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SPEAKING NOTES

for

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COMPETITION BUREAU

**Criminal Enforcement of Anti-Trust Laws -
The U.S. Model - A Canadian Perspective**

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Thank you Paul. It's a pleasure and an honour to be here today with such distinguished co-panelists from around the world to comment on the US model for criminal enforcement of anti trust laws.

From our vantage in Canada, the United States has a very effective antitrust regime and the innovativeness of American policy makers and enforcers is certainly a source of inspiration. Coordination of enforcement actions, harmonization of policies, and sharing experiences certainly have produced terrific benefits for Canadian consumers and businesses; and, of course Americans have always provided great leadership in this field.

As I am sure the audience will appreciate, every panel discussion is preceded by a flurry of e-mails among co-panelist suggesting a host of fascinating and provocative issues and questions. Proverbial zingers like "should all anti trust law be criminal?" In Canada, we have a dual criminal - civil law regime. Conspiracies to lessen competition unduly and bid-rigging are treated criminally while 'market power' offences, notably mergers and abuses of dominant position are treated civilly. Meanwhile, for certain offences, such as predation and price discrimination, we can elect to proceed criminally or civilly.

Why the split? To me the answer is obvious. The criminal law should be available to deal with the most egregious forms of anti-competitive conduct that do not offer any compensating efficiency rationale. Applying Judge Posner's economic theory of the criminal law, one could liken naked price fixing to thievery. Thieves could buy the property they have stolen like other honest members of society do, but have pre-empted the market solely to enrich themselves at the expense of others. Criminal sanctions are justified on the grounds of encouraging business people to use the more socially desirable option of voluntary exchange in the marketplace. Here, over-deterrence is less a concern.

Other practices, however, may have countervailing benefits. Understanding the competitive implications of mergers and other types of business transactions, particularly unilateral conduct, requires a sophisticated economic analysis. Obviously the competitive implications of mergers and business practices, such as tied sales, largely rest on market definition and industry and structure issues. They are socially desirable or undesirable depending on the context, an inquiry that is ill suited, I would argue, for criminal courts.

Canada has certainly had some first hand experience in seeing the relative merits of relying on criminal rather than civil provision of anti trust violations. Prior to 1986, with the passage of the current *Competition Act*, mergers and abuses of dominance were treated criminally. Under the predecessor *Combines Investigation Act*, mergers and monopolies that operated to the detriment of the public were deemed illegal and the Canadian courts seemed reluctant to accept that a reduction or even elimination of competition was in itself evidence of detriment to the public.

Following a comprehensive review, the Canadian government decided to decriminalize both merger review and abuse of dominance provisions, introducing a civil onus of proof, before a specialized Tribunal composed of judges and lay members with backgrounds in economics, accounting and business.

At the same time, the government retained the possibility of criminal prosecution for some business practices - specifically predatory pricing and price discrimination. More notably, it opted to retain the criminal onus for cartels, but one that required prosecutors to prove that a conspiracy would lessen competition unduly. Only bid rigging and price maintenance were made per se offences.

The Supreme Court of Canada's interpretation of the word 'undue' essentially requires an inquiry into the seriousness of the competitive effects of the agreement. Or as the Court said, the conspiracy provision requires a partial rule of reason falling between a per se rule and a full-blown rule of reason analysis.

Thus in matters involving hard core cartel activity, such as price fixing or market sharing, that would be condemned as per se violations of section 1 of the *Sherman Act*, Canadian authorities have to establish competitive effects under criminal law standards of evidence. Despite the great success we have enjoyed over the past ten years, particularly in the international cartel arena, where over \$200 CDN million in fines have been imposed following guilty pleas, convictions after a trial have been very difficult to secure.

Amendments to the conspiracy provisions have been hotly debated in recent years, following the publication of a report of the Standing Committee on Industry Science and Technology in April 2002, which recommended substantial reforms to the provisions. The Standing Committee recommended the removal of the word 'unduly' and the adoption of the American two-track per se/rule of reason model.

Subsequent public consultations on reforming the conspiracy provisions proved to be conclusive only in the sense that there is no consensus in Canada on the nature of any reforms that could be achieved.

The Bureau continues to study a variety of models to reform the conspiracy provisions; the challenge is to develop legislative language that will provide for effective deterrence of hard core cartel activities while not over deterring non-objectionable agreements among competitors, for example efficiency enhancing strategic alliances. Meanwhile, the Standing Committee's recommendations to decriminalize price discrimination and predation and treat these business practices as potential anti-competitive acts under the abuse of dominance provisions have proven to be less controversial.

So while our experience in Canada definitely supports a civil approach to mergers and anti-competitive business practices, we face considerable challenges in making out our criminal cartel case.

One important element in attacking cartels is persuading the courts to impose sanctions that will act as a strong deterrent for this behaviour. There is some debate about the relative merits of fines versus imprisonment, including concerns about the likelihood that a court will impose a fine that truly represents the harm that cartel activity inflicts on the marketplace.

In Canada, our courts have, in the past, demonstrated some reluctance to impose sizeable fines for domestic cartels; however, in a recent case concerning carbonless paper, a judge levied record amounts, declaring this was “as it should be” for such crimes and that monetary penalties should not become regarded simply as a cost of doing business.

While this is a good start, the Bureau and the Attorney General of Canada will have to continue to work hard to educate the Canadian business community and judiciary on the importance and seriousness of criminal competition law offences.

More challenging is the court’s reluctance to sentence white-collar criminal to a term of imprisonment. While there have been a few findings of individual guilt, with custodial sentences, individual fines and community service are far more common in Canada compared to the United States. In part this difference can be attributed to the Canadian Criminal Code which stipulates that an offender should not be deprived of liberty, if less restrictive sanctions are appropriate.

Given these challenges, why not go the civil route?

My response is that civil laws fail to hold people accountable for their behaviour. Of course, corporate fines should not be discounted; they do provide an important measure of deterrence. However, I believe that individual exposure reduces the likelihood that price fixing and other illegal conspiracies become a business decision where executives balance expected profits against the probability of getting caught. We will therefore continue to look for guilty pleas and incarceration in appropriate circumstances.

However, even where we do not pursue individuals criminally, it is our intention to insist on some aspect of personal accountability. For example, in the prohibition order associated with the carbonless paper case I mentioned earlier, the judge ordered the companies to remove key employees from their positions or strip them of any pricing responsibilities and demote them. The identity of these individuals, their role in violating conspiracy provisions and the consequences of their action were described in a note distributed to current employees, directors and officers (as well as to those employed over the next three years). It may not have been American justice, but it is innovative, given the Canadian legal system.

The Competition Bureau is also looking at other types of personal consequences. For example, we are exploring the option of taking fuller advantage of the Canadian Police Information Centre by registering individuals convicted of cartel offenses. This can have

serious consequences on an individual's ability to cross international borders, particularly important consideration for Canadians given the integrated nature of the U.S. and Canadian economies.

It may be that courts are unwilling to impose fines that accurately reflect the full impact on the market place of cartel behaviour, particularly if this could lead to bankruptcy. However, we are seeing the growing importance of other financial consequences that could offer considerable deterrence. As some of you may know, our legislation provides a mechanism for private parties to sue for the recovery of single damages associated with a criminal offence under the *Competition Act* or the breach of a Competition Tribunal order in the case of a civil matter. Private suits in Canada are by no means as pervasive as in the U.S. yet the field is evolving in a way that I see as entirely appropriate.

The provision establishing such a mechanism has been upheld as constitutionally valid and most provinces have legislation that permits the certification of class action suits. As a consequence, we are seeing more private actions for the recovery of damages in Canada and the word in legal circles is that this is a growing trend.

One aspect of the U.S. model that I personally find very interesting is the use of sentencing guidelines. While significant sanctions in the form of fines and prison sentences certainly act as a deterrent, the more these sanctions are predictable and transparent to parties, the greater their deterrent value.

In Canada the decision to prosecute and to request certain sanctions is in the hands of the Attorney General, not Bureau investigators. Moreover, the judiciary have ultimate discretion over sentencing. We have neither a sentencing commission nor statutory minimums for indictable competition law offences. In arguing sentences, prosecutors rely instead on their familiarity with court practices and the experience of colleagues in similar circumstances as well as a list of undifferentiated factors set out in the *Criminal Code*.

Nonetheless in a context where most parties to antitrust offences plead guilty and pay fines, I think that there is more that can be done in this area to educate the business and legal communities, and ultimately the judiciary. We are presently preparing internal sentencing guidelines that reflect the Canadian legal requirements and recent precedents in cartel cases to ensure, as much as possible, that the Bureau's sentencing recommendations to the Attorney General are consistent, logical and transparent.

I have focussed most of my comments on some of the unique Canadian challenges in obtaining appropriate sanctions within the context of our legal system in order to deter cartel activity. An equally critical key to successful deterrence is improving our ability to detect cartels.

Cartel enforcement is the number one priority of the Competition Bureau, and

increasingly we are focussing on detecting domestic cartel enforcement.

The last time I spoke at this conference, I underlined our plan to increase the number of criminal matters officers in our regional offices, in order to be closer to the market place and thereby improve our ability to detect local bid rigging and other cartel behaviour. I am happy to report that we have begun to implement those plans.

We are also updating our immunity programme, which plays a critical role in finding cartels.

The Bureau is also very active on the international front. One of the most successful tools contributing to increased detection has been the high degree of international co-operation. Competition law offenders have few places to hide in the world now. With the establishment of the numerous co-operation agreements between countries and agencies on competition matters and with the development of the ICN and the ongoing work of the OECD, the global effort to track down and bring competition offenders to justice has been greatly enhanced.

Currently, Canada has cooperation agreements or arrangements with ten jurisdictions, including the largest economic players: the United States, the European Union, Japan and the United Kingdom. These various accords allow competition agencies to exchange information, carry on discussions of strategy, and co-ordinate investigations. This has proven critical to effective cartel detection and prosecution.

The paper I have prepared for today's conference, which I understand will be distributed to conference participants shortly, provides a more detailed description of Canada's role in the international arena, as well as the other subjects I have touched upon today. I hope that everyone will take the time to read it.

Thank you for your attention.