



Competition Bureau
Canada

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Canada

SPEAKING NOTES

for

**Gaston Jorré
Senior Deputy Commissioner of Competition**

COMPETITION BUREAU

**Remarks to the Standing Committee on Canadian Heritage:
Study of the Canadian Feature Film Industry**

Ottawa

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(Check against delivery)

Introduction

Good morning Madame Chair and members of the Committee.

I am accompanied today by Mr. Richard Taylor, Deputy Commissioner of our Civil Matters Branch.

We are pleased to have this opportunity to participate in your study of the Canadian feature film industry.

The Competition Bureau recognizes that governments must balance a variety of interests and concerns when establishing new policies and programs or assessing the effectiveness of those already in place.

While important issues of culture do not fall within the scope of our mandate, the Bureau's work does ensure that Canadians can benefit from a competitive marketplace, in all sectors of the economy, including film.

I would like to briefly outline our roles and responsibilities and provide you with an overview of how the Bureau has dealt with past issues involving this industry.

Our Roles and Responsibilities

The Competition Bureau is an independent law enforcement agency.

Headed by the Commissioner of Competition, Sheridan Scott, we enforce and administer the *Competition Act*, an economic law of general application which governs most business conduct in Canada.

Essentially, the Bureau acts as a marketplace referee.

We receive thousands of complaints each year from consumers and businesses alleging anti-competitive conduct.

We investigate and when necessary, take the matter before the Competition Tribunal or another court.

We also review mergers, which is something I will touch on further in my presentation. And we act as an advocate for competition. In this latter role, in recent years, the Bureau has appeared before a number of parliamentary committees studying cultural issues.

You can find more information about the Bureau's structure and mandate in the appendix to my written statement.

Recent Bureau Statements involving the Cultural Sector

In 2002, the former Commissioner of Competition appeared twice before this committee when it was considering broadcasting policy.

He also appeared before the Industry Committee in 2003 on the issue of foreign ownership of telecommunications common carriers.

As Acting Commissioner of Competition, I testified before the Senate Committee on Transport and Communications in 2003 for its ongoing inquiry into the state of the Canadian media industries.

During our appearances before these committees, we have emphasized that our interests in the cultural sector are strictly focussed on competition in the key markets.

That is, after all, the Bureau's role.

However, as I have already mentioned, we acknowledge that the Government and this Committee may have other interests in mind, including cultural and social goals.

With this background in mind, I will now describe how we go about our enforcement work and our analytical framework for determining competitive harm. Then, I will give you some examples regarding the film industry.

Bureau's Analytical Framework For Determining Competitive Harm

We use a well-defined analytical framework and fact-based approach to carry out our enforcement work.

Our analysis of whether markets are or are likely to be competitive applies to all industries and all types of business transactions and conduct. Generally, it involves two principal steps:

First, we define the relevant product and geographic markets.

Second, we analyze whether or not market participants have the ability to significantly increase or control prices for a sustainable period of time. While the legal tests in the *Competition Act* vary based on the particular kind of conduct under review, in all of our cases, we consider a number of factors to satisfy those tests and meet our evidentiary burdens.

In the course of our investigations, we speak with complainants, market participants, and competitors of targeted firms.

When necessary, we use subpoenas or search warrants to gather evidence necessary to our analysis.

We may also hire independent industry or economic experts to obtain their views.

We use a variety of tools to help parties comply with the law and to remedy anti-competitive conduct. They range from education and suasion, such as speeches, warning letters and investigative visits, on the one hand, to adversarial proceedings before the courts and the Competition Tribunal and consent instruments, on the other.

Let me illustrate the application of the *Competition Act* with two recent film matters, one a civil reviewable matter and the other a merger. I'll begin with the civil matter reviewed by the Bureau under the refusal to supply section of the *Competition Act*, s. 75.

Recent Enforcement Work: Civil Matters Branch

In 2000, the Bureau initiated an extensive inquiry into the Canadian film distribution and exhibition industry.

The Bureau received complaints that the major distributors and two Canadian exhibitors, Famous Players Inc. and Cineplex Odeon Corporation, had engaged in practices which denied other exhibitors access to commercially valuable films.

The Bureau used its powers of inquiry to obtain evidence in the form of documents and written responses from forty exhibitors and distributors. There were no problems experienced in obtaining documents requested from foreign-owned firms. The Bureau also obtained evidence interviews and economic and legal analysis.

In December 2002, after carefully examining the extensive documentation provided by the distributors and considering the many films distributed in a five year period, the Bureau discontinued the inquiry.

The Bureau did not find evidence of a violation of the *Competition Act*.

I'll turn your attention now to our recent merger work in the film industry.

Recent Enforcement Work: Mergers Branch

When we examine a merger, we must determine if it would result in a "substantial lessening or prevention of competition" in the relevant markets. To make this determination, we consider a number of factors such as the market shares of the merging parties, market concentration, barriers to entry, the extent of effective remaining competition and foreign competition, innovation in the relevant market and other factors.

If the Bureau finds a transaction to be anti-competitive, the Commissioner would ask the merging parties to restructure the transaction or obtain remedies on consent to resolve

competition concerns. Consent agreements negotiated between the Commissioner and parties are filed with the Competition Tribunal.

When competition problems cannot be resolved by negotiation, the Commissioner may bring an application to the Competition Tribunal, asking it to block the transaction or order divestitures.

In March 2002, Onex acquired control of Loews Cineplex and Cineplex Odeon which had been under bankruptcy protection in both Canada and the United States. This was an example of a merger with a strong pro-competitive element in that it kept a failing firm in the market as a competitive factor.

However, in the course of reviewing the proposed restructuring of Loews Cineplex, the Bureau learned of a previous merger between Galaxy Entertainment, controlled by Onex, and Famous Players. Famous Players was Canada's largest exhibitor and Galaxy had 12 theatres in five provinces.

Under the *Competition Act*, the Bureau has the authority to review mergers up to three years after they take place. So, we opened an investigation.

The competition concern was that Famous Players had a share ownership in and some ancillary agreements with Galaxy, that raised concerns under Onex's proposal to acquire Loews Cineplex.

These concerns were remedied when Famous Players agreed to divest itself of its interest in Galaxy and terminate its ancillary agreements.

The result was that Cineplex was able, following its restructuring, to continue as a competitive enterprise in the Canadian market, and Canada's largest exhibitor, Famous Players, remained an independent competitor with no corporate connections to Cineplex.

Conclusion

Madame Chair, I have spoken today about the role of the Competition Bureau and our recent enforcement experiences related to the film industry in Canada, in particular with respect to the distribution and exhibition segments of the industry.

We appreciate fully the interest Canadians and this Committee have in developing a diverse and competitive cultural sector. While our role in this regard is of necessity limited to ensuring that markets remain open and competitive, we believe that such markets in and of themselves are necessary to achieving our broader cultural objectives. We would be pleased to respond to your questions.

Appendix

The Competition Bureau

What Is the Competition Bureau?

The Competition Bureau is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*. Its role is to promote and maintain fair competition so that Canadians can benefit from competitive prices, product choice and quality services. Headed by the Commissioner of Competition, the organization investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction.

What Is the Competition Act?

The *Competition Act* is a federal law governing most business conduct in Canada. It contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace.

Criminal Offences

Price fixing: When competitors agree on the prices that they will charge their customers.

Bid-rigging: When, in response to a call or request for bids or tenders, one or more bidders agree not to submit a bid, or two or more bidders agree to submit bids that have been prearranged among themselves.

False or misleading representations: When materially false or misleading representations are made knowingly or recklessly to the public.

Deceptive telemarketing: When false or misleading representations to promote a product or business interest are made through interactive telephone calls.

Deceptive notice of winning a prize: When a notice, sent by any means, gives a recipient the impression of winning a prize and requires the recipient to incur a cost to obtain the prize.

Reviewable Matters

Abuse of dominant position: When a dominant firm engages in anti-competitive practices that substantially lessen competition in a market, or are likely to do so.

Exclusive Dealing, Tied Selling and Market Restrictions: (1) When a supplier requires or induces a customer to deal only, or mostly, in certain products; (2) requires or induces a

customer to buy a second product as a condition of supplying a particular product; (3) requires a customer to sell specified products in a defined market.

Refusal to deal: When someone is substantially affected in his or her business, or is unable to carry on business, because of the inability to obtain adequate supplies of a product on usual trade terms.

Mergers: When all or part of one business is acquired by another. The Bureau has the authority to review any merger, regardless of its size. However, the Bureau must be notified in advance of proposed transactions when the value of the assets or the target firm exceeds \$50 million or the value of the amalgamated company exceeds \$70 million, and when the combined dollar value of the parties and their respective affiliates exceeds \$400 million.

False or misleading representations: When false or misleading representations are made to the public.

Deceptive marketing practices: When a product is advertised at a bargain price and is not supplied in reasonable quantities; when a product is supplied at a price above the advertised price; when retailers make "regular price" claims without selling a substantial volume of the product, or offering the product, at that price or a higher price in good faith for a substantial period of time; or when a contest, lottery, or game of chance or skill is conducted without making adequate and fair disclosure of facts that affect the chances of winning.