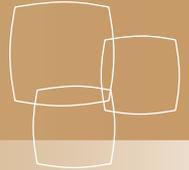




Enforcement Guidelines



Promotional Contests

**Section 74.06 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 74.06 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 promotional contests 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 section 74.06 of the Act and the general approach taken by the Competition Bureau to enforce that provision.





2. THE PROMOTIONAL CONTEST PROVISION OF THE COMPETITION ACT

Section 74.06 of the *Competition 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.

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 of up to \$750,000 in the case of a first time occurrence by an individual and \$10,000,000 in the case of a first time occurrence by a corporation. For subsequent orders, the penalties increase to a maximum of \$1,000,000 in the case of an individual and \$15,000,000 in the case of a corporation.

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

Promotional contests

74.06 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 any manner that the court specifies, in an amount not exceeding
 - (i) in the case of an individual, \$750,000 and, for each subsequent order, \$1,000,000, or
 - (ii) in the case of a corporation, \$10,000,000 and, for each subsequent order, \$15,000,000; and

(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold – except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products – in any manner that the court considers appropriate.





3. 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(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:

3.1 Approximate Value

Paragraph 74.06(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.

3.2 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(a) of the Act, any regional allocation of prizes should be clearly disclosed.

3.3 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.

3.4 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.

3.5 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.

3.6 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.



4. PURCHASE REQUIREMENTS AS A CONDITION OF PARTICIPATION

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 section addresses 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 section 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.

4.1 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.

4.2 Purchase Requirements and Section 74.06 of the *Competition Act*

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. 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*.

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.



5. 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.





6. 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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