November 9, 2001

Susan Whelan, M.P.
Chair
Standing Committee on
Industry, Science and Technology
House of Commons
Room 671, 180 Wellington Street
Ottawa ON K1A 0A6

Dear Ms. Whelan,

Re: Bill C-23, *Competition Act Amendments*
Supplementary Comments Concerning Deceptive Prize Notices, Proposed Deceptive Prize Guidelines, Proposed Amendments to Allow Inquiries before the Canadian International Trade Tribunal and the Draft Model Treaty on International Mutual Assistance in Non-Criminal Matters

Introduction

On behalf of the Canadian Bar Association's National Competition Law Section (the Section), I am writing to provide supplementary comments concerning Bill C-23. These arise from our appearance before the Committee on October 23, 2001, documents filed by the Commissioner of Competition and proposed amendments tabled at the Committee's hearings.

Our comments concerning the Draft Model Treaty are contained in the attached submission, the executive summary of which is in English and French.

Deceptive Prize Notices

During the Section's appearance, the Committee questioned whether subsection 53(2) of Bill C-23 would alleviate the Section's concerns relating to the proposed deceptive notice of winning a prize provisions of the Bill. It does not. It is a defence which only applies if the person actually wins the prize and the promoter meets the standard section 74.06 contest conditions.

We understand that the Competition Bureau has suggested or will be suggesting amendments to section 53(1), so that it would read as follows:

> 53. (1) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, send or cause to be sent by electronic or regular

> mail or by any other means a document or notice in any form, if the document or notice gives the general impression that the recipient has won, will win or will on doing a particular act win, a prize or other benefit, and if the recipient is asked or given the option to pay money, incur a cost or do anything that will incur a cost. [changes underlined]

The Section supports this suggested amendment.

Proposed Deceptive Prize Guidelines

The Section commends the Competition Bureau for issuing the Proposed Guidelines: Deceptive Prize Notices (the Guidelines). The Guidelines are designed to assist in the interpretation of proposed section 53 of the *Competition Act* (the *Act*).[1]

We understand that the Bureau may propose amendments to ensure that the prohibition does not capture standard promotional contests in which contestants are required to meet a condition such as having their name drawn or correctly answering a skill testing question. Although the Guidelines do not reflect any such amendment, these comments are premised on such an amendment being accepted.

The Section has concerns about the interpretation of the phrase "send or cause to be sent by electronic or regular mail or by any other means". The potential scope of these terms is unclear and, regrettably, the Guidelines do not assist. They indicate that the deceptive marketing provisions would apply to notices or documents of any kind "sent by any means, including but not limited to mail, electronic mail, facsimile transmissions, door-to-door delivery, billboards or retail distribution". This raises two issues: what means of delivery are covered by the words "sent" or "send"; and what constitutes a notice.

The Guidelines fail to enunciate a guiding principle as to the type of delivery caught by the provision and the list of examples does not offer a unifying theme. For instance, would the provision capture materials preprinted on a product? Further, and more fundamentally, the inclusion of billboards in the list of examples would seem to go beyond the ordinary meaning of the word "sent", which is used in the Bill. Is a notice on a billboard, or placed in a retail store, "sent" within the meaning of the section? What about notices transmitted in other mass media (television, radio, newspapers)?

If the Bill was intended to capture any communication of a notice, then it would have used different wording. Given that the Bill uses the word "sent", it is inappropriate for the Guidelines to refer, for instance, to communications in retail stores, on billboards, or through other forms of

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[1] With regard to proposed section 53 itself, see the Section's October 2001 submission concerning Bill C-23, presented October 23, 2001. We do not propose to repeat here comments we made with respect to Bill C-23.

mass media. The Section therefore urges the Bureau to make this portion of the Guidelines accord better with the provision in the Bill.

The Guidelines state that a "notice" includes "a notice or document of any kind". This is inconsistent with the language in the Bill, which refers only to a "notice". The word "document" has a broader meaning than the word "notice".

The Guidelines do not articulate the sort of communication that would constitute a "notice". Elsewhere, the *Act* uses the more general word "representation" (see, for example, sections 52 and 74.01). The Bill uses the word "notice", which has a narrower meaning than the general prohibition on misleading "representations". A different meaning must therefore be intended. The Guidelines would benefit from articulation of the Bureau's view as to what constitutes a "notice" as opposed to a "representation".

The Section agrees with the Guidelines' interpretation of the phrase "on meeting a condition". However, if section 53 is amended, this portion of the Guidelines may have to be changed. Furthermore, the Guidelines should state that the Bureau will not regard as a "condition" having one's name drawn, correctly answering a standard skill testing question, or meeting the skill portion of a true skill contest. A list of the types of conditions contemplated by this provision would be helpful.

The Section is also concerned about proposed subsections 53(2)(a) to (c) and the Guidelines' commentary on these provisions. Interpretation guidelines already exist with respect to section 74.06 of the *Act* (the existing Guidelines),[2] which are almost identical to subsections 53(2)(a) to (c). Yet, in some respects, the Guidelines differ from the existing Guidelines — for instance on the matters that need to be disclosed in contest advertising. This raises the spectre of having contradictory guidelines or at best suggests alternate enforcement approaches. This creates confusion instead of providing guidance. The Guidelines should simply refer to the existing Guidelines. Any changes to one should be made to the other.

With these few exceptions, the Section regards the Guidelines as likely to be helpful in promoting compliance with the proposed section 53, and endorses the Competition Bureau's position as set out therein. We also thank the Competition Bureau for making these Guidelines available for comment before they are finalized.

Proposed Inquiries before the Canadian International Trade Tribunal

On October 12, 2001, amendments were proposed to Bill C-23. They would add a new section 124.3 of the *Act*, giving the Commissioner of Competition new power to ask the Canadian International Trade Tribunal (CITT) to inquire into "the state of competition and the functioning

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[2] See Competition Bureau *Information Bulletin – Section 74.06 of the Competition Act*.

of markets in any sector or subsector of the Canadian economy". This inquiry would be in accordance with terms of reference approved by the Minister of Industry.

In the Section's view, this proposed power of reference is neither necessary nor appropriate. The following is a summary of the Section's concerns.

- While it is expert in trade matters and certain aspects of markets, the CITT does not hold an advantage over the Competition Bureau or the Competition Tribunal in analysing competition and the functioning of markets for competition policy purposes.

- The Governor-in-Council already has the power under section 18 of the *Canadian International Trade Tribunal Act* to direct the CITT to inquire into any matter related to "the economic, trade or commercial interests of Canada with respect to any goods or services of any class thereof". Therefore, the requested amendment is superfluous.

- The sort of public inquiry envisaged under the CITT Rules for section 18 inquiries (which presumably would be the model for the new references from the Commissioner) are inappropriate. Public proceedings under the *Act* are only commenced after the Bureau has performed its usual private inquiry and has concluded (or the Attorney General has concluded) that grounds exist to bring an action under the *Act* before either the courts or the Competition Tribunal. If no grounds exist, then there is no justification for subjecting persons to the enormous time, effort and expense of a public inquiry.

- Under section 10 of the *Act*, the Minister may already force the Commissioner to commence an inquiry into allegedly actionable conduct, and the Commissioner may also initiate such inquiries. Again, if there are no grounds to seek an order of a court or the Tribunal, then it is unclear how such a reference would assist in enforcing the *Act* or the three other statutes for which the Commissioner has responsibility. After all, the Commissioner's duties under section 7 of the *Act* do not go beyond the administration and enforcement of those statutes.

- If the Committee accepts that such public inquiries are appropriate, it should be the Governor-in-Council that directs such an inquiry to be undertaken.

Comments

The CITT is not the appropriate venue for the proposed reference power. While many skilled economists are on staff at the CITT, the work they perform under the *Special Import Measures Act* (*SIMA*) and other legislation does not involve an analysis of the state of competition *per se.* Many significant aspects of a competitive market analysis simply do not arise in a typical anti-dumping case or other reference under *SIMA*, such as barriers to entry, oligopoly theory and interdependence and portfolio effects. On the other hand, the Bureau and the Tribunal have expertise in precisely these areas.

The Governor-in-Council can already direct inquiries under the *CITT Act.* This mechanism allows the Governor-in-Council to direct the CITT to inquire into and report on "any matter in relation to the economic, trade or commercial interests of Canada with respect to any goods or services or any class thereof". This has not, to the Section's knowledge, been used to inquire into the general state of competition in a sector of the economy, which suggests that the Bureau and the Tribunal have the appropriate institutional expertise in competitive market analysis.[3]

Public inquiries impose a huge burden on the objects of the inquiry. They are inappropriate where the Bureau does not believe it has grounds for an order under the *Act*, and where the Minister has not requested an inquiry accordingly.

Under section 10(2), inquiries under the *Act* are to be conducted in private. This rule, which is carefully observed by the Bureau, protects all of the interested parties including the alleged perpetrators and complainants. Both parties might be unnecessarily compromised should the details of an investigation become public without proceedings or other enforcement measures under the *Act*. Interested parties are also assured a thorough review by the Bureau without incurring the enormous legal expense of appearing before a public inquiry.

On the other hand, the CITT rules on section 18 references under the *CITT Act* envisage a public process, in which the identity of all parties is public knowledge. So too are the written materials which the parties must, at a minimum, provide to the CITT if they are to participate in the inquiry. Specific confidential information such as the identity of specific customers and prices may be kept confidential, but not from counsel for the other parties to the inquiry.

In an investigation of competition, such a public process is not appropriate unless the Commissioner or the Attorney General has concluded there are grounds for commencing a

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[3] The *Fruit and Vegetable Industry Report* (GC-90-001) examined the competitiveness of the Canadian fruit and vegetable growers in the context of trade with the United States. It did not examine the degree and vibrancy of competition in or barriers to entry into the Canadian industry, but looked at what Canada could do to make the industry more efficient. *An Inquiry into the Importation of Dairy Product Blends outside of the Coverage of Canada's Tariff-Rate Quotas* (GC-97-001) examined the impact of dairy product blends on the Canadian dairy industry in the context of the supply-management and international trade rules relevant to that industry. The CITT's expertise in examining the performance of various industries in the context of foreign competition and Canada's international trade obligations is self-evident. Its expertise in examining the "state of competition" in an antitrust/competition law sense is far from clear. For example, competition can only be examined in the antitrust sense in the context of relevant markets, which do not usually correspond to a particular industry or even a particular product, and this analysis is not one the CITT typically conducts.

prosecution or bringing an application under the *Act*. If there are no grounds, then there are no grounds for imposing the costs of a public process on Canadian businesses, whether they are complainants or respondents.

The Bureau can already issue public reports concerning its inquiries. One example is its report on the July 1999 gasoline price increases. The Bureau must already report to the Minister if it discontinues an inquiry. One solution which might address the concern of these proposed amendments would be to permit the Minister to require the Bureau to report publicly more detailed results of certain inquiries (with appropriate safeguards for confidential information).

Section 10(1) already allows the Bureau to commence its own inquiries and permits the Minister of Industry to request that the Commissioner commence an inquiry into whether sanctionable conduct has occurred. The Commissioner has used these powers to issue public reports of the results of inquiries that were particularly topical or of widespread public concern. Again, the report on the July 1999 gasoline price increases is an example of this. There, the Bureau conducted its examination in private, as is appropriate, and gave detailed reasons in its public report as to why there were no grounds to seek an order under the *Act*. In such a situation — where there are no grounds for an order — there is no reason why Canadian businesses should be forced to defend themselves against public opinion in a formal, public inquiry process that is not likely to result in any findings of actionable conduct.

The Commissioner's job is to enforce the *Act* and three other statutes. If public inquiries can be justified, even where no violation of the *Act* is alleged, then it should be the Governor-in-Council that requests the reference, not the Commissioner. If the power to inquire into allegedly actionable conduct under the *Act* is thought to be too narrow, the Commissioner is not the appropriate person to direct a general inquiry. If the Bureau sees no reason to commence an investigation under the *Act*, the Minister may still force the Bureau to conduct one. Unless there is an allegation of actionable conduct under the *Act*, the Commissioner would presumably have no interest in commencing an inquiry.

In short, although the Section feels that a general power of public inquiry is unnecessary, if this amendment is adopted, then the Governor-in-Council and not the Commissioner is the more appropriate party to direct these references.

Conclusion

We thank you for the opportunity to provide our views. Should your Committee have any questions or comments, we would be glad to respond.

Yours truly,

J. Tim Kennish,
Chair, National Competition
Law Section

c.c. Members of the House of Commons Industry Committee
Konrad von Finckenstein, Q.C., Commissioner of Competition