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INFORMATION BULLETIN

SECTION 74.06 OF THE *COMPETITION ACT*

PROMOTIONAL CONTESTS

Canada 



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PROMOTIONAL CONTESTS

INTRODUCTION

This Information Bulletin outlines the approach that the Commissioner of Competition (the “Commissioner”) is taking in enforcing section 74.06 of the *Competition Act* (the “Act”).

THE PROMOTIONAL CONTEST PROVISION OF THE *COMPETITION ACT*

Section 74.06 of the Act is a civil provision. It prohibits any promotional contest that does not disclose the number and approximate value of prizes, the area or areas to which they relate and any important information relating to the chances of winning such as the odds of winning. It also stipulates that the distribution of prizes cannot be unduly delayed and that participants be selected or prizes distributed on the basis of skill or on a random basis. Pursuant to subsection 74.1(1), if a court determines that a person has engaged in conduct contrary to section 74.06, it may order the person not to engage in such conduct, to publish a corrective notice and/or to pay an administrative monetary penalty.

Section 74.06 and subsection 74.1(1) of the Act read as follows:

Promotional contests

74.06 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product, or for the purpose of promoting, directly or indirectly, any business interest, conducts any contest, lottery, game of chance or skill, or mixed chance and skill, or otherwise disposes of any product or other benefit by any mode of chance, skill or mixed chance and skill whatever, where

- (a) adequate and fair disclosure is not made of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the person that affects materially the chances of winning;
- (b) distribution of the prizes is unduly delayed; or
- (c) selection of participants or distribution of prizes

is not made on the basis of skill or on a random basis in any area to which prizes have been allocated.

Determination of reviewable conduct and judicial order

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

- (a) not to engage in the conduct or substantially similar reviewable conduct;
- (b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
 - (i) a description of the reviewable conduct,
 - (ii) the time period and geographical area to which the conduct relates, and
 - (iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and
- (c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding
 - (i) in the case of an individual, fifty thousand dollars and, for each subsequent order, one hundred thousand dollars, or
 - (ii) in the case of a corporation, one hundred thousand dollars and, for each subsequent order, two hundred thousand dollars.

It should be noted that in addition to complying with section 74.06 of the Act, a contest must be lawful as it relates to other federal statutes such as the *Criminal Code*, as well as any relevant provincial statutes and local by-laws.

THE COMMISSIONER’S VIEWS ON ADEQUATE AND FAIR DISCLOSURE

The following comments represent the Commissioner's views with respect to the

requirement of adequate and fair disclosure under paragraph 74.06(1)(a) of the Act.

In order to satisfy the requirement of the provision, disclosure should be made in a reasonably conspicuous manner prior to the potential entrant being inconvenienced in some way or committed to the advertiser's product or to the contest. Therefore, the Commissioner does not consider it to be a form of "fair and adequate disclosure" to put the onus on consumers to obtain further details which, by statute, are required to be disclosed by the advertiser. Similarly, a contest advertised in the media should not require that a consumer visit or patronize any particular retail outlet of the advertiser, or one of its franchises, or a dealer handling only its product, in order to become adequately and fairly informed of the information required by the provision.

The issue of adequate disclosure is important in relation to each of the following points:

1. Approximate value

Paragraph 74.06(1)(a) of the Act requires the disclosure of the "approximate value" of the prizes. It is the Commissioner's opinion that this phrase would normally mean the approximate regular market value of the product. In instances where it is difficult to make such an approximation, for example, where the prize is a trip from the winner's residence to the Caribbean and the value of the prize is thus dependant upon the location of the winner in Canada, the Commissioner takes the view that inclusion of a few representative examples or of the range of possible values of the prize would meet the requirements of the section. Depending on the circumstances of each case, there may be other acceptable methods of meeting these requirements.

2. Regional allocation

In some contests, prizes are allocated on a

regional basis, for example, one for entrants from the Atlantic Provinces, one for entrants from Québec, etc., while the promotion for the contest takes place on a national basis. It is the Commissioner's view that, to meet the requirements of paragraph 74.06(1)(a) of the Act, any regional allocation of prizes should be clearly disclosed.

3. Chances of winning

The Commissioner has also expressed the view that whenever the total number of seeded prizes in any production run or other population is known, this matter would be a "fact within the knowledge of the advertiser that affects materially the chances of winning", and should therefore be disclosed. For example, in a contest where winning coupons are packed in specially-marked containers and the total number of specially-marked containers is known, this fact should be disclosed. Similarly, in a contest where sets of tokens under bottle caps are distributed, the availability of scarce tokens needed to complete a set should be disclosed.

4. Series of prizes

It should be noted that when a contest involves a series of prizes to be awarded at different times, care should be taken to ensure that the promotional material does not imply that prizes remain to be won when they 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 series of five months, advertisements for the contest should not continue to imply, after the first month of the contest, that five \$1,000 prizes are to be awarded.

5. Early bird prizes

Where "early bird" prizes are to be awarded only to the first entrants in a contest, it is the Commissioner's view that the advertiser should disclose the starting date for the contest, in order

to meet the disclosure requirement. With this information, at any point during the contest offer, a consumer could evaluate the chances of winning an “early bird” prize.

6. Disclosure at point of sale

Where a manufacturer holds a promotional contest involving specially-marked packages of its product, the Commissioner is of the opinion that the manufacturer should ensure that proper disclosure of the contest rules is made wherever the specially-marked packages are sold. Since retailers often do not permit in-store displays promoting manufacturers’ contests, manufacturers ought to provide a short list of the contest rules on the outside of each package. The consumer should not have to buy the product or tamper with it to read these rules. This short list should contain the following information: (i) the number and value of prizes, (ii) any regional allocation of prizes, (iii) the skill testing question requirement, (iv) details as to the chances of winning (a chart may simplify explanation of the chances), (v) the contest closing date and (vi) any other fact known to the advertiser that materially affects the chances to winning.

ADVISORY OPINIONS

The Competition Bureau facilitates compliance with the law by providing various types of advisory opinions. 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 Act. The specific opinion, subject to fees, 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.

HOW TO CONTACT THE COMPETITION BUREAU

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

Telephone

Toll free: 1-800-348-5358
National Capital Region: (819) 997-4282
TDD (for hearing impaired): 1-800-642-3844

Facsimile

(819) 997-0324

Address

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

Web site

<http://competition.ic.gc.ca>

E-mail

compbureau@ic.gc.ca

Contests - The *Competition Act* and the *Criminal Code* Purchase Requirements as a Condition of Participation

NOTE: This article originally appeared in the 1/1992 issue of the *Misleading Advertising Bulletin* formerly published by the Competition Bureau. The article has been modified to reflect amendments to the *Competition Act* which came into effect on March 18, 1999.

INTRODUCTION

In relation to promotional contests, the *Competition Act* states:

74.06 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product, or for the purpose of promoting, directly or indirectly, any business interest, conducts any contest, lottery, game of chance or skill, or mixed chance and skill, or otherwise disposes of any product or other benefit by any mode of chance, skill or mixed chance and skill whatever, where

- (a) adequate and fair disclosure is not made of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the person that affects materially the chances of winning;
- (b) distribution of the prizes is unduly delayed; or
- (c) selection of participants or distribution of prizes is not made on the basis of skill or on a random basis in any area to which prizes have been allocated.

In addition to complying with section 74.06 of the Act, it should be noted that a contest must be lawful as it relates to other federal and provincial statutes and local by-laws. The *Criminal Code* is one federal statute which deals with contests under section 206, and should be considered, along with the requirements of section 74.06 of the Act, whenever a party proposes to conduct a contest.

There is often confusion about the interrelationship between the *Competition Act* and the *Criminal Code* in this regard. Therefore, while the Commissioner of Competition has no responsibility to enforce it, this article will address

the *Criminal Code* provision as it relates to requirements to purchase a product, or otherwise provide valuable consideration, as a condition of contest participation.

This article should not be taken to be a complete statement of the requirements of the *Criminal Code*. If in doubt, readers are encouraged to seek legal advice.

THE CRIMINAL CODE

In relation to lotteries and games of chance, the *Criminal Code* states:

206. (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who ...

(f) disposes of any goods, wares or merchandise by any game of chance or any game of mixed chance and skill in which the contestant or competitor pays money or other valuable consideration ...

In effect this section prohibits a requirement that a product or service be purchased as the sole condition of contest participation. Where other means of entry are available, such as using a “reasonable hand-drawn facsimile” or obtaining entry forms by means other than making a purchase, illegal contests under paragraph 206(1)(f) are avoided since the purchase requirement has been removed.

PURCHASE REQUIREMENTS AND SECTION 74.06

Unlike the *Criminal Code*, section 74.06 of the Act does not directly prohibit a requirement that participants pay money or other valuable consideration in order to participate in a contest. However, where a purchase is necessary in order to participate, for example, in a contest of pure skill such as a slogan-writing competition, this

fact should be prominently disclosed in order to avoid giving the Commissioner reason to initiate an inquiry.¹

Where no purchase is required, this fact should also be prominently disclosed in situations where failing to do so could lead those wishing to participate to make a purchase (due to a mistaken belief that a purchase is necessary in order to participate) or, alternatively, in situations where they might be discouraged from entering, thus materially affecting participants' chances of winning.

Furthermore, it has long been the Commissioner's policy that a potential contest entrant should not be required to buy a product, or be otherwise inconvenienced, to obtain the "adequate and fair disclosure" required by section 74.06 of the Act.

CONCLUSION

The Commissioner's Program of Advisory Opinions allows businesses and legal counsel to submit proposed contests for non-binding opinions as to whether such contests would provide grounds to initiate an inquiry under the Act. The opinions provided, however, are limited to possible issues which may arise under section 74.06 of the *Competition Act* and do not address potential violations which might arise as a result of the provisions in other federal, provincial or municipal enactments. It is hoped, however, that this article has clarified some of the issues which may arise respecting the interrelationship between section 206 of the *Criminal Code* and section 74.06 of the Act.

¹ It is recognized that purchase requirements often appear in conjunction with contests of chance or mixed chance and skill, which are prohibited by the *Criminal Code*.

Contests - The *Competition Act* and the *Criminal Code* Skill-testing Questions

NOTE: This article originally appeared in the 3/1992 issue of the *Misleading Advertising Bulletin* formerly published by the Competition Bureau. The article has been modified to reflect amendments to the *Competition Act* which came into effect on March 18, 1999.

INTRODUCTION

This article continues a discussion of the interrelationship between the *Competition Act* and the *Criminal Code* regarding contests.¹ There is often confusion about this interrelationship and, although the Commissioner of Competition has no mandate to enforce the *Criminal Code*, it is his view that this article will provide readers with information which will help clarify the roles of the two statutes as well as outline some of the major issues which they raise. The focus of this article is primarily on skill-testing questions.

Below is an edited excerpt taken from a presentation given by Ms. Wendy Reed, a promotion and advertising lawyer with the law firm, Heenan Blaikie, to the Promotion Marketing Association of America in November 1991. It is rare that an outside author's work is quoted at length in this publication. However, because of its timeliness and topicality, we were pleased to receive permission to reproduce substantial portions of it.

This article should not be taken to be an exhaustive discussion of the laws that apply to contests, nor does it necessarily reflect the position of the Commissioner. Readers are encouraged to seek legal advice to obtain further clarification of the specific requirements of the

various statutes and are encouraged to take advantage of the Commissioner's Program of Advisory Opinions. As was previously stated in the article on purchase requirements however, these opinions are limited to issues which arise under the *Competition Act* and not to other federal, provincial or municipal enactments.

The above-mentioned excerpt follows:

CRIMINAL CODE PROHIBITIONS

Many intriguing issues arise as to when particular sweepstakes or contests may offend the various gaming or lottery provisions of the *Criminal Code*. The most fundamental issues, however, and therefore the issues upon which we will focus are the Three Big Questions...

Big Question #1: Is a skill-testing question required in all sweepstakes?

To answer Big Question #1, we must delve into the murky passages of section 206(1) paragraphs (a)-(d) of the *Criminal Code*, the provisions that address schemes of chance... [The author then sets out the text of the provisions.]

Examining paragraphs (a) through (d), you are startled... by the glaring absence of any references to either "consideration" or the word "lottery" itself. The provisions on their face would therefore suggest that if you have a disposition of property (i.e. prize) and it is a scheme of chance, it will be illegal whether or not there is consideration. On that basis, it would be necessary to ensure that there was a skill test in all sweepstakes, whether or not there was any consideration.

Could it be, however, that Parliament meant to abandon the common law concept that an illegal scheme of chance needed to contain all three

¹ The first article, "Contests - the *Competition Act* and the *Criminal Code* - Purchase Requirements as a Condition of Participation" appeared in the 1/1992 issue of the *Misleading Advertising Bulletin*.

“lottery” elements of a prize, chance and consideration? When considering that question, courts have fallen in both directions. While there is support for the proposition that consideration is required before a scheme will be illegal under these provisions (and therefore that a pure chance promotion would be permitted provided there was no consideration), conservative sweepstakes promoters take the provisions at face value and add a skill test in all cases.

Big Question #2: What is considered a sufficient skill test?

The following have been found to be adequate skill tests:

- estimating the time it would take a barrel to travel a specified distance down a river²
- estimating attendances at a fair and the future temperatures of cities³
- estimating the number of beans in a jar⁴
- estimating the number of votes to be cast in an upcoming election⁵
- a four-step mathematical question⁶

The following are examples of skill tests found to be inadequate:

- shooting a turkey at 50 yards⁷
- a potato peeling contest⁸
- memorizing answers given to contestants earlier on⁹
- estimating how many passengers would be carried on a railway at a future date¹⁰

In considering whether any particular new form of skill test will be acceptable, there will often be a degree of uncertainty. (I confess I was surprised that the turkey shoot did not make it.) Most commonly, then, sweepstakes promoters continue to rely on the four-step time-limited mathematical question.

Care should be taken, however, as the precise level of difficulty that should be presented by a mathematical question has not yet been tested. The question approved in the *Canada Trust Company* case was:

- Step 1 multiply 228 times 21;
- Step 2 add 10,824 to the answer from Step 1;
- Step 3 divide the answer from Step 2 by 12; and
- Step 4 subtract 1121 from the answer to Step 3.

By vivid contrast to the above, many questions today have dropped several digits to:
 $5 + 10 \times 2 - 10 = ?$ Is that a sufficient test of skill? It remains to be seen. Again, those who wish to proceed prudently stay with double or triple digit questions.

² *Roe v. R.*, (1949) S.C.R. 652.

³ *R. v. Regina Agricultural and Industrial Exhibition Assn. Ltd.* (1932) 2 W.W.R. 131 (Sask. C.A.).

⁴ *R. v. Dodds* (1884), 4 O.R. 390 (C.A.).

⁵ *R. v. Johnston* (1904), 7 C.C.C. 525 (Ont. Co. Ct.).

⁶ *R. v. The Canada Trust Company*, Alta. Prov. Ct., July 5, 1984, Plomp Prov. J.

⁷ *R. v. Johnson* (1902), 6 C.C.C. 48 (Man. C.A.).

⁸ *R. v. Wallace* (1954), 109 C.C.C. 351 (Alta. Sup. Ct. Appeal Division).

⁹ *Reference re Montreal Voluntary Tax Plan* (1969), 6 D.L.R. (3d) 411 (Que. C.A.), affirmed [1970] S.C.R.332.

¹⁰ *R. v. Irwin*, (1928) 4 D.L.R. 625 (Alta. C.A.)

Big Question #3: May consideration be required in a sweepstakes if there is a skill-testing question?

The provision addressing consideration in relation to games of mixed chance and skill (as well as pure chance) is paragraph 206(1)(f) of the *Criminal Code*.

Paragraph (f) is the shortest and simplest of these provisions but has been the subject of no less debate than its sibling paragraphs. Under section 206(1)(f), it constitutes an offence to,

(f) dispose[s] of any goods, wares or merchandise by any game of chance or any game of mixed chance and skill in which the contestant or competitor pays money or other valuable consideration...

The three main issues arising out of paragraph (f) are immediately apparent:

- (i) is a sweepstakes or contest really a “game” of chance or mixed chance and skill?
- (ii) what do “goods, wares and merchandise” include?
- (iii) what constitutes “valuable consideration?”

(i) “Game”

Is it necessary to have participants hooting and hollering around a table to have a game or can one have a game in the remote silence of a sweepstakes? There has not been a definitive judicial answer to this question. Eyes have turned to a particularly recent case, however, which suggests that a sweepstakes may not be a “game”.

In *R. v. Simpsons Ltd.*, (1989), 25 C.P.R. (3d) 43 (Ont. Dist. Ct.), the court considered whether Simpsons’ “mini casino” promotion constituted a “game”, among other things, under section 59

[now 74.06] of the *Competition Act*. The provision at issue was not section 206(1)(f) of the *Criminal Code*, of course. However, the court did consider the concept of a “game” and adopted the following words of Wiggery, J. in the English case of *Adcock v. Wilson* [1967] 1 All E.R. 1028 at page 1037:

I think that an ordinary man, when talking of playing a game, is talking about something which involves entertainment; he is talking of something which involves excitement and fun in the common pursuit by a number of competitors of a similar and known object, and it seems to me exceedingly difficult to produce those elements which the common man would ascribe to a game if the participants are in separate places with no communication between them while the activity is going on and thus no sort of opportunity of seeing how their competitors are progressing and, I would have thought, none of the excitement which any true game can provide. (emphasis added)

With that, the *Simpsons* court decided that a scheme in which consumers would fold down one of four tabs to see whether they would receive a 10%, 15% or 25% discount was not a “game” (although it was held to be a means of disposing benefits and therefore still caught by section 59 [now 74.06] of the *Competition Act*).

The *Simpsons* case and older similar authorities have not put all minds to rest, however, and prudent sweepstakes promoters continue to provide a free-entry alternative to more confidently avoid section 260(1)(f).

(ii) What do goods, wares and merchandise include?

As section 206(1)(f) applies only to games involving the disposition of “goods, wares or merchandise”, one is led to consider what prize would not constitute goods, wares or merchandise and therefore not attract the provision. Cash is probably among the safer bets. Services is also a contender. There is some debate about trip prizes. Some feel that because criminal laws would be interpreted narrowly, trips would be construed as

a bundle of services and therefore outside the ambit of “goods, wares or merchandise”.

Unfortunately, this is another issue that has not been answered in the case law and we are therefore left to speculate.

(iii) What will constitute valuable consideration?

What will be regarded as consideration for the purposes of section 206(1)(f) has not been tested with much precision.

It is well accepted that the purchase of a product or service to enter a sweepstakes, even if only the regular price is paid, will be regarded as providing consideration [see e.g., *R. v. Hudson’s Bay Co.* (1915), 25 D.L.R. 396 (Alta. S.C.)]. Attention is therefore paid to permit entry by some means other than a purchase. The range of such “free entry alternatives” runs from the common single hand-drawn facsimile of a UPC symbol to multiple hand-drawn facsimiles to requiring a 500-word essay on a (generally product-related) topic. Sometimes “free entrants” are required to send in their requests for free entry paraphernalia (e.g., a randomly selected scratch ‘n win card) along with a self-addressed, stamped envelope. Requiring two envelopes and two stamps, that free entry would cost about \$1.00, which looks particularly odd when consumers might have entered more directly by purchasing the product itself for \$0.60, as is sometimes the case.

As we do not have the benefit of the guidance provided in some U.S. state laws as to where the line should be drawn, sweepstakes promoters must decide how much risk they are willing to undertake in loading further cost and effort items into the free entry alternative.

Finally, even if section 206(1)(f) does not apply and even if you have a skill-testing question, another provision that must be considered before

you require consideration is section 206(1)(e) of the *Criminal Code*. This prohibits (in rather cumbersome terms) schemes in which contestants pay a sum of money or give valuable security and become entitled to receive a larger sum of money or amount of valuable security by reason of the fact that others have paid money or valuable security under the scheme. There is some case law that applies this provision in a situation that one might not have expected. The issue should therefore be examined closely before requiring consideration in a contest or sweepstakes.

THE COMPETITION ACT - DISCLOSURE AND OTHER REQUIREMENTS

The minimum disclosure requirements under federal law are set out in section 59(1)(a) [now 74.06 (1)(a)] of the *Competition Act*. While the scope of the *Criminal Code* provisions may be questionable, the ambit of section 59(1) [now 74.06(1)] is convincingly all-embracing...

A principal issue arising under this provision is what “adequate and fair” means. Consumer and Corporate Affairs Canada [some of which now forms part of Industry Canada] explains in its *Guidelines on Misleading Advertising* that:

Disclosure should be made in a reasonably conspicuous manner at a time before the potential entrant is inconvenienced in some way or committed to the advertiser’s product or to the contest...

Promoters, should therefore do whatever is necessary to ensure that the minimum information is conveyed before consumers are committed to the product or inconvenienced. In the case of “specially marked products”, it may be risky to rely on point of purchase materials (e.g. ad pads) to communicate the minimum information as the materials may be torn down or depleted. Disclosing a short list of the required information on a product package is therefore desirable where at all possible.

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