SPEAKING NOTES

for

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COMPETITION BUREAU

Competition Law and Intellectual Property Law: Getting the balance "just right"

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It is my great pleasure and honour to be here today at this symposium - in part because it is taking place in my hometown of Vancouver and is sponsored by my alma mater, the Faculty of Law, at the University of Victoria. But more importantly because I welcome the chance to address such a group of experts on a topic that I believe is of vital importance to our economy, namely the relationship between competition law and intellectual property law

Perhaps not surprisingly, many people don't understand the various linkages between competition policy and intellectual property. And there are some who think that the two conflict. They believe that because intellectual property can create market power, it must run counter to the efforts of competition policy to maintain and encourage competition.

But our economy is much more complex than that. Continual innovation is both one of the hallmarks of competition, and an important source of competition in the marketplace. To the extent that a strong and effective intellectual property framework contributes to this innovation, it supports competition. And to the extent that competition stimulates innovation, it clearly contributes to the development of intellectual property.

I try to summarize the linkages as follows: both competition and intellectual property policies stimulate innovation. Innovation leads to productivity and prosperity, and prosperity stimulates the creation of competition and intellectual property. This is a virtuous circle of the highest order. It is wonderful in its simplicity and clarity.

However, forming this virtuous circle is not straightforward. Both IP and competition policy attempt to create frameworks for economic activity which protect individual and societal objectives. They both operate with contesting self-interest and legitimately differing philosophies and analytical frameworks. Both can arouse passionate if not always well informed debate. And if we get them wrong, we will suffer.

In both competition and IP, we are looking for solutions which are not too restrictive, and not too lax. Not too prescriptive and not too vague. Not too burdensome and not too light. And between competition policy and IP, we are seeking a balance which preserves private incentives to invest and create, while ensuring that we are not creating undue barriers to future competition and innovation. In short, we have to get things "just right."

Sound familiar? Well, it might to those of you who studied philosophy. Almost 2500 years ago, Aristotle pondered the questions of virtuous character and virtuous behaviour. And he found that virtue lies in finding the "Golden Mean" between extremes. This gets translated in various ways - for example, the Temple at Delphi carries the admonition to do nothing to excess, something I suspect we would all do well to remember.

Now, this is not the time for a lecture on philosophy or proper behaviour. But I think we can take some comfort in the fact that finding the balance in intellectual property laws is part of a long line of searches for the Golden Mean. And at the risk of trivializing the quest, we should recognize that finding this Golden Mean may well ensure that we also find economic gold.

We face a challenging quest for this gold, and it is not clear we are fully prepared for it.

On October 18, 2005, the Conference Board described Canada as an underperforming but potentially gifted child. Our productivity achievements were declared to be our most significant weakness, with 2004 increases less than one-third of those in the US (1.1% versus 3.6%).

This difference goes straight to Canadians' wallets and purses: Our annual per capita income gap with the US now exceeds $ 8, 000 (US dollars).

While this is the bad news, I don't want to overlook our accomplishments. As a country, we have made great progress in the last twenty years, opening up to new markets with multilateral and

regional trade agreements, reducing barriers to internal trade and restoring our fiscal health.

In these and other ways, we have created a solid foundation for our future. The challenge is to ensure the foundation remains strong, and to build on it. And in this effort, the Competition Bureau plays a key role. Our job, according to the *Competition Act,* is to maintain and encourage competition in Canada. Competition is one of the cornerstones of our foundation.

We do our job in two ways: by enforcing the *Competition Act* to protect competitive forces in the economy, and by being energetic advocates for competition.

I will speak a bit more about our advocacy work later, but let me begin with a quick primer on the four broad enforcement elements of the Act.

First, the Act provides the Bureau with the right to review and contest mergers in order to prevent excessive market concentration. Only the larger mergers must be notified to the Bureau, and these mergers are very carefully analysed to ensure that we act only where the merger will result in a substantial lessening of competition -- historically, over 96% of all notifications are approved without change.

The second part of the Act provides the Bureau with civil powers to deal with certain potentially anti-competitive business practices. These include practices such as abuse by a firm of its dominant position in a market to reduce or preclude competition, refusal to deal, tied selling, and exclusive dealing. It is sometimes difficult to distinguish between such abusive acts, like predatory pricing, and highly competitive acts, like aggressive pricing in the market place, so we were very pleased to have been successful in our recent appeal to the Federal Court of Appeal of the Canada Pipe decision.[1] The resulting determination provides a very clear articulation of the basic tests that must be met.

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[1] Canada (Commissioner of Competition) v. Canada Pipe Company Ltd. (2006 FCA 233)

Third, you are most likely aware that the Act covers criminal practices such as price fixing and bid rigging. These have been described as the most egregious forms of anti-competitive conduct and are taken very seriously.

You may, in fact, recall the announcement in late January of a major cartel decision involving the paper industry. Cascades Fine Papers Group Inc., Domtar Inc. and Unisource Canada, Inc. each pled guilty in the Superior Court of Justice in Toronto to two counts of conspiring to lessen competition unduly contrary to section 45 of the *Competition Act*. Each company was sentenced to record fines of $12.5 million for their part in the domestic conspiracy of carbonless sheets. A prohibition order was issued against the companies and senior staff were either demoted or dismissed.

This decision demonstrates that we and the courts take domestic cartels very seriously.

And the economic reason is clear: cartels and bid rigging are capable of diverting large sums of money away from consumers, away from taxpayers, and away from other Canadian companies that compete globally. In short, these acts destroy markets and competitiveness.

This brings me to the fourth element of our mandate which is to preserve the integrity of the marketplace and, in particular, marketplace information. To this end, the Act contains provisions dealing with false and misleading advertising.

The Bureau's role and powers in enforcing these four elements of the Act are those of a law enforcement agency. For example, we can and do seek search warrants and conduct searches. We can and do seek wiretaps. We have an immunity program for individuals who want to bring us evidence of cartels or other criminal offences.

As with other law enforcement bodies, we examine and analyse cases as they emerge. And when warranted, we present our cases either to the Competition Tribunal, a specialised body equipped with both judicial and economic and business expertise, or through the Attorney General to the courts for Criminal matters.

While you may be aware of these enforcement duties, I suspect that our advocacy role is less well known. Yet it is every bit as important.

We are specifically charged by our Act to advise on, and speak for and about competition in Canada. We take this role very seriously, from our interventions in regulatory fora such as the Canadian Radio Television and Telecommunications Commission and the Canadian Transportation Agency, to providing advice to governments of all levels on policies affecting the marketplace. Occasionally, government departments will seek our advice on legislation - including the *Patent Act* or the *Copyright Act*.

Most recently, we intervened in an Appeal Court case[2] in which the linkages between the *Competition Act* and the *Patent Act* formed the key question before the court. The case involved three pharmaceutical companies, Eli-Lilly, Shionogi, and Apotex, and the appeal was based on whether the assignment of a patent can constitute an agreement or arrangement to lessen competition unduly, contrary to section 45 of the *Competition Act.*

This is a critical question which brought into play the relationship between the *Competition Act*'s authority vis-à-vis the *Patent Act*. A lower court judge had, in effect, held that a simple assignment of a patent in whatever circumstances would not run afoul of the *Competition Act* because the assignment of patents is expressly authorized by section 50 of the *Patent Act* and Parliament must be taken to have understood that patents confer market power.

If this interpretation had stood, the capacity of the *Competition Act* to deal with cases involving intellectual property, for example, where a company buys up all the competing intellectual property thereby creating a true monopoly, would have been seriously compromised, and the effects may have carried over to other forms of property and related laws.

[2]Apotex Inc. v. Eli Lilley and Company, Docket: A-579-04. Citation: 2005 FCA 361

Our specific reason for intervening lay in our belief that the court's decision had misinterpreted our <u>Intellectual Property Enforcement Guidelines</u> http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1286&lg=e which state that the assignment of a patent can contravene the *Competition Act* if it has an anti-competitive effect. Specifically, our Guidelines state:

> ***"If an IP owner licenses, transfers or sells the IP to a firm or a group of firms that would have been actual or potential competitors without the arrangement, and if this arrangement creates, enhances or maintains market power, the Bureau may seek to challenge the arrangement under the appropriate section of the Competition Act."***

On appeal, the Federal Court of Appeal agreed. It found that the *Patent Act* does not override the *Competition Act*, and that the two Acts could be found to "operate harmoniously." Specifically, the Court concluded:

> ***"...section 50 of the Patent Act does not immunize an agreement to assign a patent from section 45 of the Competition Act when the assignment increases the assignee's market power in excess of that inherent in the patent rights assigned."***

This is an important determination in that it explicitly recognizes the overall importance of maintaining competition while respecting the protection of intellectual property.

Our intervention in the case respected the importance of intellectual property and competition. We respect other important governmental objectives in all of our advocacy efforts: we do not argue blindly for competition at the expense of all other goals. We advocate that these goals be achieved in concert with competitive forces and with the least impact on the marketplace.

And we need to get these balances "just right" because success in the competitive market place is crucial for our future. The central role of competition in economic progress is well established. But this competitive market place is constantly changing. We are now living in a knowledge-based economy and one that transcends national

boundaries. And in this market place, IP is becoming one of the most critical property interests.

In a knowledge-based economy, with production coming from a much bigger, more diverse world, the real key to significant gains in our standard of living is innovation -- innovation in our business practices, technologies, and science. Innovation in our product designs and marketing. And innovation in our marketplaces to keep pace with emerging opportunities and challenges.

You know too well that the pace of innovation has skyrocketed, facilitated by a much larger base of highly educated individuals, information and communication technology, and of course globalization. Companies are bringing new products, services and processes to markets at a speed which is dazzling. Whereas in the past, a company could successfully stick to its knitting. Today, it will find itself rapidly unravelled by rivals that knit faster, better and at lower costs.

At the same time, these emerging markets are offering us enormous opportunities. But unless we are there with world class, innovative products, our opportunities will be severely limited.

To survive and prosper in this new global arena, we must ensure that our economy excels in the virtues of the perpetual "Global Economic Olympics" - not faster, higher, stronger, but more innovative, more efficient and more economically agile. These are the business virtues that we must nurture.

And such virtues are most often the products of the successful interpretation and reaction to market forces - in other words, competition.

Today, I am going to focus on the innovation virtue, but my comments can apply equally to our need for efficiency and agility.

So what drives innovation?

Well, it appears that innovation is the complex product of supply and demand. On the supply side are factors such as highly qualified graduates, tax credits, funding for basic research, centres of excellence, and so on. This side of the equation has received and will continue to receive considerable attention and debate.

Less attention has been paid to the flip side of the coin, the factors affecting the demand for innovation -- that is, the factors that push businesses to take on the challenges and risks of innovation. But this is changing. In January of 2005, *The Institute for Competitiveness and Prosperity* produced a report titled *Canada's Economic Prosperity*. Based on the work of the World Economic Forum, the report identifies many factors contributing to our productivity malaise compared to the US. One of the overall factors they identify is weaker competitive pressures in Canada, including the effectiveness of our antitrust policy.

To quote their report:

> ***"The Business Competitiveness Index rates Canada very low on factors of competitive pressure - with Canada trailing the United States in 17 of the 23 factors regarding firm rivalry and degree of sophistication of customers."***

Their view of the impacts of these shortcomings is harsh. The report concludes that:

> ***"...company strategies and operations are only as good as they need to be. If the environment in which companies operate is not providing the specialized support and the intense pressure for innovations and upgrading, then the companies will have uninspired strategies and mediocre operations."***

If true, where does that leave Canada? I know that we are blessed with entrepreneurial skills and drive. And I hear regularly about the pressures that business face, and see that many Canadian markets, especially those well integrated into the global scene are intensely competitive. But to function at the cutting edge of global competition, all of our markets need to be highly efficient, with minimal distortions from regulations. They need to be supported by

world-class marketplace frameworks, such as those dealing with copyright and patents. And they need to be free from anti-competitive activity.

This is not just because Canadian companies need to have competitive suppliers, although that is critically important. And it is not just because the success and failure of competitive markets ensure greater resource efficiency.

In fact, the impact of competition may be more subtle and powerful. Competitive, effective markets generate the market information and ideas that guide successful innovation. They give companies rapid feedback on their progress and strategies. They set competitive challenges that spur better performances.

Customers, faced with choices, become more demanding, more confident and more successful. And successful customers are good customers.

A competitive marketplace, in parallel with intellectual property laws, ensures that firms can enjoy the benefits of innovation. They will not suffer from undue regulatory delays, uncertainty or restrictions. They will be effectively protected from unfair practices of other marketplace participants. Their successful innovation will have a chance to turn into profits.

Obviously, the sheer force of competition is a powerful spur to innovation. This was demonstrated in the two-year investigation into labour productivity in the United States, France and Germany carried out by the McKinsey Global Institute. The report on this study, found in the Harvard Business Review[3], concludes as follows:

> ***…our research clearly shows that wherever competitive intensity was greatest, innovative products and practices proliferated and productivity grew robustly. And wherever competition was constrained, innovation waned and productivity suffered.***

[3]The Real New Economy, Harvard Business Review, October 2003, p.107

So, effective, competitive markets help to drive demand for innovation, and innovation drives competitiveness and productivity. Given that, the obvious question is: what do we have to do to improve Canadian marketplaces?

We can draw on examples of action elsewhere in the world. 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 a national consensus on the importance of competitive markets and have coordinated state and federal efforts.

The UK offers another example. They have also revamped their competition enforcement, but perhaps more importantly, 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 in the Competition Bureau, we are acting on the two fronts I mentioned earlier - enforcement and advocacy.

I won't dwell on the enforcement front today. Suffice it to say that we are increasing our focus on areas such as bid rigging, cartels, and mass-marketing fraud. We are also looking at how new technologies are affecting the marketplace, including how they may be abused. These are all areas that hurt Canadian consumers, impair Canada's international competitiveness and erode confidence in emerging markets.

On the advocacy front, one of our key priorities has been the interface between intellectual property laws, competition policy and innovation.

This is a critical question not just for Canada but for many jurisdictions. In fact, the US Federal Trade Commission and Department of Justice held numerous hearings staged over five

months on this very issue and have published one major study of the results, with a second one in the works. Europeans are examining how their treatment of IP and competition policy compares to that in the US.

In Canada, the Competition Bureau along with Industry Canada and the Canadian Intellectual Property Office are working together on the interface between intellectual property and competition policy. We have commissioned a review paper of the major issues, identified topics for further study and created an international editorial panel to oversee the work of various authors who will undertake work on these issues.

This work will inform a top level symposium early next year. The 40 to 50 selected participants will include leading academics and practitioners, along with government representatives who have responsibilities concerning competition or intellectual property. We have now finalized our list of topics for greater in depth study, though our discussions at the symposium may be somewhat wider ranging. The topics are:

1. Authorized Generics

- **will examine the extent to which brand-name pharmaceutical companies in Canada have launched authorized generics (i.e., generics licensed by brand-name firms just before patent expiry) and the impact that these drugs have had on the entry of other generics and marketplace competition.**

2. Collective Management of Copyright

- **will examine Canada's current system of copyright collectives and determine, given the current state of technological development, whether it is functioning well in terms of minimizing transactions costs and encouraging the creation and dissemination of works.**

3. Extension of IP rights

- **will examine some of the ways that firms have attempted to extend their IP rights beyond what was initially provided by statute. A recent example of this resulted in the Supreme Court of Canada's decision involving an attempt for trade-mark protection on LEGO blocks.**

4. Compulsory Licensing

- **will examine Canada's existing provisions for compulsory licensing, that is, sections 19 and 65 of the *Patent Act*, and section 32 of the *Competition Act*, to determine whether these have met their legislative intent. The study will also explore other models for compulsory licensing and the appropriate division of responsibility among the Commissioner of Patents, the Commissioner of Competition and the Courts.**

5. Tying/Bundling in the IP Context

- **will include a systematic review of the economic literature on tying and bundling in relation to the exercise of IP rights. The focus would be to determine the circumstances where these practices could extend IP protection and block innovation by deterring entry and investment, to better inform enforcement policy.**

6. Canadian Patent Law in an International Context

- **will compare and contrast Canada's patent regime with its obligations under international treaties with a view of determining whether there is scope to improve the current regime to better foster innovation and competition.**

I think you will agree that this is a wide-ranging and ambitious program of enquiry.

Beyond this project, we have been active in a number of areas. For example, in June 2004 we presented a paper to an OECD roundtable on Intellectual Property Rights. Our submission focussed on the interface between IP and Competition Law, with an emphasis on our approach to compulsory licensing. This is an issue that many jurisdictions grapple with, but Canada is unique in that we have a provision addressing this in section 32 of the *Competition Act*. Many in the international community are interested in how the Bureau enforces section 32 and our submission highlighted our approach as it is articulated in our *Intellectual Property Enforcement Guidelines*.

We are staying on top of international thinking and developments, for example in the US and the EU, through monitoring and maintenance of our contacts in this area. And late last year, this was one of two specific issues that were discussed at the first trilateral meeting of Canadian, American and Mexican competition authorities. All of us recognized the importance of this area and a comparison of the US and Canadian approaches, as articulated in our respective Guidelines[4], demonstrates a clear sharing of fundamental principles. These include

- **For anti trust purposes, IP is essentially comparable to any other form of property;**
- **There is no presumption that IP creates market power; and**
- **Licensing of IP is generally pro-competitive**

So while there may be some differences in approach to specific issues that you will be hearing about, there is no doubt that we have a similar outlook.

This is because getting the correct balance between IP law and competition law matters in both our economies. As I said earlier, both contribute to innovation, which was recently described by BusinessWeek in the following terms:

[4] http://www.usdoj.gov/atr/public/guidelines/0558.htm

> ***Innovation is the new currency of competition. It is the key to organic growth, the lever to wider profit margins, the Holy Grail of 21st Century business.***[5]

In other words, finding the Golden Mean really will bring the gold.

Aristotle certainly knew the importance of constantly seeking the best balance. Succinctly, he noted that: *Even when laws have been written down, they ought not always to remain unaltered.* Aristotle recognised that time and circumstances may well require us to seek new Golden Means.

But enough philosophy I want to wrap up this discussion. And in doing so, let me revert to a point I made at the outset. Our economy and our markets are strong overall. But we face a rather imposing challenge from innovative, competitive and efficient new economies.

We have to learn to be every bit as innovative, competitive and efficient in our own ways. And getting our competition and intellectual property policies "just right" will make this effort possible.

Thank you.

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[5] BusinessWeek, June 19, 2006, at p.19