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SPEAKING NOTES

for

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COMPETITION BUREAU

"C" is for Competition: How we get things done in a globalized business world

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Introduction

Thank you for inviting me to Montreal today.

I read recently - and this is especially apropos at the dessert time of a luncheon address - that Cookie Monster of Sesame Street fame is changing his tune. He will no longer sing "C is for Cookie."

No more "Super Size me" for the Cookie Monster. In the interests of combating growing levels of obesity in our children, and possibly to avoid litigation, Cookie Monster will now sing a song called "Cookies are a Sometimes Food" so that our youngsters learn the difference between healthy food and sugary treats.

Well if "C" is for cookie, it is also for Competition. But competition is not a sometimes thing. For you and your clients in an ever tougher world, competitive markets are challenges driving innovation, choice and efficiency. And they are the window to enormous opportunity. The challenge is to ensure that we can and do respond to the challenges, and are able to seize the opportunities.

We all know that of course. Canadian companies need highly competitive, high quality sources of supply in order to take on the rest of the world. And many companies need the experience and discipline of competing in tough Canadian markets to prepare themselves for global combat. But that preparation will not be useful unless those foreign markets are themselves open to effective competition.

The challenge of keeping markets competitive has been long recognized. Adam Smith, in his classic phrase beloved by all competition authorities noted the potential of business people to conspire against free markets:

> *People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.*

Now brother Adam overstated his case. In my experience, the vast majority of business people are far more interested in making money than in breaking the law. But there are the exceptions, of course, and those exceptions distort markets, cost consumers and your companies billions of dollars, and sully the reputation of all legitimate businesses. They must be dealt with.

Lest you think that I am too selective in identifying the source of market distortions, let me flip ahead in time for another quote – I am advancing some 73 years from the Wealth of Nations to Henry David Thoreau's Civil Disobedience where he puts the finger on government:

> *Trade and commerce, if they were not made of India-rubber, would never manage to bounce over the obstacles which legislators are continually putting in their way.*

Okay. I know that both Messrs. Smith and Thoreau overstate their case to good effect. But both made points which underlie what it is that keeps me coming to the office each day – the effort to prevent Canadian markets from getting gummed up by anti-competitive pursuits of business or the obstacles erected by government.

And that is why, love us or otherwise, we at the Competition Bureau are on your side. We enforce the Act, covering business issues including mergers, advertising, predatory pricing and cartels. And we are advocates for public policy which eliminates barriers to markets or which supports market forces.

Not that long ago, the Bureau could fulfill this mandate with only a passing interest in international affairs. Sure, we would have the occasional cross border merger; and every so often, an international cartel. But our interests for the most part stopped at the border.

Now the question we find ourselves asking is, "What border?"

You know this all too well. It is the G word, globalization, and it is affecting everything we do, and likely everything you do as well.

I am going to spend some time today talking about our international arrangements, both formal and informal, that improve both our capacity and efficiency in enforcing the Competition Act, and I will risk another short message at the end about why you should care that we do this well. Then we can all return to our cookies.

In fact, let me return one last time to the Cookie Monster and the letter C as a memory device: the important work we at the Bureau are doing internationally can be divided into three pieces: cooperation, coordination and convergence. Each of these words represents a tool in the enforcement agency tool kit for ensuring that our work gets done in an efficient and effective manner in the face of an increasingly borderless, globalized economy.

Let's take them one at a time…in bite-sized portions, beginning with cooperation.

Cooperation

Cooperation is a great Sesame Street word. But in the international world of law enforcement, it is hardly a playful activity. Indeed, the formal cooperation agreements we have with various partners are at times difficult to arrange, time-consuming to maintain, and essential to effective enforcement of our laws in the global economy.

No one size fits all of our arrangements with our foreign partners, but generally our agreements are either state-to-state, or agency-to-agency accords.

State-to-state agreements typically are comprehensive and provide a regime for notification, enforcement cooperation, coordination with regard to related matters, positive comity and avoidance of conflicts, consultations, periodic meetings and confidentiality. Canada now has comprehensive state-to-state cooperation agreements with the United States, the European Union, and Mexico, and we expect to sign one with Japan soon.

Agency-to-agency cooperation arrangements are similar to state-to-state agreements but are limited to competition law enforcement interests rather than broader national interests. These arrangements have not traditionally contained provisions related to positive comity nor do they provide for formal consultations or notifications through diplomatic channels. They have the advantage of requiring less formal procedures for their negotiation and signature . We have inter-agency arrangements with competition authorities in Australia, New Zealand, Chile, and most recently, the United Kingdom and we have recently intiated negotiations on yet another such arrangement.

Of course, we are not limited to competition specific agreements. We make use of existing Mutual Legal Assistance Treaties or "MLATs" in criminal cases. These treaties can potentially provide us with access to evidence in respect of cartels and deceptive telemarketing activities. As many of you know, MLATs impose binding obligations on signatory countries. The primary purpose of MLATs is to seek evidence, located in the other jurisdiction, of criminal activity, as defined in the requesting jurisdiction. For example, in recent cartel cases, we have used MLATs to request production of evidence located in another jurisdiction and to request assistance to compel the attendance of witness(es) for examination under oath in the other jurisdiction. However, MLATs, such as the Canada-US MLAT, can also be used to initiate criminal process, such as the service of criminal charges. Canada currently has MLATs with approximately 30 countries.

Foreign requests for assistance under MLATs result in a formal process subject to ministerial and court authorization under the Mutual Legal Assistance in Criminal Matters Act.

The MLATs are very good for criminal enforcement, but what about civil enforcement? Here there has been a gap. In 2002, however, the Competition Act was amended to permit Canada to enter into mutual legal assistance agreements in non-criminal competition matters and we see tremendous benefits in negotiating an MLAT for civil matters with partners like the United States. These "Civil MLATs" would provide an evidence-gathering framework similar to that provided by our criminal MLATs.

So if we are cooperating, do we have our act together? Not unless we are well coordinated, the second "C".

Coordination

No amount of formal cooperation agreements can substitute for the ability to pick up the phone and informally talk something out with a foreign counterpart, be they at the head of agency or working level. I am sure the same is true for communication between non-government officials. As Terry Calvani, a Commissioner with the Irish competition authority, pointed out at the American Bar Association Spring Conference on Antitrust Law, this culture of cooperation represents a sea change from just twenty years ago, when conflicts between agencies were the order of the day. We are now working hard to keep our efforts coordinated, both for better enforcement and to reduce the burdens on increasingly international businesses.

One of the most obvious examples of coordination is in the area of cartel enforcement. In recent cases, enforcement agencies have engaged in simultaneous raids or other evidence gathering in different countries.

As you will hear in a few minutes, we have also worked to coordinate merger review internationally and will continue to do so in order to minimize the procedural burden on businesses.

We are also coordinating our activities in other areas, such as telemarketing fraud. The Bureau is very active in regional strategic partnerships across Canada where we coordinate with the Federal Trade Commission as well as other Canadian law enforcement agencies to combat deceptive telemarketing operations that not only victimize consumers but also undermine legitimate and growing areas of market development. In February of this year we coordinated with over forty partners of the Fraud Prevention Forum to deliver Fraud Awareness month. The Fraud Prevention Forum includes private sector firms, consumer and volunteer groups, government agencies and law enforcement organizations committed to fighting fraud aimed at consumers and businesses – and it has developed new tools and information to empower Canadians to recognize, report and stop fraud. As a key part of the Bureau's Conformity Continuum, raising awareness in this coordinated manner is both effective and efficient.

Now we lawyers know that economists are guilty of using obscure phrases and terminology to conceal their alchemy from us plain speaking lawyers. But every so often, or actually quite often, my economics gang at the Bureau accuses us of similar transgressions. Which brings me to the principle of comity -- or as my economists say, the legal doctrine that is required to get lawyers to consider the results of their actions on the work of others.

There are two aspects of Comity: "positive" comity and "traditional " comity. In the case of positive comity, agreements allow Country A to ask Country B to address anticompetitive conduct in its territory that affects the important interests of Country A. In October 2004 Canada and the US signed such a positive comity agreement.

An example would be where an American dominant producer of a particular product is, with the use of anti-competitive exclusive contracts, foreclosing the American market to a Canadian competitor. Should the Canadian competitor file a complaint with the Competition Bureau

against the American producer, the Bureau could formally ask the relevant American competition authority to initiate enforcement action in the U.S. against the American producer.

While our 1995 Cooperation Agreement with the US contains a limited provision on positive comity, the 2004 Positive Comity Agreement sets out in greater detail the situations in which positive comity can be used and will help pave the way for making such requests. Importantly, it introduces rules for deferral or suspension of investigative activities and outlines commitments that a requested competition authority will undertake in handling a request. It is expected that such requests will be rare, especially in light of the integrated nature of our economies, however, when these conditions do occur, we will have an important tool and clear process in place.

As for traditional comity, well the economists are not far wrong in their definition. According to the WTO, comity is:

> *A term used in international law to signify the reciprocal courtesy or mutual respect which one member of the family of nations owes to the others in considering the effect of its official acts.*

Essentially, in the competition law world we are talking about trying to ensure that our enforcement actions will not have negative impacts on those of our counterparts. In some cases it means we should consider working with other jurisdictions to resolve a matter together rather than heading off in divergent directions, especially at the remedy stage. A good example is the merger review process where we have in certain cases found that commitments made, by a party or parties, to a foreign enforcement agencies would address Canadian concerns regarding substantial lessening of competition in the Canadian market.

This was the case in the General Electric's acquisition of Instrumentarium Corporation, where GE confirmed that commitments to the European Commission would be applied on a global basis and therefore resolve Bureau's competition concerns. The acquisition of Aventis by Sanofi-Sythélabo last year is another example where a European Commission remedy dealt with our concerns.

Comity can apply to questions of abuse of dominance as well. In fact, with respect to Microsoft issues that arose a few years ago, we recognized that a global remedy was preferable to a patchwork quilt approach. In that matter, procedures in Canada would have likely resulted in a duplication of efforts, resources and remedies to achieve the same result. Given that the market for such computer products in North America is highly integrated, the Bureau thought it prudent to await the outcome of the case in the United States. I believe we should act with moderation and constraint when proposed enforcement action conflicts with another state's action, when there is a significantly greater nexus with that jurisdiction and our concerns will be dealt with.

Comity depends, of course, on the other jurisdiction having more or less the same competition concept in their law as we do in ours, and in the best traditions of a segue, this brings me to the topic of policy convergence, the last C.

Convergence

As I noted at the outset, competition policy was once largely a domestic matter, and different countries tailored policies to meet their diverse economic, social and, dare I say it, political objectives. But this is becoming less tenable as an approach. The globalized world is resulting in both a greater need for common approaches and improved economic understanding to facilitate a gradual convergence in competition policy.

We are not talking about the complete harmonization of competition law. There are still sufficient divergences in economic and business needs, domestic legal systems, and economic perspectives to require some degrees of individualization in our competition policies.

Rather than seeking uniformity, our strategy is to encourage soft convergence on general principles and best practices while recognizing the need of each jurisdiction to adapt these practices to their unique situations.

One of our key mechanisms to pursue this soft convergence is the International Competition Network, the ICN.

The ICN is not a traditional international organization. It is a virtual network of competition agencies, with no staff, no headquarters and no diplomatic baggage. But it has a mission of "all competition, all the time", and enjoys the support and direct engagement of the heads of most of the world's competition agencies.

And fear not – this is not about a bunch of enforcement agencies meeting on hilltops in splendid isolation from the real world. We depend a lot on the contributions of "Non-governmental advisors" (NGAs) who have volunteered a tremendous amount of time, effort and expertise to the activities of this virtual organization.

The annual ICN conferences bring together the heads of competition authorities and participating NGAs. During the first three conferences in Italy, Mexico and Korea, much progress was made in terms of the adoption of recommendations and other valuable work product. And just last week in Bonn, we met for the fourth time, focusing on issues such as implementation and what younger agencies expect from the ICN. In response to requests from some of these younger agencies we have struck a new one-year Working Group on Telecommunications, which I am pleased to co-chair. The establishment of this Working Group responds to a rapidly evolving sector that presents many challenges for competition authorities from both developing and developed countries in their enforcement work and in their competition advocacy efforts before regulators. You can review the accomplishments of the ICN through its website to find out more.

In addition to the work of the ICN, the OECD's Competition Committee continues to play a significant role in promoting international cooperation and coordination in competition enforcement and establishing best practices, particularly in the areas of cartels and merger review procedures. The OECD Council has recently approved a new Recommendation that

incorporates many of the elements of the ICN Recommended Practices on merger notification and procedures. Further, in May, Working Party 3 of the OECD's Competition Committee completed work on Recommended Practices for Formal Information Exchanges in International Cartel Investigations. These are additional tools to help us cooperate and coordinate more effectively with our international partners.

Conclusion

Okay. I have now covered my three "Cs". Which means that the end must indeed be near. And it is.

But I have one last quote to leave with you, not from big thinkers like Adam Smith or Henry David Thoreau, but from Mario Puzo, author of The Godfather. Referring to Don Corleone, Puzo writes:

> *Like many businessmen of genius he learned that free competition was wasteful, monopoly efficient. And so he simply set about achieving that efficient monopoly.*

Well Mr. Puzo had it partially right. For the Godfather personally, the lack of competition may have been efficient. But in the end, it resulted in less than happy endings for his family.

And for our economy, impeded competition is not a recipe for a happy ending, but for mediocre performance and stagnation. That is why Canada needs an effective and vigorous competition policy and enforcement in our own markets. It is why we need a continued focus on ways to ensure that government policies contribute to market functioning rather than inhibiting market forces. And it is why, the international efforts of the Competition Bureau, focused on cooperation, coordination and convergence, will ensure that Canadians and Canadian businesses can and will benefit from competitive markets at home and abroad.

Thank you. And now for some cookies.