

## DID YOU INTEND TO LESSEN COMPETITION? A Commentary on Canada's Conspiracy Law

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Conspiracies in Canada are not *per se* illegal, nor are they defensible on a rule of reason analysis. The *Competition Act*,<sup>1</sup> following a so-called "partial rule of reason" prohibits only conspiracies which are determined to have serious competitive effects.

Since its inception in 1889, Canada's conspiracy law has been unclear with regard to the degree of proof required to establish an offense. The most recent Supreme Court of Canada decision on that law initially was thought to broaden and also clarify the scope of the offense. However, subsequent application of the principals enunciated by the Court has shown that proving an illegal conspiracy may continue to be difficult for the Crown. While the recent case leaves room for fairly aggressive marketplace behavior, it remains difficult in many circumstances to determine whether a particular arrangement is prohibited under the *Competition Act*.

proved beyond a reasonable doubt.<sup>3</sup> With regard to requisite intent, while it is required that the parties intended to enter into an agreement, it is not required that they intended that agreement to have an undue effect on competition.<sup>4</sup> It is also not necessary for the Crown to prove that the conspiracy, if carried out, 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 to the conspiracy to eliminate, completely or virtually, competition in that market.<sup>5</sup>

In its 1992 decision in *R. v. Nova Scotia Pharmaceutical Society*<sup>6</sup> (commonly known as the "PANS" decision), the Supreme Court of Canada attempted to clarify the elements of the conspiracy offense. The case is important because it is the Court's most recent statement of the law in this area and one of relatively few reported decisions which attempts to interpret the section.

### The Statutory Threshold

Section 45 of the *Competition Act* creates an indictable offense for anyone who conspires, combines, agrees or arranges with another person to restrain or injure competition unduly.<sup>2</sup> Persons found guilty of violating the section are subject to imprisonment for up to five years or a fine of CDN\$10 million, or both.

A conspiracy may be inferred from circumstantial evidence. Although direct evidence of communication among the parties to an agreement is not required, existence of an agreement must still be

### The PANS Decisions

#### A. THE COURTS BELOW

The PANS case arose out of an alleged conspiracy among members of the Nova Scotia Pharmaceutical Society, a corporate association of pharmacists and pharmacy operators, contriving to fix dispensing fees charged to private insurance companies in the Province of Nova Scotia. The Society negotiated agreements with providers of direct-pay prescription insurance plans on behalf of its member pharmacies. As part of the negotiations, the Society obtained agreement on the maximum fees

that could be charged by individual pharmacies for dispensing pharmaceuticals. The Society used the threat of boycotts and termination by the pharmacies of acceptance of individual insurer's direct-pay cards in order to ensure that each insurer agreed to the maximum fee. The Society also sought to negotiate uniform contracts between pharmacies and the insurers, and a "master contract" to be used for arrangements between each insurer and the Society. The Crown alleged that these arrangements contravened Section 45 of the *Competition Act*<sup>7</sup>.

The accused made a pre-trial motion for a declaration that Section 45 of the *Competition Act* was invalid under *Canadian Charter of Rights and Freedoms*. The trial judge made this declaration and squashed the indictment.<sup>8</sup> That decision was appealed by the Crown and subsequently overturned by the Nova Scotia Court of Appeal.<sup>9</sup> The accused appealed to the Supreme Court of Canada.

#### B. THE SUPREME COURT OF CANADA

The issues before the Supreme Court of Canada were primarily constitutional. But, in determining that the *Competition Act* conspiracy provision was not too vague for the purposes of the *Canadian Charter of Rights and Freedoms*, the Court had to consider the proper definition of "undueness" and, in so doing, the Court considered all requisite elements of the conspiracy offense.

In its unanimous decision, the Supreme Court made clear that an illegal conspiracy has several elements, each of which must be proved beyond a reasonable doubt. The Crown must first establish the existence of an agreement to which the accused is a party. Second, the agreement, if implemented, must be likely to prevent or lessen competition unduly. The Court defined the word "unduly" to mean "of seriousness or significance."<sup>10</sup> Undueness may be established through analysis of market structure and the behavior of the accused. The required analysis is only a "partial rule of reason" inquiry into the seriousness of the competitive effects of the agreement because consideration of private gains by the parties to the agreement or of counter-balancing

efficiency gains by the public are outside of the scope of inquiry.

After definition of relevant markets, analysis of the market structure, and determination of the market power of the accused, a court must examine the accused's behavior. The object of the agreement is the most important element of the court's inquiry. The combination of *some* market power (*i.e.*, the ability to behave relatively independently of the market, as opposed to an ability to influence the market) and *some* behavior likely to injure competition makes a lessening of competition "undue" for the purposes of Section 45 of the *Competition Act*.<sup>11</sup> Thus, undueness might be established where market power is not considerable if the behavior complained of is particularly injurious; likewise, if market power is great, the market place effects of an agreement to lessen competition need not be so strong.

Because conspiracy is a criminal offense, it is not sufficient for the Crown to prove the mere existence of an agreement that has undue effect. The Crown must also prove objective and subjective fault elements. To establish the subjective fault element, the Crown must show that the accused had the intention to enter into the agreement and had knowledge of the agreement. The Court said that "once that is established, it would ordinarily be reasonable to draw the inference that the accused intended to carry out the terms of the agreement," unless there is evidence to the contrary.<sup>12</sup>

To satisfy the objective fault element of a conspiracy offense, the Crown must demonstrate that the evidence, viewed objectively (*i.e.*, by a reasonable business person), establishes that the accused was aware or ought to have been aware that the agreement would prevent or lessen competition unduly. The Court stated:

This surely does not impose too high a burden on the Crown. Section [45] requires that the Crown demonstrate that the effect of the agreement will be to prevent competition or to lessen it

unduly. Once again, it would 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 the undue lessening of 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.<sup>13</sup>

The Court ultimately determined that Section 45 of the *Competition Act* did not violate the *Canadian Charter of Rights and Freedoms* and returned the case to the Nova Scotia trial court for consideration on the merits.

### C. TRIAL ON THE MERITS

The Nova Scotia Supreme Court Trial Division dismissed the case against the accused on the basis that a conspiracy was not made out.<sup>14</sup> The trial judge determined that notwithstanding the existence of an agreement which unduly lessened competition, the Crown had failed to prove that the accused would or should have known that their agreement might lessen competition unduly.

Judge Boudreau found that the PANS case was not one where the court could "routinely infer" merely from the proof of the *actus reus* that the accused would or should have known the likely effect of the agreement.<sup>15</sup> The case was "not a straight price fixing case by any stretch of the imagination"<sup>16</sup> and did not involve "an ordinary or usual market situation."<sup>17</sup> Among the factors considered by the court in holding that the Crown failed to establish the accused's objective intent was that the accused negotiated a maximum allowable tariff and not minimum prices; that the third party

insurers were willing negotiators and in fact preferred to negotiate only with the Society; that the government traditionally had been involved in the negotiation of fees; that the issue of "master contracts" was referred to the Competition Bureau for an advisory opinion on its legality and the Society abandoned the plan in the face of a negative opinion; and that the two economic experts who gave testimony disagreed on the competitive effects of the arrangement.<sup>18</sup>

### Implications

The appeal decisions in the PANS case were warmly greeted by the *Competition Act* Director.<sup>19</sup> In a speech given in June, 1992, the then-Director Howard Wetston stated that the Nova Scotia Court of Appeal decision had "created a more favourable enforcement climate. Following the decision, the Bureau [of Competition Policy] has seen a renewed willingness by parties to advance discussion regarding section 45 cases."<sup>20</sup> Wetston later stated that the "analytical framework developed [by the Supreme Court of Canada] in the PANS decision supports and legitimizes to a great extent the screening criteria" put in place by the Bureau for conspiracy cases and that the case made it possible to "identify types of collusive behavior that may be contrary to section 45 even if market power is not so considerable."<sup>21</sup>

However, the ultimate acquittal of the accused illustrates the continued uncertainty regarding application of Canada's conspiracy law, notwithstanding the Supreme Court of Canada's decision.<sup>22</sup> While it is clear that garden-variety price fixing cases will not be difficult to prove, there are no bright lines which establish the parameters of permissible conduct outside of the most obvious cases. As a result, it is expected that the criminal conspiracy provisions of the *Competition Act* will be used primarily to take action against naked restraints, while less obvious joint arrangements will be challenged under the *Act's* civil abuse of dominance provision.<sup>23</sup>

The conspiracy provision's persistent uncertainties underscore the need for compliance programs to educate business people regarding permissible behavior, particularly with respect to arrangements involving benchmarking and facilitating practices. For more complicated agreements, it may be appropriate to resort to the *Competition Act* Director's compliance program as a means to determine the legality of agreements.

**NOTES**

<sup>1</sup> *Competition Act*, R.S.C. 1985, c. C-34.

<sup>2</sup> Subsection 45(1) of the *Competition Act* provides:

Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offense and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

<sup>3</sup> *Id.* at s. 45(2.1).

<sup>4</sup> *Id.* at s. 45(2.2).

<sup>5</sup> *Id.* at s. 45(2).

<sup>6</sup> *R. v. Nova Scotia Pharmaceutical Society* (1992), 43 C.P.R. (3d) 1 (SCC).

<sup>7</sup> The Crown charged two pharmaceutical associations and 10 pharmacies under Section 45(1)(c) [then 32(1)(c)] of the *Competition Act*.

<sup>8</sup> *R. v. Nova Scotia Pharmaceutical Society* (1990), 32 C.P.R. (3d) 259 (N.S.S.C., Trial Div.).

<sup>9</sup> *R. v. Nova Scotia Pharmaceutical Society* (1991), 36 C.P.R. (3d) 173 (N.S.S.C., App. Div.).

<sup>10</sup> *R. v. Nova Scotia Pharmaceutical Society* (1992), at 29.

<sup>11</sup> *Id.* at 36.

<sup>12</sup> *Id.* at 38.

<sup>13</sup> *Id.* at 39.

<sup>14</sup> *R. v. Nova Scotia Pharmaceutical Society* (1993), 49 C.P.R. (3d) 289 (N.S.S.C., Trial Div.).

<sup>15</sup> *Id.* at 333.

<sup>16</sup> *Id.* at 335.

<sup>17</sup> *Id.* at 334.

<sup>18</sup> *Id.* at 334-335.

<sup>19</sup> The Director of Investigation and Research is vested with responsibility for enforcement of the *Competition Act*.

<sup>20</sup> H. Wetston, *Decisions and Developments: Competition Law and Policy*, Address Before the Canadian Institute (Toronto, June 8, 1992) at 15.

<sup>21</sup> H. Wetston, *Developments and Emerging Challenges in Canadian Competition Law*, Address Before the Fordham Corporate Law Institute (New York, October 22, 1992) at 10.

<sup>22</sup> One Department of Justice attorney has commented that the trial judge put a "peculiar spin" on what he thought was "the straight forward and useful Supreme Court direction on the requisite intent to satisfy a conviction". See W. Miller, *New Perspectives on Civil Enforcement*, Address (Toronto, January 24, 1994) at 10.

<sup>23</sup> *Competition Act*, s. 79.