



November 27, 2003

Gaston Jorré
Acting Commissioner
Competition Bureau
Place du Portage, Phase 1
50 Victoria Street
Gatineau QC K1A 0C9

Dear Mr. Jorré:

RE: Guidelines on Deceptive Notice of Winning a Prize Provision (Section 53 of the Competition Act)

I. INTRODUCTION & OVERVIEW

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to provide its comments on the Competition Bureau's draft *Guidelines on Deceptive Notice of Winning a Prize Provision (Section 53 of the Competition Act)* (the 2003 Guidelines), issued for consultation in August 2003.

Section 53 deals with deceptive notice of winning a prize. The legal community has voiced considerable concern with the broad wording of the section. To the extent that the 2003 Guidelines bring greater clarity and certainty they are most welcome. We believe that they could be made more useful with more clarity in certain areas. The Competition Bureau released draft guidance on section 53 (the 2001 Bulletin) when Bill C-23, which added section 53 to the *Competition Act*, was enacted. In this submission the CBA Section will compare the 2001 Bulletin with the 2003 Guidelines.

II. APPLICATION OF GUIDELINES AS LAW

The 2001 Bulletin stated that it did not establish the law, but rather reflected the Commissioner's interpretation of how the law would be consistently applied by the Bureau. The 2003 Guidelines delete this statement. We believe the statement is important and should be reinserted in the 2003 Guidelines.

500 - 865 Carling, Ottawa, ONTARIO Canada K1S 5S8

Tel/Tél. : (613) 237-2925 Toll free/Sans frais : 1-800-267-8860 Fax/Télécop. : (613) 237-0185

Home Page/Page d'accueil : www.cba.org E-Mail/Courriel : info@cba.org

A comparison of the 2003 Guidelines to the 2001 Bulletin could suggest that the Commissioner may not follow the 2003 Guidelines on a consistent basis. The 2001 Bulletin referred to the guidelines being *consistently applied*. The 2003 Guidelines are considerably less emphatic: the guidelines “outline the approach that the Commissioner of Competition *is taking* ... They are intended to *help* the general public, business people and their legal advisors to *better understand...the general approach* taken by the Competition Bureau to enforce that provision.” We prefer the more precise language of the 2001 Bulletin.

III. DEFINITION OF “SENT”

The 2003 Guidelines indicate that section 53 will apply to notices or documents of any kind “sent by any means, including but not limited to mail, electronic mail, facsimile transmissions, or door-to-door delivery”. This statement raises two issues: what constitutes a “notice”; and what means of delivery are included.

Section 53(1) speaks of notices sent “by electronic or regular mail or by any other means...” The 2003 Guidelines list examples of delivery methods. The 2001 Bulletin listed billboards and retail distribution as examples of how notice might be sent. These have been omitted from the 2003 Guidelines. It would appear that the Bureau is narrowing the scope of its enforcement focus for section 53. Given that section 53 requires the notice to be “sent”, the Section supports the narrower scope, as it is more consistent with the statutory wording.

In our view, however, the approach to delivery should be further clarified, to be consistent with the statutory wording and with the reasons underlying the enactment of section 53. The 2003 Guidelines fail to enunciate a guiding principle of the type of “delivery” caught by the provision. The list of examples does not appear to have a unifying theme. If the means of “sending” are not in the illustrative list, it is not possible to determine whether the Bureau believes they fall within the provision.

Had the Parliamentary intent been to capture any *communication* of notice, different statutory wording would have been used. In that section 53 contemplates a *document or notice* being sent, in our view it is inappropriate for the 2003 Guidelines to refer to communication through forms of mass media. For example, the reference to door-to-door delivery may suggest the Bureau’s view that section 53 covers newspapers delivered by home delivery. In its comments on the 2001 Bulletin, the CBA Section urged the Bureau to articulate a theoretically coherent position on the statutory wording that notices be “sent”. We are still of that view. The list in the 2003 Guidelines is more coherent than in the 2001 Bulletin, but it would be useful to know if the Bureau takes the position that billboards, in-store displays and mass media are not caught by this provision. We recommend a clear statement of the types of communication that are and are not caught by section 53. We submit that it would be useful, for example, to expressly exclude mass media, billboards, in-store displays, etc., and refer explicitly to notices “sent on an individual basis to identifiable recipients by means such as ...”.

IV. DEFINITION OF “NOTICE”

The 2003 Guidelines refer to “a notice or document of any kind”, while the Act refers to “a document or notice in any form”. The Act contemplates various forms of document or notice, but not a notice “of any kind”. We suggest that the 2003 Guidelines employ the same language as the Act (“in any form”), and then articulate what the Bureau understands that to mean. If the using

“kind” rather than “form” is intended to provide insight into the meaning of “form”, we do not think it is helpful. If the intent is to extend the statutory language, for example to suggest that the section applies to mass media, we do not think it is appropriate.

Beyond this, the 2003 Guidelines do not articulate what sort of a communication would constitute a “document or notice”. Elsewhere the *Act* uses the more general “representation” (see sections 52 and 74.01). Since section 53 uses “document or notice”, which is narrower than the general prohibition on misleading “representations”, Parliament must have intended a different meaning. The 2003 Guidelines would benefit from articulation of the Bureau’s view as to what constitutes a “document or notice” as opposed to a “representation”.

V. “ON DOING A PARTICULAR ACT”

Clarification of the provision related to “doing a particular act” would be very helpful. For instance, we believe that the 2003 Guidelines should state that certain *passive or active* conditions, including standard contest requirements (such as answering a skill testing question, filling in a survey, creating a hand-drawn facsimile of a box top, and the like) are not intended to be captured, and in the Bureau’s view are not captured, by section 53.

VI. “INCUR A COST”

With respect to the phrase “incur a cost”, the 2003 Guidelines make it clear that *de minimis* charges such as a postage stamp will not trigger application of this provision. They also state “the cost of telephone toll charges, such as 1-900 charges, *is considered* to be a cost incurred to win a prize or other benefit”. While this may be true in particular cases, there may be situations where the toll charge is equivalent to a postage stamp. There is a difference between a long distance charge for communications services and a fee from which the promoter benefits, as in many “900 number” situations. We believe that lumping *all* telephone toll charges together is inappropriate. We believe that the 2003 Guidelines should not exclude the possibility of charges for communication services, if the promoter does not benefit from the charges.

The 2003 Guidelines state that payment to genuine arm’s length third parties that are nominal in relation to the fair market value of the prize would not generally be considered “a cost incurred” for the purpose of section 53. We certainly agree with that statement, as far as it goes, so long as there has been sufficient disclosure (including the value of the prize and the cost which may be incurred in order to enjoy the prize), and the cost arises only after the prize has been won. However, we do not believe that there is a principled reason to differentiate on the basis of the payment being nominal in relation to the fair market value of the prize. Again, the distinction should be drawn as between benefits to the promoter and amounts that may have to be provided to third parties to enjoy the prize.

VII. SECTION 74.06 GUIDELINES

The CBA Section has some concerns with respect to paragraphs 53(2)(a)-(c), and commentary in the 2003 Guidelines on these provisions. Section 74.06 contains provisions parallel to those in paragraphs 53(2)(a) and (e) and interpretation guidelines exist already for those provisions in section 74.06¹.

¹ See Competition Bureau Information Bulletin – Section 74.06 of the Competition Act

Portions of the 2003 Guidelines reproduce aspects of the 74.06 Guidelines. However, significant portions are left out. The CBA Section would prefer a cross reference to the 74.06 Guidelines. Even a reference to the greater detail in the 74.06 Guidelines would improve the 2003 Guidelines.

To the extent that the 2003 Guidelines differ from the 74.06 Guidelines, even though they deal with identical or virtually identical statutory provisions, they will inevitably contradict one another, or at best suggest alternate enforcement approaches. This provides confusion, not guidance. The better approach would be to refer to the 74.06 Guidelines in the 2003 Guidelines, rather than promulgating different guidelines. Insofar as the 74.06 Guidelines should be changed (for instance, to make it clear that not all items of disclosure need appear in advertising for a contest or promotion), that change should be made to the 74.06 Guidelines.

VIII. MINOR DRAFTING SUGGESTIONS

- (a) Under the heading “Adequate and Fair Disclosure” we suggest adding “material”, so that disclosure would take place “at a time before the potential entrant is inconvenienced in some material way...”.
- (b) Under the heading “Regional Allocation” we prefer the clearer wording of the 2001 Bulletin, “the contest takes place in more than one region,” rather than that of the current draft, “ the contest takes place on an inter-regional basis”.

IX. CONCLUSION

The CBA Section regards the 2003 Guidelines as likely to be helpful in promoting compliance with section 53, but believes that further clarification is possible. Adopting the suggestions in this submission would significantly improve the 2003 Guidelines. We urge the Competition Bureau to give serious consideration to these matters. We would be pleased to discuss our recommendations with you at a convenient time.

Yours very truly,

Original copy signed by Tamra L. Thomson for Susan Boughs

Susan Boughs
Chair
National Competition Law Section