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Address

by

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to

**INSIGHT CONFERENCE
CANADA'S CHANGING COMPETITION REGIME**

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Thank you for inviting me to address this conference on Canada's changing competition regime. Today, I will focus my remarks on two main subjects. First, I would like to briefly outline the changes brought about by Bill C-23, now C.16 of the Revised Statutes of Canada, which became law in June 2002. Secondly, I would like to address the process that is underway to develop the next round of proposed amendments to the *Competition Act*.

Bill C-23 Summary

In recent years, the Government of Canada has taken an incremental approach to amending our competition laws. This approach increases the likelihood of important proposed amendments becoming law, since it allows stakeholders and legislators to focus on a limited number of issues, carefully and comprehensively analyse them, and reach, through meaningful consultations, an acceptable consensus on appropriate legislation. The approach has resulted in significant, modernizing amendments through Bill C-20 (in force March 1999), Bill C-26 (in force July 2000) and, most recently, Bill C-23 (in force June 2002).

Bill C-23 implemented significant changes to Canada's competition law regime. The impetus for these changes came from a number of recent initiatives, including several private members' bills that proposed amendments to the Competition Act. These initiatives formed the basis for a discussion paper, followed by consultations and, ultimately, a report prepared by the Public Policy Forum. Bill C-23 represented a compromise, dealing with those issues on which there was consensus, while leaving for further consideration, those that required further analysis and discussion.

Summarized briefly, Bill C-23:

- created a legislative scheme for the use of mutual legal assistance in civil matters, where appropriate treaties between states are in place;
- created a new criminal offence dealing with deceptive notices of winning a prize;

- allowed private actions, on granting of leave by the Competition Tribunal, for matters involving refusal to deal (s.75) and exclusive dealing, market restriction, and tied-selling (s.77), and codified the test of “adverse effect” on competition for matters under section 75;
- provided for a number of procedural changes including:
 - < replacing the consent order process with one allowing for the registration with the Competition Tribunal of consent agreements between the Commissioner of Competition and the parties under inquiry;
 - < allowing the provision of certified copies in place of original records in responses to orders for records production under section 11 of the *Act*;
 - < extending the confidentiality protection of section 29 of the *Act* to voluntarily provided information;
 - < allowing the provision of binding written opinions regarding proposed business conduct, which will come into force by April 1, 2003
 - < allowing references to the Tribunal, cost awards, and summary dispositions;
 - < giving the Tribunal the authority to issue interim orders prior to the commencement of litigation in respect of civil reviewable matters under Part VIII of the *Act* and, in appropriate circumstances, extend such orders;
 - < giving the Tribunal the authority to impose administrative monetary penalties in the case of abuse of dominance by an air carrier operating a domestic service.

These changes will help build a more efficient and competitive marketplace, while ensuring that

Canada keeps pace with a rapidly changing global economy. They allow the Competition Bureau to cooperate more effectively with our counterparts in other jurisdictions. They also address harmful marketplace practices, provide for more timely resolution of competition issues before the Tribunal, and provide greater protection for confidential information supplied to the Bureau, including that which is supplied voluntarily.

Amendments - Committee Report and the Next Round

The House of Commons Standing Committee on Industry, Science and Technology released its final report, *A Plan to Modernize Canada's Competition Regime* in April 2002. The government response to the report was tabled on October 1, 2002. The report presented a comprehensive set of recommendations for amendments to the *Competition Act* and changes to Bureau policies and Tribunal procedures. Its main recommendations were as follows:

- create a dual track approach to agreements among competitors by retaining criminal sanction against hard core cartel behaviour and having other agreements among competitors subject to civil review;
- provide for civil review of the pricing conduct currently covered by criminal provisions, e.g. price discrimination, predatory pricing, promotional allowances, price maintenance, etc.;
- allow private right of action under sections 75, 77, and 79, and empower the Tribunal to award costs and damages; and
- introduce administrative monetary penalties for matters involving refusal to deal, consignment selling, exclusive dealing, market restriction, tied selling, abuse of dominance, and delivered pricing (sections 75, 76, 77, 79, and 81);

Additional recommendations of the Committee's report included: ensuring that the Competition

Bureau has adequate resources to carry out its responsibilities, having the Bureau review its enforcement guidelines to ensure appropriate emphasis on dynamic efficiency considerations; and increasing the threshold levels for transactions covered by the pre-merger notification regime.

In its response, the Government called the report an important step in the ongoing effort to amend Canada's competition law regime. The response also noted a strong commitment to an incremental approach to changing the law to ensure the *Competition Act* remains suited to the rapidly changing competition law environment.

Noting that one-third of the report's recommendations addressed the conspiracy provisions (section 45 of the *Competition Act*) and the high priority attached to effective enforcement against anti-competitive agreements among competitors, the Government said it supports the need to amend section 45. Furthermore, it endorsed the two-track approach of retaining criminal sanctions, without a competition test or an efficiency defence, against hard-core cartel activities such as price-fixing, market-sharing, bid-rigging, etc. However, given the close relationship between sections 45 and 61 (price maintenance), the Government believed that it was more appropriate to wait until the consultation process on section 45 was complete before dealing with the recommendation to repeal section 61.

In respect of the Committee's other major recommendations, the Government response:

- agreed in principle with the recommendation to implement administrative monetary penalties;
- indicated that there will be a review of the enforcement experience and effectiveness of the provisions relating to the airline industry two years after the coming into force of c.16;
- recognized the importance of effective enforcement of the *Competition Act* and promised to ensure that the Bureau will be adequately funded;

- supported including the recommendations regarding sections 50(1)(a), (b), and (c) and section 51 in the consultation process for the next round of amendments; and
- generally supported the recommendations designed to improve the Tribunal process, many of which have been addressed in c.16.

Some of the Committee's recommendations, particularly those regarding cost awards, private access to the Competition Tribunal and increased thresholds for merger notification have already, at least in part, been addressed, or they are currently being addressed.

Given this background and support, the Competition Bureau is working hard on formulating the next amendments package. Although we have not yet finalized a discussion paper that will underpin formal consultations to be conducted by the Public Policy Forum, a number of key areas for reform have been identified.

There is considerable support for the recommendation to amend the law with respect to agreements or arrangements among competitors in the two-track approach suggested by the Committee report and other commentators. The basic notion is simple. The existing section 45 would be changed to create a criminal law provision covering the hard core cartel activities that are unquestionably harmful to competition, such as price-fixing and market sharing arrangements. Other agreements among competitors that raise competition issues would be dealt with under a civil review provision that would allow assessment and, in appropriate cases, weighing of the pro-competitive and anti-competitive effects. As they say - the devil is-in the details. As most you know, the Bureau has commissioned studies on how such a law could be crafted and these will inform the proposals that come forward in the discussion paper.

The second major focus will be on changes to the non-merger civil regime of the *Act*, to make it more effective. The Bureau has undertaken considerable effort to ensure that business people and their legal advisers understand their obligations under the *Act* and the approach the Bureau takes to the

enforcement of key provisions, particularly section 79, which is really the heart of the civil provisions. We have also made it clear, through our Conformity Continuum, that we encourage voluntary compliance with the Act and that we will pursue formal proceedings to force compliance in cases of serious and deliberate anti-competitive conduct. In addition, as noted above, the *Act* now contains procedures that make it easier for the Bureau and businesses to resolve issues and cases quickly and, in many cases, without resort to formal proceedings. Where formal processes are necessary more efficient mechanisms have been put in place, specifically binding written opinions, consent agreements, and references to the Tribunal on issues of application and interpretation of the *Act*. These tools and policies are designed to increase the confidence that Canadians have in the marketplace and allow businesses to comply with the law without the need for lengthy and expensive contested litigation.

Given the available guidance and compliance mechanisms that we have made available to businesses and their advisors, my view is that when businesses choose to disregard the *Act* or to ignore compliance options, the remedies available under the existing regime are inadequate, especially when compared internationally. To address this issue we are considering the introduction of administrative monetary penalties and the extension of section 36 to the non-merger civil reviewable matters under the *Act*.

We are looking at the feasibility of introducing administrative monetary penalties, which are now in place for the civil deceptive marketing practices provisions and the abuse of dominance provisions in respect of domestic airlines, for matters under sections 75, 76, 77, 79, or 81, and any new civil "section 45" provisions where the Tribunal finds that a remedial order is appropriate. Introduction of such penalties would provide consistency among all the major provisions dealing with civil reviewable matters. A major issue for consideration is the amount for such penalties. Should there be different levels depending on the section, a fixed maximum level, or penalties determined at the discretion of the Tribunal?

Also under consideration is the issue of linking the provision in section 36 to certain civil provisions, particularly abuse of dominance, civil reviewable marketing practices under Part VI.1, and

the new “civil section 45 “. Currently section 36 allows parties to initiate actions for damages in the case of violations of the criminal provisions of the *Act* or breaches of orders of the courts or the Competition Tribunal. Two major issues arise if the provision were extended to cover breaches of the civil provisions directly. First, what is the appropriate trigger for allowing parties to pursue an action for damages and second, the appropriate period for which parties could successfully claim damages. Clearly, no action under section 36 should be able to proceed without the Tribunal having made an order in respect of the conduct in question. However, once that is done, for what period should damages be available. Should they cover the entire period of the conduct, the period from the date of the application to the Tribunal, or, perhaps from the date of any temporary order of the Tribunal.

The current situation under our civil matters regime allows parties the opportunity to carry on anti-competitive practices for significant periods of time without any fear of financial penalty or effective deterrence mechanism. Amendments in the direction discussed would:

- bring the remedial regime for civil matters into line with that available for criminal matters,
- make it substantially more effective,
- bring certain areas of market conduct under the civil regime where they more properly belong, and
- make our civil regime more consistent with those in other jurisdictions.

We also want to consider how best to deal with the current criminal provisions of section 50 dealing with price discrimination and predatory pricing. The question, at heart, is whether it is more appropriate that such behaviour be dealt with under a civil regime, most likely within the current abuse of dominance provisions of section 79. Certainly the prevailing view is that this type of behaviour is more properly addressed under a civil review mechanism.

For some time now, and especially with the recent amendments dealing with deceptive telemarketing and deceptive prize notices, the Bureau has acquired responsibilities for criminal law enforcement that is much more akin to criminal fraud behaviour than “normal” competition law offences

we have historically dealt with. In doing so, we are confronting criminal organizations and find a pressing need for expanded law enforcement tools to meet the enforcement challenges this conduct presents. Accordingly, we are considering seeking such powers, possibly through a circumscribed form of peace officer designation for those Bureau officers that are engaged in this work. We are not considering having authorized representatives become full-fledged peace officers and there is no intention to have staff empowered for the use of arms, physical force, or covert operations. Rather, we want to ensure that our people have the necessary powers and protections; and the requisite training to use such powers.

Also being examined is the notion of instituting a process that would empower the Canadian International Trade Tribunal to conduct inquiries into the state of competition in specific industries and markets. Such inquiries would only be conducted on ministerial direction. If implemented, this would allow careful examination and analysis of issues.

The next round of competition law amendments will follow closely on the recommendations of the Committee Report regarding the need to modernize Canada's competition law regime and ensure that the Bureau has the tools to effectively enforce and administer the *Act*. We want to develop a clear, coherent approach to anti-competitive activity in all its guises, from naked cartel activity to civil reviewable matters that substantially prevent or lessen competition. In doing so, we want to ensure that efficiency considerations are dealt with fairly and consistently across the various provisions of the law. We want to protect Canadians against anti-competitive practices and clearly distinguish between anti-competitive behaviour and that which is pro-competitive or competitively neutral.

The final shape of the forthcoming discussion paper and the ultimate amendments package will, of course, be decided by Cabinet. Our ultimate objective is to have a law that is equipped to deal with competition issues in the modern global economy. Having set out the issues we have under consideration, I strongly encourage your active participation in the upcoming consultation process.

Thank you again for the opportunity to speak to you today and enjoy the rest of the conference.