Recent Developments in Conspiracy Law and Enforcement: New Risks and Opportunities

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The recent Supreme Court of Canada decision in the *Nova Scotia Pharmaceutical Society* case is the most important competition law decision in decades. In the first part of this article, the authors discuss the Supreme Court's ruling and its implications for the enforcement of the conspiracy and other provisions of the *Competition Act*. The authors analyze the Supreme Court's treatment of two key issues: (i) whether the conspiracy provisions in section 45 of the *Act* are too vague to meet the requirements of the *Canadian Charter of Rights and Freedoms* because of the requirement that competition be prevented or lessened "unduly" and (ii) whether the conspiracy provisions of the *Act* require subjective *mens rea* with respect to the effects of the impugned agreement. Given the Supreme Court's comments regarding the meaning of the term "unduly," the authors suggest that the lower boundary of the zone of risk should now be considered to be a combined 35% market share, rather than the 50% market share threshold that was previously widely embraced. The authors also highlight the implications of this aspect of the Supreme Court's decision for other provisions of the *Act*, such as the provisions pertaining to mergers and abuse of dominant position. Regarding the *mens rea* issue, the Supreme Court affirmed that subjective intent is not required with respect to the effects of the agreement. Rather, it must be proven that the accused was aware, or ought to have been aware; that the effect of the agreement would be to prevent or lessen competition unduly. To determine whether an accused ought to have been aware of the anti-competitive effect, a court will consider whether a reasonable business person would have been aware that the effect of the agreement would be to lessen or prevent competition unduly. The authors suggest that this aspect of the Supreme Court's ruling may change if price-fixing and other agreements become widely viewed as similar in nature to theft and fraud.

In the second part of this article, the authors discuss recent developments in the enforcement of the conspiracy and bid-rigging provisions of the *Act*. The discussion includes reviewing the trend to substantially increased fines for conspiracy and bid-rigging and recent statements by the Director of Investigation and Research that more charges against individuals appear to be necessary to strengthen deterrence. In that regard, the authors suggest that there is reason to believe the Director may soon begin recommending jail sentences in conspiracy and bid-rigging cases. Finally, the authors discuss the Director's developing policy respecting immunity from prosecution in conspiracy cases. The authors compare the Director's policy with the similar policy in the United States and highlight the tax, confidentiality and other practical issues associated with the decision to seek a recommendation for immunity.

La récente décision de la Cour suprême du Canada dans l'affaire *Nova Scotia Pharmaceutical Society* est la plus importante décision en droit de la concurrence depuis plusieurs décennies. Dans la première partie de cet article, les auteurs discutent de la décision de la Cour suprême et de ses conséquences pour la mise en application des dispositions de la *Loi sur la concurrence*, entre autres celles portant sur les complots. Les auteurs analysent le traitement qu'a fait la Cour suprême de deux questions clés : (i) si les dispositions sur les complots à l'article 45 de la *Loi* sont trop vagues pour satisfaire aux exigences de la *Charte canadienne des droits et libertés*, à cause de l'exigence que la concurrence soit empêchée ou réduite « indûment », et (ii) si les dispositions de la *Loi* qui portent sur les complots exigent une *mens rea* subjective pour ce qui est des effets des ententes attaquées. Étant donné les remarques de la Cour suprême sur la signification du mot « indûment », les auteurs suggèrent que l'on devrait considérer une part de marché combinée de 35 % comme étant la limite inférieure de la zone de risque, plutôt que la part de marché limite de 50 % qui était auparavant largement acceptée. Les auteurs examinent également les conséquences de cet aspect du jugement de la Cour suprême pour d'autres dispositions de la *Loi* telles que celles relatives aux fusionnements et à l'abus de position dominante. Par rapport à la question de la *mens rea* subjective, la Cour suprême a affirmé que la présence d'une intention subjective n'est pas requise pour ce qui est des effets de l'entente. Il faut plutôt prouver que l'accusé était conscient, ou aurait dû être conscient, du fait que l'entente aurait comme conséquence d'empêcher ou de réduire la concurrence indûment. Pour déterminer si un accusé aurait dû être conscient des effets anti-concurrentiels d'une entente, un tribunal évaluera si des gens d'affaires raisonnables auraient dû être conscients du fait que l'arrangement aurait comme effet de réduire ou d'empêcher indûment la concurrence. Les auteurs suggèrent que cet aspect de la décision de la Cour risque de changer si on commence à assimiler les ententes fixant les prix ainsi que d'autres ententes au vol et à la fraude.

Dans la deuxième partie de cet article, les auteurs discutent des développements récents dans la mise en application des dispositions de la *Loi* qui portent sur les complots et le truçage des offres. Leur discussion inclut un survol de l'actuelle tendance vers des amendes considérablement augmentées pour des complots ou truçages d'offres et un traitement des récentes déclarations du Directeur des enquêtes et recherches à savoir qu'il faudrait plus d'inculpations contre les individus pour renforcer l'effet dissuasif de la *Loi*. À cet égard, les auteurs suggèrent qu'il y a raison de croire que le Directeur commencera bientôt à recommander des peines d'emprisonnement dans les affaires de complot et de truçage d'offres. Finalement, les auteurs examinent la politique émergente du Directeur quant à l'immunité de poursuites judiciaires dans les affaires de complot. Les auteurs comparent la politique du Directeur à une politique similaire qui existe aux États-Unis et mettent en évidence les questions de confidentialité, de fiscalité et autres problèmes pratiques associés à la décision de chercher une recommandation pour recevoir l'immunité.

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Synopsis

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Introduction

This article is divided into two parts. Part I focuses on the recent Supreme Court of Canada decision in *R.* v. *Nova Scotia Pharmaceutical Society* (*PANS*).[1] Given the brevity of the Supreme Court's decision, it can only be fully understood in the context of the lower courts' rulings. Accordingly, the discussion

[1][1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36, 43 C.P.R. (3d) 1 [hereinafter *PANS* cited to S.C.R.]. The *PANS* case is also discussed elsewhere in this special issue. See R. Janda & D.M. Bellemare, "Canada's Prohibition against Anti-Competitive Collusion: The New Rapprochement with U.S. Law" (1993) 38 McGill L.J. 620.

begins with a brief summary of the trial judgment[2] and its unanimous reversal by the Nova Scotia Court of Appeal.[3] After the decisions of the lower courts and the Supreme Court are summarized, the implications of the Supreme Court's ruling are discussed.

The Supreme Court's decision in *PANS* is by far the most important Canadian competition law decision in decades, perhaps ever. It has resurrected section 45 of the *Competition Act*[4] from the ashes of the lower court decisions in both *PANS* and *L'Association québécoise des pharmaciens propriétaires* v. *Canada (A.G.)*.[5] The Court's ringing endorsement of section 45 and its underlying rationale have diffused a crisis that would almost certainly have led to an amendment of the *Act*. One can only speculate whether what would have eventually descended from the legislator's easel would have been more or less difficult to live with.

For the most part, Gonthier J.'s unanimously endorsed decision is bold in its clarity. By venturing beyond the existing jurisprudence, it narrows the scope for debate about the lower boundary of the zone of risk, thereby reducing uncertainty and some of the chilling effect of section 45. At the same time, by pushing down this lower boundary, it extends the reach of section 45 into areas formerly thought to be out of its range. In view of the Supreme Court's finding that agreements between persons who have only a moderate amount of market power may trigger the application of section 45, it would be imprudent to follow the old rule of thumb that an agreement would not likely contravene section 45 if the parties thereto account for less than fifty per cent of the relevant market. A better market share rule of thumb would be the thirty-five per cent standard employed by the Director of Investigation and Research ("Director") with respect to mergers and predatory pricing, and by U.S. federal enforcement authorities with respect to mergers.

The *PANS* decision also creates scope, albeit limited, for parties to avoid conviction in section 45 proceedings by raising a reasonable doubt as to whether they were aware or ought to have been aware that the effect of an impugned agreement would be to prevent or lessen competition unduly.[6] This aspect of the Supreme Court's ruling would appear to be equally applicable to the geographic price discrimination (paragraph 50(1)(*b*)) and predatory pricing (paragraph

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[2]*R.* v. *Nova Scotia Pharmaceutical Society* (1990), 32 C.P.R. (3d) 259, 73 D.L.R. (4th) 500 (N.S.S.C.T.D.) [cited to C.P.R.].

[3]*R.* v. *Nova Scotia Pharmaceutical Society* (1991), 36 C.P.R. (3d) 173, 80 D.L.R. (4th) 206 (N.S.S.C.A.D.) [cited to C.P.R.].

[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][1991] R.J.Q. 205 (Sup. Ct.).

[6]In the subsequent trial on the merits, Boudreau J. acquitted the Pharmacy Association of Nova Scotia ("Association") on this ground. Contrasting the facts with "a straight price fixing case," he concluded that he had not been satisfied beyond a reasonable doubt that the Association or its predecessor "would or should have known all of the intricate and complicated effects" of the impugned agreement (*R.* v. *Nova Scotia Pharmaceutical Society (No. 3)* (1993), 120 N.S.R. (2d) 304 at 339, 332 A.P.R. 304 (N.S.S.C.T.D.) [cited to N.S.R.]).

50(1)(*c*)) provisions of the *Act* which also embody a competitive effects test (*i.e.* "effect or tendency of substantially lessening competition").

In addition, the Supreme Court's statements with respect to the meaning of "unduly" preventing or lessening competition have implications for the meaning of the "substantially" preventing or lessening competition standard employed in various sections of the *Act*, and for the meaning of the "substantial or complete control" standard set forth in subsection 79(1) (abuse of dominant position) of the *Act*. These parts of the Supreme Court's decision would have been much more helpful if they had been less terse.

The Supreme Court came close to stating that price-fixing and market sharing agreements between parties who collectively have, or through their agreement acquire, market power are *per se* illegal. However, it passed up a historic opportunity to discuss the point in further detail. The Court could have made a much greater contribution to public policy by declaring that, like bid-rigging (section 47), "naked" or "garden-variety" price-fixing and market allocation agreements have no redeeming virtues, are inherently bad, and therefore *always* contravene the *Act*, even where the parties to the agreement have no market power. It could then have explicitly recognized that some agreements which incidentally have the effect of fixing prices or allocating markets may not prevent competition unduly, if they are pro-competitive in other respects. Unfortunately, the Supreme Court's failure to more thoroughly discuss the issue of agreements which affect prices or allocate markets may have the chilling effect of deterring many business people from devoting significant resources to seriously considering proposals that may be pro-competitive. The Supreme Court's decision would also have been more helpful if it had elaborated upon the statement that "[a] particularly injurious behaviour may also trigger liability even if market power is not so considerable."[7]

Finally, by affirming the rusty, eighty-year-old doctrine that forecloses consideration of public and private benefits in the assessment of whether a prevention or lessening of competition is undue, the *PANS* decision entrenched and underscored a serious inconsistency in the *Act*. In short, the crude consumers' surplus approach to the law that is implicit in the partial rule-of-reason framework described by the Supreme Court represents a fundamentally different policy approach to competition law than the total welfare framework that underlies the key 1986 amendments to the *Act* pertaining to mergers, specialization agreements, joint ventures and, arguably, abuse of dominance.

In Part II, the paper addresses recent developments with respect to fines, individual prosecutions and the Director's willingness to recommend immunity from prosecution. The Director has made it clear on several occasions over the last three years that he intends to pursue conspiracy and bid-rigging matters vigorously. To this end, he has pursued a policy of extracting increasingly large "record" fines. This policy appears to be directed toward getting fines closer to the new $10 million ceiling under section 45 of the *Act*, thereby ensuring that fines function as "more than a licence fee."[8] This is in keeping with the govern-

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[7]*Supra* note 1 at 657.

[8]H.I. Wetston, "Competition Law: Current Issues in Conspiracy Law and Enforcement" in *Com-*

ment's intention to "send a clear signal to the courts that Parliament considers conspiracy to be a very serious criminal offence and that offenders should be dealt with by a firm hand."[9] There are reasons to believe that the U.S. approach of setting fines at a level which is "greater than the expected profits from successful collusion" will soon be embraced.[10] Indeed, staff at the Bureau of Competition Policy are currently in the early stages of developing sentencing guidelines that may incorporate this principle.[11] These developments have implications for public disclosure and strongly mitigate in favour of greater use of U.S. style in-house compliance programs, which have been widely adopted in the United States for decades.

In addition to pursuing increased fines, the Director has made it clear that he will be recommending to the Attorney General of Canada that more charges be laid against individuals. This is consistent with a suggestion made in the 1990 Supreme Court of Canada *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research)* decision that imprisonment of individuals may be "necessary if the objectives of combines legislation are to be realized."[12] To date, no one has been imprisoned for an offence under the conspiracy provisions of the *Act*. However, if the Director follows the practice that has been adopted in the U.S., this could soon change. Apart from the obvious implications of the Director's new policy concerning the prosecution of individuals, the policy has significant implications for indemnification practices between corporations and executives, as well as providing an additional reason for corporations to develop in-house compliance programs.

Finally, the Director's program of immunity for corporations gives parties to conspiracy and bid-rigging arrangements an opportunity to obtain a recommendation from the Director to the Attorney General of Canada that immunity from prosecution be granted. However, the Director has specified several conditions which must be satisfied before he will recommend immunity. There is reason to believe that the articulated conditions do not comprise an exhaustive list of those which must be satisfied by parties seeking immunity, and there are several practical implications associated with using the Director's program.

I. The *PANS* Case

A. Background

The proceedings in *PANS* arose out of charges that were laid on February 25, 1987 against the Nova Scotia Pharmaceutical Society, its successor, the Pharmacy Association of Nova Scotia (from whence comes the acronym "*PANS*"), and various drug stores and pharmacists carrying on business in Nova

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mercial Crime and Commercial Law, Meredith Memorial Lectures, McGill Faculty of Law (Cowansville: Yvon Blais, 1990) 33 at 46.

[9]Consumer and Corporate Affairs Canada, *Competition Law Amendments — A Guide* (Ottawa: Supply and Services Canada, 1985) at 27.

[10]Wetston, *supra* note 8.

[11]One of the authors is currently working with Bureau staff in this regard.

[12]*Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research)*, [1990] 1 S.C.R. 425 at 514, 54 C.C.C. (3d) 417, La Forest J. [hereinafter *Thomson Newspapers* cited to S.C.R.].

Scotia.[13] At the conclusion of a preliminary inquiry on March 22, 1990, the accused were committed for trial. On May 31, 1990, an indictment was filed against the accused, charging them each with two counts of conspiracy to prevent or lessen competition unduly, contrary to paragraph 32(1)(*c*) of the *Combines Investigation Act* (now paragraph 45(1)(*c*) of the *Act*). Both counts related to the sale and offering for sale of prescription drugs and pharmacists' dispensing services during the period from January 1, 1974 to June 16, 1986, in the first, and from July 1, 1976 to June 16, 1986, in the second.[14] The trial was scheduled to begin in October 1990. However, in August 1990, the respondents applied to the Nova Scotia Supreme Court, Trial Division, for an order to quash the indictment. The motion was based on the grounds that paragraph 32(1)(*c*) and subsections 32(1.1) and (1.3) were invalid and of no effect because they violated the rights of the respondents under section 7 and paragraphs 11(*a*) and (*d*) of the *Canadian Charter of Rights and Freedoms*.[15] The arguments raised concerned *mens rea* and vagueness.

During the period covered by the indictment, paragraph 32(1)(*c*) of the *Act* provided:

> 32(1) Everyone who conspires, combines, agrees or arranges with another person
> ...
> (*c*) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or the price of insurance upon persons or property,
> ...
> is guilty of an indictable offence and is liable to imprisonment for ... five years or a fine not exceeding $1 million or to both.

The *Act* was amended in 1976 by the addition of subsection 32(1.1) which states:

> 32(1.1) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation 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 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.

In June of 1986, subsection 32(1.3) was inserted into the *Act*.[16] It provides as follows:

> 32(1.3) 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 that

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[13]The Nova Scotia Pharmaceutical Society and the Pharmacy Association of Nova Scotia ultimately were tried separately from the other accused and acquitted on February 26, 1993 (*supra* note 6). The charges against the other accused have been stayed.

[14]On June 17, 1986, various amendments to the *Act*, including amendments to section 45, were given Royal Assent. These amendments were proclaimed into force two days later.

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

[16]In December 1990, the *Act* was renumbered. S. 32(1) became s. 45(1), s. 32(1.1) became s. 45(2), and s. 32(1.3) became s. 45(2.2).

> 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).

The relevant provisions of the *Charter* are as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> ...
>
> 11. Any person charged with an offence has the right
> (*a*) to be informed without unreasonable delay of the specific offence;
> ...
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

B. The Trial Judgment

1. Jurisprudence and Double Intent

With respect to the *mens rea* issue, the accused argued that the Supreme Court of Canada decisions in *Aetna Insurance Co.* v. *R.*[17] and *Atlantic Sugar Refineries Co.* v. *Canada (A.G.)*[18] changed the law laid down in a line of cases dating back to *Container Materials, Ltd.* v. *R.*,[19] by requiring the Crown to prove not only that the accused intended to enter into the impugned agreement, but also that the accused intended to lessen competition unduly.[20] They further argued that if the *Aetna* and *Atlantic Sugar* decisions did not change the law by requiring this "double intent," paragraph 32(1)(*c*) violated section 7 and paragraph 11(*d*) of the *Charter*. Relying on the Supreme Court of Canada's decision in *R.* v. *Vaillancourt*,[21] they stated that these *Charter* violations would result from the fact that they could be deprived of their liberty (*i.e.* imprisoned), notwithstanding their "moral innocence" (*i.e.* absence of intent to prevent or lessen competition unduly).[22]

In *Container Materials*, Mr. Justice Kerwin stated:

> It was argued that it was not sufficient for the Crown to show an agreement or arrangement, the effect of which would be unduly to prevent or lessen competition, but that the agreement or arrangement must have been intended by the accused to have that effect. This is not the meaning of the enactment upon which the count was based. *Mens rea* is undoubtedly necessary, but that requirement was met in these prosecutions when it was shown that the appellants intended to enter, and did enter, into the very arrangement found to exist.[23]

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[17](1977), [1978] 1 S.C.R. 731, 34 C.C.C. (2d) 157, 75 D.L.R. (3d) 332 [hereinafter *Aetna* cited to S.C.R.].

[18][1980] 2 S.C.R. 644, 54 C.C.C. (2d) 373, 115 D.L.R. (3d) 21 [hereinafter *Atlantic Sugar* cited to S.C.R.].

[19][1942] S.C.R. 147, 77 C.C.C. 129, [1942] 1 D.L.R. 529 [hereinafter *Container Materials* cited to S.C.R.].

[20]*Supra* note 2 at 265-70.

[21][1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399 [cited to S.C.R.].

[22]*Supra* note 2 at 270ff.

[23]*Supra* note 19 at 158.

This ruling was followed in the *R.* v. *Northern Electric Co.* and *R.* v. *Anthes Business Forms Ltd.* cases.[24] The dispute with respect to the *Aetna* and *Atlantic Sugar* decisions arose from the fact that the following statement of the trial judge in *Aetna* was quoted with approval by Mr. Justice Ritchie in *Aetna*[25] and by Mr. Justice Pigeon in *Atlantic Sugar*:

> This review of the various statements on the meaning of "unduly" as it relates to the offence of lessening competition brings me to these conclusions. An agreement to prevent or lessen competition alone is not an offence. What is criminal is an agreement that is intended to lessen competition improperly, inordinately, excessively, oppressively or one intended to have the effect of virtually relieving the conspirators from the influence of free competition. There is no requirement for the Crown to prove the existence of a monopoly and it is a question of fact as to whether the agreement reaches the point of intending to lessen competition unduly and therefore becomes a criminal conspiracy.[26]

The accused argued that the Supreme Court would not have quoted this statement if it had been of the view that only "single intent" was required to satisfy the *mens rea* requirement of paragraph 32(1)(*c*).[27] Moreover, they noted that in *Atlantic Sugar* Pigeon J. stated:

> I must also point out that while, as was stressed in *Aetna*, the offence lies in the agreement made with the intention to lessen competition unduly, not in the actual result of the agreement, no such distinction has to be made when, as here, the only evidence of the agreement is found in the course of conduct from which it is inferred.[28]

The accused further argued that subsection 32(1.3), which did not apply to the case because it was enacted subsequent to the period covered by the indictment, changed the law back to single intent.

Roscoe J. agreed with the Crown's submission that the Supreme Court's *Aetna* and *Atlantic Sugar* decisions were ambiguous and that if the intention of the Court had been to reverse its decision in *Container Materials*, "it would have done so with more clarity."[29] She further agreed that Ritchie J. had quoted the trial judge's statement in the context of his treatment of the meaning of "unduly" and she noted that, prior to quoting that statement, Ritchie J. had articulated the traditional single intent test.[30] She also appears to have implicitly accepted the Crown's submission that subsection 32(1.3) was inserted into the *Act* to address the "confusion" which resulted from the *Aetna* and *Atlantic Sugar* decisions, by clarifying the law.

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[24]*R.* v. *Anthes Business Forms Ltd.* (1975), 10 O.R. (2d) 153 at 178, 26 C.C.C. (2d) 349 at 373-74, 20 C.P.R. (2d) 1 at 24-25 (C.A.) [hereinafter *Anthes* cited to O.R.], aff'd [1978] 1 S.C.R. 970, 32 C.C.C. (2d) 207n; *R.* v. *Northern Electric Co.*, [1955] O.R. 431 at 451-52, 111 C.C.C. 241 at 262-63, [1955] 3 D.L.R. 449 at 469, 24 C.P.R. 1 at 22 (H.C.) [hereinafter *Northern Electric* cited to O.R.].

[25]*Supra* note 17 at 748.

[26]*Supra* note 18 at 659.

[27]*Supra* note 2 at 268.

[28]*Ibid.*

[29]*Ibid.* at 268-70.

[30]*Ibid.* at 268.

2. *Mens Rea* and the *Charter*

Having found that the law did not require the Crown to prove that the accused intended to prevent or lessen competition unduly, the learned judge turned to the *Charter* argument. In *R.* v. *Vaillancourt*, Lamer J., speaking for the majority of the Supreme Court of Canada, held:

> This Court's decision in *Re B.C. Motor Vehicle Act* [[1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289] stands for the proposition that absolute liability infringes the principles of fundamental justice, such that the combination of absolute liability and a deprivation of life, liberty or security of the person is a restriction on one's rights under s. 7 and is *prima facie* a violation thereof. In effect, *Re B.C. Motor Vehicle Act* acknowledges that, whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, even, as in *Re B.C. Motor Vehicle Act*, a mere provincial regulatory offence, there is, as a principle of fundamental justice, a minimum mental state which is an essential element of the offence. It thus elevated *mens rea* from a presumed element in *Sault Ste. Marie* [[1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353] to a constitutionally required element. *Re B.C. Motor Vehicle Act* did not decide what level of *mens rea* was constitutionally required for each type of offence, but inferentially decided that even for a mere provincial regulatory offence *at least* negligence was required, in that *at least* a defence of due diligence must *always* be open to an accused who risks imprisonment upon conviction.[31]

In *Vaillancourt*, which dealt with the constitutionality of a charge under the constructive murder provision in paragraph 213(*d*) of the *Criminal Code*,[32] the Supreme Court observed that there are very few crimes "where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime."[33] Given that "the punishment for murder is the most severe in our society and the stigma that attaches to a conviction for murder is similarly extreme,"[34] the Supreme Court stated that a conviction for murder "cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight."[35] Turning to paragraph 11(*d*) of the *Charter*, which requires that an accused be presumed innocent until his guilt has been proven beyond a reasonable doubt, the Supreme Court observed that "the trier of fact must be satisfied beyond a reasonable doubt of the existence of all of the essential elements of the offence."[36] The Court therefore held:

> The acid test of the constitutionality of s. 213 is this ultimate question: *Would it be possible for a conviction for murder to occur under s. 213 despite the jury having a reasonable doubt as to whether the accused ought to have known that death was likely to ensue?* If the answer is yes, then the section is *prima facie* in viola-

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[31]*Supra* note 21 at 652.

[32]S. 213(*d*) provided that if a person caused death while committing the offence of robbery and had possession of a weapon during the robbery, then the accused had committed murder "whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being ..." The Supreme Court found that provision to violate s. 7 of the *Charter* because it did not meet the minimum threshold test of objective foreseeability which it had earlier held applied to all offences that create the possibility of imprisonment.

[33]*Supra* note 21 at 653.

[34]*Ibid.* at 653-54.

[35]*Ibid.* at 654.

[36]*Ibid.*

> tion of ss. 7 and 11(*d*). I should add in passing that if the answer is no, then it would be necessary to decide whether objective foreseeability is sufficient for a murder conviction.[37]

The Crown submitted in *PANS* that "competition offences are not really crimes and carry no moral stigma upon conviction and, therefore, it is not necessary to extend the *Vaillancourt* reasoning to them."[38] However, Roscoe J. disagreed, and found "that s. 32(1)(*c*) creates a truly criminal offence."[39] She therefore held that because paragraph 32(1)(*c*) "does not require a subjective *mens rea*, it allows, in my opinion, the possibility of conviction of the 'morally innocent' ... [and] therefore, fails the acid test in *Vaillancourt*."[40] As a result, she found that paragraph 32(1)(*c*) violated the principles of fundamental justice and was contrary to section 7 of the *Charter*.

3. Vagueness and the *Charter*

The second issue raised by the accused was whether paragraph 32(1)(*c*) and subsection 32(1.1) of the *Act* were invalid on the basis that the word "unduly" is too vague for a criminal offence, and therefore contrary to section 7 and paragraphs 11(*a*) and (*d*) of the *Charter*. Specifically, the accused submitted that the use of the word "unduly" in paragraph 32(1)(*c*) violated their rights in two ways:

> 1. the offence gives insufficient notice of the legal standards of the offence before the defendant commits the alleged criminal conduct and, therefore, offends s. 7 of the Charter, and
> 2. after the defendant is charged, he is given insufficient notice of the legal elements of the crime, which denies him the right to make a full answer and defence and to have a fair trial, as provided in s. 11(*d*) and (*a*) of the Charter.[41]

In making their submissions, the accused relied on *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, where Chief Justice Dickson, with whom La Forest and Sopinka JJ. concurred, stated:

> I agree with Lamer J. that vagueness should be recognized as a principle of fundamental justice. Certainly in the criminal context where a person's liberty is at stake, it is imperative that persons be capable of knowing in advance with a high degree of certainty what conduct is prohibited and what is not. It would be contrary to the basic principles of our legal system to allow individuals to be imprisoned for transgression of a vague law.[42]

Madam Justice Roscoe accepted the argument put forth by the accused that subsection 32(1.1) effectively removed the only definition of the word "unduly" that had previously been given which provided some degree of certainty.[43] In

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[37]*Ibid.* at 657.

[38]*Supra* note 2 at 273.

[39]*Ibid.* at 274.

[40]*Ibid.*

[41]*Ibid.*

[42][1990] 1 S.C.R. 1123 at 1141, 56 C.C.C. (3d) 65, 77 C.R. (3d) 1 [cited to S.C.R.]. See also Lamer J.'s comments *ibid.* at 1152ff. See also *Morgentaler* v. *R.*, [1988] 1 S.C.R. 30 at 68-69, 37 C.C.C. (3d) 449, where the ambiguous definition of "health" in s. 251 of the *Criminal Code* was found to violate the principles of fundamental justice.

[43]*Supra* note 2 at 278.

addition, she was not persuaded by the Crown's argument that the case law provided a number of principles on the meaning of "undue" which give guidance to those seeking to ensure that they do not contravene paragraph 32(1)(*c*). The Crown had submitted that the case law indicated it was

> a question of the degree to which competition is lessened; that the share of the market held by the conspirators and their corresponding ability to control the market are indicators of undueness; ... that the type of competitive restraint involved is a factor; ... [and] that the exemptions listed in s. 32(2), (4), (6) and (7) provide further guidance[44]

to the public as to the nature of the prohibited conduct. After disagreeing with these submissions, Roscoe J. came to the conclusion that the word "unduly" was not sufficiently certain to comply with section 7 of the *Charter*.[45]

Madam Justice Roscoe also accepted the accused's argument that the word "unduly" was too vague to meet the requirements of paragraphs 11(*a*) and (*d*) of the *Charter*, because an accused could not have "clear and certain advance notice of the legal elements, which comprise the offence for which they are charged,"[46] and because the right to a fair trial "includes the right to make a full answer and defence and the right to a full answer and defence is a component of fundamental justice under s. 7"[47] of the *Charter*.

C. Reversal by the Court of Appeal

The foregoing rulings were reversed in a unanimous decision by the Nova Scotia Court of Appeal (N.S.C.A.).[48] With respect to the double intent issue, the N.S.C.A. disagreed with the trial judge by finding that the majority ruling given by Pigeon J. in *Atlantic Sugar* had changed the law to require an intention to prevent or lessen competition unduly.[49] Given that subsection 32(1.3) was not proclaimed into force until three days after the periods covered by the indictments, the N.S.C.A. held that the law met the minimum *mens rea* requirement for criminal offences articulated in *Vaillancourt*, between the time of the *Atlantic Sugar* ruling and June 16, 1986, the end of the period of the indictment.[50] The N.S.C.A. clearly implied that if it had been presented with a case in which the charges related to a period after subsection 32(1.3) became law, it would have struck down that provision.

With respect to the vagueness issue, the N.S.C.A. ruled that the word "unduly" in paragraph 32(1)(*c*) "does not permit a 'standardless sweep' which precludes a person from knowing 'in advance with a high degree of certainty what conduct is prohibited and what is not'."[51] After referring to the provisions

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[44]*Ibid.* at 277-78.
[45]*Ibid.* at 279.
[46]*Ibid.* at 280.
[47]*Ibid.* at 279.
[48]*Supra* note 3.
[49]*Ibid.* at 184-85.
[50]*Ibid.* at 185-89.
[51]*Ibid.* at 196, quoting from *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra* note 42 at 1141, 1157.

of what are now subsections 45(3) and (4), and noting that section 45 contains various other defences and exceptions, Clarke C.J.N.S. stated: "A plain reading of the statute provides warning and notice to parties entering agreements of the type of conduct that runs the risk of being found illegal."[52] While recognizing that "unduly" "is not a precise term capable of exact definition," he held that this did not lead to a conclusion that the term is void for vagueness.[53] He added that the case law must also be considered in interpreting a statute, and observed that in addition to the extent of control of the market held by the respondents, other factors that have been considered relevant by the courts

> include price fixing, the competitive effect of market share and control of distribution, the geography of the market area, the effect of the agreement on the nature of the product subject to restraint, the effect of creating barriers to the entry of the product on the market, controls over export prices, attempts to limit imports, prevention of the entry of new products to the market through price cutting, [and] attempts to limit the entry of substitute products to the market place.[54]

Given the foregoing finding with respect to vagueness, the N.S.C.A. did not find it necessary to address the arguments relating to paragraphs 11(*a*) and (*d*) of the *Charter*.

D. The Supreme Court's Ruling

1. *Mens Rea*

The Supreme Court's ruling on the *mens rea* issue was terse and virtually without any explanation. Speaking for a unanimous Court, Gonthier J. simply stated that paragraph 32(1)(*c*) and subsections 32(1.1) and (1.3)

> require the proof of two fault elements: one subjective, the other objective.
> To satisfy the subjective element, the Crown must prove that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement. Once that is established, it would ordinarily be reasonable to draw the inference that the accused intended to carry out the terms in the agreement, unless there was evidence that the accused did not intend to carry out the terms of the agreement.
> In order to satisfy the objective element of the offence, the Crown must establish that on an objective view of the evidence adduced the accused intended to lessen competition unduly ... [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.
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> In summary then, the Crown must establish the subjective fault elements that the accused had the intention to enter into the agreement and was aware of its terms. As well, the Crown must demonstrate that the proof, viewed objectively (*i.e.*, by

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[52] *Ibid.* at 197.
[53] *Ibid.* at 199.
[54] *Ibid.*

> a reasonable business person), establishes that the accused was aware or ought to have been aware that the effect of the agreement entered into by the accused would be to prevent or lessen competition unduly.[55]

2. Vagueness

After reviewing the Supreme Court's previous decisions dealing with the void for vagueness doctrine, Gonthier J. observed that "the threshold for finding a law vague is relatively high. So far discussion of the content of the notion has evolved around intelligibility."[56] Gonthier J. then clarified this and may have narrowed the scope for future application of the doctrine by explaining that an unintelligible provision is one which "gives insufficient guidance for legal debate ..."[57] At first blush, it would seem to be somewhat paradoxical, in determining when a law is too vague, to ask "Is it capable of legal debate?" However, the following explanation for the standard reveals a sound, common sense rationale:

> Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.
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> ...
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> It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.
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> ...
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> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary.[58]

In short, the question is: Is it possible to ascertain whether a course of conduct is or would be in the risk zone? If the answer is affirmative, the law in question is not vague, notwithstanding that there may be legitimate debate about whether the conduct in question actually contravenes the law.

Before assessing paragraph 32(1)(*c*) in terms of this test, Gonthier J. addressed two arguments of the Association québécoise des pharmaciens propriétaires ("AQPP"), an intervenor in the case and the respondent in an appeal from a judgment of the Quebec Superior Court that was pending before the Quebec Court of Appeal.[59] Philipon J. of the former court, dealing with an

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[55]*Supra* note 1 at 659-60.
[56]*Ibid.* at 632.
[57]*Ibid.* at 638.
[58]*Ibid.* at 638-40.
[59]*Supra* note 5.

indictment that had been laid following the renumbering of the *Act*, had found paragraph 45(1)(*c*) to be unconstitutional for essentially the same reasons as Roscoe J. in *PANS*, and for the two additional reasons raised by the AQPP again in intervention before the Supreme Court.[60] The AQPP's first additional argument was that "the range of agreements covered by s. 32(1)(*c*) is too wide."[61] Its second was that, in giving the Director the option of deciding between criminal and civil (*e.g.*, abuse of dominance) recourse, the *Act* left the Director with too much discretion. The Supreme Court rejected both of these arguments.[62]

Turning to the issue of whether the word "unduly" was too vague, Gonthier J. stated that in view of the addition of subsection 32(1.1) (now subsection 45(2)) to the *Act* in 1976, there could be no doubt that the traditional interpretation of "unduly" provided by Anglin J. in *Weidman* v. *Shragge*[63] remains authoritative.[64] However, rather than "adding to [the] string of synonyms" (*i.e.*, improperly, inordinately, excessively or oppressively) that had been repeated in several cases, Gonthier J. adopted the following interpretation of Clarke C.J.N.S.'s decision: "While the word unduly is not defined by statute and defies precise measurement, it is a word of common usage which denotes to all of us in one way or another a sense of seriousness. Something affected unduly is not affected to a minimal degree but to a significant degree."[65]

He then stated that the public policy objectives of paragraph 32(1)(*c*) also "offer a clear idea of what is meant by 'unduly' lessening competition, and what kind of inquiry is mandated."[66] He observed that the numerous remarks that had been made by the Supreme Court on the public policy interests underlying paragraph 32(1)(*c*) would perhaps be best summarized in the following passage from the majority judgment in *Howard Smith*: "The statute proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint."[67]

Gonthier J. paraphrased this passage in the following terms:

> Considerations such as private gains by the parties to the agreement or counterbalancing efficiency gains by the public lie therefore outside of the inquiry under s. 32(1)(*c*). 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.[68]

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[60]*Ibid.* at 237, 245.

[61]*Supra* note 1 at 644.

[62]*Ibid.* at 644-46.

[63](1912), 46 S.C.R. 1 at 42-43, 2 D.L.R. 734 [hereinafter *Weidman* cited to S.C.R.]. See *Stinson-Reeb Builders Supply Co. Ltd.* v. *R.*, [1929] S.C.R. 276 at 278, [1929] 3 D.L.R. 331 at 334 [hereinafter *Stinson-Reeb* cited to S.C.R.]; *Container Materials*, *supra* note 19; *Howard Smith Paper Mills Ltd.* v. *R.*, [1957] S.C.R. 403 at 410, 118 C.C.C. 321 [hereinafter *Howard Smith* cited to S.C.R.].

[64]*Supra* note 1 at 646.

[65]*Ibid.* at 646-47.

[66]*Ibid.* at 650.

[67]*Ibid.* at 649, quoting *Howard Smith*, *supra* note 63 at 411.

[68]*Ibid.* at 649-50.

Gonthier J. then compared the foregoing approach with the U.S. approach:

> Section 32(1)(*c*) 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 economic advantages and disadvantages of the agreement, like a rule of reason would. Since "unduly" in s. 32(1)(*c*) leads to a discussion of the seriousness of the competitive effects, but not of all relevant economic matters, one may say that this section creates a partial rule of reason.[69]

Gonthier J. proceeded to note that paragraph 32(1)(*c*) of the *Act* is sufficiently precise to meet the constitutional standard, "[e]ven when considered without the rest of the Act and case law ..."[70]

Turning to the content of the inquiry under paragraph 32(1)(*c*) of the *Act*, Gonthier J. stated that there are two major elements that must be assessed: "(1) the structure of the market, and (2) the behaviour of the parties to the agreement."[71] With respect to market structure, Gonthier stated that the aim of the "inquiry is to ascertain the degree of market power of the parties to the agreement ..."[72] He observed that "[m]arket share alone is not determinative,"[73] and that various other factors are also relevant, such as the number of competitors, market concentration, barriers to entry, product differentiation and countervailing power.

He defined market power as the "ability to behave relatively independently of the market ... [which is] precisely what s. 32(1)(*c*) of the Act seeks to prevent."[74] Gonthier J. observed that paragraph 32(1)(*c*) would not apply in the absence of market power because "agreements to restrict competition would either benefit the public by allowing small firms to consolidate their position and be more competitive, or dissolve under competitive pressures."[75]

The level of market power necessary under paragraph 32(1)(*c*) was then contrasted with the level of market power required under section 79 of the *Act*, which embodies a substantial or complete control standard. Gonthier J. suggested that this standard was more onerous than an ability to behave independently of the market.[76] Under paragraph 32(1)(*c*): "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. A moderate amount of market power is required to achieve this ..."[77]

With respect to the behavioural element in the paragraph 32(1)(*c*) inquiry, Gonthier J. stated that the objective of the agreement was the most important matter to consider. He also noted that subsections 32(2), (3) and (6) (now sub-

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[69]*Ibid.* at 650.
[70]*Ibid.* at 651.
[71]*Ibid.*
[72]*Ibid.* at 653.
[73]*Ibid.*
[74]*Ibid.*
[75]*Ibid.* at 653-54.
[76]*Ibid.* at 654.
[77]*Ibid.*

sections 45(3), (4) and (7)) provide "guidance as to which behaviour may or may not be injurious to competition."[78]

Finally, he noted that where market power already exists independently of the agreement, "any anti-competitive effect of the agreement will be suspicious" and that a "particularly injurious behaviour may also trigger liability even if market power is not so considerable."[79]

E. Implications

1. *Mens Rea*

As a practical matter, the "reasonable business person" *mens rea* standard that has been read into the second element of the *actus reus* of paragraph 45(1)(*c*) likely will not affect to any significant degree the ability of the Crown to prove its case in many section 45 proceedings. Indeed, Gonthier J.'s observation that once the subjective intent required to prove the agreement is established "the Crown could, in most cases, establish the objective fault element,"[80] will likely influence lower court judges to draw that inference more readily than might otherwise have been the case. This may be particularly so with respect to price-fixing and market-sharing agreements which Gonthier J. suggested would be undue if the parties thereto have the requisite degree of market power.[81]

Many of the agreements pursued by the Crown in recent years have been alleged to have had these or other equally obvious anti-competitive matters as their object. Nevertheless, there is now significant scope for parties to agreements falling outside of this category to avoid conviction by raising a reasonable doubt as to whether they were aware or ought to have been aware that the effect of the agreement entered into would be to prevent or lessen competition unduly. This may temper any inclinations that the Director might have to pursue such agreements as a result of what the Supreme Court had to say about the words "prevent or lessen *unduly* competition" [emphasis added].

The Supreme Court's ruling with respect to *mens rea* has implications for the other sections in Part VI of the *Act* which have competitive effects tests, *i.e.* paragraphs 50(1)(*b*) and (*c*), which deal with geographic price discrimination and predatory pricing, respectively. However, given that Gonthier J. did not discuss his rationale for embracing an objective "reasonable business person" fault standard, these implications can only be fully understood in light of the Court's other recent decisions which address the level of *mens rea* necessary to meet the requirements of the *Charter*.

As noted earlier,[82] in *R.* v. *Vaillancourt*, Lamer J. (as he then was), speaking for the majority of the Supreme Court, made it clear that a minimum mental

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[78]*Ibid.* at 656.
[79]*Ibid.* at 657.
[80]*Ibid.* at 660.
[81]*Ibid.* at 657.
[82]See text accompanying note 32.

state or fault element *of at least negligence* is constitutionally required for each offence that provides for the possibility of imprisonment. He then stated that certain crimes, very few in number, require proof of nothing less than subjective foresight, "because of the special nature of the stigma attached to a conviction therefor *or* the available penalties." [emphasis added][83] In his view, such crimes include murder and theft.[84] In *R.* v. *Logan*, Lamer C.J.C. clarified that "the social stigma associated with a conviction is the most important consideration, not the sentence,"[85] in assessing whether an offence is one of the very few that requires proof of *subjective* foresight of the consequences. Once again, he highlighted the social stigma associated with a conviction for murder and theft in stating that those crimes were among the very few in question. The following year, in *R.* v. *Wholesale Travel Group Inc.*, he contrasted the stigma that would attach to a conviction for theft with the stigma associated with a conviction for misleading advertising. He stated: "In my view, while a conviction for false/misleading advertising carries some stigma, in the sense that it is not morally neutral behaviour, it cannot be said that the stigma associated with this offence is analogous to the stigma of dishonesty which attaches to a conviction for theft."[86]

As a result, he concluded that the offence of misleading advertising, which provides for the same maximum term of imprisonment (five years) as section 45, was not one of the very few offences which required subjective *mens rea*. Instead, the minimum *mens rea* requirement for the offence of false/misleading advertising is negligence. In that same case, Cory J., who agreed with this position, contrasted "[m]urder, sexual assault, fraud, robbery and theft," which he characterized as being "all so repugnant to society that they are universally recognized as crimes," with regulatory offences, which "are directed not to conduct itself but to the consequences of conduct."[87] He then observed that the Supreme Court's decisions in *General Motors of Canada Ltd.* v. *City National Leasing*[88] and *Thomson Newspapers* "make it clear that the *Competition Act* in all its aspects is regulatory in character."[89] In the *Thomson Newspapers* case, La Forest J. observed:

> The conduct regulated or prohibited by the Act is not conduct which is by its very nature morally or socially reprehensible. It is instead conduct we wish to discour-

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[83]*Supra* note 21 at 653. See also *R.* v. *DeSousa*, [1992] 2 S.C.R. 944 at 962, 76 C.C.C. (3d) 124; *R.* v. *L.(S.R.)* (1993), 11 O.R. (3d) 271 at 282-83 (C.A.). Note that in *DeSousa* the Court made it clear that "[a]s a matter of statutory interpretation, a provision should not be interpreted to lack any element of personal fault unless the statutory language mandates such an interpretation in clear and unambiguous terms" (*ibid.* at 956).

[84]*Vaillancourt*, *ibid.*

[85][1990] 2 S.C.R. 731 at 743-44, 58 C.C.C. (3d) 391 [hereinafter *Logan* cited to S.C.R.].

[86][1991] 3 S.C.R. 154 at 185, 38 C.P.R. (3d) 451 [hereinafter *Wholesale Travel* cited to S.C.R.].

[87]*Ibid.* at 218-19.

[88][1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255.

[89]*Wholesale Travel*, *supra* note 86 at 223. Contrast the position taken by Cory J. here with the earlier position he took in an *obiter dictum* in *Knox Contracting Ltd.* v. *Canada*, [1990] 2 S.C.R. 338 at 355, 73 D.L.R. (4th) 110 [cited to S.C.R.]. Note that in that case Sopinka J., with whom L'Heureux-Dubé and McLaughlin JJ. concurred in dissent, took the position that the presence of criminal sanctions in the *Act* "[does] not remove the Act from the regulatory, administrative sphere" (*ibid.* at 359).

> age because of our desire to maintain an economic system which is at once productive and consistent with our values of individual liberty. It is, in short, not conduct which would be generally regarded as by its very nature criminal and worthy of criminal sanction ... It is conduct which is made criminal for strictly instrumental reasons.[90]

Notwithstanding Gonthier J.'s subsequent observation in *PANS* that paragraph 45(1)(*c*) "is not just another regulatory provision,"[91] his unanimously endorsed finding with respect to *mens rea* and the above-noted comments of Cory and La Forest JJ. suggest that the provisions in Part VI of the *Act* are not viewed by the Supreme Court as being truly criminal in nature or as being associated with the same degree of stigma as murder, theft, fraud and sexual assault. If this is the basis for the finding that the effects element of paragraph 45(1)(*c*) requires only objective intent, the growing view that price-fixing and other anti-competitive agreements are analogous to theft and fraud may lead the Court to revisit its position on this issue.[92] As Cory J. observed in *Wholesale Travel*, "as social values change, the degree of moral blameworthiness attaching to certain conduct may change as well."[93]

This shift in public opinion may be accelerated as increased understanding of basic economic principles by the general public leads to a recognition that agreements which prevent or lessen competition unduly actually have more serious economic effects than those associated with theft or fraud. In short, while theft and fraud result in a redistribution of income, agreements that lessen competition unduly result in a redistribution of income *and* a deadweight loss.[94]

In light of the foregoing, it is relevant to ask whether the Supreme Court had other reasons for concluding that the effects element of paragraph 45(1)(*c*) only requires objective intent. At first blush, it is tempting to infer from the *PANS* and *Wholesale Travel* cases that the Supreme Court does not consider a five-year maximum term of imprisonment to be sufficient to trigger a subjective

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[90]*Supra* note 12 at 510.

[91]*Supra* note 1 at 649. The absence of more discussion of this point in *PANS* has already given rise to uncertainty. See *R.* v. *Durham* (1992), 10 O.R. (3d) 596, 76 C.C.C. (3d) 219 (C.A.).

[92]See *e.g.* Wetston, *supra* note 8 at 1, 13; the testimony of Lawson Hunter, Director of Investigation and Research from 1981-1985, to the Legislative Committee on Bill C-91, which is reported in Canada, House of Commons, Legislative Committee on Bill C-91, "Minutes of Proceedings and Evidence," Issue No. 7 (12 May 1986) at 7:41; and remarks by James F. Rill, who stepped down from his position earlier this year as Assistant Attorney General, Antitrust Division, U.S. Department of Justice, in "Antitrust Enforcement: An Agenda for the 1990's" (Remarks before the 23rd Annual New England Antitrust Conference, 3 November 1989) at 3 [unpublished]. See also W.T. Stanbury, "Legislation to Control Agreements in Restraint of Trade in Canada: Review of the Historical Record and Proposals for Reform" in Khemani & Stanbury, eds., *Canadian Competition Law and Policy at the Centenary* (Halifax: The Institute for Research on Public Policy, 1991) 61 at 80ff.

[93]*Supra* note 86 at 220.

[94]The "deadweight loss" resulting from "garden variety" anti-competitive agreements represents something lost by consumers but not gained by producers. It is a measure of the amount by which society as a whole is worse off by virtue of the fact that persons who continue to buy the product at a higher price have less money left over to buy other products, and persons who no longer buy the product because its price has increased allocate the money that they would otherwise have spent on the product to less-valued products.

intent requirement. However, in *Logan*, Lamer C.J.C. indicated that the offence of theft requires subjective *mens rea*, even where the Crown proceeds summarily and the maximum term of imprisonment is six months.[95] This, together with the fact that the Chief Justice explicitly de-emphasized the maximum available penalty as a consideration in determining whether subjective *mens rea* is required in respect of a given offence, suggests that the maximum term of imprisonment applicable for contraventions of paragraph 45(1)(*c*) was not a significant factor in the Court's decision to reject a subjective intent requirement for section 45.

Another factor that the Supreme Court seems to consider to be important in determining the minimum required mental element of offences is the extent to which the offence in question will be enforceable if subjective *mens rea* is required. This consideration permeated the various opinions given in *Wholesale Travel*. For example, Cory J., with whom L'Heureux-Dubé J. concurred, stated:

> It is absolutely essential that governments have the ability to enforce a standard of reasonable care in activities affecting public welfare. The laudable objectives served by regulatory legislation should not be thwarted by the application of principles developed in another context.
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> ...
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> [F]rom a practical point of view, it is simply impossible for the government to monitor adequately every industry so as to be able to prove actual intent or [subjective] *mens rea* in each case. In order to do so, governments would have to employ armies of experts in every conceivable field.[96]

Iacobucci J., with whom Stevenson and Gonthier JJ. concurred, stated:

> I concur that the specific objective of placing a persuasive burden on an accused to prove due diligence is to ensure that all those who are guilty of false or misleading advertising are convicted of these public welfare offences *and to avoid the loss of convictions because of evidentiary problems which arise because the relevant facts are particularly in the knowledge of the accused.* This legislative objective is of sufficient importance to warrant overriding the right guaranteed by s. 11(*d*) of the Charter.[97]

Lamer C.J.C., with whom Sopinka, McLachlin and La Forest JJ. concurred, also highlighted "the general objective of convicting the guilty."[98] Similarly, in *R.* v. *Sault Ste. Marie*, Dickson J. (as he then was), speaking for the Court, held:

> The correct approach, in my opinion, is to relieve the Crown of the burden of proving [subjective] *mens rea*, having regard to *Pierce Fisheries* and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence.[99]

The foregoing rationale, combined with the regulatory/public welfare aspect of the offence created by section 45 of the *Act*, may provide sufficient

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[95]*Supra* note 85 at 744.
[96]*Supra* note 86 at 239-40.
[97]*Ibid.* at 257.
[98]*Ibid.* at 202.
[99][1978] 2 S.C.R. 1299 at 1325, 85 D.L.R. (3d) 161 at 181.

support to the "lack of serious stigma" rationale to prevent the Supreme Court from reversing itself with respect to the subjective/objective intent issue if the general public begins to regard price-fixing, bid-rigging, market allocation and other forms of agreements which unduly lessen competition as analogous to, or worse than, theft and fraud.

If subjective intent with respect to competitive effects is not required for section 45, it is very unlikely that it will be required for other offences in Part VI of the *Act* that have competitive effects tests, *i.e.* geographic price discrimination (paragraph 50(1)(*b*)) and predatory pricing (paragraph 50(1)(*c*)). In *PANS*, Gonthier J. characterized section 45 as "one of the pillars of the Act"[100] and observed, "[t]he prohibition of conspiracies in restraint of trade is the epitome of competition law ... It definitely rests on a substratum of values ..."[101] Neither geographic price discrimination nor predatory pricing could be characterized in these terms. Moreover, a conviction for either of these offences would not carry more stigma than a conviction under section 45. It is also noteworthy that the maximum term of imprisonment provided in each of these offences (two years) is less than the maximum term of imprisonment under section 45 (five years).

Even if a conviction for geographic price discrimination and predatory pricing would carry less stigma than a conviction under section 45, there is no reason to believe that the Supreme Court would require something less than the objective intent it requires for section 45. The Supreme Court appears to have drawn only one line to date, that between the very few offences that require subjective intent and all other offences. It has not even suggested that there may be other categories distinguished by the greater or lesser degree of stigma attached to a conviction for offences which do not require subjective intent.

In any event, it is not clear that a different *mens rea* requirement, such as the negligence standard applied in *Wholesale Travel* to the *act* of false or misleading advertising, would be appropriate or workable when applied to the *effects* element of geographic price discrimination and predatory pricing, *i.e.* substantially lessening competition.

2. The Meaning of "Unduly"

a. Market Power

The meaning of the word "unduly" is a question of law. Whether a particular agreement is likely to prevent or lessen competition "unduly" is a question of fact.[102] The Supreme Court has now clarified that as a matter of law, agreements between persons who do not have market power do not contravene section 45.[103] This aspect of the *PANS* decision forecloses any possibility of lower

[100]*Supra* note 1 at 648.
[101]*Ibid.* at 649.
[102]*Aetna, supra* note 17 at 747.
[103]*Supra* note 1 at 653-54.

courts using section 45 to advance the kinds of populist objectives pursued by the U.S. Warren Court in the 1960s.[104]

As noted earlier, the Supreme Court held that the degree of market power required under section 45 is lower than the degree of market power required to "substantially or completely control ... a class or species of business,"[105] within the meaning of the abuse of dominance provisions in section 79 of the *Act*. In Gonthier J.'s view, the substantial or complete control standard requires more than "simply the ability to behave independently of the market."[106] In *Canada (Director of Investigation and Research)* v. *Laidlaw Waste Management Systems Ltd.*, the Competition Tribunal stated:

> 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.[107]

As a result of the Supreme Court's ruling in *PANS*, the Competition Tribunal may feel compelled to clarify that more than a moderate amount of market power is required to meet the "substantial or complete control" element of section 79. The degree of market power that is required in this regard is something more than a capacity to behave independently of the market in a passive way. However, this latter amount of market power may be sufficient to satisfy the "preventing or lessening competition substantially" element of section 79.

This aspect of the Supreme Court's ruling clearly goes significantly beyond subsection 45(2), which was Parliament's reaction to the "Cartwright heresy."[108] In the *Howard Smith* case, Cartwright J., speaking for himself and Locke J., interpreted the jurisprudence relating to the meaning of the word "unduly" as holding that the parties to the agreement must be free to carry on their activities "virtually unaffected by the influence of competition."[109] Notwithstanding that this view was rejected in cases before and after *Howard Smith*,[110] Parliament

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[104]See *e.g. Brown Shoe Co.* v. *United States*, 370 U.S. 294 at 315-18, 323-24, 333, 344 (1962); *United States* v. *Von's Grocery*, 384 U.S. 270 at 276-77 (1966). See also D.I. Baker & W. Blumenthal, "Ideological Cycles and Unstable Antitrust Rules" (1986) 31 Antitrust Bull. 323; B.E. Hawk, *United States, Common Market and International Antitrust: A Comparative Guide*, vol. 2 (Englewood Cliffs: Prentice Hall Law & Business, 1990) at 7.

[105]*Supra* note 1 at 654. See *supra* notes 76-77 and accompanying text.

[106]*Ibid.*

[107]*Canada (Director of Investigation and Research)* v. *Laidlaw Waste Management Systems Ltd.* (1992), 40 C.P.R. (3d) 289 at 325 (Comp. Trib.). In *Canada (Director of Investigation and Research)* v. *NutraSweet* (1990), 32 C.P.R. (3d) 1 at 31 (Comp. Trib.), the Competition Tribunal stated that it did not need to explore the boundaries of "substantial" in the phrase "substantial or complete control," because Nutrasweet's control was clearly substantial. However, in addressing the issue of whether the practice of anti-competitive acts prevented or lessened competition substantially, the Tribunal stated: "In essence, the question to be decided is whether the anti-competitive acts engaged in by NSC preserve or add to NSC's market power" (*ibid.* at 47).

[108]See B. Dunlop, D. McQueen & M. Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987) at 124-25.

[109]*Supra* note 63 at 426.

[110]See *R.* v. *Abitibi Power & Paper Co. Ltd.* (1960), 131 C.C.C. 201 at 251 (Que. Q.B.) [here-

evidently considered it necessary to enact subsection 45(2) (formerly subsection 32(1.1)) after Cartwright J.'s test was merged with the traditional interpretation of the word "unduly" in *Aetna*.[111]

The Court's statement in *PANS* that "the competition law of both the United States and the European communities comprises an analogous requirement of minimal market power in cases of agreements to restrain competition"[112] suggests that the level of market power required to trigger potential liability under section 45 may be just beyond a *de minimis* degree of market power. However, earlier in its decision the Court adopted the following statement of Clarke C.J.N.S. and observed that the word "unduly" "expresses a notion of seriousness or significance":[113] "While the word unduly is not defined in the statute and defies precise measurement, it is a word of common usage which denotes to all of us in one way or another a sense of seriousness. Something affected unduly is not affected to a minimal degree but to a significant degree."[114]

Given these statements and given that Parliament has also chosen to use a "substantially lessening competition" threshold (which is widely considered to be a lower threshold than "unduly lessening competition"[115]) in various sections of the *Act*, the better view would appear to be that the degree of market power required to trigger potential liability under section 45 is something *more than* just beyond *de minimis*. In this regard, it is relevant to note that the 1991 *Merger Enforcement Guidelines* state that the Director considers a prevention or lessening of competition to be *substantial*

> where the price of the relevant product is likely to be *materially* greater, in a substantial part of the relevant market, than it would be in the absence of the merger; and where this price differential would not likely be eliminated within two years by new or increased competition from foreign or domestic sources. [emphasis added][116]

The MEGs then state that a *materially* greater price "may be a differential that is less than the 'significant' price increase that is postulated for the purpose

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inafter *Abitibi Power*]; *R.* v. *Electrical Contractors Ass'n of Ont. and Dent* (1961), 131 C.C.C. 145 at 160, 27 D.L.R. (2d) 193 (Ont. C.A.) [hereinafter *Electrical Contractors* cited to C.C.C.]; *R.* v. *J.J. Beamish Construction Co.*, [1968] 1 O.R. 5 (C.A.); *R.* v. *Canadian Coat and Apron Supply Ltd.*, [1967] 2 Ex. C.R. 53 at 62-63, 70-71; *R.* v. *Crown Zellerbach Canada Ltd.*, [1955] 5 D.L.R. 27 at 32-33, 113 C.C.C. 212 at 219 (B.C.S.C.); *R.* v. *Northern Electric Co. Ltd.*, [1955] O.R. 431 at 469 (H.C.J.).

[111]See text accompanying notes 24, 25.

[112]*Supra* note 1 at 654.

[113]*Ibid.* at 647; see also *ibid.* at 657.

[114]*Ibid.* at 646-47.

[115]This was the accepted view at the Bureau of Competition Policy from 1987-1991 when one of the authors was there. See also P.S. Crampton, *Mergers and the Competition Act* (Toronto: Carswell, 1990) at 361.

[116]Director of Investigation and Research – *Competition Act, Merger Enforcement Guidelines* (Ottawa: Supply and Services Canada, 1991) at §2.4 [hereinafter MEGs]. The Executive Summary to the MEGs states at page i: "In general, a merger will be found to be likely to prevent or lessen competition substantially when the parties to the merger would more likely be in a position to exercise a *materially* greater degree of market power in a substantial part of a market for two years or more, than if the merger did not proceed in whole or in part."

of market definition."[117] This makes it clear that the Director considers the word "material" to connote a lower market power threshold than the word "significant." Thus, a price increase that is likely to occur in only part of a relevant market may be considered material while, by definition, it could never be significant.[118]

Based on all of the foregoing, it would not be unreasonable to take the position that a "material" degree of market power (*i.e.* an ability to materially influence price or an important non-price dimension of competition) is sufficient to cross the "substantial lessening of competition" threshold, whereas a somewhat greater degree of market power, *i.e.* a moderate, significant or substantial amount, is required to trigger potential liability under the "unduly lessening competition" threshold in section 45 of the *Act*. In this regard, it is relevant to note that the MEGs and the United States Department of Justice 1984 *Merger Guidelines* state that "in most contexts" the Director and the U.S. Department of Justice ("DOJ"), respectively, consider a "significant and nontransitory" price increase to be a price increase of five per cent lasting one year.[119] The Supreme Court observed: "This approach may or may not be appropriate [when measuring market power] in the context of [paragraph 45(1)(*c*)] of the Act."[120]

The Court's holding that the level of market power necessary to trigger the application of paragraph 45(1)(*c*) is simply a degree of market power which enables the parties to an impugned agreement "to behave independently of the market, in a passive way,"[121] rather than in a way which permits them to influence the market, suggests that the ability to increase prices to any degree may not be necessary. The latter level of market power, or the corresponding ability

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[117]*Ibid.* The MEGs define a relevant market as the *smallest* group of products and *smallest* geographic area in relation to which sellers, if acting as a single firm (a "hypothetical monopolist") that was the only seller of those products in that area, could profitably impose and sustain a significant and nontransitory price increase above levels that would likely exist in the absence of the merger (*ibid.* at §3.1.).

[118]*Ibid.* at §2.1. The MEGs discuss anti-competitive effects in terms of the price dimension of competition, but make it clear that competition may be considered to be substantially prevented or lessened where there is a material reduction in the benefits provided by non-price competition.

[119]*Ibid.* at §3.1; U.S. Department of Justice, "Merger Guidelines" Antitrust & Trade Reg. Rep., No. 1169 (Special Supplement) (Washington: BNA, 14 June 1984) at §2.11. Insofar as the DOJ's approach to horizontal mergers, market definition, barriers to entry and other matters is concerned, these *Guidelines* have been superseded by the 1992 *Horizontal Merger Guidelines* issued by the DOJ and the Federal Trade Commission. These guidelines are reproduced in 62 *Antitrust & Trade Reg. Rep.*, No. 1559 (Special Supplement) (Washington: BNA, 2 April 1992) [hereinafter 1992 Guidelines]. Pursuant to these Guidelines, the DOJ now uses "in most contexts ... a price increase of five percent lasting for the foreseeable future" as a proxy for a "small but significant and nontransitory price increase" (*ibid.* at §1.11.).

[120]*PANS*, *supra* note 1 at 653. In *Canada (Director of Investigation and Research)* v. *Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 at 329 (Comp. Trib.) [hereinafter *Hillsdown*], a merger case, the Competition Tribunal stated that it "does not find it useful to apply rigid numerical criteria although these may be useful for enforcement purposes."

A "significant and nontransitory" price increase is used by the Director and the DOJ to define relevant markets in which a substantial lessening of competition may occur, not to define what constitutes a substantial lessening of competition.

[121]*PANS*, *supra* note 1 at 654.

to influence non-price conditions in the market to a similar degree, would appear to be greater than the passive type of market power described by Gonthier J. The "capacity to behave independently of the market, in a passive way," seems to suggest that it may be sufficient simply to have an ability to resist the pressures to offer the market new products or product attributes, new brands, new marketing techniques or initiatives, new methods of distribution, new types of discounts, etc. This contrasts with the greater degree of market power that might be required to take something away from the market, *e.g.* increase prices or reduce service, quality, variety, etc.

If this is what the Supreme Court meant when it stated that "the capacity to influence the market" in an active way is not required, then the minimum level of market power required to trigger the application of the various provisions of the *Act* which have a "substantially lessening competition" threshold (*e.g.* mergers) would be less than that which is described in the MEGs. However, as discussed below, after describing the level of market power required to trigger *potential* liability under the *Act*, the Supreme Court made it clear that some behaviour likely to injure competition is required in order to convict someone under paragraph 45(1)(*c*). Moreover, as a practical matter, there are very few situations where the distinction between the ability to behave independently of the market in a passive way and the ability to influence the market in an active way would affect the outcome of a case. Would the Tribunal have decided the *Hillsdown* case, which it described as "very much a borderline one,"[122] any differently if it had only been required to find an ability to behave independently to a greater degree than in the absence of the merger?

Regardless of whether "unduly" requires a greater degree of market power than "substantially," the risks associated with being found to have been a party to an agreement which unduly lessens competition are such that persons who collectively account for more than thirty-five per cent of a relevant market should exercise great caution before entering into agreements with their competitors.[123] Prior to *PANS*, many practitioners used a loose fifty per cent market share rule of thumb when advising their clients as to whether an agreement between competitors was likely to contravene section 45 of the *Act*. This practice was followed because in the 103-year history of the conspiracy offence virtually no one was convicted who, together with the other parties to the impugned agreement, accounted for less than fifty per cent of the relevant market.[124]

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[122]*Hillsdown*, *supra* note 120 at 330-31.

[123]The vast majority of agreements that are challenged under s. 45 involve competitors. Vertical and other agreements rarely give rise to serious issues under s. 45.

[124]The one possible exception is the parties that were convicted in *Electrical Contractors*, *supra* note 110. They may have accounted for as little as one third of the market. The parties that were convicted with the next lowest market shares were the parties to the impugned agreement in *Abitibi Power*, *supra* note 110. They accounted for 56-74% of the relevant market. See also *R.* v. *McGavin Bakeries Ltd. (No. 6)* (1951), 101 C.C.C. 22, 3 W.W.R. (N.S.) 289 (Alta. S.C.T.D.), where the accused accounted for approximately 58.5%, 76% and 79% of the markets for the supply of bread and other bakery products in B.C., Alberta and Saskatchewan, respectively. In *Anthes*, *supra* note 24 at 181, Houlden J.A. characterized as "a fair summary of the reported cases" a passage from

The Director uses a thirty-five per cent market share threshold in both the MEGs[125] and the *Predatory Pricing Enforcement Guidelines*[126] to distinguish between situations that are unlikely to result in the unilateral exercise of a material degree of market power and those that may have such results. The 1992 *Horizontal Merger Guidelines* issued by the DOJ and the U.S. Federal Trade Commission employ a thirty-five per cent market share threshold for essentially the same purpose.[127] Given that an agreement between competitors to fix prices, allocate markets, pursue exclusionary conduct, etc., can have effects that are little different from those which result from the exercise of market power by a single firm, prudence dictates that firms which collectively account for over thirty-five per cent of a market should exercise great caution when considering whether to engage in conduct that would raise concerns in the merger context. A merger, after all, is simply one step beyond a conspiracy, in structural terms.[128]

Parenthetically, neither the Director nor U.S. federal antitrust enforcement authorities draw adverse inferences from the fact that a merged entity would account for in excess of thirty-five per cent of the market. This threshold is simply used to distinguish situations that are unlikely to warrant further review from those that require a more qualitative analysis before any conclusions regarding likely competitive impact can be reached.[129] This is consistent with the Supreme Court's view that "[m]arket share alone is not determinative ... [M]any factors other than market share are relevant."[130]

b. Behaviour

After discussing market power, Gonthier J. stated that "in addition to some market power, some behaviour likely to injure competition"[131] is required by paragraph 45(1)(*c*). He observed: "It is the combination of the two that makes a lessening of competition undue."[132] By "behaviour likely to injure competi-

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a speech given by a former Director, which stated, "it may be said that arrangements held to have been an undue restriction of competition have run all the way from a virtual stifling of competition ... to a situation where the parties to the agreement accounted for somewhere between 56 and 74 per cent of the market." See also *R.* v. *La Fédération des courtiers d'assurance du Québec* (20 April 1979), (Que. Sup. Ct.) [unreported] (Bureau of Competition Policy unofficial translation) at 31.

Note that in the Economic Council of Canada's *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969) at 68, it was concluded that "an agreement covering less than the whole but well over half of the market runs a substantial risk of being held illegal."

[125]*Supra* note 116 at §4.2.1.

[126]Director of Investigation and Research – *Competition Act*, *Predatory Pricing Enforcement Guidelines* (Ottawa: Supply and Services Canada, 1992) at §2.2.1.1 [hereinafter PPEGs].

[127]1992 Guidelines, *supra* note 119 at §2.211, 2.22, where the Court placed significant weight on the fact that the accused's market share was less than 50% in acquitting them.

[128]Note that the *Act* appears to contemplate that a merger can be pursued under s. 45. See ss. 98, 45.1.

[129]See MEGs, *supra* note 116 at §4.2.1, p. ii in Executive Summary; PPEGs, *supra* note 126 at §2.2.1.1; 1992 Guidelines, *supra* note 119 at §§2.211, 2.22.

[130]*Supra* note 1 at 653.

[131]*Ibid.* at 657.

[132]*Ibid.*

tion," he did not appear to imply that some actual injury to competition is required. Rather, he appears to have meant that the agreement must contemplate some behaviour likely to injure competition, "irrespective of any actual effect it may have had."[133] This is consistent with the previous authorities.[134]

In some cases, such as agreements with respect to the matters listed in subsection 45(3) of the *Act*, the agreements may not contemplate "behaviour likely to injure competition."[135] However, if these agreements prevent or lessen competition unduly in respect of any of the matters listed in subsection 45(4) of the *Act* (*i.e.* prices, quantity or quality of production, markets, customers or channels/methods of distribution), they will contravene section 45.

Gonthier J. came close to stating that price-fixing and market sharing are *per se* illegal when engaged in by parties who collectively have, or through the impugned agreement acquire, market power, as shown in the following passage:

> The agreement could either have an "internal" effect, in consolidating the market power of the parties (as is the case with price-fixing) or have an "external" effect, in weakening competition and thus increasing the market power of the parties (as is the case with market-sharing). Market power may also exist independently of the agreement, in which case any anti-competitive effect of the agreement will be suspicious. A particularly injurious behaviour may also trigger liability even if market power is not so considerable. These are only examples of possible combinations of market power and behaviour likely to injure competition that *will be "undue"* under [paragraph 45(1)(*c*)] of the Act. [emphasis added][136]

Although Gonthier J.'s distinction between "internal" and "external" effects of an agreement is somewhat confusing and unnecessary, there is little doubt that he and, by implication, the rest of the Supreme Court, believe that price-fixing and market-allocation agreements between parties who collectively have, or through their agreement acquire, market power, fall squarely within the type of behaviour that will trigger the application of section 45. Unfortunately, the Supreme Court passed up a historic opportunity to discuss this point in further detail. It could have made a much greater contribution to public policy by declaring that, like bid-rigging (section 47), "naked" or "garden-variety" price-fixing and market allocation agreements have no redeeming virtues, are inherently bad even if only *de minimis* in nature, *and therefore always* contravene the *Act*, even where the parties to the agreement have no market power.[137] Given that such an approach would avoid the burdensome and time-consuming exercise of defining relevant markets and assessing whether the parties to the impugned agreement have market power within those markets, it would give rise to enormous savings in enforcement costs. It would also produce greater

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[133]*Ibid.* at 656.

[134]See *e.g. Howard Smith*, *supra* note 63 at 406, 409; *Container Materials*, *supra* note 19; *Aetna*, *supra* note 17 at 747.

[135]*PANS*, *supra* note 1 at 657.

[136]*Ibid.*

[137]See Economic Council of Canada, *supra* note 124 at 101-02 and Dunlop *et al.*, *supra* note 108 at 129. Even such strong "Chicago School" proponents of a *laissez-faire* approach to antitrust as Robert Bork agree that *per se* treatment of "naked" price-fixing, bid-rigging and market allocation is warranted. See R. Bork, *The Antitrust Paradox: A Policy at War With Itself* (New York: Basic Books, 1978) at 263.

certainty, at least in respect of those price-fixing and market-allocation agreements that are clearly "naked" or "garden variety."[138]

"Naked" price-fixing,[139] bid-rigging,[140] market allocation[141] and certain types of group boycotts[142] are treated as *per se* illegal in the U.S. for these very reasons. As Circuit Judge F. Easterbrook has explained:

> Should we say that unless cartels are "never" efficient, we must rummage through the facts case by case to determine the consequences of every price-fixing arrangement? Not on your tintype. Courts started applying per se rules to cartels and other practices early in the history of antitrust. These rules are based on probabilities over the run of cases, on the belief that a *category* of practices is so likely to be undesirable that it is not worth the costs (litigation, uncertainty, and error) of sifting through instances to separate beneficent from baleful. Even proof that a practice saves consumers "millions of dollars" every year does not justify case-by-case inquiry once the practice is located in a group likely to be deemed harmful. If this is the right way to deal with cartels, it is the right way to deal with other practices.[143]

Parenthetically, it should be noted that Department of Justice lawyers representing the Director appear to believe that price-fixing may be *per se* illegal in Canada. They have made it clear in the past that they are prepared to proceed against horizontal agreements affecting prices, pursuant to the resale price maintenance provisions in paragraph 61(1)(*a*) of the *Act*. This is consistent with the position articulated in the *Background Papers* that accompanied the 1976 amendments to the *Act*.[144] There is some jurisprudence which supports this posi-

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[138]See *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1 at 5 (1958). The DOJ's *Antitrust Enforcement Guidelines for International Operations*, 24 Trade Reg. Rep. (CCH) (10 November 1988) at §3.0 state: "The Department considers a restraint to be naked if it is a type of restraint that is inherently likely to restrict output or raise price and is not plausibly related to some form of economic integration (by contract or otherwise) of the parties' operations that in general may generate procompetitive efficiencies."

[139]*U.S.* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 at 223 (1940). See *National Collegiate Athletic Association* v. *Board of Regents of the University of Oklahoma*, 468 U.S. 85 at 99-100 (1984), where the Supreme Court characterized horizontal price-fixing as "perbaps the paradigm of an unreasonable restraint of trade" and as being "ordinarily" condemned as illegal *per se*. The *per se* approach was not adopted in *NCAA* because of a finding that, in the particular circumstances, "horizontal restraints on competition are essential if the product is to be available at all" (*ibid.*). See also C.F. Rule, "Criminal Enforcement of the Antitrust Laws: Targeting Naked Cartel Restraints" (1988) 57 Antit. L.J. 257 at 262-63.

[140]Rule, *ibid.*

[141]See *Palmer* v. *BGR of Georgia, Inc.*, 111 S. Ct. 401 at 403 (1990); *U.S.* v. *Topco Associates, Inc.*, 405 U.S. 596 at 608 (1976). See also Rule, *ibid.*

[142]The traditional rule is discussed in *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 at 289-90, 293-94 (1984). Note that the Court appeared to relax the traditional rule when it subsequently held, *ibid.* at 296, that the *per se* rule would not be applied unless the boycotters possess "market power or exclusive access to an element essential to effective competition ..." In *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447 at 458 (1986), the Supreme Court stated: "the per se approach [to boycotts] 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 ..."

[143]F. Easterbrook, "Ignorance and Antitrust" in T.M. Jorde & D.J. Teece, eds., *Antitrust, Innovation, and Competitiveness* (New York: Oxford University Press, 1992) 119 at 129-30. See also *U.S.* v. *Container Corp.*, 393 U.S. 333 at 341 (1969).

[144]Consumer and Corporate Affairs Canada, *Background Papers — Stage 1 Competition Policy*

tion.[145] Nevertheless, notwithstanding the unlimited fines that are available under section 61, the Director does not appear to have seriously pursued this avenue of recourse.

The Supreme Court could also have recognized that some agreements which incidentally have the effect of fixing prices or allocating markets may not prevent or lessen competition unduly if they are *pro-competitive* in other respects. Unfortunately, the Supreme Court's failure to more thoroughly discuss the issue of agreements which affect prices may have the chilling effect of deterring many business persons from devoting significant resources to seriously considering proposals to enter into such agreements.

In addition to the foregoing, the Supreme Court implicitly declined to take advantage of the opportunity to clarify the risks of entering into exclusionary agreements and agreements which might facilitate co-ordinated conduct (*e.g.* agreements to adopt what are known as "facilitating practices").[146] Even where such agreements are not collateral to a price-fixing or other more obviously anti-competitive agreement, they may prevent or lessen competition unduly, if, for example, they result in increased prices, a greater stabilization in prices or a greater convergence in prices. The *PANS* decision also provided no insight into the meaning of Gonthier J.'s statement that "[a] particularly injurious behaviour may also trigger liability even if market power is not so considerable."[147] Given that he had already addressed price-fixing and market allocation when he made this statement, one can only speculate as to what he may have had in mind. Perhaps agreements which have the effect of reducing product development or product availability in the medical field would fall within this category.

F. Partial Rule of Reason Approach

The affirmation that "[c]onsiderations such as private gains by the parties to the agreement or counterbalancing efficiency gains by the public lie therefore

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(April 1976). It is stated that "it is the Director's view that if the members of a trade providing a service to the public sought by agreement or threat to get their fellow members to charge higher prices for their services, each of the persons shown to have attempted to exert such influence could be guilty of the offence" (*ibid.* at 76).

[145]See *e.g. R.* v. *Campbell* (1979), 51 C.P.R. (2d) 284 (B.C. Co. Ct.); *R.* v. *Schelew* (1984), 78 C.P.R. (2d) 102 at 111-12 (N.B.C.A.); *R.* v. *Brouillette* (3 December 1982), (Que. Sup. Ct.) [unreported].

[146]Soon after H.I. Wetston assumed the role of Director, he observed:

> Collusion can also be greatly facilitated by a variety of other practices that limit the ability of individual firms to "cheat" on their co-conspirators, a practice which can lead to the eventual breakdown of any cartel. Practices used to prevent cheating may include price posting and open-pricing policies, the allocation of specific buyers or geographic markets to particular suppliers, the maintenance of market shares, the pooling of profits, or the use of most-favoured-nation (buyer) clauses, which require price cuts to be passed on to all consumers. Such measures enhance the transparency of business transactions and thereby make it easier to enforce an agreement (*supra* note 8 at 39).

See also J.L. Howard & W. Stanbury, "Oligopoly Power, Co-ordination and Conscious Parallelism" in F. Mathewson, M. Trebilcock & M. Walkers, eds., *The Law and Economics of Competition Policy* (Vancouver: Fraser Institute, 1990) at 219.

[147]*Supra* note 1 at 657.

outside of the inquiry under [paragraph 45(1)(*c*)],"[148] brings into sharp focus an unfortunate and unjustifiable inconsistency in the *Act*. This position with respect to section 45 is consistent with the Court's earlier rulings.[149] For example, in *Howard Smith*, the Court stated: "The statute proceeds upon the footing that the prevention or lessening of competition is in itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint."[150] Cartwright J. added, "once it is established that there is an agreement to carry the preventing or lessening of competition to the point mentioned, injury to the public interest is conclusively presumed..."[151]

The view that competition is an end in itself, and that public and private benefits are not relevant if the agreement prevents or lessens competition unduly, is a crude consumers' surplus approach. It focuses on the preservation of competition to prevent significant or serious injury to consumers, *i.e.* redistribution of significant wealth from consumers to producers.[152] A *bona fide* consumers' surplus approach to agreements in restraint of trade would declare all horizontal agreements in restraint of trade which result in a non-trivial price increase or reduction in service, quality, variety, etc., to be *per se* illegal, unless it could be established that the consumers' surplus would, on balance, increase, *e.g.* as a result of the development of a new product or an increase in output.

By contrast, a total surplus approach would permit agreements to proceed if, in the relevant market, the reduction in consumers' surplus resulting from the anti-competitive effect of the agreement was outweighed by either an increase in producers' surplus (*e.g.* resulting from efficiency gains), an increase in consumers' surplus (*e.g.* resulting from the creation of a new product) or a combination of these two welfare increasing effects. A total welfare approach is slightly broader than a total surplus approach in that it also permits an assessment of positive and adverse effects on consumers' surplus and producers' surplus across all markets affected by the agreements, to the extent that they would not likely otherwise occur.

The provisions in section 86 of the *Act* pertaining to specialization agreements reflect a total welfare approach to that particular category of horizontal restraints. The merger provisions in sections 92 and 96 also reflect a total welfare approach. The same is arguably true of the joint venture provisions in section 95 of the *Act*. The superior competitive performance provisions in subsec-

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[148]*Ibid.* at 649-50.

[149]See *e.g. Weidman*, *supra* note 63; *Stinson-Reeb*, *supra* note 63 at 280; *Howard Smith*, *supra* note 63 at 410-11. Compare this position with the position taken by the majority in *Aetna*, *supra* note 17. There, Ritchie J. stated that the trial judge had not erred in considering evidence of public benefit to ascertain whether the object and design of the price-fixing agreement in question was to prevent or lessen competition unduly. As Laskin C.J.C. pointed out in dissent, this position was contrary to the above mentioned precedents.

[150]*Ibid.* at 411.

[151]*Ibid.* at 427. See also Laskin C.J.C.'s dissent in *Aetna*, *supra* note 17 at 737.

[152]See *e.g.* P. Gorecki & W. Stanbury, *The Objectives of Canadian Competition Policy 1888-1983* (Montreal: The Institute for Research on Public Policy, 1984) at xviii. The intention of Parliament to use the law against anti-competitive agreements to prevent redistributions of wealth is further elaborated *ibid.* at 14ff. See also *ibid.* at 34.

tion 79(4) of the *Act* may also provide scope for taking a total surplus or total welfare approach to the review of abuse of dominance matters.

It is not immediately obvious why the enlightened and state-of-the-art approach that Parliament decided to take in 1986 with respect to mergers, joint ventures and specialization agreements should not be extended to other agreements in restraint of trade. There would not appear to be any sound justification for adopting two very different economic orientations to agreements in restraint of trade that can have the same kinds of positive and negative effects on consumers' surplus and producers' surplus. All agreements in restraint of trade should be evaluated by a total welfare standard because it is only in the total welfare framework that the full costs to society of prohibiting an agreement can be balanced against the costs of permitting it to proceed.[153] Ironically, the *PANS* decision probably eliminates any hope of amending section 45 in the foreseeable future.

G. *The First Elements of* Actus Reus *and* Mens Rea *Remain Unchanged*

The offence created by paragraph 45(1)(*c*) has two *actus reus* elements and two *mens rea* elements. To establish the *actus reus* of the offence, the Crown must prove beyond a reasonable doubt:

1. the existence of a conspiracy, combination, agreement or arrangement to which the accused was a party; and
2. that the conspiracy, combination, agreement or arrangement, if (not when) implemented, would likely prevent or lessen competition unduly.[154]

The Crown has traditionally been required to establish beyond a reasonable doubt the existence of subjective *mens rea* in respect of the first of the above elements of *actus reus*. This has not changed. In addition, the *PANS* decision leaves the law with respect to the first element of *actus reus* unchanged.

The words "conspire, combine, agree or arrange" all "express the act of agreeing."[155] This requires more than that two or more parties simply "intentionally arouse in each other an expectation that they will act in a certain way."[156] The Ontario Court of Appeal has held that "all four words contemplate a mutual arriving at an understanding or agreement between the accused and some other

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[153]Like a consumers' surplus approach, a total welfare standard would permit a "*per se*" approach to "naked" price-fixing, bid-rigging and "naked" market allocation, and would permit the use of a 35% market share screen to dramatically narrow the class of cases that would require a full trade-off assessment.

[154]*Anthes*, *supra* note 24 at 178. See also the Supreme Court's decision in *PANS*, *supra* note 1 at 643, 656, and the Nova Scotia Court of Appeal's decision, *supra* note 3 at 185.

[155]*R.* v. *Gage (No.2)* (1908), 13 C.C.C. 428 at 449, 18 Man. R. 175 at 220 (C.A.) [hereinafter *Gage*].

[156]*R.* v. *Armco Canada Ltd.* (1976), 13 O.R. (2d) 32 at 41, 30 C.C.C. (2d) 183 (C.A.) [hereinafter *Armco* cited to O.R.], leave to appeal den'd (1976) 13 O.R. (2d) 32n, 30 C.C.C. (2d) 183n (S.C.C.), rev'g (1974), 6 O.R. (2d) 521, 21 C.C.C. (2d) 129 at 191 (H.C.J.), where the trial judge relied on *British Basic Slag Ltd.* v. *Registrar of Restrictive Trading Agreements*, [1963] 1 W.L.R. 727 at 739 (H.L.).

person."[157] The following passage from a case which dealt with charges of conspiring to have possession of extorted funds succinctly describes the first element of the *actus reus* of section 45:

> The word "conspire" derives from two Latin words, "con" and "spirare," meaning "to breathe together." To conspire is to agree. The essence of criminal conspiracy is proof of agreement. On a charge of conspiracy the agreement itself is the gist of the offence ... The *actus reus* is the fact of agreement ... The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme while others may drop out. So long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end.[158]

Communication is a necessary but not a sufficient condition for a conspiracy to exist. The Crown must go further and establish sufficient two-way communication to constitute an agreement. "A conspiracy may be proved by proof that the parties accused actually met together and entered into an alleged agreement or it may be inferred by proof of a course of conduct."[159] Given that direct evidence of the agreement is available only in rare cases, it must typically be established from "several isolated doings."[160] In this regard, it is relevant to note that subsection 45(2.1) provides:

> 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.

Price followership and other forms of conscious parallelism which result from unilateral, as opposed to collective, decisions by market participants to maintain or not to depart from the *status quo*, do not fall within the scope of section 45. The law recognizes that in highly concentrated markets competitors may independently arrive at similar decisions with respect to the optimal strategy to pursue, and that the parallel behaviour which results is entirely rational.[161] The law does not require competitors to compete more strongly than what they believe to be in their own interest, as long as the resulting conduct is not the product of a verbal or non-verbal agreement.[162]

However, information-sharing agreements and other agreements that do not directly bear on prices but which may have the effect of leading to a price increase or to greater stabilization or convergence of prices, may well contra-

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[157]*Armco*, *ibid.* at 41. See *R.* v. *Aetna Insurance Co.* (1975), 22 C.C.C. (2d) 513 at 542 (N.S.S.C.A.D.), rev'd on other grounds, *supra* note 17; *Gage*, *supra* note 155. Contrast these decisions with Laidlaw J.A.'s 1961 ruling in *Electrical Contractors*, *supra* note 110 at 157.

[158]*Papalia* v. *R.*, [1979] 2 S.C.R. 256 at 276, 37 C.C.C. (2d) 469.

[159]*Northern Electric*, *supra* note 24 at 434.

[160]*Paradis* v. *R.*, [1934] S.C.R. 165 at 168, 61 C.C.C. 184. See also *R.* v. *Canadian General Electric Co.* (1976), 15 O.R. (2d) 360 at 374, 34 C.C.C. (2d) 489 (H.C.J.) [hereinafter *General Electric* cited to O.R.].

[161]*Atlantic Sugar*, *supra* note 18 at 655-66, 667-68. See also *General Electric*, *ibid.* at 389; *R.* v. *Armco Canada Ltd.* (1974), 6 O.R. (2d) 521 at 579-80, 21 C.C.C. (2d) 129 at 187-88 (H.C.J.), aff'd *supra* note 156.

[162]*Atlantic Sugar*, *ibid.*

vene section 45 if a reasonable business person would foresee that such results were likely to flow from the agreement in question. This is particularly so where the market is already somewhat uncompetitive.[163] With respect to the subjective element of *mens rea*, there must exist an intention to put a common design into effect.[164] "[M]ere words purporting agreement without an assenting mind to the act proposed are not sufficient."[165]

> [T]he Crown must prove that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement. Once that is established, it would ordinarily be reasonable to draw the inference that the accused intended to carry out the terms in the agreement, unless there was evidence that the accused did not intend to carry out the terms of the agreement.[166]

In *R.* v. *Canada Packers Inc.*, a 1988 decision of the Alberta Court of Queen's Bench, Lomas J. stated: "The law requires an exchange of promises between parties which, if legal, would be enforceable. It further requires an intention by the party charged to abide by those promises."[167] These statements and others like them in the decision[168] have attracted surprisingly little commentary. They confuse the law relating to criminal conspiracies with the law of contracts. There does not appear to be any other authority in support of the proposition that the Crown must establish an exchange of promises between the accused and that the accused intended to abide by their promises. Indeed, if the Crown had to demonstrate the latter requirement, parties to an illegal agreement could make the Crown's task virtually impossible by departing from their agreement from time to time, and using such departures as evidence that they did not intend to be bound by their agreement. Even if such parties did not have the foresight to plan in this way, the marketplace would eventually come to their rescue because, as the OPEC cartel demonstrates, anti-competitive agreements are inherently unstable. There is a natural incentive to cheat on the other participants to an anti-competitive agreement. In short, it would be very risky to proceed with a course of action on the basis of an expectation that this aspect of the *Canada Packers* decision will be followed by another court. As one leading authority has noted: "It may be asserted with a degree of certainty that an 'agreement' in the context of criminal conspiracy is not equivalent to contractual agreement."[169]

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[163]See *PANS*, *supra* note 1 at 657.

[164]*R.* v. *O'Brien*, [1954] S.C.R. 666 at 668, 110 C.C.C. 1 [hereinafter *O'Brien* cited to S.C.R.].

[165]*Ibid.* at 670.

[166]*PANS*, *supra* note 1 at 659-60.

[167](1988), 19 C.P.R. (3d) 133 at 179 (Alta. Q.B.).

[168]See *e.g. ibid.* at 168.

[169]M. Goode, *Criminal Conspiracy in Canada* (Toronto: Carswell, 1975) at 10. See also P. MacKinnon, "Developments in the Law of Criminal Conspiracy" (1981) 59 Can. Bar Rev. 301 at 306-07; G. Orchard, "'Agreement' in Criminal Conspiracy — 1" [1974] Crim. L.R. 297 at 300-01; *R.* v. *Tibbits and Windust*, [1902] 1 K.B. 77 at 89 (C.C.R.); and Estey J.'s dissent in *Atlantic Sugar*, *supra* note 18 at 395-97. At 396, Estey J. observes:

> The "act of agreeing" is but another way of describing a meeting of the minds of the persons charged. How those minds meet or how the act of agreeing occurs is not limited to the rules and practices of contract law. The four words describe "agreement" in the broad sense accorded to that word in the language and not the narrow term of art from a specialized branch of the law.

Once the Crown establishes beyond a reasonable doubt that the accused intended to enter into the impugned agreement and in fact did enter into that agreement with at least one other party who shared a common design, all that remains to be proved is that the likely effect of the agreement would be to prevent or lessen competition unduly, and that the accused was aware or ought to have been aware that the agreement would likely have such an effect.[170] It is not necessary for the Crown to prove that there were any acts in furtherance of the agreement,[171] "although evidence of the effects offers good guidance as to the likely effects of the agreement"[172] and "may be evidence of the agreement."[173] Once a person enters into an agreement proscribed by section 45, an offence is committed, even if the person later refuses to put the plan into effect.[174] An offence is also committed even if "the agreement could not have been successfully carried into execution."[175] Although subjective intent going to the effects of the agreement is not required, parties to an agreement who have market power would probably be convicted if the Crown established that the purpose or intention of the parties was to prevent or lessen competition unduly.[176]

H. Update: The Trial Judgment on the Merits

Soon after the Supreme Court's decision in *PANS*, the Crown's case on the merits against the Nova Scotia Pharmaceutical Society and the Pharmacy Association of Nova Scotia proceeded to trial. On February 26, 1993, the Supreme Court of Nova Scotia rendered its decision in that matter.[177] Space does not permit more than a brief summary of that ruling. In short, Mr. Justice Boudreau found, *inter alia*, that:

1. the accused had been parties to "a combination, agreement or arrangement such as was capable of violating s. 32,"[178] *i.e.*, that they were parties to an agreement with their "pharmacy operator members to act collectively vis-a-vis third party insurers,"[179] with respect to "direct-pay" insurance plans;
2. the likely (and actual) effect of the agreement[180] was "an undue lessening of competition in the third party insurer direct-pay market ... [which] had the effect of removing or lessening a significant number of competitive elements

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[170]*PANS*, *supra* note 1 at 656-60; *Container Materials*, *supra* note 19 at 158-59; *Anthes*, *supra* note 24 at 178.

[171]*Container Materials*, *ibid.* at 159.

[172]*PANS*, *supra* note 1 at 656. See also *Container Materials*, *ibid.* at 159: "The evidence ... of what was done is merely better evidence of [the object of the agreement] ... than would exist where no act in furtherance of the common design had been committed."

[173]*Northern Electric*, *supra* note 24 at 452.

[174]*O'Brien*, *supra* note 164 at 669.

[175]*Howard Smith*, *supra* note 63 at 412. See also *Anthes*, *supra* note 24 at 171.

[176]*Anthes*, *ibid.* at 177-78; *U.S.* v. *United States Gypsum Co.*, 438 U.S. 422 at 444, 436 note 13 (1978).

[177]*Supra* note 6.

[178]*Ibid.* at 322.

[179]*Ibid.* at 327. For example, they were found to have acted collectively to bring particular insurers "in line with contractual terms or maximum allowable tariffs acceptable to the Society/Association and a vast majority of its members" (*ibid.* at 332).

[180]Mr. Justice Boudreau pointed out that the Crown is not required to establish "that the accused would or should have known that the likely effect of such an agreement would be to 'unduly lessen

from this market, thus seriously lessening the competition for the supply of prescription drugs and pharmacists' dispensing services to insurers";[181] but that

3. it had not been established beyond a reasonable doubt that the accused "were aware or ought to have been aware, or would have known or should have known, that the effects of the arrangements ... would lead to the likely effects which I have found to be an undue lessening of competition."[182]

In arriving at the latter finding, Mr. Justice Boudreau took note of Gonthier J.'s observation that "the Crown could, in most cases, establish the objective fault element" of section 45.[183] However, he stated that the case before him was "*not one of those cases*,"[184] in part because it did not involve what he would consider "to be an ordinary or usual market situation."[185] In this regard, he contrasted what he characterized as the "intricate and complicated effects of the various dealings between the Society/Association, the member pharmacies, the Government Plan and the third party insurers" with "a straight price fixing case."[186] This aspect of Mr. Justice Boudreau's decision is somewhat surprising, in part because he appeared to accept the Crown's claim that the accused had organized several

> "boycotts", whereby the vast majority of participating pharmacies in the province, on the direction and advice of the Society/Association and its committees, acted collectively in either terminating or providing notice of termination of their participation in a particular insurers' [*sic*] direct-pay plan in order to bring that particular insurer (or insurers) in line with contractual terms or maximum allowable tariffs acceptable to the Society/Association and a vast majority of its members.[187]

He further found that "such actions usually brought about agreement between the parties, sometimes on the basis of compromise, but more often than not, on the basis of the position taken by the Society/Association."[188]

II. Developments in Enforcement: Higher Fines, Prosecution of Individuals and Immunity

The Director has stated that enforcement of the conspiracy and bid-rigging provisions of the *Act* is a priority for the Bureau. This Part of the paper explores

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competition' in the legal sense, but only that the effects were as I have found, which amount in law to an undue lessening of competition" (*ibid.* at 337).

[181] *Ibid.* at 334. In arriving at this finding, Mr. Justice Boudreau discussed at some length several of the market power assessment criteria highlighted by the Supreme Court, including barriers to entry, product differentiation, countervailing power and the cross-elasticity of demand between direct-pay plans and reimbursement plans. After reviewing these matters, he concluded "that the accused did have a moderate degree of market power which, though I would not classify it as excessive, was sufficient, however, to permit the accused to behave relatively independently of the insured market" (*ibid.* at 331). He also held that the fact that the impugned conduct "was approved and participated in fully by third party insurers ... does not make the lessening of competition any less undue" (*ibid.* at 334).

[182] *Ibid.* at 339.

[183] *PANS*, *supra* note 1 at 660.

[184] *Supra* note 6 at 337.

[185] *Ibid.*

[186] *Ibid.* at 339.

[187] *Ibid.* at 332.

[188] *Ibid.*

recent developments in the enforcement of these provisions. Specifically, developments in three areas will be considered: higher fines, prosecution of individuals and the Director's policy respecting corporate immunity from prosecution. The discussion includes the implications of these developments and, in the case of the Director's immunity program, some practical observations relevant to seeking a recommendation for immunity.

A. Higher Fines

In 1990, the Director stated that "to date, ... fines have functioned as little more than a licence fee."[189] It is not surprising therefore that the Director's announced policy to "get tough" with conspiracy and bid-rigging includes seeking greater fines.[190] In the proceedings in 1990 against various flour companies, each of the three largest participants in a bid-rigging scheme were fined $1 million. These fines were at that time the highest ever, but the following year a new record was set in the compressed gas proceedings, where three corporations were each fined $1.7 million for conspiracy.

However, higher fines do not necessarily provide greater deterrence. A fine of any size only achieves deterrence to the extent that the expected value of the potential cost of engaging in illegal conduct exceeds the expected value of the gain. In his 1990 speech, the Director stated:

> Greater compliance with antitrust laws will come about only when penalties are sufficient not only to appropriately punish collusive behaviour once detected, but also to deter other persons from engaging in such activities. Successful deterrence of such crimes requires that penalties be greater than the expected profits from successful collusion. If the penalties only equal the actual profits reaped by the defendants in individual cases, they will not be sufficient. We know that the crime of robbery would not be adequately deterred if convicted persons merely faced the prospect of having to return their stolen property to society.[191]

While the Director recognizes that fines are not likely to deter collusive conduct unless they exceed actual profits, the Bureau does not now have a systematic method of determining an appropriate fine in any particular case. This is in contrast to the United States, where detailed sentencing guidelines are used to determine appropriate fines.[192]

Under the sentencing guidelines promulgated by the U.S. Sentencing Commission,[193] the base fine for price-fixing, bid-rigging and market allocation agreements is typically twenty per cent of the volume of affected commerce. The volume of affected commerce is the volume of commerce by the accused

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[189]Wetston, *supra* note 8 at 9.

[190]See *e.g.* H.I. Wetston, "Notes for an Address to the Canadian Corporate Counsel Association" (Ottawa: Consumer and Corporate Affairs Canada, 19 August 1991) at 3 [hereinafter 1991 speech]; H.I. Wetston, "Decisions and Developments: Competition Law and Policy" (Ottawa: Consumer and Corporate Affairs Canada, 8 June 1992) at 9 [hereinafter 1992 speech].

[191]*Supra* note 8 at 46.

[192]However, staff at the Bureau are currently in the early stages of developing sentencing guidelines which incorporate many of the principles reflected in the U.S. sentencing guidelines.

[193]The portion of the Sentencing Guidelines pertaining to antitrust offences is published in 183 *Trade Reg. Rep.* (5 November 1991) at ¶13,250 (p. 21,051).

in the goods or services that were affected by the violation. The Sentencing Commission's commentary to the guidelines[194] states that a percentage of commerce standard is used to avoid the time and expense of determining the actual gain or loss. This commentary also states that the average gain from price-fixing is estimated to be ten per cent of the selling price. A fine of twenty per cent of the selling price would have the effect of more than disgorging this gain, and the disincentive increases as the dollar value of the affected commerce increases. The guidelines permit adjustments to the base fine to account for aggravating and mitigating factors. These adjustments can result in fines ranging from a low of fifteen per cent to a high of eighty per cent of the volume of affected commerce.

In the absence of sentencing guidelines in Canada, sentencing recommendations by Bureau staff have lacked consistency. They have also apparently left Bureau staff wondering whether the recommended fines would be sufficient to achieve deterrence. For example, in the proceedings against several flour companies for bid-rigging, the Bureau apparently did not know whether the fine would have a deterrent effect. While the $1 million fines were at the time the largest in history, it was reported in the press that "[c]ompetition officials admit they have no way of knowing how the $1 million fines compare to the illegal profit made by Ogilvie, Robin Hood and Maple Leaf from the bid-rigging scheme. It lasted for 12 years — from 1975 to 1987 — and involved federal contracts worth $500 million."[195]

The same article reported that a "federal official" had stated that "[i]t's inherently logical that someone wouldn't do this for 12 years if there wasn't an economic incentive. ... But the economic analysis necessary to know what that was would have to be pretty expensive, costly and time-consuming."[196]

While the Bureau has not allocated significant resources to estimating the fines necessary to disgorge illicit gains and provide deterrence, the Director seems to be pursuing an incremental approach to raising fines toward the $10 million maximum under section 45.

For corporations, the trend to higher fines highlights the importance of avoiding violations of the conspiracy and bid-rigging sections. Simply put, compliance programs are now good business. A good compliance program will assist a corporation and its employees in complying with the law. However, compliance programs can have an additional benefit: they may influence the manner in which the Director exercises his discretion in enforcement proceedings. The Director's 1989 Information Bulletin on the Program of Compliance[197] states that, in determining an appropriate course of action, the Director will consider whether the conduct in question "was in keeping with the corporate policy

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[194]*Ibid.* at 21,052.

[195]D. Fagan, "Getting Off With a Nod and a Wink" *The Globe and Mail* (17 December 1990) B1 at B2.

[196]*Ibid.*

[197]Director of Investigation and Research – *Competition Act* (Information Bulletin No. 3) (Ottawa: Consumer and Corporate Affairs Canada, June 1989) at 3.

of the companies involved."[198] This implies that the presence of an effective compliance program may be considered to be a mitigating factor in determining the recommended penalty. For example, the existence of an effective compliance program might be relevant to the Director's willingness to accept a prohibition order, to which the corporation and the Director consent, to resolve conspiracy or bid-rigging charges. This is obviously preferable to a fine.

While an effective compliance program may be a mitigating factor, there is no reason to believe that a corporate policy that, without more, prohibits the violation of competition laws will carry much weight in negotiations with the Director. The Director probably requires a compliance program to be effective in achieving its goals before it will be taken into account in determining the appropriate penalty. This is the position of antitrust authorities in the United States.[199] James Rill, the U.S. Assistant Attorney General, Department of Justice from 1989 to April 1992, has stated that

> participation in an offence by a low-level individual [who is] nevertheless [granted] substantial authority, creates a rebuttable presumption that the organization lacked an effective compliance program. Also, if the organization unreasonably delayed reporting the offence to the government after becoming aware of it, it cannot receive the ... reduction for having an effective compliance program.[200]

Our experience has been that there is an increasing number of corporations seeking information on compliance programs in Canada. Included among these corporations are Canadian subsidiaries of U.S. corporations that wish to implement U.S.-style compliance programs.

In summary, the trend to higher fines highlights the importance of compliance and compliance programs. Compliance programs help to avoid illegal conduct and there are reasons to believe that the presence of an effective compli-

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[198]*Ibid.* at 13.

[199]See Rill, *supra* note 92 at 3-6. Mr. Rill cites the following as the seven steps that the United States Sentencing Commission has stated are essential for any compliance program to be counted for mitigation:

1. The organization must have established standards and procedures to be followed by its agent and employees that are reasonably capable of reducing the prospect of criminal conduct.
2. A specific high-level person within the organization must have been designated and assigned ultimate responsibility to ensure compliance with those standards and procedures.
3. The organization must have used due care not to delegate significant discretionary authority to persons whom the organization knew, or should have known, had a propensity to engage in illegal activities.
4. The organization must have effectively communicated its standards and procedures to agents and employees.
5. The organization must have taken reasonable steps to achieve compliance with its standards.
6. The standards must have been consistently enforced through appropriate disciplinary mechanisms.
7. After an offence has been detected, the organization must have taken all reasonable steps to respond appropriately to the offence and to prevent further similar offences.

See *supra* note 193.

[200]See Rill, *ibid.* at 4.

ance program will be relevant to the willingness of the Director to recommend a prohibition order or lesser penalty than might otherwise be the case. In that regard, the Director might look to factors similar to those mentioned in the U.S. Sentencing Guidelines[201] in evaluating a compliance program.

The trend to higher fines may have additional implications for public companies under the disclosure rules contained in securities laws. Securities legislation in Canada typically requires public companies to make prompt disclosure of material changes in their affairs. An example is the obligation in Ontario to issue a "material change report" and then file a press release when a "material change" occurs in the affairs of the issuer.[202] A "material change" is defined as a "change in the business, operations or capital of a corporation that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the corporation."[203] The disclosure obligation might be triggered if, for example, the discovery of illegal activity and its cessation would cause a significant reduction in the profitability of a corporation.[204]

A related disclosure requirement is the obligation to disclose all "material facts"[205] in prospectuses and proxy statements. A material fact is defined in the *Securities Act* (Ontario) as follows: "A 'material fact', where used in relation to securities issued or proposed to be issued, means a fact that significantly affects, or would be reasonably expected to have a significant effect on, the market price or value of such securities."

This general rule would probably require disclosure of any material fines which are imposed against the corporation or any material awards of damages which are obtained pursuant to an action under section 36 of the *Securities Act*, which allows for the recovery of "the loss or damage proved to have been suffered ... together with any additional amount that the court may allow not exceeding the full cost ... of any investigation in connection with the matter and the proceedings under this section."[206]

In addition to the general requirement for disclosure of all material facts, there are specific rules respecting the financial disclosure to be made in prospectuses and other disclosure documents. The regulations under the *Securities Act* (Ontario) make clear that the financial statements to be included in a prospectus and other disclosure documents must be prepared in accordance with

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[201]See *supra* note 199.

[202]See s. 75 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended.

[203]*Ibid.* at s. 1(1).

[204]In a 1979 panel discussion entitled "Is There an Obligation to Report Violations?" (1979) 48 Antitrust L.J. 119 at 129, members of a panel analysing a breach of antitrust laws suggested that in a situation where, in the absence of the unlawful arrangement, a company's profits would fall by 25%, there was an obligation under U.S. securities laws to disclose the facts in a current prospectus. While this is a different form of disclosure, the same principle might be applied to continuous disclosure obligations.

[205]See *e.g. Securities Act*, *supra* note 202, s. 56(1).

[206]*Ibid.* It is worth noting that s. 36(2) provides that a conviction for conspiracy or bid-rigging is, in the absence of any evidence to the contrary, proof that the person engaged in that conduct in a civil proceeding under s. 36 and any evidence used in the criminal proceeding can be used as evidence in the civil proceeding.

generally accepted accounting principles, specifically the recommendations of the Canadian Institute of Chartered Accountants.[207] Section 3290 of the *CICA Handbook* defines a contingency as an "existing condition or situation involving uncertainty as to possible gain or loss to an enterprise that will ultimately be resolved when one or more future events occur or fail to occur ..." Section 3290 provides a recommendation, which is effectively a statement of generally accepted accounting principles, that the existence of a contingent loss at the date of the financial statements should be disclosed in the notes to the financial statements when the occurrence of a future confirming event (namely, an event which confirms that a loss was incurred as at the date of the financial statements) is not determinable. A commentary to this principle provides that there are "certain unlikely contingent losses which, if confirmed, would have a significant adverse effect on the financial position of an enterprise. It is desirable for such unlikely contingent losses, which might include lawsuits and guarantees on behalf of others, to be disclosed."[208]

If a fine (or civil liability under section 36 of the *Securities Act*) would have "a significant adverse effect on the financial position" of a company, it may be that such a contingency should be disclosed in the notes to the financial statements of the corporation. Section 3290 states that in providing disclosure of a contingent loss in the notes to the financial statements, the disclosure should include the nature of the contingency and an estimate of the amount of the contingent loss or a statement that the amount of loss cannot be estimated. Given the requirements of the *Securities Act* (Ontario), financial statements with notes that comply with section 3290 of the *CICA Handbook* will be included in public disclosure documents.

In summary, the trend to higher fines underscores the importance of compliance and compliance programs. Depending upon the size of the public company and the circumstances involved, the trend in fines may at some point have public disclosure implications for public companies.

B. Prosecution of Individuals

Like fines, the prosecution of individuals in Canada has historically been criticized as providing very limited deterrence. To date, no individual has been sentenced to jail for any offence under the conspiracy provisions of the *Act*, although the *Dredging* case[209] involved individual jail sentences in the context of *Criminal Code* charges arising from bid-rigging.

In August 1991, the Director stated: "Our review of cases over the past several years has led me to conclude that more charges against individuals will be necessary to strengthen deterrence incentives."[210]

And, in 1990,

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[207]See ss. 1(3) and 2(1) of the Regulation under the *Securities Act*, R.R.O. 1980, Reg. 910, as amended.

[208]*CICA Handbook* (Toronto: Canadian Institute of Chartered Accountants, 1981) s. 3290.17.

[209]See *R.* v. *McNamara (No. 2)* (1981), 56 C.C.C. (2d) 516 (Ont. C.A.).

[210]1991 speech, *supra* note 190 at 3.

> [A]n increase in the incidence of individuals charged under the conspiracy or bid-rigging provisions is a necessary by-product of achieving deterrence. The Bureau is now conducting its investigations with a view to identifying cases where individual charges would be appropriate, and gathering evidence which would support such action.[211]

One of the most recent examples of the Director's approach to prosecution of individuals is the conviction and record $500,000 fine levied against Donald Cormie for misleading advertising. While this represented a significant increase from prior fines, there are reasons to believe that jail sentences for individuals may also be sought in the future.

First, Crown prosecutors have said so. In the recent compressed gas proceedings, the Crown prosecutor of the two executives who were fined stated publicly that further charges would be laid against other individuals involved in the conspiracy, and that it was possible the Crown would seek jail sentences, depending on the severity of the offence.[212]

Second, the Director recognizes that the objective of achieving deterrence may be frustrated if corporations subsequently indemnify executives for fines levied against them. The Director has observed that "collusion is also unlikely to be adequately deterred if the penalties awarded in such cases are paid directly or indirectly by the corporation involved, rather than by the executives responsible for the decision to break the law."[213]

While there may be arguments that indemnity will not legally be available to executives and that therefore fines should be viewed as an adequate deterrent, as a practical matter there is reason to believe that indemnification may occur and that the Director's concerns are legitimate.[214]

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[211] *Supra* note 8 at 46-47.

[212] A. Bradley, "Gas Company Chiefs Fined for Price Fixing" *The Financial Post* (21 October 1991) A3.

[213] *Supra* note 8 at 46-47. Also see the comments of Mr. Justice La Forest in *Thomson Newspapers*, *supra* note 12 at 514 on this point. Similarly, in the United States, in a 1977 memorandum to attorneys in the Antitrust Division, Donald Baker, then Assistant Attorney General in charge of the Antitrust Division, said that while fines are a poor second choice, imposing fines "is based upon the assumption that the individual himself will bear the burden of the fine. If the individual is or will be indemnified, and this is known to us, we should argue this to the court as further reason for imposing a jail sentence."

[214] Under Canadian corporate law, it is generally the case that indemnity may be given by a corporation to its directors and officers against the cost and expenses of defending an action and the imposed fine, so long as the director or officer was acting in the best interests of the corporation and he had reasonable grounds for believing that what he was doing was lawful. See *e.g.* s. 124(1) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended [hereinafter *CBCA*]. S. 124(1) provides that a corporation "may" indemnify directors and officers in certain circumstances. It is arguable that a necessary implication of the permissive language (*i.e.* the use of "may" rather than "shall") is that s. 124(1) sets out all the circumstances in which indemnity may be granted. If that is so, it is noteworthy that s. 124 does not allow for indemnification to all employees, and that there may be significant doubt as to whether a director or officer is entitled to indemnification in a conspiracy case, given the requirement that the person have had "reasonable grounds for believing that his conduct was lawful." Even the provision which states that, in the circumstances therein described, a director or officer *must* be indemnified (s. 124(3)) requires the director or officer to have reasonable grounds for believing his conduct was lawful. It may be possible to argue the indemnification is justified on the basis that, at least until he is convicted, the corporation's

Third, the Director has said that conspiracy is a form of theft[215] and it is reasonable to expect that he would seek to treat it like theft. By way of comparison, it should be noted that corporate officers are frequently sent to jail for their part in helping a corporation evade the payment of income tax.[216]

Finally, another important antitrust authority, the DOJ, regularly seeks and obtains prison sentences. The U.S. Sentencing Commission has stated its belief that "the most effective method to deter individuals from committing [price-fixing] is through imposing short prison sentences coupled with large fines."[217]

In summary, there are reasons to believe that the Director may soon seek prison sentences. There is also reason to believe that a court might be willing to impose prison sentences.[218] Recent case law indicates that courts are now willing to sentence individuals to jail for violation of public welfare offences. For example, in *R.* v. *Varnicolor Chemical Ltd.*,[219] an individual was sentenced to eight months in jail for violating Ontario's *Environmental Protection Act*. In *PANS*, the Supreme Court of Canada observed that paragraph 45(1)(*c*) of the *Act* "remains at the core of the criminal part of the Act ... [and] is not just another regulatory provision."[220]

Individual officers should therefore closely consider the criteria identified by the Director as relevant to deciding whether to recommend prosecution of an individual. These are:

(i) the position of the individual in the organization;
(ii) his or her role in initiating, implementing or enforcing the agreement; and

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interests in preserving its ability to attract competent personnel are served by assisting an individual with his defence. There has not been any reported Canadian case of which the writers are aware which is helpful in resolving the interpretation of these two restrictions in the antitrust context. As a practical matter, directors and officers will likely be indemnified, without ensuring that a court would be satisfied that indemnity is available, because corporations generally believe it to be in their interest to indemnify their executives. However, directors should be careful in extending indemnity in such situations, for directors can be held personally liable for indemnification which was paid in violation of the statutory restrictions (see *e.g.* s. 118(2) of the *CBCA*). However, unless the amount indemnified is a material amount, it is unlikely that the indemnity expense would be publicly disclosed or otherwise brought to the attention of shareholders, who might take issue with the legality of the payment. In that regard, it is important to remember that in the compressed gas proceedings, the record fines imposed against individuals were $75,000, amounts which for many public companies would not be material.

[215]See *e.g. supra* note 8 at 35, where the Director states that unlike "other conduct addressed by competition law, bid-rigging, price-fixing and related activities are widely recognized to be unambiguously harmful. There are no redeeming social benefits. In many cases, the conduct of conspirators amounts to a form of theft from the public on a multi-million dollar scale."

[216]See *e.g.* the chart of prison sentences contained in Revenue Canada's Information Circular IC 80-13.

[217]U.S. Sentencing Guidelines, *supra* note 193. Similarly, in a 1977 memorandum, referred to in note 213, the U.S. Assistant Attorney General, Antitrust Division at that time stated: "Fines are usually poor alternatives to prison sentences and should be used and viewed only as a second choice. ... We should recommend prison first and make it clear that was indeed our recommendation."

[218]See the comments of Mr. Justice La Forest in *Thomson Newspapers*, *supra* note 12 at 514.

[219](1992), 9 C.E.L.R.(N.S.) 176 (Ont. H.C.J.).

[220]*Supra* note 1 at 649.

(iii) the degree of knowledge of illegality or moral turpitude of the particular party.

The Director's willingness to consider whether the individual knew his or her conduct was illegal may distinguish the Canadian policy from the policy in the United States. There is significant doubt that a similar approach would be adopted in the United States.[221]

The most important implication of the Bureau's new focus on the prosecution of individuals is, as with increasing fines, the importance of a compliance program. As mentioned earlier, the presence of an effective compliance program will not only help to prevent transgressions in the first place but also may well be taken into account in the Director's determination of how to proceed.

Another implication of the increased threat of prosecution of individuals is the importance of indemnity agreements for executives. Many corporations have in their by-laws a statement that a corporation *shall* indemnify individuals if certain conditions are met, but not all corporate by-laws have these provisions and corporate statutes typically provide for only limited situations in which an executive is *entitled* to indemnification. A contract can fill the gap when a corporation's by-laws do not provide for indemnity. Further, the statutory provisions and often even corporate by-laws which require indemnification do not expressly require the corporation to pay the costs of the executive's defence as they are incurred, as opposed to following a final resolution of the charges against him or her. It is therefore desirable, from the executive's perspective, that the corporation have an express contractual obligation to reimburse legal fees and other expenses as incurred. Further, an agreement gives the executive the direct right to indemnity without suing the corporation under corporate statutes to enforce the by-laws. An agreement may also help to overcome a corporation's objection to providing indemnity on the basis that it is illegal to do so.[222] If a corporation agrees to provide indemnity, it should be aware that insurance companies typically will not insure against fines imposed on individuals. As a result, any indemnity which is granted will be borne entirely by the corporation.

While an indemnity agreement may be desirable for an executive for these reasons, it must be remembered that the presence of indemnity may in the proper circumstances motivate the Director, in the interests of achieving deterrence, to seek a prison sentence. The need and desirability of such a contract should therefore be carefully weighed by the executive and the corporation.

In summary, the increased prosecution of individuals means that officers should ensure that they and their corporate employer comply with the law and

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[221]A former U.S. Assistant Attorney General, Antitrust Division has stated that the DOJ has difficulty accepting arguments by companies at the pre-indictment phase of an investigation that an employee has transgressed a policy and that the illegal conduct will not occur again because the company has initiated a compliance program. There does not appear to be any leniency given to people who, merely because of an ineffective compliance program, violate the law. See Rill, *supra* note 92 at 2-3.

[222]It may be difficult for a corporation to argue that it is prohibited by corporate law from indemnifying an executive when the corporation has voluntarily executed an agreement expressly calling for an indemnity in precisely those circumstances.

that they should consider the execution of indemnity agreements with the corporation.

C. *Corporate Immunity*

Potentially the most significant development in the enforcement of conspiracy and bid-rigging is the Director's corporate immunity program. The August 19, 1991 speech of Howard Wetston to the Canadian Corporate Counsel Association[223] announced an extension to corporations of the Director's existing immunity program for individuals and set out some of the criteria to be satisfied by corporations seeking immunity. Under the Director's policy, if certain conditions are met, the Director will recommend to the Attorney General that immunity from prosecution be granted.

The possibility of immunity for individuals was mentioned in the June 1989 Information Bulletin on the program of compliance.[224] Also in 1989, Michael Dambrot, then a representative of the Department of Consumer and Corporate Affairs, identified several factors relevant to the Crown's consideration of grants of immunity and other "rewards" to individuals:

> The degree of "reward" the Crown will offer (assuming that the Crown determines that any offer at all is consistent with the proper administration of justice in the circumstances) depends on many factors, including: the importance of the evidence, its credibility, the existence of other evidence to prove the same facts, the degree of complicity of the accomplice, the seriousness of the offence, and the accomplice's history.[225]

While individual immunity pre-dated the Director's August 1991 speech, in that speech he introduced his program of immunity for corporations and set out some of the factors he will consider in deciding whether to recommend immunity. In summary, these are:

(i) the firm must be the first to approach the Bureau with evidence of the offence;
(ii) the firm must provide full and frank disclosure of the facts;
(iii) the firm must co-operate fully with the Bureau's investigation and with any ensuing prosecution;
(iv) the evidence provided by the firm must be important and valuable in terms of any prosecution or other legal proceeding;
(v) the firm must be prepared to make restitution commensurate with the facts and its responsibility in the matter;
(vi) the evidence must confirm that the firm took immediate steps to terminate the activity and report it to the Director as soon as it was discovered by its senior executives;
(vii) a prior record of antitrust violations will be a significant factor in deciding whether to recommend immunity;

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[223]*Supra* note 190.

[224]*Supra* note 197 at 9.

[225]M.R. Dambrot, "Agreements in Restraint of Trade: Comments" in *Competition Law: What Every Lawyer with Business Clients Needs to Know* (Toronto: Law Society of Upper Canada, 16 May 1989) at B2-12.

(viii) the firm should usually be prepared to consent to the issuance of a prohibition order; and

(ix) the role of the firm in the conduct in question must be considered. For example, "it may not be consistent with the responsible enforcement of the Act or the administration of justice to recommend immunity for the instigator of criminal conduct."[226]

Interestingly, the Director's speech stated that the foregoing were "only *some* of the considerations which will be relevant" [emphasis added][227] to determining whether to recommend immunity. Articulation of the others would be helpful to parties considering a possible request for immunity. Uncertainty may prevent corporations from seeking immunity even if all the identified factors are present.

For corporations considering requests for immunity, it may be instructive to consider the United States' policy of providing amnesty for "whistle blowers," as articulated on October 4, 1978 by John Shenefield, then U.S. Assistant Attorney General, Antitrust Division[228] and expanded by the 1993 speech of Anne Bingaman, current U.S. Assistant Attorney General, Department of Justice.

Distinctions between the U.S. policy and the Canadian policy can offer insights into considerations the Director may find relevant which were not articulated in his 1991 speech. One such distinction is the U.S. requirement that the "first confession be truly a corporate act, as opposed to the confessions of individual executives or officials." The rationale for this rule appears to be that if a corporate officer comes forward and seeks immunity for himself or herself on the basis of the information he or she provides, the corporation has not voluntarily provided the information, and therefore it should not receive the benefit of the disclosure. While the Director's stated criteria do not contain this factor, there is a good chance that the Director would decline to grant immunity to the corporation where the first contact was by an individual on his or her own behalf, particularly if the individual had separate counsel and did not ask concurrently for immunity for the corporation. Given the increasing emphasis on prosecution of individuals, for the first time in Canada there is the possibility that an individual will report evidence of a conspiracy to the Director in order to protect himself or herself, even at the expense of sacrificing his or her corporate employer. While that may not be a significant risk at this time, it will likely become one once prison terms are imposed in Canada for conspiracy or bid-rigging. As suggested above, it is likely the Director will seek prison sentences sooner rather than later.

In addition to the possible presence of unarticulated conditions, recent speeches of the Director and others indicate that the Director's policy has evolved since 1991. The Director recently stated that since 1991, the Bureau has

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[226]1991 speech, *supra* note 190 at 4-5.

[227]*Ibid.*

[228]For a succinct summary of the 1978 U.S. Amnesty Policy, see "Prosecutorial Amnesty — 'Whistle Blowing Conspirators'" 43 Trade Reg. Rep. at ¶13,112.

> held lengthy consultations with the Attorney General's office and experienced members of the private competition bar in order to examine the many complex issues and concerns which the related issues of plea negotiations, sentencing and immunity give rise to. We have also had the benefit of the Canadian Law Reform Commission's thorough and thoughtful report on "Immunity From Prosecution" which was issued earlier this year. These consultations have allowed us to clarify many of the issues that must be addressed in order to ensure that the possibility of a grant of immunity by the Attorney General continues to be a useful and effective tool to promote compliance with the *Competition Act* consistent with fair and impartial administration of justice.[229]

In an August 1993 speech to the Canadian Bar Association, François Rioux, Senior Counsel of the Department of Justice, indicated that recommendations for immunity may also be considered even after investigation has begun. This is an expansion of the criteria identified in 1991 and closely parallels the U.S. position as announced in August 1993 by Anne Bingaman, U.S. Assistant Attorney General, Department of Justice. It would be helpful, for the reasons mentioned earlier, if any other modifications to the Director's policy as enunciated in August 1991 were made public.

In its working paper on immunity from prosecution,[230] the Law Reform Commission of Canada makes several noteworthy comments on immunity and the situations in which the Attorney General of Canada should grant immunity. Obviously, the Commission's views and recommendations should be considered by any corporation considering approaching the Director to request a recommendation for immunity. The Commission's observations may also be relevant to the circumstances in which the Attorney General will or will not accept the Director's recommendation for immunity.

As a general matter, it is interesting to note that the Commission states: "The more serious a crime is, of course, the more difficult it will be to justify providing immunity for it. If immunity were granted for a bank robbery, for example, the benefit to the public would have to be considerable to counterbalance the inevitable frustration of the community's sense of justice."[231]

It should be remembered that the Director has in the past analogized conspiracy to theft.[232]

The Working Paper also contains a synopsis of all the criticisms that have been made of granting immunity: that it is unfair, provides for unequal treatment, runs counter to the *Charter*, and acts as an inducement to fabricate evidence. However, the Commission does not believe the granting of immunity is inherently unethical or immoral[233] and believes there are, at the least, good arguments to counter virtually all the criticisms levelled against immunity, as long as certain safeguards are met.

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[229]1992 speech, *supra* note 190 at 28-29.

[230]Law Reform Commission of Canada, *Immunity from Prosecution* (Working Paper 64) (Ottawa: Law Reform Commission of Canada, 1992) [hereinafter Working Paper].

[231]*Ibid.* at 50.

[232]*Supra* note 8 at 35.

[233]*Supra* note 230 at 10.

The Working Paper lists several suggested factors to be considered prior to granting immunity. One of these factors is whether it is possible to obtain the evidence or assistance in another manner. The Working Paper states that this condition is meant to require that some thought be given to less drastic alternatives to providing immunity; for example, by obtaining the information from a different source who requires nothing in return or by providing only a sentence concession on the part of the Crown.[234] If the Director were to adopt this approach, it could significantly reduce the incentive to seek immunity. A corporation would be much less likely to pursue immunity if it were possible that immunity would be refused because information was provided subsequently by another person. For example, the corporation may not learn of a possible contravention under the *Act* until it is threatened with disclosure of the matter by a disgruntled employee or former employee, a customer or a supplier. If such a corporation approached the Director in advance of these other persons, surely it should not lose the opportunity for immunity.

Counsel should also be aware that the Working Paper contains conditions which may differ from the analogous conditions articulated by the Director. For example, the Director's list of conditions precedent to a recommendation of corporate immunity includes considering "the role of the firm in the conduct in question," saying that "it may not be consistent with responsible enforcement of the Act or the administration of justice to recommend immunity for the instigator of criminal conduct."[235] The analogous condition in the Working Paper is arguably different and perhaps more restrictive. The Working Paper states that the Commission

> favour[s] the proposition that it would rarely (if ever) be appropriate to immunize the most guilty offender in order to obtain evidence against the others. Nor, ordinarily, would we consider it appropriate to provide immunity on a "first come, first served" basis; we agree with the suggestion of one commentator that, while this approach may be justified where the offenders involved are indistinguishable in terms of their respective degrees of guilt, in other cases determining who (if anyone) should receive immunity requires a global assessment as to which prosecutions advance the interest of the public.[236]

Since the Director has said that the Commission's Working Paper, as well as consultation with members of the private competition bar, have allowed the Bureau to clarify many of the issues that must be addressed in order to ensure that immunity is a useful enforcement tool, it will obviously be important to understand the Director's current view of the conditions precedent to a recommendation for corporate immunity.

In addition to understanding all the conditions precedent to a recommendation for corporate immunity, there are several practical implications and issues associated with pursuing corporate immunity.

When a potential breach of the conspiracy or bid-rigging provisions comes to the attention of counsel (inside or otherwise), the first task is determining

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[234] *Ibid.* at 53.

[235] 1991 speech, *supra* note 190 at 5.

[236] *Supra* note 230 at 53.

exactly what has happened. In the past, such investigations would typically not proceed beyond an initial investigation followed by instructions to cease the activity and a reminder that the legislative provisions should not be breached. Now it is important to go beyond this initial stage and conduct a full investigation for the purposes of determining the potential liability and whether immunity should be pursued. Retaining an outside firm will assist in ensuring that the investigation is both thorough and objective. Following completion of the investigation, the corporation's disclosure obligations, if any, should be considered. Again, public companies should consider these obligations and options with outside counsel.

In addition, the corporation's course of action should be determined. If individuals have violated established corporate policy, they should have their own counsel available to them. The question of indemnifying those individuals against legal costs and any other potential amounts should also be considered. Often, the corporation will pay for the cost of outside counsel for individuals until they are convicted of an offence. In some instances, counsel should be retained for individuals during the course of the internal investigation, especially if it is clear there is a divergence between the corporation's and the individual's interests.

As mentioned earlier, individuals might approach the Director in advance of the corporation to seek personal immunity. There is a risk that an individual doing so would eliminate the corporation's opportunity to seek immunity. It is therefore important to establish communication between counsel for the individuals and counsel for the corporation.

Counsel will be asked following completion of the internal negotiations to make a recommendation to senior management as to whether the appropriate course of action is simply to issue a directive from senior management that the conduct is to cease and not be repeated or whether the corporation ought to bring the matter to the attention of the Director and seek immunity or a reduced penalty.

Whether a claim for immunity can be made depends on whether the criteria are satisfied. For example, if a senior officer has transgressed a corporate policy or was aware of but ignored a transgression by junior executives, immunity may not be available, given the Director's requirement that "the evidence must confirm that the firm took immediate steps to terminate the activity and report it to the Director as soon as it was discovered by its senior executives."[237]

However, even if all the criteria for immunity are not satisfied, there is still the possibility that by providing information and co-operating with the Bureau the consequences that the corporation will suffer would be lessened. It has already been mentioned that the Law Reform Commission of Canada recommends that alternatives to granting immunity be pursued in exchange for disclosure, including the reduction of penalties.[238] Air Products Canada Ltd. paid a

[237]1991 speech, *supra* note 190 at 5.
[238]*Supra* note 230.

reduced fine of $200,000 as a result of its co-operation with the Bureau's investigation of price fixing in compressed gases. In contrast, three other companies were each fined $1.7 million and a fourth was fined $700,000. Further, Air Products also received immunity for its senior officers, while three senior officers of other companies were each fined $75,000.

If a corporation believes that it satisfies the known criteria and is eligible to take advantage of the immunity policy, there are a number of threshold issues that are relevant to the question of whether a corporation should seek immunity.

One of the most significant issues is the potentially different tax treatments afforded to a fine and the restitution called for by the Director. As a general proposition, fines may not be deductible from income for Canadian income tax purposes.[239] Thus, if a corporation does not report a transgression and is subsequently discovered, convicted and fined, there is a significant risk that the fine will not be deductible for income tax purposes.

Conversely, the Director's program of immunity requires, as a condition to the recommendation of immunity, that a firm be prepared to "make restitution commensurate with the facts and its responsibility in the matter." To the extent that restitutionary payments of this kind are, in effect, a reimbursement of "overcharging," these payments may well be deductible from income for Canadian income tax purposes. This is a very significant distinction since it may mean, assuming a corporate tax rate of forty-five per cent, that a corporation which is currently taxable can agree to a deductible restitutionary payment of approximately 1.8 times the size of a non-deductible fine which it might otherwise have paid, and be in the same after-tax position as it would have been in by paying the fine.

The Director's requirement that a party seeking immunity be prepared to make restitution suggests that the Director will likely have conversations with affected customers to determine their views as to the appropriate amount of restitution.[240] This possible involvement of third parties raises a very significant concern relating to confidentiality that should be addressed before proceeding with a claim for immunity. There are several levels to this concern.

The first is the possibility that, if the Director refuses to recommend immunity or the Attorney General disregards the Director's recommendation for immunity, the discussions with the Director would trigger charges and the possible use of the information provided to the Director against the corporation. There are several arguments which might be used in an attempt to suppress the use of the information by the Crown,[241] but in any event there is still the pos-

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[239]For a useful discussion of the issues associated with the deductibility of fines and damages claims, see E.M. Krasa, "The Deductibility of Fines, Penalties, Damages and Contract Termination Payments" (1990) 36 Can. Tax J. 1399. Revenue Canada's position is set out in its *Interpretation Bulletin* IT-104R.

[240]In fact, the idea of consulting with the parties aggrieved by a criminal act is referred to in the Working Paper of the Law Reform Commission of Canada, which stated that, in deciding whether to enter into an immunity agreement, the Crown should seek the views of persons who have a legitimate interest in the decision. See Law Reform Commission of Canada, *supra* note 230 at 53, 55.

[241]Including the argument that it violates the *Charter* and any information, having been obtained by the inducement of possible immunity, is inadmissible as evidence against the corporation.

sibility that the Bureau would conduct searches or compel testimony under section 11 of the *Act* in order to obtain other evidence to support a prosecution. A representative of the Department of Justice recently suggested that, to reduce the possibility that information provided to the Director might be used as the basis for obtaining a search warrant or even laying charges, counsel should always attempt to get the Director and the Department of Justice to agree not to use any information provided in such discussions against the corporation or individual in question.[242]

For Canadian subsidiaries of U.S. parent corporations, there is the additional concern that providing information to the Director may trigger an investigation of the U.S. parent by U.S. antitrust authorities, for two reasons. First, pursuant to the 1984 *Memorandum of Understanding between Canada and the United States*[243] the two governments agree to "cooperate with and assist each other in the enforcement of their respective antitrust laws through the exchange of information." Second, the *Mutual Legal Assistance Treaty*[244] permits the Canadian Minister of Justice or officials designated by him to request assistance from the United States government in obtaining information relevant to an investigation or prosecution of an offence under the *Act*, and if the Director were to request assistance in obtaining information, U.S. antitrust authorities, alerted to the activities of the Canadian subsidiary, may commence an investigation of the U.S. parent corporation.

The statutory safeguards of confidentiality may not apply to information supplied by a corporation seeking immunity. Section 29 of the *Act* requires that the Director and the members of the Bureau, subject to certain restrictions, keep confidential any information obtained under certain sections of the *Act*. Information obtained from a person seeking immunity may not be covered by section 29. While the Director and the Bureau may well keep all information confidential without a specific request to that effect, counsel should be aware that in the absence of any assurances respecting confidentiality in that regard, discussions in Canada may eventually result in an investigation of a U.S. parent corporation. The Deputy Director of Investigation and Research (Criminal Matters) recently stated that section 29 would not prevent disclosure of information to a foreign government for the purpose of assisting that foreign government to help the Director to investigate a matter.[245]

Accordingly, counsel should consider whether the first step in approaching the Director for a recommendation of immunity should be a request for an advisory opinion as to whether, on a "no names" basis, the Director would be willing

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[242]These remarks were made by Donald Houston, a representative of the Department of Justice, at the May 11, 1993 Insight Conference in Toronto.

[243]*Memorandum of Understanding between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of Antitrust Laws*, 9 March 1984.

[244]*Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters*, 18 March 1985, Can. T.S. 1990 No. 19 (in force 24 January 1990).

[245]These remarks were made by Harry Chandler at the May 11, 1993 Insight Conference in Toronto.

to recommend immunity in the circumstances. Not surprisingly, this will likely be greeted by a conditional response which includes a statement that if the criteria are met, immunity may be recommended. Given the uncertainty mentioned earlier concerning the conditions precedent to a recommendation for immunity, even an advisory opinion that states, for example, that the only criteria that have to be addressed are those set out in the August 1991 speech of the Director will provide additional comfort. It is unlikely that the Attorney General will confirm more than that the Director's recommendations are always given significant weight and that there is no reason to believe that in any particular instance that would not be the case. It is unrealistic to expect that the Attorney General will bind his discretion before he is fully informed of the facts.

At this stage (*i.e.* when discussions are still on a "no names" basis), counsel should seek confirmation that any disclosure made to the Director and the Bureau will be kept confidential and, where there is a U.S. parent corporation, that all information which is provided will not be disclosed to United States antitrust authorities. While it is not clear that this assurance can be given in the context of the *Memorandum of Understanding* or the *Mutual Legal Assistance Treaty*, counsel should seek comfort in this area. In the final analysis, counsel for the corporation will have to act in accordance with their best judgment and, if the decision is made to proceed with a request for immunity, to some extent it will be in reliance upon the good faith and fairness of those with whom counsel and the corporation are dealing.

If a decision is made to proceed with a request for immunity, the disclosure which is provided should be as complete as the corporation can make, since any material non-disclosure can vitiate the subsequent agreement on immunity. Further, the corporation should restrict the number of people within the corporation who have complete knowledge of the facts, to ensure among other reasons that there is no disclosure to any co-conspirator which could prejudice a subsequent search by the Bureau of the co-conspirator's offices.

While an advisory opinion may provide some comfort or additional information regarding certain issues, there are other issues associated with the immunity program which cannot be addressed by an advisory opinion. Specifically, if the Director is approached under the program of immunity and subsequently decides not to recommend immunity or the recommendation is rejected, obviously there is a risk of prosecution. In those cases, approaching the Director under the program of immunity may accelerate the prosecution of the offence. Conversely, if immunity is granted, the corporation will likely be required to make some restitution to the aggrieved parties. Section 3200 of the *CICA Handbook* states that a contingent loss must be accrued in the financial statements, not just recorded in the notes to the financial statements, when it is likely that a future event will confirm that an asset has been impaired and the amount of the loss can be reasonably estimated.[246] The fine or restitution a corporation may have to pay once it seeks a recommendation for immunity might be covered by

[246]This is in distinction to a loss where the likelihood of the future confirming event cannot be ascertained, in which case the disclosure would be in the notes to the financial statements. See *CICA Handbook*, *supra* note 208, s. 3290.

this policy. Therefore, approaching the Director for an immunity recommendation may accelerate the accrual in financial statements of a negative amount, because the corporation will likely either face prosecution or be required to make restitution.

The task of weighing the prospective risks and benefits of seeking immunity is best done by the directors of the corporation, who are charged with acting in the best interests of the corporation.

Conclusion

In summary, there have been a number of significant developments in conspiracy law that have important implications for corporations and their employees. As a result of the *PANS* decision, it would be imprudent to follow the old rule of thumb that an agreement would not likely contravene section 45 if the parties thereto account for less than fifty per cent of the relevant market. A better market share rule of thumb would be the thirty-five per cent standard employed by the Director with respect to mergers and predatory pricing.

The *PANS* decision also creates particular risk for price-fixing and market-sharing agreements between parties who have, or through their agreement acquire, market power. Unfortunately, the Supreme Court's failure to more thoroughly discuss the issue of agreements which affect prices or allocate markets may have the chilling effect of deterring many business people from devoting significant resources to considering proposals that may be pro-competitive.

Although the *PANS* decision lowers the zone of risk with respect to the second element of *actus reus* and creates an objective mental requirement with respect to this element of *actus reus*, it leaves the first element of *actus reus*, as well as the corresponding subjective mental requirement, unchanged.

At the same time the zone of risk has been lowered, there have been important developments in enforcement of the conspiracy provisions. These developments underscore the importance of compliance programs and raise the possibility of jail terms for individuals and, for the first time, immunity from prosecution for corporations that satisfy criteria that are still developing.