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SPEAKING NOTES

for

Sheridan Scott
Commissioner of Competition

COMPETITION BUREAU

Bill C-19, *An Act to amend the Competition Act*
and to make consequential amendments to other Acts

Standing Committee on Industry, Natural Resources, Science and Technology
Ottawa

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(Check against delivery)

Thank you, Mr. Chair and members of the Committee. Before I begin, I would like to introduce my colleagues. Brendan Ross, Senior Competition Law Officer, Fair Business Practices Branch, Richard Taylor, Deputy Commissioner, Civil Matters Branch, and Rhona Einbinder-Miller, General Counsel with the Competition Law Division of the Department of Justice.

Over the past year, I have had the privilege of appearing before this Committee on several occasions to speak in favour of Bill C-19. The proposed amendments found in Bill C-19 will strengthen Canada's ability to innovate and compete in a global economy to the benefit of all Canadians. We believe the proposals in this bill reflect a careful balancing of the interests of consumers, small businesses and large firms. These amendments will give us greater flexibility in our work and will effectively deter and remedy anti-competitive behaviour in the Canadian marketplace.

Mr. Chairman, today I would like to begin by responding to some of the concerns raised by the Retail Council of Canada and Professor Peter Hogg. I would also be pleased to answer any final questions you may have about any aspect of this important piece of legislation.

First, on the issues raised by Professor Hogg, I think it is important to stress that Bill C-19 is a Government bill and as such, it has been vetted by the Department of Justice to assess compliance with the Charter and the Constitution. Justice officials must, by law, ensure that proposed legislation respects the Charter rights of Canadian citizens and businesses. The provisions of Bill C-19 are no exception.

While I certainly respect Professor Hogg's expertise in constitutional matters, in this instance I - and clearly the Department of Justice - disagree with Professor Hogg's characterization of the AMP scheme proposed in Bill C-19. Professor Hogg's Charter concerns are only triggered if it is determined that the AMPs proposed in Bill C-19 are penal or criminal in nature. If the AMPs are not, then the Charter issues identified in Professor Hogg's legal opinion simply do not arise. The key issue then is whether the AMP scheme proposed in Bill C-19 is properly characterized as criminal in nature. In our view it is not.

Increasing the maximum AMP level is meant to promote compliance with the Act; it is not meant to impose a punishment amounting to a criminal sanction. C-19 makes this very clear. It is simplistic to say that the proposed AMPs are penal in nature because they could, in a given circumstance, be so high as to punish. The proposed maximum is just that - a maximum, intended to give courts the room to adequately promote compliance in relation to the particular circumstance before the court.

In this regard, the *Competition Act* provides explicit instructions to the Tribunal that orders for AMPs "...shall be determined with a view to promoting conduct by that person that is in conformity with the

purposes of this Part, *and not with a view to punishment*.[1]" The Act also provides the Tribunal with criteria to assist in making this determination and C-19 provides additional criteria. The Act then goes a step further: a failure to pay the AMP is not a criminal offence, but is a debt to the Crown.[2] Nothing in C-19 changes this.

The potential lucrative benefits for deceptive marketing in various media need to be taken into account in assessing an appropriate remedy. Current AMP levels of up to $200,000 could be seen by certain companies as nothing more than a cost of doing business. In reality, if misleading claims attract customers and generate revenues, there is now little incentive to comply with the Act. Ultimately, it is law-abiding competitors and consumers who pay the price.

Mr. Chairman, it might be useful to consider how the AMP scheme works with the following example.

A small advertiser in Canada offers a number of products for sale direct to consumers, including a gas-saving device. The company generates $12 million in revenues annually, including $2 million from the sale of this device. Let us assume that the gas-saving device does not actually work.

First of all, it is important to note that if the company had exercised due diligence, there would be no AMP at all in accordance with the current provisions of the Act. However, if the company failed to exercise due diligence, how would the Tribunal assess an AMP in these circumstances?

To ensure the AMP is remedial and not punitive, the Tribunal would consider the factors set out in the Act to help it assess the amount of the AMP. Accordingly, the Tribunal would be required under the Act to take into consideration that the gross revenue from the sales of the product was $2 million. The Tribunal would look also at the financial position of the company in question, recognizing that the company only generates $12 million a year in total revenue. If the company had corrected its conduct, that would further mitigate the AMP assessed, as would the absence of a prior history of contravening the Act. All of these assessments are based on the criteria set out in the current legislation supplemented by C-19. They are clearly focussed on removing any financial incentive to break the rules and convincing the company to comply with the Act in the future. The AMP is not intended to punish the company.

While it is difficult to say with precision what the AMP might be, we do not expect it to be anywhere near the maximum of $10 million in these circumstances. At the same time, the AMP would likely be much larger for a retailer who targeted a much broader range of customers, generated substantially more revenue from the conduct, and had engaged in precisely the same conduct before. Such a large AMP would reflect greater economic harm and the need for stronger deterrence.

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[1] *Competition Act*, s. 74.1(4)

[2] Ibid, s. 66.

Under C-19, this case would make an excellent candidate for restitution to consumers. If the court ordered restitution, or if the company offered restitution voluntarily to correct the impact of its conduct, this would affect the amount of any AMP ordered, again in accordance with the criteria.

I hope that this hypothetical example provides a helpful illustration of how this bill before you is carefully crafted to ensure that it can address a broad range of conduct with remedies that are measured and appropriate for the behaviour and are not penal in nature.

Let me close my remarks by saying that Bill C-19 will strengthen the *Competition Act* to effectively deter anti-competitive practices in all industries. It will strengthen Canada's ability to innovate and compete in a global economy. The amendments contained in Bill C-19, along with the two amendments proposed by the Government as part of its energy relief package, constitute a careful balancing of the interests of consumers and businesses.

Mr. Chairman, the Bureau must have the legislative tools necessary to ensure compliance with the law. The Competition Tribunal must be equipped with an appropriate range of remedies to deal with anti-competitive practices brought forward by the Bureau, including financial penalties and restitution. Bill C-19 provides these tools and enhances the Bureau's ability to respond to anti-competitive behaviour in the Canadian marketplace.

Thank you.

I would be pleased to answer your questions.