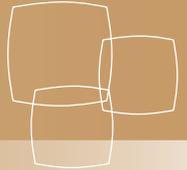




Enforcement Guidelines



Deceptive Notices of Winning a Prize

Section 53 of the *Competition Act*

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

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I. INTRODUCTION

The Competition Bureau is an independent law enforcement agency that contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choice. Headed by the Commissioner of Competition, the Bureau is responsible for the administration and enforcement of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The purpose of the *Competition Act* is to maintain and to encourage competition in the Canadian marketplace. Section 53 is one of the false or misleading representations and deceptive marketing practices provisions of the Act. These provisions aim to promote fair competition in the marketplace by discouraging deceptive business practices and by encouraging the provision of sufficient information to enable informed consumer choice. The Act applies to most businesses in Canada, regardless of size.

This publication outlines the approach that the Commissioner of Competition is taking in enforcing the criminal "deceptive notice of winning a prize" provision of the Act. The guidelines contained in this publication are intended to help the general public, business people and their legal advisors to better understand the deceptive notice of winning a prize provision and the general approach taken by the Competition Bureau to enforce that provision.





2. THE DECEPTIVE NOTICE OF WINNING A PRIZE PROVISIONS OF THE *COMPETITION ACT*

Section 53 of the *Competition Act* is a criminal provision. It prohibits the sending of a notice that gives the recipient the general impression he or she has won a prize or other benefit and asks or gives the option to pay money or incur a cost in order to obtain the prize or benefit. The provision applies to notices sent by any means, including but not limited to regular or electronic mail. No offence would arise if the recipient actually receives the prize or benefit and the person who sent the notice: (1) provides fair and adequate disclosure of the number and approximate value of prizes or benefits, the area or areas to which they have been allocated, and any fact that materially affects the chances of winning; (2) distributes prizes without unreasonable delay; and (3) selects participants or distributes prizes randomly or on the basis of participants' skill, in any area to which the prizes or benefits have been allocated.

Any person who contravenes section 53 is guilty of an offence and liable to a fine of up to \$200,000 and/or imprisonment up to one year on summary conviction, or to fines in the discretion of the court and/or imprisonment up to 14 years upon indictment.

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 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.

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.

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 14 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.



3. GENERAL PRINCIPLES

3.1 Enforcement

The Bureau strives for consistency in its approach to enforcement. However, it should be recognized that the choice of approach that the Commissioner takes under the Bureau's Conformity Continuum in any particular case is determined with reference to the facts of that case.

3.2 "Document or notice in any form"

A document or notice in any form will be interpreted to mean any document or notice that is recorded in any fashion, including in print or by any other means of audio or visual recording.

3.3 "Sent by electronic or regular mail or any other means"

The Bureau considers a notice or document that is sent by any means of communication, and that gives the impression that it was intended to be received by a specific person or class of persons, to be subject to subsection 53(1). These means would include, but would not be limited to, mail, electronic mail, facsimile transmissions or door-to-door delivery.

The Bureau would not normally regard notices that were sent to the general public by such means as billboards, in-store displays, or radio or television broadcasts, to be captured by the section.

However, should a notice sent by any such means of mass communication, either alone or in combination with another notice or document, give the general impression that the notice is intended to be received by a specific person or class of persons, the Bureau would consider subsection 53(1) to apply.

3.4 "On doing a particular act"

The phrase "on doing a particular act" is interpreted by the Bureau to mean any condition or requirement that the recipient 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, are not considered as being captured by the provision.

3.5 "Incur a cost"

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, is generally 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 where the promoter benefits directly or indirectly from the charge, is considered to be a cost incurred to win a prize or other benefit.

A payment to a party genuinely at arm's length to the promoter 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.

3.6 "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 looks to the substance of the disclosure and the manner in which it is made, whether it is comprehensive, meaningful and provided at a time before the recipient is inconvenienced in some way, incurs some cost, or is committed to the advertiser's product or to the contest. Adequate and fair disclosure are evaluated in light of the actual and intended audiences of the contest.

3.7 The Issue of Adequate and Fair Disclosure is Determined in Relation to Each of the Following:

3.7.1 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.

3.7.2 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.

3.7.3 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.

3.7.4 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 \$1,000 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 \$1,000 prizes to be awarded.

3.8 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.

4. WRITTEN OPINIONS

The Competition Bureau facilitates compliance with the law by providing various types of written opinions subject to fees. Company officials, lawyers and others are encouraged to request an opinion on whether the implementation of a proposed business plan or practice would raise an issue under the *Competition Act*. These written opinions are binding on the Commissioner of Competition when all the material facts have been submitted by or on behalf of an applicant for an opinion and when they are accurate. A specific written opinion will be based on information provided by the requestor and will take into account previous case law, prior opinions and the stated policies of the Bureau.





5. HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, the *Precious Metals Marking Act*, or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

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