



Competition Bureau
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SPEAKING NOTES

for

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Commissioner of Competition
Competition Bureau**

COMPETITION BUREAU PROGRESS AND PRIORITIES

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It is an honour to speak to you again. It seems like such a short time ago that I appeared before this gathering for the first time. It certainly has been an exciting year since then.

Excitement and change are very much a part of today's competition environment. As I said last year, we are experiencing a massive change in the worldwide marketplace. Thomas Friedman has aptly described this transformation as a triple convergence: "new players, on a new playing field, developing new processes and habits for horizontal collaboration." The entry of countries such as China and India has effectively doubled the size of the global economic community in recent decades. Technology, there is no doubt, has changed the playing field—helping businesspeople bridge time zones and be more efficient. And strategic alliances, if not a habit, are certainly something companies are looking at with increasing regularity—and not just with firms in their own cities and markets, but anywhere. It is truly a changing world.

Competition law must be able to do its job in such a world. In Canada, we have long realized that laws, in and of themselves, don't create competition. Honest players in the marketplace create competition. Agencies that enforce the law also play an important role. And we were certainly called upon to do exactly that this past year.

Here are just a few highlights of our accomplishments. We reviewed a number of important mergers, for example in the cinema, beef, mobile phone and forestry sectors. We also obtained \$9 million in fines for an international price-fixing conspiracy in the rubber chemicals market and, for the first time, a prison sentence for fraudulent telemarketing. Our work in the Sears Canada case before the

Competition Tribunal resulted in an important ruling that clarifies the ordinary selling price provisions of the *Competition Act*. We signed a co-operation agreement with Japan to work together to improve the enforcement of competition laws and we launched Fraud Awareness Month, bringing together more than 40 representatives of leading Canadian businesses, consumer and volunteer groups, government agencies and law enforcement organizations, to educate the public about fraud aimed at consumers and businesses.

The Government also introduced important legislative amendments to the *Competition Act*. Bill C-19 is currently before the industry committee and we are eagerly awaiting the outcome of that group's deliberations. We have appeared before the committee a number of times now to make the case for action on C-19.

You will notice that I always use the word we when I describe our accomplishments. It is important to me to recognize publicly the hard work and dedication of my colleagues at the Competition Bureau.

Now, my preference is to speak to you more to the future than to the past. However, before turning to our priorities for the current year, I thought I would update you briefly on some of the initiatives launched at this forum last year.

Update on new initiatives

In April, we published our policy on technical backgrounders, setting out the circumstances in which we will provide details of our analysis in individual

investigations. We did this in response to comments from a number of you that there needs to be greater transparency in our investigative work. We have issued three technical backgrounders so far and intend to step up our activities in this area during the coming year.

The backgrounders are in no way intended to set precedents. What they show is how we proceeded in a particular investigation. This will allow companies and you as their legal representatives to get a better idea of what to expect in a future investigation, without committing the Bureau to any particular judgment or remedy.

A good example is our technical backgrounder on the Cineplex Galaxy/Famous Players merger. When reviewing this merger, we looked at both upstream and downstream considerations. Upstream, we had to consider the potential effects the merger would have on producers looking to exhibit their movies. Downstream, we had to consider the impact on competition between exhibitors to attract moviegoers.

Today's consumers have a much broader range of choices than many of us did when we were teenagers going to the local cinema. They can buy or rent DVDs, or subscribe to pay-per-view or video-on-demand, on top of the offerings at the local movieplex. Given all these choices, it is not at all unusual for a film to make more money from these other types of sales than from its theatrical release.

So, the obvious question for us when looking at this merger was, are these other options in direct competition with theatres? The short answer to the question is "no", or at least "not yet." What our technical backgrounder does is set out how we

arrived at the conclusion. It makes interesting reading. You will find it and our other backgrounders on our Web site.

Before leaving the subject of technical backgrounders, I should acknowledge that they also, of course, provide evidence for anyone who wishes to criticize us. I don't like being criticized any more than anyone else does but in this case what I like doesn't matter. What matters is accountability. Transparency means that informed critics will review our work. This, in turn, means that we will be under increased pressure to act in an accountable way — which is just as it should be.

In my remarks last year, I also said that we would be calling for comments on our bulletin on regulated conduct. We have just published a revised document for public comment, after considerable research.

The case law in this area is complex and not always clear, so it may be that some legislative amendment is required. We also accept that reasonable people can disagree about the application of the doctrine. In addition, the impact of this year's Supreme Court decision in *Garland v. Consumer's Gas* is still unclear. All that said, Parliament directs the Bureau to enforce the *Competition Act*: only where the law or a court clearly relieves us of this responsibility can we step aside. The proposed approach will certainly have an impact on our work, particularly in the Civil Matters Branch, but we believe it is an appropriate reflection of the law. We look forward to hearing from you.

Last year I spoke to you of our intention to launch an initiative we call sector days. The program was originally conceived as a series of one-day workshops designed to focus on the effects of the global economy, technology and deregulation on

specific industry sectors. This past year, we were able to take advantage of an opportunity presented to us by our involvement in a number of telecommunications proceedings. Prior to those proceedings, we focused half-a-dozen sessions exclusively on the telecommunications business to ensure our interventions reflected current realities in this important sector.

We also spent a half-day looking at the insurance industry last year. We are now gearing up for sessions on the forestry sector, the pharmaceutical sector and retail distribution.

At last year's meeting, I also announced the publication of our paper on efficiencies. This paper was the first in a series of initiatives aimed at fleshing out the debate on this very important topic. To that end, we also held roundtables with stakeholders across Canada and competition authorities from around the world. I also appointed a panel of leading members of the business community to analyze the economic and other underpinnings of the current treatment of efficiencies under the *Competition Act*. A copy of their report was posted on our Web site earlier this week.

One aspect of this debate that continues to intrigue me is our approach to dynamic efficiency—or innovation. I truly believe that the increasingly global nature of our economy, the pace of technological change and growing reliance on market forces will intensify competition and transform markets. I also believe that if Canada is going to continue to prosper in this changing world, our companies have to innovate. And there is no doubt in my mind that much innovation is borne of competition. The ability of companies to realize dynamic efficiencies is a critical piece of this puzzle. But, as I am sure you are aware, most experts agree that

predicting and measuring these types of efficiencies are extremely challenging undertakings. I agree. However, even if the task is difficult, I believe we will all benefit from a discussion of how we might better understand the treatment of dynamic efficiencies in competition analysis.

I am pleased with what we have accomplished. Let me now turn to some of our priorities and challenges for the coming year.

Enforcement priorities

I'd like to begin with enforcement, our core activity. Our biggest challenge is managing the heavy workload. In addition, the cases we handle are becoming increasingly complex due to the forces of globalization, technological change and deregulation.

This is certainly the case with respect to our first enforcement priority: fighting cartels—both international and domestic. To me, this is the worst type of anti-competitive behaviour and one that we must unceasingly work to counter. While our focus in recent years has been on international conspiracies, we are building capability in our regional offices in order to put greater emphasis on combating domestic cartels. In fact, we have announced internally how we plan to put more of the Bureau's "feet on the street" throughout the country over the next several years. This local presence will increase the visibility of the Bureau and increase opportunities for detection of cartel activities

Our second enforcement priority is fighting fraudulent mass marketing. Much of this work is currently focussed on telemarketing fraud and deceptive mail, but it

will increasingly include deceptive spam. Spam fraud casts a very wide net. These criminals target huge audiences with several clicks of a mouse. With practically no effort, they succeed all too often at reaching vulnerable targets. We will continue to work with our many partners, seeking jail terms for offenders when appropriate.

Our third enforcement priority is ensuring accurate information in the marketplace. As I mentioned at the start of my remarks today, a major development of the past year was the Competition Tribunal's ruling in the Sears Canada case, which included a 100-page interpretation of the ordinary selling price provisions of the *Competition Act*. While we will continue to undertake litigation when warranted, in cases such as these, especially now that we have jurisprudence, we feel it's most effective to use the softer end of the Conformity Continuum as much as possible. We need to inform businesses about the law and how they can ensure compliance.

We have already started by speaking to business groups, such as the Canadian Marketing Association in September, about the implications of the recent interpretation of the ordinary selling price provisions. Early in the new year we will hold a workshop to inform the retail sector about the ordinary sales price provisions.

Of course, we continue to devote significant resources to merger review reflecting a significant upturn in the number of cases before us. And as I mentioned earlier, our proposed approach to regulated conduct will have implications particularly for the Civil Matters Branch.

Advocacy priorities

I will speak now about advocacy. Under the *Competition Act*, in addition to enforcing the law, we are charged with the role of chief advocate for competition. The two are closely linked in my mind and you will see that our enforcement actions support many of our advocacy efforts and vice versa.

The challenge we face is how we should use our limited resources to best advocate for competition in the marketplace. We cannot be present in every situation in which competition concerns arise. We have to instead, pick and choose our opportunities carefully, seeking the best return on the taxpayers' investment.

That is why last year we devoted considerable effort to developing a strategic framework for setting advocacy priorities. After several discussions, we decided that we should ask ourselves four questions to determine what areas we will monitor more closely.

- Does a ready forum to present information exist?
- Can the Bureau bring its unique perspective to bear on this issue in a useful way?
- Will we be able to gauge or measure any effects our advocacy efforts may have?
- Will our advocacy efforts have clear benefits for Canadians?

In light of these criteria, we are continuing our well-established advocacy programs for telecommunications, financial services, transport and energy. As I

mentioned earlier, we had several advocacy opportunities in the telecom area this year before the CRTC and the Telecom Policy Review Panel. We have also appeared before the Senate Banking Committee on financial services and the Commons Transport Committee on air liberalization and the Industry Committee on gasoline prices. Increasingly, however, we will turn our attention to two relatively new areas that I believe would benefit from careful input: intellectual property and health.

As I just said, these sector priorities will also inform our enforcement actions. Already you can see evidence of our focus on health when you consider the cases we've taken dealing with weight loss, cancer treatments and tanning studios. We are also looking into these sectors in our Criminal Matters Branch and our Civil Matters Branch.

Critical self-assessment

Finally, I'd like to focus on what could be called the qualitative effects of our efforts. The Bureau could simply work year after year on investigations and bringing successful cases against companies under the Act. However, I do not think that is enough. We also need to continually ask ourselves how effective we are and how we can improve.

Last year, I recalled the words of Bill Kovacic, then general counsel of the Federal Trade Commission, from his speech at the International Competition Network conference in Korea. In those remarks, he called upon competition authorities to engage in critical self-assessment. We at the Bureau have taken up that challenge and continue to review our work and what we might do better. I have already

spoken about our technical backgrounders. Let me now give you a few other examples of the areas we are exploring this year.

In the course of our investigations, we collect large amounts of information from the parties involved—information that we are extremely careful about handling in order to maintain confidentiality. We must balance the need to maintain confidentiality with the need to share information with other law enforcement authorities where warranted.

That is why two months ago, we called for comments on our policy on how we treat the information we collect. The policy was amended to reflect amendments to the Act since the original policy was developed in 1995. For example, since 2002, section 29 protects any information that parties provide voluntarily. Of course, the way we handle information has changed, largely due to the global nature of the marketplace. We are re-examining the policy, with a view to determining whether we have the right balance between meeting our confidentiality and law enforcement responsibilities.

Another good example of self-assessment is our work on the application of section 45 of the Act, which contains provisions against criminal conspiracy. As I told you last year, we are considering various models that we could use when applying section 45. Last month, we struck an external working group of expert lawyers and economists to help us with this analysis.

The committee will meet regularly over the next eight months. Committee members have agreed on criteria for evaluating the potential models and begun their assessment of the models in the context of a number of case scenarios, all

with a view to determining, amongst other things, what behaviour the provisions should cover and whether the provisions should ultimately be criminal or civil ones. These will be followed by public technical roundtables on any proposed legislation.

We appreciate that today's complex markets often require firms to make strategic alliances with other firms. And we understand that these legitimate alliances can often be *pro-competitive*. That is why we are asking ourselves how we can act against conspiracies in a way that will not harm legitimate alliances.

We are also looking at our approach to merger remedies. In mid-October, we published a discussion paper to elicit comments. Merger remedies are determined on a case-by-case basis for the very simple reason that there is no other way to do it. The purpose of these remedies is, as determined by the Supreme Court in *Canada v. Southam Inc.*, "eliminating the substantial lessening or prevention of competition."

That, of course, is easier said than done. To ensure our remedies are effective, we need to regularly re-examine our approach to them. As part of this ongoing critical assessment, we are currently consulting on our policy of seeking, designing and implementing remedies. I hope you will offer your opinions on this matter.

In addition to these three initiatives, we are also continuing to explore the possibility of examining the actual outcomes of the conclusions we reach on mergers. In particular, we would like to be able to determine whether our analysis of impacts of a merger turned out to be correct and whether remedies had the

desired effect. I hope that next year I might be in a position to tell you that we have made progress in carrying out such post-merger reviews.

Conclusion

I'd like to conclude today with a challenge. Each of you can play a greater role in promoting the benefits of competition to your fellow Canadians.

Most people have never taken Competition 101. You can go all the way from kindergarten to university and never hear the case for competition. While it's not perfect, we stick with it because, for most economic behaviour, it just happens to be, as the famous quip about democracy has it, better than all the alternatives. That means we all have to be stronger advocates for competition.

It is in our collective interest. The world is changing. China and India are rising forces. Some industrial giants that seemed permanent are struggling. New companies, new markets, new products and new services are created every year. If Canadians are going to continue to prosper in this world, we need competition.

And it is here that I challenge the competition law community. We have to explain to our fellow Canadians, both formally and informally, how competition works in the real world and to remind them of its benefits.

And I will certainly continue to advance the view that there are strong economic benefits to ensuring that competition is given its due throughout the course of the legislative development process.

Thank you for your time today. I look very much forward to the work that will continue over the next day and a half to build our community and strengthen our efforts to respond to the competitive challenges of our ever-changing world.