



Government
of Canada

Gouvernement
du Canada

COMPETITION ACT

PROPOSED GUIDELINES

DECEPTIVE PRIZE NOTICE

OCTOBER 2001

Canada 



GUIDELINES FOR THE DECEPTIVE PRIZE NOTICE PROVISIONS OF THE *COMPETITION ACT*¹

The purpose of the *Competition Act* is to maintain and encourage competition in the Canadian marketplace. The *Act* applies to most businesses in Canada, regardless of size. Section 53 is one of the provisions of the *Act* dealing with misleading representations and deceptive marketing practices. These provisions aim to improve the quality and accuracy of marketplace information and discourage deceptive marketing practices.

This Information Bulletin outlines the approach that the Commissioner of Competition is taking in enforcing the “deceptive prize notice provisions” of the *Act*. The guidelines contained in this bulletin are not law, but they do reflect the Commissioner's interpretation of how the law is to be applied on a consistent basis by Competition Bureau officials.

Section 53 of the *Act* reads as follows:

Deceptive notice of winning a prize

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 notice or other document if the notice or document gives the general impression that the recipient has won, will win, or will on meeting a condition 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.

Non-application

(2) Subsection (1) does not apply if the recipient actually wins the prize or other benefit and the person who sends or causes the notice or document to be sent:

- (a) makes adequate and fair disclosure of the number and approximate value of the prizes or benefits, of the area or areas to which they have been allocated and of any fact within the person's knowledge that materially affects the chances of winning;
- (b) distributes the prizes or benefits without unreasonable delay; and
- (c) selects participants or distributes the prizes or benefits randomly, or on the basis of the participants' skill, in any area to which the prizes or benefits have been allocated.

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¹These Draft Guidelines have been prepared on the basis of provisions contained in Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*, which is currently before Parliament. The guidelines are not law. However, they reflect the Commissioner's interpretation of how the law would be applied on a consistent basis by the Competition Bureau in the event that Bill C-23 is enacted.

Due diligence

(3) No person shall be convicted of an offence under this section who establishes that the person exercised due diligence to prevent the commission of the offence.

Offences by employees or agents

(4) In the prosecution of a corporation for an offence under this section, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the corporation, whether or not the employee or agent is identified, unless the corporation establishes that the corporation exercised due diligence to prevent the commission of the offence.

Liability of officers and directors

(5) Where a corporation commits an offence under this section, any officer or director of the corporation who is in a position to direct or influence the policies of the corporation in respect of conduct prohibited by this section is a party to and guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted, unless the officer or director establishes that the officer or director exercised due diligence to prevent the commission of the offence.

Offence and punishment

(6) Any person who contravenes this section is guilty of an offence and liable

- (a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years, or to both; or
- (b) on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year, or to both.

Sentencing

(7) In sentencing a person convicted of an offence under this section, the court shall consider, among other factors, the following aggravating factors:

- (a) the use of lists of persons previously deceived by the commission of an offence under section 52.1 or this section;
- (b) the particular vulnerability of recipients of the notices or documents referred to in subsection (1) to abusive tactics;
- (c) the amount of the proceeds realized by the person from the commission of an offence under this section;
- (d) previous convictions of the person under section 52 or 52.1 or this section; and
- (e) the manner in which information is conveyed, including the use of abusive tactics.

GENERAL PRINCIPLES

Enforcement

The Competition Bureau has developed a variety of education, compliance and enforcement instruments to support a balanced approach to enforcement. Collectively, these instruments are known as the Conformity Continuum. It should be recognized that the approach taken by the Commissioner or his officials under this continuum is based on the facts relevant to each case.

Notice sent by electronic or regular mail or any other means

The Bureau will consider a notice or document 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, to be subject to subsection 53(1).

Interpretation of the phrase “on meeting a condition”

The phrase “on meeting a condition” will be interpreted by the Bureau to mean any condition which requires the recipient to actually do something prior to winning the prize or other benefit. Passive conditions, such as meeting age or residence requirements, or being selected in a random draw, will not be considered as being captured by the provision.

Determination of cost incurred

In determining whether a cost has been incurred under subsection 53(1), any cost other than the initial incidental cost of entering a contest or game, such as the cost of a postage stamp in order to send in an entry, will generally be considered by the Bureau to be a cost incurred to win a prize or other benefit. For example, the cost of telephone toll charges, such as 1-900 charges, will be considered to be a cost incurred to win a prize or other benefit.

A payment to a genuinely arm’s length third party, that is nominal in relation to the fair market value of the prize or benefit won, would not generally be considered a cost incurred to obtain a prize or other benefit. An example of such allowable costs would include: auto insurance premiums required to be paid prior to taking delivery of a free automobile.

Adequate and fair disclosure

In determining whether disclosure has been made in an adequate and fair manner under the saving provision of paragraph 53(2)(a), the Bureau will consider whether disclosure has been made in a reasonably conspicuous manner, at a time before the potential entrant is

inconvenienced in some way, incurs some cost or is committed to the advertiser's product or to the contest. Adequate and fair disclosure will be evaluated in light of the actual and intended audiences of the contest.

The issue of adequate and fair disclosure will be determined in relation to each of the following:

(1) Approximate Value

The section requires the disclosure of the approximate value of the prizes or benefits. This normally means the approximate regular market value of the product. However, where the final value of a prize or benefit in a contest is dependent upon the location in Canada of the winner (for example, where the prize is a trip from the winner's residence to a foreign destination), the inclusion of a few representative examples or of the range of possible values of the prizes or benefits would meet the requirements of the section. Depending on the circumstances of each

case, there may be other acceptable methods of disclosing the approximate value of the prizes or benefits.

(2) Regional Allocation

For contests where prizes or benefits are allocated on a regional basis (for example, one prize for residents of the Atlantic provinces, one prize for residents of Quebec, etc.), and where the promotion for the contest takes place in more than one region, any regional allocation of prizes or benefits should be clearly disclosed.

(3) Chances of Winning

Whenever the total number of any production run or population in which prizes or benefits are to be seeded or awarded is known, this matter would be a "fact within the person's knowledge that materially affects the chances of winning" and needs to be disclosed.

(4) Series of Prizes or Benefits

When a contest involves a series of prizes or other benefits to be awarded at different times, care should be taken to ensure that the promotional material does not imply that all of the prizes or benefits remain to be won when some have, in fact, already been awarded. For example, in a contest where a prize of \$1000 is to be awarded each month for a period of five months, advertisements for the contest should not continue to imply, after the first month of the contest, that there are still five \$1000 prizes to be awarded.

Unreasonable delay

The prize or other benefit should be provided to the winner within 60 days of the person being declared a winner or the closing date of the promotion, whichever comes first. In the case where the prize or other benefit can be redeemed at a later date, or at the discretion of the winner, such as a vacation, the certificate or voucher to redeem this prize or other benefit should be provided to the winner within 60 days of the person being declared a winner or of the promotion closing date, whichever comes first.

BINDING ADVISORY OPINIONS

The Competition Bureau facilitates compliance with the law in a number of ways, including the provision of advisory opinions, subject to a fee. Section 124.1 of the *Act* enables a person to apply to the Commissioner of Competition for a binding written opinion on the application of any provision of the *Competition Act* or regulations, including section 53.

If in doubt, company officials, lawyers and others are encouraged to request an advisory opinion on whether a proposed business plan or practice would raise an issue under the Act. A specific opinion would be based on information provided by the requestor, on any prior opinions and on the stated policies of the Competition Bureau.

The applicant is required to submit all supporting information relating to the request and the Commissioner may then provide the applicant with a written opinion. The opinion would be binding on the Commissioner, provided that the material facts on which the opinion is based are accurate. Also, the opinion would remain binding for so long as the material facts remain substantially unchanged and the conduct or practice would be carried out substantially as proposed.

HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information or file a complaint under the provisions of the *Competition Act* should contact the Competition Bureau's Information Centre at the numbers provided below:

Information Centre

Industry Canada
Competition Bureau
50 Victoria Street
Hull, Quebec
K1A 0C9

Hours of Operation:

Mon.- Fri. 8:00 a.m. to 8:00 p.m.
Eastern Time

Phone: (819) 997-4282

Toll free: 1-800-348-5358

TDD (hearing impaired) 1-800-642-3844

Facsimile: (819) 997-0324