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SPEAKING NOTES

for

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Commissioner of Competition

COMPETITION BUREAU

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Canada

It is a pleasure to be here and to have the opportunity to speak about our work at the Competition Bureau. At the Competition Law Spring Conference in May, I addressed what the Bureau is doing to maintain and enhance competition in Canada in light of an economy that is being changed and challenged by massive external forces, internal regulatory shifts and new technologies. I took the opportunity to introduce our key priorities for the coming year, with a special focus on enforcement, advocacy and performance management.

Today, I'd like to update you on the progress we've made and give you an idea of what's in store for the remainder of the year. Moving forward, it is our intention to introduce our priorities at the spring conference and provide a progress update in the fall. We also hope to continue to use the conference as a key venue for discussing changes to our guidelines, bulletins and practices.

Enforcement Priorities

Let me begin with the progress we've made on our enforcement priorities.

As you have heard me say many times, our top enforcement priority is to focus on fighting cartels, particularly domestic ones that hurt competition in Canada. With this in mind, we have increased the Criminal Branch's budget by about 50 per cent over the last three years and are strengthening the capacities of our regional offices so that we can more easily detect cartels at the local and national levels. The outcome in the paper merchants case last January, with record fines of $37.5 million and the removal or demotion of key personnel, is just one example of our work fighting domestic cartels. This case reflects our approach in seeking personal consequences to deter employees and executives from engaging in conspiracies or implementing directives. As you may have noticed recently, we also have a zero tolerance policy when it comes to anyone who we believe has obstructed our investigations. Earlier this month, the Attorney General of Canada laid criminal charges of obstruction relating to the destruction of

documents against an employee of a ventilation company in Laval, in respect of a Bureau cartel investigation.

If you've been reading the newspapers, you've no doubt noticed that our search teams have been very active this year. In June, I issued a statement confirming that the Superior Court of Quebec had granted us search warrants to investigate alleged price fixing between competitors in the retail gasoline industry in local markets in the province of Quebec. More recently, in September, we confirmed that we had obtained search warrants and were investigating alleged anti-competitive practices by certain companies in the tour operators industry in Canada. Clearly, we have some interesting files in the works.

We also remain active when it comes to international cartels. In August, we obtained a prohibition order against the international auction house, Sotheby's, and its Canadian subsidiary, Sotheby's (Canada) Inc. This followed an investigation into an international price-fixing conspiracy and its effects on auction services supplied to Canadian clients. The Bureau began its inquiry in 2003, but faced a delay of nearly two years due primarily to a Charter challenge of the Bureau's section 11 Order. We were therefore pleased when the parties subsequently agreed to cooperate in the Commissioner's investigation to determine the facts. This ultimately led to the settlement reached this September.

We're also very actively involved in the international competition community's attack on cartels. In particular, Denyse MacKenzie will continue to co-chair the subgroup on enforcement techniques for cartels. At the ICN conference last spring in Cape Town, South Africa, this subgroup added a chapter to its Anti-Cartel Enforcement Techniques Manual on digital evidence gathering and expanded the chapter on leniency. It also established a template for anti-cartel enforcement, which provides a standardized overview of the main features of the vast majority of the anti-cartel enforcement regimes existing in the world today. In addition, the sub-group hosts an annual cartel workshop attended by ICN enforcers around the world who exchange views on best practices and investigative experiences.

Closer to home, in mid-September, I participated on an international panel that addressed the topic of deterrence and the use of criminal sanctions in criminal competition law enforcement at the Fordham Conference on International Antitrust Law Policy held in New York. Part of this discussion related to the need to improve our ability to detect cartels. To this end, we are currently in the process of updating our Immunity Program. Denyse MacKenzie will be addressing our work in this area in her remarks during this afternoon's immunity panel.

A second enforcement priority for us is combatting mass marketing fraud. We are very busy in this area and expect our workload to remain heavy. The Bureau receives thousands of mass marketing fraud complaints each year. Most of the complaints relate to cross-border cases and we are continuing our efforts to pursue these in partnership with other agencies. In order to select which mass marketing fraud cases to pursue, we are refining our approach to specifically address schemes that exploit Canadians.

Currently, the Bureau is most active in the area of business supply cases. These schemes target businesses, governments, charities and NGOs with deceptive representations to sell anything from toner cartridges to business directories. Our goal is to develop jurisprudence to maximize general deterrence on existing business supplies cases.

The Benlolo case is an example of our work in this area and the penalties we will seek for this type of crime. Last spring, the Ontario Court of Appeal upheld jail terms of 34 months and fines of $400,000 for each of the two principals behind the Yellow Business Directory.com phoney invoice scam. We are particularly encouraged by the Court of Appeal's opinion that section 52 of the Act should be viewed as criminal and akin to fraud. The Bureau will recommend to the Attorney General that the principles stated in the Benlolo case be applied in sentencing submissions and negotiated pleas in all of our mass marketing fraud cases, but notably for business supply cases. These principles state that:

1) fines should equal the revenue generated by the scam;
2) significant jail time is required in appropriate cases; and
3) an accused can face both a fine and a jail term.

Of course, a great deal of our work in combatting mass marketing fraud involves targeting online activities. To that end, finding better ways to enforce the *Competition Act* in the electronic marketplace is our third enforcement priority. In particular, we've set our sights on pursuing fraudulent and misleading health performance claims made through the Internet and SPAM. In April of 2004, the Bureau launched project FairWeb, a dedicated surveillance initiative aimed at targeting misleading advertising online. Since that time, we have completed a successful two-year coordinated campaign with our international partners, combatting largely Internet-based weight loss schemes. This initiative involved the announcement of over 734 enforcement and outreach actions among those partners. Of the Web sites targeted by the Bureau for further attention under this initiative, 73 per cent now comply with the *Competition Act*.

As highlighted by this initiative, the cross-border nature of Internet fraud requires an international response. The Bureau works closely with its international partners to better combat and recognize e-marketplace threats. For example, through our participation in the International Consumer Protection and Enforcement Network (ICPEN) and the Mexico-U.S.-Canada Health Fraud Working Group, or MUCH, we benefit from information sharing and coordinated efforts with international partner agencies. In carrying out this work, the Bureau has obtained technological solutions to detect targeted activity, allowing us to take a pro-active approach to e-marketplace issues. In fact, we have recently begun using an automated Internet search tool to more quickly and methodically identify potential fraudulent businesses. We have also obtained external expertise for surveillance and assistance in identifying responsible parties of fraudulent activity.

Back home, we hosted a very successful Retail Sector Day last January on e-commerce with consumer, business and industry experts. The forum explored current trends in online business as well as unfair marketing practices and emerging issues such as "net neutrality."

Our final enforcement priority is in the area of abuse of dominance. This field of competition policy is increasingly receiving attention worldwide from antitrust agencies. There is tangible interest in defining clearer monopolization standards and best practices. In fact, just this month, I was part of an international panel that testified at joint public hearings before the Federal Trade Commission and the antitrust division of the Department of Justice on single-firm dominant behaviour. Our priority in this area is to define more clearly the boundaries of the abuse of dominance provision. Therefore, through early assessments against triage criteria as well as internal review by a Civil Branch enforcement committee, we are striving to be more efficient at prioritizing matters that show the greatest potential to achieve this objective and set aside the ones that do not.

Part of this work will also involve a rationalisation of our policy on predation. We have a number of different publications that outline our approach in this area of the law, including this week's draft bulletin on abuse of dominance in the telecommunications industry. We will be holding internal discussions this year as a first step toward clarifying our predation approach.

Of course, we also intend to be very active in this area within the International Competition Network. On this note, I would like to highlight the participation of many non-government advisors, who have stepped up to make valuable contributions to the ICN's work in this field. We look forward to your help moving forward.

In terms of enforcement in this area, we were pleased last June when the Federal Court of Canada ordered the Competition Tribunal to take another look at our case against Canada Pipe. In its order, the Court found that the Tribunal misconstrued Section 79's treatment of anti-competitive acts or substantial prevention or lessening of competition in the context of

unilateral conduct. The Court also dismissed Canada Pipe's cross-appeal regarding the Tribunal's finding that the firm was dominant in the market. We believe this decision provides useful guidance for Section 79 cases.

Advocacy Priorities

I'd now like to turn to advocacy, our second major priority area. My German counterpart, Ulf Böge may have summed up the importance of this line of work best when he said:

"Acting against infringements of competition by companies remains without doubt our key task. But to effectively protect competition requires more. The battle against state-imposed restrictions of competition is no less important if competition is to develop freely."[1]

As you know, the Bureau plays a key role as an informed advocate for the marketplace within and outside the government. A huge part of our job involves promoting the benefits of competition in markets throughout Canada. In May, I explained how we would focus our advocacy efforts on health, telecommunications, self-regulated professions, and establishing a competition lens. I would like to briefly update you on our activities in these sectors over the past few months.

In terms of health, the majority of our focus is on the pharmaceutical industry. This industry is significant because it represents a large portion of Canada's health-care budget and has grown year-over-year in both absolute and relative dollars. We've developed a comprehensive work-plan for advocacy in this area. Our intellectual property and health sector teams hosted a pharmaceutical sector day in March. They have also given presentations to drug purchasers and stakeholders at various levels of government and governmental organizations about potential anti-competitive activities in the industry. We will continue to seek opportunities

[1]Ulf Böge, 2004 Competition Forum in Seoul, Korea.

for these types of presentations as I believe this is an area where market forces can potentially bring about positive results, benefiting all Canadians.

This year we will also be undertaking a market study of the generic pharmaceuticals sector. Generics play an important role in creating competition in the supply of pharmaceuticals after their period of patent protection has ended. Studies such as the June 2006 report of the Patent Medicine Prices Review Board which found generic prices to be generally high in relation to comparator countries, suggest that the related Canadian markets may not be providing the benefits that they could. Our study will attempt to assess this matter, and potential means for enhancing the benefits from generic drug competition, as warranted, with a focus on regulatory and market structure matters.

Meanwhile, we are working with the Canadian Intellectual Property Office and others 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 will help inform a top level symposium early next year and possibly the review of our Intellectual Property Enforcement Guidelines. We will also contribute to the dialogue in this area, through the publication of technical backgrounders dealing with pharmaceutical companies, such as the recent transaction involving GlaxoSmithKline Inc and ID Biomedical Corporation.

We are also continuing to advocate for competition in the telecommunications sector. In March 2006, the Telecommunications Policy Review Panel issued its report, which made a number of recommendations to the Minister of Industry that were consistent with our views. These included a greater reliance on market forces and the importance of using our expertise with that of the CRTC in a more coordinated and effective manner. We subsequently approached the CRTC to assist us in developing a bulletin on abuse of dominance as it applies to the telecommunications industry. In drafting this document, we have drawn upon the CRTC's knowledge of the industry, including examples of conduct frequently alleged to be anti-

competitive by telecom industry participants. Sector-specific focus is the exception rather than the rule for us; however with the Panel's recommendations for greater reliance on market forces, it seems that we may well be playing a greater role in this area and we felt more predictability and transparency would be welcomed by stakeholders. With this in mind, we devoted significant resources this summer to get a draft bulletin ready in time for this conference. I'm sure it has already led to some discussion and I look forward to continuing this dialogue with you.

Promoting competition in the self-regulated professions is our third advocacy priority and you'll hear lots on this tomorrow during the panel with my international colleagues. Meanwhile, we had a modest success in June when the Real Estate Council of Alberta decided to eliminate rules prohibiting real estate brokers from offering cash incentives to buyers and to remove restrictions on the payment of referral fees in certain circumstances. Through discussions with RECA, the Bureau had strongly encouraged the adoption of these amendments to promote more vigorous competition for real estate services in Alberta.

Our work promoting the benefits of competition in dental hygiene is another example of how we will undertake advocacy. On March 7, 2006, the Bureau published on its Web site letters it had sent to the governments of Alberta, Nova Scotia and New Brunswick in which we supported provincial initiatives to create independent colleges of dental hygiene. We also made recommendations regarding the rules which might govern an effective and efficient college. And we encouraged the provinces to use the opportunity to establish meaningful competition in the market for dental hygiene services to promote the efficient, low cost and innovative provision of dental hygiene services.

Finally, as I have mentioned before, one of our top advocacy priorities is to find ways in Canada to review legislation with a view to limiting government intervention to the least intrusive means. This fall, we will participate in the meetings of the OECD's Competition Committee, where we will be reviewing tools that might assist us in this task.

Performance Management

As I mentioned to you in the spring, we've implemented a new planning cycle at the Bureau. The process, which is driven by an internal planning group, involves an initial assessment which engages all of the Bureau staff in examining the environment in which they will be working in the coming year. The results of this exercise are discussed at a retreat of the senior management of the Bureau.

This year, I've asked the planning group to use a similar approach to drive our performance management project. We believe this initiative will enable us to ensure that we can be as efficient and effective as possible in our work to maintain and promote a competitive economy for all Canadians. We are also currently speaking with our international colleagues on their best practices in this area.

Of course, an important part of performance management involves looking back on our work. Along these lines, Steven D. Levitt and Stephen J. Dubner suggest in their book *Freakonomics* that "if you ask enough questions, strange as they seem at the time, you may eventually learn something worthwhile." We have already begun an ex-post merger review and I am sure we will learn more than a few worthwhile lessons from this project. The focus of the review will be on a merger that is no longer subject to our statutory three-year review period. Based on comments we heard at our forestry sector day last January, I can imagine that some stakeholders might have wanted us to take a look at a recent forestry merger review. However these transactions fall within this three-year period, so they will not be part of the exercise.

We are also doing a separate review of past remedies. Performing these types of exercises keeps us in line with foreign jurisdictions such as the European Commission and the Federal Trade Commission and is a critical step in self-assessment.

To aid us in our self-assessment, the post-merger review will answer the following questions:

- Is the market more or less competitive now than during the pre-merger period?
- Did we correctly predict the competitive effects of the merger?
- Have any unanticipated effects come about?
- Did we overlook any relevant factors during our review?
- Did we use the correct techniques in applying our analytical framework?

The project will include third-party interviews with industry participants and a review of other relevant sources of information. We expect to have the results by the end of this calendar year. Once the final report has been vetted to remove confidential information, it will be published on our Web site.

The remedies portion of the review will involve interviews with buyers, sellers and trustees. Our goal is to assess, in retrospect, the strengths and weaknesses of our remedies as well as the effectiveness of the divestiture processes. This project is just getting underway, with a review of approximately 30 files where remedies were involved, to be followed by interviews. It is our intention to complete the remedies project within the next year. We will, of course, publish our findings here as well, subject to the removal of confidential information.

Ongoing Initiatives

Before closing, I'd like to quickly update you on some other important initiatives we've been working on this year.

On the legislative front, I announced at the last Fall conference that the Bureau had struck an external working group of expert lawyers and economists to help the Bureau consider various models that could be used when applying section 45 of the *Competition Act*. At the same time, the Bureau also struck an internal working group in order to review the models. In June of this

year, the members of the external and internal working groups completed this task. The Bureau has since been reviewing their work with a view to formulating a proposal regarding the reform of section 45. We plan to hold public technical roundtables to discuss the proposal in early 2007.

As many of you know, we have also undertaken a number of initiatives in an effort to clarify how efficiencies should be analysed under the Act. Among our most recent undertakings, in 2005 we commissioned an Advisory Panel to prepare a report on the appropriate treatment of efficiencies in merger review. Prompted in part by certain of the Panel's recommendations, we have since sought outside expert advice on, among other issues, dynamic efficiencies, a particularly key issue in today's economy where rapid innovation and technological change are so important. While our work to date on that issue suggests that there are no clear indicators to anticipate real dynamic efficiencies, or easy ways to measure them, there is much to consider here which merits further study.

While we will continue our work on efficiencies, and anticipate being able to provide greater guidance in the near future on what we consider to be the appropriate enforcement approach, I would like to share with you certain observations and principles arising from the work conducted to date.

First, we do not consider that, in the short term, it is either desirable or advisable to seek amendments relating to efficiencies. While we believe that there remain areas of uncertainty with respect to the enforcement of the efficiencies defence, we will, at this stage, devote our attention to clarifying how we interpret our mandate, in view of the current statutory language and such case law as we have, and how we will pursue that mandate in practice.

Second, we want to emphasize, as we make explicit in our Merger Enforcement Guidelines, that we do consider efficiencies claims when submitted. Robust and thoughtful submissions are important to us, offering insight into both the parties' motivation for the transaction as well as the potential synergies relevant to our assessment. We would urge your

clients to bring those submissions to us early in as substantiated a form as possible, and not to be deterred by an unfounded notion that to do so is somehow an admission of anti-competitive concern.

Third, a clear reading of the Act requires that we consider efficiencies in the course of our assessment as to whether to challenge a merger. As to section 96 specifically, we would not necessarily require recourse to the Tribunal in a case where the efficiencies resulting from the merger would clearly be greater than and offset any anti-competitive effects; rather, while our experience suggests that such cases are rare, we could, if sufficiently satisfied on the evidence, make our own independent assessment of efficiencies, and clear the merger on that basis.

As to section 92, we have a number of questions about the scope for efficiencies in that first stage of our assessment, particularly in light of some comments of the Tribunal in the Superior Propane case, where it indicated that efficiencies are to be considered only under section 96 and not under section 92. As is the case for dynamic efficiencies, we intend to continue our consultative efforts in this regard. We anticipate being in a position to provide greater guidance in the near future and look forward to debating these important issues with you further.

As you can see, it has certainly been a busy year and it will no doubt be an even busier winter. Of course, none of my work as Commissioner would be possible without the hard work of my staff. They are the lifeblood of the Competition Bureau and I thank each of them for their continued dedication. In particular, their hard work made it possible for us to publish several documents, under extremely tight deadlines, in time for you to discuss them at this conference. These include the Information Bulletin on Merger Remedies in Canada and the Draft Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry. I would also like to thank each of you that has worked with us this year in some capacity or participated in any one of our consultations. It is clear that we all share an interest in ensuring

competition remains vibrant and effective in the Canadian marketplace. I look forward to another year of working with you.

Thank you.