



Competition Bureau
Canada

Bureau de la concurrence
Canada

SPEAKING NOTES

for

Sheridan Scott

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I want to begin by thanking the organizing Committee for the opportunity to speak to you today.

Each time I return to my native Vancouver, I am struck by the dynamism of the city, the diversity of people and industry, and the vibrant and global spirit of the community.

And I know I will be even more impressed into the future. The Pacific Gateway is going to make it easier to take Canada to the world. And in just over three years, the world will be coming here as you host the world's finest athletes in the winter Olympics. Canadians all across the country look forward to this great competition – we Canadians love our winter sports.

But our greatest competitive undertaking has little to do with snow or ice. It takes place daily in the increasingly globalized marketplace. And this competition is not based on the Olympic ideals of faster, higher, and stronger. It is based on innovation. It demands efficiency. And it requires agility. These are the virtues needed to succeed in the global economic Olympics.

The question is: Do we have what it takes to take the gold medal in this competition?

Maybe not. At least not yet. In the view of The Economist magazine, we are a country with “a passion for bronze”. And by some measures, we are not even near the podium. The 2006 version of the “Business Competitiveness Index,” saw us drop to 15th from 14th place. And on the “Global Competitiveness Index,” we settled into 16th spot, down three spots from last year.

Our rankings have fallen despite the progress we have made in the last twenty years, opening up to new markets with multilateral and regional trade agreements, reducing barriers to internal trade, and arguably trimming some red tape and regulations. Our fiscal health has been restored. And critical efforts have been made in areas such as education and innovation support that will bear fruit in years ahead.

Those are real strengths. So where are we weak? Well, according to Roger Martin, Chairman of

the Institute for Competitiveness & Prosperity and Dean of the University of Toronto's Rotman School of Management, amongst other things we "need to strengthen our market structures in Canada so that businesses have the pressure to innovate from capable rivals and sophisticated and demanding customers...¹".

But why am I here talking about our economic performance instead of back in Ottawa enforcing the 4 enforcement pillars of the Act that you are learning about today?

The reason is simple. Aside from enforcement, we at the Competition Bureau are specifically charged by our Act to advise on, and speak for and about competition in Canada. And we believe that Canada's economic performance is intimately tied to competition.

Of course, you might think advocating for competition is a superfluous function. In fact, many business people feel that they are facing more than enough competition.

But in reality, our markets are often undermined by rules and regulations, by restrictive internal or external trade measures, and of course, by anti-competitive business practices.

So our advocacy efforts are dedicated to ensuring that we minimize the anti-competition impacts of such restrictions. And as you will see, our enforcement efforts are increasingly focussed on anti-competitive practices with the greatest impact on Canada and Canadians.

In this work, we face a very real challenge and opportunity.

A study released in September comparing OECD countries found that relatively restricted market regulations slow the adoption of information and communication technologies, and foreign investment. They estimate that the "productivity dividend" from "product market reform" in Canada would have resulted in annual productivity growth more than 0.75%

¹<http://www.competeprosper.ca/public/release260906.html>

percentage points higher than we experienced in the 1995-2003 period.²

This study is just one more proof that effective markets are essential to foster innovation, efficiency and agility in our economy needed to succeed in the international economic Olympics.

Other countries have already recognized this reality. For example, Australia, the UK and the European Union are all making competition a cornerstone of their economic development initiatives, with great success. In Australia, they have totally revamped their way of doing things, from their competition act through to the way they treat regulation and legislation in all markets. They have achieved national consensus on the importance of competitive markets and have coordinated state and federal efforts.

The UK offers another example. They are applying a *competition lens* to all proposed legislation to ensure that the many and varied policy objectives of government are achieved with the least interference to the marketplace.

We in Canada have to get moving. And at the Bureau, we have accepted the challenge of the global economic Olympics and are striving to be more innovative, efficient and agile in all our work.

Now, if we had all day, if you had the patience of Job, and if you possessed an abiding interest in competition policy that knows no bounds, I could give you a complete review of all that we are doing.

But something tells me that this is not the case. So instead, I am going to focus on one of our sectoral efforts, which illustrates the broad spectrum of approaches we can take to deal with

²Regulation, Competition and Productivity Convergence, OECD Economics Department Working Papers No. 509, Paul Conway, Donato de Rosa, Giuseppe Nicoletti and Faye Steiner

competition concerns. I am then going to address two key areas of our responsibility – false or misleading advertising, and abuse of dominance – to illustrate how we are focussing our efforts as we drive for the gold.

As you will see, in all three areas there is one common theme: getting the most bang for our bucks. The Competition Bureau has limited resources which have not grown with our markets, the complexity of the issues we face, or the importance of competition to Canada. We are therefore targeting our efforts, using innovative, smart technology to achieve our goals, and increasingly reaching out directly to Canadian consumers and producers. And we are getting results.

Health Care and the Competition Bureau

Health care is a great example of this. It is one of a handful of areas we have identified as a priority, using a range of outreach, advocacy and enforcement tools.

And our work in this area is, without doubt, worthy of a gold medal. It demonstrates our move to be informed rather than driven by the complaints we receive, and to use innovative investigatory and enforcement techniques in a world where the challenges are both domestic and global. And it illustrates our efforts to focus on those markets and issues of greatest importance to Canadian consumers and businesses.

While much has and will be written about the challenges facing the public health care system, the reality is that much of the sector is private and operates in more or less competitive markets. These include, for example: hospital construction; medical equipment, service and supplies; pharmaceuticals; many self-regulated professions; and the vast array of products and services bought directly by consumers.

Canadians have great concerns about whether these markets are serving their needs. And so do we.

So what are we doing?³ Well, our efforts are based on active outreach to educate and equip business and private purchasers of health care products and service. We have targeted enforcement efforts. We are engaged in informed advocacy for change. And we are getting results in all of these areas.

As an example of outreach, we have made over 20 presentations to health care officials involved in procurement to help them detect, report and prevent costly bid-rigging schemes, with success. Such presentations have resulted in parties bringing a case to our attention.

The Bureau has also made presentations to major health care purchasers on potentially anti-competitive clauses in procurement contracts, such as exclusive dealing and tied selling clauses.

At the consumer level, we are addressing the global nature of fraud affecting consumers. We have joined forces with our counterpart agencies in the U.S. and Mexico to take a total of 177 compliance and enforcement actions this year against companies promoting bogus diabetes products and services, and 734 actions relating to weight loss claims in the two previous years. In cooperation with these partners, the Bureau has also developed tri-lingual "teaser" Internet sites related to diabetes and weight loss. These sites warn consumers of the types of fraudulent claims often employed by "scammers" .

Why diabetes and weight loss? These were selected on the basis of marketplace intelligence gathered by the Bureau and our enforcement partners from across North America. This past year, we vastly improved our ability to detect fraud by using specialized intelligent software which scans the Internet and helps to determine where the greatest problems for consumers may lie. As a result of this innovation, we are both agile in responding to emerging issues and efficient in

³For more information on the Bureau's health care activities, please see: "Competition Bureau's Health-Related Activities in Priority Areas", <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2234&lg=e>

allocating our resources.

This sophisticated informatics system is, in fact, part of the Bureau's FairWeb project, which is aimed at combatting misleading and deceptive advertising found on the web. FairWeb's initial focus has been on bogus weight-loss products. And to date, over 450 questionable Web sites related to weight-loss products have been identified through the Bureau's Internet sweeps. Over 80% of the most problematic sites have either removed the suspect performance claims from their sites or have expressed an intent to comply with the Act, an impressive result which was achieved without expending major resources in individual investigations.

Of course, you have probably already read about our agreements with the major Canadian Tobacco companies to voluntarily remove "light" and "mild" descriptors from all cigarette packaging. This was the result of extensive analytical efforts by Bureau staff in response to concerns raised with us by concerned health care advocacy groups, and the outcome efficiently met our objective to remove such labels from store shelves.

And this combination of applying extensive analyses to a major public or business concern is typical of our approach to issues – we are careful to identify the most important issues and only act once we have done our homework.

Our advocacy efforts in health care, which are currently focussed on the critically important pharmaceutical market, provide a good example of this approach.

Prescription and non-prescribed drugs make up nearly 18% of total health care spending, and have been growing at an average of 10% annually. This money comes out of the pockets of consumers and tax payers. Our immediate question is whether existing restrictions on pharmaceutical markets cause prices to be unduly high.

So we have launched a study of generic drugs to better understand their pricing, which appears to be higher in Canada than elsewhere. We have organized a roundtable on the interface

between intellectual property and competition, where we will look at issues such as the use of authorized generics. And we are asking whether there are unnecessary restrictions on pharmacists, and other health related professionals, that may be limiting competitive forces or movement across the country for employment purposes.

Beyond these studies, we also took the unusual step of seeking the status of amicus curiae to intervene in an appeal court case involving drug manufacturers Eli Lilly and Apotex. In this case, the original judge's ruling would have resulted in a serious weakening of the Competition Act's ability to deal with cases where companies acquired patents, possibly with the effect of lessening competition.⁴ We were very pleased with the outcome of this intervention.

And we are happy with the first outcome of another of our advocacy efforts. The Bureau has been in contact with various provincial governments, supporting provincial initiatives to create independent colleges of dental hygiene and suggesting ways to establish meaningful competition in the provision of dental hygiene services. In fact, Alberta has just removed the requirement for dental hygienists to work under the supervision of a dentist.

As you can see, our health care work encompasses all aspects of the Bureau mandate, and uses many of our enforcement, advocacy, and outreach tools. In such areas of our work, we are not engaged in a single discipline but, like a decathlete, have to work at a number of disciplines, and be good at them all.

Strategic resource use : Misleading Advertising

But we cannot enter every event. Nor should we. To get the most medals for our efforts, we have to focus. We have to choose those issues where we can and will make the greatest difference by going after anti-competitive practices that have the greatest impacts on markets.

⁴<http://decisions.fca-caf.gc.ca/en/2005/2005fca361/2005fca361.html>

In the case of cartels, most of our cases come from immunity applicants, a process which you will hear about after lunch. And, as you heard from the Mergers panel this morning, statutory reviews bring us our merger cases, making such choices relatively straightforward.

But in the areas I am going to speak of now, misleading advertising and abuse, we have to make more strategic choices of issues to pursue, and which tools to deploy from across the conformity continuum.

And it is first - and always - markets that interest us. Our jurisdiction over misleading advertising, for example, flows directly from the federal powers in trade and commerce. And as misleading advertising distorts essential marketplace information which is essential to trade and commerce in Canada, it is on our agenda to minimize it.

Notice that I said minimize it, not eliminate it entirely – we are not that naive. I suspect that, from the time of the first transaction, sellers have tried to put the best shine on their product, and the temptation to stretch the truth is difficult to resist. The thousands of complaints we receive each year bear witness to this reality.

Now one of the hallmarks of great athletes is the ability to cut through the myriad distractions that surround them to focus on their key objectives. And the same challenge applies to the Bureau. We cannot be driven by every one of the thousands of complaints and concerns raised with us. We can, however, be informed by these complaints to target those practices with the greatest impact on Canadian buyers and sellers.

To do so, we have developed a systematic approach to guide our decisions.

We begin by drawing up a list of issues in the market place. In the past we would have compiled such a list almost exclusively on the basis of complaints. However, are becoming much more proactive. We are now turning to broader, more diverse, information sources about what's going on in the market, including literature reviews, dialogues with stakeholders, in house and

contracted market place intelligence, internet sweeps, like those I mentioned in the case of health care, as well as other sources of metrics.

This intelligence-based approach allows us to put together a list of current marketplace issues or classes of complaints. The comprehensive data we gather are then used to analyse the impact of the anti-competitive behaviour on competitors and on consumers, asking ourselves such questions as:

- do compliant competitors suffer the risk of a significant disadvantage in the marketplace or is the impact on them simply indirect?
- is there a risk that the anti-competitive behaviour will spread to other competitors if it is not stopped soon?
- could consumers suffer health or safety risks as a result of the representations or are they simply inconvenienced?

Answers to these and other questions allow us to conclude whether the impact would be high, medium or low. We then assess the likelihood that a significant number of consumers would respond to the representations or that competitors would be affected by the conduct, again measuring whether the likelihood is high, medium or low.

Our sweet spot is found where the impact on the marketplace is the highest and likelihood of harm is the greatest. We will focus on this set of issues - the ones of greatest importance to consumers and businesses and where the consequences of inaction would be the most important, by assigning dedicated enforcement teams to minimize these high-risk threats in the marketplace.

But please be careful. Just because we are focussing at a given time on certain issues, there is no 'get out of jail free card'. We will continuously refresh our sources of data and stay on top of

consumer complaints about egregious behaviour. If we need to refocus, we will.

Abuse of Dominance

And it is not just consumers who complain. Businesses can and do raise important issues, especially under the abuse of dominance provisions of the Competition Act.

In such cases, we are also seeking to make better use of our resources, but from a different perspective. Here, our challenges lie less with the complaints than with the fact that abuse of dominance issues, by their nature, demand very careful enforcement to avoid putting a chill on what may, in some circumstances, be pro-competitive business acts.⁵ This demands clarity in our understanding of both the economics of abuse and the Act itself. You heard a discussion this morning about whether loyalty programs and rebates raise issues under the abuse provisions. The recent decision of the Federal Court of Appeal in the Canada Pipe case was useful in confirming previous Tribunal jurisprudence. But we could benefit from greater clarity in other areas.

This will not arise absent additional jurisprudence. So our focus here is in finding a simple case or two that may allow us to sharpen the lines around the definitions of acceptable conduct and dominance.

We are not alone in seeking greater clarity in this area as competition authorities around the world are looking for better answers. And it is important that we coordinate our efforts because, in an increasingly global economy, businesses want and need more certainty that practices that are acceptable in one country will, all other things being equal, be increasingly accepted elsewhere.

⁵For a more detailed review of the Bureau's approach to abuse questions, see: Speaking Notes for Sheridan Scott, Commissioner of Competition, "Abuse of Dominance Under the Competition Act", Federal Trade Commission/Department of Justice Hearings on Single-firm Conduct, Washington D.C., September 12, 2006:
<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2179&lg=e>

As a result, I am pleased that the International Competition Network, or the ICN as it is known, is considering how unilateral conduct issues are considered by different countries.

In fact, our work at the ICN on unilateral conduct typifies the Bureau's commitment to bringing greater harmony and effectiveness to the international application of competition policy. Canada was a leading founder of the ICN, which brings together 100 of the world's competition authorities. And I am proud to have been selected to lead the organization this year.

Now I know I have covered a lot of ground today, and there is more I could have discussed, such as our increased allocation of people in our regional offices to combat domestic cartels. But it is time to wrap up.

If you faced a quiz later on, I hope that you would summarize my remarks in one key phrase: the Competition Bureau is making every effort possible to be as innovative, efficient and agile as our Canadian companies must be to compete in the global economic Olympics.

In fact, one of our Olympic gold medal winners had a very appropriate quote to close this discussion.

Wayne Gretzky noted that:

A good hockey player plays where the puck is. A great hockey player plays where the puck is going to be.

His point perfectly captures the challenge we face. We have to move competition in Canada, not to where the world is now, but to where it is going to be.

That competition will benefit all players in our economy, from individual consumers through to the biggest businesses. And it is part of the recipe to ensure that the Canadian economy takes the economic gold medal.

Thank you.