



Government Gouvernement
of Canada du Canada

Statement

**SPEAKING NOTES FOR
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**BILL C-23
AN ACT TO AMEND THE COMPETITION ACT AND
THE COMPETITION TRIBUNAL ACT**

**TO THE
SENATE STANDING COMMITTEE
ON BANKING, TRADE AND COMMERCE**

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- Mr. Chairman, Honourable Senators, I am pleased to have this opportunity to address your committee in its consideration of Bill C-23, a legislation that is essential to increase Canada's ability to effectively enforce and administer competition law in the 21st century.

- Bill C-23 is a reflection of the Bureau's policy initiatives, the legislative proposals from individual Members of Parliament and the results of nationwide consultations by the Public Policy Forum.

- It deals with 6 major areas which I will address in turn:
 - prohibiting deceptive prize notices;
 - enhancing mutual international assistance in civil competition matters;
 - improving the Competition Tribunal process;
 - giving the Competition Tribunal the ability to issue interim orders;
 - providing a limited right of private access to the Competition Tribunal; and

- providing additional measures to protect competition in the Canadian airlines industry.
- The first amendment deals with **deceptive prizes notices**;
- For example, we have warned Canadians many times against “Scratch-and-Win” promotions which are sent directly to their households.
- The new offence will prohibit the sending of documents or notices that give the general impression a prize has been won, but require the recipient to incur costs which exceed the value of the prize itself.
- It also sets a “code of conduct” for businesses who wish to use this type of promotion for their commercial activities by ensuring that the information in the marketplace is accurate and adequate for consumers to make informed decisions.

- The proposed amendment will not impede on the legitimate practices of law-abiding enterprises.
- I brought copies today of the draft enforcement guidelines to describe how this provision would play out in practice. With your permission I would like to table these.
- The second amendment will enhance **mutual international assistance in “civil” competition matters;**
- Bill C-23 proposes to add a new section to the *Act* that will allow the gathering of evidence for and from foreign jurisdictions with respect to “civil” competition matters.
- A similar framework currently exists with respect to criminal matters under the *Mutual Legal Assistance in Criminal Matters Act*.
No such framework is available for “civil” competition matters.

- In fact, the proposed amendment essentially duplicates the framework for criminal matters.
- It will allow the Competition Bureau to obtain and consider the evidence it needs to ensure that enforcement decisions affecting competition in Canada are made in Canada.
- The new Part III establishes the basic requirements of any treaty negotiated for this purpose.
- It will allow Canada to enter into treaties only with other countries that have substantially similar competition laws and legal standards as Canada.
- Once such a treaty is signed, the decision to act on a request for evidence from a foreign authority will rest with the Minister of Justice. The gathering process will take place under stringent judicial oversight.

- As a result of stakeholders concerns, amendments were added:
 - to give voluntarily-provided information confidentiality protection under the *Competition Act*;
 - to indicate that information already in the possession of the Commissioner may be sent in response to a request under a treaty only pursuant to the procedure outlined in that Part;

- We prepared a model treaty which reflects the obligations and standards which I would like to table with you.

- The third area addressed by Bill C-23 will improve the **Competition Tribunal process**.

- These amendments are about giving the Tribunal the tools to manage its caseload so that its proceedings operate in a more efficient or business-like manner.

- With these amendments, the Tribunal will:
 - award full costs against any party.
 - hear and determine, by way of reference, questions of law, jurisdiction, practice or procedure;
 - register consent agreements with no hearing necessary.
 - hear and determine, on a motion from a party, an application in a summary way.

- The fourth amendment deals with **interim orders**.

- The key to effective enforcement is speed, that is the ability to halt alleged anti-competitive conduct before irreparable harm is done to competition.

- Under the current powers, we can only apply for an interim order from the Competition Tribunal during an inquiry in matters dealing with mergers and reviewable deceptive marketing practices.

- The proposed amendments would allow the Tribunal to issue an interim order while the Bureau is investigating a complaint pertaining to reviewable matters under Part VIII, such as abuse of dominant position.

- Before it issues an order, the Competition Tribunal would have to find that the conduct is likely to:
 - cause injury to competition that cannot be remedied by the Tribunal;
 - a person is likely to be eliminated as a competitor; or
 - a person is likely to suffer a significant loss of revenue or market share, or suffer some other harm that cannot be remedied by the Tribunal.

- During its review of Bill C-23, the House of Commons made two key changes to the bill. The first one provides for a limited right of private access to the Competition Tribunal. The second one provides for additional measures to protect competition in the Canadian airline industry.

- Let me start with the **limited right of private access**.
- Private access has been a recurrent topic for discussion in previous legislative rounds. Many observers have argued in favour of broadening access to the Competition Tribunal for private parties.
- On the other hand, other have argued in favour of *status quo*, that the Commissioner of Competition should be the only person who can make an application for an order before the Competition Tribunal.
- It has been our long held belief that a limited form of private access would complement the enforcement activities of the Bureau.
- The issue was thoroughly discussed during the Public Policy Forum consultations which preceded the introduction of Bill C-23 and during the Commons Committee hearings.

- Stakeholders in favour of private access indicated that the experience with private access in other jurisdictions, notably Australia, has shown that it yields many benefits by:
 - establishing important precedents about competition law;
 - allowing the competition enforcement authority to concentrate on cases raising public concern;
 - making the competition legislation more effective and achieving greater compliance with the law; and
 - demonstrating that private enforcement can be more suitable for businesses than public enforcement.

- The prevailing argument against private access was the risk of possible strategic litigation.

- In light of the competing interests, the Government proposed a balanced solution which limits the number of anticompetitive conduct open to private action (refusal to deal, tied selling, exclusive dealing and market restrictions) and introduces stringent safeguards to lessen the risk of strategic litigation.

- Those safeguards are:
 - the Tribunal will act as a gatekeeper. The Tribunal will grant leave only where satisfied that there is reason to believe the applicant is directly and substantially affected in its business by the alleged anticompetitive practices.
 - a 15-day period will be provided during which submissions may be made in respect of applications for leave, to provide respondents with adequate time to address the allegations against them in the leave application.
 - cases cannot proceed if the Commissioner of Competition is on inquiry or has settled a matter.
 - the Tribunal cannot award damages to aggrieved parties.
 - the Tribunal can award full costs against any party in accordance with the *Federal Court Rules*;

- cases must proceed within a year following the cessation of the conduct in question;
- adding an economic test in section 75 (refusal to deal) requiring the applicant to prove an adverse effect on competition.
- We believe that the current proposal strikes an appropriate balance.
- The last area of amendments deals with the **protection of competition in the airline industry**.
- You will recall that amendments to the *Competition Act* for dealing with domestic airlines were first introduced as part of the restructuring of the Canadian airline industry, in the aftermath of the Air Canada/Canadian merger.
- Those amendments:
 - permitted the enactment of regulations defining anti-competitive conduct as they apply to air carriers; and

- allowed the Commissioner of Competition to issue temporary orders when :
 - ▶ he is investigating a complaint into alleged anti-competitive conduct under section 79 against the dominant airline;
 - ▶ he considers that in the absence of an order, the conduct will likely cause injury to competition that cannot be remedied by the Tribunal; a person is likely to be eliminated as a competitor; or a person is likely to suffer a significant loss of revenue or market share, or suffer some other harm that cannot be remedied by the Tribunal.
- Following the coming into force of these amendments, the Bureau enacted regulations and issued enforcement guidelines to inform the industry about the type of conduct that the Bureau would likely challenge.

- Bill C-23 proposes additional measures to strengthen the *Competition Act* to deal with the challenges facing Canada's airline industry. The collapse of Canada 3000 and the likelihood of new start-up airlines makes it especially important to protect competition in the airline industry.

- Since the departure of CanJet, Royal, Roots and Canada 3000, Air Canada now accounts for approximately 80% of the domestic airline market. Coupled with the airline industry's unique characteristics, the proposed amendments will ensure that the rules set under the Act are followed.

- These characteristics include:
 - competitive information available on computer reservation systems;
 - the ease with which capacity can be redeployed;
 - the mobility of assets;
 - the low variable cost structure of the airline industry.

- The proposed amendment will:
 - grant the Tribunal the authority to maintain in effect a temporary order until the Bureau has had sufficient time to receive and review the information needed to determine whether to make an application before the Tribunal;
 - provide the Competition Tribunal the authority, as an incentive to comply with the *Competition Act*, to impose an administrative monetary penalty of up to \$15 million against an airline when a permanent order has been made under s. 79, the abuse of dominance section of the *Competition Act*.
- The following are available to air carriers:
 - Regulations defining what constitute anti-competitive behaviour in the airline industry;
 - Enforcement Guidelines on the Abuse of Dominance in the Airline Industry; and
 - The Act as amended by this bill will provide for binding advisory opinions by the Commissioner.

- If a dominant airline refuses to comply with the “code of conduct” established by the regulations and the guidelines, and does not obtain an advisory opinion, the Tribunal, in its wisdom, can decide to impose an administrative monetary penalty.

- In the process of deciding whether or not to impose a penalty, the Competition Tribunal will look at different factors:
 - frequency and duration of the practice;
 - vulnerability of the class of persons affected;
 - injury to competition;
 - history of compliance with the *Competition Act*; and
 - any other relevant factor.

- Bill C-23 is a balanced package of amendments with strong support from a wide range of stakeholders. In our view, the bill before you will strengthen our competition law to the benefit of all Canadians.

- I would like to thank the Committee for this opportunity to discuss Bill C-23. I would be pleased to answer any question you may have.

