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SPEAKING NOTES

for

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Commissioner of Competition

COMPETITION BUREAU

Bill C-249
An Act to Amend the *Competition Act*

Standing Senate Committee on Banking, Trade and Commerce

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(Check against delivery)

Thank you Mr. Chairman, Honourable Senators, for inviting me to participate in your deliberations on Bill C-249, *An Act to Amend the Competition Act.* This is the first time I am appearing before you as the Commissioner of Competition and I welcome the opportunity.

Before explaining why the Competition Bureau supports this important piece of legislation, please allow me to say a few words about our mandate and my role as Commissioner of Competition.

As an independent law enforcement body, the Bureau seeks to ensure that all Canadians enjoy the benefits of a competitive marketplace in the form of competitive prices, product choices and quality services.

The Bureau administers and enforces four statutes: the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, and the *Precious Metals Marking Act*.

It enforces provisions prohibiting anti-competitive conduct such as false or misleading representations, deceptive marketing practices, abuse of dominant position, exclusive dealing, price-fixing, and bid-rigging.

It also reviews merger transactions to determine if they will result in a substantial lessening or prevention of competition in the marketplace.

In addition to my enforcement duties as Commissioner of Competition, I also have a role to play as a competition advocate which brings me before committees, such as this one, to provide my perspective as the head of Canada's competition agency. The Act also provides me with the right to appear before provincial and federal regulatory authorities.

The bill before you today would amend the merger provisions of the *Competition Act* and change the way we consider efficiencies in the course of a merger review.

Under the current regime, which was adopted in 1986, the Bureau undertakes a delicate and complex exercise to assess a proposed merger's effect on competition. As explained in our Merger Enforcement Guidelines, a merger can substantially lessen or prevent competition when the merged company gains enough market power to maintain prices at a higher level than could be expected in the absence of the merger. In reaching this determination, the Bureau assesses a number of elements in its review. These include market concentration, market shares and factors enumerated in section 93 of the Act such as foreign competition, innovation, the availability of acceptable substitute products, the existence and effects of any barriers to entry and the extent of remaining competition in the relevant markets.

Under the current law, it is possible for a merger to proceed even if it results in a substantial lessening of competition. This is due to the "efficiency defence" which allows the Competition Tribunal to weigh efficiencies resulting from a merger against anti-competitive effects, such as price increases.

These efficiencies can include savings associated with integrating new activities within the merged firm, transferring knowledge between merging parties, quality improvements and the introduction of new products. Under our current system, a merger will be allowed if the efficiencies generated by the merger *are likely to be greater than, and will offset, the effects of any prevention or lessening of competition*.

My recent ten years in the private sector have made one thing very clear to me. The need for an efficient economy remains a critical issue for Canadians and Canadian corporations. My consultations over the past three months with over 200 competition stakeholders have confirmed my belief that industries around the world will continue to undergo profound transformation in response to accelerating technological change, a growing global economy and continued deregulation. If our economy is to prosper and grow in these challenging times, there is no doubt in my mind that we need to have successful and efficient corporations that can make the necessary investments in infrastructure and R&D to keep Canada at the forefront of progress. In this way, we will continue to see growth, job creation and innovation in this country. For these reasons, the role of efficiencies in merger review remains an important issue.

So what will be the impact of Bill C-249 on the role of efficiencies? Under Bill C-249, efficiencies would become a factor that is considered in the assessment of whether a merger should proceed, rather than a justification of an otherwise anti-competitive merger. Like the Canadian Bar Association, the Bureau supports this approach. By factoring efficiencies into the overall competitive analysis of a merger, our review would focus on the likelihood that the relevant markets would remain competitive and consequently bring the many positive results that can flow from competitive markets - choice, competitive prices, product and service innovations and investment.

Having reviewed the transcripts from last week's Committee hearings, I would like to take this opportunity to answer the Chair's question regarding the use of "may" vs. "shall" in Bill C-249. Does the use of "may" suggest that efficiencies need not be taken into account? The short answer is "no." Replacing the word "shall" with "may" simply makes this legislation consistent with section 93 of the *Competition Act*. Section 93 lists factors to be considered regarding a prevention or lessening of competition. The word "may" is used since each factor need not apply to all cases. And if evidence of efficiencies is properly adduced, it is certainly hard to imagine that the Tribunal would choose to disregard it. In fact, in the past, the Tribunal has systematically reviewed the evidence on all relevant factors in merger proceedings.

Furthermore, as a factor, efficiencies would continue to be broadly defined, so that different types of efficiencies specific to the proposed merger would be taken into account. Nothing in the language of C-249 restricts the types of efficiencies that would be considered. Specifically, the Bureau would continue to look at allocative, productive and dynamic efficiencies, as I mentioned earlier.

Bill C-249 would however change how the Bureau considers efficiencies. This amendment would drop the notion of a defence and provide that efficiencies are considered in an integrated fashion from the onset of a merger review. Furthermore, efficiencies would be considered in the

context of the benefits they bring to consumers. This last point raises two issues: (1) what types of benefits could be passed on to consumers, and (2) who are the consumers.

I read this legislation to be very broad in terms of the benefits that could be passed onto consumers. These could include innovations, quality and product improvements, choice and competitive prices that efficiently run competitive companies can demonstrate over time. They would not be limited simply to price issues, as they are in some jurisdictions. This is clear in the language of the section which identifies two types of benefits - price and choice - but does not limit other options.

In terms of the meaning of the concept of "consumer", I also read the legislation broadly. The dictionary meaning of a consumer is a purchaser of goods and services. It is not necessarily limited to end-consumers or consuming households. Jurisprudence in this area is consistent with a broad interpretation of "consumers" that would include individuals as well as businesses in the assessment of consumer impacts. This definition is also consistent with the concept of "consumer" internationally. For example, the European Union defines the meaning of "consumers" to include *intermediate and ultimate consumers, potential and/or actual*.

There is one important difference, however, under the factor approach. It is highly unlikely that efficiencies would justify a merger which results in a monopoly, something that has occurred under the current approach and, I would submit, is contrary to the purpose and objectives of the *Competition Act*.

The bill would also bring us closer to the rules of our trading partners. Historically, Canada has looked at efficiencies from a different viewpoint than virtually all other jurisdictions in the world. In recent years, foreign competition authorities have focussed more on how to encourage efficiencies without hindering the interest of consumers. For instance, the EU adopted guidelines in 2004 that indicate a willingness to consider efficiencies as part of its reviews provided they deliver advantages to consumers and do not hinder competition. Prior to that time, efficiencies were virtually ignored. And it was in the late 90s that the US confirmed that efficiencies would be integrated in the overall assessment of mergers as long as they do not harm consumer welfare.

I would therefore suggest that we are not witnessing a move internationally to the existing Canadian model as some witnesses seem to posit. Rather we are seeing jurisdictions around the world revisiting their approach to mergers with a view to achieving the right balance between the promotion of efficiencies and the interest of consumers, much like C-249 does.

Before I conclude, Mr. Chairman, I would like to say a few words in response to an issue that you raised last week; namely why this matter is being dealt with as a stand alone amendment and not part of a comprehensive policy review. Let me begin with a procedural explanation.

As the Committee is aware, Bill C-249 originated as a private member's bill and not as government legislation. As such, it followed the normal parliamentary procedures and was not the subject of parallel public consultations. Bill C-249 had a long history in Parliament and the bill was adopted by the House of Commons following the normal procedures in May 2003.

The fact that this was a private member's bill certainly explains why it was not part of a broader policy review; however, I do not think this explanation is fully responsive to the concerns you were expressing last week. These relate, I believe, to the broader question of why this private member's bill should not be reborn as part of a broader government review of changes to the Competition Act and be the subject of further consultations.

To answer that question, I would look at the advantages and disadvantages from a competition policy perspective and assess where the risks lie.

What are the advantages to such an approach? I perceive just one: namely the possibility that one might obtain a more macro analysis of the impact of changing the efficiency defence to a factor.

What are the disadvantages to such as approach? First, the Canadian Bar Association indicated that there is uncertainty in the business community as to the application of the approach endorsed by the Federal Court and the Tribunal. While Professor Townley clearly described the conceptual elegance of the model, practitioners such as Mr. Kennish are all too aware of the practical challenges in advising clients on whether their merger is likely to pass muster before the Competition Bureau and ultimately the Tribunal. Under this approach, merging parties must speculate on whether any consumers will be affected in a socially adverse manner, how this should be weighed and what adjustment should thus be made to the determination of the value of efficiencies – all highly subjective assessments.

Second, in an increasingly concentrated economy, it is conceivable that another merger application raising the efficiency defence will come forward and result in the creation of a monopoly. This is speculative of course but growing levels of concentration increase the odds.

Third, any further consultations would necessarily involve additional and unknown delays, with no guarantees that the delays will allow parties to shed further light on a debate where the sides have been clearly drawn for some time. The choice is between a defence, where efficiencies can justify an anti-competitive merger or a factor approach, where efficiencies must be considered in light of overall benefits to consumers.

Mr. Chairman, I suggest that, from a competition policy perspective, the risks of ongoing business uncertainty, the potential for another anti-competitive merger as well as the delays one might face argue in favour of the passage of C-249.

I trust this is responsive to your concerns and we would be pleased to answer any further questions you may have.