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## NO PURCHASE NECESSARY - THE PITFALLS OF PROMOTIONAL CONTESTS

By Drew Mitchell

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### Background

Consider this seemingly innocent situation:

Bob's Suit Shop Inc. has determined that in an effort to raise the company's profile, it will hold a contest in which any individual who purchases a suit will be entered into a draw for a free pair of pants. Bob, the proprietor of Bob's Suit Shop Inc., writes up a set of contest rules and begins selling suits and collecting entries. One month later, Bob determines that the contest has run long enough, and he makes the draw and awards the pants.

It would seem to most that the actions of Bob's Suit Shop Inc. in holding the contest and awarding the pants have not breached any Canadian laws. This, unfortunately, is not the case. In fact, Bob's Suit Shop Inc. has arguably breached both the *Criminal Code* (Canada) and the *Competition Act* (Canada), and is potentially subject to some steep penalties.

Promotional contests are a great method of marketing the products and services of a new business, or building on an already established name. Apart from the excitement that accompanies the prizes to be awarded, the publicity created can assist in retaining current customers and engaging dormant or departed customers. However, companies must not forget that when conducting promotional contests, there are a number of legal rules that must be adhered to.

Promotional contests in Canada are governed generally by the law of contract, the *Criminal Code*, the *Competition Act* and applicable privacy legislation (generally the *Personal Information Protection and Electronic Documents Act* (Canada)). This article will briefly describe some of the requirements under the *Criminal Code* and the *Competition Act*, and answer some common questions relating to promotional contests. (The reference above to the *Personal Information Protection and Electronic Documents Act* is for information purposes only.)

### The Law of Contract

Promotional contests are contracts between the contest provider and the contestants, with the terms of the contract being set out in the contest rules. Accordingly, in addition to complying with the rule requirements under the *Competition Act* (discussed below), it is important to ensure that the rules of the contest are structured in such a way as to reduce contractual liability to the extent possible, and contain provisions which clearly set out the rights and obligations of the contest promoter and the contestants.

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### *Criminal Code*

Section 206 of the *Criminal Code* contains general provisions which prohibit a comprehensive range of gaming and contest-related activities. This provision received judicial consideration in *Reference Re: Earth Future Lottery*, where the Prince Edward Island Court of Appeal explained Parliament's rationale in enacting this section as follows:

*[These provisions] clearly demonstrate that Parliament does not happily abide gaming activities of any sort in Canada. The little it tolerates, it does so grudgingly. Section 206 is prohibitive in nature, not regulatory. The purpose of Parliament in enacting it was generally to outlaw gaming and lotteries, not just to ensure they would be run honestly.*

This ruling was affirmed by the Supreme Court of Canada.

As can be seen, both Parliament and the Courts have indicated that they will not tolerate contests which fall outside of the scope allowed by the *Criminal Code*. Accordingly, contests must be carefully structured and conducted in order to ensure compliance.

Generally speaking, section 206 prohibits contests involving an element of chance unless an element of skill is introduced and there is no consideration payable to enter the contest. Consequently, if your contest involves any element of chance, contestants should not be obligated to pay an entry fee (or make a purchase), and an element of skill should be introduced. Bob's contest, for example, involved the purchase of a suit (consideration) and a draw (which contains an element of chance) for the pair of pants, and would therefore be prohibited by the *Criminal Code*.

### **Why do so many contests have skill testing questions?**

Skill testing questions (such as a mathematical equation) are often used by contest promoters in order to inject an element of "skill" into the contest. Any contest which involves an element of chance (such as a draw) should also have an element of "skill" in order to stay on side of the provisions of the *Criminal Code*. A properly prepared skill testing question is generally used in order to add this element.

### **Why do contest rules often stipulate that "no purchase is necessary"?**

As discussed above, the *Criminal Code* prohibits contests in which the winner is determined by a game of chance or mixed chance and skill when the contestants are required to pay to participate. For that reason, if the contest involves any element of chance, contest promoters should not require participants to pay any money or provide any other consideration, such as the purchase of a product. In the example discussed above, Bob required the payment of consideration (the purchase of a suit) in order to enter the draw for the pants. This requirement violates the provisions of the *Criminal Code*.

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### *Competition Act*

The *Competition Act* must also be considered when conducting a promotional contest. This legislation requires that contest promoters provide “adequate and fair disclosure” of the number and approximate value of prizes, the area or areas to which the prizes will be allocated, the contest closing date, and any facts which materially affect the chance of winning.

In determining whether appropriate disclosure has been made, the Competition Bureau has set out the following guidelines:

- The “approximate value” of a prize is the “approximate regular market value”. If the regular market value of the prize is difficult to approximate, the Competition Bureau has indicated that including representative examples or the range of possible values would typically satisfy this disclosure requirement;
- Any regional allocations must be clearly disclosed. For example, if the contest is national in scope, and one prize will be awarded in Manitoba, this should be disclosed;
- The chance of winning involves the total number of prizes and the total number of potential entrants. The Competition Bureau has stated that when the total number of prizes is known, this would be a fact which “materially affects the chances of winning”, and should therefore be clearly disclosed.

In the example above, given that Bob’s contest did not stipulate when the draw would be held (and instead was held when Bob thought the contest had been ongoing for long enough), the draw was held in violation of the provisions of the *Competition Act*.

### **Conclusion**

Although the average business may not realize the financial and legal consequences that result from poorly structured marketing contests, the reality is that the penalties can be significant. Cave Promotions Ltd., for example, was fined \$75,000.00 for running a contest in violation of the provisions of the *Competition Act*.

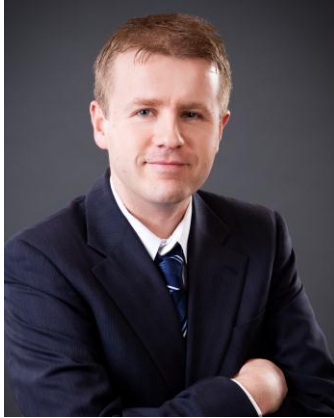
When conducted properly, promotional contests can provide benefits to companies. However, as can be seen in the example involving Bob, owing to the legal rules surrounding these contests, and the contractual nature of the contest rules, companies should be sure to retain experienced legal counsel to advise them. TDS assists clients with promotional contests, and would be happy to be of assistance to you.

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### About the Author



This article was written by Drew Mitchell. Drew's practice is focused on corporate and commercial law, and can be divided into four areas: (i) securities law, including private placements and advice on regulatory requirements; (ii) a general corporate and commercial practice involving advising a wide variety of businesses from small to large on acquisitions, dispositions, mergers and reorganizations, as well as advising on the organization and structure of corporations and other business entities, such as limited partnerships; (iii) banking and finance, including acting for financial institutions and borrowers; and (iv) real estate and development, including acting on purchases and sales, leasing and financings.

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