

SPEAKING NOTES

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Thank you Mr. Chairman.

First of all, let me thank you for the opportunity of appearing here today to participate in these hearings. The last time I was in this room was when I was head of the Canadian Competition Bureau and was invited by Chairman Pitofsky to speak to innovation economies. I'm also honoured to be on the same panel as Margaret Bloom and Jim Rill and Paul Lugard, individuals I've known for awhile now.

Introduction

In reflecting on the multitude of issues you are dealing with when considering unilateral conduct by dominant firms or abuse of dominance as we would refer to it in Canada, I think it's important to recall the role that antitrust agencies and their related institutions, be they the courts or as in the case of Canada, a specialized administrative tribunal are to play.

I think that Chairman Majoras put it quite well on the first day when she said and I quote

"The FTC and the Antitrust division have the responsibility to ensure that competition in U.S. markets is free of distortion and that consumers are protected, not from markets but through markets unburdened by anticompetitive conduct and government imposed restrictions."

Such a characterization applies equally to the situation in Canada and I would suspect to most jurisdictions.

The issue before you is a serious one. We live and work in an era characterized by increasingly globalized markets and increasing concentration levels of many sectors. Ensuring the "right"

approach to assessing allegations of abuse in dominance in this context is critical. Not only is it an important issue from the perspective of economic rents, but it also poses a challenge to competition agencies attempting to apply domestic antitrust laws to business markets that are global and business practices which are globalizing.

Within that context, the problem one faces is attempting to bridge the tension between a desire for clearly defined, detailed and predictable rules that will identify unacceptable unilateral dominant firm conduct and the fact that most of the conduct analyzed can rightly be characterized as competitive behaviour that benefits the consumer and should not be deterred or inadvertently "chilled".

The principal theme that I would like to share with you today and suggest that you keep front and centre in your deliberations is a simple one: **be cautious**.

With that by way of backdrop, let me share a few thoughts.

A few cases are obvious, most are not

Firstly, the practice or behaviour we are for the most part dealing with here is conduct which lies in the "grey zone" between the acceptable and the unacceptable. The cases outside the zone are easy to identify. So we are mostly dealing with conduct which may go either way. And in the realm of abuse of dominance there is more of this grey area than, for instance, criminal conduct like price fixing and probably a lot more than we see in merger review.

This "greyness" was recognized by the Canadian Parliament when it introduced the abuse of dominance provisions in 1986. The subject conduct was de-criminalized and characterized as a

civil "reviewable practice". There is no presumption (rebuttable or otherwise) that any particular conduct is unlawful. The behaviour is subject to study by the Commissioner and if considered by the Commissioner to be problematic it is then to be challenged in an adversarial litigation context before a specialized administrative Tribunal, The Competition Tribunal (with a mix of judicial and lay members) for determination.

The choice of the Competition Tribunal was not accidental, it was deliberate. Given the nature of the conduct subject to challenge under the reviewable practice provisions of our legislation, Parliament thought it wise to have the adjudication benefit from not only judicial members bringing their legal experience to the table, but also the input of business people who would be perhaps closer to the world of business and business decision making. As a side observation, while the model in my view remains attractive, in practice we don't hear much from the lay members.

The creation of a specialized Tribunal to review trade practices like those captured by the abuse of dominance provision reflects the Canadian Parliament's concerns that extreme care be taken in evaluating business conduct that, on its face, is indistinguishable from and most often is, perfectly lawful competitive behaviour. Indeed, one of the important reasons Parliament created this specialized Tribunal was to ensure that normal and legitimate competitive behaviour would not be discouraged or "chilled" inappropriately by the misapplication of the reviewable practices provisions of the Act, particularly at the request of the disgruntled competitor. This Tribunal has consistently fostered and promoted this goal since its creation 20 years ago by taking an approach to business conduct that is grounded in a sound economic view of the market. That view ensures that healthy business practices are not prohibited on the basis of their harmless

effects on their competitors but rather only on the basis of their harmful effects on competition as a whole.

The battle between predictability and uncertainty

Second, it is indeed difficult to reconcile the desire of many participants – counsel, business people and competition agencies – to have clear and detailed rules that provide predictability of treatment of behaviour under antitrust scrutiny with the need for competitive freedom and a healthy measure of flexibility and uncertainty so as not to stifle or chill what is truly competitive behaviour.

Trying to develop principles to inform an analysis is a very worthwhile pursuit. Indeed the six principles mentioned by Chairman Majoras and Assistant Attorney General Barnett on the first day are an excellent place to begin. And perhaps those principles can be refined even further but I do not think we should expect the kind of detail or precision some proponents might advocate.

There has already been testimony earlier in these proceedings about the potential problems associated with the various tests whether it's the "but for" or "no economic sense" or any of the other tests. There has also been testimony about problems with some of the tools that might be used for measuring components of behaviour – marginal costs, average variable costs. While each will have proponents and detractors, it is clear that they all ultimately have both strengths and weaknesses and there is no holy grail formula.

While many of these tools or screening devices will keep many of us within and outside of government gainfully employed, if there is one thing that we are all acutely aware of in this post-

Enron/Worldcom environment, it's that there is a lot more analysis required to understanding corporate commercial behaviour than simply doing the arithmetic. We do need to consider intent in some form or another.

On the issue of "tools" we do have in Canada abuse guidelines issued by the Commissioner's office in 2001. And Commissioner Scott referred to them in her remarks earlier today.

There is merit to trying to provide additional guidance. As we have observed the proliferation of competition regimes around the world has also driven an increase not only in knowledge of the law but also an increased understanding of possible strategic use of those laws. Parties threaten to initiate antitrust complaint mechanisms to extract commercial concessions. To a degree, articulating "safe harbours" can both provide guidance and reduce some of the opportunities for strategic games. I would note that the "greyness" of the conduct and risk of strategic litigation in part explains why many in Canada have opposed private actions in this area of the law. Not only did "chill" and strategic litigation concerns keep abuse out of the recent amendments allowing private claims in limited circumstances, where the door was opened, procedural screens and limitations on remedies were included to minimize such risks.

The risk of inadvertent "chill" is real

My third comment relates to the issue of "chill". The risk of chill is real and the economic costs associated with the inappropriate or inadvertent chilling of legitimately competitive conduct is, in my view, significant although I acknowledge it's very, very difficult to measure.

Let me illustrate the realities of chill. In order to protect the innocent etc... I will use a real example from the Telecom sector. At a senior executive meeting when I was at TELUS, Canada's #2 telco we had to decide where to invest about \$100 million of capital and we had a brief debate about the regulatory climate in various jurisdictions. We settled on the U.K. because its regulator was more market oriented than Canada's. The investment was quite profitable and benefited shareholders.

I use this to illustrate how overly intrusive enforcement or simply the perception of such an attitude will drive away or chill business behaviour which could benefit consumers and we will never know it.

I echo the comments of Doug Melamed during his appearance when he said: "The signals you send to the business community are much more important frankly than whether the cases are right or wrong".

The unwanted chill not only affects parties who may be the target of some proceedings, but extends far beyond those individual firms to other observers of market behaviour, including other market participants or participants in different markets. They not only see the outcome of the proceeding at issue but they also observe the costs, uncertainty and disruption associated with lengthy and protracted litigation dealing with those issues.

The market is more robust that we sometimes give it credit for

As I believe one of the earlier witnesses testified one has to be careful not to be overly eager to substitute economic analysis for a business judgment that may have been made several years

earlier. As many government officials, judges, lawyers and commentators in the area have noted one must recognize the ability for markets to self correct and adjust. One of the interesting questions is given markets will eventually correct, should action be taken?

In trying to develop rules to assist in taking action against abusive unilateral conduct one mustn't lose sight of the enforcement "lag". Markets can and often do move faster than enforcement agencies or the courts. The chronology of the most recent Canadian abuse case – Canada Pipe which is still before the courts – is illustrative. The conduct at issue a loyalty rebate program was initiated in January 1998. The Commissioner was aware of it at the time. It wasn't conduct below the radar screen. The Commissioner's challenge was filed with the Competition Tribunal on October 31, 2002 and the evidentiary base was "locked in" by that time. The decision of the Competition Tribunal was released February 3, 2005. The Federal Court of Appeal decision was June 23, 2006. Leave will shortly be sought for a further appeal to the Supreme Court of Canada. The Federal Court of Appeal decision called for a rehearing using a different interpretation of the law. Not only does it take a long time but the market has evolved significantly from the perspective of new competing products as well as new entrants and importers.

As the third principle advanced by Chairman Majoras makes clear, the goal of antitrust laws is to protect competition, not competitors. That theme is echoed in Canada as well in the Bureau's 2001 Enforcement Guidelines on Abuse of Dominance and I quote

"... the objective of the abuse provisions is to promote effective competition and not the interests of any one competitor or group of competitors. The provisions are not intended to be used to attempt to tilt the playing field in favour of market

participants, who, for example, lack the ability to compete with more efficient or better managed rivals."

The "take away" from this portion of my remarks is that only in the clearest cases should enforcement agencies intervene. To the extent that there is any doubt as to the competitive legitimacy of some behaviour I believe that more often than not, the doubt should be resolved in favour of the potential defendant. My response to Assistant Attorney General Barnett's question of whether agencies should be more or less aggressive with enforcement in this area is yes be less aggressive.

The importance of considering commercial interests and business purposes is clear. These factors contribute to an understanding of the conduct in a regular market setting. Taking conduct out of its business context risks mistaking conduct that may be harmful to particular competitors, or indeed that is even intended to harm competitors, for conduct that is harmful to competition as a whole. In language similar to that adopted by the Supreme Court in *Trinko* our Competition Tribunal articulated the following caution,

"It would not be in the public interest to prevent or hamper even dominant firms in an effort to compete on the merits. Competition, even tough competition, is not to be enjoined by the Tribunal but rather only anticompetitive conduct... Decisions by the Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition that is, in our view, not consistent with the purpose of the Act, as set forth in Section 1.1." (*DIR vs Teledirect*)

Such an approach I think is reflected in the enforcement history of Canada on abuse of dominance. Until recently, the contested abuse of dominance cases were targeting what I considered to be clearly an egregious conduct.

The enforcement history also illustrates a purely statistical perspective, the concern about inappropriately chilling lawful behaviour. Since the provision was introduced into the legislation in 1986, there have only been only 5 contested cases and remedial orders were issued in only 4. The fifth case, the *Canada Pipe* case which is currently under appeal and for which Commissioner Scott and I are on opposite sides of the dispute, remains unresolved. Clearly these statistics show that "reviewable conduct" is rarely anticompetitive and even more rarely crosses the legal threshold of "substantial lessening or prevention of Competition". And under our law, even where the requirements for an adverse finding are met – (i) dominance, (ii) practice of anticompetitive acts and (iii) substantial lessening or prevention of competition – a Tribunal nevertheless retains discretion not to issue a remedy. Canadian law also directs the Tribunal to consider whether the effect is due to abuse or superior competitive performance.

Thus we have conduct that on its face is lawful unless following a review it is determined otherwise; we have the review being adjudicated by an administrative Tribunal with mixed legal and business expertise; we have a well articulated test in the statute requiring factual determinations relating to dominance, deliberate intended anticompetitive acts and measurable anticompetitive effects; we have the need to assess the conduct in the context of superior competitive performance; we have a residual discretion on the part of the Tribunal not to issue a remedy even if all the thresholds are met; and we have a requirement that any remedial order at least initially must be limited to a prohibition order preventing parties from engaging in the

practice of issue (a divestiture is theoretically possible but has not been requested in any case to date).

Conclusion

I commend you on holding these hearings. Your goal of improving predictability (both domestically and internationally) and minimizing friction as between competition agencies in dealing with unilateral conduct is a good one. However, I would urge caution on both the domestic and the international issues. Make sure the cure is not more harmful than the perceived disease.