

FOOTNOTES

1. *Proceedings in Memory of Mr. Justice Brandeis*, 317 U.S. IX, XV (1942).
2. Professor O. J. Firestone of the Department of Economics, University of Ottawa has defined advertising thus:
Advertising involves a process of communicating to a large number of people to achieve one of three objects:
 - (a) to promote directly the merits of goods and services for sale (thus conveying information about what kind of goods and services are available for sale, their uses, usefulness and effectiveness, their prices and where they can be purchased);
 - (b) to enhance the image of producers and distributors of goods, services (with the ultimate objective of improving the economic position of the advertiser); and
 - (c) to inform the public and possibly achieve acceptance of proposals put forward by governments and other sectors (as for example in the case of safety advertising campaign sponsored in Canada by provincial governments and the construction industry).
 Firestone, O. J., *Broadcast Advertising in Canada*, p. 7. Contrast this definition to that of Mary Wells, President of the advertising agency of Wells, Rich, Greene Inc., New York: "Advertising is the art of persuading somebody to buy something."
Quoted in: Fisher, John: *The Plot to Make You Buy*, p. 24.
3. Total advertising expenditures in Canada in 1967, not taking account of internal costs of advertisers were estimated at \$967,603,701. This represents an increase of 30.9% and 7.7% over 1964 and 1966 respectively. Dominion Bureau of Statistics, D.B.S. Daily, 30 December, 1969.
4. One observer has characterized the relationship of advertising and commerce, as follows: Doing business without advertising is like winking at a girl in the dark: you know what you are doing but nobody else does.—Ed Howe.
Quoted in, *The Telegram*, (Toronto) 5 March, 1970, p. 6 (Final Edition).
5. For example, in a brochure entitled "Your Next Step", published by General Foods of Canada for university placement centres, one of the Company's seven policies was stated as:
Corporate Expansion: predicated on marketing objectives that call for development and market introduction of 5 new products each year.
6. For a study of demand creation in the United States, see: Packard, Vance: *The Hidden Persuaders*; Packard, Vance: *The Waste Makers*; Galbraith, J. K.: *The Affluent Society*. The observations made in these books would not be inappropriate to the Canadian scene.
7. Advertising and the broadcast media will be discussed fully in Chapter IX.
8. See: Galbraith, J. K.: *The Affluent Society*; Galbraith, J. K.: *The New Industrial State*. Once again, many factors discussed in the United States context could be applied to Canada.
9. For a discussion of the problem of free speech and commercial messages, see: Note, *Freedom of Expression in a Commercial Context (1964-65)* 78 *Harvard Law Review*, p. 1191.
10. Quoted in *Harvard Law Review*, Vol. 80 (1966-67) p. 1005.
11. [1603] 79 E.R. 3.
12. *Ibid.*, p. 4.
13. *Vulcan Metals Co. v. Simmons Mfg. Co.* (1918) 248 F. 853 at 856 (Mr. Justice Learned Hand).
14. [1894] 40 N.S.R. 52; also contained in Wright: *Cases on the Law of Torts* (4th ed.: 1967) at p. 962.
15. Wright, *Cases on the Law of Torts*, *ibid.* p. 962.
16. (1893) 1 Q.B. 256.
17. See also: *Wood v. Letrick Ltd.* (1932) *Times*, January 12 and 13 (electric comb advertised, "inter alia" as a cure for baldness; five thousand pound guarantee that product would function as advertised): Quoted in Lepper, W. J. *The Law of Advertising*, 2nd ed., pp. 12-13.
18. *Derry v. Peek* (1889) 14 A.C. 337.
19. (1932) A.C. 562. See also: *Grant v. Australian Knitting Mills Limited* (1936) A.C. 85. *Watson v. Buckley*, (1940) 1 All E.R. 174.
20. Perhaps to state the obvious, for a defendant to be found liable there must be established: (a) a duty of care; (b) breach of that duty and (c) damages sustained by the plaintiff.
21. (1963) 2 All E.R. 575 (Court of Appeal); (1964) A.C. 465 (House of Lords). Here, the plaintiffs were advertising agents who lost seventeen thousand pounds as a result of relying on certain information regarding the financial situation of a company. The information was supplied by the Defendant. In finding for the Plaintiffs, the House of Lords unanimously found a duty of care as between the parties. See also: *Careless Statements and the Duty Problem*, V. III L.J. 831 (1961); *Negligence and Liability for Statements*, V. 113 L.J. 779; Goodhart, A. L.: *Liability for Negligent Misstatements* (1962) 78 L.Q.R. 107; Fleming, J. G.: *The Law of Torts* (3d ed.) pp. 168-69.

22. See Sutton, K. C. T., *The Reform of the Law of Sales* (1969) V. 7 Alberta Law Review, p. 130, for an excellent discussion of the inadequacies of the English [Canadian as well] Sale of Goods Act, 1893, in light of changing marketing techniques.
23. (1958) 147 N.E. 2d 612 (Supreme Court of Ohio).
24. *Ibid.*, p. 621. The Court also stated that an implied warranty arises when considering the relations between the parties, the nature of the transaction and the surrounding circumstances, a warranty is imposed by operation of law.
25. *Ibid.* pp. 615-16.
26. See as well the remarks of Black, J. of the United States Supreme Court in *F.T.C. v. Standard Education Society* (1937) 302 U.S. 112 at p. 116.
27. For example, *Bristol-Myers v. F.T.C.* (1950) 185 F.2d, 58 where the Company's claim that its toothpaste led to brighter teeth and a more attractive smile was deemed to be mere puffing.
28. For an interesting discussion of the liability of advertising agencies for products which do not fulfill all the qualities advertised, see: Vol. 12, *New York Law Forum* (1966): *Tort Liability of Advertising Agencies*, p. 602.
29. But see *Shanklin Pier Ltd. v. Detel Products Ltd.* (1951) 2 K.B. 854 where it was held, (quoting the footnote) that a seller of goods is liable on an express warranty given by him to the promisee who in consideration of the warranty causes a third party to buy the goods so warranted and suffers damage by reason of the breach of the warranty. Again, however, a contract is essential. In the words of McNair, J. (p. 856): "If as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or B should do some other act for the benefit of A."
- 29(a). R.S.M. 1970 c. C200 amendment: S.M. 1971 c. 36 s. 8.
- 29(b). The amended section 58(8) reads: Every claim by a seller regarding the quality, condition, quantity, performance or efficiency of goods or services that is contained in an advertisement or made to a buyer shall be deemed to be an express warranty respecting those goods or services.
30. Again see: *Grant v. Australian Knitting Mills* and *Donoghue v. Stevenson* (ref. *supra* footnote 19); *Rogers v. Toni Home Permanent* (ref. *supra* footnote 23).
31. A Toronto barrister has suggested that a tightening-up on warranty regulations might prove of assistance to the dissatisfied consumer in actions against manufacturers of goods. He predicts that clauses such as the following will appear in provincial consumer protection legislation:
In any action for enforcement of a warranty of goods, it shall be assumed that the goods have been subjected to reasonable use only unless the contrary be proven by the warrantor.
Although such a clause would place the onus on the manufacturer (under the law as it presently stands, the burden of proof to prove ineffectiveness would be on the consumer-plaintiff), it is hardly likely that the average consumer would be willing to commence legal proceedings on a *de minimus* claim.
See *Marketing*, 25 October, 1968, p. 32. "Warranties may affect ad claims" (Smookler); 28 April, 1968, "New court trend on warrantee" (Smookler).
32. Of course if the product were totally ineffective, eventually all sales would cease. But by this time, the manufacturer might have realized a substantial profit—at public expense.
33. 38 Stat. 719 (1914).
34. Sec. 91(27) *British North America Act*.
35. See for example: *Citizens Insurance Co. v. Parsons* (1881) 7 A.C. 96; *In Re the Board of Commerce Act and the Combines and Fair Prices Act*, [1922] 1 A.C. 191. These cases stand in contrast to early Supreme Court of Canada decisions, such as, *Severn v. The Queen* (1879) 2 S.C.R. 70 and *Fredericton v. The Queen* (1880) 3 S.C.R. 505, which gave a much more liberal interpretation of s. 91(2), B.N.A. Act.
36. For example, *Gold Seal Ltd. v. Dominion Express Co. and A.G. Alberta* (1921) 62 S.C.R. 424; 62 D.L.R. 62; [1921] 3 W.W.R. 710; *Citizens Insurance Co. v. Parsons* (*supra*, footnote 35).
37. For example: *Citizens Insurance Co. v. Parsons* (*supra*, footnote 35); *The King v. Eastern Terminal Elevator Co.* (1925) S.C.R. 434; 1925 3 D.L.R. 1.
38. R.S.C. 1970 c. C23.
39. *Proprietary Articles Trade Association v. A.G. Canada* (1931) A.C. 310; (1931) 3 D.L.R. 1; (1931) 1 W.W.R. 552.
40. R.S.C. 1970 c. F27.
41. See for example: *Standard Sausage Co. v. Lee Proctor* (1933) 4 D.L.R. 501; (1934) 1 D.L.R. 706; 47 B.C.R. 411.
42. R.S.C. 1970 c. P25.
43. R.S.C. 1970 c. M6.
44. R.S.C. 1970 c. H3.
45. R.S.C. 1970 c. W7.
- 46., 47. R.S.C. 1970 c. N16. Footnote 47 was deleted in revision.
48. Federal jurisdiction over communications was crystallized by the decision in, *In re Regulation and Control of Radio Communications* (1932) A.C. 304. The Privy Council cited sec. 93(10)(a) of the B.N.A. Act as the basis of federal power, with the Peace, Order and Good Government paragraph of s. 91 also being a possible head of federal power. Today, advertising on the media is governed through the *Broadcasting Act* S.C. 1967-68 c. 25 and especially the *Regulations* thereto. See discussion of advertising on radio and television Chapter IX.

49. As shall be discussed in Chapter IX, the provinces share jurisdiction with the federal government in regulating advertising of alcoholic beverages.
50. R.S.C. 1970 c. C32.
51. R.S.C. 1970 c. B3.
52. R.S.C. 1970 c. P4.
53. R.S.C. 1970 c. T10.
54. R.S.C. 1970 c. C30.
55. For 1969, the overall budget of the Department of Consumer and Corporate Affairs was \$9.8 million, with 1,493 employees. Of these totals, the Bureau of Consumer Affairs operated on \$2.3 million, with 600 employees. Source: *The Telegram*, (Toronto) (Metro Night Edition), 12 February, 1970, Douglas Fisher: "Ottawa's role in great debate".
56. Contained in an address by D. H. W. Henry, Q.C., Director of Investigation and Research under the *Combines Investigation Act*, to the Broadcast Executives Society, Toronto, Ontario, 12 November, 1969. Notes of address published by the Department of Consumer and Corporate Affairs, p. 4.
57. Administration of the *Food and Drugs Act* will be discussed in detail in Chapter V.
58. Department of Consumer and Corporate Affairs press release of an address by the Honourable Ron Basford to the 22nd annual meeting of the Consumer's Association of Canada, 11 June, 1969.
59. Department of Consumer and Corporate Affairs press release of an address by the Honourable Ron Basford to the Montreal Board of Trade, 6 November, 1968.
60. D. H. W. Henry, Q.C., (ref. *supra*, footnote 56) p. 7.
61. Department of Consumer and Corporate Affairs, press release of an address given to the inaugural meeting of the Canadian Consumer Council, 9 December, 1968.
62. See for example, the *Hazardous Products Act* (ref. *supra*, footnote 44).
63. D. H. W. Henry, Q.C., (ref. *supra*, footnote 56) p. 3.
64. *Ibid.*, pp. 2-3.
65. See *supra*, footnote 59 for reference: p. 10.
66. Compare the philosophy of Mr. Basford regarding the role of government in the field of consumer protection, with that of his one time counterpart in the United States, the Honourable Maurice H. Stans, United States Secretary of Commerce:
 The basic question before us is whether we really can achieve the full protection our people must have in the marketplace, without turning the marketplace itself into a preserve of government regulations and product uniformity.
 The alternative to voluntary action by business is new regulation by government.
 But if we ever resort to manufacture by government prescription only, we could very well clamp a lid on the inventiveness and the productive skill which gives the American consumer the most abundant markets and the highest standard of living in the world.
 Address to the Business Council, Hot Springs, Virginia, 18 October, 1969. *United States Department of Commerce News*, pp. 14-15.
67. See ref. *supra*, footnote 56 at pp. 9-11.
68. *Ibid.*, p. 10.
69. The Department of Consumer and Corporate Affairs presently maintains regional offices at Halifax, Montreal, Toronto, Winnipeg and Vancouver.
70. See ref. *supra*, footnote 56 at p. 11.
71. *Ibid.*, p. 11.
72. See *Annual Report of the Director of Investigation and Research*, 1969.
73. Yet, such a change of policy toward a particular campaign is not completely beyond the realm of possibility. For instance in 1968, the Beer and Wine Clearance Committee (see Chapter IX below) ordered certain cuts in a particular beer commercial after that commercial had been cleared by the Committee and the commercial aired for several days. The reason for the change was due to complaints received from listeners that the music employed in the commercial sounded much like, "land of Hope and Glory" (and was therefore sacrilegious); and treated the Canadian flag in a derogatory manner. In contrast with the United States position, an advisory opinion given an advertiser by the Federal Trade Commission is binding on the Commission until revoked.
74. Sec. 306 of the Code was repealed 1968-69, c. 38, s. 21: transferred to *Combines Investigation Act* as sec. 33D.
75. Actually, the Federal Department of Justice could commence a prosecution directly, if it had all pertinent facts. In practice however, the Department would always await a report from the Director, before prosecuting.
76. The Commission does have the power to seek preliminary injunctions in certain cases and assess misdemeanor penalties in others, but these powers remain virtually unused. See 52 Stat. 111 (1938), 15 U.S.C. No. 52-56 (1964) (preliminary injunction for food, drug and cosmetic cases); 15 U.S.C. No. 54(a) (penalties for misdemeanors).
77. See: Alexander, George: *Honesty and Competition*, pp. 4-5.
78. *Interim Report on Competition Policy* (1969), Chapter 6.
79. *Ibid.*, p. 126.
80. *Ibid.*, p. 102.
81. Regardless of Council proposals, and the desirability of having misleading advertising moved from a criminal to a civil base, the constitutional hurdles remain. The Council, at p. 107 of its Report, suggests somewhat optimistically, two methods to breach the constitutional barrier:
 The first way would be for the federal government to reach agreement with the provinces to make an appropriate change in the constitution. The change might well involve an enlargement of the trade and commerce power. The second way would be, within the existing constitution, to refer proposed legislation to the Supreme Court of Canada for the Court's opinion on its constitutional validity. Again, the issue would, perhaps be most likely to turn on whether the legislation lay within the powers of the federal government under the trade and commerce head of Section 91 of the *British North America Act*.

82. Pursuant to a Food and Drug Directorate issued by the Department of National Health and Welfare and dated 25 September, 1969 (T.I.L. No. 319) the Bureau of Consumer Affairs of the Department of Consumer and Corporate Affairs, was given responsibility for the following aspects of the **Food and Drugs Act and Regulations**:
 - (a) The labelling, advertising and packaging (other than components of packaging material) of foods under the authority of the **Food and Drugs Act and Regulations**;
 - (b) The enforcement and interpretation of those provisions of the Food and Drug Regulations relating to economic fraud in foods;
 - (c) The inspection of foods at the retail level;
 - (d) The investigation of consumer complaints concerning economic fraud in foods;
 - (e) The approval of radio and television commercials for foods and the maintenance of the surveillance of food and drug continuities at radio and television stations on behalf of the Canadian Radio-Television Commission.
 - (f) Any consultation required with food manufacturers, consumer groups, Federal or Provincial Government Departments or trade associations on the foregoing matters, under the authority of the **Food and Drugs Act and Regulations**.
83. S.C. 1960, c. 45.
84. The **Interim Report on Competition Policy** (1969) submitted by the Economic Council of Canada suggests that all service industries be brought within the scope of the **Combines Investigation Act**: see Chapter 7 of the Report and especially pp. 147-48. The present Minister of Consumer and Corporate Affairs appears to be in agreement with this recommendation: see ref. *supra*, footnote 59, at p. 4, where Mr. Basford implies that his Department will be considering the entire question of service industries and their relation to the Act.
85. Historically, the **Combines Investigation Act** has been limited to dealings in goods, with services fully outside its purview. This situation is not surprising when one considers that only in recent years have services gained the economic significance they presently hold. Realizing the primary position of services in our modern economy, the Economic Council of Canada has advocated bringing the service industries under the Act. See: Economic Council of Canada, **Interim Report on Competition Policy, 1969**. (Chapter 7: Competition Policy and the Service Industries). It would appear however that sec. 37 of the **Combines Investigation Act** applies to services as well as goods. The explanation is that until 1969, the section was contained in the **Criminal Code**.
87. An interesting question is: When is the offence committed? Is it committed when the advertisement is first published or is it committed throughout the life of the advertisement? The question becomes of some importance in light of the 6 month limitation period for summary conviction offences.
88. Sec. 722 **Criminal Code** (individuals); sec. 647 (corporations).
89. For a discussion of the history of the **Combines Investigation Act** and a discussion of the major cases thereunder, as regards monopolies, mergers and conspiracies to lessen competition, see: Skeoch, L. A. (ed.) **Restrictive Practices in Canada, 1966**. For a list of prosecutions undertaken by the Department of Justice on the recommendation of the **Combines Investigation Board**, see the annual Report of the Director of Investigation and Research, **Combines Investigation Act**.
90. **R. v. Allied Towers Merchants Limited** (1966) 46 C.P.R. 239; (1965) 2 O.R. 623; (1966) 1 C.C.C. 220 (Ontario Supreme Court).
91. *Ibid.*, p. 242 (C.P.R.).
92. Unreported: Magistrate Dnieper, Toronto Magistrates Court, 20 November, 1964.
93. Ref. *supra* footnote 90: pp. 243-44 (C.P.R.).
94. Another open question, unrelated to *mens rea*, was discussed in **R. v. Morse Jewellers (Sudbury Limited)** (1964) 1 O.R. 466; 1964 1 C.C.C. 293. (Supreme Court of Ontario, in Chambers). Mr. Justice Fraser held that sec. 33C creates one substantive offence and not three separate offences.
95. The Allied Towers decision (ref. *supra* footnote 90) has generally been followed throughout Canada as representing the law on the matter of *mens rea*. See for example: **R. v. Miller's T.V. Ltd.** (1969) 56 C.P.R. 237 (Province of Manitoba Magistrates Court; Magistrate Enns) **R. v. G. McGrath & S. O. Smith** (1969) 56 C.P.R. 160 (Magistrate's Court; City of Ottawa; Magistrate Beaulne). But also see: **R. v. Poderisky's Limited** (1969) 58 C.P.R. 140, where the Magistrate seemed to indicate that proof of intention to mislead was necessary for conviction.
96. See *supra* text footnote 84 et seq.
97. Unreported: Magistrates' Court, Niagara Falls, Ontario: Magistrate Roberts: 13 September, 1963.
98. In advertising language, the words and their layout are known as, "copy".
99. **R. v. Allied Towers Merchants Limited** (unreported) Magistrate's Court, Hamilton, Ontario: Magistrate March: 5 June, 1964; appeal: County Court of County of Wentworth, Ontario: 17 March, 1964: Sweet, County Court Judge.
100. Ref. *supra* footnote 95.
101. **Regina v. R. A. Cohen Limited**, (unreported) Magistrate's Court, Ottawa: 15 November, 1965: Magistrate Sherwood; also see **Regina v. Eddie Black's Limited** (1962) 38 C.P.R. 140 (Toronto Magistrate's Court). But also see: **R. v. Poderisky's Limited** (1969) 58 C.P.R. 140, where the Magistrate, on the facts of the case, found that the word "Reg." was used synonymously with list price, although the advertisement in question gave no indication that this was the case.
102. Ref. *supra*, footnote 95.
103. There appear to be no Canadian decisions on this point, but for a discussion of the United States position, see: Alexander, **Honesty and Competition: Some Problems in the Pricing of Goods**, (1962-63) 31 Fordham Law Review, p. 141 at pp. 146-47.

104. Unreported: Summary Conviction Court, City of Quebec: Dumontier, J.S.P., 16 May, 1967: See also *R. v. Patton's Place Limited* (1969) 57 C.P.R. 12. Here, an advertisement for washing machines contained, *inter alia* the words: "Save \$100.00 . . . Mfg. regular \$229.95". Both the terms "Save \$100.00" and "\$229.95" were in heavy black print which made them stand out from the rest of the copy. The Magistrate indicated that the case might have been decided differently, had the heavy print not been used (p. 16).
105. *R. v. Michael Benes*, Unreported: Provincial Court, Ottawa-Carleton: Judge Fitzpatrick: 7 October, 1969.
106. Both cases were heard together: Unreported: Magistrates Court, Peterborough, Ontario: 19 July, 1966: Magistrate W. R. Philip.
107. (1969) 1 O.R. 731; (1969) 57 C.P.R. 221 affirming (1968) 54 C.P.R. 190.
108. (1969) 57 C.P.R. 221 at p. 224.
109. *Ibid.*, p. 225.
110. *Ibid.*, p. 224. After conviction, Colgate-Palmolive replaced the offensive advertisement with the following: "Prix Suggéré \$1.49, Suggested Retail Price".
111. (1969) 58 C.P.R. 210.
112. (1891) 28 Sc.L.R., 289 at 293.
113. Ref. *supra*, footnote 111 at p. 212.
114. Unreported: Provincial Court (Criminal Division of the Regional Municipality of Ottawa-Carleton: Judge Marin: 17 September, 1969.
115. As an aside, the writer noticed that a Toronto supermarket used the following copy in advertising its periodic "specials": Special — At regular price. The word "special" is of much greater size in proportion to the other words. The hurried housewife will probably be attracted by the word "Special" and read no further. Yet, technically, this advertisement is probably legal under sec 36 although, as shall be discussed below, it might conceivably run afoul of sec. 37.
116. For a good description of the "cents-off" practice in retailing, see Fisher, J.: *The Plot to Make You Buy* p. 151.
117. A phenomena which is especially prevalent during a period of inflation!
118. Unreported: Magistrate's Court, Ottawa, Ontario: Magistrate Strike: 12 August, 1965.
119. The writer would like to quote another example of the manner in which a "cents-off" promotion can deceive the unwary consumer. Recently, a certain packaged product was being marketed in a Toronto supermarket, with a message on the box indicating that inside the package was a coupon worth 7c toward the next purchase of the same product. The writer was familiar with the previous cost of the item, i.e. before the coupon advertisement was introduced, the price being, 56c. However, the new packages with the coupons were now selling at 63c.
120. See for example: *Regina v. Products Diamants Ltée.*, (ref. *supra*, footnote 118); *R. v. R and A Cohen Limited* (Magistrate's Court, Ottawa: Magistrate Sherwood: 15 November, 1965: unreported); *R. v. Patton's Place Limited* (Magistrate's Court, Ottawa: Magistrate Sherwood: 13 December, 1962: unreported), indicating that good value was a factor in finding against conviction. This case would, however, appear overruled by subsequent decisions.
121. Ref. *supra*, footnote 120.
122. *Ibid.*, p. 15.
123. *Ibid.*, p. 16.
124. *R. v. Trans-Canada Jewellery Importing Co.* (Quebec Superior Court, 12 June, 1967: Pothier, J.: unreported). This decision was subsequently appealed to the Court of Appeal for Quebec on a procedural point where it was quashed and sent back to the Superior Court for retrial (Quebec Court of Appeal: 16 November, 1967: Tremblay, C.J.P.Q.: unreported). The writer has been unable to obtain a copy of the retrial decision, which also does not appear to have been reported.
125. Quære the situation where something is advertised as being given "free" with the purchase of the main product, but the price being charged for the latter is greater than the average selling price in the trade area. It is submitted that such a promotion would be caught under sec 36 or possibly 37 of the *Combines Investigation Act*. There appear to be no reported Canadian cases dealing with the use of "free" but for a good discussion of the United States position see, Alexander: *Honesty and Competition* pp. 138-147.
126. Ref. *supra* footnote 118.
- 127., 128. Ref. *supra* footnote 107. Footnote 128 deleted in revision.
129. (1969) 58 C.P.R. 56 (Provincial Court, Ottawa).
130. "Irrespective of the correctness of the assertion, it is deceptive to advertise — "Regularly", "Usually", "Formerly", "Originally", "Reduced", "Was — Now —", "— Per cent off", "Save up to \$—", "You save \$—", "\$50.90 Dress — \$35" — if the comparison runs to prices charged by others rather than the prices formerly charged by the advertising seller". Alexander, George J.: *Honesty and Competition: Some Problems in the Pricing of Goods.* (1962-63) 31 *Fordham Law Review*, 141.
131. *Ibid.*, p. 146.
132. Alexander, G.: *Honesty and Competition.*
133. See for example *R. v. Miller's T.V. Ltd.* (ref. *supra* footnote 95). Although the court does not actually say that evidence need not be adduced outside the City of Winnipeg area, the implication appears to be that the Crown need not obtain such evidence to obtain a conviction. Similar findings can be noted in other cases involving newspaper advertisements in a city. Also, see: *R. v. Patton's Place Limited* ref. *supra*, footnote 104); *R. v. Allied Towers Merchants Limited* (County Court of Wentworth, Ontario: Sweet, C.Ct.J.: 17 March, 1965 unreported) which simply state that the trade area is that covered by London Free Press and Hamilton Spectator respectively. The better view however, would be that the Crown need not look beyond the city proper to establish ordinary selling price. See as well *R. v. Podersky's Ltd.* (ref. *supra* footnote 128: Edmonton stores only checked to determine trade area price).

134. *R. v. Mountain Furniture Company Limited* (ref. supra, footnote 106).
135. *R. v. Thomas Sales Agencies* (1983) Ltd. (Breck Shampoo Case) (ref. supra footnote 111). *R. v. Colgate-Palmolive* (Halo Shampoo Case) (ref. supra footnote 107). *R. v. Produits Diamant* ("cents-off" case) (ref. supra footnote 118). *R. v. G. McGrath and S. O. Smith* (display sign on store counter) (ref. supra footnote 95).
136. A United States case indicates that there can be different trade areas operating in the same city: *Rayex Corp. v. F.T.C.* 317 F. 2d (1963).
137. (1969) 57 C.P.R. 52.
138. Ref. supra, footnote 129.
139. It would appear that our courts have not made a distinction between sales made through regular retail outlets and those made through discount stores, in determining regular area price. The effect, of course, of using discount store prices to determine ordinary selling price, is to drive that price down to a lower level. Presumably, however, discount store prices would be used in finding the usual area price.
140. See for example: *R. v. Eddie Blacks Limited* (ref. supra, footnote 101. Judicial treatment of "materially" under sec. 36 stands in sharp contrast to the interpretation of "unduly" in sec. 32 of the same Act. One explanation is undoubtedly that sec. 32 is indictable, while sec. 36 is summary conviction offence.
141. Ref. supra, footnote 95. For instances where the courts have simply found misleading advertisement to be "materially" deceptive, see for example: *R. v. Eddie Blacks Limited* (ref. supra, footnote 101), *R. v. G. McGrath & S. O. Smith* (ref. supra, footnote 95).
142. *Ibid.*, p. 241.
143. For example: *R. v. Miller's T.V. Ltd.* (ref. supra footnote 95).
144. *R. v. Allied Towers* (ref. supra footnote 137).
145. For example: *R. v. Produits Diamant Ltée.* (ref. supra footnote 118); *R. v. Colgate-Palmolive Limited* (ref. supra, footnote 107).
146. *R. v. Patton's Place Limited* (ref. supra, footnote 104) (newspaper advertisement), *R. v. Colgate-Palmolive Limited* (ref. supra footnote 107) (advertisement attached to bottle of shampoo).
147. For a discussion of what is the "public" in regard to national catalogue sales, see: *R. v. Simpsons-Sears Limited* (ref. supra, footnote 129).
148. The decisions on this point are too numerous to be completely listed. See, for example: *R. v. Miller's T.V. Ltd.* (ref. supra, footnote 95).
149. Ref. supra, footnote 106.
150. Supra, text footnote 130.
151. *R. v. Allied Towers Merchants Limited* (ref. supra, footnote 90). The retrial by the Magistrate does not appear to have been reported, although the accused was subsequently found guilty. See: *R. v. Allied Towers Merchants Limited*; (1970) 60 C.P.R. 140.
152. 21.(1) Every one is a party to an offence who,
 (a) actually commits it,
 (b) does or omits to do anything for the purpose of aiding any person to commit it, or
 (c) abets any person in committing it.
 (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.
153. *R. v. Carmen Jewellery* (ref. supra, footnote 104).
154. *R. v. Mountain Furniture*; *R. v. Featherweight Mattress* (ref. supra, footnote 106).
155. 36(2): Subsection (1) does not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.
156. *R. v. Colgate-Palmolive* (ref. supra footnote 107); *R. v. Andrew Jergens* (ref. supra footnote 114); *R. v. Produits Diamant* (ref. supra footnote 118); *R. v. Thomas Sales* (ref. supra footnote 111). Of course, where the manufacturer and retailer collaborate on a misleading promotion, the latter would be in breach of sec. 36. See: *R. v. Mountain Furniture*; *R. v. Featherweight Mattress* (ref. supra footnote 106), discussed above.
157. *R. v. Colgate-Palmolive* (ref. supra, footnote 107).
158. *R. v. Thomas Sales Agencies* (ref. supra, footnote 111).
159. *R. v. Colgate-Palmolive* (ref. supra, footnote 107), at p. 224 (C.P.R.).
160. Alexander, G.: *Honesty and Competition*, p. 7.
161. Prosser W.: *The Law of Torts* (3rd ed., 1964) at p. 738.
162. "But if the Commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that in the words of the prophet Isaiah, "wayfaring men, though fools, shall not err therein", it is not for the courts to revise their judgment."
General Motors Corporation v. F.T.C. (1940) 114 F. 2d. 33 at p. 36; cert. denied: 312 U.S. 682 (1941).
163. Using decided cases as a source, Professor Alexander has incisively noted, "General stupidity is not the only attribute of the beneficiary of F.T.C. policy. He also has a short attention span; he does not read all that is to be read but snatches general impressions. He signs things that he has not read, has marginal eyesight, and is frightened by dunning letters when he has not paid his bills. Most of all, though, he is thoroughly avaricious. Fortunately, while he is always around in substantial numbers, in his worst condition he does not represent the major portion of the consuming public." Alexander, George: *Honesty and Competition*, p. 8.
164. Supra, text, footnote 84 et seq.
165. *R. v. C. P. Kaufman Ltd.* (1970) 60 C.P.R. 138.
166. *R. v. Genser & Sons Limited*: Unreported: County Court of Winnipeg: Solomon C.C.J.: 21 October, 1969.

167. *R. v. The Andrew Jergens Company Limited* (ref. supra, footnote 114).
168. *R. v. C. P. Kaufman Ltd.* (ref. supra, footnote 165).
169. *R. v. Allied Towers Merchants Limited* (ref. supra, footnote 151).
170. An order of prohibition is roughly similar to cease and desist orders of the F.T.C.
171. For an example of some instances where an order of prohibition was granted, see: *R. v. Eddie Black's Limited* (ref. supra, footnote 101); *R. v. G. McGrath & S. O. Smith* (ref. supra, footnote 95).
172. See for example: *R. v. Eddie Black's* (ref. supra, footnote 101).
173. *R. v. Colgate-Palmolive* (ref. supra, footnote 107). Quare whether enough consideration was taken of the fact that numerous bottles of the shampoo had been sold to an unsuspecting public prior to the conviction? See also: *R. v. Products-Diamant Ltée.* (ref. supra, footnote 118).
174. *R. v. MacLeod Stedman Ltd.* (1970) 60 C.P.R. 135.
175. *R. v. The Andrew Jergens Company Limited* (ref. supra, footnote 114).
176. *R. v. Genser & Sons Limited* (ref. supra, footnote 166).
177. See also the, *National Trade Mark and True Labelling Act, R.S.C. 1970 c. N16*, providing that use of the national trade mark, "Canada Standard" (C.S.) cannot be made without the consent of the Governor-in-Council.
178. See footnote 88, supra.
179. See footnote 190 below.
180. D. W. Henry, Q.C., Director of Investigation and Research under the *Combines Investigation Act* has commented "Besides being indictable [sec. 37(1)], it would appear to apply to advertisements for almost any commercial reason, including the sale of services". Ref. supra, footnote 56, at p. 21.
181. As with sec. 36, there is bound to be a certain amount of overlapping between sec. 37(1) and other federal statutes, especially the, *Food and Drugs Act*. The Director has also indicated that close contact will be maintained with the C.R.T.C., etc., in administering the section. See supra, text footnote 77 et seq.
182. This would include publication through print, via radio and television, and probably any other method used to convey a commercial message to the public.
183. The Director of Investigation and Research under the *Combines Branch* has pointed out that such a statement of fact would not include promises or guarantees, which would be the subject of enforcement in private litigation. Ref. supra, footnote 56 at p. 20.
184. *Ibid.*, p. 8.
185. *Ibid.*, p. 11.
186. *Ibid.*, pp. 23-25. See also, News Release of the Department of Consumer and Corporate Affairs: 31 July, 1969: "Misleading Advertising".
187. Dept News Release, supra, footnote 186.
188. *Ibid.*
189. (1952) 102 C.C.C. 68 (Magistrate's Court, City of London, Ontario).
190. As it would appear that sec. 37(4) is a separate and distinct offence, and since no penalty or punishment is expressly stated, then it would automatically be an indictable offence, and would be governed by sec. 115 of the *Criminal Code*.
191. *Ibid.*: "... wilfully doing any thing ...".
192. A second case which indirectly touched [then] sec. 33D was *Canada Starch Co. v. St. Lawrence Starch Co. et al* (1938) 85 C.C.C. 270 (Ontario Court of Appeal). The case was in essence between competitors regarding a dispute as to the publication of an advertisement for corn syrup used to feed the Dionne quintuplets. It was held by the Court, *inter alia*, that illegality by violating the *Criminal Code* resulting in the Plaintiff being wronged in business may be made the basis of an action in tort, regardless of the fact that no criminal prosecution was first obtained.
193. Unreported: 1969, Ottawa, Magistrate's Court.
194. *The Telegram*, (Toronto) 19 September, 1969.
195. The Director has indicated that this type of case is not representative of the class of cases being investigated by his Department. He explained that this particular case had to be undertaken on a first priority basis, before the accused could visit other exhibitions and then leave the country (the accused was a resident of Miami, Florida). Ref. supra, footnote 56 at p. 25. There has been newspaper report of another prosecution under the Act, this one against Imperial Tobacco Co. of Canada arising from the advertisement of "Casino" cigarettes. It appears that the Company advertised that a cash prize was in each package of the cigarettes, when in fact, this was not true. Although the author could not obtain details on the prosecution, it would appear as if the charge were laid under sec. 37(1) of the Act. See *The Telegram*, (Toronto) 5 February, 1970.
- 196.. 197. 1971 64 C.P.R. 3; (1971) 2 C.C.C. (2d) 533: appeal decision: 1971 5WWR 509; 1971 4 C.C.C. (2d) 423. Footnote 197 deleted in revision.
198. Ref. supra, footnote 189.
199. Ref. supra, text footnote 139 et seq.
200. *R. v. Veger* (1971) 1 C.P.R. (2d) 215.
201. *F.T.C. v. Colgate-Palmolive et al* (1964) 380 U.S. 374. See also text, footnote 21 et seq. supra and (1966) 12 N.Y.L.F., *Tort Liability and Advertising Agencies*, p. 602.
202. Supra, text, footnote 22.
203. In, *Confessions of an Advertising Man* at p. 172, the author, David Ogilvy says that "free" is one of the most powerful words which can be used in advertising headlines (the other is "new").
204. Automobile advertising is a subject in itself, especially in the areas of motivation research and psychological elements of purchasing. From a legal point of view, the question is whether it is possible, or even desirable, to control advertisements which either overtly or by innuendo make the automobile a sex symbol, status symbol, etc. This problem of legal control over psychologically-oriented advertising will be discussed in greater detail in Chapter XI. See also, Packard, V.: *The Hidden Persuaders*; Fisher, J.: *The Plot to Make You Buy*.
205. See supra, footnote 105.

206. For a statement of the United States position on ambiguity, see Alexander, G.: *Honesty and Competition* at p. 104. "The fact that it [the advertisement] had another meaning which differed from the general understanding and which proved as interpreted to be deceptive would be a sufficient cause for Commission intervention."
207. Ref., *supra*, text footnote 196.
- 207(a). (1944) 143 F. 2d 676.
- 207(b). Sec. 20(5) Bill C-256.
208. It would be to an advertiser's advantage to conduct his own test, for the Act contains no prohibition for publishing the results of such private test, while sec. 37(4) prohibits the results of a National Research Council or other public department test from being published without Council or government department permission.
209. See Brown, Ralph S. Jr.: *Advertising and the Public Interest: Legal Protection of Trade Symbols* (1947-48) 57 Yale Law Journal, p. 1165.
210. Alexander, G.: *Honesty and Competition*, p. 94.
211. F.T.C. v. Sterling Drug, Inc. 317 F 2d 669 (1963).
212. See the Trade Marks Act, S.C. 1952 c. 49.
213. See footnote 209 *supra*.
214. For a view upholding the position of brand-names, see: Harris and Arthur, *Advertising and the Public* (Institute of Economic Affairs, 1962) at p. 13; p. 79.
215. See *supra*, footnote 82.
216. See *supra*, text footnote 77.
217. *Supra*, text footnote 83.
218. "Food" includes all types of beverages: see sec. 2(g), *Food and Drugs Act*.
219. Canada Gazette, Part 2, Statutory Orders and Regulations; 88, 1954. The Regulations are passed pursuant to sec. 24(1) of the *Food and Drugs Act*.
220. The writer was informed by the Department of National Health and Welfare, that the 1961 Guide was currently being up-dated, but no time of completion could be given. It may be therefore, that much of what will be said touching the Guide might become dated in the future.
221. Part B of the Regulations deals with Foods and covers, *inter alia* the following areas:
- B.01.003: provides for the labelling and packaging of food, requiring, *inter alia* that all ingredients and the percentage of each be listed on the label; that all artificial or imitation flavouring be listed on the label, that the label contain the name and address of the manufacturer; the weight of the food, except where the food and package are under two ounces.
 - B.01.004: all labelling requirements as prescribed by the Regulations are to be conspicuously displayed.
 - B.01.019: deals with weights and measures.
- Part C: *Drugs*: The Regulations provide very detailed requirements for drug manufacture; percentages of certain chemicals allowed, etc.
- Part D: *Vitamins*: Some illustrative requisites;
- D.02.001: No person shall sell a food or drug represented as containing a vitamin that is not labelled.
 - D.02.005: An advertisement to the general public or a label shall not
 - (a) give assurance regarding results to be obtained from the treatment by vitamin medication or from the addition of vitamins to the diet, or
 - (b) refer to, reproduce or quote any *testimonial* (emphasis mine) in specific cases regarding the action of any vitamin in a food or drug represented as containing the vitamin.
 - D.03.001: stipulates when the phrase "excellent dietary source" can be used in an advertisement.
 - D.03.002: requisites for advertising a food as a "good dietary source".
- Part E: *Cosmetics*:
- E.01.004: No manufacturer shall, on any label of, or in any advertisement for a cosmetic, make any claim respecting the action or effect of the cosmetic, or any ingredient therein, in cleansing or altering the complexion, skin, hair or teeth unless such claim
 - (a) has general recognition as being proper, or
 - (b) is supported by adequate and proper tests, and he maintains a satisfactory record of such tests, and supplies the Director with copies of such records upon request.
222. Sec. 2(a) *Food and Drugs Act*. "Device" is defined in sec. 2(e) of the Act as meaning "any instrument, apparatus or contrivance, including components, parts and accessories thereof, manufactured, sold or represented for use in the diagnosis, treatment, mitigation, or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof, in man or animal."
223. Department of National Health and Welfare, Food and Drug Directorate: *Guide for Manufacturers and Advertisers* (1961) at p. 5, para. B.8. Similarly, the F.T.C. ordered the manufacturers of "Geritol" to cease advertising the product as a remedy for iron-poor blood, for the reason, *inter alia* that it implied a person was capable of self-diagnosis to determine if "Geritol would help his worn-out feeling". J. B. Williams Co., F.T.C. 1965: quoted in Alexander G.: *Honesty and Competition*, pp. 107; 109.
224. *Guide for Manufacturers and Advertisers*, 1961 para. B9 p. 6.
225. *Ibid.*, para. D. 5, p. 23.
226. *Ibid.*, para. D. 8, p. 24.
227. *Ibid.*, paras. D.10-11; p. 25.
228. In light of Schedule A diseases, see also, *Guide*, paras.: D4 (menstrual flow); D23 (food purifiers). The Guide similarly contains interpretations for other treatments associated with Schedule A diseases and should be consulted when in doubt about the legality of a particular advertisement.
229. *Food and Drug Regulations* C.01.044. Prescription drugs are listed in Schedule F, as amended by the Regulations; SOR/54-295.
230. *Ibid.*, C.01.027; limits of drug dosage, C.01.021.

231. The complete list of Schedule F Drugs are found in the Regulations, SOR/54-295.
232. Sec. 14, Food and Drugs Act.
233. 1981 Guide for Manufacturers and Advertisers, p. 1, para A1.
234. As noted above, certain aspects of food advertising are now the responsibility of the Department of Consumer and Corporate Affairs, with the balance of the Act being under the jurisdiction of the Department of National Health and Welfare.
235. 1981 Guide for Manufacturers and Advertisers, p. 3, para. A.10.
236. R. v. Wander Ltd. (1948) 90 C.C.C. 268 (Toronto Magistrate's Court): to be discussed in detail below.
237. See *infra* text footnote 446 et seq. for the F.T.C. position regarding Guides, Trade Regulation Rules, etc.
238. 1981 Guide for Manufacturers and Advertisers, p. 3, para. A.8.
239. *Ibid.*, p. 14, para. B. 46.
240. *Ibid.*, p. 15, para. B.50. The Guide notes that geographical adjectives may be used without question where the term has lost its significance, as for example Hamburg Steak; Spanish Onion, Boston Beans.
241. *Ibid.*, p. 15, para. B.52.
242. *Ibid.*, p. 12, para. B.33.
243. *Ibid.*, p. 13, para. B.36.
244. *Ibid.*
245. *Ibid.*, p. 13, para. B.37.
246. *Ibid.*, p. 11, para. B.26. See also B.29, B.30. Testimonials or similar statements are prohibited regarding vitamin products. See Food and Drugs Regulations D.02.005.
247. *Ibid.*, p. 11, para. B.25. The paragraph reads, *inter alia*.
"It is not to be accepted that a small number of supporting professional opinions must outweigh the general body of opinion in the profession, even if the non-supporters have not used or tried the product that is the subject of the opinion."
248. *Ibid.*, p. 5, para. B.7.
249. *Ibid.*
250. See Appendix A for a list of specific products phraseology mentioned in the Guide. Preliminary draft of Chapter II, "Advertising Regulations".
251. Ref. *supra* footnote 236.
252. *Ibid.*, p. 269.
253. The equivalent section of the present Food and Drugs Act is sec. 5(1) which is virtually identical in wording to its predecessor.
254. *Ibid.*, p. 269.
255. *Ibid.*, p. 268; See also *supra*, text footnote 156 et seq.
- 255(a). (1971) 5 W.W.R. 300 (B.C. Prov. Ct.).
256. See *supra* footnote 46, at p. 31: "It is my understanding, however that so far as the Food and Drugs Act Regulations are concerned, industry has been working very closely with our Department and its predecessor in order to secure compliance with these provisions. As a result it has been necessary to undertake very little in the way of formal enforcement proceedings by way of prosecution".
257. 1981 Guide for Manufacturers and Advertisers, p. 30, para. G.1.
258. Trade Information Letter No. 248: February, 1965.
259. As once existed in relation to the packaging of bacon, there now appears to be government concern regarding the packaging and labelling of pork and beans. Anyone who has ever purchased this product will know that the amount of "pork" included is virtually negligible. It would appear that federal government measures will be taken to rectify the descriptive labels, but whether such a measure will take the form of a Department Letter (as with bacon packaging) or packaging and labelling legislation, is unknown. Most manufacturers label their product as "Beans with Pork", thereby stressing that the prime ingredient is the former—beans. See *The Telegram*, (Toronto) 7 February, 1970: "The Great Pork and Beans Mystery", by Pat Johnson, *Telegram Staff Reporter*.
260. The pre-clearance will be discussed in greater detail in Chapter IX.
261. Section 25 states the penalties for a violation of the Act. Where the Crown proceeds by way of Summary Conviction, a convicted party is liable to a maximum fine of \$500.00, or a maximum term of imprisonment of 3 months or both, for a first offence. A subsequent offence dealt with on summary conviction carries a maximum fine of \$1,000.00, imprisonment up to 6 months, or both. If the Crown proceeds by indictment, the maximum fine is \$5,000.00, and maximum imprisonment 3 years, or both. The Crown is always possessed with a choice of procedure, so that a first offence might be proceeded with via indictment, or a tenth offence by summary conviction. As noted previously, there is a 12 month time limit for summary conviction offences (sec. 26) rather than the 6 month period under the Criminal Code.
262. Chapter VII.
263. Ref. *supra*, footnote 43.
264. Ref. *supra*, footnote 42.
265. Ref. *supra*, footnote 45.
266. Sec. 2(g).
267. Sec. 26(1).
268. Ref. *supra*, footnote 44.
269. Secs. 3(1), (2).
270. For example: bleaches, cleansers or sanitizers containing chlorine compounds, household or hobbycraft glues containing aliphatic or aromatic hydrocarbon solvents or ketone solvents. As of the date of writing (March, 1970) the regulations to the Act have not yet come into force.
271. For other relevant federal enactments, which are beyond the scope of this work to deal with in detail, see
(a) Industrial Design Act R.S.C. 1970, c. 18.
(b) Precious Metals Marketing Act, R.S.C. 1970, c. P19.
(c) National Trade Mark and True Labelling Act, R.S.C. 1970 c. N16.
There appear to be no reported cases on any of these enactments.

272. In light of the extensive revision currently being made in the *Criminal Code*, the following discussion might conceivably prove dated in the future. The author has attempted to obtain information from the federal Department of Justice regarding possible amendments insofar as they related to commercial advertising, but was informed that some were still being treated as confidential.
273. For a general discussion on the subject, see: Smith, B.: *The Law of Lotteries in Canada*, Vol. 1, U.B.C. Law Review, 277.
274. 189(1). Every one is guilty of an indictable offence and is liable to imprisonment for two years who
- (a) makes, prints, advertises or publishes or causes or produces to be made, printed advertised or published any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets or any mode of chance, whatsoever.
 - (d) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances are the winners of any property so proposed to be advanced, loaned, given, sold or disposed of.
275. 41 D.L.R. 46 at p. 50; (1918) 1 W.W.R. 258; 29 C.C.C. 153; See also: *The King v. Fish* (1906) 11 C.C.C. 201 at pp. 202-3.
276. *R. v. Roe* [1949] S.C.R. 652; 8 C.R. 135; 94 C.C.C. 273; (1949) 2 D.L.R. 785 ("Barrel derby" involving the estimating of the time required for a barrel to travel between two points in a river). However, the defence of skill or mixed skill and chance is not a defence to a charge under sec. 189(1)(e). See also: *Dream Home Contests (Edmonton) Ltd. v. The Queen, Hodges v. The Queen* (1960) 126 C.C.C. 291, 33 C.R. 47 regarding sec. 189(1)(e), where *R. v. Roe* was quoted with approval. *R. v. Blain* (1951) 1 W.W.R. (N.S.) 145 (estimating break-up of Saskatchewan River); *R. v. Krueger* (1968) 2 C.C.C. 60 (chain letter).
277. See *R. v. Irwin* (1928) 4 D.L.R. 625; 1928 50 C.C.C. 159 (estimating the number of passengers that would be carried by a street railway on a specified date.); *R. v. Long* (1928) 4 D.L.R. 716; (1928) 2 W.W.R. 599 (estimating the number of grains of wheat in a jar). In both cases, it was held that the contests involved pure chance only.
278. This reasoning would seem to flow from *R. v. Roe* ref. supra footnote 276.
279. By sec. 483(c)(iv), of the *Criminal Code* the Magistrate has absolute jurisdiction to try a charge under sec. 189.
280. For example, *R. v. Roe* supra, footnote 276; *R. v. Marshall* [1930] 53 C.C.C. 118; *R. v. Proctor and Gamble Co.* (1959) 127 C.C.C. 252; 32 C.R. 137; Supreme Court of Canada: (1961) 128 C.C.C. 340; 34 C.R. 144.
281. *R. v. Hudson's Bay Co.* (1915) 25 C.C.C. 1 (each customer purchasing goods of \$1.00 or more received a coupon envelope, on which the customer wrote his name and address, inserted his sales receipt, and deposited it in a special box in the store, taking note of the number. A pre-determined number was deposited in a local bank, and a draw held of the deposited envelopes, with the winning number getting the car). See also the annotation to this case for a good discussion of the early Canadian jurisprudence on the subject of lotteries.
282. *R. v. Young* (1958) 24 W.W.R. (N.S.) 83. *R. v. Wallace* (1954) 13 W.W.R. (N.S.) 435, 20 C.R. 39. Note that which had held that selection by chance was a violation of sec. 189, was not approved. Also see *R. v. Pasternick* (1956) 19 W.W.R. 529 (*Photo-Nite*); and *Chablayc v. Western Grocers* (1958) 24 W.W.R. 223, discussed in *Martins Criminal Code* 1969 at pp. 177-78.
283. Supra, footnote 277.
284. (1903) 6 C.C.C. 48; 14 M.R. 27.
285. *Ibid.*, p. 52 (C.C.C.).
286. (1954) 13 W.W.R. (N.S.) 435.
287. (1958) 121 C.C.C. 39.
288. *Ibid.*, per Gordon, J. A. at p. 55.
289. *Ibid.*, p. 53.
290. *Ibid.*, p. 53. Definition of "skill" selected from the *New Oxford Dictionary*.
291. *Ibid.*, p. 53.
292. *R. v. Marshall* (1930) 53 C.C.C. 118.
293. (1927) 48 C.C.C. 154.
294. Ref. supra, footnote 276.
295. *Ibid.*, at p. 788 (D.L.R.).
296. *R. v. Young* ref. supra, footnote 282.
297. Unreported. Magistrate's Court, City of Winnipeg, 1956; Magistrate Garton: Quoted in *Marketing*, 17 February, 1956 at p. 12. "Where can law step in on premium deal? Here is a guide to the legal maze" (Hanson).
298. (1961) 128 C.C.C. 340; 34 C.R. 144.
299. *Ibid.*, pp. 342-43 (C.C.C.). On the matter of a contract in a promotional scheme, see: *R. v. Pasternick* ref. supra footnote 282.
300. Is such a requirement as signing a statement that no assistance was given merely inviting a participant to lie? If a third party checked or corrected the answer, would this be classed as assistance?"
301. Some other contests purporting to require skill are those calling on the participant to complete a jingle (generally about the sponsor's product); or the famous, "In 25 words or less, tell what you think about _____". Presumably, a judge or panel of judges read every entry and decide which is the most original, etc. and on this basis award the prize. The incidence of these types of contests appears to have waned as of late, possibly because of the time and effort involved in reading all entries. It is much easier to simply draw the winners by lot and award prizes via the skill-testing questions route.
302. *Ranger v. Herbert A. Watts (Québec) Ltd.* (1970) 2 O.R. 225; (1970) 10 D.L.R. (3d) 395.
303. At the conclusion of the case, a spokesman for the Defendant stated that although no prior warning of the call was given, the contest participant was always asked if the call were convenient and told the Company would call back if it were not, *The Telegram* (Toronto), Final Edition, 25 March, 1970, p. 10.

304. The same spokesman for the Defendant also stated that other persons had previously failed to answer the skill-testing question and were not awarded the prize. Mr. Ranger was the first to sue, however. Also, the Defendant apparently has changed its methods and now gives the contestant reasonable notice of when he or she will be asked to answer the question. *The Telegram* (Toronto), *Ibid*.
305. *Ibid*.
306. The Peter Jackson Company has announced that it will appeal the decision. *The Telegram* (Toronto) Metro Night Edition, 6 April, 1970, p. 2. The writer has been informed by the Registrar of the Court of Appeal of Ontario that as of 15 May, 1970, appeal procedure had not been commenced.
307. *Quære* whether proceedings could be launched against the Company under sec. 37 of the *Combines Investigation Act*.
308. For example, Imperial Oil Limited's "Matching Tigers" game.
309. The author knows from experience that when an individual asked a certain retail outlet for an entry form without making a purchase, the request was refused. He was told that the outlet's policy was not to give forms without a purchase. The contest had been nationally advertised as requiring no purchase for participation.
310. *R. v. Hudson's Bay Co.* (ref. *supra*, footnote 281).
311. *R. v. Choquette* (1963) 3 C.C.C. 198 (British Columbia Supreme Court). This case did not follow an earlier decision on the point: *R. v. O'Malley* 77 C.C.C. 99; (1942) 1 W.W.R. 127. (British Columbia Supreme Court).
312. *Supra*, text footnote 63 et seq.
313. 1968-69 (Can.) c. 38, s. 13. Under the new s. 190, lotteries may be permitted under the authority of the Government of Canada or the Provinces.
314. Recently, three United States companies—Gulf Oil, Sun Oil and Proctor and Gamble—informed Congressional investigators in Washington that they were dropping their respective "sweepstake" games because of criticism that all prizes promised were not being awarded. See *The Telegram* (Toronto), 14 November, 1969. That contest-type promotions can backfire on the promoter was demonstrated recently in Alberta, where two residents of that province broke the "system" in a promotion by Imperial Tobacco for "Casino" cigarettes. After winning an estimated \$36,000.00 in prize-money, the two gentlemen passed the secret on to some friends, and subsequently over \$120,000.00 in winnings were claimed. The Company thereupon set an arbitrary date for ending the contest, and withdrew "Casino" cigarettes from the market. See, *The Telegram* (Toronto) 20 January, 1970, "Casino Cigarette Jackpot rolls on", by Wade Rowland, *Telegram Staff Reporter*.
315. For a discussion of trading stamps see *Marketing*, 2 February, 1968, p. 2: "Consumers have a love-hate feeling for trading stamps".
316. For example, see: *R. v. Loblaw Groceries* (1960) 34 C.R. 224 at p. 228; (1960) 129 C.C.C. 223; *R. v. Robert Simpson et al* (1964) 3 C.C.C. 318 at p. 323; 43 C.R. 366; (1964) 2 O.R. 227. See also some of the views expressed in debate when the trading stamp Bill was presented in the House of Commons, House of Commons Debates, v. 5 (1965).
317. The constitutionality of the trading stamp law was upheld in *R. v. Western Auto Club Limited* 62 C.C.C. 10.
318. For an excellent survey of the economic history and judicial decision of trading stamps see: Campbell, R. M.: *Trading Stamps* V. 18 University of Toronto, Faculty of Law Review, p. 56. This article also provides several references to other writings on the subject of trading stamps.
319. Royal Commission on Price Spreads of Food Products (1959) Report, V. 2, p. 52.
320. S. 337: *Criminal Code*. Note as well the saving clause: "... an offer, endorsed by the manufacturer upon a wrapper or container in which goods are sold, of a premium or award for the return of that wrapper or container to the manufacturer is not (emphasis mine) a trading stamp". Thus, such promotions as returning the boxtop of a product in return for a prize, etc., are within the law as by this exception.
321. *R. v. Loblaw Groceries (Man.) Limited; R. v. Thomson (Niagara I.G.A. Grocery)* 34 C.R. 224 at p. 228; (1960) 129 C.C.C. 223. This case can be regarded as overruling the decision of the Saskatchewan Court of Appeal in *R. ex rel. Juno v. O.K. Economy Stores Ltd.* (1960) 128 C.C.C. 247, 31 W.W.R. 481; 23 D.L.R. (2d) 555 which had held, *inter alia* that so long as the stamps given the purchaser represent a discount on the price of goods or entitle the purchaser to a premium on presentation or redemption, all other considerations enumerated in sec. 337(b) are immaterial and have no bearing on whether or not the offence was committed. See also *R. v. Kleckner* (1963) 1 C.C.C. (Saskatchewan Court of Appeal) which also overrules the O.K. Economy Case.
322. Again, see *R. v. Loblaw Groceries et al* (ref. *supra*, footnote 321).
323. *Ibid*.
324. *R. v. Ex Rel. Kuhn v. Loblaw Groceries Co. No. 2*, (1960) 127 C.C.C. 351.
325. *Ibid*. But see *R. v. United Dominion Promotion Sales, Inc. v. Shaw* (1957) 119 C.C.C. 380 at p. 388 where the Court commented on the Statement, "Merchantable Value 1 Mill" which appeared on the stamp in question. "I doubt if that means much to the ordinary individual. It is certainly not a statement of value in the ordinary usage".
326. (1965) 3 C.C.C. 70.
327. *R. v. Kleckner* (ref. *supra*, footnote 321).
328. (1964) 3 C.C.C. 318; 43 C.R. 366; (1964) 2 O.R. 227.
329. Unreported: St. Boniface Magistrate's Court, (Manitoba): 14 March, 1958: *Martin's Criminal Code*, 1969 p. 347.
330. *Martin's Criminal Code*, 1969, p. 347.
331. (1959) 2 Crim. L.Q. 236 (Mag. Ct., London, Ontario).
332. (1960) 127 C.C.C. 351.
333. (1938) 3 W.W.R. 560; 71 C.C.C. 47; (1939) 1 D.L.R. 98.
334. (1957) 119 C.C.C. 380.

335. 324. Everyone who makes use of the mails for the purpose of transmitting or delivering letters or circulars concerning schemes devised or intended to deceive or defraud the public, or for the purpose of obtaining money under false pretences, is guilty of an indictable offence and is liable to imprisonment for two years.
336. R.S.C. 1970, c. P14.
337. *Ibid.*, sec 7(1); penalty clause: sec. 73.
338. Statutory Orders and Regulations: *Canada Gazette* Part 2, 1968, p. 1448 (27 November, 1968).
339. See the Department of Consumer and Corporate Affairs, *Communiqué*: October, 1969: *Unsolicited Mail*.
340. Advertising or selling contraceptives was also an offence under this section prior to an amendment to the *Criminal Code* (1968-69) c. 41, s. 13). See *R. v. Keystone Enterprises Ltd.* (1961) 133 C.C.C. 338; 37 C.R. 397; 38 W.W.R. 442. As advertising contraceptives is now legal, the case is somewhat of historical significance only, save for a consideration of the question of public good (sec. 159(3)). Also, *R. v. Karn* 5 C.C.C. 543, 6 C.C.C. 479.
341. There appear to be no reported cases involving secs. 159(2)(c) and (d), save for those concerned with contraceptives, as discussed, *supra*, footnote 340. It would seem reasonable to assume that advertisements would be in contravention of the sections if they either overtly promoted devices for obtaining miscarriages, or accomplished same by innuendo. Thus in a United States decision, *Personal Drug Company* (50 F.T.C. 828 (1954)), *aff'd sub nom* 218 F 2d 817 (1955), the following advertisement was in question:
 Period Delayed? Don't Risk Disaster. Don't Worry. At Last — It Can Be Sold, a new extra effective Doctor-approved formula — "Quick-Kaps" capsules may relieve you of your biggest worry — when due to minor functional menstrual delay or borderline anemia. Scientifically prepared by registered Pharmacists, "Quick Kaps" capsules contain only medically recognized drugs, having no harmful after-effects — complete supply — packed in a confidential box only \$5.00 . . . just the thing to have on hand.
 The advertisement was interpreted as promoting the capsules to be abortifacient.
342. Sec. 159(3) *Criminal Code*.
343. *Ibid.*, sec. 159(4).
344. See: *R. v. Karn* (ref *supra*, footnote 340).
345. Sec. 159(5) *Criminal Code*.
346. *Ibid.*, sec. 159(6).
347. Grant, Peter S.: *Canadian Broadcasting Law and Administration* (preliminary draft).
348. See Appendix C.
349. Reference re *Ontario Municipal Amendment Act* (unreported) quoted in *Campbell, R.M.: Trading Stamps* (Ref. *supra*, footnote 318) where the Ontario Court of Appeal held the provincial legislation to be *intra vires* as valid legislation in relation to civil rights in the province. However in *Wilder v. Cité de Montréal* (1905) 14 C.B.R. 139, the Quebec Court of Appeal found similar Quebec legislation to be *ultra vires* as transgressing on the Dominion's trade and commerce power.
350. 38 C.R. 188; 35 D.L.R. (2d) 483; (1962) 38 W.W.R. 513.
351. 1958 S.A. c. 30 (name of enactment changed to: *Licensing of Trades and Business Act*).
352. By Order in Council 406/60, the Code of Fair Competition was rescinded, after the government of Alberta received assurances that trading stamps would not be offered in the Province. Should the assurances not be kept, the Code could easily be introduced via Order in Council. Source of information: letter dated 8 December, 1969 received by the writer from D. E. L. Keown, Consumer Credit Officer, Consumer Credit Branch, Office of the Deputy Provincial Treasurer, Alberta.
353. Apparently a charge was laid against Loblaw's Groceries under the *Food Products Minimum Loss Act* of Manitoba, R.S.M. 1954 c. 89, as well as under the Code. The pertinent sections of the Manitoba Act were:
 (3) No retailer shall offer for sale, sell or keep for sale in the province any food product at a price less than five per centum above the cost thereof to the retailer.
 5(1) . . . the sale of a food product
 (a) Contemporaneously with the gift of any commodity; or
 (c) in connection with which a premium, certificate, or other similar inducement to purchase originating with the retailer or with the manufacturer or processor who is also a retailer is offered or advertised is a violation of section 3.
- This Act was repealed by the Manitoba Legislature in 1969.
 See *Campbell, R.M. Trading Stamps* (ref. *supra*, footnote 318).
 For the British Columbia equivalent of the above Manitoba statute, see: *Commodities Minimum Loss Act*, R.S.B.C. 1960 c. 64.
354. S.O. 1966, c. 23.
355. R.S.N.S. 1967 c. 53, sec. 14.
356. See Appendix C, for other provincial statutes of a similar nature.
- 356(a). *Supra*, text footnotes 29(a) and 29(b).
357. R.S.O. 1960 c. 268, 1962-63 c. 93.
358. See: *Oleomargarine Act*, R.S.N.B. 1953 c. 164, sec. 7; 1954, c. 65, sec. 71; *Margarine Act*, R.S.M. 1970, c. M30, sec. 7.
359. For the constitutional validity of provincial liquor legislation, see: *A.-G. Ontario v. Canada* (Local Prohibition Case) 1896 A.C. 348.
360. Provincial regulation of broadcast media advertising will be discussed in detail in Chapter IX.
361. *The Liquor Control Act*, S.A. 1958 c. 37, S.S. 2(13), 17, 90.
362. *Government Liquor Act*, R.S.B.C., 1960 c. 166, ss. 2, 83.
363. *The Liquor Control Act*, S.N.B. 1961-62 c. 2, ss. 1(17), 128.
364. *Liquor Control Act*, R.S.P.E.I., 1951 c. 159, ss. 1(h), 47.

365. **The Liquor Act**, R.S.S. 1965, c. 382, ss. 2(k), 114; **Saskatchewan Regulation 3/68** (allows a manufacturer of beer to advertise in newspapers in relation to educational, charitable or cultural activities, but only the brewer's corporate name may be used to demonstrate sponsorship).
366. **The Liquor Control Act**, R.S.M., 1970, c. L160: **Manitoba Regulation 82-67** July 22, 1967.
367. **Liquor Control Act**, R.S.N.S. 1967, c. 169, ss. 1(1), 101; "Statement of Policy of the Liquor Licence Board Respecting Liquor Advertising", 1 June, 1961, and changes thereto.
368. **The Liquor Control Act**, R.S.O. 1960, c. 217, ss. 1(1)(j), 93; "Directive on Advertising", July, 1968.
369. **The Liquor Board Act**, R.S.Q. 1964, c. 44, ss. 121, 122; Order-in-Council No. 2396, 13 August, 1969; **Quebec Official Gazette**, August 30, 1969.
370. Federal jurisdiction over communications was crystallized in the Privy Council decision of, *In re Regulation and Control of Radio Communications* (1932) A.C. 304, (1932) 2 D.L.R. 81, (1932) 1 W.W.R. 563.
371. S.C. 1967-68 c. 25.
372. Sec. 51(a) **Regulations of the Broadcasting Act** (ref. supra, footnote 371).
373. A.M. and F.M. Regulations, s. 8(1)(a) T.V. Regulations, s. 9(1)(a).
374. 8(1)(c) A.M. and F.M. Regulations; 9(1)(c) T.V. Regulations. See also the exceptions at 8(2) and 9(2) respectively.
375. 8(1)(d) A.M. and F.M. Regulations; 9(1)(d) T.V. Regulations; and note again, 8(2) and 9(2) respectively.
376. In his forthcoming book, **Canadian Broadcasting Law and Administration**, the author comments on a technical defence to a prosecution under the Regulations: Section 5(1)(a) of the present Criminal Code provides that "where an enactment creates an offence and authorizes a punishment to be imposed thereof, . . . a person shall be deemed not guilty of that offence until he is convicted thereof." Consequently, if the C.R.T.C. wished to prosecute under s. 5(1)(a) of its Regulations because a station broadcast "anything contrary to law", it would first have to prove that the broadcaster had contravened that law, and this would apparently not be possible without first obtaining a conviction under such law. Once having obtained such a conviction, however, the Criminal Code further provides that "a person who is convicted of that offence is not liable to any punishment in respect thereof other than . . . by the enactment that creates the offence. This probably precludes therefore, a further fine under the Broadcasting Act, although whether the phrase, "an enactment" includes provincial enactments is still a debatable question. Apparently no prosecution was levelled against the Regina television station which carried the illegal lottery in *R. v. Robert Simpson (Regina) Ltd.* (ref. supra text footnote 287).
377. "Acceptance in good faith" refers to honesty of intention and freedom from knowledge of circumstances which ought to put the accepting party upon inquiry. **Black's Law Dictionary** (rev. 4th. ed.) p. 622.
378. As, for example: Secs. 36(2) and 37(3) of the **Combines Investigation Act**.
379. *F.T.C. v. Colgate-Palmolive et al* (1964) 380 U.S. 374.
380. To be discussed in greater detail below.
381. See Appendix C.
382. R.S.B.C. 1960 c. 59.
383. The Regulations were passed prior to the enactment of the 1968 Broadcasting Act, and thus contain the name of the Canadian Radio-Television Commission's predecessor, the Board of Broadcast Governors. Also, the Department of National Health and Welfare was previously responsible for administering all aspects of the **Food and Drugs Act**, part of which now comes under the jurisdiction of the Department of Consumer and Corporate Affairs. The appropriate changes have been shown in brackets.
384. B.B.G. Circular 123, 1 December, 1965 at p. 4. See also: B.B.G. Circulars 42 (27 October, 1961) and 92 (15 August, 1963).
385. B.B.G. Circular 42, 27 October, 1961.
386. B.B.G. Circular 123, 1 December, 1965 at p. 7.
387. *Ibid.*
388. Statement by the Hon. C. Munro, Minister of National Health and Welfare: House of Commons Debates Vol. VIII, April 28 - May 27, 1969 p. 8041.
389. Grant, Peter: **Canadian Broadcasting Law and Administration** (preliminary draft).
390. *Ibid.*
391. See supra footnote 370.
392. See footnotes 361 - 369 supra for a listing of the applicable provincial liquor statutes.
393. A.M., F.M. and T.V. Regulations, 10(2).
394. *Ibid.*
395. The House of Seagram has announced that it will not sponsor the Canadian Open after 1972.
396. 10(2) A.M., F.M. and T.V. Regulations.
397. B.B.G. Circular 95, 5 November, 1963.
398. Consequently, persons cannot be shown actually drinking beer or wine.
399. B.B.G. Circular 95, 5 November, 1963.
400. 2(d) of the A.M., F.M. Regulations and 2(c) of the T.V. Regulations defines "billboard" as follows: "billboard means an announcement at the commencement or end of any programme naming the sponsor, if any."
401. 10(2), A.M., F.M. and T.V. Regulations.
402. *Ibid.*, Schedules thereto.
403. See footnotes 297-300 supra for references.
404. Order-in-Council No. 2396, August 13, 1969; **Quebec Official Gazette**.
405. "Statement of Policy of the Liquor Licence Board Respecting Liquor Advertising", 1 June, 1961 and changes thereto.
406. "Directive on Advertising", July, 1968.

407. **Liquor Control Act**, S.M. 1967 s. 9a; Regulation 82/67.
408. Ref. *supra*, footnote 405.
409. Ref. *supra*, footnote 406.
410. Ref. *supra*, footnote 405.
411. Grant, **Canadian Broadcasting Law and Administration** (preliminary draft) Chapter 9.
412. For an example, see above footnote 73.
413. See *supra* footnote 73 and 74.
414. 8(3) A.M. and F.M. Regulations; 9(3) T.V. Regulations.
415. 9, A.M. and F.M. Regulations; 12 T.V. Regulations.
416. The "cease and desist" power of the Commission in regard to advertisements or promotions of an "offensive or objectionable" nature has been challenged as being beyond the powers of the C.R.T.C. and therefore, *ultra vires*. See Grant, **Canadian Broadcasting Law and Administration in Canada**, Chapter 9. (preliminary draft).
417. Because of the environment in which television commercials are staged, modification in certain advertised products is essential. The heat of television lights, for example would quickly melt ice-cream if that product were being advertised, so that mashed potatoes are used as a substitute to depict ice cream. Here, obviously there is no consumer deception. Where however, substitute products are used to enhance the normal functionings of a product and thereby demonstrate the product as superior to what it actually is, there would be deception. See: *F.T.C. v. Colgate-Palmolive* (1964) 380 U.S. 374; *Carter Products v. F.T.C.* (1963) 323 F.2d. 523; Note: *Illusion or Deception: The use of "props and mock-ups" in television advertising* (1962-63) 72 Yale L.J. 145.
418. See: *Libbey-Owens-Ford Glass Company et al v. F.T.C.* (1965) 352 F.2d 415. See also: *Hutchinson Chemical Corp.* 55 F.T.C. 1942 (1959) ("flaming auto" demonstration for car wax) where advertiser's practice was approved by the F.T.C. Discussed in (1962-63) 72 Yale L.J. at pp. 160-161.
419. For a discussion on the inability of self-regulation to curb offensive or excessive advertising, see: Boyd, H. W. Jr., and Claycamp, H.: **Industrial Self-Regulation and the Public Interest** (1965-66) Vol. 64 Michigan Law Review, p. 1239.
420. For an insight into the workings of advertising agencies, including the highly competitive nature of the business and the vagaries of dissatisfied clients see, Mayer, Martin: **Madison Avenue, U.S.A.**
421. Under secs. 36 and 37 of the **Combines Investigation Act** however, an agency could not wilfully promote a product, the claims for which it knew, or suspected were untrue. Such agencies would be deemed parties to an offence and be liable accordingly. There are no Canadian cases on these questions but see *United States v. Andreadis* (1965) 238 F. Supp. at pp. 800, 802, 805; 366 F. 2d 432 (Criminal conviction against an advertising agency for knowingly devising a false advertising scheme with a client); *F.T.C. v. Colgate-Palmolive* (1964) 380 U.S. 374 (liability of agency where it knew or ought to have known misleading aspects of an advertisement).
422. Memo to [then] Consumer and Corporate Affairs Minister Ron Basford. Reported in *The Telegram* (Toronto) (Night Edition) 3 February, 1970, p. 19: "Advertising", by Wade Rowland, *Telegram Staff Reporter*.
423. See Appendix D for the full text of the Code.
424. The Participants are: Agricultural Press Association of Canada; Association of Canadian Advertisers, Inc.; Association of Canadian Better Business Bureaux Inc.; Association of Industrial Advertisers; Canadian Business Press; Canadian Association of Broadcasters; Canadian Broadcasting Corporation; Canadian Daily Newspaper Publishers Association; Canadian Direct Mail Association; Canadian Weekly Newspaper Association; Federation of Canadian Advertising and Sales Clubs; Institute of Canadian Advertising; Magazine Advertising Bureau of Canada; Outdoor Advertising Association of Canada, Periodical Press Association, Trans-Ad Division, Warnock Hersey International Limited.
- Source: **The Canadian Code of Advertising Standards, 1967.**
425. *Ibid.*
426. *Ibid.*, see Appendix D.
427. *Ibid.*
428. Advertising Standards Council, 159 Bay Street, Toronto 116, Ontario.
429. Conseil des normes de la publicité, suite 1404, Immeuble de la Place Victoria, Montréal 115, Québec.
430. **The Canadian Code of Advertising Standards, 1967.** For a discussion of any potential liability on the part of advertising councils and the media for blocking access to the media, see: Baum, D. J.: **Self-Regulation and Antitrust: Suppression of Deceptive Advertising by Publishing Media** (1959-61) 11-12 *Syracuse Law Review*, 289.
431. Weir, Walter, **Truth in Advertising . . . and other Heresies** p. 36.
Another writer has suggested that a government body undertake a study of selective products—toys, cosmetics, etc.—advertised on the broadcast media and publish its findings. He submits that such projects ". . . would have a tremendous effect on advertising through exercising a moral force, bringing the attention of the public to the nature of the corrosive influence. Such publication would be a kind of textbook of clean advertising practice which, over the years might gradually re-educate the older generations of advertising men while providing fundamental principles to younger personnel. It would have the further effect, through naming agencies, and products, of keeping the young job-seeking generation out of companies responsible for copy that is nauseating, insulting or merely legally innocent."
Henry, Jules: **Culture Against Man** at p. 88.
432. The six provinces in which the Better Business Bureau is located are: Alberta, British Columbia, Manitoba, Nova Scotia, Ontario and Quebec.
433. **Toronto Advertising Standards**, Better Business Bureau of Metropolitan Toronto.
434. *Ibid.*, p. 2.

435. *Ibid.*
436. *Ibid.*, p. 4.
437. *Ibid.*, p. 6.
438. But note the following comment on the Consumers Union and Consumers' Research Inc., the United States equivalents of the Consumers' Association of Canada. According to research reported by the Harvard Business Review, consumers who buy religiously in accordance with the ratings of C.R. and C.U. will often go astray for these reasons: (a) the small size of their technical staffs; (b) the difficulties of getting an adequate sample for testing; (c) the inherent weakness of consumer goods standards and test methods and; (d) the subjectivity of test interpretation.
- The Regulation of Advertising, 1956 V. 56, Columbia Law Review, p. 1018 at p. 1095.** For the same criticism of consumer's associations and the value of their tests, see Harris, R. and Seldon, A. *Advertising and the Public*, pp. 220-28.
439. Source: Department of Consumer and Corporate Affairs News Release, 11 June, 1969. Address by the Minister of Consumer's Association of Canada.
440. **Consumer Associations**
- | Country | Association | Publication |
|---------------|---|----------------------|
| Canada | Consumer's Association of Canada,
100 Gloucester St., Ottawa 4, Ontario | Canadian
Consumer |
| United States | Consumers Union of U.S. Inc.,
256 Washington St., Mount Vernon,
N.Y. 10550. | Consumer
Reports |
| | Consumers Research Inc.,
Washington, N.J. 07882. | Consumer
Bulletin |
| Great Britain | Consumer's Association,
14 Buckingham St., London, W.C. 2. | Which? |
| | The Consumer Council,
3 Cornwall Terrace, London, N.W. 1. | Focus |
| | British Standards Institution,
British Standards House,
2 Park St., London, W. 1. | Consumer
Reports |
441. See Chapter V.
442. For the mathematical wizardry required of the average consumer to calculate cost per ounce of "Large", "Giant", "Family" and "Economy" sizes see: R. v. Colgate-Palmolive (ref. *supra* footnote 107).
443. For a searing indictment of current packaging methods see Fisher, J.: "The Plot to Make You Buy", Chapter 4, "The Great Packaging Caper".
444. "Packaging, labelling act in force by year's end" by Elaine Brown: *Winnipeg Tribune*, 23 February, 1972.
445. The proposed Canadian legislation will in all likelihood be analogous to the United States Fair Packaging and Labelling Act P.L. 89-755, 80 Stat. 1296 (1966). See also the legislative history of the statute: U.S. Code: Congressional and Administrative News, vol. 3, 89th Congress, Second Session, P.4069. Also, see labelling legislation of the City of New York: Regulation 49 of the Department of Consumer Affairs, City of New York, 26 September, 1969.
446. The Federal Trade Commission has published, *inter alia*, the following guides: (a) Guides against deceptive labelling and advertising of adhesive compositions; (b) Guide lines for audience rating claims; (c) Guides for bath advertising; (d) Cigarette advertising guides; (e) Guides against debt collection deception; (f) Guides against deceptive advertising of guarantees; (g) Guides for advertising fallout shelters; (h) Guides for mail order insurance industry; (i) Guide for avoiding deceptive use of word "Mill", in textile advertising; (j) Guides against deceptive pricing; (k) Guides for advertising radiation monitoring instruments; (l) Guides for advertising shell homes; (m) Guides for shoe content labelling and advertising; (n) Tire advertising and labelling guides; (o) Dry Cell battery rule; (p) Deception as to nonprismatic and partially prismatic instruments being prismatic binoculars; (q) Trade regulation for the prevention of unfair and deceptive advertising and labelling of cigarettes in relation to the health hazards of smoking; (r) Trade regulation rule regarding deceptive advertising and labelling of previously used lubricating oil; (s) Trade regulation rule — sewing machines; (t) sleeping bags trade regulation rule; (u) Trade Regulation regarding deceptive advertising and labelling as to size of tablecloths and related products; (v) Deceptive advertising as to sizes of viewable pictures shown by television receiving sets; (w) Trade regulation rule regarding misbranding and deception as to leather content of waist belts.
447. See Chapter IV.
448. According to a letter received by the writer from D. H. W. Henry, Q.C., Director of Investigation and Research, Combines Investigation Act, and dated 5 March, 1970, permission has never been granted by the National Research Council to publish its test results in a commercial advertisement.
449. See Appendix D for the entire Code.
450. Gerry Robinson, President of Kellogg's of Canada Ltd. is reported to have made the following observation:
Don't underestimate the power of a kid. They now tell mother what to buy for breakfast. And she buys it — \$650 million worth of dry cereal a year. If she doesn't, Cap'n Crunch or Yogi Bear will get her.
Quoted in Fisher, J.: *The Plot to Make You Buy*, p. 117.
451. Only the private Independent Television permits advertising on the broadcast media.
452. Independent Television Companies Association Limited: rules relating to Television Advertising and Children, para. 2 Quoted in Leaper, W. J.: *The Law of Advertising*, (2d ed.) p. 352.
453. *Ibid.*, para. 3 in Leaper, *The Law of Advertising*, p. 352.
454. *Ibid.*, para. 7 in Leaper, *The Law of Advertising*, p. 353.

455. In the United States, broadcast pre-clearance is performed on a voluntary basis through the private National Association of Broadcasters. Recently the Association gave its approval to a children's television show entitled "Hot Wheels" (seen in the Toronto area on channels 9 and 13), which the United States Federal Communications Commission contends is in essence a half-hour commercial for a toy manufacturer. The F.T.C. has asked the Association to reconsider the programme. *The Telegram* (Toronto) 3 March, 1970 "Advertising", written by Wade Rowland, *Telegram Staff Reporter*.
456. See *supra*, text footnote 383 et seq. and text footnote 412 to end of chapter.
457. Vocationally, Mr. Garrett is an account manager for the Toronto advertising agency of Ronalds-Reynolds.
458. The Canadian Code of Advertising Standards: see Appendix D.
459. *The Telegram* (Toronto) (Night Edition) 3 February, 1970 at p. 19: Wade Rowland, *Telegram Staff Reporter*: "Advertising".
460. The federal government would have some difficulty in supporting such a scheme under its trade and commerce power (sec. 91(2) B.N.A. Act) since it is aimed at a particular industry, the advertising industry. The Criminal law power (91(27) B.N.A. Act) is a possibility, but in the writer's opinion somewhat of a remote one.
461. *The Telegram* (Toronto) 28 February, 1970: "Adman hits statistical selling". The speaker was Jerry Goodis, President of the Toronto Advertising firm of Goodis, Goldberg, Soren Ltd., with the address being delivered at the Robert F. Kennedy Symposium on Mass Media, Kansas City. See also *Marketing*, 11 August, 1969, p. 1: "Ad Agencies Favor New Guidelines", dealing with the misleading advertising provisions of the **Combines Investigation Act**.
462. See *supra*, Conclusion following.
463. All advertisers or agencies are, unfortunately, not as candid and enlightened as those discussed above, and are totally against further government regulation of advertising. See for example *Marketing* 19 January, 1968, p. 63. "Business warned—act soon to forestall restrictive law" (Ernest J. Little, Public Relations Manager of Texaco Canada); 7 April, 1969 p. 3. "Now Consumers Call the Shot" (Donald M. Kendall, President of Pepsi Co., New York); here Mr. Kendall is of the opinion that existing and proposed government regulations over marketing practices may stem not so much from genuine consumer concern as from vote-seeking politicians. See also: Sanford, David (ed.) *Hot War on the Consumer* at pp. 201-215 for a discussion of the Ralph Nader — General Motors affair and an insight as to how far a corporation will go to silence opposition if its products and promotions are seriously challenged.

APPENDIX A

Specific products mentioned in the 1961 Guide for Manufacturers and Advertisers; relevant Guide sections in brackets.

dietetic foods (C.13)	iron (B.13, B.16)
minerals (B.13)	proteins (B.14)
vitamins (B.12)	athlete's foot remedies (D.16)
butter (C.10)	chocolate or cocoa products (C.7)
cosmetics with sex hormones (E.3)	dentifrices (E.4)
eye medicines (D.14)	food fads (C.25)
hair preparations (E.2)	kidney and bladder remedies (D.19)
laxatives and cathartics (C.17, D.12)	liniment (D.13)
liver remedies (D.18)	malted foods (C.11)
meat extract (C.6)	milk (C.8)
mineral waters (C.9)	reducing plans (B.9, C.13)
skin preparations (D.15)	tonic foods (C.14)

APPENDIX A – Continued

Specific Wording

- allergies (D.9)
 alkali forming (C.18)
 alkaline (C.18)
 anemia (B.16)
 approved (B.23)
 arthritic pain (D.8)
 itch (D.15)
 lasting (C.21)
 liver (D.18)
 low in (B.49)
 low in calories (C.13)
 low in sodium (C.13)
 asthma (D.9)
 balanced (B.42, C.16)
 before and after (B.36)
 best (B.42)
 better (B.42, B.46)
 butter fat (C.8)
 certificates (B.24)
 certified (B.23)
 compound (C.3)
 colds (D.10)
 concentrated; concentrate (B.48)
 coughs due to colds (D.11)
 cream (C.23)
 creamy (C.8, C.23)
 dietary standards (B.1)
 dietetic (C.13)
 digestability (C.12)
 does not burn (B.57)
 does not sting (B.57)
 double strength (B.47)
 dried (B.48)
 eczema (D.15)
 energy food (C.20)
 enrichment (B.19)
 evaporated (B.48)
 flu (D.10)
 food energy (C.20)
 lumbago (D.8)
 malted (C.11)
 manly power (D.3)
 meat extract (C.6)
 medicated (C.15)
 minimum requirement (B.15)
 miracle (B.42)
 mixture (C.3)
 mother nature (B.53)
 natural (B.54)
 nature (B.53)
 nature's way (B.53)
 negative statements (B.57)
 neuritic (D.8)
 non-fattening (C.19)
 non-irritating (B.57)
 non-laxitive (B.57)
 non-narcotic (B.57)
 non-poisonous (B.57)
 non-staining (B.57)
 non-toxic (B.57)
 nutrition rules (B.11)
 organic iron (B.13)
 pain (D.8)
 pediculosis (D.6)
 pep (C.20)
 prescribed (D.2)
 food iodine (B.13)
 for wife and man (D.3)
 fortification (B.19)
 freedom from cough (D.11)
 fresh (C.22)
 fresh-frozen (C.22)
 fruit, fruit juice (C.24)
 genuine (C.5)
 guarantee (B.39)
 harmless (D.25)
 hay-fever (D.9)
 health, healthful (B.44)
 health and beauty aids (B.44)
 health salts (B.44)
 high in (B.14, B.49)
 high in protein (C.13)
 high in quality proteins (B.14)
 home-made (B.52)
 imitation (C.4)
 imported (B.51)
 iron (B.13, B.16)
 laboratory (B.34)
 lice (D.6)
 psoriasis (D.15)
 pure (C.5)
 quick food energy (C.20)
 reconstituted (B.48)
 rheumatism (D.8)
 rich in (B.49)
 richer (B.46)
 safe (D.25)
 salt free (C.13)
 saltless (C.13)
 scabs (D.15)
 sensational (B.42)
 sinus trouble (D.17)
 stop cough (D.11)
 strong (B.48)
 substitute (C.4)
 sugar free (C.13)
 sugarless (C.13)
 sustained (C.21)
 tonic (C.14)
 triple strength (B.47)
 vermin and infection control (D.6)
 virility (D.3)
 whole milk (C.8)

APPENDIX B

FEDERAL STATUTES

- Combines Investigation Act*, R.S.C. 1970, c. C23.
Food and Drugs Act, R.S.C. 1970, c. F27; *Regulations* thereto, Canada Gazette, Statutory Orders and Regulations, 1954, Vol. 881; Part 2.
Criminal Code
Broadcasting Act, R.S.C. 1970, c. B11; *Regulations* thereto (A.M., F.M. and T.V.).
Proprietary and Patent Medicine Act, R.S.C. 1970, c. P25.
Hazardous Products Act, R.S.C. 1970, c. H3.
Weights and Measures Act, R.S.C. 1970, c. W7.
Trade Marks Act, R.S.C. 1970, c. T10.
National Trade Mark and True Labelling Act, R.S.C. 1970, c. N16.
Meat and Canned Foods Act, R.S.C. 1970, c. M6.
Industrial Design and Union Label Act, R.S.C. 1970, c. I8.
Precious Metals Marking Act, R.S.C. 1970, c. P19.
Post Office Act, 1970, c. P14; *Regulations* thereto.; Statutory Orders and Regulations, Canada Gazette, Part 2, 1968, p. 1448 (27 November, 1968).

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Provincial Statutes touching commercial advertising (bracketed statutes inserted by the author).

- Alberta:** Dairyman's Act, R.S.A. 1955, c. 74; Electrical Protection Act, R.S.A. 1955, c. 99; Liquor Control Act, S.A. 1958, c. 37; Livestock and Livestock Products Act, R.S.A. 1955, c. 181; Mortgage Brokers Regulations Act, S.A. 1964, c. 55; Real Estate Agent's Licensing Act, R.S.A., 1955, c. 279.
- British Columbia:** Beef Grading Act, R.S.B.C. 1960, c. 26; Closing-Out Sales Act, R.S.B.C. 1960, c. 59; (Commodities Minimum Loss Act, R.S.B.C., 1960, c. 64); (Consumer Protection Act, S.B.C. 1967, c. 14); Collection Agents Act, S.B.C., 1967, c. 10; Fruit, Vegetables and Honey Grades Act, R.S.B.C., 1960, c. 157; Government Liquor Act, R.S.B.C., 1960, c. 166; Motor Carriers Act, R.S.B.C. 1960, c. 252; Poultry and Poultry Products Act, R.S.B.C. 1960, c. 291; Real Estate Act, R.S.B.C., 1960, c. 330, S.B.C. 1961, c. 54.
- Manitoba:** Consumer Protection Act, R.S.M., 1970, c. C200; Dairy Act, R.S.M., 1970, c. D10; Fair Accommodation Practices Act, R.S.M., 1970, c. F20; Fruit and Vegetables Sales Act, R.S.M., 1970, c. F180; Liquor Control Act, R.S.M., 1970, c. L160; Livestock and Livestock Products Act, R.S.M., 1970, c. L170; Mortgage Brokers Registration Act, R.S.M., 1970, c. M210; Real Estate Brokers and Salesmen Act, R.S.M., 1970, c. R20; Securities Act, R.S.M., 1970, c. S50; Trade Practices Inquiry Act, R.S.M., 1970, c. T110.
- New Brunswick:** (Consumer Bureau Act, S.N.B., 1967, c. 5); Cost of Credit Disclosure Act, S.N.B., 1967, c. 6; Fair Accommodation Practices Act, S.N.B., 1959, c. 6; (Liquor Control Act, S.N.B. 1961-62, c. 3); Natural Products Grades Act, R.S.N.B. 1952, c. 157; Oleomargarine Act, R.S.N.B. 1952, c. 164; Real Estate Agents Licensing Act, S.N.B. 1960-61, c. 16.
- Newfoundland:** Food and Drug, R.S.Nfld. 1952, c. 56; Livestock and Meat Grading Act, 1953, No. 26 (to be proclaimed); Newfoundland Agricultural Marketing Act, R.S.Nfld., 1952, c. 193; Real Estate Trading Act, 1964, No. 48; Securities Act, R.S.Nfld., 1952, c. 139; Vegetable Grading Act, R.S.Nfld. 1952, c. 191.
- Nova Scotia:** Agriculture and Marketing Act, R.S.N.S., 1967, c. 3; Boarding Homes Act, R.S.N.S. 1967, c. 25; Collecting Agencies Act, R.S.N.S., 1967, c. 38; Consumer Protection Act, R.S.N.S., 1967, c. 53; (Consumer Service Bureau Act, S.N.S. 1968, c. 5); (Liquor Control Act, R.S.N.S. 1967, c. 169); (Margarine Act, R.S.N.S. 1967, c. 174); Mortgage Brokers and Lenders Registration Act, R.S.N.S. 1967, c. 189; Securities Act, R.S.N.S. 1967, c. 280.

APPENDIX C — Continued

- Ontario:* Department of Tourism and Information Act, S.O., 1966, c. 44; Consumer Protection, S.O., 1966, c. 23; Debt Collectors Act, R.S.O. 1960, c. 89; Deposits Regulation Act, S.O. 1962-63, c. 36; Farm Products and Sales Act, R.S.O. 1960, c. 136; (Liquor Control Act, R.S.O. 1960, c. 217); Livestock and Livestock Products Act, R.S.O., 1960, c. 219; Loan and Trust Corporations Act, R.S.O. 1960, c. 222; Investments Contracts Act, R.S.O. 1960 c. 194; Mortgage Brokers Registration Act, R.S.O., 1960, c. 244; Oleomargarine Act, R.S.O., 1960, c. 268; Ontario Deposit Insurance Corporation, S.O. 1967, cc. 61 and 62; Ontario Human Rights Code, 1961-62, c. 93; Real Estate and Business Brokers Act, R.S.O., 1960, c. 344; Theatres Act, R.S.O., 1960, c. 396; Used Car Dealers Act, S.O. 1964, c. 121.
- Prince Edward Island:* (Fair Disclosures of Cost of Credit Act, S.P.E.I., 1967, c. 16); Temperance Act, R.S.P.E.I., 1951, c. 159; Pedlars Act, R.S.P.E.I., 1951, c. 107; Poultry and Poultry Products Act, R.S.P.E.I., 1951, c. 116.
- Quebec:* Agricultural Products and Food Act, R.S.Q., 1964, c. 119; Liquor Board Act, R.S.Q., 1964, c. 44.
- Saskatchewan:* Closing-Out Sales Act, R.S.S. 1965, c. 175; Cost of Credit Disclosure Act, S.S. 1967, c. 85; Fair Accommodation Practices Act, R.S.S., 1965, c. 379; (Liquor Act, R.S.S. 1965, c. 382); Livestock and Livestock Products Act, R.S.S., 1965, c. 212; Theatres and Cinematographers Act, S.S., 1968, c. 76; Vegetable and Honey Sales Act, R.S.S., 1965, c. 245.

APPENDIX D

The Canadian Code of Advertising Standard, 1967

To be effective, advertising must rest on a base of public confidence; therefore, advertising practices should be directed to meriting and enhancing such confidence.

The following Standards for advertising in Canada have been approved in principle by all participating organizations. They may be revised from time to time on the recommendation of the Committee on Advertising Standards. These Standards apply to all advertising, regardless of the medium used, and to all components of an advertisement—verbal or visual. They should be conscientiously adhered to in letter and in spirit.

False or Misleading Advertising—No advertisement shall be prepared, or be knowingly accepted, which contains false, misleading, unwarranted or exaggerated claims—either directly or by implication. Advertisers and advertising agencies must be prepared to substantiate their claims.

Public Decency—No advertisement shall be prepared, or be knowingly accepted, which is vulgar, suggestive or, in any way, offensive to public decency.

Superstitions and Fears—No advertisement shall be prepared, or be knowingly accepted, which is calculated to exploit the superstitions, or to play on fears to mislead the consumer into the purchase of the advertised commodity or service.

Exploitation of Human Misery—No advertisement shall be prepared, or be knowingly accepted, which offers false hope in the form of a cure or relief for the mental or physically handicapped, either on a temporary or permanent basis.

Price Claims—No advertisement shall be prepared, or be knowingly accepted, which makes misleading or inaccurate presentations of actual and comparative prices.

Testimonials—No advertisement shall be prepared, or be knowingly accepted, which contains false or misleading testimonials, or which does not reflect the real choice of the person giving the testimonial. Advertisers and agencies must be prepared to produce evidence in support of the claims made in any testimonial advertisement.

Disparaging Claims—No advertisement shall be prepared, or knowingly accepted, which unfairly disparages products or services of other advertisers. Substantiation is always required where comparisons are made with competing products or services.

Professional or Scientific Claims—No advertisement shall be prepared, or be knowingly accepted, which distorts the true meaning of statements made by professionals or scientific authorities. Advertising claims should not be made to appear to have a scientific basis they do not truly possess. Scientific terms, technical quotations, etc., should be used in general advertising only with a full sense of responsibility to the lay public.

APPENDIX D — Continued

Guarantees—No advertisement shall be prepared, or be knowingly accepted, offering a guarantee or warranty, unless the guarantee or warranty is fully explained as to the name of the guarantor or warrantor, conditions and limits, or it is indicated where such information can be obtained.

Advertising to Children—No advertisement shall be prepared, or be knowingly accepted, which would result in damage—physical, mental or moral—to children.

Imitation—No advertisement shall be prepared, or be knowingly accepted, which deliberately imitates the copy, slogans, or illustrations of other advertisers and is apt to mislead the consumer.

Bait Advertising—No advertisement shall be prepared, or be knowingly accepted, which does not give the consumer a fair opportunity to purchase the goods or services advertised at the terms or prices represented.

SPECIAL NOTE: The foregoing Code embraces those areas in which it is possible to make an objective appraisal of advertising content. It avoids entry into the subjective area of taste, which is difficult to pinpoint, and in which personal judgment plays such an important part.

Nevertheless, the participating organizations agree to discourage wherever possible, the use of advertising of questionable taste, or which is deliberately irritating in its content, or method of presentation.

APPENDIX E

TABLE OF CASES

A

Allied Towers Merchants Limited, R. v.: Unreported, Magistrate's Court, Hamilton, Magistrate Marck, 5 June, 1964.

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 Eddie Black's Limited, R. v.: (1962) 38 C.P.R. 140.

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Featherweight Mattress, R. v.: Unreported, Magistrate's Court, Peterborough, Ontario, Magistrate Philp, 19 July, 1966.
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 F.T.C. v. Sterling Drug, 317 F.2d 669 (1963).
 F.T.C. v. Colgate-Palmolive et al. (1964) 380 U.S. 374.
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 Fleming, R. v.: 38 C.R. 188; 35 D.L.R. (2d) 483; (1962) 38 W.W.R. 513.
 Fredericton v. The Queen (1880) 3 S.C.R. 505.

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 General Motors v. F.T.C. 114 F.2d 33 (1940); *cert denied* 312 U.S. 682 (1941).
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