at 774). At another point, he stated: "The burden lying upon the Crown in this case is to establish beyond a reasonable doubt first, that the respondents intended to enter into a conspiracy, combination, agreement or arrangement and, secondly, that that conspiracy, combination, agreement or arrangement if it were carried into effect would prevent or lessen competition unduly" (*ibid.* at 748). Any ambiguity caused by the second statement was clarified by Mr. Justice Pigeon, who rendered the double intent requirement even more explicit in *Atlantic Sugar*: "I find it abundantly clear that, applying this test to the facts found by the trial judge, it is impossible to say that he erred in law when coming to the conclusion that the Crown had failed to prove an agreement to lessen competition unduly" (*supra* note 25 at 659).

[33]Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969) [hereinafter *Interim Report*].

[34]This point was subsequently emphasized in L.A. Skeoch & B.C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Minister of Consumer and Corporate Affairs, 1976) at 39-40. See also Robert Bork, who wrote in 1978 "the only legitimate goal of antitrust is the maximization of consumer welfare" (*supra* note 1 at 7).

[35][1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255 [hereinafter *City National Leasing* cited to S.C.R.].

of competition law that had been blocked in the *Board of Commerce* case became possible.[36]

Despite the shift in focus toward administrative law signalled by the *Interim Report*, that report did not recommend abandoning the use of criminal law altogether. Drawing on the American classification of certain practices as *per se* illegal, the report recommended maintaining a strict and clear criminal prohibition against those practices "inimical to the public interest," namely:

> (1) collusive arrangements between competitors to fix prices (including bid-rigging on tenders); (2) collusive arrangements between competitors to allocate markets; (3) collusive arrangements between competitors to prevent the entry into markets of new competitors or the expansion of existing competitors; (4) resale price maintenance; (5) misleading advertising.[37]

The first three of these overlap precisely with the conspiracy provision that was always part of Canadian criminal law. Arguably, resale price maintenance is analogous in constituting evidence of collusion.[38]

In 1976, Parliament adopted a first set of amendments to the *Combines Investigation Act* which included important amendments to the cartel provision.[39] In particular, two amendments tackled the virtual monopoly test and the

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In that decision, the Supreme Court of Canada held that s. 31.1 of the amended *Combines Investigation Act* (*supra* note 11) was *intra vires* the federal Parliament as a valid exercise of the federal trade and commerce power (*Constitution Act, 1867*, *supra* note 14, s. 91(2)), specifically as legislation referring to "general" trade and commerce (see the origin of federal jurisdiction over "general" trade and commerce in *Citizens' Insurance Company of Canada* v. *Parsons* (1881), 7 A.C. 96 at 113 (P.C.), Sir Montague Smith). For a further discussion of *City National Leasing*, see P. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 535-36.

[36]*Supra* note 12.

[37]*Supra* note 33 at 101-02.

[38]See R. Pitofsky, "Why Dr. Miles was Right" (1984) *Regulation* 27.

[39]See *An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, S.C. 1974-75-76, c. 76, especially s. 14(1). This legislation was supplemented in 1986 by a legislative endorsement of the use of circumstantial evidence to prove tacit agreement — in effect a legislative amendment to reverse *Atlantic Sugar* (*supra* note 25); see *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, R.S.C. 1985 (2d Supp.), c. 19., s. 30(1). The section now reads as s. 45 of the current *Competition Act*:

> 45.(1) Every one who conspires, combines, agrees or arranges with another person
> (*a*) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
> (*b*) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
> (*c*) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
> (*d*) to otherwise restrain or injure competition unduly,
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.
>
> (2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or vir-

double intent *mens rea* requirement. Henceforth, it would no longer be necessary to demonstrate that competition was or would be totally eliminated by anti-competitive collusion or that the conspirators intended to lessen competition unduly. Yet the word "unduly" remained part of the new framework.

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tually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

(2.1) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.

(2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

(3) Subject to subsection (4), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:
- (*a*) the exchange of statistics;
- (*b*) the defining of product standards;
- (*c*) the exchange of credit information;
- (*d*) the definition of terminology used in a trade, industry or profession;
- (*e*) cooperation in research and development;
- (*f*) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media;
- (*g*) the sizes or shapes of the containers in which an article is packaged;
- (*h*) the adoption of the metric system of weights and measures; or
- (*i*) measures to protect the environment.

(4) Subsection (3) does not apply if the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:
- (*a*) prices,
- (*b*) quantity of quality of production,
- (*c*) markets or customers, or
- (*d*) channels or methods of distribution,

or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

(5) Subject to subsection (6), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada.

(6) Subsection (5) does not apply if the conspiracy, combination, agreement or arrangement
- (*a*) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;
- (*b*) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
- (*c*) has prevented or lessened or is likely to prevent or lessen competition unduly in the supply of services facilitating the export of products from Canada.

(7) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates

The amendments, particularly as regards the virtual monopoly test, were designed to change the interpretation given to the word "unduly" by the Supreme Court of Canada.[40] Thus, one legitimately would have expected that the definition of the word "unduly" would be reconsidered according to the new legislation.

D. Interpretation of the Stage I Amendments by the Courts

Unfortunately, the message did not reach the country's courtrooms. In prosecutions commenced after the coming into force of what is now subsection 45(2) of the *Competition Act*,[41] courts either ignored that provision or referred to it without reconsidering the meaning of the word "unduly." In at least four cases where charges were laid for offences committed after January 1976, *British Columbia Television Broadcasting*,[42] *R.* v. *Dave Spear Ltd.*,[43] *R.* v. *B.C. Fruit Growers Association*[44] and *R.* v. *Southam-Thomson Newspapers*,[45] no mention was made of the new subsection and reliance was placed on the definition of the word "unduly" found in *Container Materials*, *Howard Smith Paper Mills* and *Aetna*.[46] In all four cases the accused were acquitted and the scope of subsection 45(2) was never discussed.

In three other cases, namely *Mediacom Industries Inc.* v. *R.*,[47] *Tank Lining Corp.* v. *Dunlop International Ltd.*,[48] and *R.* v. *Canada Packers Inc.*,[49] the courts referred to subsection 45(2) and came to the conclusion that "[t]he new section

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only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public

(*a*) in the practice of a trade or profession relating to the service; or

(*b*) in the collection and dissemination of information relating to the service.

(7.1) Subsection (1) does not apply in respect of an agreement or arrangement between banks that is described in subsection 49(1).

(8) Subsection (1) does not apply in respect of a conspiracy, combination, agreement or arrangement that is entered into only by companies each of which is, in respect of every one of the others, an affiliate.

For the purposes of clarity, all references to s. 32(1)(*c*) in the *Nova Scotia Pharmaceutical* decision will be subsequently identified in this text as references to s. 45.

[40]As Mr. Justice Vallerand pointed it out in *Pavillon Chasse et pêche (440) Inc.* v. *Sumner Sports Inc.*, [1990] R.J.Q. 1863 at 1871, 72 D.L.R. (4th) 317 (C.A.) [hereinafter *Sumner Sports* cited to D.L.R. (translation)]: "Finally, I would like to point out that the 1976 amendment to the Act ... was clearly intended, perhaps in response to a suggestion by the Supreme Court of Canada ..., to attenuate a jurisprudential interpretation of 'unduly' which some might describe as too liberal" (*ibid.* at 327).

[41]See *supra* note 4.

[42]*Supra* note 27.

[43](1986), 11 C.P.R. (3d) 63 (Ont. H.C.).

[44](1985), 11 C.P.R. (3d) 183 (B.C.S.C.) (part of the offence was committed prior to 1976).

[45](28 October 1983), (Ont. S.C.) [unreported].

[46]See *supra* notes 3, 25.

[47](1982), 36 O.R. (2d) 281, 63 C.P.R. (2d) 75 (H.C.), aff'd (1982), 37 O.R. (2d) 91, 68 C.P.R. (2d) 285 (C.A.), leave to appeal den'd (1988), 44 N.R. 242 (S.C.C.) [hereinafter *Mediacom Industries* cited to O.R.].

[48](1982), 40 O.R. (2d) 219, 68 C.P.R. (2d) 162 (C.A.) [hereinafter *Tank Lining Corp.* cited to O.R.].

[49](1988), 19 C.P.R. (3d) 133 (Alta. Q.B.) [hereinafter *Canada Packers*].

did not bring an alteration, but rather a clarification of the existing law."[50] In *Mediacom Industries*, Mr. Justice Labrosse of the Ontario High Court of Justice went so far as to rule that the addition of subsection 45(2) was aimed at confirming the views of Kellock and Cartwright JJ. in *Howard Smith Paper Mills* concerning the meaning of the word "unduly."[51]

In *R.* v. *Manigo Inc.*, the Quebec Superior Court mentioned subsection 45(2) and stated that the test was whether the parties had substantial control over the market.[52] Although this test seems different from that elaborated by the Supreme Court of Canada, the Court did not depart explicitly from the previous case law. Furthermore, the Court in fact found that the defendants had a monopoly over the sale of the product in issue.

Finally, in *Sumner Sports*,[53] the Quebec Court of Appeal analysed paragraph 32(1)(*c*) (now 45(1)(*c*)) in light of the appellant's argument that a market division agreement was to be deemed *per se* illegal. In support, the appellant cited American case law under section 1 of the *Sherman Act*.[54] Mr. Justice Vallerand, however, rejected this argument, noting that Parliament had elected to maintain the word "unduly" within the offence created by subsection 45.[55]

E. Why Criminal Law Remains

The reform to Canadian competition law that ultimately emerged through the 1975 and 1986 amendments produced a hybrid of criminal and administrative law and followed the general contours of what was recommended by the Economic Council of Canada's *Interim Report*.[56] One can only wonder whether

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[50]*Mediacom Industries*, *supra* note 47 at 288, Labrosse J., followed in *Canada Packers*, *ibid.* at 181, Lomas J. See also *Tank Lining Corp.*, *supra* note 48 at 231.

[51]*Mediacom Industries*, *ibid.* at 287-88. See *Howard Smith Paper Mills*, *supra* note 25.

[52](14 January 1988), Percé, District de Gaspé 110-27-00902-858, J.E. 88-174 (Sup. Ct.) at 12, Jourdain J.: "La jurisprudence constante est à l'effet que pour conclure à une diminution 'indue' de la concurrence, la preuve doit démontrer que les parties à une entente exerçaient un degré de contrôle substantiel sur le marché."

[53]*Supra* note 40.

[54]In particular, appellants (*ibid.* at 324) relied on *U.S.* v. *Topco Associates Inc.*, 405 U.S. 596 (1971) [hereinafter *Topco Associates*]. See *Sherman Act*, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§1-7 (1988)). Section 1 of the *Act* reads: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal ..."

[55]See *Sumner Sports*, *ibid.* at 327: "But, as I have said, the amendment did not remove the term 'unduly' from the text of the Act and therefore a minimum of evidence is always necessary which means that the trial judge must consider the facts of the case. Thus the American notion of *illegal per se* does not apply." As is developed further below, this ruling of Mr. Justice Vallerand is arguable. A comparative analysis of s. 1 of the U.S. *Sherman Act* (*ibid.*) and s. 45 of the *Competition Act* (*supra* note 4) shows that the presence of the word "unduly" in the conspiracy section of the Canadian statute does not in principle preclude the implementation of *per se* rules of illegality. In the United States, Congress elected to forbid "every" agreement in restraint of trade. But the U.S. Supreme Court rejected a literal interpretation of the law and ruled instead that in order to contravene s. 1 an agreement must lessen competition unduly, giving rise to the rule of reason. When the application of a rule of reason to every arrangement proved to be impracticable and self-contradictory in certain cases (notably price-fixing and market division), the U.S. Supreme Court created *per se* rules as an exception to the rule of reason.

[56]*Supra* note 33. Bill C-256, *Competition Act*, 3d Sess., 28th Parl., 1971, s. 16(1), would have

the survival of criminal sanctions was based on inertia or the fear of attacks on the constitutional validity of attempting to apply the trade and commerce power.[57] Now that the constitutional validity of the legislation and the Competition Tribunal seems beyond reproach, both from the standpoint of the division of powers and from the standpoint of the *Canadian Charter of Rights and Freedoms*,[58] it is unclear in fact whether there is any residual rationale for invoking criminal law.

In the end, it would seem impossible to abstract entirely from the sense that there is an element of moral blameworthiness attributable to the most egregious forms of anti-competitive collusion. Some of the early legislative debate concerning cartel activity focused on the analogy between price-fixing and theft.[59] In the post-Chicago-School world,[60] this may seem naïve and quaint. But there remains an element of truth in the connection made to that other "economic crime," and the analogy is also revealing as concerns the respective roles for criminal law and other methods of deterrence.

Theft might be conceived, somewhat ironically, as a practice that circumvents orderly markets through unilateral appropriation of value without bargaining.[61] Inasmuch as widespread theft could eliminate certainty as to what could be bargained about in the market, and would divert resources into the preservation of possessions, it would produce massive inefficiencies. These inefficiencies are not only of the allocative variety, because that presumes the existence of a well-functioning market. They are also inefficiencies relating to under-utilization of the market. Another way of describing these theft-related

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followed quite closely the recommendation of the *Interim Report* respecting the adoption of a *per se* standard for collusion offences. Indeed, there was a more specific itemization of species of collusive arrangements and no attempt to evaluate whether such arrangements restricted competition "unduly." Ultimately this provision was unable to withstand attacks from the business community, which claimed that it would apply to *de minimis* and uncolourable practices.

[57]On the issue of criminal liability under competition law, see B. McDonald, "Criminality and the Canadian Anti-Combines Laws" (1965) 4 Alta. L. Rev. 67. For a review of the recent enforcement record, see C. Goldman, "The Competition Bureau's New Focus: Increased Risks for Individuals under the Competition Act" (1992) 13:2 Can. Comp. Pol. Rec. 33.

[58]Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[59]Gorecki & Stanbury, *supra* note 2.

[60]See discussion *supra* note 1.

[61]R.A. Posner discusses the economic justification for the legal prohibition against theft in the context of discussing the tort of conversion, in the *Economic Analysis of Law*, 3d ed. (Boston: Little, Brown and Co., 1986) at 192. As he writes:

> These torts, and the corresponding list of crimes, involve not a conflict between legitimate (productive) activities but a pure, coerced transfer of wealth to the defendant, occurring in a setting of low transaction costs. Such conduct is inefficient because it violates the principles developed in earlier chapters that, where market transaction costs are low, people should be required to use the market if they can and to desist from the conduct if they can't.

For a discussion of the analogy between theft and price-fixing, see Crampton & Kissack, *supra* note 5 at 586, where the authors go so far as to suggest that competitive-restricting agreements have more serious economic effects than those associated with theft or fraud and thus might ultimately give rise to a greater perception of blameworthiness. However, the link between blameworthiness and negative economic consequences is far from obvious.

inefficiencies is that there is lack of confidence in the market; there is insufficient trust in the orderliness of free and open bargaining.

Some might take the goal of the law relating to theft to be to maximize deterrence so as to enhance confidence in the market and to promote its utilization.[62] The criminal law need not provide the only or even the best deterrent. Let us put to one side ways of reducing the initial incentive to steal (*e.g.* reducing poverty). An expeditious and reliable restitutionary scheme, especially if coupled with exemplary damages (*e.g.* treble damages) as a means of offsetting the probability of escaping compensation and of stimulating private litigation, could in principle serve the purpose.[63] However, an efficient restitution scheme would not fully address the moral blameworthiness of theft. The act of theft, not just its consequences, deserves censure. While a restitutionary scheme may signal moral reprobation, it is not designed to delimit what is beyond the pale. Criminal law is the vehicle for that purpose. Thus, even if we were able to develop workable schemes of civil or administrative deterrence of theft, and even if we concluded that a criminal sanction provided comparatively ineffective deterrence, we would be wrong to abandon a criminal sanction for theft. The existence of the criminal sanction as a formal public pronouncement against theft, together with the criminal trial process that can lead to public identification and punishment of criminal behaviour, serves a purpose whatever its effectiveness in deterring crime. We are saying: "This behaviour is sufficiently wrong that it requires public sanction. You are a wrongdoer, and as a wrongdoer you have placed yourself against the whole community, for which you will be punished."[64]

Is anti-competitive collusion like theft in the sense that it is morally blameworthy, and if so is it morally blameworthy for similar reasons? The thief takes another's property without consent. The participant in a cartel appropriates wealth from consumers with their consent, but with consent that is vitiated by the elimination of choice. However, vitiation of consent, which may have civil law consequences, does not ordinarily carry with it the degree of moral blameworthiness attached to crime. Can it be that collusion gives rise to an egregious form of vitiated consent, analogous say to consent obtained through criminal fraud?[65]

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[62]See G. Ezorsky, ed., *Philosophical Perspectives on Punishment* (Albany: State University of New York Press, 1972) at 186ff. See also, C. Tollefson, "Ideologies Clashing: Corporations, Criminal Law and the Regulatory Offence" (1991) 29 Osgoode Hall L.J. 705 at 715.

[63]See *Chrysler Canada Ltd.* v. *Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394 at 407, 92 D.L.R. (4th) 609 [hereinafter *Chrysler* cited to S.C.R.], where Mr. Justice Gonthier makes the following comment about the relation between the criminal and civil law provisions of the *Competition Act*: "The same concern for the proper long-term functioning of the free market lay at the very heart of the enactment of Part VIII in 1986. Civil remedies can be more finely attuned and stand a better chanee of leading to lasting compliance with the *CA* [*Competition Act*] than criminal convictions."

[64]On the relationship between utilitarian and retributivist rationales for the imposition of criminal sanctions, see N. Walker, *Why Punish?* (Oxford: Oxford University Press, 1991).

[65]See the "false pretences" provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 361 and following, as well as Part X of the *Criminal Code* dealing with fraudulent transactions related to contracts and trade.

Market pricing is premised upon a free alignment of demand and supply. The consumer is drawn to make purchases in the market and consent to prices established there on the basis that price reflects cost and demand. Beyond causing allocative inefficiency by breaking down that alignment, naked cartel arrangements are egregious inasmuch as they attack the foundation for consent in the market. In principle, price-fixing of any individual product or service will disturb the relative demand and pricing for every other product and service. The more generalized the phenomenon of price-fixing, the less the notions of "cost" and "demand" have any practical meaning. Furthermore, the fixed price masquerades as a market price in two ways. First, there is no disclosure of the way in which it is set. Second, because there is a plurality of actors, there is an appearance of competition. In this sense, a fixed price is analogous to a fraudulent price.[66]

Of course, it could be replied that unlike in the case of fraud, the disclosure of price-fixing would not fundamentally change consumer behaviour. The key piece of information, *i.e.* price, is disclosed and consumers will respond to that information according to the elasticity of their demand. Perhaps if price-fixing were disclosed, this would cause consumers to boycott or would undermine cartel stability.[67] However, the Organization of Petroleum Exporting Countries (OPEC) was a disclosed cartel that survived for a considerable period.[68] Occasionally, cartels formed in response to claims of "cut-throat competition" are disclosed as well.[69]

Yet even disclosed cartels are premised upon manipulation of relatively inelastic demand. The consumer is understood to be vulnerable, having few options in the face of fixed prices, and that vulnerability is to be exploited.[70] The freedom of the market is abused and indeed negated. In short, price-fixing takes

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[66]An analogy might also be pursued to insider trading. The insider trades not only on the possession of information that is generally concealed, but also on the fact that others rely upon the transparency of the market to participate in the market and enter into transactions with the insider. The culpability of the act can only be understood when the second element is taken into account. The insider is a special kind of free rider on public confidence in the market — a free rider who manipulates the vulnerability inherent in that confidence.

[67]Interestingly enough, it is often argued that cartel arrangements are inherently unstable given the considerable incentive for cartel members to cheat on cartels. However, where consumers are prone to accept advertised prices as reflecting an outcome of competition, they may exert less pressure upon cartel members to defect. This in turn can foster cartel stability; see W.B. Erickson, "Price-Fixing Conspiracies: Their Long-Term Impact" (1975-76) 24 J. of Ind. Econ. 189.

[68]Note that Canadian export cartels are exempt from criminal liability unless their cartel behaviour affects the Canadian export market — *i.e.* whatever its effect is on foreign consumers: see ss. 45(5), (6). One must question this "beggar thy neighbour" approach. Indeed the current legislation repealed s. 32(5)(*d*) of the *Combines Investigation Act*, *supra* note 31, which provided that the exemption for export cartels did not apply where the cartel "has lessened or is likely to lessen competition unduly in relation to a product in the domestic market."

[69]See *Ontario Salt Co.* v. *Merchant Salt Co.* (1871), 18 Gr. 540 (Ch. C.). The historical dimensions of this case are explored elsewhere in this special issue; see W.E.B. Code, "The Salt Men of Goderich in Ontario's Court of Chancery: *Ontario Salt Co.* v. *Merchants Salt Co.* and the Judicial Enforcement of Combinations" (1993) 38 McGill L.J. 517.

[70]Here an analogy might be drawn to criminal breach of trust or to the setting of criminal interest rates (*Criminal Code*, ss. 336, 347).

advantage of a public good — the market — and exploits a vulnerability that comes from use of and reliance upon that public good. Indeed, at the outset of Gonthier J.'s analysis of section 45 in *Nova Scotia Pharmaceutical*, there is an important assertion that "[c]ompetition is presumed by the Act to be in the public benefit."[71] Competition itself, rather than the positive consequences of competition, is deemed worthy of protection. The fact that anti-competitive collusion manipulates that public good is the normative basis for its criminal prohibition.[72]

From the foregoing it would appear that the criminality of anti-competitive collusion depends upon an economic context — a generalized market economy. Cartel behaviour would not be in the same way blameworthy if market relations were not our principal means of redistributing social wealth. Similarly, in the absence of private property, theft would have little or no meaning. But criminalization cannot be explained simply as an instrument for promoting the market. Rather, given a market, certain extreme manipulations of that market take on criminal blameworthiness.

F. When Criminal Law, When Civil Law?

To this point the discussion has only attempted to identify arguments for the criminal blameworthiness of anti-competitive collusion without attempting to specify which cases of such collusion are sufficiently egregious to justify laying criminal blame as opposed to proceeding under civil or administrative remedies.[73] However, it should be noted that the problem of distinguishing the most egregious cases is not particular to anti-competitive collusion. Criminal fraud and criminal breach of trust have been alluded to previously. Not all cases of fraud or breach of trust attract criminal liability.

Just as there might be practical, instrumental reasons for proceeding to seek a civil remedy in a particular case of theft rather than a criminal remedy,

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[71]*Supra* note 5 at 650.

[72]It should be noted that the Supreme Court of Canada, as a general matter, has characterized the conduct regulated by the *Competition Act* as lacking in moral blameworthiness. As the Court has described it, some of this conduct is made criminal for strictly instrumental reasons so as to control its negative economic consequences; see *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research)*, [1990] 1 S.C.R. 425 at 510, 67 D.L.R. (4th) 161, LaForest J., and *R.* v. *Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 216-23, 8 C.R. (4th) 145, Cory J. [hereinafter *Wholesale Travel*]. However, while the *Act* as a whole surely can be characterized this way, s. 45 stands out, in Mr. Justice Gonthier's words (*Nova Scotia Pharmaceutical*, *supra* note 5 at 649), as "not just another regulatory provision" but rather one that "remains at the core of the criminal part of the Act." Together with bid-rigging (s. 47), which is an extreme form of price-fixing, the cartel prohibition regulates conduct not only for its economic consequences, but also because of its inherent culpability.

[73]For a useful discussion of the relationship between criminal and civil sanctions for antitrust violations, see P. Areeda & D. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, vol. 2 (Boston: Little, Brown, 1978) at 26-36. See also Ky P. Ewing Jr, "The View from the Department of Justice: Some Thoughts on Pricing Questions" (Dallas: Department of Justice, Antitrust Division, 1980) at 13: "Before and after *Gypsum*, the Antitrust Division proceeded criminally only against what we believed to be deliberate violations. Consequently, we have sought indictments only when the evidence demonstrated that the purpose of the conspiracy was to achieve an anti-competitive restraint. This, of course, satisfies the *Gypsum* standard."

so too there are practical, instrumental reasons why one might seek a civil remedy under section 36 or an administrative remedy under section 79 in particular cases of cartel behaviour.[74] For example, a prosecutor must take account of the

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[74]For the purposes of future discussion, it is worthwhile to set out the text of these particular provisions. Section 36 of the *Competition Act* reads:

36.(1) Any person who has suffered loss or damage as a result of
(*a*) conduct that is contrary to any provision of Part VI, or
(*b*) the failure of any person to comply with an order of the Tribunal or another court under this Act,
may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

Sections 78 and 79 of the *Act* on "Abuse of Dominant Position" read as follows:

78. For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:
(*a*) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
(*b*) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
(*c*) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
(*d*) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
(*e*) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
(*f*) buying up of products to prevent the erosion of existing price levels;
(*g*) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
(*h*) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
(*i*) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

79.(1) Where, on application by the Director, the Tribunal finds that
(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or

differing burdens of proof to be met. Nevertheless, the central consideration should be to identify the most serious forms of anti-competitive collusion as meriting criminal prosecution, leaving the civil and administrative remedies as the default regime. In attempting to work out how to deploy the range of instruments arrayed under Canadian competition law, the antitrust regime of the United States offers a useful point of comparison. This is so for two reasons. First, the American regime has long contained a mixture of criminal, civil and administrative approaches. Second, American courts have developed a doctrine respecting conspiracy in restraint of trade that distinguishes between practices that are illegal *per se* and those that are subject to a "rule of reason." The former are acts inherently contrary to the ban on restrictive practices. The latter are subject to a more fine-grained analysis of their origin, purpose and effect. The distinction between *per se* and rule-of-reason analysis may thus help to identify practices subject to stricter criminal law scrutiny. We turn first to a summary of the American rule-of-reason/*per se* distinction and then to its applicability in Canada in light of the *Nova Scotia Pharmaceutical* decision. In outlining the American approach to section 1 of the *Sherman Act*, our objective is to highlight the most important and recent decisions in order to facilitate a comparison with the "partial rule of reason" test formulated by Gonthier J.

II. The American Approach to Section 1 of the *Sherman Act*: *Per se* and Rule of Reason

In the United States, the judiciary has long used two separate methods for assessing the competitive impact of a specific practice under section 1 of the

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lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

(7) No application may be made under this section against a person
(*a*) against whom proceedings have been commenced under section 45, or
(*b*) against whom an order is sought under section 92
on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.

Sherman Act:[75] *per se* analysis and rule-of-reason analysis. It is thus important to outline the origin and scope of each rule.[76]

A. The Rule of Reason

Although the *Sherman Act* appears to contain far more absolute prohibitions against anti-competitive behaviour than Canada's cartel provision, this absolute language has never been applied literally. The rule of reason, which moderated the strictness of the *Sherman Act*'s explicit terms, is not a recent innovation in American antitrust law. It was developed by the United States Supreme Court at the beginning of the century in a case brought by the government against the oil industry pursuant to sections 1 and 2[77] of the *Sherman Act*. In *Standard Oil Company of New Jersey* v. *U.S.*,[78] it was decided that the expressions "restraint of trade" and "monopoly" had to be interpreted in light of their meaning at common law[79] as well as in light of American law in force when Congress enacted the *Sherman Act*.[80] As to section 1 of the *Sherman Act*, the majority of the Court came to the conclusion that it aims only at "*undue* restraint of interstate or foreign commerce." [emphasis added][81] Thus, whereas the word "unduly" was explicitly part of the Canadian legislation, it was read into the *Sherman Act* by the United States Supreme Court. This gave rise to what was termed "the standard of reason"[82] and was deemed to be the appropriate analysis in spite of the fact that section 1 forbids "every" conspiracy in restraint of trade.[83]

Although in *Standard Oil* the Court set down the rule-of-reason approach to section 1 of the *Sherman Act*, the decision provided little indication of the parameters for the required inquiry. In *Chicago Board of Trade* v. *U.S.*,[84] Mr.

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[75]*Supra* note 54.

[76]For a detailed analysis of the analytical approaches used under s. 1 of the *Sherman Act*, see T.A. Piraino, "Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis" (1991) 64 S. Cal. L. Rev. 685.

[77]Section 2 of the *Sherman Act*, *supra* note 54, reads:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[78]221 U.S. 1 (1910) [hereinafter *Standard Oil*].

[79]Mr. Justice White (*ibid.* at 56) referred, *inter alia*, to *Mogul Steamship Co.* v. *McGregor*, [1982] A.C. 25 (H.L.).

[80]As Mr. Justice White wrote: "It's certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question" (*ibid.* at 51).

[81]*Ibid.* at 59-60.

[82]*Ibid.* at 60.

[83]*Supra* note 54. For further discussion of "the standard or reason," see *U.S.* v. *American Tobacco*, 221 U.S. 106 at 179-80 (1911) [hereinafter *American Tobacco*], and discussion in W. Letwin, *Law and Economic Policy in America: The Evolution of the American Antitrust Act* (New York: Random House, 1965) at 253-65, as well as E. Kintner, *Federal Antitrust Law* (Cincinnati: Anderson Publishing, 1980) at 350-54.

[84]246 U.S. 231 (1918) [hereinafter *Chicago Board of Trade*].

Justice Brandeis took the position that a rule-of-reason analysis mandates a careful consideration of the objective and effect of an agreement before it is deemed unlawful. Thus, a court must consider whether the evidence shows an agreement whose effects are either pro-competitive or anti-competitive.[85]

The rule-of-reason approach is the default regime under section 1 of the *Sherman Act*.[86] It also applies to the section 2 monopolization offence and to merger review.[87] For example, in the case of monopolization, a strict rule-of-reason approach includes proof of the following elements:

(i) "monopoly power"[88] within a relevant market;
and
(ii) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[89]

This makes it necessary, first, to adduce evidence regarding the relevant market, *i.e.* the product over which the defendant(s) is said to have control ("product market") and the territory where such control is claimed to exist ("geographic market").[90] Second, it must be shown that the defendant has market power within the relevant market. Usually this is done by measuring the market share

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[85]As Mr. Justice Brandeis stated in *Chicago Board of Trade*, *ibid.* at 238:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effects, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and predict consequences.

[86]For recent decisions of the United States Supreme Court applying a rule-of-reason analysis under s. 1 of the *Sherman Act* (*supra* note 54), see *inter alia*: *F.T.C.* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986) [hereinafter *Indiana Federation of Dentists*]; *Northwest Wholesale Stationers* v. *Pacific Stationery and Printing Co.*, 105 S. Ct. 2613 (1985) [hereinafter *Pacific Stationery*]; *National Collegiate Athletic Association* v. *Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) [hereinafter *University of Oklahoma*]; *Broadcast Music Inc.* v. *Columbia Broadcasting System Inc.*, 441 U.S. 1 (1978) [hereinafter *Broadcast Music*]; *Continental T.V. Inc.* v. *G.T.E. Sylvania*, 433 U.S. 36 (1977) [hereinafter *G.T.E. Sylvania*].

[87]For the applicability of the rule of reason to s. 2 (*supra* note 77), see *U.S.* v. *Grinnell Corp.*, 384 U.S. 563 (1966) [hereinafter *Grinnell*] (monopolization), and *Brown Shoe Co. Inc.* v. *U.S.*, 370 U.S. 294 (1962); *U.S.* v. *Philadelphia National Bank*, 374 U.S. 321 (1963) [hereinafter *Philadelphia National Bank*]; *U.S.* v. *General Dynamics Corporation*, 415 U.S. 486 (1974) (mergers).

[88]*Grinnell*, *ibid.* at 570. The Supreme Court defined monopoly power as "the power to control prices or exclude competition" (*ibid.* at 571 citing *United States* v. *du Pont & Co.*, 351 U.S. 377 at 391 (1956)). For two articles discussing the issue of market definition and market power, see R. Pitofsky, "New Definition of Relevant Market and the Assault on Antitrust" (1990) 90 Colum. L. Rev. 1805; W.M. Landes & R.A. Posner, "Market Power in Antitrust Cases" (1981) 94 Harv. L. Rev. 937.

[89]*Grinnell*, *ibid.* at 570-71.

[90]Pitofsky, *supra* note 88 at 1810.

of the defendant; a high market share (*e.g.* over seventy per cent)[91] provides evidence, *prima facie*, that the defendant has market power although countervailing evidence may be introduced.[92] Finally, there is an assessment as to whether the defendant(s) gained market power through legitimate or illegitimate trade practices.[93]

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[91]*Domed Stadium Hotel Inc.* v. *Holiday Inns Inc.*, 732 F.2d 480 at 489 note 11 (5th Cir. 1984). See also *Grinnell*, *supra* note 87 at 571, where the defendant company and its affiliates were found to possess monopoly power by controlling 87% of the relevant market.

[92]In two decisions, *Canada (Director of Investigation and Research)* v. *Nutrasweet Co.* (1990), 32 C.P.R. (3d) 1 at 31 (Comp. Trib.) [hereinafter *Nutrasweet*], and *Canada (Director of Investigation and Research)* v. *Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 at 325 (Comp. Trib.) [hereinafter *Laidlaw*], the Competition Tribunal used this analytical approach in assessing whether the relevant defendants had "control" over "a class or species of business" for the purposes of s. 79(1) of the *Competition Act* (see text to provision, *supra* note 74). For a comparative analysis of Canadian and American Law regarding monopoly, see D.M. Bellemare, "La Loi sur la concurrence" (Montreal: Congrès du Barreau du Québec, 1992) at 243.

[93]Mergers are reviewed both under s. 1 of the *Sherman Act* (*supra* note 54) and s. 7 of the *Clayton Act* (*supra* note 17); see U.S. Department of Justice Merger Guidelines, *Antitrust & Trade Reg. Rep.* (BNA) No. 1559, April 2, 1992. Courts use the same methodology to assess the anti-competitive impact of mergers under these two sections. As in the case of s. 2 monopolization, the boundaries of the market must first be defined. Then, pursuant to the ruling of Mr. Justice Brennan in *Philadelphia National Bank*, *supra* note 87 at 363, it must be decided if the market share of the parties raises a presumption that the merger "[will] lessen competition substantially or will tend to create a monopoly." As Brennan J. elaborated in full, justifying a *prima facie* case approach in light of legislative history:

> This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects (*ibid.*).

Such an approach was confirmed in several recent cases: *Hospital Corporation of America* v. *F.T.C.*, 807 F.2d 1381 (7th Cir. 1986) [hereinafter *Hospital Corporation of America*]; *F.T.C.* v. *Elders Grain Inc.*, 868 F.2d 901 (7th Cir. 1989); *F.T.C.* v. *University Health Inc.*, 938 F.2d 1206 (11th Cir. 1991).

In order to reverse the presumption of illegality, defendants may supply economic evidence tending to demonstrate that the market share achieved through the merger does not provide market power, *e.g.* evidence as to the absence of entry barriers (*U.S.* v. *Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990); *U.S.* v. *Calmar Inc.*, 612 F. Supp. 1298 (D.N.J. 1985); *U.S.* v. *Waste Management Inc.*, 743 F.2d 976 (2d Cir. 1984)), the failing economic condition of one party (*F.T.C.* v. *Harbour Group Investments* L.P. (1990) 2 Trade Cases 64912; *F.T.C.* v. *Warner Communications Inc.*, 742 F.2d 1156 (9th Cir. 1984); *U.S.* v. *Greater Buffalo Press Inc.*, 402 U.S. 549 (1971); *Citizen Publishing Co.* v. *U.S.*, 394 U.S. 131 (1969); *International Shoe Co.* v. *F.T.C.*, 280 U.S. 291 (1930)), or the realization of efficiencies, such as economies of scale (W. Adams & J.W. Brock, "Antitrust and Efficiency: A Comment" (1987) 62 N.Y.U. L. Rev. 1116; T.J. Muris, "The Efficiency Defense Under Section 7 of the Clayton Act" (1980) 30 Case W. Res. L. Rev. 381; A.A. Fisher & R.H. Lande, "Efficiency Considerations in Merger Enforcement" (1983) 71 Cal. L. Rev. 1580). The *prima facie* rule of illegality enunciated in *Philadelphia National Bank* (*ibid.*) was adopted by the Competition Tribunal in *Canada (Director of Investigation and Research)* v. *Hillsdown Holdings (Can.) Ltd.* (1992), 41 C.P.R. (3d) 289 at 314 (Comp. Trib.), in the context of an application made by the Director of Investigation and Research under s. 92 of the *Competition Act* against a merger completed in the rendering industry in Ontario. See also D.M. Bellemare, *The Relevance of the Structure-Conduct-Performance Paradigm to Horizontal Merger Analysis Under the Competition*

In sum, the rule of reason compels the trial judge to undertake an exhaustive investigation of the economic environment in which the agreement in restraint of trade took place. This often requires the presentation of complex economic studies and analyses. Also relevant under section 1 of the *Sherman Act* is the motivation or state of mind of the parties to the agreement. Section 1 is enforced through criminal prosecution as well as civil actions. Violation of section 1 is a felony giving rise to a fine and imprisonment. In addition, the Attorney General and private parties may bring civil actions under section 4 of the *Clayton Act* for recovery of treble damages. They may also seek injunctive relief under sections 15 and 16 of the *Clayton Act*. In criminal proceedings *mens rea* must be established.[94] However in civil proceedings no proof of *mens rea* is required — only a showing of either "unlawful purpose or an anti-competitive effect."[95]

B. The Per Se *Rule*

Whereas the rule of reason applied to conspiracies in restraint of trade is the general or default rule,[96] over the years courts have concluded that certain types of conduct are inherently anti-competitive and therefore would not be open to justification.[97] Thus, the courts have created, as an exception to the general rule of reason test, *per se* rules of illegality for certain types of conduct — in part for reasons of administrative efficiency.[98] These practices are: price-fixing, market division, tying arrangements and group boycott.[99] However, the *per se* rule is not enforced uniformly in the sense that somewhat different evi-

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Act (LL.M. Thesis, McGill University, 1991). In another decision, *Canada (Director of Investigation and Research)* v. *Southam Inc.* (1992), 43 C.P.R. (3d) 161 (Comp. Trib.), on appeal, No. A-1093-92 (F.C.A.), the Tribunal did not mention the *prima facie* rule. However, it should be noted that the Director supplied market share data only with respect to the Vancouver Courier merger: *DIR* v. *Southam Inc. et al.* Notice of Application and Statement of Grounds and Material Facts, CT-90/1, November 29, 1990, paragraphs 67 and 70. No such information was supplied as to the *North Shore News* merger or the *Real Estate Weekly* merger.

[94]In *U.S.* v. *U.S. Gypsum Co.*, 438 U.S. 422 at 444 (1978) [hereinafter *U.S. Gypsum*], Mr. Justice Burger defined the relevant *mens rea* as "action undertaken with knowledge of its probable consequences."

[95]*Ibid.* at 436 note 13.

[96]*Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 at 343 (1982) [hereinafter *Maricopa County Medical Society*]; *Broadcast Music*, *supra* note 86 at 8.

[97]For a contrary view as to the inherent anti-competitiveness of cartel behaviour, see Leslie, *supra* note 1.

[98]Stevens J. explained the rationale for *per se* offences in *Maricopa County Medical Society*, *supra* note 96 at 343-44:

> The costs of judging business practices under the rule of reason, have been reduced by the recognition of *per se* rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable. [citations omitted]

[99]*Northern Pacific Railway Co.* v. *U.S.*, 356 U.S. 1 at 5 (1957) [hereinafter *Northern Pacific Railway*].

dentiary standards are applied depending upon the type of practice involved. We will review in turn each practice subject to a *per se* rule.

1. Price-fixing

Although rivalry among competing firms may take several forms,[100] price competition is crucial to the workings of the market. Price-fixing, which by definition involves no new economies of scale or gains in productive or dynamic efficiency, is inherently inconsistent with a free market system.[101] Not surprisingly, therefore, since the coming into force of the *Sherman Act*, courts have been very strict in their interpretation of the antitrust statute when confronted with price-fixing agreements.

For instance, in *U.S.* v. *Trenton Potteries Co.*,[102] the Court rejected the defendants' contention that a price-fixing agreement falls under section 1 of the *Sherman Act* only if the price fixed or agreed upon is unreasonable. Rather, Mr. Justice Stone concluded that price-fixing was inherently unreasonable: "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices."[103]

Consequently, the Court declared "price-fixing illegal as a matter of law."[104] In particular, there is no need to prove that the defendants had market power.[105] It is sufficient to prove that the defendants had fixed prices and that interstate commerce was affected.[106]

Subsequently, in *U.S.* v. *Socony-Vacuum Oil Co.*,[107] the Court applied this *per se* rule to an agreement that had a direct effect on price without strictly speaking fixing price. In that case, a group of vertically-integrated oil compa-

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[100]For a discussion of the various non-price dimensions to competition, see *National Society of Professional Engineers* v. *U.S.*, 435 U.S. 679 at 695 (1978) [hereinafter *National Society of Professional Engineers*].

[101]Market division may, in fact, have more significant anti-competitive consequences. As one author writes: "In fact, horizontal territorial allocations arguably have a greater anticompetitive effect than horizontal price fixing. Price fixing eliminates only price competition among competitors, but horizontal market division eliminates all competition" (Piraino, *supra* note 76 at 721 note 161).

[102]273 U.S. 392 (1927) [hereinafter *Trenton Potteries*]. In that case, twenty individuals and twenty-three corporations, with control over 82% of the manufacture and distribution of vitreous pottery fixtures in the United States were charged with price-fixing and exclusive dealing (*ibid.* at 394).

[103]*Ibid.* at 399.

[104]*Ibid.* at 400. Mr. Justice Stone cited some early cases (for instance, *U.S.* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897); *U.S.* v. *Joint Traffic Association*, 171 U.S. 505 (1898); *Addyston Pipe & Steel Co.* v. *U.S.*, 175 U.S. 211 (1899); *Swift & Co.* v. *U.S.*, 196 U.S. 375 (1905); *Maple Flooring Association* v. *U.S.*, 268 U.S. 563 (1925); *Cement Manufacturers' Protective Association* v. *U.S.*, 268 U.S. 588 (1925)) in an attempt to show that the rule of reason enunciated in *Standard Oil* (*supra* note 78) did not apply to price-fixing.

[105]*University of Oklahoma*, *supra* note 86 at 100.

[106]*Topco Associates*, *supra* note 54; *U.S.* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) [hereinafter *Socony-Vacuum Oil*]; *Trenton Potteries*, *supra* note 102. In the case of criminal prosecution, it is also necessary to prove *mens rea* beyond a reasonable doubt.

[107]*Ibid.*

nies had purchased surplus oil refined by independent refiners within two distinct interstate markets, therefore creating upward pressure on oil prices.[108]

After *Socony-Vacuum Oil* the United States Supreme Court applied the *per se* rule to both direct and indirect price-fixing agreements. A broad range of practices have now been categorized as price-fixing by the Court, including establishing minimum or maximum fee schedules,[109] entering into "credit-fixing" arrangements,[110] and agreeing not to include prices in bids. The last example offers an illustration of how far the *per se* rule against price-fixing extends. In *National Society of Professional Engineers*,[111] those sections of a professional Code of Ethics forbidding engineers from submitting competitive bids for engineering works were deemed to be in *per se* violation of section 1 of the *Sherman Act*.[112] Engineers were not allowed to discuss their fees until selected by the client. Although not a price-fixing agreement strictly speaking, the Code did prevent engineers from competing against each other on the basis of price for their professional services.

However, two recent cases illustrate that the *per se* rule against price-fixing is not to be applied mechanically. *Broadcast Music*[113] posed the question

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[108]As Mr. Justice Douglas explained for the Court: "An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the *Sherman Act*. But so would agreements to raise or lower prices whatever machinery for price-fixing was used" (*ibid.* at 222).

[109]See *e.g. Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) [hereinafter *Goldfarb*], where it was decided that a mandatory minimum-fee schedule for real estate transactions infringed s. 1 of the *Sherman Act*. The Court noted that "[a] purely advisory fee schedule issued to provide guidelines, or an exchange of price information without a showing of an actual restraint of trade, would present us with a very different question" (*ibid.* at 781). Chief Justice Burger pointed out that the Court was faced with a "naked agreement" which unquestionably affected prices (*ibid.* at 782). Even if not mentioned expressly in the decision, the Court applied the *per se* rule. In another case, *Maricopa County Medical Society*, *supra* note 96, the Court reviewed the legality of a maximum-fee schedule established by two county physician organizations for fees recoverable from insurers of insurance plans. Invoking the longstanding tradition of "enforcement of the *per se* rule against price-fixing" (*ibid.* at 347), the Court condemned this scheme with the same vigor as the minimum-fee schedule deemed unlawful in *Goldfarb*: "But the fee agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price-fixing mold" (*ibid.* at 357).

[110]See also *Catalano Inc.* v. *Target Sales Inc.*, 446 U.S. 643 (1980), which concerned the proper rule of analysis to be applied to a "credit-fixing" agreement. The Court extended the *per se* rule against price-fixing to an arrangement among beer wholesalers whereby they agreed no longer to provide credit on beer purchased by beer retailers. As a result, customers had to pay in advance or upon delivery. The "interest-free credit" allowed to beer retailers prior to the agreement was considered by the Court to be integral to the price of beer: "It is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price" (*ibid.* at 648).

[111]*Supra* note 100.

[112]As Stevens J. wrote for the Court:

> In this case we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer. While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. ... On its face, this agreement restrains trade within the meaning of §1 of the Sherman Act (*ibid.* at 692-93).

[113]*Supra* note 86.

whether it was *per se* illegal for the owners of copyrighted musical compositions to pool their rights within two associations (ASCAP and BMI) which in turn issued "blanket licenses" to television networks. Mr. Justice White, for the majority, ruled that the blanket licenses did not constitute price-fixing *stricto sensu* and should be subject to a rule-of-reason analysis given the specific context in which they were issued.[114] In looking at that context, the majority concluded that what was granted under a blanket license constituted a different product than the rights to an individual musical composition protected under copyright law. Blanket licenses were usually issued to television networks for a flat rate. Authors or composers were not forbidden from dealing individually with television networks in licensing their own compositions. Furthermore, blanket licenses were found to be a more practical means for licensing rights to compositions than a series of individual contracts with composers. In such a context, a rule-of-reason analysis was adopted.[115]

The second case, *University of Oklahoma*,[116] concerned an agreement among member universities of a collegiate association aimed at limiting the number of football games each member could broadcast. The purpose of limiting television broadcasts was to prevent a decrease in live attendance at university stadia. Mr. Justice Stevens concluded that this type of agreement would ordinarily fall within the ambit of the *per se* rule.[117] Yet he decided that it should be subject to a rule-of-reason analysis because of the special characteristics of

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[114]Among the factors considered by Mr. Justice White in applying the rule of reason were the following: (1) the Department of Justice had submitted an *amicus curiæ* brief to the effect that in this context, the blanket licenses should not be considered price-fixing (*ibid.* at 14-15); (2) prior litigation initiated by the Department of Justice had culminated in consent decrees governing the issuance of blanket licenses and binding upon ASCAP and BMI (*ibid.* at 10-13); and (3) blanket licenses were sanctioned by U.S. copyright laws and seemed to be the most practical way for copyright owners to license musical compositions (*ibid.* at 15-16). This last point comes close to what Canadians would recognize as a regulated industry exemption. Hence *Broadcast Music* does not fundamentally challenge the *per se* approach to direct and indirect price-fixing agreements. For descriptions of the regulated industry exemption in Canada, see D.M. Bellemare, "Les secteurs réglementés" in S. Bourque, ed., *La nouvelle loi sur la concurrence* (Montréal: Yvon Blais, 1989) 153; R.J. Roberts, *Roberts on Competition/Antitrust: Canada and the United States*, 2d ed. (Toronto: Butterworths, 1992) at 435-45.

[115]The *Broadcast Music* case does not constitute a reconsideration of the *per se* rule against price-fixing. As a former Deputy Assistant Attorney General in the Antitrust Division has written: "The Court, however, did not signal a retreat from use of the *per se* rule, or offer a new framework for analysing pricing cases. Rather, the Court, in essence, accepted the arguments made by the defendants and the Justice Department, that blanket licensing was simply not price fixing in the classic sense" (Ewing, *supra* note 73 at 5). But see *contra*, Piraino: "The Court's broad language in *BMI* can be viewed as establishing a wholly new approach to Section 1 conduct. The Court required a threshold competitive analysis even for horizontal price fixing, which had been the most firmly established of all per se conduct" (*supra* note 76 at 696).

[116]*Supra* note 86.

[117]As Mr. Justice White wrote:

> By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint — an agreement among competitors on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law (*ibid.* at 99).

the industry.[118] In any event, the practice was considered illegal under a rule of reason analysis. Furthermore, it should be emphasized that the *per se* rule is still enforced against price-fixing in all other industries where no special circumstances warrant a different approach.[119]

The *per se* rule of illegality against price-fixing applies not only to horizontal price-fixing, but also to vertical price-fixing, *i.e.* resale price maintenance.[120] It is *per se* illegal for a manufacturer to impose a resale price on a wholesaler or for a wholesaler to do the same to a retailer.[121]

2. Market Division

Market division — an agreement among competitors whereby participants agree to operate their businesses within different territories — is arguably more anti-competitive than price-fixing because it eliminates all forms of competition, not only price competition.[122] The *per se* rule applicable to price-fixing has also been applied to market division under section 1 of the *Sherman Act*.[123] As applied to market-division agreements, the rule is broad in scope and extends to agreements to operate separate lines of commerce,[124] as well as to arrangements to divide up customers.[125] Two leading cases have laid the foundation for the approach of the Supreme Court of the United States in recent years: *Topco Associates*[126] and *Palmer*.[127] Although these were civil rather than criminal

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[118]Mr. Justice White continued:

> This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all (*ibid.* at 100-01).

[119]See *e.g. F.T.C.* v. *Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) [hereinafter *Trial Lawyers Ass'n*]; *Palmer* v. *BRG of Georgia Inc.*, 110 S. Ct. 401 (1990) [hereinafter *Palmer*].

[120]*Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911). Unlike horizontal price-fixing, vertical price-fixing is not unambiguously anti-competitive. See Bork, *supra* note 1, c. 14; W.S. Comanor, "Vertical Price-Fixing, Vertical Market Restriction and the New Antitrust Policy" (1985) 98 Harv. L. Rev. 983; C. Green, *Canadian Industrial Organization and Policy*, 3d ed. (Montreal: McGraw-Hill Ryerson, 1989) at 340-47.

[121]Resale price maintenance is also *per se* illegal in Canada under s. 61 of the *Competition Act* (*supra* note 4) but subject to a number of defences, including a loss-leader defence and a decreased service defence. See, *inter alia*, *R.* v. *Must de Cartier Canada Inc.* (1989), 27 C.P.R. (3d) 37 (Ont. Dist. Ct.); *R.* v. *Shell Canada Products Ltd.* (1989), 24 C.P.R. (3d) 501 (Man. Q.B.); *R.* v. *Sony of Canada Ltd.* (1987), 16 C.P.R. (3d) 50 (Ont. Dist. Ct.); *R.* v. *Epson (Can.) Ltd.* (1987), 19 C.P.R. (3d) 195 (Ont. Dist. Ct.); *R.* v. *North Sailing Products Ltd.* (1987), 18 C.P.R. (3d) 497 (Ont. Dist. Ct.); *R.* v. *George Lanthier & Fils Ltée* (1986), 12 C.P.R. (3d) 282 (Ont. Dist. Ct.); *R.* v. *Sunoco Inc.* (1986), 11 C.P.R. (3d) 557 (Ont. Dist. Ct.), aff'd (1988), 28 C.P.R. (3d) 287 (Ont. C.A.).

[122]*Supra* note 101.

[123]This kind of combination must be distinguished from "non-price vertical restrictions" to which a rule-of-reason analysis must be applied (*G.T.E. Sylvania*, *supra* note 86 at 42).

[124]*Hartford-Empire Co.* v. *U.S.*, 323 U.S. 386 (1945).

[125]*U.S.* v. *Suntar Roofing Inc.*, 897 F.2d 469 (10th Cir. 1990) [hereinafter *Suntar Roofing*].

[126]*Supra* note 54.

[127]*Supra* note 119.

cases, the *per se* rule against market division has been enforced in the same manner in criminal antitrust prosecution.[128]

In *Topco Associates*, the Court invalidated a scheme providing for exclusive licensing of Topco products to regional supermarket chains. Each member of Topco Associates, a cooperative purchasing agent owned by the retailers, was assigned a specific territory within which it was authorized to sell Topco products on an exclusive basis. The Supreme Court applied the *per se* rule despite the fact that the agreement aimed at restricting competition for a specific brand of product; *i.e.* the agreement concerned "intrabrand competition," not "interbrand competition." Furthermore, Mr. Justice Marshall made clear that a market-division agreement need not be accompanied by a price-fixing agreement to be unlawful *per se*.[129]

The *per se* illegality of market division was restated in *Palmer*.[130] Unlike the licensing agreement in *Topco Associates*, the licensing agreement in *Palmer* comprised a "revenue-sharing formula." The largest American provider of state bar courses, HBJ, had concluded an agreement with its main competitor in Georgia, BRG, for the supply of its materials. To that end, HBJ granted BRG an exclusive sale license in Georgia; in turn, each agreed not to compete against the other in Georgia or in any other state of the union where HBJ was doing business. Soon thereafter the price of bar review materials jumped dramatically.[131] The Court ruled that the agreement was *per se* illegal under section 1 of the *Sherman Act*.[132] Significantly, the Court relied on its previous decision in *Topco Associates* and declined to endorse the view of the lower courts that a *per se* violation of section 1 occurs only if competitors had previously competed against each other within the territories covered by the market-division agreement.[133]

3. Tying Arrangements

A tying arrangement may be defined as an agreement providing for the supply of a product or service conditional on the purchase of a second product or service, *i.e.* tying the sale of one item to the purchase of another one.[134] The

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[128]See *Suntar Roofing*, *supra* note 125 at 473, citing *Topco Associates*, *supra* note 54.

[129]*Topco Associates*, *ibid.* at 609 note 9.

[130]*Supra* note 119.

[131]*Ibid.* at 402.

[132]The Court wrote in a *per curiam* decision, "agreements between competitors to allocate territories to minimize competition are illegal ..." (*ibid.*).

[133]"[S]uch agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the others" (*ibid.* at 403).

[134]In *Northern Pacific Railway*, Mr. Justice Black defined tying arrangements in these words: "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier" (*supra* note 99 at 5). In Canada, "tied selling" is in principle subject to s. 45 and is also a restrictive trade practice reviewable by the Competition Tribunal under part VIII, s. 77(2) of the *Competition Act* (*supra* note 4). See *Canada (Restrictive Trade Practices Commission)* v. *BBM Bureau of Measurement* (1981), 60 C.P.R. (2d) 26 (Restrictive Trade Practices Comm.).

principal objection to tying arrangements is that they can be used to extend market power over one product into market power over another product — an objection known as the "leverage theory."[135] However, there is considerable controversy surrounding whether and under what circumstances tying arrangements are indeed anticompetitive.[136] Thus, even if the American courts have repeatedly mentioned that tying arrangements are to be evaluated under a *per se* illegality rule,[137] the rule is implemented differently than in the case of price-fixing or market division. In order for a tying arrangement to exist, two separate product markets must be involved.[138] The *per se* rule applies where the defendant possesses a degree of market power in the tying product (*i.e.* the main product). As the Court specified in *Northern Pacific Railway*, tying arrangements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product."[139] By contrast no proof of market power is required in price-fixing or market-division cases. However, the test for

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[135]See L. Kaplow, "Extension of Monopoly Power through Leverage" (1985) 85 Colum. L. Rev. 515. See also *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984) [hereinafter *Jefferson Parish Hospital*], where a hospital entered into an exclusive dealing arrangement with a firm providing anesthesiological services. Thus, the hospital's patients undergoing surgery were compelled to retain the anesthesiological services of the firm selected on an exclusive basis. As a result, anesthesiological services were tied to hospital services. The Court mentioned that for a tying arrangement to be *per se* illegal, the defendant must possess "market power" in the tying product (*ibid.* at 13-14). In this context market power is assimilated to "forcing" or "leverage." In the Court's words: "Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms" (*ibid.* at 12). The same approach was followed in *Eastman Kodak Co.* v. *Image Technical Services Inc.*, 112 S. Ct. 2072 at 2080-81 (1977) [hereinafter *Kodak*]. Kodak was sued by Independent Service Organizations under both ss. 1 & 2 of the *Sherman Act* for illegal tying arrangements and monopolization of the market for the supply of replacement parts and services for certain equipment manufactured by Kodak. As to the first claim, it was alleged that Kodak was tying the supply of replacement parts for its photocopiers and micrographic equipment to aftermarket service for such equipment. In other words, Kodak refused to supply parts unless the customer also used Kodak's maintenance or repair services. The Court ruled that the absence of market power in the equipment market does not imply, *per se*, that Kodak cannot have market power either in the part or service market. As explained by Mr. Justice Blackmun, "[t]hus, contrary to Kodak's assertion, there is no immutable physical law — no 'basic economic reality' — insisting that competition in the equipment market cannot coexist with market power in aftermarkets" (*ibid.* at 2084).

[136]See Bork, *supra* note 1 at 396-98; Posner, *supra* note 1 at 177-83.

[137]*International Business Machines Corp.* v. *U.S.*, 298 U.S. 131 (1936); *International Salt Co.* v. *U.S.*, 332 U.S. 392 (1947); *Northern Pacific Railway*, *supra* note 99; *Jefferson Parish Hospital*, *supra* note 135; *Kodak*, *supra* note 135.

[138]*Kodak*, *ibid.* at 2079-80 (discussing whether service and parts for Kodak's photocopiers and micrographic equipment are two separate product markets); *Jefferson Parish Hospital*, *ibid.* at 18-25 (discussing whether hospital services and anesthesiological services are two distinct markets).

[139]*Supra* note 99 at 6. In *Northern Pacific Railway*, sale and lease contracts for land entered into by a railroad company, whereby products manufactured on these lands had to be carried through the railway system of the company, were deemed to be subject to a *per se* rule analysis because the said railroad company had "substantial economic power" in the tying product (*i.e.* land ownership) (*ibid.* at 7). The Court also pointed out that a substantial amount of interstate commerce had to be affected (*ibid.* at 3).

market power over the tying product does not appear to be as stringent as in the case of a merger or monopoly, where it must be demonstrated that there is or is likely to be an ability to charge supra-competitive prices in a specific market.[140]

4. Group Boycott

A group boycott or concerted refusal to deal[141] prevents one or several firms from competing in the market and can decrease price competition. Indeed, where a group boycott affects price competition, it is a form of price-fixing. The United States Supreme Court has consistently held that group boycotts are *per se* illegal.[142] However, the precise range of behaviour falling within the ban on group boycotts is unclear, as is the antitrust standard applicable to such conduct.[143] Where there is evidence that a group boycott has an effect on pricing, a strict *per se* rule applies, as in price-fixing and market-division cases. Where there is no obvious price effect, a middle-range standard is applied similar to that in tying-arrangement cases.

The case of *U.S.* v. *General Motors Corp.*[144] offers an example of a group boycott to which a strict *per se* rule was applied.[145] A group of Los Angeles area General Motors ("GM") dealers complained to GM upper management that

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[140]See discussion *supra* note 93.

[141]A unilateral refusal to deal can be challenged under s. 2 of the *Sherman Act*; see *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847 (1985). In Canada, see s. 75 of the *Competition Act* (*supra* note 4) and *Chrysler Canada Ltd.* v. *Canada (Competition Tribunal)* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.), aff'd (1991), 38 C.P.R. (3d) 25, 129 N.R. 77 (F.C.A.), as well as *Canada (Director of Investigation and Research)* v. *Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.).

[142]*Trial Lawyers Ass'n*, *supra* note 119; *Indiana Federation of Dentists*, *supra* note 86; *Pacific Stationery*, *supra* note 86; *U.S.* v. *General Motors Corp.*, 384 U.S. 127 (1966) [hereinafter *General Motors*].

[143]See *Pacific Stationery*, *ibid.* at 2619: "Exactly what types of activity fall within the forbidden category is, however, far from certain."

[144]*Supra* note 142.

[145]See also *Trial Lawyers Ass'n*, *supra* note 119, which concerned a strike organized by an association of criminal lawyers seeking an increase in the legal fees paid by the District of Columbia to lawyers representing criminal defendants unable to afford a lawyer. At one point, most of the lawyer members of the association refused to take cases and the courts became paralysed. Thereafter, the District of Columbia surrendered: the legal fees were increased and the lawyers' strike ended. The Federal Trade Commission filed a complaint against the association charging that the group boycott organized by the association was an "unfair method of competition" under s. 5 of the *Federal Trade Commission Act* (*supra* note 17). The group boycott was declared to constitute a *per se* violation of s. 1 of the *Sherman Act*. The Court did not engage in an analysis of market power — although defendants probably had market power because of the type of professional service involved. But here, as in the *General Motors* case (*ibid.*), there was evidence that the activities of those who participated in the group boycott actually succeeded in raising prices: "The agreement among the CJA lawyers was designed to obtain higher prices for their services and was implemented by a concerted refusal to serve an important customer in the market for legal services and, indeed, the only customer in the market for the particular services that CJA regulars offered" (*Trial Lawyers Ass'n*, *ibid.* at 422-23). Thus, the group boycott orchestrated by the association was analysed as a form of price-fixing to which a strict *per se* rule applied; as Stevens J. wrote for the Court, "this case involves not only a boycott but also a horizontal price-fixing agreement ..." (*ibid.* at 436 note 19).

other local GM dealers were selling cars to discounters. The discounters were selling the same GM models near the complainants' outlets at lower prices. Pressure by the discontented dealers prompted GM management to enjoin GM dealers from selling cars to discounters. The company also established enforcement mechanisms to ensure compliance with the promise not to deal with discounters. Discounters were thus cut off from selling GM models in the Los Angeles area.[146]

The Court declared the scheme a *per se* violation of section 1 of the *Sherman Act*. The Court did not engage in an analysis of the market power of any defendant and did not hesitate to apply a *per se* rule even if the purpose of the agreement was to reduce intrabrand competition. Having concluded that the agreement affected price competition, the Court held that it was found to be illegal *per se*.[147]

The Supreme Court's decision in *Pacific Stationery*,[148] on the other hand, offers an example of where a strict *per se* rule was not applied to an arrangement akin to a group boycott.[149] That case concerned a collective decision made by retailers of a buying group (in the form of a cooperative) to expel a retailer from that group without providing rules allowing the expelled member to challenge the expulsion. The Court decided that a qualified rule-of-reason analysis was required because the boycott was not facially anti-competitive. The kind of economic harm produced by previous group boycotts that had been deemed *per*

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[146]As Mr. Justice Fortas noted writing for the Court:

> We have here a classic conspiracy in restraint of trade: joint, collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose (*General Motors*, *ibid.* at 140).

[147]Fortas J. continued: "We note, moreover, that inherent in the success of the combination in this case was a substantial restraint upon price competition — a goal unlawful per se when sought to be effected by combination or conspiracy. ... And the per se rule applies even when the effect upon prices is indirect ..." (*ibid.* at 147).

[148]*Supra* note 86.

[149]See also *Indiana Federation of Dentists*, *supra* note 86, in which an association of dentists located mainly within three local areas of the State of Indiana adopted a policy of not supplying X-rays to dental insurers. Dental health insurers requested X-rays from dentists as part of a measure to constrain payments made under dental insurance plans. The Federal Trade Commission filed a complaint against the Indiana Federation of Dentists under s. 5 of the *Federal Trade Commission Act* (*supra* note 17) alleging an "unfair method of competition." The Court ruled that the practice of the dentists could be considered a group boycott, yet not subject to a *per se* rule of analysis under s. 1 of the *Sherman Act*. Referring to *Pacific Stationery* (*ibid.*), Mr. Justice White stated that in order for the *per se* rule to apply to a group boycott, the boycotting group must have market power: "[T]he category of restraints classed as group boycott is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor — a situation obviously not present here" (*Indiana Federation of Dentists*, *ibid.* at 458). As in *Pacific Stationery*, there was no evidence that the refusal to submit X-rays had contributed to the inflation of dentists' claims under insurance dental plans. In spite of that, the practice was considered a violation of s. 1 of the *Sherman Act* (*supra* note 54) under a rule-of-reason analysis and, accordingly, an "unfair method of competition" pursuant to s. 5 of the *Federal Trade Commission Act*.

se illegal was not present.[150] It should be stressed that there was no evidence showing that the collective decision of the cooperative members to expel Pacific Stationery had had any influence on prices of office supplies. In the circumstances, the Court required evidence that "the cooperative possesses market power or exclusive access to an element essential to effective competition" before it would trigger the *per se* rule against group boycotts.[151]

In sum, group boycotts that affect prices are analysed under the same strict *per se* rule applied to price-fixing and market-division agreements. Absent an effect on prices, courts apparently require evidence that the defendants have a degree of market power as in tying-arrangement cases.

C. Summary

The two analytical approaches used to assess the legality of combinations in restraint of trade under section 1 of the *Sherman Act* are the rule of reason and the *per se* rule. The rule of reason is the general approach to which the *per se* rule provides specific exceptions.[152] The application of a rule of reason will require introduction of evidence pertaining to the definition of the market (*i.e.* "product" and "geographic" market), market structure, and anti-competitive consequences and may require proof of the intention of the parties and their justification for entering into the agreement. Thus, a rule of reason analysis generally involves a significant burden of proof.

Certain trade practices are reviewed under a *per se* rule. These practices are: price-fixing, market division, tying arrangements and group boycott. As to price-fixing and market division, such agreements violate section 1 of the *Sherman Act* if two evidentiary conditions are met: the agreement fixes prices (directly or indirectly) or divides markets and the agreement affects interstate commerce. Price-fixing and market division are the only practices deemed to be anti-competitive in and of themselves, *i.e.* to which a strict *per se* rule is applied.[153]

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[150]See *Pacific Stationery*, *ibid.* at 2619:

> Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors ... In these cases the boycott often cut off access to a supply, facility or market necessary to enable the boycotted firm to compete ... and frequently the boycotting firms possessed a dominant position in the relevant market.

[151]*Ibid.* at 2620-21.

[152]As the Court stated in *Pacific Stationery*: "Rule of reason analysis guides the inquiry ..." (*ibid.* at 2616).

[153]However see *Broadcast Music* and *University of Oklahoma*, both *supra* note 86, discussed above in text accompanying notes 113, 116. These decisious appear to draw a distinction, like that suggested by Robert Bork, between "naked" and "ancillary" restraints. See Bork, *supra* note 1 at 263:

> The rule should be restated so that it is illegal per se to fix prices or divide markets (or to eliminate rivalry in any other way) only when the restraint is "naked" — that is, only when the agreement is not ancillary to cooperative productive activity engaged in by the agreeing parties. Only then is the effect on the agreement clearly to restrict output.

A qualified or partial *per se* rule applies to tying arrangements and group boycotts where some evidence regarding the defendant's market power may be required. In tying-arrangement cases, it must be established that the defendant has sufficient economic power in the tying product to compel purchase of the tied product. The treatment of group boycotts is more confused. If the practice is deemed to be a conventional group boycott as defined in the case law and is proved to have affected prices, a strict *per se* rule applies. In all other situations, the court will require evidence that the boycotting firms have market power.

III. An Interpretation of the Canadian Law on Anti-Competitive Collusion

A. *The Interpretation of Section 45 in* Nova Scotia Pharmaceutical

We are now in a position to assess the "partial rule of reason" approach developed by Mr. Justice Gonthier in the *Nova Scotia Pharmaceutical* case in light of the American experience and in light of the appropriate role for criminal sanctions in Canadian competition law.[154] Gonthier J. develops the partial rule of reason test as a response to the "void for vagueness" challenge under section 7 of the *Charter*. His judgment is therefore designed essentially to circumscribe for the sake of the accused the range of criminally culpable anti-competitive acts proscribed by section 45.[155] This reasoning is parallel to the reasoning the United States Supreme Court applied in the *U.S. Gypsum* case where it identified the species of "vicious will" requisite to attract criminal, rather than civil, liability for breach of section 1 of the *Sherman Act*.[156] The goal of Mr. Justice Gonthier's interpretation of section 45 seems to be: (1) to identify clearly for the accused what the issues are in the prosecution; (2) to avoid imposing a degree of complexity in economic analysis that would render the provision unenforceable as criminal legislation; and (3) to focus the provision on significantly anti-competitive collusion and not to extend it to innocent agreements or agreements that have minimal anti-competitive effect. In framing the discussion that culminates in formulating a "partial rule of reason," Mr. Justice Gonthier invokes the "continuum between a *per se* rule and a rule of reason," concluding that section 45 lies somewhere in between.[157] In his view, the presence of the word "unduly"

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[154]For a brief review of the decision, see H. Wetston, "Évolution récente et enjeux du droit de la concurrence au Canada" Consommation et Corporations Canada, D-10883\93-02 October 22, 1992 at pp. 5-11. As well, within this special issue, see Crampton & Kissack, *supra* note 5.

[155]Note that U.S. courts had refused the "void for vagueness" challenge to antitrust legislation, most recently in *U.S. Gypsum*, *supra* note 94 at 439, where Chief Justice Burger cited with approval *Nash* v. *United States*, 229 U.S. 373 at 376-78 (1913), and summarized the holding as follows: "the indeterminacy of the Sherman Act's standards did not constitute a fatal constitutional objection to their criminal enforcement."

[156]*U.S. Gypsum*, *ibid.* at 437.

[157]As Gonthier J. writes:

> [Section 45] of the Act lies somewhere on the continuum between a *per se* rule and a rule of reason. It does allow for discussion of the anti-competitive effects of the agreement, unlike a per se rule, which might dictate that all agreements that lessen competition attract liability. On the other hand, it does not permit a full-blown discussion of the agreement, like a rule of reason would. Since "unduly" in [section 45] leads to a discussion of the seriousness of the competitive effects, but not of all relevant eco-

in the provision mandates an inquiry into the seriousness of economic effects — an inquiry that is not necessary with respect to those activities subject to a *per se* rule in the United States.

This way of framing the discussion risks giving rise to a certain degree of confusion for two reasons. First, as we have seen, the American rule of reason/*per se* distinction does not entail classifying a provision as lying somewhere on a continuum. Rather, it is section 1 of the *Sherman Act* that encompasses a range of activity lying on that continuum, and therefore the provision itself is sometimes deployed as a *per se* rule and sometimes as a rule of reason. Nothing prevents interpreting section 45 according to a different degree of proof of market power depending upon the type of activity in question. Indeed, as becomes clear subsequently in the decision, Mr. Justice Gonthier favours precisely such an interpretive range for section 45. Thus, he should not be read as having prescribed a uniform "partial rule of reason" for all activity subject to section 45 scrutiny.

Second, one might imply from the focus of the word "unduly" that its presence in the Canadian statute and absence in the American statute establishes conclusively that the American approach must differ from the Canadian approach.[158] To the contrary, as we have seen, American courts themselves read the word "unduly" into the *Sherman Act*, rejecting its literal interpretation.[159] Indeed, it was precisely because of this approach that American courts generally applied a rule of reason to the *Sherman Act*. Those acts subject to *per se* prohibition — such as horizontal price-fixing — were acts that were inherently unreasonable and anti-competitive (*i.e.* "unduly" restrictive of competition) and thus represented a limiting case of the general rule of reason.[160] Thus, it cannot be said that the presence of the word "unduly" in the Canadian legislation compels an approach that is different from that in the United States. It might be more accurate to say that the American case law respecting the application of a *per se* rule in certain contexts (*e.g.* tying arrangements, group boycotts) must be applied with caution in Canada given that it is largely derived from civil law enforcement (either damages or injunctive relief) under the *Clayton Act*. A strict liability approach to the criminal prohibition that might flow from the application of a *per se* rule would be inconsistent with *Charter mens rea* requirements, as we shall see. Indeed, in this respect the American case law reaches a similar conclusion, given that the *per se* rule is not applied identically in the criminal and civil contexts — there is an additional *mens rea* requirement in the criminal context. Thus, when Gonthier J. arrives at the conclusion that section 45 might be said to create a "partial rule of reason,"[161] he is seeking principally to identify the scope of the evidentiary inquiry mandated by section 45. As he goes on to explain, evidence must be adduced respecting two interrelated issues: (1) anti-

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nomic matters, one may say that this section creates a partial rule of reason (*Nova Scotia Pharmaceutical*, *supra* note 5 at 650).

[158]See also *Nova Scotia Pharmaceutical*, *ibid.* at 655.

[159]See *Standard Oil*, *supra* note 78 at 59-60; *American Tobacco*, *supra* note 83 at 179-80. See text accompanying note 81.

[160]For instance, in the case of price-fixing, see *Trenton Potteries*, *supra* note 102.

[161]*Nova Scotia Pharmaceutical*, *supra* note 5 at 650.

competitive behaviour and (2) a market structure predisposed to anti-competitive consequences of such behaviour or rendered less competitive by the behaviour.[162] By referring to a "partial rule of reason," Mr. Justice Gonthier forecloses the use of section 45 as a purely behavioural prohibition. Unlike in the United States, some minimal degree of inquiry into market structure is also mandated. In this sense, section 45 does not give rise to an absolute *per se* prohibition against price-fixing and market division.[163] However, as we have seen, some practices — tying arrangements and group boycotts — are subject to a qualified *per se* rule in the United States. Evidence of market power is required before the *per se* rule is applied.

1. Evidence Respecting Market Structure

From the standpoint of competition law enforcement, evidence of impugned behaviour can be difficult to gather; but in principle it involves the same kinds of forensic considerations governing the proof of any other *actus reus* and *mens rea*. On the other hand, evidence concerning market structure can require considerable economic sophistication. Indeed, this was one of the rationales for having an expert tribunal deal with those reviewable practices that require detailed analysis of market structure.[164] In the first place, the identification of the relevant geographic and product/service market can be notoriously difficult. Once the market has been identified, thorny issues can arise concerning the appropriate method of measuring concentration,[165] the identification of barriers to entry, the contestability of the market,[166] substitutability of products, and cross-elasticity of demand.[167] A full-blown rule of reason — precisely what Mr. Justice Gonthier seeks to avoid — would examine all of these matters in seeking to discover whether the accused had market power. At its most elaborate, a rule-of-reason analysis could also consider evidence that the impugned practice was the result of "superior competitive performance" or that it gives rise to countervailing efficiencies.[168]

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[162]*Ibid.* at 651.

[163]In the United States there is an "affecting commerce" test that operates as part of the general interstate commerce test and is not strictly speaking part of antitrust law; see *e.g. Socony-Vacuum Oil*, *supra* note 106 at 223-24. Given the Supreme Court of Canada's interpretation of general head of the trade and commerce power as applied to competition law (see the discussion of *City National Leasing*, *supra* note 35), no such *de minimis* requirement must be met for constitutional purposes in Canada. Instead, a threshold test of minimal market power test is applied as part of s. 45 of the *Competition Act*.

[164]See W. Grover, "The Competition Bill: The Courts or a Specialized Administrative Tribunal?" in J.R.S. Prichard *et al.*, eds., *Canadian Competition Policy: Essays in Law and Economics* (Toronto: Butterworths, 1979) at 97-133.

[165]For instance, in the absence of revenue statistics, the determination of market share can prove quite difficult. See *Laidlaw*, *supra* note 92 at 325-27.

[166]For an example of the difficulty in identifying whether a market is in fact contestable, see M. Levine, "Airline Competition in Deregulated Markets: Theory, Firm Strategy and Public Policy" (1987) 4 Yale J. Reg. 393.

[167]Although Gonthier J. lists these factors separately from the issues of market definition (*Nova Scotia Pharmaceutical*, *supra* note 5 at 653) as part of the "market structure" inquiry, the last two in particular are embraced by the exercise of defining the relevant market. See L.A.W. Hunter, "The New Merger Provisions of the Competition Act — Certainty or a Random Walk" [1987] Meredith Mem. Lect. 219.

[168]Evidence of "superior competitive performance" can be raised under s. 79(4) review for abuse

How does Gonthier J. avoid a full-blown rule of reason if an inquiry into market structure is mandated? Part of the answer turns on his definition of "market power," which he defines as "the ability to behave relatively independently of the market."[169] According to Gonthier J., one can behave relatively independently of the market without necessarily having the capacity to influence the market. This latter capacity betokens "substantial or complete control" and is characteristic of a "dominant position," abuse of which is reviewable under section 79.[170] Gonthier J. goes on to assert that only a "moderate amount of market power" need be shown, and refers subsequently to "minimal market power" and "some showing of market power."[171] By contrast, in those American tying and group boycott cases that apply a qualified *per se* rule, the threshold test for market power is not characterized as a test of "minimal" or "moderate" market power.[172] This would indicate that Gonthier J.'s "partial rule of reason" is not as strict as the *per se* rule applicable to price-fixing and market division in the United States, but less qualified than the test applicable to tying and group boycotts.

According to the microeconomic model that still forms the foundation of industrial organization texts, firms under the equilibrium conditions of perfect competition cannot influence the market by raising price or restricting supply.[173] They are price-takers facing a flat demand curve. To have market power is to face a downwards-sloping demand curve and thus to be able profitably to

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of dominant position (see *supra* note 74), while evidence of countervailing efficiencies can be raised under s. 96 merger review. Within the so-called "structure-conduct-performance" paradigm elaborated by Joe Bain, these latter considerations fall under "performance"; see J.S. Bain, *Industrial Organization* (New York: Wiley, 1959). Mr. Justice Gonthier only explicitly takes account of structure and conduct factors. Indeed, he appears to rule out considering at least efficiency gains when he states: "Considerations such as private gains by parties to the agreement or counterbalancing efficiency gains by the public lie ... outside of the inquiry under s. [45]. Competition is presumed by the Act to be in the public benefit. The only issue is whether the agreement impairs competition to the extent that it will attract liability" (*Nova Scotia Pharmaceutical, ibid.* at 649-50). On a narrow reading, this passage is merely a restatement of the *Howard Smith Paper Mills* decision (*supra* note 25 at 426), excluding as it does arguments that the public benefits from the price stability of a cartel. It may not, therefore, exclude performance arguments that go to the competitive consequences of the behaviour in issue.

[169]*Nova Scotia Pharmaceutical, ibid.* at 653.

[170]See Gonthier J.'s discussion of s. 79, *ibid.* at 654. In contrast, the Competition Tribunal has taken a more orthodox view of s. 79 in *Laidlaw, supra* note 92. In discussing the meaning of "substantial or complete control of a market," the Tribunal held that "[m]arket power in the economic sense is the power to maintain prices above the competitive level without losing so many sales that the higher price is not profitable" (*ibid.* at 325). Thus, it would now seem that there is some potential for confusion arising out of Mr. Justice Gonthier's *obiter* respecting s. 79. Whereas the Tribunal had equated the inquiry into "substantial or complete control" with an inquiry into market power, Gonthier J. implies that more than mere market power must be found under s. 79. However, his usage of the term "market power" differs from that of the Tribunal. The Tribunal's definition of "market power" involves precisely that ability to influence the market (prices) that Gonthier J. reserves for "control." Nevertheless, in the result the analysis is the same.

[171]*Nova Scotia Pharmaceutical, ibid.* at 654, 655.

[172]See text accompanying notes 134-151.

[173]Discussions of the traditional microeconomic model can be found in F.M. Scherer, *Industrial Market Structure and Economic Performance*, 3d ed. (New York: Rand McNally, 1990); Green, *supra* note 120.

restrict output and raise price relative to the conditions that would prevail in a competitive market. According to this model, it seems difficult to divorce the ideas of market power and market influence as Gonthier J. has done.[174]

However, a less idealized and more practical view of market behaviour lends credence to Gonthier J.'s usage of the term "market power." Market imperfections make it possible for producers in a relatively competitive market to exploit brand loyalty, informational deficiencies and transaction costs incurred in switching to a lower-cost competitor so as to be insulated to some degree from the market.[175] Indeed, Gonthier J. goes so far as to suggest that this limited form of market power involves a "capacity to behave independently of the market, *in a passive way*." [emphasis added][176] Under relatively short-term circumstances, a competitor may be able to behave independently of the market using an established customer base without being able to "influence" the market as a whole. The key appears to be that where anti-competitive collusion is not grounded on the ability to act independently, "collusion" might in fact be competition enhancing (*e.g.* a horizontal merger between two small competitors allowing the emergence of a stronger new competitor) or likely to dissolve under competitive pressures (*i.e.* as business is lost to cheaper competitors who are not following suit). Whereas the exploitation of relative independence from the market begins to suggest criminal culpability, the absence of such independence negates criminal culpability.

It is important to emphasize the extent to which Mr. Justice Gonthier is innovating here, although his innovation has statutory support. As we have seen, the old case law of the Supreme Court of Canada was characterized by a full-blown rule of reason according to which it was often necessary to demonstrate a "virtual monopoly."[177] Gonthier J.'s decision finally gives effect to the 1975 amendment to the *Competition Act* that provided:

> 45(2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be

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[174]It is worth noting that in the *Howard Smith Paper Mills* decision (*supra* note 25 at 426), Mr. Justice Cartwright had linked the idea of lessening competition "unduly" to the state of being "virtually unaffected by the influence of competition."

[175]Mr. Justice Gonthier cites the *Abitibi Power* case (*supra* note 27) in support of the moderate or minimal market power approach (*Nova Scotia Pharmaceutical*, *supra* note 5 at 654). In *Abitibi Power*, Batshaw J. took issue with the "virtual monopoly" approach characteristic of cases like *Howard Smith Paper Mills* (*ibid.*) and asserted that it was not necessary to show extinguishment of competition to meet the test of the *Act* (*Abitibi Power*, *ibid.* at 236-39). For economic literature supporting a finding of anti-competitive market conditions where there is less than outright "market power," see O.E. Williamson, "Antitrust Enforcement: Where It's Been, Where It's Going" (1983) 27 St. Louis U. L.J. 289; O.E. Williamson, "Assessing Vertical Market Restrictions: Ramifications of the Transaction Costs Approach" (1979) 127 U. Pa. L. Rev. 953 (arguing for a strategic behaviour or transaction costs approach to issues of market power). For a general analysis of differing market models with special emphasis on the concept of "raising rivals' costs," see M. MacCrimmon & A. Sadanand, "Models of Market Behaviour and Canadian Competition Law: Exclusive Dealing" (1989) 27 Osgoode Hall L.J. 709. See also Pitofsky, *supra* note 88 at 1810-11, where the author emphasizes that "market power" may exist even in the absence of high market share.

[176]*Nova Scotia Pharmaceutical*, *ibid.* at 654.

[177]See *supra* note 25 and accompanying text.

> necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.[178]

The test of moderate market power evidencing the ability to act relatively independently of the market establishes a new and lower burden of proof upon the Crown.

Furthermore, while it is no simple task to establish the ability of the accused to act relatively independently of the market, the evidentiary burden will not be as high as in abuse of dominant position cases.[179] For example, rather than looking for high concentration ratios — something Gonthier J. expressly puts to one side[180] — evidence might be offered of stable sales figures for the firms engaged in anti-competitive behaviour. The central idea here is that an agreement that arises from or results in a market structure characterized by a merely *de minimis* reduction in competition is not to attract criminal liability.

In practical terms, a finding of "a moderate amount of market power" will require two steps. First the relevant product and geographic market must be identified — although not with the degree of precision that would be necessary to show substantial market power. For example, in the case of price-fixing or market division, the product market contemplated by the anti-competitive agreement provides a sufficiently precise definition of the market in issue.[181] Second, some evidence of minimal ability to act independently of the market must be adduced. With respect to the latter element, Gonthier J. gives a non-limitative list of factors that may be relevant but does not suggest that evidence must be adduced with respect to each of these factors. They include:

> (1) the number of competitors and the concentration of competition, (2) barriers to entry, (3) geographical distribution of buyers and sellers, (4) differences in the degree of integration among competitors, (5) product differentiation, (6) countervailing power and (7) cross-elasticity of demand.[182]

Evidence on any of these points could establish a minimal threshold of ability to act relatively independently of the market, as might evidence of switching costs, brand loyalty or information deficiencies. One imagines that frequently the simplest evidence to adduce will be evidence of moderate market concentration.[183] Most importantly, and as becomes clear from Gonthier J.'s discussion

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[178]*Supra* note 4.

[179]The irony here is more apparent than real. Although it is true that the non-criminal provision sets a higher burden of economic proof than the criminal law provision, this is because the criminal law provision focuses essentially on inherently injurious behaviour rather than the control of anti-competitive effects of behaviour that might be benign in other contexts. Indeed, s. 79 frequently will address market structure rather than anti-competitive behaviour, as is evidenced by the fact that there is a provision for a divestiture remedy in s. 79(2).

[180]As Gonthier J. writes: "[M]any factors other than market share are relevant" (*Nova Scotia Pharmaceutical, supra* note 5 at 653).

[181]See Bork, *supra* note 1 at 269: "Very few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices. Thus, the fact of agreement defines the market."

[182]*Nova Scotia Pharmaceutical, supra* note 5 at 653.

[183]While evidence of moderate market concentration will frequently be the simplest evidence to

of the behavioural element of the offence, the requisite degree of precision in identifying a market structure that is prone to restricted competition will depend on the seriousness of the anti-competitive behaviour in issue.

In this respect, the "partial rule of reason" closely resembles the trade-off between market structure and behaviour that distinguishes practices subject to rule of reason or *per se* analysis in the United States. But the approaches are not identical; there are two important differences. First, the partial rule of reason always appears to require proof of market power, unlike a pure *per se* rule — although the "market power" in issue is the ability to act independently of the market, not the ability to raise prices unilaterally as in U.S. law. Second, the partial rule of reason gives rise to a gradient moving from lower to higher degrees of proof of market power rather than a bright line distinction between behaviour requiring proof of market power (rule of reason) and behaviour that does not.[184]

2. Evidence of Anti-competitive Behaviour

The behavioural element of the section 45 offence relates to the likely effect of the agreement among those possessing a minimum degree of market power. Gonthier J. insists that evidence of the actual effects of an agreement, although offering "good guidance" as to the anti-competitive nature of the agreement, is not the critical factor.[185] Rather, the agreement is to be evaluated on its own terms and classified according to the sort of injurious consequences likely to flow from such an agreement. This approach is consistent with the *mens rea* test that Gonthier J. subsequently outlines; the relevant subjective element is intent to enter into an agreement, not intent to produce a given set of consequences. There is to be an "objective" determination that the likely effect of the agreement would be to lessen competition.

Gonthier J. signals the set of factors listed in subsection 45(4) as indicating "impermissible fields" of agreement.[186] Thus, agreements having the likely consequence of restricting competition as regards (a) price, (b) quantity or quality of production, (c) markets or customers, (d) channels or methods of distribution, are illegal even where the agreement relates to matters that are otherwise within a permissible field of agreement listed in subsection 45(3) (*e.g.* exchange of statistics, definition of product standards, etc.). One might go so far as to say, following Gonthier J.'s reasoning, that agreements relating directly to price-fixing, restriction of supply, quality restrictions, market division, or exclusive distribu-

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adduce, it deserves emphasis that Gonthier J. never asserts that such evidence must be adduced — indeed, he writes that other factors will be relevant (*ibid.*). Nor is there any bright line cut-off for minimal concentration levels. Gonthier J. explicitly states that "[a] particularly injurious behaviour may also trigger liability even if market power is not so considerable" (*ibid.* at 657). It is thus questionable that any market share threshold can or should be gleaned from the "partial rule of reason" formulated by Mr. Justice Gonthier. See *contra* Crampton & Kissack, *supra* note 5 at 571, 592-93, 619, although the authors characterize their 35% threshold as a "rule-of-thumb."

[184]It should be recalled that there is in the United States an "affecting commerce" test for "more than *de minimis* control" flowing from the commerce clause and not from antitrust law; see *supra* note 163.

[185]*Nova Scotia Pharmaceutical*, *supra* note 5 at 656.

[186]*Ibid.* at 656.

tion are inherently likely to lessen competition. Such agreements could be characterized as presumptively illegal subject to the minimal market power requirement. This comes very close to *per se* illegality for the most egregious types of anti-competitive behaviour, notably price-fixing and market division.[187]

Mr. Justice Gonthier takes an additional step toward harmonizing Canadian law with the American *per se* rule when he returns to the relationship between the market structure and behaviour. Gonthier J. indicates that it is "the combination of the two [factors] that makes a lessening of competition undue"; but he is clear that "[m]any combinations are possible."[188] On the one hand, the more likely it is that the behaviour in question will injure competition, the less substantial need be the proof of market power.[189] Such behaviour lies close to the *per se* rule side of the spectrum. On the other hand, the more dramatic the pre-existing market power, the stricter the scrutiny of an agreement that is less inherently anti-competitive.[190] Such behaviour lies close to the rule-of-reason side of the spectrum.

Gonthier J. confirms that inherently injurious behaviour lies close to the *per se* side of the spectrum by asserting that, in some instances, the agreement itself can give rise to or enhance market power.[191] The instances cited by Gonthier J. are "price-fixing," through which competitors who separately have no pre-existing market power can create and exploit joint market power, and "market-sharing" (*i.e.* market division), through which competitors agree to withdraw from competing and thus grant each other market power.[192] Gonthier J. had been careful to note at the outset of his analysis that the structure-behaviour framework "should not be seen as a rite of passage" and that "the determination of whether an agreement unduly restricts competition involves an examination not only of market structure and firm behaviour separately, but also of the relationship between them."[193] In cases where the behaviour in issue creates market power, there is no point in mechanically following a two-step structure-behaviour test. It becomes more logical to identify the nature of the agreement (*e.g.* price-fixing, market division) and then to ask whether the parties together, through the agreement, were likely to achieve a moderate degree of market power. Thus, for example, an attempt at price-fixing by two shoe stores in downtown Montreal, though inherently suspicious, might be unlikely to achieve any market power because of the number of competitors not party to the agreement to whom customers would have easy access without incurring any appreciable cost.[194] Even in this case, however, the situation might be dif-

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[187]It bears repeating that Gonthier J. had explicitly disavowed a pure *per se* approach (*ibid.* at 655).

[188]*Ibid.* at 657.

[189]As Gonthier J. writes: "A particularly injurious behaviour may also trigger liability even if market power is not so considerable" (*ibid.*).

[190]As Gonthier J. explains: "Market power may also exist independently of the agreement, in which case any anti-competitive effect of the agreement will be suspicious" (*ibid.*).

[191]*Ibid.*

[192]*Ibid.*

[193]*Ibid.* at 652.

[194]Robert Bork gives the example of price-fixing within a law firm partnership, noting not only that the law firm faces considerable rivalry and has no market power, but also that the common

ferent if, for example, the two parties to the agreement had control over a distinctive brand. Given the nature of the agreement, the evidentiary burden as regards market power would be low, although more than *de minimis* control must exist. One way of putting this is that mere folly is not criminally culpable; agreements that will dissolve under competition are not the subject of section 45.[195]

A corollary to this latter conclusion is that the less inherently anti-competitive the behaviour, the less likely is criminal prosecution. After all, the stricter the evidentiary burden under the structural side of the analysis, the more difficult it will be to prove the elements of the offence beyond a reasonable doubt. This corresponds to the observation that in the United States, criminal prosecution rarely takes place for behaviour subject to a rule of reason. Rather, civil or administrative remedies are sought in such circumstances. One can safely conclude, therefore, that the categories of behaviour subject to a strict *per se* analysis in the United States — price-fixing and market division — correspond to the subset of conduct most likely to attract criminal liability in Canada. However, in Canada, more explicitly than in the United States, proof of such behaviour must be supplemented by evidence of minimal market power so as to demonstrate that the agreement was not of minor importance or without significant effect.

The relationship between the structural and behavioural elements of the section 45 offence might be summarized according to Figure 1.[196] Along the

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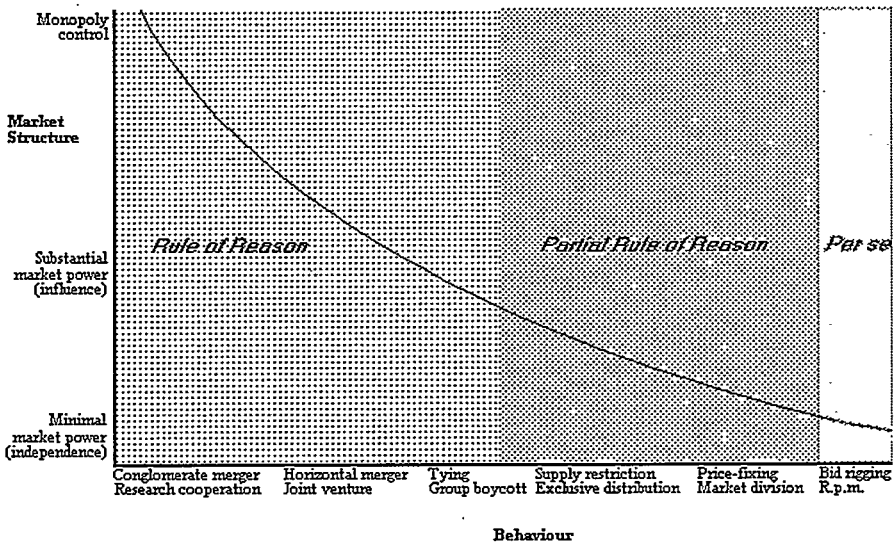
pricing arrangement gives rise to efficiencies for the firm (Bork, *supra* note 1 at 265).

[195]Gonthier J.'s use (*Nova Scotia Pharmaceutical*, *supra* note 5 at 655, 656) of the EC examples from the European Communities, namely *de minimis* agreements that fall outside Article 85 of the *Treaty Establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 11 [hereinafter *Treaty of Rome*] and block exemptions from Article 85 of the *Treaty of Rome*, is somewhat misleading given that Article 85 is not enforced as criminal law. Nevertheless, one must recall that s. 45 can be enforced as civil law, as is discussed below.

[196]We note that another interpretation is possible although in our view such an interpretation is less desirable and less consistent with Gonthier J.'s explicit reasoning. It is conceivable that the "moderate market power" test sets an upper ceiling on the degree of market power that must be proved with respect to all forms of behaviour subject to scrutiny under s. 45. This would mean inevitably that the courts would attempt to read certain behaviour out of the ambit of s. 45, for example in cases involving vertical restrictions, joint ventures or exchange of price information — *i.e.* cases not subject to a pure *per se* rule in the U.S. Yet s. 45 itself is drafted so as to have an apparently wide behavioural ambit and explicitly to include exchange of statistics, definition of product standards and environmental protection measures. To exclude, say, vertical restrictions would be to place a most strained construction upon s. 45. It seems inconceivable that courts would apply a minimal market power test in such cases. Furthermore, Mr. Justice Gonthier himself emphasizes the wide range of combinations of degrees of market power and types of injurious behaviour. He even goes so far as to say, speaking of the relationship between structural and behavioural factors, that "[m]arket power may exist independently of the agreement, in which case any anti-competitive effect of the agreement will be suspicious" (*Nova Scotia Pharmaceutical*, *ibid.* at 657). Here he does not qualify "market power" as minimal or moderate. Where there is full-fledged market power, less inherently anti-competitive behaviour may become suspicious. Behaviour that might not be suspicious where there is only minimal market power becomes suspicious where there is full-fledged market power. Thus, it would seem sensible to conclude that there is a range of behaviour subject to more than a partial rule of reason that nevertheless comes within the ambit of s. 45.

Figure 1: Anti-competitive collusion attracting criminal liability



behaviour axis one finds agreements that are to differing degrees inherently anti-competitive, ranging from least to most competitive. Along the market structure axis one finds differing degrees of market power ranging from minimal market power (an ability to act relatively independently of the market), through substantial market power (an ability to influence price), to monopoly control. The curve prescribes the level of proof of market power corresponding to differing degrees of injurious behaviour. The area below the curve falls outside criminal liability whereas the area above the curve corresponds to criminal liability. As the degree of proof required under the market structure element of the offence rises from proof of minimal market power to proof of substantial market power, the partial rule of reason becomes a full-blown rule of reason.

Although Mr. Justice Gonthier excludes the application of a pure *per se* rule under section 45, there are in the *Competition Act* two other criminal prohibitions against collusive behaviour which, by parity of reasoning, are subject to a *per se* rule. Neither the prohibition against bid-rigging (section 47) nor the prohibition against resale price maintenance (section 61) include the word "unduly." After the failed attempt in Bill C-256 to redraft section 45 so as to create an explicit *per se* prohibition against certain collusive practices (namely price-fixing, market division, supply restrictions, exclusive distribution, group boycott), only bid-rigging reappeared as a *per se* offence in the 1975 Stage I amendments.[197] It is understandable that there would be a heightened element of criminal culpability involved in bid-rigging given the necessarily fraudulent nature of the practice.[198] It is somewhat more surprising that resale price main-

[197]Bill C-256, *supra* note 56, s. 16(1).

[198]See *R.* v. *Coastal Glass & Aluminum Ltd.* (1984), 8 C.P.R. (3d) 46 at 58, 17 C.C.C. (3d) 313 (B.C.S.C.), aff'd (1986), 11 C.P.R. (3d) 391, 27 C.C.C. (3d) 289 (B.C.C.A.), where the judge

tenance has long been a *per se* offence.[199] It should be noted, however, that subsection 61(10) contains a number of specific defences. Where the product is sold (a) as an advertising loss-leader, (b) at a loss to sell other products, (c) using misleading advertising, or (d) without adequate levels of service being provided, the defendant will not be found guilty. Thus, resale price maintenance is not a pure *per se* offence because a number of countervailing factors can be considered. Nevertheless, absent one of the specific defences, resale price maintenance is deemed inherently anti-competitive and is not subject to a minimal market power requirement.

3. Mental Element

The structure-behaviour framework is designed to identify the *actus reus* of the section 45 offence. In a sense, the presence of the word "unduly" triggers the deployment of that framework in order to identify whether the behaviour in question is sufficiently injurious to give rise to criminal culpability. As a criminal offence, however, section 45 requires some proof of intent. It is notable that although Gonthier J. cites *Wholesale Travel*[200] — a case that concerned one of the misleading advertising provisions of the *Competition Act* — he does not choose to classify section 45 as a regulatory offence.[201] The culpability lies in having the *mens rea* to do the act, not in the negligent failure to observe what is mandated by a regulatory scheme. It is safest to conclude that section 45 proscribes conduct more akin to "true crime" rather than to a regulatory offence.[202]

It is interesting to compare the interaction between the *actus reus* of the offence and the requisite level of *mens rea* under American and Canadian law. As we have seen, in the United States it is the presence of a *mens rea* requirement that distinguishes the burden of proof in the criminal context from the civil

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referred to bid-rigging conduct as "reprehensible" and that such a bid was "a fraud and unnecessarily and dishonestly increases the costs to an [owner]."

[199]For a critique of the prohibition on resale price maintenance, see H. Marvel & S. McCafferty, "Resale Price Maintenance and Quality Certification" (1984) 15 Rand J. Econ 384; H. Marvel & S. McCafferty, "The Welfare Effects of Resale Price Maintenance" (1985) 28 J. of L. & Econ. 363. However, the Economic Council of Canada did praise the ban on resale price maintenance as efficiency-enhancing (*Interim Report*, *supra* note 33 at 64).

[200]*Supra* note 72.

[201]This conclusion is reinforced by the remarks of Gonthier J. at an earlier part of his judgment: "[Section 45] remains at the core of the criminal part of the Act ... [it] is not just another regulatory provision" (*Nova Scotia Pharmaceutical*, *supra* note 5 at 649). See *supra* note 72.

[202]There is arguably a contradiction between the approach taken by Gonthier J. and the Supreme Court's approach to *mens rea* in *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636 at 653, 47 D.L.R. (4th) 399, and *R.* v. *Logan*, [1990] 2 S.C.R. 731 at 743-44, 73 D.L.R. (4th) 40, where it was made clear that those "very few" crimes carrying the highest degree of social stigma required proof of subjective foresight. If the conduct proscribed by s. 45 falls into this special category, it should require proof of full subjective intent. Nevertheless, Gonthier J.'s opinion is defensible on the assumption that the *Vaillancourt* crimes are only those at the hard core of the *Criminal Code* and that other conduct — even conduct that partakes of a degree of moral culpability analogous, say, to theft — can be subject to a lesser *mens rea* requirement. The behaviour contemplated by s. 45 is both economically injurious, like regulatory offences, and morally blameworthy, like true crimes. The *mens rea* test Parliament has adopted is stricter than a due diligence test but not as strict as full subjective intent. In essence, Gonthier J. arrives at the conclusion that the *Charter* does not preclude the creation of offences lying on the boundary of "true crimes." For a discussion of Gonthier J.'s reasons in this regard, see Crampton & Kissack, *supra* note 5 at 584-88.

context. Although, in the civil context, section 1 of the *Sherman Act* bans behaviour subject to a rule of reason and not just behaviour subject to a *per se* rule, behaviour subject to a rule of reason has only rarely given rise to criminal conviction.[203] This result occurs not because behaviour subject to a rule of reason cannot attract criminal liability as a matter of principle. Rather, it occurs because it is quite difficult to establish *mens rea* where, on a rule of reason analysis, there might be market conditions under which the same sort of behaviour would not give rise to criminal liability. To prove *mens rea* beyond a reasonable doubt in the United States, one must show intention to enter into a conspiracy together with knowledge of the probable consequences of the conspiracy. Thus, where the *actus reus* is to be established according to a rule of reason, there is a large zone of reasonable doubt as to knowledge of probable consequences.

In Canada, on the other hand, it is now clear that after *Nova Scotia Pharmaceutical*, subsection 45(2.2) means what it says. As the subsection reads:

> (2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

Gonthier J. concludes that according to this provision, the Crown need not establish subjective knowledge of probable consequences as part of the *mens rea* requirement. One need simply establish that "the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement."[204] As Gonthier J. describes, the consequences of the agreement are to be assessed according to the standard of a reasonable business person:

> [I]t would be a logical inference to draw that a reasonable business person who can be presumed to be familiar with the business in which he or she engages would or should have known that the likely effect of such an agreement would be to unduly lessen competition. Thus in proving the *actus reus* that the agreement was likely to lessen competition unduly, the Crown could, in most cases, establish the objective fault element that the accused as a reasonable business person would or should have known that this was the likely effect of the agreement.[205]

In a sense, therefore, the somewhat higher burden on the Crown in Canada to establish the *actus reus* of the section 45 criminal offence (proof of minimal market power) is offset by a somewhat lower burden in establishing *mens rea*. This conclusion can be summarized in the following table:

	Canada	**United States**
actus reus	*per se* + mimimal market power	*per se*
mens rea	intent to agree + knowledge of agreement + objective analysis of consequences	intent to agree + knowledge of probable consequences

[203]See Areeda & Turner, *supra* note 73 at 30. See also, D. Baker, "To Indict or Not To Indict: Prosecutorial Discretion in Sherman Act Enforcement" (1978) 63 Cornell L. Rev. 405.

[204]*Nova Scotia Pharmaceutical*, *supra* note 5 at 659-60.

[205]*Ibid.* at 660.

In practice, the results of criminal prosecutions ought to be virtually identical in the two jurisdictions. Whereas some proof of the likely anti-competitive effect will be necessary to establish the *actus reus* in Canada, the same thing will be needed to establish the *mens rea* in the United States — conjoined with subjective knowledge. It should even be marginally easier to obtain conviction in Canada because once the *actus reus* is established, there is no subjective defence based on ignorance of likely consequences. However, because of the burden of proof beyond a reasonable doubt, those agreements caught by a strict *per se* rule in the United States are also the agreements most likely to give rise to criminal prosecution in Canada. In price-fixing and market division cases, one can all but infer proof of minimal market power through proof of the agreement.[206] In the United States, proof of the agreement goes a long way toward proving intent to create anti-competitive effects. Thus, as concerns criminal prosecution, those agreements subject to a strict *per se* rule in the United States also prescribe the highest zone of risk of criminal prosecution in Canada, although for somewhat different reasons.

4. The Application of the Supreme Court's Decision at Trial

The Supreme Court's decision in *Nova Scotia Pharmaceutical* has already received its first application — not surprisingly in the trial decision of the *Nova Scotia Pharmaceutical* case itself.[207] There Mr. Justice Boudreau reviewed over a decade of negotiations (1974-86) between the accused, the "Society/Association," acting on behalf of approximately eighty per cent of Nova Scotia pharmacists, and three providers of direct pay insurance plans in Nova Scotia, having between them over 200,000 subscribers. The trial judge concluded that the accused did form a combination, the effect of which was to lessen competition "seriously" for the supply of prescription drugs and pharmacists' dispensing services.[208] In particular, the Society/Association organized a series of boycotts of individual insurers' direct-pay plans in order to force acceptance of a tariff. In each case, these boycotts achieved the intended result virtually overnight. However, Boudreau J. also concluded that reasonable business persons in the position of the accused would not necessarily have known that the effects of these actions were anti-competitive.[209] On that basis, he acquitted the Society/Association. We examine briefly this surprising result in order to highlight what we take to be misapplications of the Supreme Court of Canada's framework of analysis for section 45.[210]

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[206]The *Nova Scotia Pharmaceutical* decision does not really cast direct light on the problem of conscious parallelism — *i.e.* parallel pricing in a tight oligopoly but absent an explicit price-fixing agreement. However, one might extrapolate from Mr. Justice Gonthier's reasons that parallelism will be viewed with great suspicion where, as in an oligopoly, there is pre-existing market power. Subsection 45(3) now specifies that whereas the existence of the agreement must be proved beyond a reasonable doubt, it can be inferred from circumstantial evidence without any direct evidence of communication between the parties. This enhanced ability to prove tacit agreements, together with heightened scrutiny of the anti-competitive effects of market power, may now combine to overturn the decision in *Atlantic Sugar* (*supra* note 25).

[207]*R.* v. *Nova Scotia Pharmaceutical Society (No. 3)* (1993), 120 N.S.R. (2d) 304, 332 A.P.R. 304 (S.C.T.D.) [hereinafter *Nova Scotia Pharmaceutical* (Trial Decision) cited to N.S.R.].

[208]*Ibid.* at 334.

[209]*Ibid.* at 339.

[210]For a brief discussion of the decision, see Crampton & Kissack, *supra* note 5 at 601-02.

a. Market Definition

Although the definition of the relevant product and geographic markets did not prove to be particularly controversial in this case, nevertheless the methodology pursued by Boudreau J. was notable for its simplicity. He defined the market as that "which was the subject of discussions and negotiations between the accused and the third party insurers."[211] It was entirely appropriate in a price-fixing case to adopt the market definition used by the parties in their agreement.[212] The whole thrust of Gonthier J.'s partial rule of reason is to avoid an unrealistically high evidentiary burden on the Crown, especially in those cases coming under a *per se* rule in the United States — cases in which the accused in any event has the most ample source of information. If the parties to the agreement believed it made economic sense to fix prices for direct-pay insurance in Nova Scotia, surely they cannot be heard to argue that this was not the relevant market for their services. It would nevertheless have been helpful for Mr. Justice Boudreau to link his streamlined approach to market definition with the nature of the anti-competitive behaviour in issue.

b. The Structure/Behaviour Framework

Although Mr. Justice Gonthier had emphasized that the structure/behaviour framework he outlined "should not be seen as a rite of passage,"[213] that is precisely the way in which Mr. Justice Boudreau seems to have viewed the task of applying the Supreme Court's analysis. Boudreau J. begins by defining the product and geographic markets on the assumption that the definitional exercise proceeds independently from the characterization of the behaviour in issue. He then addresses the question of market structure, canvassing each and every one of the factors Gonthier J. had mentioned as potentially relevant to this issue.[214] Finally, he addresses the behaviour of the accused. Yet, Gonthier J. had emphasized in his discussion of the issue that some forms of anti-competitive behaviour — notably price-fixing — are so egregious as to "trigger liability even if market power is not so considerable."[215] The instant case concerned price-fixing.[216] Indeed, the facts relevant to establishing this behaviour were not in

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[211]*Nova Scotia Pharmaceutical* (Trial Decision), *supra* note 207 at 325.

[212]See Bork, *supra* note 1 at 269.

[213]*Nova Scotia Pharmaceutical*, *supra* note 5 at 652.

[214]It is important to emphasize that the factors applied mechanically by Boudreau J. in his analysis of market power were not enumerated by Gonthier J. for the purpose of setting out a test. Rather, Gonthier J. sought to demonstrate that the kinds of considerations brought to bear in previous s. 45 cases — notably in *R.* v. *J.W. Mills & Son Ltd.*, [1968] 2 Ex. C.R. 275 at 307-08, 56 C.P.R. 1, aff'd [1971] S.C.R. 63, 14 D.L.R. (3d) 464 [hereinafter *J.W. Mills* cited to Ex. C.R.] — gave sufficient precision to the word "unduly" for the purposes of s. 7 of the *Charter*; see *Nova Scotia Pharmaceutical*, *ibid.* at 653. Indeed, the *J.W. Mills* methodology was applied prior to the adoption of s. 45(2), which now makes clear that there is no need to establish the existence of a virtual monopoly in order to find the accused liable under s. 45.

[215]*Nova Scotia Pharmaceutical*, *ibid.* at 657.

[216]It should be recalled that maximum price-fixing is *per se* illegal in the United States; see *Maricopa County Medical Society*, *supra* note 96. Note as well that in this case, there was clear evidence that the maximum price was also the minimum price (*i.e.* the fixed price) (*Nova Scotia Pharmaceutical* (Trial Decision), *supra* note 207 at 315). Furthermore, it should be recalled that group

dispute.[217] This behaviour placed the accused within the zone of most suspect conduct under section 45. Had Boudreau J. begun his analysis by characterizing the behaviour in issue as triggering liability even where market power is not so considerable, that would have simplified considerably the approach taken to the finding of market power. In particular, once it was established that the Society/Association was able to coordinate a group boycott by over eighty per cent of the pharmacies in Nova Scotia,[218] the analysis of market power was at an end. This conclusion was reinforced by the existence of serious barriers to entry in the form of provincial licensing requirements.[219] Thus, there was no need to explore mechanically the geographical distribution of buyers and sellers, differences in degree of integration among competitors, product differentiation, countervailing power or cross-elasticity of demand, especially given that the behaviour in issue attracts liability even where the market power is not considerable.[220] Indeed, it is most surprising that Boudreau J. concludes that there was only moderate, not excessive, market power in this case.[221] The market power at issue in this case was far from being close to the line.

c. *The Necessary* Mens Rea

Mr. Justice Boudreau's application of the *Nova Scotia Pharmaceutical mens rea* test is highly problematic. Having found that the accused had entered into an agreement to restrict competition, he nevertheless concludes that the "objective" element of the test was not met by the Crown. Boudreau J. writes:

> I am not satisfied beyond a reasonable doubt that the accused, as reasonable business persons familiar with the pharmacy business, would or should have known all of the intricate and complicated effects of the various dealings between the Society/Association, the member pharmacies, the Government Plan and the third party insurers, which involved numerous and complicated negotiations, some mandated by law, some not. In my opinion, the burden is on the Crown to establish this critical element beyond a reasonable doubt and I am far from satisfied that this is one of those cases where objective fault can be inferred as a matter of course from the establishment of the *actus reus*.[222]

Boudreau J.'s conclusion flows from a series of fifteen factors that, in his view, rendered the context of the case ambiguous. In particular, he notes that the process of negotiating maximum allowable tariffs originated with a Government

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boycotts affecting prices are *per se* illegal in the United States: see *supra* note 142 and accompanying text.

[217] *Nova Scotia Pharmaceutical* (Trial Decision), *ibid.* at 307.

[218] *Ibid.*

[219] See *Hospital Corporation of America*, *supra* note 93 at 1387, for Posner J.'s discussion of such entry barriers.

[220] In any event, the issues of geographical distribution of buyers and sellers, product differentiation and cross-elasticity of demand were in essence settled by the definition of the relevant market. Boudreau J. had put these issues to one side, having concluded that they belonged within the analysis of market structure and undueness (*Nova Scotia Pharmaceutical* (Trial Decision), *supra* note 207 at 325). In our view, it would have been more appropriate for the trial judge to conclude that these factors need not be addressed in naked price-fixing cases.

[221] *Ibid.* at 331.

[222] *Ibid.* at 339.

Plan covering drug costs for persons sixty-five and over.[223] Yet, the ongoing process of negotiations was not the *actus reus* of the offence as Boudreau J. determined it. Rather, the offence flowed from a series of successful "boycotts" coordinated by the accused with a view to achieving (1) a forty-two per cent increase in the maximum allowable dispensing fee — a fee accompanying the fulfilment of individual prescriptions — and (2) in several instances an increased maximum tariff.[224] It is one thing to walk away from negotiations — in this case, to say to the direct-pay insurer in question that it would be up to that insurer to negotiate with individual pharmacies if an agreement could not be reached collectively.[225] It is quite another thing to organize a boycott of that insurer using the umbrella of the Society/Association and thereby to fix a price.[226]

Even if these illegal boycotts took place as part of a bargaining process that could have been conducted lawfully — a questionable proposition — that is neither here nor there. The only issue Boudreau J. had to address was whether a reasonable business person would or should have known that such boycotts would have an anti-competitive effect. By formulating a question around the much broader issue of drug tariff negotiations, Boudreau J. comes to the wrong conclusion.

One of the factors Boudreau J. mentions in finding the accused innocent is, however, particularly troublesome. The trial judge notes that the Director of Investigation and Research had been contacted in 1982 to give an opinion about a proposed "master contract" respecting, *inter alia*, tariffs.[227] At that stage, the

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[223]Boudreau J.'s reference to the Nova Scotia Government Plan is problematic because the negotiations with the third party insurers, although clearly influenced by the outcome of negotiations with the Government, were not formally part of any regulatory scheme. This is underlined by the fact that in 1984 the Society/Association demanded and received a maximum tariff schedule higher than that under the Government Plan (*ibid.* at 320). Had the Nova Scotia Government chosen to include the third party insurers within a common legislatively-mandated tariff negotiation, the results of such a negotiation would not have been subject to scrutiny under the *Competition Act*. Here, the Society/Association was ultimately free from liability in part because the trial judge viewed the context as being akin to a regulatory context, thereby expanding beyond recognition the ambit of the current regulated industry defence.

[224]*Ibid.*

[225]The accused attempted to argue that the insurers in effect represented the public and were able to use that bargaining power to gain reasonable maximum tariffs — indeed that these dealings "resulted in significant efficiencies in the distribution of prescription drugs and pharmacists' dispensing services to the public" (*ibid.* at 333). Boudreau J. quite rightly rejected this line of argument as lying outside the inquiry mandated by the *Act*, although he did suggest that efficiencies arguments might be made on sentencing (*ibid.*). It is in any event dubious that the third party insurers could be treated as surrogates for the public. They had the ability to pass increased costs along to the public in the form of higher premiums, although this was somewhat constrained by the public's ability to opt out of such plans. Furthermore, to the extent that the pharmacists sought to equalize their bargaining power with a third party insurer oligopoly, the policy of the *Act* is now clear. Absent a specific exemption (as for trade unions), price-fixing combinations are not a permitted vehicle for achieving improved — in this case maximal — bargaining power. Internal growth, mergers or joint ventures can give rise lawfully to the efficiencies claimed by the Society/Association.

[226]See *Trial Lawyers Ass'n*, *supra* note 119.

[227]*Nova Scotia Pharmaceutical* (Trial Decision), *supra* note 207 at 338.

Director gave the opinion that the contract was illegal and so the Society/Association decided instead to propose guidelines for agreements between the insurers and individual pharmacies. Boudreau J. found that in acting this way, the Society/Association "abided by the opinion given" by the Director.[228] The trial judge appears to have concluded that this contact with the Director's office gave the impression that the negotiation process itself did not run afoul of the combines legislation. The Director did not issue an opinion telling the Society/Association that its negotiation of maximum tariffs on behalf of pharmacies was illegal. Nor did the Director pursue any further immediate investigation designed to determine whether the negotiations giving rise to the master contract posed other anti-competitive problems. By that time, the Society/Association had already engaged in a number of boycotts. The alleged anti-competitive practices continued for another four years, and charges were laid only on May 31, 1990. It is plain, on the one hand, that the accused must have contemplated that their behaviour was problematic in light of the cartel prohibition — otherwise, why refer the matter to the Director? On the other hand, more aggressive action from the Director was not forthcoming, which could have led a reasonable business person to conclude that no illegal act had yet been committed. In short, the trial judge appears to conclude that the Director lulled the accused into believing that its acts were legal.[229] However, the relevant question is not whether a reasonable business person might have been drawn into believing that the acts were legal. Rather, the question is whether a reasonable business person would have concluded that the acts would have anti-competitive consequences. The Director's failure to act more aggressively when contacted about the "master contract" might have been a factor in sentencing, but should not have been a factor in arriving at the verdict.[230]

5. Summary of Criminal Law Enforcement of Section 45

In assessing the applicability of section 45 as a criminal law provision (as distinct from the degree of certainty required for the civil law application of section 45 via section 36), a rule of presumptive illegality for specific forms of anti-competitive behaviour is joined with a test for minimal market power so as to avoid conviction where the anti-competitive behaviour in issue has no significant effect. In cases of price-fixing and market division, the agreement itself can create this market power and thus, from an evidentiary standpoint, the Crown need merely prove, for example, the participation of a significant set of actors.

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[228] *Ibid.*

[229] See P.L. Warner & M.J. Trebilcock, "Rethinking Price-Fixing Law" (1993) 38 McGill L.J. 679 at 717-20, where the authors propose a formalized notification procedure that would provide a safe harbour from criminal prosecution. In a sense, Boudreau J. concluded that the accused made a good faith effort not only to comply with the law but also to notify the Director.

[230] Given the Director's ambiguous prior involvement in the case, we question whether prosecutorial discretion was appropriately exercised in proceeding by way of indictment. As we discuss below, this might instead have been an appropriate case for proceeding by way of information in order to seek a prohibition order under s. 34(2). Upon issuance of an order accompanied by a finding of guilt, the record of proceedings could have been used by the public to recover damages under s. 36. Alternatively, the Attorney General of Canada might have brought a *parens patriæ* action under s. 36, perhaps together with a claim for injunctive relief under s. 62.

This is not a pure *per se* rule but rather a "*per se* +" rule or a "partial rule of reason" because the significance of the anti-competitive activity (its "undueness") is to be assessed. Furthermore, to the extent that the behaviour in question would require greater degrees of proof of market power and anti-competitive effect — a full-blown rule of reason at the extreme — we stray from the criminal law context. Indeed, this corresponds to the American approach exemplified in *U.S. Gypsum* indicating that criminal liability under section 1 of the *Sherman Act* will involve a degree of culpability not necessarily present in cases of civil liability under section 4 (damages) and section 16 (injunctive relief) of the *Clayton Act*.[231]

B. Civil Law Enforcement of Section 45 through Section 36

One of the most significant recent amendments to the *Competition Act* was the creation of a civil remedy for any person who has suffered loss or injury as a result of conduct contrary to Part VI of the *Act* — including notably for our purposes section 45. This amendment parallels the remedy available under section 4 of the *Clayton Act* against conduct contrary to the *Sherman Act* — including notably for our purposes section 1. As we have seen, in the United States the rule of reason/*per se* distinction is applied with full force in the civil context. In that domain, the level of proof necessary to establish that an act was illegal is proof on the balance of probabilities. In particular, the plaintiff must prove on the balance of probabilities that the collusive behaviour in issue had an anti-competitive effect causing injury to the plaintiff. The plaintiff need not prove on the balance of probabilities that the defendant would have been convicted of a criminal offence.[232] Consequently, it is possible to claim damages for behaviour subject to a rule of reason — behaviour that in principle is subject to criminal prosecution in the United States but in practice would virtually never give rise to a conviction.

Mr. Justice Gonthier nowhere addresses the application of his framework for section 45 to the civil context under section 36. However, it seems safe to conclude that agreements subject to the least stringent partial rule of reason (price-fixing, market division) become subject to what is very close to a *per se* rule in the civil context. One need only prove on the balance of probabilities that the agreement created minimal market power — something that can be inferred from most price-fixing or market division agreements themselves. Furthermore, like in the United States, as we move toward a rule-of-reason analysis, behaviour that might not attract criminal liability may nevertheless attract civil liability; the act may be illegal without being so inherently injurious to competition

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[231]See *U.S. Gypsum*, *supra* note 94 at 437 note 13. See also T.P. Sullivan, "Criminal Intent and the *Sherman Act*: The Label *Per Se* Doesn't Take *Gypsum* Away" (1980) 32 Hastings L.J. 499.

[232]This is in contrast to civil law cases where "a right or defence rests upon the suggestion that the conduct is criminal" — a situation in which it must be established as reasonably probable that the crime was committed (*Hanes* v. *Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154 at 162, 36 D.L.R. (2d) 178). See also *Continental Insurance Co.* v. *Dalton Cartage Ltd.*, [1982] 1 S.C.R. 164 at 169, 131 D.L.R. (3d) 559; P. Glossop & J.T. Kennish, "Private Civil Actions in Canadian Competition Law — Recent Developments" (1991) 6 E.C.L.R. 237 at 239. In these cases there was no independent statutory tort claim akin to s. 36 of the *Competition Act*.

to attain levels of criminal culpability detected through the criminal law burden of proof. As Mr. Justice Gonthier notes, the word "unduly" provides protection for the criminal accused in assessing the offence from the standpoint of the *Charter*.[233] All issues of vagueness are to be resolved in favour of the presumption of innocence. When it comes to civil damages, however, what is at stake is compensation rather than culpability. *Mens rea* need not be proved. Instead, the plaintiff must prove on the balance of probabilities that the collusive behaviour in issue had an anti-competitive effect causing injury to the plaintiff.[234] Furthermore, although the criminal law definition of the *actus reus* also specifies the act that can give rise to civil damages, the lowering of the evidentiary burden in practice means that the civil sanction casts a wider net.[235]

The evidentiary issues under section 36 are summarized in Figure 2. In contrast to a finding of criminal liability, as summarized in Figure 1, given the lower burden of proof in effect, the zone of *per se* analysis expands to cover naked cartel arrangements, and the zone for a partial rule of reason expands to cover agreements such as group boycotts or tying arrangements that may lie outside a partial rule of reason for criminal law purposes.[236] With the exception of resale price maintenance, for the reasons discussed above,[237] the scope of the civil evidentiary burden in Canada should thus correspond quite closely to that in the United States.

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[233]*Nova Scotia Pharmaceutical*, *supra* note 5 at 619. As Gonthier J. writes: "The word 'unduly' actually benefits the accused; even though it defies precise measurement, it is of common usage, and denotes a sense of seriousness" (*ibid.*).

[234]This should be contrasted with the elements of the civil law tort of conspiracy; see *Canada Cement Lafarge Ltd.* v. *British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 470-72, 145 D.L.R. (3d) 385 [hereinafter *Cement Lafarge* cited to S.C.R.].

[235]In *Industrial Milk Producers Assn.* v. *British Columbia (Milk Board)*, [1989] 1 F.C. 463, 47 D.L.R. (4th) 710 (T.D.) [hereinafter *Industrial Milk Producers* cited to F.C.], Madam Justice Reed commented as follows on the relationship between the civil and criminal prohibitions against anti-competitive collusion:

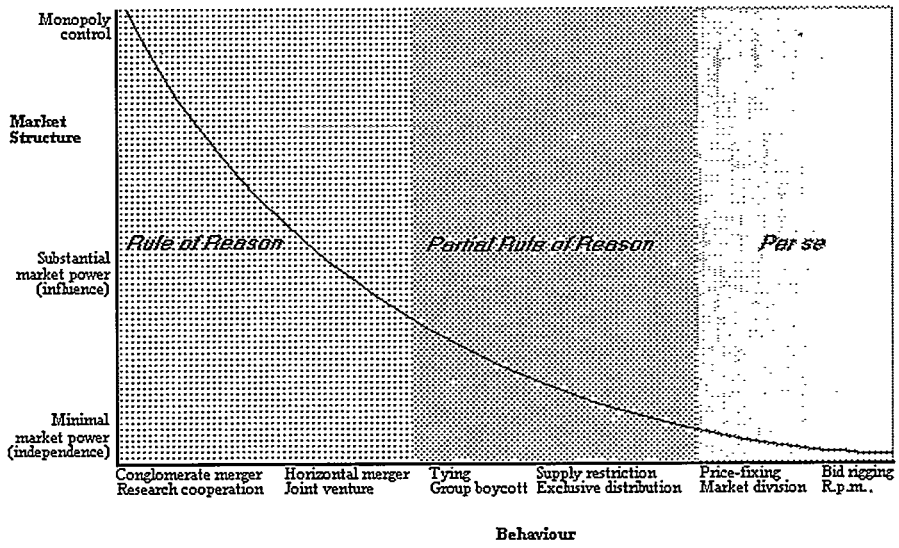
> While it is true that the plaintiffs are suing on the basis of a civil cause of action, pursuant to section [36] of the *Competition Act*, in my view this does not remove them from the operation of the established jurisprudence. In order to have a civil cause of action under section [36], one must prove the same elements which it is required to prove under section [45]. The fact situation on which a section [36] action is founded will also constitute a criminal offence pursuant to section [45] (*ibid.* at 476).

This does not mean, however, that the same degree of economic proof of market structure will be required in the criminal and civil law settings. It is one thing to prove moderate market power on the balance of probabilities, but it is another thing to do so beyond a reasonable doubt although the elements of the offence do not change. Here, Madam Justice Reed is simply noting that the regulated industry defence, available under the criminal law, remains available in the case of a civil cause of action. See also *Philippe Beaubien & Cie* v. *Canadian General Electric Co.* (1976), 30 C.P.R. (2d) 100 at 142, [1976] C.S. 1459 (Que. Sup. Ct.) [hereinafter *Philippe Beaubien* cited to C.P.R.], Nadeau J., emphasizing that in the civil law context the offence need only be proved on the balance of probabilities.

[236]As we have discussed (see text accompanying notes 134-51) these practices are subject to what one might call a partial *per se* rule in the United States. They were also left out of the set of practices to be banned on a *per se* basis under Bill C-256, *supra* note 197.

[237]See *supra* notes 120, 121 and accompanying text.

Figure 2: Anti-competitive collusion attracting civil liability



The section 36 civil remedy is potentially very important in adding to the effectiveness of the prohibition against anti-competitive collusion.[238] To date it has been little explored, but if the pattern in the United States is any lesson, it ought to become a major instrument for impugning anti-competitive practices.[239] Not only is the burden of proof lower, but the difficulty of deploying scarce prosecutorial resources is circumvented.[240] Private parties can become the monitoring agency. Nor should one forget that although private parties may not be able

[238]See Glossop & Kennish, *supra* note 232. It must be acknowledged, however, that access to treble damages adds significantly to the effectiveness of the civil remedy in the United States.

[239]To date the results of litigation have been less than conclusive. See *Philippe Beaubien*, *supra* note 235 (civil action for damages brought under article 1053 *Civil Code of Lower Canada* for the breach of the criminal provisions of the former *Combines Investigation Act* — *i.e.* before the enactment of s. 36; damages of $150,000 were awarded); *Cement Lafarge*, *supra* note 234 (civil action for damages brought under common law tort of conspiracy against defendants who had pleaded guilty to charges under s. 32 of the *Combines Investigation Act*, *i.e.* before the enactment of s. 36; the action was dismissed, *inter alia*, because the plaintiffs had been party to the anti-competitive practices in issue). See *R.D. Bélanger & Associates Ltd.* v. *Stadium Corp. of Ontario* (1991), 5 O.R. (3d) 778 (C.A.) [hereinafter *R.D. Bélanger*]; *Westfair Foods Ltd.* v. *Lippens Inc.*, [1990] 2 W.W.R. 42, 64 D.L.R. (4th) 335 (Man. C.A.), leave to appeal denied (1990), 65 Man. R. (2d) 80n, 30 C.P.R. (3d) 209n (S.C.C.); *Bérubé* v. *Makita Power Tools Canada Ltd.* (1991), 47 F.T.R. 287, 40 C.P.R. (3d) 108 (T.D.); *161364 Canada Inc.* v. *Gagne* (1990), 33 C.P.R. (3d) 200 (Ont. H.C.); *Acier d'armature Rô Inc.* v. *Stelco Inc.* (21 June 1989), Montreal 500-05-013224-843 (Que. Sup. Ct.); *Lokos* v. *Manford Ltd.* (1990), 67 Man. R. (2d) 296, 33 C.P.R. (3d) 552 (Q.B.).

[240]The U.S. Supreme Court has acknowledged that plaintiffs seeking private damages under section 4 of the *Clayton Act* "perform the office of a private attorney general" (*Associated Contractors of California Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 at 542 (1983)). For an analysis of the role played by private civil actions for damages in the enforcement of U.S. antitrust laws, see U.S. House of Representatives Judiciary Committee, *Study of the Antitrust Treble Damages Remedy*, 98th Congress (2nd session) February 1984.

to invoke section 92 of the *Competition Act* (anti-competitive mergers reviewable by the Competition Tribunal) as the basis for a civil action, section 45 bans all agreements, including mergers, that lessen competition unduly.[241] Thus, section 36 opens the door to private actions against anti-competitive mergers.[242]

However, it remains unclear whether, under section 36, a private party might proceed by way of injunction.[243] In *Industrial Milk Producers*,[244] Madam Justice Reed noted this possibility without making a definitive pronouncement. In that case, it was not necessary to resolve the issue. But Madam Justice Reed did go so far as to refuse to strike out a claim for injunctive relief, saying that whether section 36 read together with the *Federal Court Rules* and *Federal Court Act* gave rise to equitable injunctive relief was "a debatable legal issue."[245] One might add that section 62 of the *Competition Act* stipulates that nothing in Part VI "shall be construed as depriving any person of any civil right of action."[246] Thus, it may well be possible to join a claim for equitable injunctive relief with a section 36 claim.[247]

In any event, it is possible for the Attorney General to seek only a prohibition order by filing an information under subsection 34(2) of the *Act*. Proceedings under subsection 34(2) are akin to a civil application for injunctive relief but are in the nature of criminal proceedings.[248] Since the outcome of such proceedings does not result in a criminal conviction carrying a penalty of fine or imprisonment, the task of the prosecutor could be significantly less burdensome than in the case of a section 45 prosecution.[249] It may be especially appropriate for the Attorney General to proceed in this way where the practices in issue are subject to a rule of reason (*e.g.* vertical non-price agreements or exchanges of price information).

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[241]But see *contra T.U.A.C. (Local 500)* v. *Corporation d'acquisition Socanav-Caisse Inc.*, Montreal 500-05-014157-893 (Que. Sup. Ct.).

[242]See D.M. Bellemare, "Les récents développements concernant les recours privés en droit de la concurrence au Canada et aux État-Unis" in *Développements récents en droit commercial* (Cowansville, Que.: Yvon Blais, 1991).

[243]In one case, *Aca Joe International* v. *147255 Canada Inc.* (1986), 10 C.P.R. (3d) 301 at 305 (F.C.T.D.), the Federal Court Trial Division ruled out the possibility of injunctive relief without giving reasons. But see *Federal Court Act*, R.S.C. 1985, c. F-7, s. 44, and N. Finkelstein & R. Kwinter, Note, "Competition Act, R.S.C. 1985, 2nd Supp., C.19 — Section 36 and Claims to Injunctive Relief" (1990) 69 Can. Bar Rev. 298. It should be noted that Bill C-42 as well as C-13 (1977) would have added a specific injunctive relief provision to what is now s. 36. See Glossop and Kennish, *supra* note 232 at 240-41.

[244]*Supra* note 235 at 487.

[245]*Ibid.*

[246]*Supra* note 4.

[247]See Finkelstein & Kwinter, *supra* note 243.

[248]See *R.* v. *Hemlock Park Co-operative Farm Ltd.*, [1974] S.C.R. 123, 24 D.L.R. (3d) 688. See also Roberts, *supra* note 114 at 471: "Prohibition orders are like injunctions." Note also that s. 33 of the *Competition Act* (*supra* note 4) provides for interim injunctive relief; see *Canada (A.G.)* v. *Fleet Aerospace Corp.* (1985), 5 C.P.R. (3d) 470, 21 C.C.C. (3d) 180 (F.C.T.D.).

[249]S. 34(7) of the *Competition Act* (*ibid.*) specifically mentions that in the case of proceedings commenced under s. 34(2), "the procedure applicable in injunction proceedings in the superior courts of the province shall, in so far as possible, apply." This strongly suggests that the rules of evidence governing civil actions are to be applied in the context of a motion for the issuance of a prohibition order.

C. *Reviewable Practices under Part VIII of the* Competition Act

A discussion of the treatment of anti-competitive collusion under the *Competition Act* would not be complete without considering the relationship between criminal and administrative approaches, *i.e.* the interplay between sections 45 and 79 of the *Competition Act*. Some preliminary observations should be made about the structure of Part VIII of the *Competition Act* and the place of section 79 within it. Interestingly enough, the *Act* contemplates different thresholds of market power as triggering the prohibition against different kinds of practices or acts. In other words, the *Act* itself — albeit outside the criminal law context — attempts to do what Mr. Justice Gonthier had suggested in *Nova Scotia Pharmaceutical*: namely, to balance the type of practice or acts against the level of proof of market power required.[250]

Part VIII reviewable practices — those falling under the jurisdiction of the Competition Tribunal — are practices that are to be assessed and regulated in light of their economic consequences.[251] Whereas intent is necessarily a centrepiece of criminal law analysis, intent is at most an ancillary feature of Part VIII analysis. The Competition Tribunal was explicit on this point in the *Laidlaw* case, which dealt with abuse of dominant position contrary to section 79:

> Proof of subjective intention on the part of a respondent is not necessary in order to find that a practice of anti-competitive acts has occurred. Such intention is almost impossible of proof in many cases involving corporate entities unless one stumbles upon what is known as a "smoking-gun" ... Section 79 of the Act provides for a civil proceeding and civil remedies. In that context corporate actors and individuals are deemed to intend the effects of their actions.[252]

This is true despite the fact that section 78, which lists examples of practices subject to the section 79 prohibition, in most cases refers to the "purpose" of the act (*e.g.* "acquisition by a supplier ... *for the purpose of* impeding or preventing the competitor's entry" [emphasis added][253]). The intent element is even less present in the other provisions of Part VIII concerning refusal to deal, consign-

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[250]This, as we have seen, is consistent with the approach in the United States, where a "*per se*" approach nevertheless requires a level of proof of market power in the case of tying arrangements, for example; see *Kodak*, *supra* note 135. However, findings of market power need not depend solely upon finding significant market share. They can turn on an analysis of capacity to exclude competition by raising rivals' costs through switching costs, information costs, and opportunistic behaviour by firms with an installed base; see S. Salop & T.G. Krattenmaker, "Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price" (1986) 96 Yale L.J. 209; Ordover, Saloner & Salop, "Equilibrium Vertical Foreclosure" (1990) 80 Am. Econ. Rev. 127. However, see *contra*, J. Lopatka & P. Godek, "Another Look at *Alcoa*: Raising Rivals' Costs Does not Improve the View" (1992) 35 J. of L. & Econ. 311.

[251]See Skeoch & McDonald, *supra* note 34 at 86 (noting the unnecessarily high burden of proof beyond a reasonable doubt where what is in issue are economic consequences). See also *Interim Report*, *supra* note 33.

[252]*Laidlaw*, *supra* note 92 at 342-43.

[253]*Supra* note 4, s. 78(*b*). In *Nutrasweet*, the Tribunal reviewed s. 78 and noted that:

> A number of the acts share common features but, as recognized by the Director and the respondent, only one feature is common to all: an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. The purpose common to all acts, save that found in para. 78(*f*), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary (*supra* note 92 at 34).

ment selling, exclusive dealing, market restriction, tied selling, delivered pricing and mergers — none of which contain reference to the purpose of the practice or act, referring as they do only to economic consequences.[254] Thus, an obvious though important first point about proceeding under Part VIII rather than under section 45 is that the difficult evidentiary issues associated with proof of *mens rea* are avoided.

Section 79 is a general prohibition against the practice of anti-competitive acts where such a practice is conducted by one or more persons with substantial control of a class of business and where the practice is likely to lessen competition substantially. The proof of "substantial control" or "dominant position" requires a straightforward finding of market power. As the Tribunal stated in the *Laidlaw* decision:

> In deciding whether a firm has substantial or complete control of a market, one asks whether the firm has market power in the economic sense. Market power in the economic sense is the power to maintain prices above the competitive level without losing so many sales that the higher price is not profitable. It is the *ability* to earn supra-normal profits by reducing output and charging more than the competitive price for a product.[255]

With the exception of delivered pricing, each of the other provisions in Part VIII requires a finding by the Tribunal that competition is or is likely to be substantially lessened or that competition is insufficient to allow procurement of an alternate source of supply. Strictly speaking, however, there need not be a finding of market dominance for the Competition Tribunal to make an order under these other provisions — unlike the case under section 79. The merger provision, for example, creates a preventive remedy against anti-competitive market structure whereas the abuse of dominant position provision creates a curative remedy. One could postulate that section 79 requires clearer proof of market power than do the other provisions of Part VIII. Nevertheless, there is often a fine line between showing that a practice can substantially lessen competition and showing that there is market power.

The Competition Tribunal's jurisdiction to control abuse of dominant position in effect re-assembles the whole of Canadian competition law according to an administrative law model. In particular, the overlap with section 45 is virtually complete. Under section 79, where one or more persons who substantially control a class or species of business engage in a practice of anti-competitive

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Nevertheless, the Tribunal went on to note that:

> The determination of an anti-competitive act, and particularly its purpose component, is a difficult task. The Director submits that evidence of subjective intent (through verbal or written statements of personnel of the respondent) or a consideration of the act itself (the premise that a corporation can be taken to intend the necessary and foreseeable consequences of its acts) can be used to establish purpose. The tribunal finds nothing objectionable in these submissions. In most situations, of course, the purpose of a particular act will have to be inferred from the circumstances surrounding it (*ibid.* at 35-36).

Arguably, the Competition Tribunal has attenuated this purpose requirement in *Laidlaw* (*ibid.*).

[254]Thus, for example, there was no analysis of the purpose of the refusal to deal in the *Chrysler* case (*supra* note 63).

[255]*Laidlaw*, *supra* note 92 at 325.

acts having or likely to have the effect of lessening or preventing competition, the Tribunal may make a range of different orders, including the divestiture of assets or shares — which are forms of structural relief. Under section 45, everyone who conspires with another person to restrain competition unduly is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding $10 million or to both. The conduct subject to sanction under section 45 is thus a subset of the conduct subject to an order under section 79; section 79 has a broader ambit given that the conduct there contemplated need not have taken place in concert with others.[256] Each of the other practices and acts identified in Part VIII can in principle be subject to a proceeding under section 79, and the other provisions do not make reference to concerted action.

Both sections 45 and 79 make explicit reference to the possibility of alternate proceedings by stipulating that where proceedings have been commenced under one provision, they may not be commenced under the other.[257] Consequently, the question arises as to when proceedings are best commenced under one or the other of these provisions for those cases that are covered by both.

The closer the behaviour in question is toward the *per se* or partial rule of reason side of the spectrum, the more criminal prosecution is not only possible but justified.[258] Section 78, which lists possible types of anti-competitive practices subject to scrutiny under section 79, does not include price-fixing, market division, supply restriction or exclusive distribution, for example. It is not that such agreements would not fall under the ambit of section 79 — they do. But the framework for proof of market power under section 79 is more elaborate than the framework under section 45. On the other hand, the closer the behaviour in question is to the rule of reason side of the spectrum, the more appropriate are proceedings under section 79. Here, Competition Tribunal expertise in assessing economic evidence becomes crucial. If a full-blown test of market power and superior economic performance is to be undertaken, the Competition Tribunal is better placed than are the superior courts or even judges of the federal court sitting alone to weigh the technical issues. In the grey zone of behaviour in the middle of the spectrum, there may be instances where prohibition orders under section 34 will be easier to obtain. This may be the case with vertical non-price agreements or exchange of price information.

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[256]Arguably, an illegal conspiracy that has not yet been carried out is not yet a "practice" for the purposes of s. 79. Evidence of an agreement would be enough for the purposes of s. 45. It might be argued, to the contrary, that those who attempt to carry out a conspiracy are engaging in a practice that is "likely to have" the effect of lessening competition. In any event, the typical pattern of conspiracy prosecution involves evidence of fixed prices, market division, or supply restrictions — *i.e.* evidence of a practice.

[257]*Competition Act*, *supra* note 4, ss. 45.1, 79(7). Note also the overlap with s. 92, to which allusion is made in the *Laidlaw* decision (*supra* note 92 at 338) and also in *Nova Scotia Pharmaceutical* (*supra* note 5 at 645).

[258]For a legislative proposal aimed at narrowing and clarifying the zone of criminal liability while rendering civil enforcement more effective, see Warner & Trebilcock, *supra* note 229 at 717-18.

Of course, only the Director of Investigation and Research has standing to initiate proceedings before the Competition Tribunal. Private parties therefore have no choice but to proceed under section 36 even in cases subject to a full-blown rule of reason.

Conclusion

The law on anti-competitive collusion in Canada has finally escaped the straitjacket imposed upon it by half-hearted legislative provisions and cautious judicial decision-making. Despite some initial court skittishness with the 1975 and 1986 reforms to the *Competition Act*, the *Nova Scotia Pharmaceutical* case now confirms that the "virtual monopoly" test and double intent *mens rea* requirement are both things of the past. Furthermore, increased use of civil law and administrative law sanctions against the broad range of anti-competitive agreements will strengthen the effectiveness of the legislation and focus criminal sanctions on the zone of inherently culpable conduct — naked cartel and market division agreements. After a century of false starts, Canada may finally have found the appropriate mix of regulatory instruments to deal with "combines."

In this paper, we have set out an interpretation of the "partial rule of reason" test formulated by Mr. Justice Gonthier in *Nova Scotia Pharmaceutical*. Our interpretation is informed by a comparison with the U.S. case law — it being our judgment that Canadian law is now on a very similar footing to U.S. law as developed in the interpretation of section 1 of the *Sherman Act*. The two minor differences in approach — the existence of a minimal market power threshold in Canada and a somewhat stricter *mens rea* analysis in the United States — should not produce substantially different results in practice. This is true all the more of civil law cases, where the lower burden of proof should all but eliminate the nuances of difference.

By way of summary, Table 1 presents a comparison of the criminal, civil and administrative law approaches to anti-competitive collusion in Canada. It is worth noting that while there is virtually complete overlap in the range of behaviour subject to these three approaches, there is nevertheless an implicit division of labour as to the behaviour most appropriately addressed under each rubric. This reflects differing sanctions, evidentiary burdens and levels of tribunal economic expertise.

Table I: A Comparison of the Criminal, Civil, and Administrative Law Approaches to Anti-Competitive Collusion

	Criminal Law (s. 45)	Civil Law (s. 36)	Administrative Law (s. 79)
Sanctions	Up to $10 million fine and/or 5 years in prison + s. 34 prohibition orders	Damages + costs of investigation and proceedings + perhaps injunctive relief	Prohibition order + other reasonable orders (*e.g.* divestiture) necessary to overcome anti-competitive effects where prohibition insufficient
Locus standi	A.-G. Canada on reference from the DIR (s. 23)	Any person who has suffered loss	DIR
Competent tribunal	Federal Court and Superior Courts (s. 73)	Federal Court and Superior Courts	Competition Tribunal
evidence of act	sliding scale of market power and injurious behaviour with minimal market power threshold (proved beyond reasonable doubt) — bid-rigging (s. 47) and resale price maintenance (s. 61) are *per se* offences	sliding scale of market power and injurious behaviour with minimal market power threshold (proved on balance of probabilities) — bid-rigging (s. 47) and resale price maintenance (s. 61) are *per se* offences	Proof of market power and anti-competitive behaviour on balance of probabilities
evidence of intent	intent to agree and knowledge of agreement + objective analysis of anti-competitive consequences beyond reasonable doubt	proof of agreement on balance of probabilities	persons deemed to intend effects of actions
range of behaviour covered	any conspiracy, combination, agreement or arrangement that prevents or lessens competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation of a product or the price of property or person insurance; or otherwise restrains or lessens competition	any conspiracy, combination, agreement or arrangement that prevents or lessens competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation of a product or the price of property or person insurance; or otherwise restrains or lessens competition	any practice that has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market
appropriate focus of litigation	horizontal price-fixing and market division + s. 34 prohibition orders against tying and group boycott	the full range of anti-competitive agreements including mergers and joint ventures	those anti-competitive acts requiring proof of substantial market power (examples given in s. 78)

From the earliest days of Canadian competition policy, it has been argued frequently that because this country has a relatively small economy, it is unrealistic to apply competition law strictly, if indeed at all.[259] Yet, with a growing

[259]For example, Gorecki points out that Canadian firms face the problem of having a small market relative to scale economies: see Bureau of Competition Policy, *Economies of Scale and Effi-*

emphasis upon developing the international competitiveness of Canadian firms, and with cash-strapped governments discovering a predilection for market instruments, competition law is likely to gain greater importance in the regulatory arsenal. At the core of competition law lies a ban on forms of anti-competitive collusion that have no possible justification in countervailing efficiencies. We have argued that after *Nova Scotia Pharmaceutical*, there are now realistic evidentiary requirements that will allow for stricter, though not inflexible, enforcement of this aspect of Canadian competition law.

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cient Plant Size in Canadian Manufacturing Industries (Research Monograph No. 1) (Ottawa: Supply and Services Canada, 1976).