Contest, Coupons and Cash Ads: Making Your Promotion A Winner!

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# TABLE OF CONTENTS

INTRODUCTION .......................................................................................................................... 1

CONTESTS .................................................................................................................................... 1
  Contests and the *Criminal Code* ................................................................................................. 1
  Contests and the Competition Act .............................................................................................. 3
  Contests in Quebec ..................................................................................................................... 4
  Special Issues Facing Contest Sponsors ..................................................................................... 5

COUPONS.................................................................................................................................... 10
  The Offence .............................................................................................................................. 11
  Few Prosecutions ...................................................................................................................... 11
  Structuring a Legal Cross-Merchandising Promotion .............................................................. 12

CASH ADS................................................................................................................................... 14
  The Prohibition ......................................................................................................................... 15
  The Exemption .......................................................................................................................... 16
  Prosecutions .............................................................................................................................. 17
  Legal Advertisements ............................................................................................................... 17

CONCLUSION............................................................................................................................. 18
  Appendix A - Statutory References ...................................................................................... 19
  Appendix B - Cases on Trading Stamps Provisions of Criminal Code ................................ 20
  Appendix C - Contest Disasters ............................................................................................ 21
  Appendix D – Contest Prosecutions ..................................................................................... 26
  Appendix E – Sample Promotions ....................................................................................... 28
  Appendix F – Bad Example of Contest Rules ....................................................................... 29
CONTESTS, COUPONS AND CASH ADS:
Making Your Promotion a Winner!

By: Bill Hearn and Theresa Maxwell, McMillan Binch LLP
November 7, 2003

INTRODUCTION

Popular promotions generate public interest in a product, creating a buzz that can increase customers and send sales spiralling. Not every promotion goes according to plan, however, and those that go awry can have significant consequences for the planners and their product. This paper provides an overview of the law as it relates to three types of promotions: contests, coupons, and cash advertisements. Its purpose is to call attention to common promotion pitfalls and to suggest some strategies to avoid missteps and to create successful promotions where everyone involved is a winner.

CONTESTS

The Globe & Mail newspaper recently reported that the contest industry in the country “is on a roll.” Canadians love contests, and an increasing number of promotions are being structured around contests. In all of the excitement, however, it is important not to lose sight of the fact that there are laws that apply to contests. The main federal laws governing contests are found in section 206 of the Criminal Code and section 74.06 of the Competition Act. Advertising relating to contests must also comply with the misleading advertising provisions of the Competition Act. As well, contests open to Quebec residents must comply with Quebec’s special laws on contests. This section briefly outlines the provisions that should be followed to ensure a “legal” contest.

Contests and the Criminal Code

Parliament passed the Criminal Code provisions on “illegal lotteries” over a century ago to curb illicit gaming. Lawmakers at that time were concerned mainly with
protecting Canadians from the evils associated with games such as 3-card monte (presumably played in the backrooms of saloons). They probably had no idea that these rules would one day be applied to regulate contests on boxes of cereal played by children over the breakfast table!

Several elements must be present before a contest becomes an illegal lottery under the Criminal Code. There is room for structuring a contest in a way that eliminates at least one of these elements and, in this way, makes the contest legal.

- **Skill-Testing Question**

Section 206 of the Criminal Code prohibits the conduct of contests in which winners are determined solely by chance. However, the Criminal Code contemplates the conduct of legal contests, where people win through mixed chance and skill or by skill alone. It is therefore prudent that an element of skill be introduced into the contest. The most common means of introducing an element of skill into a contest is the “skill-testing question” – usually, a time-limited arithmetical problem containing relatively simple addition, subtraction, multiplication, and division.

- **No Purchase Requirement**

If winners are to be determined based upon a game of mixed chance and skill, the contest is prohibited by the Criminal Code if the participants are required to pay money or give valuable consideration in order to participate. Participants should therefore not be required to pay money or give valuable consideration for the right to participate unless the contest does not involve an element of chance.

- **What is a Game of Mixed Chance and Skill?**

Courts have been considering the question of what qualifies as a game of mixed chance and skill for over a hundred years. The presence of an element of chance in a game does not necessarily make it a game of mixed chance and skill. In the late 1960s, the Supreme Court of Canada interpreted “chance” to mean something more than “the chances involved in any human activity.”
When the issue was revisited in a recent Ontario case, *R. v. Balance Group International Trading Ltd.*, the Court of Appeal held that an increased level of difficulty (i.e., where some elements of the game are out of the control of the player) does not convert a game from one of mixed chance and skill to one of pure skill. In the Court’s analysis, the “crane game” at issue was one of mixed chance and skill because a large number of factors prevented the player from bringing any skill to bear on the game at all. Although the player exercised skill to control the crane’s lateral movement, other elements of the game – the ability of the claw to hold the object, for example – were “wholly beyond the power of the player to influence”. While a game of pure skill may contain “some unpredictable elements,” the average player must be able to exercise sufficient skill to compensate for the element of chance.

**Contests and the Competition Act**

Even if a contest is legal under the *Criminal Code*, the sponsor must also comply with the requirements for contests under the *Competition Act*. In essence, section 74.06 of the *Competition Act* provides that there should be adequate and fair disclosure of such matters as the number and approximate value of prizes, the areas to which they relate (i.e. any regional allocation of prizes), and any fact within the knowledge of the advertiser that materially affects the chances of winning (such as the mechanics of the contest and the odds of winning).

- **Adequate and Fair Disclosure**

  Disclosure should be made in a reasonably conspicuous manner. It should be made before the potential entrant is inconvenienced in some way or has committed to the contest or the product or service being promoted by the contest.

- **Short List Disclosure**

  The Competition Bureau requires that sponsors provide adequate and fair disclosure by indicating a “short list” of rules, either through the media or on the outside of the package. This short list should, at a minimum, include:

  - the number and approximate retail value of prizes;
• the regional allocation of prizes, if applicable;
• if within the knowledge of the advertiser, the chances of winning and any other fact that materially affects the chances of winning;
• the requirement to answer correctly a skill-testing question;
• the date on which the contest closes;
• the information that no purchase is necessary to enter the contest; and
• the place where the full contest rules are available.

• Written Opinions

Since April 1, 2003 the Competition Bureau will, on payment of a fee of $1,000, review contest materials and give a written opinion as to whether or not the contest provides the Commissioner with sufficient grounds to commence an inquiry. This opinion is binding on the Competition Bureau, and the process takes two weeks for simple contests and six weeks for complex contests.

Contests in Quebec

Quebec is the only province that has passed a statute that applies specifically to contests. If a contest is run in Quebec, it will need to satisfy the requirements of that province’s legislation on “publicity contests.” This legislation is administered by the Régie des alcools, des courses et des jeux.

Including Quebec residents results in additional legal requirements for a contest:

• all materials for Quebec residents must be in French;
• notice of the contest, together with the applicable duties, a copy of the contest rules, and the text of any advertisement used in the contest must be filed in advance with the Régie;
• duties based on the value of prizes available to Quebec residents must be paid in advance;

• the contest rules must contain certain prescribed information; and

• in certain cases, a security bond with the Régie may be required.

The extra requirements for running contests in Quebec often lead contest sponsors to exclude residents of that province.

Special Issues Facing Contest Sponsors

Contest sponsors may face more specialized issues than those outlined above, such as: privacy protection in contests for children, the equal integrity principle, deceptive prize-winning notices, and on-line contests.

• Privacy Protection in Contests for Children

Since April 2000 in the United States, the Children’s Online Privacy Protection Act (COPPA) has required the operator of a website to obtain a “verifiable parental consent” from a child’s parent before collecting, using, or disclosing personal information from a child. In February, 2003, the Federal Trade Commission fined Mrs. Field’s Cookies and Hershey’s Food Corporation $85,000 and $100,000, respectively, for violating this requirement.

There is currently no equivalent to COPPA in Canada. However, if your contest is open to persons under the age of majority, it should comply with the guidelines prepared by the Canadian Marketing Association. Endorsed by the federal Privacy Commissioner, the CMA’s Code of Ethics & Standards of Practice (the “CMA Code”) sets out a number of important rules to follow when marketing to children and teens.

For children under the age of thirteen, marketers may collect personal information for contests, games, or sweepstakes without obtaining the parent or guardian’s express consent, only if the marketer:
• collects a minimal amount of personal information, sufficient only to determine the winner;

• deals only with the winner’s parent or guardian and does not contact the winner;

• does not retain the personal information following the conclusion of the contest or sweepstakes;

• makes no use of the personal information other than to determine the contest or sweepstakes winner; and

• does not transfer or make available the personal information to any other individual or organization.

For children over thirteen, the CMA Code divides information collected into two categories: (a) contact information, consisting of the person’s name, address, e-mail, and home and cell phone numbers, and (b) personal information, consisting of all other information which identifies the individual.

The CMA Code’s position is summarized in the following table:

<table>
<thead>
<tr>
<th>Age</th>
<th>Personal Information</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over 13, Under 16</td>
<td>Collection, use or disclosure to third party with express consent of the parent or guardian</td>
<td>Collection and use with teenager’s express consent. Disclosure to third party with express consent of the parent or guardian</td>
</tr>
<tr>
<td>Over 16, Under Age of Majority</td>
<td>Collection, use or disclosure to third party with teenager’s express consent</td>
<td>Collection, use or disclosure to third party with teenager’s express consent</td>
</tr>
</tbody>
</table>

As with all contests, it is necessary to accurately describe the intended use of the personal information at the time of collection and to obtain the appropriate form of consent from the entrant.
• **Equal Integrity Principle**

The phrase “no purchase necessary” frequently confuses marketers and contestants because the main purpose of a contest is to promote a purchase. It is important to remember that the *Criminal Code* prohibits contests that force a purchase or otherwise require “consideration” as a condition of entry, however.

“Equal integrity” refers to the notion that all entrants should be treated equally. In a typical contest, the total pool of players will include paying and non-paying entrants. If the contest contains an online method of entry, the pool of players may further be subdivided into online and off-line entrants. To what extent are contest organizers entitled to privilege entrants who select one method of entry over another?

The term “equal integrity” appears in no reported Canadian contest decision. Aside from an occasional footnote reference, the issue is usually given short shrift in articles on Canadian contest law. By contrast, in the United States the concept has been brought into prominence, particularly in the context of internet sweepstakes where online participants can enjoy a distinct advantage over their off-line counterparts.

Problems may arise when an advantage - in the form of a superior method of entry, or better odds - is associated with a purchase. “Equal integrity” is shorthand for requiring contest sponsors to avoid discriminating against non-paying participants. Among other things, this may mean identical prize pools and chances to win, and may involve adjusting ending dates for mail-in or facsimile entries to allow equal participation by off-line participants.

In Canada, this mode of thinking was applied by the Alberta Provincial Court in *R. v. Brennan*, a case that considered the legality of a contest promoting the sale of a book. While tickets for the contest were available without purchase upon request, the judge found that there was “reluctance” to give free tickets. In the Court’s view, everything appeared geared to the giving of tickets on purchase of the book. As a result, the defence could not point to the “no purchase” method of entry in order to avoid conviction under the *Criminal Code*’s illegal lottery provisions.
While the Alberta Court of Appeal set aside the conviction, the lower court’s reasoning might be viewed as a shot across the bow of Canadian contest sponsors. The decision suggests that a free alternative mode of entry (AMOE) may lose its efficacy if disparities in treatment become too glaring.

In most cases, the provision of a free AMOE will continue to satisfy the basic purpose of the statute. Canadian courts will likely take a common sense approach to the “equal integrity” principle, given that the illegal lottery provisions of the *Criminal Code* were drafted primarily to curb illegal gambling and protect against “loss,” not to burden modern commercial marketing activities.

However, contest sponsors would be prudent to attempt, where possible, to minimize the disparities in treatment between paying and non-paying entrants. If the odds of winning become too heavily tilted in favour of the paying entrant, then the no-purchase option may cease to represent an equivalent method of entry. The greater the discrepancy in treatment, the greater the risk of raising the ire of the regulators.

**Deceptive Prize Winning Notices**

A recent amendment to the *Competition Act* makes sending deceptive prize notices a criminal offence. A notice will be caught if it promotes a business interest or the supply or use of a product; if it gives the general impression that the recipient has won or will win a prize; and if the recipient is asked to pay money, incur a cost, or do anything that will incur a cost. This provision applies to a notice or document of any kind sent by any means, including mail, e-mail, fax, or door-to-door delivery. However, it will not apply if the recipient actually wins the prize and the person who sends the notice does the following:

- makes adequate and fair disclosure of the number and approximate value of the prizes, 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;
- distributes the prizes without unreasonable delay; and
selects participants or distributes the prizes randomly, or on the basis of the participants' skill, in any area to which the prizes have been allocated.

A recent direct mail piece from Reader's Digest provides an example of an elaborate contest notice that would not be caught by the deceptive prize winning notice provisions of the *Competition Act*. While it identifies the sender as the “Winners Selection Commission for Canada,” and it claims to advance the recipient directly to the final stage of the contest, the notice admits that it cannot promise that the recipient will “win all the cash.” Furthermore, though the notice is promoting subscriptions to Reader’s Digest magazine, the recipient does not need to pay money in order to enter the contest. The Competition Bureau guidelines do not count the cost of a postage stamp in order to send in the entry as a cost incurred for the purposes of the deceptive prize-winning notice provision.

**Contests on the Internet**

The same laws that apply to contests generally in Canada, apply to contests online. As a result, sponsors must comply with the *Criminal Code* and *Competition Act* and ensure that contests open to Quebec residents meet the requirements of that province’s special laws on contests.

Like other types of contests, Internet contests should be advertised in accordance with the misleading advertising provisions of the *Competition Act*. In February 2003 the Competition Bureau released an information bulletin that applied these provisions in the context of on-line advertising. The bulletin did not change the law on contests, but applied it to the peculiarities of the Internet. For instance, on-line contest disclosures must be displayed in such a way that they are likely to be read by consumers, and they should not require an active step such as sending an e-mail. Hyperlinks are an acceptable means of providing disclosures unless the disclosure is a crucial piece of the representation. In such a case, the information should be provided on the same page as the representation.
Sponsors of on-line contests must follow the same laws that apply to contests in Canada generally, but they must also deal with issues that are unique to the on-line context. One of the selling points of the Internet for marketers may be its reach across national boundaries, for instance. When marketers organize contests on the Internet, they must be conscious of the jurisdictional issues that this cross-border reach can raise. They should consider including a choice of law notice to inform people about the jurisdiction of the contest in case there are any problems that might give rise to legal action. They should also include a notice on the contest web-site establishing who is eligible to participate.

On-line contests raise other legal issues that contest organizers should consider in the planning process. This paper has already touched on one issue, the importance of not favouring on-line entrants over other contestants, under the so-called “equal integrity” principle. Contest sponsors should also remember that the ease with which people can enter an on-line contest may cause problems. They should include a glitch disclaimer and take measures so that a handful of contestants do not flood the contest web site and make the entire scheme unworkable.

**COUPONS**

Contest sponsors are often amazed by the range of legal issues they must consider during the contest-planning process. Like contests, promotions that involve coupons can come up against some little-known criminal law provisions. Many merchants and their marketers are surprised to learn that a *Criminal Code* ban on issuing trading stamps limits what they can legally do with coupons, loyalty programs, and other cross-merchandising sales promotions. This section provides an overview of the law as it relates to coupon promotions; it explains the origin of the offence, describes its current status, and then outlines some ways to ensure that a promotion does not contravene its provisions.
The Offence

The offence has its roots in the “evils” of early 20th century coupon programs. At the time, it was a pressing issue for our Members of Parliament, and even Sir Wilfred Laurier participated in the House of Commons debates. As the trading stamp issue faded from public consciousness, however, the Criminal Code amendment that Parliament eventually passed remains on the books. It prohibits merchants from providing “trading stamps” to their customers, and a “trading stamp” is defined broadly as “any form of cash receipt…coupon, premium ticket or other device” which represents a discount on the price of goods or a “premium” to the buyer.

The penalty for violating the ban on trading stamps is a fine of not more than $2,000 or imprisonment for six months or both. As with any Criminal Code offence, persons may be parties to an offence not only if they commit it themselves, but also if they aid, abet, conspire in, or counsel the commission of the offence.

This broad prohibition has the potential to catch a wide range of promotions. Chances are the electronic air miles you collect, the fast-food coupons you redeem, and the newspaper coupons you clip constitute “trading stamps” under the Criminal Code. The definition casts a very wide net (and possible shadow) over many co-promotions, and most of today’s merchants and their customers are simply not aware of the issue.

Few Prosecutions

While the ban has been around since 1905, its full range remains a mystery because there have been few prosecutions in recent memory. The last round of reported prosecutions occurred in the mid-1960s. For a list of reported cases, please see Appendix B.

In a 2002 scholarly article on the issue, the University of New Brunswick’s Richard Bird called for its repeal, arguing that the provision makes little sense in today’s marketplace. Professor Bird’s sensible recommendation echoes the view expressed nearly a decade earlier in a Financial Post (as it then was) editorial, which chided: “The federal government should repeal the “trading stamps” section of the Criminal Code - if anybody in Ottawa can remember where to find it!”
As long as the provision remains a part of the *Criminal Code*, however, the sponsors of promotions that involve coupons will need to consider its application. It would not be prudent to interpret the rarity of prosecution as a sign of government approval and a test of the activity’s legality. Even if the Crown is uninterested in prosecuting trading stamp issuers, merchants who violate the ban still expose themselves to the risk of a private prosecution. For instance, a competitor or disgruntled customer might attempt to lay a private complaint or information.

There is also the risk of a court finding a cross-merchandising sales promotion contract unenforceable on the grounds that it is against public policy to enforce an agreement to commit a crime. On the positive side, many of the current and widely-advertised schemes involving reputable merchants which, at first blush, appear to contravene the section, are likely legal because they take advantage of technical exceptions to the prohibition.

**Structuring a Legal Cross-Merchandising Promotion**

When structuring a cross-merchandising promotion, the first thing that a merchant and its marketer must do in order to reduce the likelihood of prosecution is to make sure that the proposed scheme is fair to the consumer. However, running a fair scheme is not enough. Proof of fraud is not an essential ingredient of the offence, and evidence of good faith is not necessarily a defence to prosecution.

The second thing that must be done is to design a scheme falling outside the literal wording of the “trading stamp” definition because it has been interpreted by the courts as being exhaustive. This has been attempted in a number of ways, including:

- employing an electronically-operated scheme in which no physical or tangible object (like a coupon or stamp) is given to the consumer;
- issuing a coupon that is not designed or intended to be given to the purchaser of goods (but rather to the public at large or to members of a consumer club);
• issuing a coupon that is not designed or intended to represent a discount on the price of goods or a premium to the purchaser;

• selling the coupon or not giving it away (i.e. by asking the consumer to pay a nominal sum for it);

• having the two merchants come under, in legal terms, “one roof” (e.g., by having one act as the other’s agent);

• ensuring that the coupon shows on its face the place where it is delivered and its merchantable value;

• ensuring that the coupon is redeemable on demand; and

• providing that the coupon is to be returned to the manufacturer or the manufacturer’s agent.

The problem is that many of these schemes remain untested in the courts and thus represent a business risk for merchants and their marketers. Also, as a matter of law, some of these methods are better than others. Indeed, in most cross-merchandising promotions, either by legal necessity or out of an abundance of caution, many of these schemes often appear in combination.

Interestingly, despite the broad definition of trading stamps, the ban is limited to issuing them. By implication, the redemption of coupons is not an offence. This apparently creates an opportunity for a merchant to take advantage of its competitors’ coupons and other cross-merchandising schemes without the risk of prosecution.

While it can be said that the trading stamp ban should be replaced because it is anachronistic, unnecessary, ignored and unfair, it remains on the books and merchants and their marketers should get legal advice in the early stages of developing cross-merchandising promotions in order to minimize the risk of problems in this area.
Coupons also raise a slew of contractual issues which promoters attempt to cover off with language such as “Offer expires ●”, “Limit one coupon per person”, “Coupon not valid in combination with any other offer”, “Available while supplies last”, “Coupons are void if copied or reproduced”, and “All coupons submitted for redemption become the property of ●”, to name a few.

Another risk of coupons is fraud on the promoter in the form of counterfeit or fake coupons. Starbucks was the victim of such fraud a year or so ago and a recent article in the Globe & Mail suggests that “fake coupons” are fairly common in the marketplace. Obviously, a successful coupon promotion requires some “coupon security” and “vigilance in redemption”. For example, the currently running and hugely successful General Mills/Cineplex Odeon “Theatre Cash” promotion (which gives breakfast cereal purchasers $5 off the price of admission to a movie) is driven by an elaborate coupon (in the form of a cheque) which has a built-in security device designed to prevent counterfeiting – namely, on the back of the coupon there is a padlock icon printed with ink that responds to warmth. The theatre cashier redeeming the coupon is instructed to breathe on the icon and if the image fades and reappears, it is a legitimate coupon.

CASH ADS

Structuring a promotion around a contest or coupons raises a variety of legal issues that, if ignored, can have significant implications for the promoter and its product. Many merchants and their marketers are not aware that using certain images in their promotions may also contravene the Criminal Code. This section provides an overview of the law prohibiting the use of reproductions of money in advertising.

Consider the following scenario: you are planning a major direct mail advertising campaign for a hospital lottery. You would like to use the picture of a woman surrounded by piles of $50 and $100 bills with a description of the hospital foundation and a list of the prizes available to be won. Unbeknownst to you, the advertisement may be illegal. Unless prepared appropriately, the reproduction of Canadian (and possibly foreign) bank-notes in advertising is prohibited by the Criminal Code.
The Prohibition

This prohibition has been on the books for over a century. In 1887, the federal government first enacted legislation prohibiting the reproduction of currency in advertising. The debates surrounding the enactment of the legislation suggest that the government was concerned with protecting consumers from counterfeit bank-notes, even if the bank-notes were clearly being used as an advertisement.

In 1954, the government re-visited the issue and amended the legislation. The debates indicate that the government had new concerns with the reproduction of currency. The Minister of Justice read a letter to the House of Commons from the Deputy Governor of the Bank of Canada that explained the prohibition on bank-note reproduction as follows:

- reproduction of currency will encourage others to develop new ways of reproducing currency;
- plates made for the innocent reproduction of currency may fall into the wrong hands; and
- reproduction generally cheapens the position of bank-notes in the public eye.

Following amendments in 1999, section 457(1) of the Criminal Code now reads as follows:

No person shall make, publish, print, execute, issue, distribute or circulate, including by electronic or computer-assisted means, anything in the likeness of

(a) a current bank-note; or

(b) an obligation or security of a government or bank.

A person who contravenes this provision is guilty of an offence punishable on summary conviction.
The legislation provides that any reproduction portraying the likeness of a bank-note is prohibited even if the reproduction is an obvious advertisement and the marketer has no intention of passing-off the reproduction as currency. Any likeness of a bank-note is illegal unless an exemption applies.

**The Exemption**

There are several ways to use images of money in advertising and avoid the prohibition on reproducing bank-notes. First, an exemption is built into the provision:

Section 457(4) of the *Criminal Code* states:

No person shall be convicted of an offence . . . in relation to the printed likeness of a Canadian bank-note if it is established that the length or width of the likeness is less than three-fourths or greater than one-and-one-half times the length or width, as the case may be, of the bank note and

(a) the likeness is in black-and-white only; or

(b) the likeness of the bank-note appears on only one side of the likeness.

Section 457(4) permits advertisements that portray Canadian bank-notes of a different size and use black and white or illustrate only one side of the likeness. This may stem from the fact that an advertisement portraying a bank-note with such characteristics is not easily counterfeited and does little damage to the prestige of true bank-notes.

Arguably, the wording of section 457 also permits the portrayal of Canadian coins (as opposed to bank-notes). Marketers may be able to run advertisements with the likeness of a loonie or toonie, for example.

Finally, an argument can also be made that, with successive amendments to the *Bank of Canada Notes Regulations* removing from circulation $1, $2, and $1000 bills, advertisements which reproduce these bank-notes are not caught by the prohibition because they are no longer “current.”
Prosecutions

To date, there has been only one reported case involving a prosecution under the bank-note prohibition. In *R v. Giftcraft*, the defendant was importing and distributing various novelty items such as ceramic mugs and ashtrays, which carried images of bank-notes. The defendant was charged under the predecessor of section 457 of the *Criminal Code*, which provided that everyone who publishes or prints anything in the likeness or appearance of all or part of a current bank note or paper money is guilty of an offence on summary conviction.

The court held that the word “publishes” is not restricted to the production of materials but that importing and distributing items carrying the resemblance of bank-notes is an illegal act. By distributing the novelty items and making them available to retailers in Canada, the court held that the defendant was a publisher.

Although the court was clear that any distribution of material carrying the likeness of currency that does not fall under the exemption violates the *Criminal Code*, the provision is rarely prosecuted.

Legal Advertisements

Recently, an Ontario charity distributed a flyer advertising its lottery that portrayed a man surrounded by money. Although the advertisement reproduced Canadian currency, it did not violate section 457 of the *Criminal Code*, as the reproduced bank-notes were approximately 2 centimetres long and only portrayed one side of the likeness.

The bottom line is that the venerable prohibition on reproducing currency in advertising (even if honoured more often in the breach than in the observance) is something that marketers must account for when dreaming up advertisements.

Even when there appears to be less than vigorous enforcement of the prohibition by the Crown, marketers are well advised to ensure that their reproductions of currency in advertisements fall within the permitted exemption. After all, the section was revised, and not repealed, in 1999. Otherwise, portraying money in ads may be costly and bring the wrong kind of attention to your company’s product or service.
CONCLUSION

Promoters are often surprised by the range of legal issues that they find themselves considering during the planning process. Prudence dictates that such issues not be ignored, particularly in the context of contests, coupons, and cash ads.

A popular promotion can have a significant impact by creating interest and new customers for a product. Not every promotion goes according to plan, however, and missteps can be costly. Being aware of the common promotion pitfalls and having strategies to avoid (or at least mitigate mishaps), will help promoters run successful promotions where everyone involved is a winner.
Appendix A - Statutory References

Contests

*Criminal Code* s. 206(1)

Excerpts from the *Competition Act*

- s.74.06(1) – Reviewable Matters – Promotional Contests
- s.74.01(1) – Reviewable Matters – Misrepresentations to the Public
- s.52(1) – Offences – False or Misleading Representations
- s.53 Offences – Deceptive Prize Notices

Coupons

*Criminal Code*, ss. 379 – Definitions- Trading Stamps

*Criminal Code*, s. 427 – Offences – Trading Stamps

Cash Ads

*Criminal Code*, s. 457 – Offences – Bank-Notes
Appendix B - Cases on Trading Stamps Provisions of Criminal Code

1. Rex. v. Pollock (1916) 36 O.L.R. 7 (County Court of the County of York)

2. Rex v. Smith [1932] 1 W.W.R. 131 (British Columbia Court of Appeal)

3. Rex v. Western Automobile Club Ltd. [1934] 3 D.L.R. 592 (Alberta Supreme Court, Appellate Division)

4. Rex. McManus [1939] 1 D.L.R. 98 (Saskatchewan Court of Appeal)


7. R. v. Rice and Fletcher (1959, Magistrates’ Court, Ontario) noted at 2 C.L.Q. 236.

8. Regina v. O.K. Economy Stores Ltd. (1959) 30 W.W.R. 529 (Saskatchewan District Court)


10. Regina v. Loblaw Groceteria Co. (Saskatchewan) Limited (No. 2) (1960) 31 W.W.R. 283 (Saskatchewan District Court)


15. Regina v. Kleckner et al. [1963] 1 C.C.C. 64 (Saskatchewan Court of Appeal)


17. Regina v. Lloyd H.A. & Son Ltd. (1965) 1 O.R. 695 (Ontario High Court of Justice)
## Appendix C - Contest Disasters

<table>
<thead>
<tr>
<th>Company Name / Date</th>
<th>Problem</th>
<th>Exposure</th>
<th>Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>McDonald’s (US and Canada), 2001</td>
<td>Game piece promotion involved placing instant win pieces on containers for drinks and french fries. Personnel with the marketing company responsible for the promotion stole valuable winning pieces and then, through various tactics, collected the prize money.</td>
<td>Negative publicity and an FBI investigation.</td>
<td>McDonald’s published full-page apologies in national newspaper and awarded $10 million in prizes at randomly selected outlets across North America.</td>
</tr>
<tr>
<td>Ultramar (Canada), 2001</td>
<td>Various coupons for gas were to be awarded, including three grand prizes of $1500 worth of fuel. A printing error created hundreds of grand prize winners.</td>
<td>Prize claims totalled $150 million.</td>
<td>The company relied upon a “Kraft clause” in its contest rules to cancel the original prize distribution and substitute an alternate method of allocating the grand prize.</td>
</tr>
<tr>
<td>General Motor Dealers / Ottawa Senators, 2000</td>
<td>Contest grand prize was a private suite at the Corel Centre for a Senators game during the second round of the NHL playoffs. Secondary prizes also included pairs of tickets to second round playoff games. Ottawa lost to Toronto in the first round of the playoffs.</td>
<td>Value of prizes and negative publicity.</td>
<td>Substitute prizes offered made up of tickets for games in the 2001/2002 season.</td>
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<table>
<thead>
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<tr>
<td>KBQI FM Albuquerque, 2000</td>
<td>Radio station promised to play 20,000 songs, commercial free, or to pay $20,000 to the first caller who caught them playing a commercial. About one week into the promotion, the computer that controlled the on-air production, suffered a software glitch that caused it to play an advertisement for Geico Insurance. A listener called to claim the prize. The applicable rules stated that the ad had to be “a paid commercial”, which the Geico ad was not, since it was played in error.</td>
<td>The value of the promised prize of $20,000.</td>
<td>The radio station chose not to rely on the rule and paid the prize money.</td>
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<td>Childrens’ Hospital of Eastern Ontario (CHEO), 1998</td>
<td>CHEO conducted a fund raising lottery which sold tickets at $100 each. Contestant purchased ticket with an NSF cheque. His name was drawn for the grand prize and he was given the opportunity to pay for the ticket with cash and claim the prize. Other entrants who had paid with an NSF cheque had been given the opportunity to make good on their payments.</td>
<td>Potential for negative publicity.</td>
<td>After the experience 1998, CHEO changed its procedure to void any ticket that had not been paid at least 24 hours before the draw.</td>
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<td>PepsiCo (Chile), 1992</td>
<td>Under-the-cap promotion involved cash prizes ranging from $14 to $30,000. The wrong number was announced in the media and far more “winners” came forward to claim prizes than planned.</td>
<td>The Pepsi bottling plant was besieged by an angry crowd of supposed winners who ultimately had to be removed by the police.</td>
<td>Pepsi garnered negative media exposure over the fiasco but was not charged or required to pay a monetary penalty.</td>
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<td>PepsiCo (Phillipines), 1992</td>
<td>Under-the-cap promotion with a grand prize of 1 million pesos (U.S. $36,000). A computer glitch resulted in the wrong winning number being announced and 500,000 people believing they had won the grand prize.</td>
<td>Pepsi faced prize claims totalling U.S. $18 billion. The disaster prompted anti-Pepsi rallies and sabotage attacks on Pepsi trucks and bottling plants. It was also reported that Pepsi’s sales in the Pacific Rim plummeted and its market share dropped nine points just after the news broke.</td>
<td>Pepsi paid $19 per piece for the “winning” caps totalling U.S. $10 million. 7000 additional lawsuits were dismissed.</td>
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<td>Hoover Europe, 1992</td>
<td>Contest promised consumers in Britain or Ireland a free airline ticket with the purchase of a vacuum. The airline tickets cost more than the revenue generated from the sale of the vacuum. Hoover was flooded with requests for vacuums by consumers seeking cheap airfares.</td>
<td>The value of the airline tickets claimed was in the tens of millions of dollars.</td>
<td>The fiasco cost Hoover tens of millions of dollars, years of litigation and immeasurable bad publicity.</td>
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<td>Coca Cola (U.S.), 1991</td>
<td>Under-the-cap promotion wherein the player was supposed to collect circular game pieces for 5 Super Bowls – Super Bowl XXI, XXII, XXIII, XXIV and XXV. The rare game piece was supposed to be the Super Bowl XXII piece and the odds of winning the $25,000 prize that came with collecting these five pieces were supposed to be 1 in over 72 million. A printing error resulted in some of the Super Bowl XXIII pieces being printing without the third “I”. As a result 17 people submitted what they thought were winning pieces and claimed the $25,000 prize.</td>
<td>The total value of the prizes claimed was $425,000.</td>
<td>Class actions were avoided due to clauses in the rules that stated that game pieces containing errors would be null and void. The rules also contained provisions for what would be done if there was more than one prize claimant.</td>
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<td>Popsicle Industries Inc. (Canada), 1990-1991</td>
<td>“Points collection” promotion allowed collectors of Popsicle sticks to trade in “points” for Nintendo games. The number of requests generated by the promotion was unexpectedly high and eventually exceeded the supply of games. Popsicle Industries exercised a clause in its rules which allowed it to award substitute rewards. However, the latter were of inferior quality and desirability.</td>
<td>Popsicle Industries, along with some employees personally, were charged under the Competition Act.</td>
<td>To settle the case, Popsicle Industries gave Nintendo prizes to all the players who claimed them, which amounted to a cost of $250,000. The company was also required to pay a $200,000 fine under s. 59 (predecessor to the current s. 74.06) of the Competition Act for failing to distribute the awards in a timely manner.</td>
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<td>Beatrice Foods (U.S.), 1990’s</td>
<td>Advertiser distributed millions of “scratch and win” cards in a probability game promotion. Every card could be a winner if the contestant uncovered the right combination of symbols. A contestant figured out that there was a limited number of variations in the configuration of the cards. This information could be used to make every card a winner. The contestant collected a large number of cards and demanded satisfaction from Beatrice. He also threatened to go public with his information. Beatrice refused and the contestant sued for $20 million.</td>
<td>The potential exposure to Beatrice was massive.</td>
<td>The parties came to a confidential settlement.</td>
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<td>Kraft (U.S.), 1980’s</td>
<td>Matching game piece promotion. If two game pieces were collected that formed a picture of a prize, that prize was won. The odds of winning were supposed to be 1 in 15,000,000, but due to an error in distributing the game pieces, the odds of winning became 1 in 1.</td>
<td>Kraft tried to cancel the contest, which spawned class action suits as well as inquiries from certain regulatory authorities. In total, the company’s exposure was $270 million.</td>
<td>After extensive public relations efforts and negotiations, the matter was settled for $10 million.</td>
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## Appendix D – Contest Prosecutions

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<td>S.S. Viking Industries, S.C. Canadian Clearing Centre Inc. and Executive Premium Distribution Centre S.C. Corporation, 2000</td>
<td>Consumers were advised that they had been selected to receive valuable awards or premiums if they purchased a product. Misrepresentations were made regarding the nature, value and quality of the awards, and important additional conditions and restrictions required to collect the awards were not disclosed or were only partially disclosed to consumers at the time of the transaction.</td>
<td>Principal director of the company, Stephen Clark, convicted under s. 52(1)(a) of the <em>Competition Act</em> and fined $300,000.</td>
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<td>3076784 Canada Inc. (carrying on business as National Clearing House, Nationwide Clearing House, National Clearing House), 1999</td>
<td>The Competition Bureau commenced a prosecution against the aforementioned company and its president, Jack Stroll, for a deceptive telemarketing scheme. Customers were mailed “official claim certificates”, indicating that they would win one of five valuable prizes. Customers were required to telephone within 72 hours to obtain the prize. When they telephoned, they were told that they had to buy overpriced promotional items to receive a prize. The prizes actually awarded had little actual value.</td>
<td>Corporation fined $290,000; Jack Stroll fined $10,000.</td>
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<td>America Family Publishers, Vijay Sharma et al., 1999</td>
<td>Consumers asked via the telephone to buy thousands of dollars worth of promotional products (pens, jewellery, letter openers, etc.) at inflated prices in order to receive prizes. However no prizes were provided.</td>
<td>Company fined $1 million; president, Sharma, fined $100,000. Various telemarketers working for the company received jail sentences of between two and six months, or community service orders.</td>
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<td>Cave Promotions Ltd., 1999</td>
<td>Promotion in which some twenty million “scratch and win” cards were mailed to Canadians. If the consumer scratched a “winning” card, they were to call a 1-900 number for prize claim instructions. These calls cost consumers between $20 and $40 each. They generally learned that they had in fact not won any prize, or that the prize they had won was not available.</td>
<td>Cave convicted under s. 52(1)(a) of the <em>Competition Act</em>, fined $75,000 and made subject to a prohibition order.</td>
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<td>Pepsi Cola Canada Ltd., 1991</td>
<td>Various Frito Lay brands of potato chips were labelled as having a “playing card inside.” Cards could be collected in certain combinations to win cash prizes. In fact, only 9 out of 10 packages contained cards. Wording on the package was alleged to be false and misleading in violation of s. 52 of the <em>Competition Act</em>. Rules on the back of the potato chip bags stated that all bags might not contain cards.</td>
<td>The Court held that there was no misrepresentation, given the small print wording on the back of the package. The producer’s attempt to place cards in all bags was a relevant consideration in a due diligence defence.</td>
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<tr>
<td>Simpsons Department Store, 1988</td>
<td>Promotion featured “mini casino” cards with four “pull-tabs”. Customers could win one of four discount amounts – 10%, 15%, 20% or 25%. A customer was meant to lift one of the tabs in the presence of a salesperson on the day of the promotion and the discount revealed would be applied to the customer’s purchase. The cards and advertising for the promotion stated that you could “save 10% to 25% on practically everything in the store”. In fact, however, 90% of the cards were printed with only one type of symbol (representing 10% off) under all four tabs.</td>
<td>Simpsons was convicted and fined $100,000.00. The Court held that the non-disclosure of this fact constituted an omission to disclose material information affecting the chances of winning contrary to Section 59(1)(a) of the <em>Competition Act</em> [then Section 37.2(1)] as well as misleading advertising contrary to Section 52(1)(a) [then Section 36(1)(a)].</td>
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<td>Pepsi Cola Can Ltd., 1986</td>
<td>Contest provided that the participating radio station would draw 150 entries from eligible entries received from which 1 winner would be drawn. Three hundred entries were in fact drawn. The decision to draw 300 was not made with the consent or knowledge of the head office of the accused. Only one customer complaint was received.</td>
<td>A fine of $2,000 was imposed under s. 74.06 of the <em>Competition Act</em>.</td>
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Appendix E – Sample Promotions
Appendix F – Bad Example of Contest Rules