

THE REGULATION OF COMMERCIAL ADVERTISING IN CANADA

INTRODUCTORY NOTE—With certain modifications and updating, this article is based primarily on a Master of Laws thesis submitted to the University of Toronto in April, 1970. As of the time of the submission of this article for publication (May, 1972) the proposed federal *Competition Act* has not yet been enacted and consequently the section of the article dealing with false and misleading advertising will refer only to the existing law as contained in sections 36 and 37 of the *Combines Investigation Act*. A reading of Bill C-256 would indicate that these two sections will form the basis of those sections of the proposed Act dealing with commercial advertising (see sections 20-26 of Bill C-256).

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Advertising helps good things happen.

— ANONYMOUS.

The art of publicity is a black art; but it has come to stay, every year adds to its potency and to the finality of its judgment.

— JUDGE LEARNED HAND.¹

CHAPTER I INTRODUCTION

Advertising² is an inextricable part of our industrial society³. It is the means by which the myriad of goods and services produced in our economy are offered to potential customers⁴. Theoretically, advertising serves to inform the consumer of available products by stressing their utility, with the customer making a reasoned choice as to whether he will purchase or not. Of course, as with most theories, the ideal exists only on paper. Coupled with, and often clouding the informative factor of advertising, are varying degrees of exaggeration employed by advertisers to extol the virtues and uniqueness of their various wares. This hyperbole, or "puffing" has long been sanctioned by the courts, so long as the elongated statements were not found to be statements of fact. In short, "colouring" an advertisement has long been recognized as a legitimate means of conveying a commercial message.

Of greater import than exaggeration are the *motives* of advertising. Where for instance, production exceeds demands, advertising may change its character from informant to stimulant, preying on the subconscious and psychological fears or fancies of the consuming public. The growth of an enterprise may be predicated upon the introduction of new products at regular intervals⁵. Rather than creating in response to a need, the need itself may be created, in order to sell the product. Maintenance of a certain share of the market in the face of existing or incipient competitors may foster adherence to a product on the basis of "brand loyalty", rather than merit. Market and motivational research has become the tool of the advertiser in his quest for marketing the countless products which flow daily from our factories. Modern advertising, then is no longer rooted primarily in language, but in science. To be sure, words are still needed to convey the message. But psychology will teach *how* and *to whom*; and technology will provide alternate *means* to the printed word to deliver the message, and in a much more powerful manner⁶. Yet up to now, the consumer has been left almost totally to his own resources in deciding between an infinite variety of seemingly identical products. Whereas some years ago, a customer could rely on the opinion or judgment of the neighbourhood shopkeeper, the same no longer holds true. With the advent of mass communication and the supermarket, buying has become an impersonal operation. While the door-to-door salesman might have treated each customer as an individual, modern advertising looks not to the individual, but to the group at which the message is aimed, and from which the advertiser expects to make his greatest sales. Flooded by torrents of commercial messages more likely aimed at emotion and the subconscious rather than reason, the average consumer finds it increasingly difficult, if not impossible to make a rational choice of goods, with the result that brand-loyalty or impulse buying often dominates his purchasing habits.

Advertising regulations, as they exist in Canada, deal primarily with questions of exaggeration, truth, health and safety. This does not mean for example that all commercial hyperbole has become subject to interdiction, but only the more overt,—namely, those messages framed in such a manner as to mislead the consumer, as to price, quantity, quality, or the nature of the product. Quite expectedly, down-right lies in an advertisement will also be subject to similar sanction. Regulations also exist in regard to products touching the health and safety of individuals. Apart from these specific areas, few laws are aimed at commercial advertising. More specifically, little, if any, control exists over stimulant or "psychological" advertising, possibly because of the very subjective criteria required to determine whether an advertisement is basically informative or persuasive—is "good" or "bad". Aside from the "good taste" requirements of the Canadian Radio-Television Commission in regard

to television and radio advertisements⁷, an advertiser is free to employ virtually any method of presentation to promote his product, provided he does not breach the requirements of honesty, health and safety, mentioned above.

Because commercial advertising is an important factor in any industrial society, regulation poses an added problem. Will, for example, increased regulation designed to combat stimulant advertising result in lower economic production and thereafter, unemployment? Has Canada yet reached the stage where a high standard of living is contingent upon the increased production of goods, many of which are not necessary or consciously desired?⁸ A further difficulty in increased regulation is to justify such control within a democratic, free enterprise society⁹.

In light of these factors, the problem of the regulation of commercial advertising in Canada might best be solved by striking a balance between advertising's social utility; economic advancement; democratic ideals and consumer interest. If a single principle were to be enunciated, it would be that the consumer must be put on an equal footing with advertisers, allowing purchases to be based on rational, not emotional or subconsciously directed motives. At the moment, the average person stands at a distinct disadvantage *vis-a-vis* an advertiser armed with the latest data from motivational research. To correct this imbalance might well be the prime reason for increasing regulation over the more objectionable aspects of commercial advertising.

CHAPTER II

THE POSITION AT COMMON LAW

Puff: . . . 'twas I first enriched their style — 'twas I first taught them to crowd their advertisements with panegyric superlatives, each epithet rising above the other . . . From me they learned to inlay their phraseology with variegated chips of exotic metaphor: by me too, their inventive faculties were called forth: yes, sir, by me they were instructed to clothe ideal walls with gratuitous fruits — to insinuate obsequious rivulets into visionary groves . . .

This, sir is . . . the art of puffing . . .

R. B. SHERIDAN,
The Critic, Act I.¹⁰

In or around the year 1603, one Chandlor, a goldsmith, sold to one Mr. Lopus a stone which he affirmed to be bezar-stone (alleged to have therapeutic efficacy). As one might suspect, the item turned out not to be bezar-stone, and Lopus sued Chandlor¹¹. The plaintiff's action was dismissed, the Court holding that an action would not lie unless it were proved that the defendant warranted the item to be bezar-stone. Even if the defendant actually knew the product was not genuine, no action could

be maintained, since it was to be assumed that a vendor would extol his wares to the best of his ability. In the words of the court:

. . . for the bare affirmation that it was bezar-stone without warranting it to be so is no cause of action: and although he knew it to be no bezar-stone it is not material; for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action and the warranty ought to be made at the same time as the sale . . .¹²

With such early cases as *Chandler v. Lopus* the principles of *caveat emptor* and legal puffing became part of the common law. If a plaintiff were to succeed in an action for misrepresentation, it was necessary to show that the statement relied upon was a statement of fact, going beyond exaggeration or "puffing". "There are some kinds of talk which no sensible man takes seriously and if he does, he suffers from his credulity. If we were all scrupulously honest, it would not be so; but as it is, neither party usually believes what the seller says about his own opinions and each knows it."¹³ Thus in the early Nova Scotia case of *Young v. McMillan*¹⁴, the plaintiff purchased from the defendant one-half of a fishing boat and its gear for, \$105.00. The defendant informed the plaintiff that he had paid \$210.00 for the boat and gear, but subsequent to the close of the transaction, the plaintiff discovered that the true price paid was \$150.00. The plaintiff's action for return of the \$105.00 plus damages was dismissed, Meagher, J. stating that he was ". . . quite unconvinced that even if the defendant made the alleged statement in the terms claimed . . . it had not the remotest effect in inducing the purchase, nor in determining the price paid."¹⁵

Such cases as these represent the apex of *caveat emptor* philosophy. Fortunately for the public however, the trend of the common law was partially to erode this once sacred doctrine, placing greater responsibility on the advertiser for his statements and thereby according increased protection to the consumer. Thus, where a plaintiff could establish a contractual relationship with the advertiser, and could demonstrate reliance on the advertiser's statements, a civil suit might prove successful. In the famous case of *Carlill v. Carbolic Smoke Ball Co.*,¹⁶ the defendant advertised that it would pay one hundred pounds to anyone contracting influenza or any disease caused by taking cold, after using its product as directed. The advertisement also noted that one thousand pounds had been deposited with a certain bank to show the defendant's "sincerity in the matter". In holding in favour of the plaintiff—who had contracted influenza despite the use of the smoke ball as directed—the Court held the defendant's offer to constitute an offer in contract, which had been accepted by the plaintiff. The Court dismissed the defence that the words contained in the advertisement were "mere puffs", noting that the statement that one thousand pounds had been deposited to meet demands was evidence that the offer was intended to be taken seriously¹⁷.

In situations where no privity of contract existed, a party suffering injury or economic loss as a result of falsely-advertised products would be compelled to seek remedy in tort. Consequently, an action for deceit would lie if the defendant *knowingly* made a false statement on which the plaintiff acted¹⁸. Since *Donoghue v. Stevenson*¹⁹, it is clear that a person will be responsible for negligent acts or statements resulting in foreseeable physical injuries to a plaintiff, where *inter alia*, a duty of care *vis-à-vis* the plaintiff and defendant, is established²⁰. The extent of liability for negligence resulting in economic loss is however not clear, despite the decision in *Hedley Byrne v. Heller*²¹.

Because the majority of retail sales in Canada are promoted through mass media, and are conducted largely on an impersonal basis through supermarkets, department stores or other such retail outlets, the consumer relies not so much on the word of the vendor, as on the advertisement of the manufacturer. What recourse, then, has the consumer against the manufacturer for defective goods? It would appear that such an action must be grounded in one of:

- (a) contract, where privity can be established; or
- (b) deceit, where a manufacturer knowingly makes a false statement about his product; or
- (c) negligence, where duty of care, is established, and where the plaintiff proves a breach of the duty.

Finally, one further hurdle remains. It would be necessary to demonstrate that the statement upon which the plaintiff relied was not a, "mere puff", but a substantive part of the selling campaign designed to promote the sale of the goods or services.

The United States position has been to tighten the responsibilities which the manufacturer owes the consumer in promoting his products. Under section 2 of the Uniform Sales Act, advertising statements have been held to constitute express warranties, the breach of which gives rise to a right of action by a party purchasing the products on the strength of the advertisement²². A manufacturer's liability for his products was demonstrated in *Rogers v. Toni Home Permanent Co.*,²³ where the plaintiff purchased a home permanent set advertised by the defendant corporation to be safe for personal use. In fact, the products in the set proved to be deleterious and harmful, and caused injuries to the plaintiff, despite their use as directed. Finding for the plaintiff, the Court held that an express warranty arises where there is an affirmation of facts by the seller as to a product or commodity to induce a purchase thereof, with the buyer relying on such statements in making the purchase²⁴. Commenting on modern marketing techniques, the Court accurately noted:

Occasions may arise when it is fitting and wholesome to disregard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization. Today, many manufacturers of merchandise, including the defendant herein, make extensive use of newspapers, period-

icals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to the ultimate consumers are but conduits or outlets through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds, no good or valid reason exists for denying him that right. Surely under modern merchandising practices, the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representation and later suffers injury because the product proves to be defective or deleterious.²⁵

United States jurisprudence has worked toward a more stringent test for commercial, "puffing",²⁶ with a manufacturer basically being accountable for all but the most innocuous statements.²⁷ The test would appear to be especially stringent where the plaintiff suffers some physical harm in using a manufacturer's products which have been advertised as safe.²⁸ Under the *English Sale of Goods Act of 1893*, the equivalent of which is in force in the common law provinces of Canada, a purchaser of goods is restricted to an action for breach of warranty or condition against the vendor of defective goods. Yet in most instances, the vendor acts merely as a conduit for the manufacturer's products, having no control whatsoever over their quality, reliability, effectiveness or safety. As discussed above, the plaintiff in Canada must rely on the common law remedies of contract, deceit or negligence to ground an action against the manufacturer for goods which do not live up to their advertised merits.²⁹

Recently the Province of Manitoba has attempted to place greater responsibility on all advertisers through an amendment to its *Consumer Protection Act*.^{29(a)} Dubbed the "honesty clause", the amended section 58(8)^{29(b)} of the Act could make advertisements a part of the warranty for goods and services, enabling an aggrieved consumer to commence a legal action against the advertiser should goods or services not live up to their advertised claims.

From a practical perspective however, common law remedies (and probably statutory remedies such as the "honesty clause") are not satisfactory to protect the consumer from misleading advertising. For generally, the expenses of launching a civil action will be out of all proportion to the damages sustained, except where extensive physical injuries are suffered,³⁰ or sizeable monetary damages are incurred. A housewife might feel cheated if a less expensive brand of detergent does not have the cleaning power of more expensive products—as advertised—, but is un-

likely to commence a civil action against the manufacturer.³¹ The only redress would be to cease using the product, and perhaps to tell others of its ineffectiveness; actions which would cause hardly a ripple in an ocean of national sales.³²

With a view to changing marketing techniques from personal to impersonal—mass retailing, the United States recognized early the need for governmental control over the more abusive advertising practices. In 1914, the Federal Trade Commission was established and given the broad mandate of dealing with “. . . unfair methods of competition”.³³ Until recently (with the establishment of the federal Department of Consumer and Corporate Affairs in 1967), Canada has not had a “consumer watchdog” equivalent to the F.T.C. Protection against misleading advertising practices had emanated primarily from the federal criminal law power³⁴ through the *Criminal Code*, the *Food and Drugs Act* and more recently the *Combines Investigation Act*. These statutes, largely administered by the Department of Consumer and Corporate Affairs, still form the basis of federal regulation over advertising. What has been altered however, is the effectiveness of federal control. Consumer protection being one of its primary responsibilities, the Department has been able to devote a sizeable portion of its budget and personnel to the regulation of misleading advertising, something which the federal Department of Justice had been unable to do. In short, specialization and expertise have been the keys to increased consumer protection against the vagaries of commercial advertising.

CHAPTER III

THE CONSTITUTIONAL FACTORS

The Federal Government of Canada, unlike its United States counterpart, has been deprived a civil base for the regulation of advertising. Due largely to a series of Privy Council decisions,³⁵ the federal Trade and Commerce power under section 91(2) of the British North America Act has been stripped of its potency in favour of increased provincial jurisdiction over the elements of commerce. While the scope of this work will not allow an extended discussion of the federal trade and commerce power, it might be said generally, that the federal role is limited to undertakings of an international or interprovincial nature;³⁶ and that control cannot be exercised over a particular trade.³⁷ Consequently, Parliament has been forced to resort to the criminal law power to regulate areas which otherwise would have been regulated on a civil law basis. Thus the *Combines Investigation Act*³⁸ has been upheld primarily as valid legislation in relation to criminal law,³⁹ while the *Food and Drugs Act*⁴⁰ has been declared *intra vires* under the same head of power.⁴¹ Al-

though no court has yet adjudicated on the point, such federal statutes as the *Proprietary and Patent Medicine Act*,⁴² the *Meat and Canned Foods Act*⁴³ and the new *Hazardous Products Act*⁴⁴—all statutes regulating certain aspects of advertising—could be justified under various heads of federal power (primarily the criminal law power), as could other statutes such as the *Weights and Measures Act*⁴⁵ or the *National Trade Mark and True Labelling Act*^{46, 47}. Finally, the federal government possesses jurisdiction over broadcasting,⁴⁸ giving it virtually exclusive control over all radio and television advertisements.⁴⁹

To summarize, the federal government regulates commercial advertising on the basis of its jurisdiction in three main areas, namely: (a) criminal law, (b) broadcasting and (c) patents and copyrights, including trade marks. Of these, the former two are the basis for federal legislation in relation to advertising and consumer protection, with the latter concerned primarily with relations between business competitors. The emasculation of the trade and commerce power has precluded federal regulation of commercial advertising via the civil law, as in the United States. The ramifications of this situation will be discussed in Chapter IV.

CHAPTER IV

THE DEPARTMENT OF CONSUMER AND CORPORATE AFFAIRS: THE COMBINES INVESTIGATION ACT

A. *Structure*

The federal Department of Consumer and Corporate Affairs was created by the Pearson government in 1967 and since then has become the major government presence in the area of consumer protection. The Department has three broad functional divisions, (a) the Bureau of Consumer Affairs; (b) Office of the Director of Investigation and Research under the *Combines Investigation Act* and (c) the corporate section. Of these sections, divisions (a) and (b) are those concerned directly with consumer protection in regard to advertising, while the corporate division is charged with administering the *Canada Corporations Act*,⁵⁰ the *Bankruptcy Act*,⁵¹ the *Patent Act*,⁵² *Trade Marks Act*,⁵³ *Copyright Act*⁵⁴ and certain other related statutes. This latter section of the Department is not therefore directly involved in consumer protection, except as might it arise out of the administration of the above Acts.⁵⁵

The Bureau of Consumer Affairs is concerned primarily with packaging and labelling, standards relating to consumer products and the protection of the consumer against physical hazard.⁵⁶ Its field of admin-

istration includes, *inter alia*, the *Hazardous Products Act*, certain portions of the *Food and Drugs Act*—including the labelling, packaging and marketing of food, drugs and cosmetics⁵⁷—and the *Weights and Measures Act*. The division also conducts a consumer information service, through the use of Box 99, Ottawa, where consumers may register complaints relating to product performance or misleading advertising. The Office of the Director of Investigation and Research under the *Combines Investigation Act* is responsible for administering all aspects of the statute, including secs. 36 and 37—false and misleading advertising.

B. *The Policy of the Department*

In an earlier address, a former Minister of Consumer and Corporate Affairs, Mr. Ron Basford noted: “. . . the age of consumerism is upon us . . . the concept of *caveat emptor* must be laid to rest and . . . our department has been created to represent the consumer in the councils of governments.”⁵⁸ With the demise of *caveat emptor* philosophy, a new rule—“let the seller take care”⁵⁹—has become the key to transactions in the marketplace, reflecting government awareness of the need to accord the consumer protection from unfair methods of competition. Fraudulent and misleading advertising is to be interdicted on the grounds, that it is both socially reprehensible and criminal in nature.⁶⁰ Further, Department policy appears aimed at reducing the advantage held by advertisers over consumers. In the words of the then Minister:

The basic problem is that the consumer needs more factual information about the products he buys — about their price, contents, merit and quality. Only when the consumer has knowledge in a readily comprehensible form at the point where he makes his purchase, will he be in a position to make rational decisions.⁶¹

In essence then, the Department is concerned with three aspects of commercial advertising. False, misleading and deceptive advertising is the first with breaches being subject to criminal prosecution under the, *Combines Investigation Act*, the *Food and Drugs Act* and other relevant federal statutes. The second aspect is full and complete disclosure by manufacturers of all relevant data concerning a product, such as weight, price and contents, thereby allowing the consumer to make a rational choice. Third, certain articles dangerous to health and safety are prohibited from being sold, or advertised.⁶² However, the Department does not see its role as obviating the necessity for individual consumer vigilance, nor does it seek to become the consumer's, “Big Brother”. The Director of Investigation and Research under the *Combines Investigation Act* has commented that Department objectives are intended to help the consumer to be a better consumer rather than to do all his thinking for him and has stated:

It would be a mistake for the Department to be over-protective. The Consumer is assumed to be able to decide what he wants for himself and within reasonable limits to exercise his choices effectively and intelligently. Where there are impediments to his doing so, however, the government must assist him.⁶³

In seeking to assist the consumer in combatting the perils of the market place, the Department has outlined six policy objectives:

- (a) protection against fraud and deception;
- (b) protection against accident and health hazards;
- (c) to ensure that the market system is kept competitive;
- (d) to assist the consumer by all reasonable means to make valid choices and judge true prices on the basis of accurate, honest and intelligible information;
- (e) to provide means for receiving and answering consumer complaints and,
- (f) to represent the consumer in the deliberations of government.⁶⁴

The degree of government regulation in relation to these objectives will depend, ultimately, on the measures taken by the business community itself in correcting market abuses. Mr. Basford had commented that "It is not the intention of [his] department to immerse manufacturers and retailers in a mass of red tape and regulations, but someone has, to, 'take care'—and if the market won't—then government will have to."⁶⁵ The onus, then, is on the business community to "Put its house in order" in rectifying abuses, should it wish to be spared government regulation. The efficacy of self-regulation as a means of curing the ills of commercial advertising will be discussed in greater detail further in this work.⁶⁶

C. *Enforcement Procedure*

(a) *By the Combines Branch of the Department of Consumer and Corporate Affairs.*

We have noted that the Combines Branch of the Department of Consumer and Corporate Affairs is responsible for the administration of the *Combines Investigation Act*, including section 36 (misleading advertising as to price) and section 37 (false, deceptive or misleading advertising of any other nature, designed to promote the sale of a product). It should be noted at the outset, however, that the Combines Branch has no direct power of enforcement, only investigation. If the Branch deems there to be sufficient evidence of an offence under one of the sections, it will recommend that the Federal Department of Justice commence prosecution, pursuant to section 15 of the *Combines Investigation Act*. In short, the role of the Branch is to investigate and research, with no right of prosecution.

Under the Act, there exist certain methods by which an inquiry into alleged misrepresentative advertising may be launched by the

Director. Under section 8 he is empowered to launch an investigation of his own volition or where so directed by the Minister of Consumer and Corporate Affairs. This is a statutory duty and is therefore mandatory. Although the majority of investigations are launched on the initiative of the Director, section 7 of the Act provides that any six persons can compel the Director to begin an inquiry where they suspect an offence under Part V has been, or is about to be committed. Again, by the terms of section 8(a), he must begin an inquiry when petitioned by six (or more) individuals.

The current Director of Investigation and Research has noted several methods by which information is obtained to commence an investigation.⁶⁷ Scrutiny of newspaper advertisements has, according to the Director, accounted for approximately 50% of all prosecutions under section 36.⁶⁸ Similarly, the division checks advertisements on both radio and television to detect misleading advertisements. Letters addressed to the Director's office; to the Minister of Consumer and Corporate Affairs; or mailed to Box 99 may prompt an investigation, as may an ordinary telephone call to the Department. Complaints from the Department's several regional offices⁶⁹ are forwarded to the Director's office and may form the basis of an investigation. A liaison is maintained with the various provincial governments and the Royal Canadian Mounted Police to detect possible breaches of the sections throughout the country. Finally, the division maintains contact with the Canadian Radio-Television Commission in considering particular advertisements which might offend the section, if aired on radio or television.

According to the Director, the question of whether an inquiry will be commenced is ultimately contingent on two factors.⁷⁰ First, there must be reasonable grounds to believe that an offence is being committed or is about to be committed. Second, the Department must be able to make the resources available to investigate the alleged offence.

When a decision has been made to launch an investigation, Department personnel will be assigned to gather information relating to the matter. This might include direct contact with the advertiser, for example through the purchase of the advertised goods, as a means of obtaining evidence for eventual prosecution. If an investigation produces sufficient evidence, all information will be turned over to the Department of Justice for prosecution.

The *Combines Investigation Act* being a criminal statute, no warning, without prosecution, can be given an advertiser who has breached sections 36 or 37. The Director has stated that he is not at liberty to issue such warning, or to suggest changes in an advertisement so that it would no longer be in violation of the statute.⁷¹ Thus either an

offence has been committed or it has not, with no intermediate area possible between conviction or acquittal. However, prior to the publication of an advertisement, an advertiser or advertising agency, may consult with the Director's office concerning a proposed advertisement. Through this, "programme of compliance",⁷² an advertiser (or his agency) is able to gauge government reaction to a "borderline" advertisement which might be in breach of the Act, if published. Preclearance being a totally voluntary procedure, the advertiser is not committed to change his advertising programme if so suggested by the Department. Further, the Department is not bound by any decisions of approval it has given to an advertising campaign. In terms of practicality however, it would probably be rare for the Department to change its position toward an advertisement where informal approval has been given unless, of course, the advertiser has appreciably altered his programme in the interim.⁷³

In certain respects, the Department of Consumer Affairs is patterned on the Federal Trade Commission of the United States Federal Government. Like its American counterpart, the Department is comprised of a body of "specialists", in the field of consumer protection. It was due to the expert nature of the Combines Branch that section 36 was made part of the *Combines Investigation Act* rather than the Criminal Code. Similarly, after lying virtually dormant in the Code, section 306 was transferred to the *Combines Investigation Act* as section 37.⁷⁴ Lacking the expertise in regard to misleading advertising, and dealing with criminal matters deemed to be of greater importance than consumer protection, the Attorney-General Departments of the provinces proved to be an unsuitable vehicle for handling the somewhat specialized field of consumer protection. As we have seen, it is now the Federal Department of Justice which alone handles prosecutions under the *Combines Investigation Act*, and only after recommendation by one of the divisions of the Department of Consumer and Corporate Affairs.⁷⁵

Yet despite certain similarities of structure and operations, a basic difference exists between the Department of Consumer and Corporate Affairs and the Federal Trade Commission (F.T.C.). The former has a criminal law base, while the latter is an outgrowth of the interstate commerce powers of the United States Federal Government. It has been pointed out that under Canadian law, either an offence has been committed or not. There is no in-between area, with voluntary pre-clearance being the only mitigating factor. However the F.T.C., because of its civil law base, is more flexible in dealing with cases of misleading advertising. In practice, it may choose from three alternatives. First, it may handle a case on an informal basis where it is satisfied that the violation found will be discontinued and is not significant enough to require formal action.

The advantage of this alternative over the Canadian position is that less serious offences are stopped with a minimum of time and expense, thereby giving the consumer protection as well as minimizing costs. In Canada, a trivial offence would either be tolerated (because of the expense of prosecution) in which case the consumer would still be exposed to the misrepresentation; or would be prosecuted, which involves time and expense. Second, a guilty party might agree to a consent order, in which case no hearing is held. The nearest equivalent to this practice under our law would be a guilty plea in court. Third, all other cases before the F.T.C. are disposed of at formal hearings resulting in either a dismissal or a cease and desist order. The cease and desist order is an administrative directive whose closest counterpart in Canada would be an order of prohibition under sec. 30 of the *Combines Investigation Act*. The latter however, is not an administrative but a formal court order, obtainable only upon the completion of criminal proceedings launched under the *Act*. The powers of the F.T.C. are confined, therefore to identifying violations and issuing cease and desist orders—the only penalty the Commission is empowered to levy.⁷⁶ The Justice Department is responsible for prosecuting violations of cease and desist orders.⁷⁷

In its *Interim Report*, (1969) the Economic Council of Canada recommends the establishment of a new, civil law tribunal, called the Competitive Practices Tribunal, to deal with certain selected aspects of trade practices.⁷⁸ While the Council recommends that advertising as an anti-competitive factor should be within the jurisdiction of the tribunal,⁷⁹ it does not deem it necessary to bring sections 36 and 37 within the ambit of the new body. Rather, it suggests that these sections remain part of the criminal law.⁸⁰ In light of the limitations imposed by the criminal law, and considering the practice of the F.T.C., it is unfortunate that the Council did not see fit to propose alternatives to the existing situation which, in this writer's opinion leaves much to be desired.⁸¹

(b) *Other areas of Enforcement by the Department of Consumer and Corporate Affairs: Overlapping:*

We have noted that the Bureau of Consumer Affairs is concerned *inter alia* with enforcing certain aspects of the *Food and Drug Act and Regulations*;⁸² the *Hazardous Products Act*; those statutes dealing with standards of weights and measures, etc.; and for administering, Box 99, Ottawa. Like the Combines Branch, the Bureau conducts investigations of breaches of statutes within its jurisdiction, with the actual prosecution being done by the federal Department of Justice. However, a certain amount of overlapping exists between the Bureau and Combines Branch. As noted, many of the complaints received through Box 99— those complaints dealing with misleading advertising—are forwarded to the Com-

bines Branch for investigation. The *Food and Drugs Act and Regulations* is especially subject to such overlapping of jurisdictions. Section 5 of that Act, provides in part:

5(1) No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

It would appear therefore that a prosecution in regard to the misleading advertising of food, drugs or cosmetics could be launched under either the *Combines Investigation Act* or the *Food and Drugs Act and Regulations*. The overlapping might well be of more than academic interest. First the *Food and Drugs Act and Regulations* does not provide for prohibition orders as does the *Combines Investigation Act*. Second, the former Act specifically provides for a 12 month limitation period on summary conviction proceedings, (sec. 26) while a 6 month period applies to prosecutions under section 36 of the *Combines Act*. Depending on the circumstances of the particular case therefore, it might well become of some importance under which act a prosecution is brought.

D. *Offences relating to advertising under the Combines Investigation Act:*

(a) *Section 36 (formerly section 33C)*

As discussed above, the administration of the *Combines Investigation Act* is carried out by the Department of Consumer and Corporate Affairs through the Office of the Director of Investigation and Research. One of the two sections of the Act directly concerned with the question of advertising is section 36, which became part of the *Combines Investigation Act* in 1960, when all of Part V was repealed and re-enacted.⁸³ Section 36 reads as follows:

36(1) Every one who, for the purposes of promoting the sale or use of an article, makes any materially misleading representation to the public by any means whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence punishable on summary conviction.

(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.

In essence, section 36 is aimed at misleading advertising as to the price of an article, and has no scope beyond a misrepresentation as to price. Thus, misrepresentation as to the origin of a product, quantity, quality or function, will not be caught by this section of the Act, unless such an advertisement also contains a false statement as to price. As will be discussed subsequently, it is section 37 of the *Combines Investigation Act* which is aimed at deception in factors other than price. Further,

section 36 is limited to representation as to the prices of goods with services falling outside its purview.⁸⁴

(i) *Elements of an offence*

Being a criminal offence, proof beyond a reasonable doubt of all elements is necessary to obtain a conviction. The section would appear to have four constituent elements, namely:

- (a) There must be a *representation* concerning the price at which articles have been, are, or will be *ordinarily* sold;
- (b) The representation must be *misleading* in a *material* respect;
- (c) The representation must be made for the purpose of promoting the sale or use of an *article* (not a service);⁸⁵
- (d) The representation must be made to the *public*.⁸⁶

Because section 36 creates a summary conviction offence, a charge must be laid within six months from the time the offence was committed.⁸⁷ As well, the maximum fine payable on conviction is \$500.00 for an individual and \$1,000.00 for a corporation with the maximum term of imprisonment being 6 months.⁸⁸ Under section 30 of the *Combines Investigation Act*, a prohibition order may be issued against the misleading advertisement.

The first trial under section 36 took place in 1962, and as of 1970, approximately 40 prosecutions have been launched under the section. Of these cases, the vast majority have resulted in convictions. Our courts therefore have shown a willingness to convict under the section,⁸⁹ and through their decisions have, as well, clarified certain aspects of the section, thereby creating a jurisprudence for misleading price advertising. A difficulty which originally confronted the courts was the lack of precedent on which to ground decisions. Although precedent did exist in United States cases involving the Federal Trade Commission, our Courts have chosen not to look to these decisions, possibly because the American position is based on civil law, while the *Combines Investigation Act* is a criminal statute. However, since 1962, principles have developed in regard to the interpretation of section 36, and the scope of the section. It is to these cases that we shall now turn.

(ii) *Mens Rea*

It has now been established that section 36 creates an offence of strict liability and that *mens rea* as an ingredient of the offence need not be proved.⁹⁰ During the course of his judgment in *R. v. Allied Tower's*, Mr. Justice Jessup of the Ontario Supreme Court, noted:

There is nothing in the express language of section 33C(1) disclosing any intention that *mens rea*, in the sense that the materially misleading representation made must be known to be such by the accused, is not an essential ingredient to the offence. But in my opinion, such an intention is derived by necessary implication from subsection 2. . . . in my opinion the Legislature intended that the maker of a materially misleading representation should take the risk and that the public should be protected irrespective of the guilt or innocence of the maker subject to the exception provided by subsection 2.⁹¹

In the *Allied Tower case*, the accused company had run an advertisement in a Toronto daily newspaper in regard to the sale of cameras. The sale price advertised was \$59.00, but next to this figure was the phrase, "Compare at \$154.90". Although the Crown had proved that the cameras on sale had never sold in the area for \$154.90, the court of first instance⁹² dismissed the charge on the ground that the Crown had not proved a deliberate attempt to mislead the public. In allowing the Crown's appeal, Mr. Justice Jessup indicated that one of his reasons for finding (then) section 33C to constitute an absolute offence is that it is summary conviction and not indictable.⁹³

The *Allied Tower* decision cleared away the main obstacle in successfully enforcing section 36.⁹⁴ Once the Crown has proved the necessary elements of the offence, a conviction will result, regardless of whether or not the accused intended to deceive, or was merely negligent in his advertising campaign. With *mens rea* not being a vital ingredient, a higher duty is thus placed on advertisers to ensure that the consumer is actually obtaining the saving depicted in the comparative price advertisement.⁹⁵

(iii) *Price at which article is ordinarily sold:*

We have noted⁹⁶ that one of the elements of section 36 is that a misrepresentation must be made as to the price at which an article is ordinarily sold. From this requirement, two questions are raised. First, what determines the ordinary selling price of goods? Second, what area is encompassed when fixing the ordinary or regular selling price? Regarding the first factor, it is apparent that any particular item can be sold at differing prices by various merchants. As well, an article may have attached to it a suggested retail price as determined by the manufacturer. The problem is to determine which price might be used as a basis for comparison when promoting the sale of an item at a reduced price. Flowing directly from this problem is the question of trade areas. There exists no "standard price" for the entire country with various considerations such as transportation costs or sales volumes, often dictating the price at which a particular item is sold in various parts of Canada. Also, economic factors, or simply customary marketing techniques will result in varied prices within a province or even city. Each of these segments, from the national to the city, is a potential trade area for the

purposes of section 36. The question therefore becomes: where must an advertiser look in determining the ordinary selling price of an article and further, how far must he look?

— *Ordinary selling price*

In *R. v. Becker*,⁹⁷ the accused published an advertisement in a Niagara Falls newspaper. The advertisement included a reproduction of a television set and contained the following wording:⁹⁸

Twin Speakers
23" Console
Only
\$196.00
Save over \$100.00

At trial, the Crown established that the average selling price for the advertised television among the merchants of the City of Niagara Falls ranged from a low of \$224.95 to a high of \$269.95. It was further established that the manufacturer's suggested list price for that particular model was \$319.95. However, it was proved that no dealer in Niagara Falls had ever sold the television at the list price, with the highest price charged being \$269.95. In acquitting the accused, Magistrate Roberts stated that in his opinion ". . . the words complained of in this advertisement are capable of more than one interpretation and are by no means an unequivocal statement, by the accused, that a purchase from him of the television model depicted in his advertisement, at a price of \$196.00 would amount to a saving of over \$100.00 when compared with the retail price charged by any other dealer in the City of Niagara Falls for the same model". The decision suggests that if the suggested list price is used as a basis for comparison, an advertisement will not transgress section 36, even if a sale has never been made at the manufacturer's price. The case was decided prior to the *Allied Tower* decision on *mens rea*.

A second case involving Allied Towers was also concerned with the question of list price.⁹⁹ Here, the accused advertised movie cameras, projectors and film by specifically using the word "List Price" in its advertisement. The sale prices of the goods were of course below the list price. Once again, it was established that various dealers in the City of Hamilton had never sold the articles in question at the suggested price, but the accused was nevertheless acquitted. Two factors appear to have influenced Judge Sweet in the trial *de novo*. The first was the suggested price itself, which the Judge deemed to be a fair and reasonable one and thus to bear a ". . . significant relationship to retail price." Second, the Judge felt that the term, "list price" was not unfamiliar to retail

buyers in general and noted: ". . . I do not think it can reasonably be inferred that potential buyers in general do not know that a retailer sometimes sells below that (list) price."

Rulings subsequent to the above cases have however, adopted a more stringent test in dealing with the manufacturer's list price. In *Regina v. Miller's T.V. Ltd.*¹⁰⁰ the defence that the ordinary reading public would interpret the phrase, "compare at" to mean manufacturer's list price or manufacturer's suggested retail price was rejected, when the ordinary selling price was proved not to be this list price. Where competitors within the trade area sell their products at varied prices, the *average* will be taken to determine the regular price. This practice was noted in the *Miller case*.

It is clear that a vendor cannot use such embellishing words in his promotion as, "Regular" or "Compare at", when in fact the price referred to is not the ordinary selling price. In the *Miller case* the use of the phrase "Compare at" was held to give a false impression regarding the usual selling price of television sets in the Winnipeg region. An advertisement employing the words "Regular price \$——" was also deemed misleading, and the accused convicted, when it was demonstrated that at the time of the advertisement the goods in question were not being sold at the alleged price.¹⁰¹ Similarly, in *Regina v. G. McGrath & S. O. Smith*,¹⁰² a conviction resulted where an advertisement contained the words, "Retail Price \$8.50", when in fact, the figure quoted was higher than the area price. Further it would appear appropriate, for a vendor to advertise a reduction of *his own* regular price (if this price differed from the ordinary selling price in the area), if the advertisement made it clear that the price was peculiarly his own. Thus, the use of "Our Regular Price \$——" would seem in order. However, it is suggested that the use of such wording implies compliance with one of two conditions. First, it would be necessary for a substantial number of "bona fide sales" to have been made at the advertised price before it can be called a regular price.¹⁰³ Alternatively, if there has been no actual sale, the quoted price must have been the true asking price over some considerable length of time. In short, a vendor cannot willfully set an inflated price with the object of lowering it a short time later in a sales promotion.

Even if express words of comparison, such as "Compare with" or "Regular", are not utilized in an advertisement, the general wording, or get up of the advertisement could suggest a saving which is not true. Thus in *The Queen v. Carmen Jewellery Mfg. Co. Inc.*,¹⁰⁴ two ball-point pens, a pair of cuff-links and a tie-pin were sold together as a set. On the box was a label bearing the inscription: "Waterman's \$25.00", but the sets were in fact being sold for \$4.50 each. The wholesaler had obtained the sets at a price of \$1.35 and had sold them to the retailer for

\$1.50 per set. One store in Quebec City was offering identical sets for sale at \$3.49, while another sold them for \$4.95. Although no precise words of value or comparison were used, the term "Waterman's \$25.00", was obviously intended to convey the impression that the goods were valued at, or had sold for, \$25.00. Here, both the wholesaler (who affixed the Watermans tag to the sets) and the vendor were convicted of violating (then) section 33C (now section 36).

Further, where a retailer tagged toy cars with a ticket reading "wholesale \$26.65; retail \$39.95" the court held that, "The only purpose of the tag, as far as the public who came into the store off the street is concerned, is to have them believe that what would normally cost \$39.95 in a so-called retail store, they were going to get here for \$26.65 which is what it was sold for to anyone who came in there". The accused was therefore convicted.¹⁰⁵

The *Carmen Jewellery* case is a form of "pre-ticketing", although there, the technique used was somewhat more subtle than is customary. "Pre-ticketing" involves the attachment to goods by the manufacturer of a tag indicating the selling price of the articles. In a sense, this practice resembles that of a manufacturer supplying a suggested retail price, although very often, the price is known only to the retailer. However in preticketing, a tag is deliberately affixed to a product, with the express object of catching the customer's attention. That this merchandising technique can lead to manufacturer-retailer collusion was shown in the twin cases of *Regina v. Mountain Furniture Company Limited*; *Regina v. Featherweight Mattresses Limited*.¹⁰⁶ The court found as a fact in the case against Featherweight Mattress Limited ". . . that the accused company would, at the request of the retailer (Mountain Furniture Company Limited), ticket his order with such a price as the retailer might desire or indicate, and that the accused company was not interested or concerned with either the pre-ticketed price, or with the price that the retailer might sell to the public". Since the pre-ticketed price was not the ordinary selling price for the Ottawa area, both the manufacturer and retailer were convicted for misleading the public into believing it was getting a better buy than was actually the case. Although the court found certain instances when the pre-ticketing had been done in error by the manufacturer, negligence was not deemed to be a defence to the charge.

Misrepresentation by inuendo is demonstrated by three cases dealing with toilet articles. These decisions are of some import, because it is precisely the language used in the advertisements which the consumer faces daily in supermarkets, drugstores or other retail outlets. In the first of the trilogy, *R. v. Colgate-Palmolive Limited*,¹⁰⁷ the accused marketed the 13 1/8 fluid oz. size (called the Economy Size) of Halo Shampoo in a bottle, to which was attached a label, reading: "Special, \$1.49". It was

established in evidence that invariably the Economy Size of Halo Shampoo was placed beside three other smaller bottles of the same product, the price and fluid ounce content of which were less than the Economy Size bottle. It was also adduced in evidence that the sale price of the Economy Size Halo Shampoo in the Ottawa area, ranged from 99¢ to a maximum of \$1.49. Nowhere was the product selling for a price greater than \$1.49.

At the trial *de novo*, Matheson, C. Co. J. applied the following test in determining whether or not the "Special \$1.49" label was misleading.

- (a) Would a reasonable shopper draw the conclusion from the diagonal red band with the words and numbers "Special \$1.49", that he was being offered Economy Size Halo Shampoo at a price below which that size bottle is ordinarily sold?
- (b) If the answer is "yes", would such a representation be true?¹⁰⁸

The Judge concluded that ". . . a reasonable shopper upon reading the words and numbers, 'Special \$1.49' upon the diagonal red band might very well conclude that he was being offered Economy Size Halo Shampoo at a price below which it is ordinarily sold".¹⁰⁹ In light of the selling pattern of the product in the Ottawa region, such a representation could not be true and the company was convicted. The argument that a shopper must be assumed to interpret the Economy Size label, "Special \$1.49" only after an examination of the three smaller bottles of Halo Shampoo which were displayed beside the Economy size bottles, was rejected, Judge Matheson holding that such a requirement ". . . would diminish very considerably the independent meaning to be accorded the labelling of a product offered for sale. The effect of such a conclusion would impose surely, upon the purchaser a burden to compare not contemplated within the wording of (then) section 33C(1)".¹¹⁰ Thus, even though the cost per ounce of the Economy size bottle was less than that for the identical product marketed in smaller bottles, the better "value" to the customer in purchasing the Economy Size was no defence. Further, it was not incumbent on the customer to mathematically calculate the cost per ounce of the various sizes of Halo Shampoo, before making a purchase.

A similar fact situation to the *Halo case* was encountered in *Regina v. Thomas Sales Agencies (1963) Ltd.*¹¹¹ Here the accused Corporation marketed the 20-ounce size of Breck Shampoo in a bottle to which was affixed a label reading:

\$3.00 Value — Special Price \$1.99

The accused agreed that the 20-ounce bottle had sold at the price of \$1.99 for a period of four of five years.

In determining what was meant by the term \$3.00 value, Matheson, Co.Ct.J. adopted the reasoning of Lord MacLaren in *Lord Advocate v. Earl of Home*¹¹²

Now, the word 'value' may have different meanings, like many other words in common use, according as it is used in pure literature or in conversation. But I think that 'value' when it occurs in a contract has a perfectly definite and known meaning unless there be something in the contract itself to suggest a meaning different from the ordinary meaning. It means exchangeable value — the price which the subject will bring when exposed to the test of competition.

Obviously, the 20-ounce bottle of Breck Shampoo could not be sold for \$3.00, since time and marketing practice had fixed its 'value' at \$1.99. Since the ordinary price of the product was therefore \$1.99, such a figure could not be colored with the terms "Special Price", since the added words would prompt the ordinary consumer to believe he was obtaining a one-third discount. Consequently, the Crown appeal was allowed at the trial *de novo* and a conviction registered against the accused Corporation.

During the course of the trial *de novo*, the court, as in the Halo case, was asked by defence counsel to consider certain marketing techniques for the product. Here it was requested to examine "... the marketing statistics of the product; to consider the average retail price of Breck Shampoo as sold in containers of all sizes and, generally, to exercise ingenuity in interpreting the words, "Special" and "Value" so beneficently as to safeguard industry against the austere provisions enacted by Parliament".¹¹³ The court rejected the supplications on behalf of the accused.

The final case in this series is, *R. v. The Andrew Jergens Company Limited*.¹¹⁴ Once again, the product in question was shampoo with the label on the 13.5-ounce bottle reading,

Special \$1.19 — Regular \$1.79

As might be expected, the product was not selling in the Ottawa area for \$1.79 nor was there any evidence that it had ever sold for such a sum. Indeed, the store where the shampoo had been purchased by the investigating officer of the Combines Branch, was selling it for 86¢! Unlike the *Colgate* and *Breck* cases, the accused corporation here entered a guilty plea.¹¹⁵

* * *

Another marketing device which has plagued the consumer is the "cents — off" practice.¹¹⁶ As the name suggests, "cents — off" implies that a product is being offered at a special price below that for which it is normally sold. The problem of course is that the base price is invariably unknown save by the most prudent shopper. It would appear equally difficult to police misleading "cents — off" promotions due to fluctuations

in the true selling price of a product.¹¹⁷ For such a scheme to be adequately controlled, detailed records would need be kept and countless on-the-spot checks made to determine the actual base price and any misleading promotions in relation thereto. It would seem that the most likely area of control would be where the "cents - off" promotion has become "stale", that is, the special has been advertised for such a length of time that it no longer represents a saving to the consumer.

One need only enter the nearest supermarket to see the vast numbers of "cents - off" promotions being offered by various manufacturers. Although it is possible for a retailer to engage in a similar campaign, the prerogative generally remains with the manufacturer, who will print onto a package or label the "cents - off" advertisement. The difficulty in controlling such promotions within the ambit of section 36 is perhaps demonstrated by the fact that to date, only one conviction has been obtained regarding this type of advertising campaign. In *R. v. Produits Diamant Ltée*,¹¹⁸ the accused company had, until June, 1961, marketed its jam in two types of containers, one an ordinary jar (sold for 99¢) and one a candy jar (selling price, \$1.29). After June, 1961, the Company changes its marketing policy and sold both jars at the same price. However, there appeared on the candy jar, the words,

17¢ off/en moins

The candy jar was marketed with the "cents-off" wording for approximately three years. In light of the changed marketing policy, whereby the jam in the candy jar was sold at the same price as that in the plain jar, the company was convicted. In his reasons for judgment, Magistrate Strike noted:

It appears to me, however, that the average person buying the product would consider that the ordinary price of the jam was at least 17¢ more than he or she was paying for it when as a matter of fact the Company has established a price which was the same as the price of the regular jar.¹¹⁹

• • •

At this point, we might consider some further aspects relating to advertised prices. First, it has now been established that an offence is committed under section 36 where the advertised price is not the ordinary selling price, even if the price asked represents a value. In other words, the subjective factor of good-buy is immaterial if the price advertised is not the prevailing area figure.¹²⁰ In delivering the judgment in *R. v. Patton's Place*,¹²¹ Magistrate Carson noted:

The Cases dealing with this section indicate, as the language of the Section itself reads, that there is a difference between Price and Value. The Section is concerned with the Price at which such or like articles have been, are or will be ordinarily sold. In this case, the Evidence was clear, that this particular article was never sold at \$229.95. The highest market value, the highest market price in the area covered by the newspaper in which the advertisement appeared was \$169.00. Generally the price was considerably less than that.¹²²

And further:

As I read the Section and the cases, the Court cannot be concerned about the Value. The only thing the Court can be concerned about is the Price.¹²³

It would also appear that a guarantee cannot be made part of the advertised price. Thus where a watch was advertised as, "Retail \$54.00"—the watch never having been sold and not currently being sold, for more than \$27.00—it was held to be no defence that the accused's stated value of \$54.00 included a guarantee.¹²⁴ Presumably, it would be legal for the advertiser to say: "Watch, \$27.00; Guarantee, \$27.00: Total Selling Price \$54.00", although such wording would undoubtedly destroy the potency of the advertisement.¹²⁵

The length of time for which a product sells at a particular price is also important in determining if an advertisement contravenes the section. It is possible for a price to be advertised as a "special" for such a considerable time, that the "special" price becomes the ordinary selling price. Therefore, the continued use of the term "special" becomes misleading, since the customer is lead to believe he is obtaining a saving over the regular price. That such "stale" prices could lead to prosecution was indicated in the *Products Diamants Ltée*¹²⁶ case and in the Halo Shampoo decision.^{127 128}

The use of catalogue sales has posed some problems for the Courts in dealing with section 36. The case of *R. v. Simpsons-Sears Limited*¹²⁹ considered an advertisement contained in the Simpsons-Sears national catalogue with the Court concluding on the facts of the case, that the charge must be dismissed. This dismissal stemmed basically from the Crown's failure to prove what was the ordinary selling price for a nationally advertised product. The question of trade areas in catalogue sales will be discussed in greater detail below.

Before proceeding with an analysis of, the relevant trade area under section 36, it might first prove useful to summarize what has been discussed thus far regarding ordinary selling price. List, or manufacturer's suggested retail price cannot be used to convey the impression that it is the ordinary selling price of the region. This is true, even where the list price is deemed "fair", so long as the regular area price is below list. Such phrases as, "Regular", or "Compare at \$——", cannot be employed if the price quoted is not that of the trade area. The general rule, therefore, is that in comparative pricing, the designated *base* price must be that for which the advertised goods ordinarily sell in the market area. Where a retailer wishes to use his own former price as the base, he must ensure that the wording of his advertisement unequivocally states that the price quoted is his own, and not that of his competitors.¹³⁰ However, the retailer's previous price must be *bona fide*, in that a substantial number of sales have been made at that figure, or the former price was

advertised for some considerable length of time with the expectation of selling at the original advertised price. It would appear, therefore, that he may not offer a product for a time at a price beyond what he expects to receive and then announce a reduction from his former price.¹³¹

A misrepresentative statement need not arise solely from the improper usage of such terms as, "Regular" or "Usually". Breach of the section may be occasioned by the innuendo of the advertisement, caused by the use of certain words (for example, "Special"; — "—— cents-off") or the physical layout of the advertisement (for example, stressing certain words by printing them in contrasting colours, larger type, etc.). Further, the only consideration in determining if there has been a breach of section 36 is the price alleged, not value. Here, the question is not whether the customer obtained a good deal, or even a bargain, but simply if the comparative price advertisement was true in regard to the ordinary selling price within the region. Finally, *mens rea* need not be proved to obtain a conviction.

— *Appropriate trade area*

We have noted that there is no standard price for goods throughout Canada, with price ranges being determined by various factors. The question then becomes one of determining what is the extent of the trade area as contemplated in section 36. By way of definition, a *trade area* refers to that location in which consumers shop or would stop for the product in question.¹³² First, it would appear that where the offence is committed in a city, the city as a whole becomes the relevant trade area. Where the advertisement in question is published in a city newspaper, it seems that the Crown need gather evidence only from competitors within the city, even where the newspaper might have a circulation outside the city area.¹³³ Similarly where the misleading advertisement is attached to the product by means of pre-ticketing¹³⁴ or other device,¹³⁵ evidence of regular selling price is obtained only from other retailers in that city.¹³⁶ In *R. v. Allied Towers Merchants*,¹³⁷ the advertisement took the form of circulars, which were distributed in the township of Gloucester, a suburb of Ottawa, as a promotion for the accused's retail store situated in the township. Evidence of ordinary selling price was obtained from retailers in the cities of Ottawa, Ontario and Hull, Quebec. That the trade area cannot be national in scope is indicated in the catalogue sales case of *R. v. Simpsons-Sears Limited*.¹³⁸

In determining cases under section 36, the courts have not set down any definite guidelines to aid in establishing what is, in fact, the market area in a particular situation. Thus, where offences have taken place in a city, the courts have simply assumed that the city proper constitutes

the relevant trade area. Where the advertisement was aimed at a location outside a city, the courts appeared to look to the nearest large centre in finding the ordinary selling price. Basically, then, the courts have developed a somewhat pragmatic approach to the question, in most cases appearing to assume that trade region simply means the immediate area surrounding the site where the advertised goods were sold. The one exception is in the *Simpsons-Sears* decision, where Provincial Judge Beaulne considered in some depth the question of local and regional markets.¹³⁹

The question now arises: What duty has a party to determine the ordinary selling price? Is, for example, a retailer expected periodically to check the prices being charged by his competitors before offering comparative prices? The cases suggest that he is deemed to know the usual price. It appears therefore, as if the courts have taken judicial notice of the fact that a businessman always knows the prices of his competitors, although they have not said so in so many words. Similarly, a manufacturer will be deemed to know the regular selling price of his product within a trade area when he attaches promotional tags to his wares.

(iv) *Questions of Fact: judicial notice*

The courts have been prepared to recognize as questions of fact certain elements of section 36. For example the word, "materially" has proved no stumbling block in obtaining convictions.¹⁴⁰ For the purposes of the Act, any false statement appears to be *per se* materially misleading, with there being varying degrees of falseness. As "materially" is nowhere defined in the Act, the courts have chosen to give the word its normal meaning. Thus in *R. v. Miller's T.V. Ltd.*¹⁴¹ the Court noted:

In this regard, there is of course no definition of the phrase, "materially misleading", and therefore the words must be accorded their normal accepted meaning. It does not read simply, "misleading representation", nor on the other hand, "grossly misleading representation". In my view there is not a minor difference, that is, the subject matter of the meaning of the section, and I certainly cannot agree that the allegation was a minimal difference.¹⁴²

The purpose of the advertisement is another factor which must be considered under section 36. Decisions indicate that an advertisement will be deemed to have been intended to promote the sale or use of an article where it is published, that is, specifically aimed at the general public. Therefore the placing of an advertisement in a newspaper;¹⁴³ handbills or circulars;¹⁴⁴ or by attachment to the products intended for sale,¹⁴⁵ would be sufficient to constitute publication for the purposes of sale, within the meaning of the section. In essence then, any method which serves to bring a product to the attention of the public will be regarded as showing intent to promote the sale or use of the product.

Under section 36, an advertisement must be intended for the public. It follows, therefore, that where a finding of fact is made that a public campaign was launched to solicit customers, the campaign will be deemed to be intended for the public. It would not appear necessary to produce in court any citizens who had actually read the advertisement; or who had made purchases pursuant to the promotion. Proof of the advertising campaign would be made via exhibits of publication,¹⁴⁶ and possibly the evidence of an investigator from the Combines Branch.¹⁴⁷

(v) *Similarity of Goods*

The wording of section 36 (“... such or like articles . . .”) provides a certain degree of latitude in determining the ordinary selling price within a trade area, since the goods of competitors need not necessarily be identical to those advertised by the accused. Generally, however the determination of ordinary selling price is based on identical goods, since the advertised products are not normally unique or sold exclusively by one dealer.¹⁴⁸ As well, evidence of ordinary price is stronger when the goods compared are the same. In a situation where identical goods are not available for comparison, “like” or similar goods may be used as a basis for parallelism. The question then becomes: How close must the items be? It would appear that this determination would be a question of fact to be decided by the court. In *R. v. Mountain Furniture Company Limited*,¹⁴⁹ the court commented on the question of similarity of goods, noting:

If the Crown must establish that such an article must be ordinarily sold at a given price in the area where the representation with which we are concerned is made, then any arrangement on the part of the retailer of the nature of a special franchise or sole sales agency in a given area would appear to render the legislation ineffective. I would find that the phrase means, articles of similar quality. Minor differences in specifications, not known or observed by the public, but only determinable by an experienced person . . . I would find, does not bar such articles as being similar.

In the *Mountain Furniture Case* the items being advertised were mattresses which on the surface appeared comparable to those of other retailers. The presiding magistrate correctly pointed out that only a person well versed in the mattress trade would be able to differentiate between the products of the accused and those of his competitors. Even here, he would be required to open the mattress, and study its construction in detail in order to detect what amounted to a minor difference.

The wording of section 36 and judicial pronouncement thereon would therefore appear to preclude a successful defence based on dissimilarity of goods if, the items were basically alike. On this question of parity, the one loophole would seem to be the situation where a single dealer has exclusive rights to the sale of a unique item, bearing no resemblance

or relationship to any other product. Even in this situation, however, the exclusive dealer cannot, with impunity quote a "regular" price and proceed to offer discounts on this price. In short, he cannot set his own market price as a base, when there is no intention to sell at this price,¹⁵⁰ although there is of course nothing to prevent him from setting as high a price as the consumer is willing to pay.

Another prohibited practice in comparative pricing is for the vendor to create the impression that his advertised goods are equal in quality and performance to higher-priced products of the same class when in fact, the accused is selling his products at a lower price. Thus where a store sold a certain line of cameras for, \$54.90, but ran a newspaper advertisement reading *inter alia*, "Compare at, \$154.90", a conviction was registered.¹⁵¹

(vi) *Scope of Section 36: Parties to an Offence*

The range of section 36 is not restricted to the party who actually publishes the misleading advertisement. The *Combines Investigation Act* being a criminal statute, section 21¹⁵² of the *Criminal Code* (parties to an offence) is directly applicable to the Act. Thus a wholesaler-distributor who knowingly attached misleading price stickers to certain products was convicted under the section along with the retailer.¹⁵³ Similarly, where a manufacturer knowingly pre-ticketed his mattresses at an inflated price, both the manufacturer and the vendor were found guilty.¹⁵⁴ Although there have been no cases on the point, it would appear that an advertising agent or publishing medium could be found to be a party to an offence under the Act. Section 36(2),¹⁵⁵ the saving proviso, applies only to publishers accepting an advertisement in good faith in the ordinary course of business.

An interesting point is raised in the situation where the misleading advertisement emanates from the manufacturer, but the product in question is displayed and sold by the retailer. Here, it would appear that the vendor is under no duty to scrutinize promotions on such products and consequently bears no responsibility if they are misleading.¹⁵⁶

(vii) *Who is to be Protected Under Section 36?*

Under certain circumstances, the test for deceptiveness in relation to comparative price advertising is an objective one, while in other instances, it is subjective. An example of the former would be where a product is advertised as "Regular \$——, Our price \$——", when in fact the ordinary selling price is not the figure quoted as the "Regular" one. Here, an offence is deemed committed. The question of how the consumer would interpret the advertisement is therefore not directly

pertinent to such a promotion, it being assumed that he or she will construe it as giving a monetary saving. Conversely, a subjective advertisement is one where consumer interpretation of the message is the test. The *Halo*¹⁵⁷ and *Breck*¹⁵⁸ shampoo cases involve advertisements of this nature. As actual consumers are not called as witnesses to give their interpretation of the advertisement, it is necessary for the presiding judge or magistrate to put himself in the position of the customer in considering the advertisement in question. In deciding the *Halo* case, Judge Matheson put forward the following test for determining the effect of the advertisement in question:

- (a) Would a reasonable shopper draw the conclusion from the diagonal red band with the words and numbers "Special \$1.49", that he was being offered Economy Size Halo Shampoo at a price below which that size bottle is ordinarily sold?
- (b) If the answer is, "Yes", would such a representation be true?¹⁵⁹

The test proposed by the Court is interesting in that it uses the "reasonable man" as the basis of decision. Save for this case (which itself does not elaborate on the "reasonable man" test), our courts have not addressed themselves to the question of standard of protection in situations which are not totally grounded on an objective test. On the other hand, the United States authorities have considered the problem in some depth, arriving at the conclusion, that the tort model of the reasonable man is *not* the basis for decision. As Professor George Alexander of Syracuse University has indicated; "he (the reasonable man) did not need protection from the blandishments of ambiguous advertising because of inherent skepticism."¹⁶⁰ On the same subject, Prosser has stated:

Sales talk or puffing, as it is commonly called, is considered to be offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer and on which no reasonable man would rely.¹⁶¹

If our courts are to adopt the test of reasonableness in cases of misleading advertising, the standard of protection given the general public is automatically lowered. Consequently, the "unreasonable" man is accorded little, if any protection, and is cast back into the jungle of *caveat emptor*. Realizing the potential danger of the reasonable man criterion, both the Federal Trade Commission and the courts of the United States have proceeded on the basis that it is the reasonable man's opposite who must be safeguarded.¹⁶² In essence, the American position has been to grant protection to the careless; often unthinking; and perhaps sub-intelligent (though not imbecilic) man.¹⁶³

It might perhaps be premature to forecast a total adoption by our courts of the reasonable man test. Further, the importance of such a test becomes more compelling under section 37 of the *Combines Investigation Act* than the instant section. As shall be discussed subsequently,

there has been virtually no precedent to guide the courts in formulating norms, because section 306 of the *Criminal Code* was for the most part a dormant provision.

(viii) *Sanctions*

As noted above,¹⁶⁴ there exist three possible penalties under section 36: (a) a fine, maximum \$500.00 (individual); \$1,000.00 (corporation); (b) imprisonment, maximum six months and (c) an order of prohibition. Of these, only fines and prohibition orders have ever been imposed by the courts. Fines on first offences have ranged from \$50.00¹⁶⁵ to the maximum of \$500.00,¹⁶⁶ for an individual and \$750.00 for a corporation¹⁶⁷ but the median would be approximately \$200.00. In a decision dealing with a second offence, a fine of \$100.00 was imposed, double that given for the first offence.¹⁶⁸ Breach of prohibition orders appear to be subject to more stringent penalties, one such breach resulting in a fine of \$1,500.00.¹⁶⁹

Very often, a prohibition order¹⁷⁰ under section 30 of the *Combines Investigation Act* is coupled with a fine.¹⁷¹ The order does *not* give a "blanket prohibition" in the sense that *all* goods sold by the guilty party are within its ambit. Rather, the order of prohibition covers only those products which were the subject of the misleading advertising.¹⁷²

Various factors appear to have a bearing on the nature and severity of a sentence for breach of section 36. Thus where the accused co-operated with the Combines Branch, and eliminated the offensive advertisement after it was brought to the company's attention, the sentence imposed was a recorded conviction, with no order as to either fine, costs or prohibition.¹⁷³ In one instance, the Court appeared to regard a guilty plea as a mitigating factor,¹⁷⁴ while in another, a similar plea appeared to have no effect on sentence.¹⁷⁵ Where, in the words of the Court, the accused was ". . . an experienced, knowledgeable businessman who, 'knows value' and 'quality' and who sells to its customers at 'best values'," a fine of \$500.00 was levied against the accused corporation for a first offence.¹⁷⁶ In the *Genser* case, it appears as if the court were placing the retailer in a position of trust *vis-a-vis* the consumer, with any deviation from this position resulting in a heavy penalty. As well, the position of the retailer in the community, length of time in business, etc., would seem to be a factor in sentencing, especially where the accused knew the advertisement to be misleading.

To summarize, the penalty imposed for a breach of section 36 is almost certainly a fine, prohibition order, or both. Mitigating factors would seem to include: (a) co-operation by the accused with the Combines Branch, (b) the removal by the accused of the offensive advertise-

ment once it was brought to the attention of the advertiser. Where the convicted party holds himself out as a reputable dealer, and has done business in the community for some time, a stringent penalty will be imposed where the retailer deliberately engaged in a deceptive advertising campaign. It follows then that, absence or presence of *mens rea* would be a mitigating factor in sentencing. Since a myriad of factors might affect the court in passing sentence, the above, of course, can only serve as examples of possible factors, based on cases decided to date.

(b) *Section 37: (formerly section 33D)*

(Now) section 37 became part of the *Combines Investigation Act* on 31 July, 1969, formerly having been section 306 of the Criminal Code. The section reads:

37(1) Everyone who publishes or causes to be published an advertisement containing a statement that purports to be a statement of fact but that is untrue, deceptive or misleading or is intentionally so worded or arranged that it is deceptive or misleading, is guilty of an indictable offence and is liable to imprisonment for five years, if the advertisement is published

(a) to promote directly or indirectly, the sale or disposal of property or any interest therein, or

(b) to promote a business or commercial interest.

(2) Everyone who publishes or causes to be published in an advertisement a statement or guarantee of the performance, efficacy or length of life of anything that is not based upon an adequate and proper test of that thing, the proof of which lies upon the accused, is, if the advertisement is published to promote, directly or indirectly, the sale or disposal of that thing, guilty of an offence punishable on summary conviction.

(3) Subsections (1) and (2) do not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

(4) For the purpose of subsection (2), a test that is made by the National Research Council of Canada or by any other public department is an adequate and proper test, but no reference shall be made in an advertisement to indicate that a test has been made by the National Research Council or other public department, unless the advertisement has, before publication, been approved and permission to publish it has been given in writing by the President of the National Research Council; or by the deputy head of the public department, as the case may be.

(5) Nothing in subsection (4) shall be deemed to exclude, for the purposes of this section, any other adequate or proper test.

In effect, section 37 creates three offences: (a) misleading advertising as to performance (section 37(2)); (b) using a test conducted by the National Research Council as the basis for an advertisement, without the permission in writing of the Council or other government department (37(4));¹⁷⁷ and (c) deceptive advertising in any other form (section 37(1)). The latter form of false advertising is deemed the more serious, being an indictable offence with a maximum term of imprisonment of five years. Section 37 (2) remains a summary conviction offence, and as such penalties are limited to those contained under Part XXIV

of the *Criminal Code*.¹⁷⁸ Since section 37(4) is a separate and distinct offence for which no penalty or punishment is specifically prescribed, it would automatically be deemed an indictable offence and be subject to section 115 of the *Criminal Code*.¹⁷⁹

In its scope, section 37(1) is extremely wide and all pervasive, being broad enough to catch virtually any type of misleading advertisement including the sale of services.¹⁸⁰ By implication, it would not include deceptive advertisements as to performance and guarantee, as this area is specifically dealt with under 37(2). Quære, however, whether section 37(1) would encompass comparative pricing of the nature contemplated in section 36? The wording of section 37(1) would suggest that it might thereby provide the Crown with a "choice of weapons" in prosecuting misleading advertising in the area of comparative pricing, based perhaps on the relative seriousness of the offence. As a practical point however, no prosecution for misleading price advertising has ever been launched under section 36(1) (or under its predecessor, section 306 of the *Criminal Code*).¹⁸¹

(i) *Elements of the Offences:*

Section 37(1)

A reading of section 37(1) would suggest four necessary elements:

- (a) the advertisement must be published.¹⁸²
- (b) the advertisement must contain that which purports to be a statement of fact.¹⁸³
- (c) the advertising message must be untrue, deceptive or misleading or be intentionally so worded or arranged that it is deceptive or misleading.
- (d) the advertisement must be published, with the object of promoting the sale or disposal of property, or an interest in property.
- (e) in the alternative, the advertisement must be published to promote a business or commercial interest.

In regard to subsection (2), the following elements would be requisite.

Section 37(2)

- (a) the advertisement must be published
- (b) the advertisement must contain a statement or guarantee of the performance, efficacy or length of life of anything that is not based upon an adequate and proper test of that thing.
- (c) the onus is on the accused to show that the statement is based upon an adequate and proper test.
- (d) the advertisement must be published to promote the sale or disposal of the thing in question.

(ii) *Enforcement Policy*

Because of the breadth of section 37, and in particular subsection (1), it should theoretically be possible to prosecute virtually all exaggerated claims, half truths, distortions, subliminal untruths, and the like.¹⁸⁴ Yet, limitations of economic resources and departmental manpower preclude such far-reaching action being taken, at least for the moment. Faced with these limitations, the Director of Investigation and Research has indicated that priorities will, of necessity be established, based on the following guidelines:

- (a) the degree of coverage of the advertisement
- (b) the impact of the advertisement on the public
- (c) the deterrent effect of successful prosecution of a particular case
- (d) the best cases to allow the courts to establish new principles and clarify the section.¹⁸⁵

Further, the Director has outlined an initial set of situations to which his Department is likely to attach initial priority.

- (a) A misleading statement of fact in an advertisement. Example: "Below our cost", when the selling price is in fact higher than the delivered price of the article to the retailer.
- (b) A statement of performance which is not supported by an adequate test. Example: Rope advertised as "2,000 pound test", where no adequate and proper test of the rope has been made.
- (c) Deceptive use of contests. Example: "You are the lucky winner of our grand award", when in fact the "award" was not exceptional in that many people received the identical mailing piece.
- (d) "Free" offers that are not in fact free. Example: Receipt of the "free" gift is contingent on the purchase of another article or articles which could be purchased through conventional channels at lower prices.
- (e) "Bait - and - Switch" operations where the item used as bait was not, in fact held for sale by the advertiser. This is the practice of advertising an article at an exceptionally low price with the intention of not selling that article but of switching customers to other goods.
- (f) Contest purporting to award prizes where such prizes are not in fact available: Example: An advertiser announces planned distribution of \$25,000 in prizes but in fact does not provide for the distribution of prizes.
- (g) The "stuffed flat". Example: An advertiser using the classified section purports to be selling his household furniture whereas in fact he is selling goods supplied from other sources.
- (h) "Clip - and - paste" solicitations: Example: This is a direct mail device in which typically the customer is invited to verify a listing in a directory but which, when signed and returned amounts to an order for which he may be invoiced.
- (i) Misrepresentation as to origin. Example: A manufacturer encloses a foreign made article in a display package marked, "made in Canada".¹⁸⁶

The above areas are not to be exhaustive of the types of advertisements scrutinized.¹⁸⁷ As well, a former Minister of Consumer and Corporate Affairs, Ron Basford has indicated that if the wording of section

37 proves deficient in obtaining convictions, then new legislation will be introduced which meets the necessary requirements.¹⁸⁸

(iii) *Judicial Decisions*

The sole reported case under former s. 306 of the *Criminal Code* was *R. v. Thermo-Seal Insulation Ltd.*¹⁸⁹ where the accused corporation published printed advertisements in connection with its insulating material, the advertisement containing the words, "Tested by National Research Council". The Council had, in fact, tested the material, but had never given its approval in writing as required by (now) section 37(4). A conviction was subsequently registered against the accused, and a fine of \$50.00 plus costs was levied.¹⁹⁰ One defence raised by the accused was that the act was not wilful and that the company had previously advertised, but had changed its advertisement with the intention of eliminating any words indicating that the product had been tested by the National Research Council. As section 115 of the *Criminal Code* is applicable to section 37(4),¹⁹¹ it would appear that proof of *mens rea* is necessary for a conviction under the section.¹⁹²

The first conviction under section 37 since its transfer to the *Combines Investigation Act* has been in the case of *R. v. Anthony*.¹⁹³ Here, the accused had advertised a "jet ignition unit for transistors" over an Ottawa television station, claiming that the unit would give "better gas mileage, easier starting and better performance".¹⁹⁴ A subsequent test by the National Research Council revealed that the unit, which the accused sold for \$5.00 each at the Central Canada Exhibition was useless and that the allegations made in connection with it, could not be upheld. The accused entered a plea of guilty and was fined \$500.00 or in the alternative six months in jail, with an order of prohibition also being granted.¹⁹⁵

With the paucity of jurisprudence, it is still too early to forecast with any assurance, principles relating to section 37. One principle which has emerged, however, is that relating to *mens rea*. In *R. v. Imperial Tobacco*,^{196 197} it was held that *mens rea* is not an essential element of an offence under section 37(1), making the section one of strict liability.

In the *Thermo-Seal*¹⁹⁸ decision, the court appeared to infer from the publication of the offensive advertisement that it was intended to promote the sale of the advertised product. We should expect, therefore, that the courts will continue to make similar findings of fact for all offences under section 37. Much of what has already been discussed in relation to section 36 would therefore be applicable here.¹⁹⁹ Further, it should not be necessary for the Crown to introduce, actual consumers in court to prove that an advertisement is false, deceptive or misleading.

Consequently, the court will place itself "in the shoes of the consumer" in determining whether or not an advertisement contravenes the section, although in a recent decision evidence of citizens who had read the advertisement in question was introduced in court.²⁰⁰ This practice of the courts placing themselves "in the shoes of the consumer" should prove especially important in regard to section 37(1) offences, when matters of innuendo and double meaning are considered. Should the courts show a propensity for enforcement of section 37, then we are apt to witness repercussions in commercial circles hitherto immune from prosecution. Perhaps the most important extension will be in regard to the advertising agencies which prepare the campaigns that turn out to be deceptive, misleading or false. If recent American jurisprudence is any indication, immunity of advertising agencies from liability for deceptive campaigns would be terminated.²⁰¹

Another area of uncertainty is that relating to exaggerated commercial statements which up to the present had been condoned as mere "puffing". It was pointed out early in this work²⁰² that following the establishment of the Federal Trade Commission, the judiciary of the United States restricted the scope of advertising hyperbole by making advertisers responsible for statements which previously had been beyond the reach of legal control. Yet even in that country considerable latitude still exists, enabling, for example an automobile manufacturer to advertise his current model as being, "All New for ———", when in fact only minor variations have been made from last year's model.²⁰³ Similar advertising themes exist in Canada, and it will be interesting to observe judicial reaction to such slogans should they become the subject of legal action. Undoubtedly, the manufacturer would plead that no person would give credence to the statement, and that the words "All New" were merely a part of an overall campaign. But something must account for the increasing number of car sales each year.²⁰⁴

If section 37(1) is to be adequately enforced, then the courts will of necessity be required to give close attention to the question of, who is to be protected. We have noted that the determining of an offence under section 36 is based primarily on objective factors, with certain aspects touching subjective considerations.²⁰⁵ Section 37(1), however, is the exact reverse. Where a prosecution is launched under section 37(1), less will depend on certain concrete facts, which, if proved, render an advertisement contrary to law. An equivocal advertisement, for example, might be interpreted one-way by ninety per-cent of its readers, while the remaining ten per-cent attaches a different meaning. Is the advertisement to be interdicted because the minority is misled?²⁰⁶ The problem raises the question, then, of what level of society is to be protected from the potential abuses of the market place.

This question of the level of protection was answered in the case of *R. v. Imperial Tobacco*²⁰⁷ where it was held that the test to determine how an advertisement is interpreted is that of the average purchaser and that the unthinking, ignorant and credulous members of the public must be protected. In framing this test, the Alberta Courts adopted the standard set in the leading American case of *Charles of the Ritz v. F.T.C.*,^{207(a)} a decision which was specifically referred to in the *Imperial Tobacco* decision. Finally, it should be noted that the proposed *Competition Act* adopts the test of the credulous man in setting the level of public protection from misleading advertising.^{207(b)}

Section 37(4) does not, of course, present the problem of ambiguity discussed above. Either permission in writing has been given by the Council, or other relevant public department, or it has not. Section 37(2), however, is not so precise, especially where the advertiser has conducted his own test. Nowhere in the Act is the term, "adequate and proper test" defined, thereby providing no guidelines to a manufacturer who might wish to test his product somewhere other than at the National Research Council laboratories. Presumably, a test conducted through a recognized university would be adequate and proper. What however, if the manufacturer performs the test in his own laboratories? Most large corporations possess extensive testing facilities, many of them undoubtedly being of equal and even perhaps higher standard than those of government or universities. Again, no certain opinion on the adequacy of a test conducted in a company laboratory can be given in the absence of judicial pronouncement.²⁰⁸

Before leaving section 37, a point might be raised in connection with subsection (4). The obvious reason for the stipulation regarding written consent from the National Research Council is that the Council does not want to become involved in claims between competing products. Publication of test results in an advertisement might be construed as a Council imprimatur on commercial goods, whereby one product is deemed superior to others. The Federal Trade Commission has adopted a similar position, regarding advertisement of test results conducted under its auspices. The wisdom of such a policy is however questionable, especially in light of trademark protection whereby manufacturers of nationally advertised products can command higher prices for their goods because of "brandname loyalty", even though unknown brands are functionally equal.²⁰⁹ In 1963, the Federal Trade Commission authorized a study of the relative merits of the various brands of analgesics (commonly known as "aspirin" tablets) being sold and advertised in the United States.²¹⁰ Although the name-brand products sold at a premium price, their effectiveness was no greater than that of less-advertised brands. When one of the smaller sellers used the test results

in its advertising campaign the Commission attempted to obtain a temporary injunction. The request was refused by the Federal Court of Appeals, the court holding that the Commission failed to make a showing that it had reason to believe the public would be misled by advertising as to results of the Commission-sponsored test.²¹¹

In according legal protection to trade-marks, trade-names and distinctive get-up,²¹² the law has in effect sanctioned a monopoly on brand names. Under this legal protection, national companies with large advertising budgets are able to maintain an artificially high price for their products by using advertising to create "brand loyalty", at the expense of identical or equally effective, but lesser-known goods.²¹³ A strong case can therefore be made for allowing publication of government-sponsored tests as a means of breaking down the often artificial concept of brand loyalty. For ultimately, the consumer will benefit by being able to purchase equivalent products at lower prices. Should there be a significant shifting of consumer choice from brand-name to lesser-known goods, a corresponding reduction in the prices of the former would undoubtedly take place. At the moment however, our courts would be unable to reach a decision parallel with the *Sterling Drug Case*, since section 37(4) unequivocally forbids test advertising without Council consent. The necessary change in the law would therefore have to come from Parliament.²¹⁴

CHAPTER V

THE FOOD AND DRUGS ACT

It has been noted that, certain aspects of the *Food and Drugs Act* are administered by the Bureau of Consumer Affairs of the Department of Consumer and Corporate Affairs.²¹⁵ As also noted, there exists an overlapping area in which proceedings for false, misleading and deceptive advertising of food could be launched either under this Act, or the *Combines Investigation Act*,²¹⁶ with the key section of the *Food and Drugs Act* being section 5(1).²¹⁷ All questions of advertising (save for that over radio and television, to be discussed below) under the Act in relation to food²¹⁸ are therefore within the jurisdiction of the Department of Consumer and Corporate Affairs. Matters relating to drug and cosmetic advertising remain the responsibility of the Department of National Health and Welfare.

The essence of regulation under the, *Food and Drug Act* is in regard to control of quality, labelling and packaging. Section 5(1) deals with the labelling, packaging, manufacturing and advertising of food, while

section 9(1) touches the same areas in relation to drugs. Sections 15 and 16 also deal with these matters, in relation to cosmetics. Details of quality standard, permitted advertising, etc., are contained in the *Regulations to the Act*.²¹⁹ A further supplement is given by the *Food and Drug Directorate: Guide for Manufacturers and Advertisers*, published by the Department of Health and National Welfare in 1961.²²⁰ Together, these documents prescribe the quality standards, of these products and outline certain specifications to be followed in their commercial promotion.

The basic philosophy behind the *Food and Drugs Act* is the protection of the consumer from products dangerous to health and safety. Thus the *Regulations* contain detailed requirements, as to chemical content; product composition and product labelling which apply to all foods, drugs and cosmetic products manufactured and marketed in Canada.²²¹ In most instances, the *Regulations* are very technical in nature, intended primarily for the chemical analyst rather than the lawyer or the layman. Consequently, a breach of a regulation dealing with vitamin or chemical content would be detected by an analyst of either the Department of Consumer and Corporate Affairs (in the case of food) or the Department of National Health and Welfare (for drugs and cosmetics).

The Act defines "advertisement" as including,

"... any representation by any means whatsoever for the purpose of promoting directly or indirectly the sale or disposal of any food, drug, cosmetic or device."²²²

A general prohibition applicable to all foods, drugs, cosmetics and devices is contained in section 3 of the Act, and reads:

- 3(1) No person shall advertise any food, drug, cosmetic or device to the general public as a treatment, preventative, or cure for any of the diseases, disorders, or abnormal physical states mentioned in Schedule A.
- (2) No person shall sell any food, drug, cosmetic or device
 - (a) that is represented by label, or
 - (b) that he advertises to the general public as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states mentioned in Schedule A.

Among the afflictions listed in Schedule A are, alcoholism; cancer; diabetes; disorders of menstrual flow; heart diseases; influenza; obesity; sexual impotence and venereal diseases. The reason for the prohibition contained in section 3, is that those afflictions given in Schedule A cannot according to expert opinion "... be diagnosed by the individual nor can the individual treat himself adequately or safely for these conditions".²²³

The prohibition imposed by section 3 regarding the advertisement of cures for Schedule A conditions is mitigated somewhat by the Department's *Guide for Manufacturers and Advertisers 1961* (to be discussed in detail below). Thus while absolute cures for obesity cannot be ad-

vertised, dietary and reducing plans, may be promoted, the Department recognizing the, "... difference between the disease condition of obesity caused by glandular malfunction and simple overweight due to over-eating".²²⁴ Similarly, it is permissible to advertise "... preparations offered as a treatment for the after effects of drinking;²²⁵ drugs for the relief of pain from, rheumatism, arthritis, neuritis, lumbago or other allied conditions (but not for the *cures* of these diseases);²²⁶ and relief from the discomforts of coughs and colds,²²⁷ taking care not to word the advertisement so that a complete cure is suggested. As well, the word "Flu" is not to be used synonymously with the common cold, influenza being a Schedule A disease.²²⁸

In addition to section 3, there are regulations governing the advertising of both prescription and non-prescription drugs. The former may not be advertised to the general public for human use,²²⁹ while the latter may be advertised if the drug package carries a recommended single or daily dosage or a statement of concentration not in excess of the limits set forth in the *Regulations*.²³⁰ Distribution of drug samples is prohibited under the Act save: (a) for samples delivered to physicians, dentists or veterinary surgeons or (b) for delivery of Schedule F²³¹ drugs to registered pharmacists for individual redistribution to adults only, or to a distributor in compliance with individual requests.²³²

A. *The 1961 Guide*

The 1961 Guide published by the Department of National Health and Welfare is intended to serve the manufacturer and advertiser in tailoring his marketing programmes to the standards set by the Act and *Regulations*. It represents the point of view of the Department in interpreting the legislation, but as the Guide is careful to point out: "It only remains to be said that *opinions of officials are not the law* and that the final decision resides with the Courts of the land".²³³ The Guide, therefore, can serve only as a general suggestion as to the types of advertisements the Department of Consumer and Corporate Affairs, or National Health and Welfare²³⁴ will condone or disapprove. Further, and quoting another portion of the Guide: "There is no power conferred by the Act for the Food and Drug Directorate or the Department to give approval of a label or an advertisement. The administration, within the limits of available facilities, is usually able to give an opinion as to whether a label conforms with requirements".²³⁵ Practically speaking however, it would be highly unlikely that a prosecution would be launched against a particular advertisement if an opinion of compliance had been given. That there has been only one reported prosecution under the Act bears witness to this truism.²³⁶ The single situation where legal action could conceivably be commenced despite a prior positive Departmental opinion

would be in the areas of overlapping jurisdiction between the *Food and Drugs Act* and the *Combines Investigation Act*. Yet the close liaison between the two Departments would minimize the chances of such an occurrence.²³⁷

In the Introduction to the Guide, it is stated that: "The conception of 'let the buyer beware' (*caveat emptor*) is discarded and no longer operates in the food and drug field."²³⁸ The major portion of the document is thus concerned with clarifying certain portions of the *Food and Drugs Act* and *Regulations*; and exemplifying certain advertising techniques which are considered either to be in contravention of the legislation or to be objectionable marketing practices, because they have the propensity to mislead. Thus the use of dangling comparatives, such as "better" or "richer", without qualifying words is regarded as objectionable. The Guide indicates that deception is avoided by making a direct comparison, for example, "better than ———", followed by particulars of the assertion.²³⁹ Where geographical terms are employed in an advertisement, the Guide states: "Where the goods are not products of the place named, and where such description may be considered deceptive or misleading, the product must be labelled in such a way as to remove the deception."²⁴⁰ Use of such terms as, "Homemade" to describe commercially produced food products is also deemed improper, although other descriptive phrases, like, "Home-Made Style", "Home-Made Flavour" or "Home-Made Appearance" are acceptable if the claim is true.²⁴¹ In this last example we see a recognition of advertising language beyond the purely utilitarian.

The manner in which an advertisement for food, drugs or cosmetics is to be presented is also discussed in some detail in the Guide. Thus "scare advertising", implying for example that good health cannot be enjoyed without the use of the advertised product, is not to be employed.²⁴² Although pictures and charts are recognized as valuable and proper advertising techniques, they are "... not to be so employed as to exaggerate, to mislead or to misrepresent".²⁴³ In this regard, "before and after" pictures are to be avoided.²⁴⁴ Using vague, mysterious or provocative atmospheres bearing no relationship to the product are likewise to be avoided.²⁴⁵ Testimonials are not looked at benignly, because they represent a selection, and where employed "... are critically reviewed by the Directorate ..." to ensure that there has been no violation of the Act or Regulations.²⁴⁶ Reference to professional people such as doctors, nurses or scientists is *per se* considered to be misleading.²⁴⁷ Advertisements are not to be made intentionally equivocal, it being stated in the Guide that: "The Act deems it to be an offence in advertisements to deal in partial truths, or to use statements in such a way as to be liable to create an erroneous impression, and this extends to failure to disclose

essential facts concerning the actual properties of the article advertised".²⁴⁸ Erroneous impressions through the deployment of illustrations of scientific or medical surroundings or other manner are likewise to be avoided.²⁴⁹

The above illustrations provide an indication of the type of commercial advertisements condoned or discouraged by the Department of Consumer and Corporate Affairs (in regard to foods) and the Department of National Health and Welfare (drugs, cosmetics and devices). In discouraging excesses of hyperbole and other objectionable techniques the Guide has attempted to structure food, drug and cosmetic advertising in such a manner as to allow for rational consumer decisions, rather than "choice" colored by non-informative advertising methods. Yet it is patently clear that in many respects, the spirit of Guides is not always followed. Perhaps the most obvious example is in the field of cosmetic advertising, where success, happiness and voluptuousness are portrayed as the byproducts of the latest hair colouring formula, or newest shade of lipstick. Tacit acceptance of such campaigns by the Department of National Health and Welfare would suggest that advertisers will be given a great deal of latitude in the commercial promotion of food, drugs, cosmetics or devices, so long as there is no apparent danger to health or safety, or outright deception.²⁵⁰

B. *Judicial decisions*

There have been only two reported cases under the *Food and Drugs Act* relating to advertising in breach of the legislation. In *R. v. Wander Ltd.*,²⁵¹ the accused was charged with advertising the product, "Ovaltine", in a manner likely to create erroneous impressions regarding its value, composition or merit. The offensive advertisement was published in the *Toronto Daily Star* and stated: "Read what you can get in two glasses of Ovaltine; more Vitamin C than four ounces of tomato juice." In considering the facts of the case and the expert evidence adduced by the Crown, Magistrate Gullen noted that the following should be the test applied:

However, the point to be considered in this connection is not the quantities used, as the servings would vary according to the size of the teaspoon used and whether it was level or a heaping teaspoonful of Ovaltine, but rather the comparison of certain foods as the sources for certain vitamins.²⁵²

Evidence was presented by the Crown indicating that eight other commonly-eaten foods were better sources of Vitamin "C" than tomato juice. In convicting the accused, the Magistrate held that the use of tomato juice as the basis for comparison was unfair and misleading in light of the superior Vitamin "C" foods, and that the advertisement thereby created an erroneous impression regarding the vitamin content of Ovaltine.

The court indicated in the judgment that under (then) section 32A of the Act,²⁵³ the onus lay on the accused to rebut the presumption of guilt. Further, whether the advertisement was likely to create an erroneous impression, “. . . is a conclusion or fact which must be found by the Court from the evidence adduced . . .”²⁵⁴ In this regard, the “likelihood” or “probability” of creating the erroneous impression must be proved beyond a reasonable doubt to obtain a conviction. Finally, the test to be applied in interpreting the advertisement is that of the “average, fair and reasonable person”.²⁵⁵

The second reported case under the *Food and Drugs Act* has been *R. v. Westminster Foods Ltd.*,^{255(a)} and involved a charge for misleading labelling of margarine containers contrary to section 5(1) of the Act. Here the Court held that the section created an offence of strict liability and that *mens rea* was not an essential ingredient for a conviction.

C. Comment

With but two reported cases touching misleading advertising, it is of course impossible to formulate concrete rules regarding the *Food and Drugs Act* and *Regulations*. The dearth of case law would however, suggest that either manufacturers and advertisers are exercising extreme caution to ensure compliance with the legislation, or else the relevant government departments have been lax in administration. Of the two, the former would appear to be the more likely.²⁵⁶ Further in this regard, the Department of National Health and Welfare periodically issues Trade Information Letters touching various aspects of administration.²⁵⁷ It was through such a letter that the “shingle” type bacon package was eliminated, and replaced by a container which allowed the consumer to see more of the product.²⁵⁸ Every Canadian packer of meat products received a copy of the Department letter, which *inter alia* contained the following provisions:

The Food and Drug Directorate has concluded that a package of bacon which reveals a portion of lean bacon, but does not show the actual proportion of lean to fat in the whole slice, is in violation of Section 5(1) of the Act. It is therefore requested that you take the necessary steps to remove any element of deception that may exist by the use of your present method of packaging bacon.

This Directorate will take appropriate action if deceptive packages of bacon continue to be sold after January 1, 1968.

The Department letter being dated 4 February, 1965, the meat producers were given ample time to redesign their bacon packages to comply with the directive. That no prosecutions for violations of the directive are recorded, and that presently bacon is packaged in a non-deceptive manner are testimonies to the effectiveness of the Trade Information Letter.²⁵⁹

The effectiveness of the *Act* and *Regulations* in curbing misleading advertising is also manifested through preclearance procedure for radio and television commercials. Working in co-operation with the Canadian Radio-Television Commission, the Food Division of the Standards Branch (Department of Consumer and Corporate Affairs) and the requisite division of the Department of National Health and Welfare screen all advertisements for food, drugs, cosmetics and devices.²⁶⁰ Yet, for all its successes in preventing deceptive advertising, be it through industry-government consultation; administrative orders or pre-clearance, the *Act* is, by its very nature limited. For it applies only to food, drugs, cosmetics and devices of a medical nature. Consequently, it can have but limited effect in the total spectrum of false misleading and deceptive advertising.²⁶¹

CHAPTER VI OTHER FEDERAL STATUTES

In having examined the *Combines Investigation Act* and the *Food and Drugs Act*, we have touched upon two of the most important federal enactments in the field of misleading commercial advertising. The other key Federal area, the *Criminal Code* and broadcasting, will be discussed subsequently.²⁶² There are, however other enactments which contain provisions for the regulation of advertising. Two which bear some resemblance to the *Food and Drug Act* are the *Meat and Canned Foods Act*²⁶³ and the *Proprietary or Patent Medicine Act*.²⁶⁴ The former deals with the labelling, marking and selling of canned foods, while the latter regulates the labelling, packaging and promotion of patent medicines. The *Weights and Measures Act*,²⁶⁵ provides *inter alia* that all pre-packaged goods as defined by the Act,²⁶⁶ correctly indicate the net quantity of the product.²⁶⁷

The latest federal enactment relating to advertising is the *Hazardous Products Act*.²⁶⁸ As its title suggests, the statute is concerned with goods which endanger health and safety, it being unlawful to import, advertise or sell any products listed in the Schedules to the Act.²⁶⁹ Included in the list of prohibited products are jequirity beans and all children's furniture and toys painted with a material containing a certain amount of lead compounds. Those products listed in Part I of the Schedule may not be imported, sold or advertised under any circumstances. Part II of the Schedule outlines those products which may only be sold, advertised or imported as authorized by the regulations, and comprises certain household products containing potentially dangerous chemicals or compounds.²⁷⁰ As of writing, there have been no reported cases under the, *Hazardous Products Act*.²⁷¹

CHAPTER VII

THE CRIMINAL CODE²⁷²

A. Lotteries²⁷³

One of the most favoured techniques of commercial advertising is the give-away. The most common forms of such practice are manifested through contests or games, designed primarily to promote the sale of a manufacturer's products through the awarding of prizes to lucky winners. Since few (if any) manufacturers award a prize to every customer, receiving a prize becomes a matter of chance, contingent in most instances on one's name being selected at random from among thousands of entries. Consequently, such promotional schemes come into direct confrontation with section 189 of *The Criminal Code*. Thus, manufacturers and advertisers have attempted to devise such promotions in such a manner as to circumvent the *Code* without destroying the effectiveness of the contest or game in terms of increased sales. The reported cases on this subject deal primarily with the question of whether or not a particular promotion is a lottery within the meaning of the *Code*.

Of the various subparts of section 189(1), subsections (a) and (d) are those most closely related to commercial promotions. The former deals with *advertising* a scheme under which awards are made through chance, while the latter forbids the actual *conducting* of any such scheme.²⁷⁴ Thus, subsections (a) and (d) constitute separate offences, although as a matter of practice, both would be present in any commercial contest or game. Under section 189(1) it is also an offence to disseminate tickets, devices, etc. in furtherance of a scheme of chance (189(1) (b)); to deal with any devices in pursuance of such a scheme (189(1) (c)); to conduct a lottery whereby the winner receives a greater amount than what he put in (189(1)(e)) and to dispose of goods by means of chance or mixed chance and skill, where the competitor pays money or other valuable consideration to enter the contest (189(1)(f)).

In the early case of *R. v. Robinson*²⁷⁵ it was held that the three essential elements of a lottery are: (a) consideration; (b) prize and (c) chance. Of these, prize remains a constant element since an award of some nature is the very essence of a contest or game. Where promotions, have been tailored to come within the law, variations have been made on the consideration and chance elements. It is possible therefore to conduct a promotional campaign employing a give-away technique by carefully framing the rules of the contest.

(a) *Skill v. Chance*

The Supreme Court of Canada has held that where a contest involves skill alone, or a mixed element of skill and chance, there is no offence committed contrary to (now) section 189(1)(d).²⁷⁶ For obvious reasons no offence is committed under section 189(1)(a) for advertising such a scheme.²⁷⁷ This principle would not apply, however, to section 189(1)(f), which specifically prohibits a game or contest where a competitor pays money or other valuable consideration, even if an element of mixed chance and skill is involved.²⁷⁸ Here, the promotion must be one of *pure skill* to be legal (if money or other valuable consideration passes). It is a matter of fact to be determined by the court,²⁷⁹ whether skill, chance, or a mixture of both is the determining factor in awarding the prize.²⁸⁰ Once it is determined that pure chance is involved (and also established that consideration has passed and a prize is to be awarded), then a conviction will result. Thus it is no defence that the price of the advertiser's goods did not increase as a result of the contest, and therefore each customer runs no risk of loss as he is receiving full value for his money.²⁸¹

The fact that a contestant is first selected by chance, would appear not to render a contest or game contrary to sections 189(a-e)²⁸² if he subsequently is required to exercise some degree of skill in gaining the prize. (This factor would not apply to section 189(1)(f), since any chance whatsoever will render a contest under this section illegal.²⁸³) However, the skill involved must be *bona fide* and must entail the use of a reasonable amount of intelligence. Thus in the early case of *The King v. Johnson*,²⁸⁴ the winning contestant was selected by lot, but in order to win the prize offered, was obligated to shoot a turkey at fifty yards in five shots. The Court held that the evidence adduced indicated "... that any person could easily shoot the turkey under the circumstances",²⁸⁵ and the accused was convicted for running an illegal lottery. Similarly, in *R. v. Wallace*,²⁸⁶ it was held that a potato-peeling contest was not really a test of skill, but a subterfuge to avoid section 179. Finally, in *R. v. Robert Simpson (Regina) Ltd.*²⁸⁷ the Saskatchewan Court of Appeal convicted the accused corporation on the basis that the skill-testing question asked was, in the words of Mr. Justice Gordon "... an absurdly simple question",²⁸⁸ relegating the entire promotion to one of pure chance. The promotion consisted of distributing "flyers" to Regina householders, informing them of a chance to win an automobile. Customers were to write their names and addresses on sales slips received pursuant to purchases made in the accused corporation's store. The automobile was to be awarded on a local television programme, but prior to the actual broadcast, the winning entry was selected and the winner telephoned and advised to have a copy of the "flyer" nearby,

when telephoned again during the actual telecasting. The winner was subsequently called during the broadcast and asked to turn to a certain page of the "flyer". She was then asked the regular price and sale price of a certain refrigerator. Having answered the questions correctly, she was awarded the automobile.

In focusing on the question of the skill involved in the contest under consideration, Mr. Justice Gordon noted:

Now it is quite true that all blind, dumb, deaf or paralyzed people would be excluded from this contest; also all those who cannot understand, read or speak English. I venture to say that out of all the people residing in Regina and district, this would exclude a very small number indeed. It really reduces itself to the question of whether or not the ability to read, understand and speak the English language is a skill within the meaning of those cases which exclude from the designation of lottery all those schemes which involve some skill in determining the winner of property offered.²⁸⁹

After holding that "skill" as the word is used in the *Criminal Code* should be defined as: "Capable of accomplishing something with precision and certainty, practical knowledge in combination with ability; cleverness and expertness",²⁹⁰ he continued:

With every respect, I am of the opinion that such elementary knowledge is the accomplishment of more than 90% of our adult population and that those who have not this ability are so far down the scale of our educational standards as to be a negligible proportion of our population.²⁹¹

Even where a contest appears to involve a test of skill, if in fact success is entirely dependent on a purely arbitrary decision of the promoter, the scheme will be found to be a lottery.²⁹² Thus, in *R. v. United Profit Sharing System Ltd.*,²⁹³ prizes in a contest were awarded at the discretion of the promoter, the award sometimes being made to persons who had not purchased tickets in the scheme. One such gratuitous award was made to the local chief of police. As prizes were given at the whim of the promoter, the accused corporation was found guilty. These cases indicate that besides satisfying other requirements, a game or contest must be conducted in a *bona fide* manner, and that prizes cannot be awarded on a discriminatory basis.

What then constitutes a proper exercise of skill? In *R. v. Roe*²⁹⁴ estimating the length of time required for a barrel to travel between two points in a river was deemed to involve some degree of skill, based on mathematical calculations involving the weight of the barrel, distance to be travelled and speed of the river current.²⁹⁵ It would appear that a contest based on one's memory and recall ability of certain newspaper advertisements would satisfy the requirements of skill.²⁹⁶ A Manitoba decision indicates that unscrambling words to form a complete sentence would also suffice. Thus in *R. v. Kellogg-Pillsbury*,²⁹⁷ contestants were selected by chance, after having submitted their names

and addresses on the boxtops of the advertiser's products. If an individual's name was selected, he or she was telephoned and asked to unscramble letters to form a sentence, in order to qualify for a prize. The scrambled sayings were varied, with one of them being the following:

ROUY TCNOU TOND DHATCHE SNEKCIHC BROFEE ER
YE TH
"DON'T COUNT YOUR CHICKENS BEFORE THEY'RE
HATCHED"

The contest was held to be one of mixed chance and skill and the accused corporation was found not guilty of conducting a lottery in contravention of the *Criminal Code*. Evidence at the trial revealed that eight contests had been held between the periods 20 March, 1956 and 31 July, 1956, and that only four contestants had managed to unscramble the words, and thereby qualify for a prize. The contest therefore was *bona fide* in that all participants whose names were drawn did not automatically receive an award. Success was entirely contingent on meeting the skill-testing requirement. That fifty per-cent of the participants did not qualify for a prize demonstrated that the question was not of the "absurdly simple" genre as in *R. v. Robert Simpson (Regina) Ltd.*

In *R. v. Procter & Gamble Co. of Canada Ltd.*,²⁹⁸ the Supreme Court of Canada considered charges against the accused corporation under sections 189(1)(a) and (d). The corporation had packed questionnaires in 10,000 packages of its soap products distributed across Canada. Over 100,000 packages contained a special marking indicating that one of the special packages might contain a questionnaire, but in fact only about ten per-cent (10,000) did. Thus, receiving a questionnaire was a matter of pure chance. A customer purchasing a package with the questionnaire was entitled to receive \$5.00 from the corporation upon completing the questions and returning the form to a specified address. The questions asked related the customer's previous washing product, whether bleach was used, and asked for suggestions as to how the accused's products could be improved. If the questionnaire were not completed and returned, the customer was not entitled to \$5.00.

In affirming the acquittal, the Supreme Court held that an uncompleted questionnaire was not an instrument "... giving a right to receive money" within the definition of property under section 2(32) (a) of the *Criminal Code*. In the words of Mr. Justice Martland; "The questionnaires constituted nothing more than an offer, but the right to receive the payment could only arise by contract, which would result if the offer were accepted in the manner which it had indicated, which involved

the furnishing of information to the respondent. In itself it created no right to property".²⁹⁹ Further, the promotional scheme was held not to be a sham, with the Court also finding that the questionnaires represented a legitimate market research technique designed to furnish the corporation with valuable information about its product.

Obviously, it is impossible to lay down definite rules in determining whether or not a "skill-testing" requirement is such in the true sense of the term. As long as there exist advertising agencies and marketing men, countless variations will be found for new contests and games, and to use a legal cliché, each contest must be decided on its own merits. For example, a current favourite has been to use mathematical problems as the skill-testing question. Although the question is often difficult enough, the promoter invariably prints the problem on the entry form, enabling it to be answered at home. Thus in a recent contest sponsored by the Tea Council of Canada, the following skill-testing question appeared on the entry blank:

Multiply 34 x 8
Add 883
Divide by 7
Subtract 87

In its, "Partners' n' Prizes" contest, General Foods also posed a mathematical question on the entry form, but of a somewhat greater degree of difficulty:

Multiply 247 x 43
Add 40,751
Divide by 36
Subtract 838

Then out of an abundance of caution, the following appeared below the space provided for the answer:

Sign Your Name Here:
I have answered this question without any assistance
.....³⁰⁰

"Absurdly simple" questions? Looking at them in isolation, the answer a court would give would probably be "no". Admittedly, some degree of skill is required to complete the problem successfully. However when judged in light of surrounding circumstances, the requirements take on the appearance of a sham. No time limit is set on answering the question. Also, despite the saving clause of the type employed by General Foods, it is suggested that the courts would view the clause as a subterfuge, and would hold that outside assistance was a distinct possibility.³⁰¹

There appear to be no reported cases of prosecutions launched under the *Code* for this variety of contest. However a recent civil decision³⁰² involved a promotion in which a skill-testing mathematical question was employed. In *Ranger v. Herbert A. Watts (Quebec) Ltd.*, the plaintiff found a \$10,000 cash award certificate in a package of the defendant company's cigarettes. In order to gain the prize however, Mr. Ranger was to answer the following question within a ninety second time-limit:

Multiply 24 x 6
Add 388
Divide by 7
Subtract 38

The question was put to the plaintiff via a long distance telephone call. No prior warning was given Mr. Ranger of the call.³⁰³

The plaintiff failed to correctly answer the question, giving the answer of 114 rather than the correct one of, 38, and was not awarded the prize of \$10,000.³⁰⁴ In finding for the plaintiff, Mr. Justice Haines noted that Peter Jackson advertisements conveyed the impression that every person finding a cash award certificate would automatically be entitled to a prize. No mention was made of the need to answer the skill-testing question. In the words of the Court:

To allow a producer to evade the fair implication of his advertising is to permit him to reap a rich harvest of profit without obligation to the purchaser.

Should such a manufacturer or sales agency be permitted to create public confidence, promote their sales and then plead that the criminal law precludes delivery of the premium?³⁰⁵

In awarding the prize money to the plaintiff, the Court, by implication has sanctioned the legality of promotion. Further, it would appear that the requirements of the *Criminal Code* are secondary to the impression created by the advertisement in the minds of the public. If this decision is subsequently upheld by the Ontario Court of Appeal³⁰⁶ or ultimately the Supreme Court of Canada, the lottery provisions of the *Code* would have little application to commercial promotions. Obviously then, all an advertiser would need to do would be to word his commercial in such a way as to create the impression that winning is automatic if a coupon is found in the sponsor's product, etc.³⁰⁷

Questions at either end of the scale—those which are of sufficient difficulty to involve skill of a high order; and those which are “absurdly simple”—would seem to present no problem in gauging whether or not a requirement of skill is *bona fide*. Rather, it is the in-between or “gray” area which presents the problem. It would appear that promoters are concentrating on this middle area, attempting to create questions which require some skill but are not of such difficulty as to preclude the

average person from answering them correctly. For obvious reasons of public relations, sponsors of contests or games are very reluctant to have a participant fail to win a prize for failure to meet the skill-testing test. Consequently, they will pitch the test at the lowest possible level; or provide conditions that attempt to guarantee that as many questions as possible will be correctly answered.

(b) *Consideration*

The principal reason for holding contests or games is to promote the sponsors' products and hopefully increase sales. The basic manner of participating in the scheme is to provide proof of purchase along with the entry form. Techniques have however been devised to circumvent the consideration aspect of such schemes. For instance, where proof of purchase is given as a condition for entry, the rules will invariably allow a "reasonable facsimile" to be used in lieu of an actual product label, boxtop, etc. Most sponsors require that the facsimile be hand drawn and not mechanically reproduced. Another technique is to advertise that a purchase is not required in order to enter the contest or participate in the game. This method was especially evident in the promotional games sponsored by the major oil companies within the last few years,³⁰⁸ it being publicized that one could simply ask a service station operator for a participation card, without making a purchase.

By making a purchase unnecessary in order to partake in the contest, it can be claimed that a lottery is not being held, since consideration is not a factor in the scheme. Of course a person *may* submit labels from the advertised products, or *may* make a purchase before receiving an entry form, but it is not incumbent on him to do so. However, as a matter of practice, the vast majority of participants *will* buy the sponsor's products before entering. Most cannot be bothered to take the time to draw "reasonable facsimiles"; or will be too embarrassed to ask for a participation form without making a purchase (if they can get one).³⁰⁹ Although no statistics can be produced in support of this last statement, the fact that contests and games continue to flourish bears testimony to their effects on sales volume.

There appear to be no reported cases touching the substantive question of consideration and promotions of the nature described above. It has been held however that requiring a person to make a purchase of the promoters' products—regardless of the fact that the purchase price represents good value, the price of the goods not having been raised to pay for contest expenses—is sufficient to constitute consideration.³¹⁰ Finally, it would now appear that failure of a charge to contain an averment that a promotional scheme involved consideration as a mate-

rial element of the offence, is not fatal to the validity of the information.³¹¹

(c) *Conclusion*

Should the law even attempt to prevent promotional contests? Various arguments have been advanced against such forms of advertising, among them (a) that contests or games awarding substantial prizes invariably increase the normal retail price of the sponsor's products; (b) that such schemes lead to irrational consumer preferences in choosing the promoted product in lieu of an identical, and cheaper substitute; and (c) that contests are inherently evil, preying on one's gambling instincts and desire to receive something for nothing. Undoubtedly, there is some truth in each of these allegations, but in virtually any commercial undertaking, there is bound to be some effect of a negative nature. As noted early in this work,³¹² it has been federal government policy to avoid assuming an over-protective attitude toward the consumer and not to assume the, "Big Brother" role. In light of the recent amendments to the *Criminal Code*,³¹³ it is submitted that to allow government-sponsored schemes, which are pure lotteries and to forbid commercial promotions which at best are "quasi" lotteries is to adopt a double standard. Save for fraudulent contests, as for example where the prizes advertised are not awarded;³¹⁴ where awards are made at the whim of the promoter; or where every participant is a "lucky winner" commercial promotions involving ethically-conducted contests should not be made the target for criminal prosecutions. In instances of misrepresentation involving contests, section 37 of the *Combines Investigation Act* could easily be invoked as the vehicle for prosecution.

B. *Trading Stamps*

Of all "gimmicks" prevalent in commercial advertising, none has been the subject of more controversy than trading stamp schemes.³¹⁵ Employed primarily by large supermarket chains, trading stamps were an especially popular form of promotion in Canada, during the latter part of the 1950's and the greater part of the 1960's. Of late however, their popularity appears to have waned considerably, due largely to the great "consumer revolution" of the 1960's. The chief consumer criticisms levelled against this type of advertising have been: (a) that trading stamps invariably obscure, and in many instances increase, the retail price of consumer goods and (b) that stamp schemes are a form of compulsory selling, compelling a consumer to accept stamps for goods which he might not want. From a legal viewpoint, one of the chief concerns surrounding trading stamps appears to be whether or not they are a form of "token currency", and hence contrary to monetary policy.³¹⁶

Since trading stamps are given with every purchase and are interwoven into the over-all operation of the retailer, a customer cannot decline the stamps in favour of a reduction in price on the goods purchased. The answer given by the retailer would be that prices are not raised as a result of the trading stamps, and that the stamps are really a bonus, entitling the customer to eventually receive "free" premiums.

Legislation prohibiting trading stamps has existed as part of the *Criminal Code* since 1905.³¹⁷ Over the years, a myriad of schemes have been devised many of which, for one reason or another fell within the prohibited area of "trading stamps" as defined by the Code. Discussion in this work will be focused on "modern" stamp schemes of the type described by the Royal Commission on Price Spreads of Food Products.³¹⁸ A typical stamp scheme would operate as follows: stamps are purchased by the retailer from a stamp company in pads of 10,000 at a cost of \$20.00 per pad. A pad represents \$1,000 of retail sales and its cost to the retailer is equal to about 2% of sales. The trading stamp company provides, besides the stamps, books in which the stamps are pasted, and catalogues illustrating the premiums. The company also purchases the premium gifts and provides redemption facilities. Stamps are given to customers at the ratio of one stamp with each ten-cent purchase and are pasted in books, each of which holds 1,500 stamps. The stamps are presented by the customer at the retailer's store for redemption.³¹⁹

"Trading Stamps" are defined under section 337 of the *Criminal Code*. The essence of a "trading stamp" is that it represents ". . . a *discount* on the price of goods or a *premium* to the purchaser . . ." but not all schemes which provide either, or both of these "bonuses" are prohibited. Thus to qualify as a trading stamp under the *Code*, the coupon is one:

- (a) that may be redeemed
 - (i) by any person other than the vendor, the person from whom the vendor purchased the goods, or the manufacturer of the goods.
 - (ii) by the vendor, the person from whom the vendor purchased the goods or the manufacturer of the goods in cash or in goods that are not his property in whole or in part; or,
 - (iii) by the vendor elsewhere than in the premise where the goods are purchased; or
- (b) that does not show upon its face the place where it is delivered and the merchantable value thereof; or
- (c) that may not be redeemed upon demand at any time.³²⁰

The substantive offence for issuing trading stamps as defined by section 337 is contained in section 384 of the *Criminal Code*:

384(1) Every one who, by himself or his employee or agent directly or indirectly issues, gives, sells or otherwise disposes of, or offers to issue, give, sell or otherwise dispose of trading stamps to a merchant or dealer in goods for use in his business is guilty of an offence punishable on summary conviction.

(2) Every one who, being a merchant or dealer in goods, by himself, or his employee or agent, directly or indirectly gives or in any way disposes of, or offers to give or in any way dispose of, trading stamps to a person who purchases goods from him is guilty of an offence punishable on summary conviction.

The thrust of the section is therefore aimed at the distributor of trading stamps, and at the retailer who engages in this form of promotion.

As the *Code* does not impose a blanket prohibition, schemes of a trading stamp nature may be legitimately promoted if certain requirements are met. The Supreme Court of Canada has indicated that where the stamps “. . . could be redeemed only from the respondent from whom (the goods) had been purchased and at the premises where it was sold; and the stamp shows upon its face the place where it was delivered and where it was redeemable upon demand, and, in fact, where it was so redeemed”, then such stamps do not fall within the definition of section 337.³²¹ In *R. v. Loblaw Grocerteria*, the stamp in question contained the following words:

Redeemable at any time
Merchantable Value 2 Mills
1445 Main Street N.
Winnipeg
B.C. Premium Company

In the instant case, a ten-cent tin of sardines was purchased with the customer receiving one “Lucky Green Stamp”. On presentation for redemption at the retailer’s address as printed on the stamp, the customer was awarded two cup cakes. Holding that the conditions stipulated in section 337(b) of the *Code* had been met and that the “Lucky Green Stamp” was not a prohibited form of the trading stamp, the Court also stated that the section gave an exhaustive definition of the term.

(a) *Approved trading stamps practices*

Generally, a trading stamp scheme which satisfies the requirements of section 337 may be legitimately conducted.³²² Further, the Courts have not in recent cases looked to the degree of compliance: token adherence to the Code appears sufficient. Thus where a small number of stamps—of insufficient quantity to obtain a premium listed in the stamp catalogue—are redeemed on demand, it is sufficient if the redemption articles are cup cakes,³²³ or a book of matches and four paper bags.³²⁴ The test appears to be that something of merchantable value be given, even where only a single stamp is presented for redemption. It has also been held that where the words, “Merchantable Value, 2 Mills” appear in very small type on the face of the stamp and can only be read with some difficulty, the requirements imposed by section 337 are nevertheless met.³²⁵

Where a merchant offers "cash bonus discount notes" to customers as an incentive to pay cash rather than use credit, such notes are not trading stamps within the Code. In *R. v. Lloyd H. Alford & Son Ltd.*,³²⁶ such coupons were given only with cash sales, and not with credit purchases. The value of the notes was dependent on the cash paid, not the price or value of the goods sold. It was held that the scheme was an incentive for cash payments and not a discount on the price of goods.

Regarding redemption on demand, it appears that a delay in filling orders for stamp catalogue premiums, does not in itself make a scheme illegal.³²⁷ As a result, it is not incumbent on a stamp plan operator to have available on his premises sufficient quantities of all catalogue premiums to satisfy expected demand. Further, it would seem from the *Klecknet* decision that equal or superior premiums to those advertised may be awarded without jeopardizing the legality of the promotion.

Finally, an interesting technique of awarding trading stamps was examined by the Ontario High Court in *R. v. Robert Simpson Co. Ltd. and Loblaw Grocerterias Co. Ltd.*³²⁸ The defendant Simpsons, sold merchandise certificates which entitled the holder to merchandise sold by the store, for the face value of the certificate. Several of these certificates were purchased by the defendant, Loblaw, and used as premiums in exchange for, "Lucky Green Stamps", which Loblaw provided its customers. In the instant case, one of Loblaw's customers accumulated sufficient stamps to obtain merchandise certificates to the value of, \$6.00. The customer then applied the certificates toward the purchase of China to the value of 5.67, receiving the china plus 33¢ in change. In acquitting both accused, the Court held that the merchandise certificates were not trading stamps within the meaning of section 337(b), since Simpsons had not issued the certificates as a discount or premium to any of its customers.

(b) *Prohibited forms of trading stamps*

It would appear that although the degree of compliance is not stringent the conditions outlined by the Supreme Court in the *Loblaw* case must be strictly followed in order for a trading stamp programme to be legitimate. Thus in *R. v. Carriere*,³²⁹ the words, "St. Boniface Manitoba" appeared on the stamp as the place of redemption. It was held that the words did not comply with the requirements of section 337 regarding place of redemption. If such an address were considered sufficient then the stamps could be issued in every store and shop in the city and redeemed in any of them whether or not they had been issued or delivered by the redeeming vendor.³³⁰ Similarly, in *R. v. Rice and Fletcher*,³³¹ the word "London" on the face of the stamp was insufficient to place the stamps in question outside the definition contained in section 337.

When a single stamp or a number of stamps cannot be redeemed on demand at any time, a conviction will result. In *R. Ex. Rel. Kuhn v. Loblaw Grocerterias No. 1*,³³² an attempt was made to redeem one stamp, but the request was refused, a company employee indicating that a single stamp had no monetary value and that the minimum number of stamps which could be redeemed was that sufficient to obtain a premium as indicated in the stamp-plan catalogue. The accused corporation was consequently convicted under (now) section 384(2) of the *Criminal Code*.

For a stamp to fall outside of the prohibited definition, it must, *inter alia* be redeemed by either the vendor of the goods, the person from whom the vendor purchased the goods (the distributor) or the manufacturer of the goods (section 337(a)(i)). Here, "goods" refers to the products purchased which entitle the customer to trading stamps. In *R. v. McManus*,³³³ the accused was a manufacturer and seller of bath salts who distributed on each container of his product, a coupon entitling the purchaser to receive an 8 x 10 photograph of himself or a member of his family. After finding that the accused was not protected by the saving clause of (now) section 337 because the offer of the premium was not printed or marked on the receptacle in which the bath salts were contained, and that was not the container which was to be returned by the purchaser, but the label, the court found the label to be a trading stamp within the meaning of the *Code*, since the label was redeemable at the studio of the photographer and not at the premises of the accused. That the accused and the photographer were joint tenants of the studio was not considered as "a real occupancy", since no rent was fixed; occupancy was never entered into on behalf of the accused; and the photographer alone redeemed the coupon.

Finally, in *United Dominion Promotion Sales, Inc. v. Shaw*³³⁴ the Court was concerned with the legality of a trading stamp scheme, where the stamps contained the following words and figures on their face:

D		10
	P	
10		S
Merchantable		
Value 1 Mill.		

It was held that because the stamp gave no indication of where it was to be redeemed, the scheme was illegal under the Code.

(c) *Conclusion*

Since 1960, the courts have generally looked with tolerance on trading stamp schemes, so long as some degree of compliance is made with sec-

tion 337. To summarize what has been discussed above, it would appear that trading stamps plans are "legal" if the stamps:

- (a) are redeemed by the vendor, distributor or manufacturer of the goods the purchase of which entitles a customer to trading stamps.
- (b) are redeemable on demand regardless of quantity.
- (c) are redeemable at the premises where the goods were purchased.
- (d) contain on their face the merchantable value; the address of the vendor; and a statement indicating that redemption may be made at any time.

In addition, it would be necessary for the vendor, distributor or manufacturer to have at least partial property in the goods, the purchase of which entitles the customer to stamps (section 337(a)(ii)), *Criminal Code*.

C. *Improper use of the Mails for the purposes of solicitation*

Unsolicited mail has become an increasingly popular method of commercial promotion. Such mail may include advertising leaflets; "bonus" coupons to be used toward the purchase of a manufacturer's products; or unordered credit cards, all of which are generally legal, albeit annoying to some recipients. It is contrary to law, however, to use the mails to transmit unordered merchandise by C.O.D., or to word a solicitation in such a manner as to create the impression that the recipient is legally obligated to order the goods advertised. Section 339³³⁵ of the *Criminal Code* makes it an indictable offence to use the mails to defraud with the *Post Office Act*³³⁶ also prohibiting the unlawful use of the mails.³³⁷ The *Regulations*³³⁸ to the *Post Office Act* detail the requirements to be met in soliciting orders for goods or services by mail, including the following stipulation:

2. Where a letter or other mailable matter that is not a bill, invoice or statement of account due is in such a form that it has the general appearance of a bill, invoice or statement of account due, it shall have endorsed on its face the following notice:
 "This is a solicitation for the order of (goods, services or goods and services as the case may be) and not a bill, invoice or statement of account due. You are under no obligation to make any payments on account of this offer unless you accept this offer."

Requirements as to printing size, location of the above notice, etc., are also outlined in the *Regulations*.

Save for sending unsolicited items by C.O.D. which is *per se* illegal, it would appear that any other form of mail solicitation would be legal, so long as the enclosed letter contains words to the effect that the recipient is not bound to accept the goods. This would include the use of such merchandising techniques as sending a free sample of a particular product with a note indicating that if further goods are not wanted, the manufacturer must be informed accordingly. It should be noted that the above *Regulation* applies only to enclosures which have the

general appearance of either a bill, invoice or statement of account, and would presumably not apply to ordinary letters.

In fairness to the enterprises which use the mails for advertising, it should be pointed out that very often, the consumer is his own worst enemy in getting himself into the position of paying for goods he does not really want. He will act on the opportunity of getting something free, frequently neglecting to read the accompanying stipulations and reacting only when further goods, and bills, are sent. In the case of book or record "Clubs", the initial advertisement, in most instances outlines the conditions on which the "free" item is given, the usual stipulation being that the customer agrees to purchase a certain minimum number of articles. Unaware of these requisites, he will gladly accept the item given *gratis*, but balk when others requiring payment are delivered. In the final analysis, legal regulation of mail advertising can go only so far in protecting the consumer, save for the highly undesirable measure of prohibiting all such forms of solicitation.³³⁹

D. *Obscene Matter*

The advertising of means or instructions "... intended or represented as a method of causing abortion or miscarriage ..." is prohibited under section 159(2)(c) of the *Code*.³⁴⁰ Similarly under section 159(2)(d), it is unlawful to advertise products or techniques purporting to restore sexual virility or cure venereal diseases or diseases of the generative organ. In regard to the latter, there is a certain amount of overlapping with section 3 of the *Food and Drugs Act*, forbidding the advertising of any food, drug, cosmetic or device claiming to be a cure for certain diseases outlined in Schedule A thereto (*inter alia*: venereal diseases; sexual impotence).³⁴¹

The defence of "public good" is open to an accused charged under the above provisions,³⁴² but the burden would appear to be a heavy one. It is a question of fact whether the acts did or did not extend beyond what served the public good, but it is a question of law³⁴³ whether any act served the public good and whether there is evidence that the act alleged went beyond it.³⁴⁴ Further, the motives of the accused are irrelevant,³⁴⁵ and ignorance of the nature of the material is no defence.³⁴⁶

E. *The Sale of Used Goods*

Section 369 of the *Code* makes it an offence to sell or advertise used, reconditioned or remade goods without advising that they are not new. There appear to be no reported cases on this section.

CHAPTER VIII

PROVINCIAL REGULATION OF ADVERTISING

A. *Generally*

Through its criminal law powers, the federal government has assumed primary responsibility over commercial advertising. Whereas federal legislation has been *general* in character (for instance, section 37(1) of the *Combines Investigation Act* provides a blanket prohibition over all forms of misleading advertising), provincial legislation has tended to deal with particular situations, resulting in a myriad of provincial statutes which in some way affect advertising. In the forthcoming book, *Canadian Broadcasting Law and Administration*,³⁴⁷ the author has cited some 69 provincial statutes relating to advertising each concerned with a specific area of provincial responsibility.³⁴⁸ The result is a patchwork of provincial legislation, with some enactments being of immediate concern to the question of commercial advertising, while others are rarely, if ever, enforced.

The sheer number of provincial statutes precludes an examination of each individually. Rather, certain areas of more immediate concern to the question of commercial advertising will be examined in this chapter.

B. *Trading Stamps*

After some uncertainty,³⁴⁹ it would seem that provincial regulation of trading stamps is *intra vires* the province, and is not an invasion of the federal criminal law power. In the Alberta case, *R. v. Fleming*,³⁵⁰ the legislation under scrutiny was section 3 of the *General Code of Fair Competition and Business Practices* issued pursuant to *The Industry and Development Department Act*.³⁵¹ Section 3 read as follows:

- No license (individual, partnership, company or organization) shall give or offer to give, directly or indirectly, any gift, premium, services, concession, prize or other benefit of any kind or character whatsoever to any person
- (a) who purchases any goods or services from the licensee, or
 - (b) to induce any person to purchase any goods or service from the licensee, or
 - (c) for the purpose of furthering the sale of goods or service by the licensee.

The Alberta enactment was upheld as being valid regulation in relation to provincial trade. Although the legislation was aimed specifically at trading stamp schemes, the basis of the enactment was to terminate merchandising practices which could result in economic loss to the consumer, and not to control lotteries.³⁵² Further, the definition of "trading stamps" under section 337 of the Code was an exhaustive one, allowing provincial control over trading stamp schemes not covered therein.³⁵³

C. *Consumer Protection*

The 1960's witnessed the enactment of increased consumer protection legislation in various provinces of Canada. As these enactments relate to advertising, the key provisions are those aimed at consumer credit. For example, section 26 of the *Ontario Consumer Protection Act*³⁵⁴ provides that no advertising of the cost of borrowing is permitted within the province unless the representation includes the full cost of borrowing as stipulated by the Act. The *Consumer Protection Act*³⁵⁵ of Nova Scotia prohibits, *inter alia*, false, misleading or deceptive advertising regarding extension of credit.³⁵⁶ Finally, as noted earlier, Manitoba has recently enacted an amendment to its *Consumer Protection Act* which would make advertised claims a part of the warranty for goods and services sold.

D. *Margarine*

Several provinces have legislation regulating the advertising of margarine. The general principle behind such regulation, is that margarine is not to be depicted as being a dairy product. Thus section 7 of the *Ontario Oleomargarine Act*³⁵⁷ reads:

- (1) No person shall make a misleading claim with respect to oleomargarine, either by word or design, in an advertisement or on a package in which oleomargarine is contained.
- (2) No advertisement respecting oleomargarine and no package containing oleomargarine,
 - (a) shall state or imply that oleomargarine has a relation to any dairy product; or
 - (b) shall depict a dairy scene.

Other provincial statutes have similar provisions.³⁵⁸

E. *Alcoholic Beverages*

The provincial government is responsible for regulating the advertising of alcoholic beverages within its boundaries, as part of its general powers over the entire liquor trade.³⁵⁹ Provincial regulatory power extends to all forms of liquor advertising, including print, radio and television.³⁶⁰

As of the writing of this thesis, the positions of the various provinces in regard to the advertising of beer, wine and spirits is as follows:

No advertising permitted:
 Alberta,³⁶¹ British Columbia,³⁶² New Brunswick,³⁶³ Prince Edward Island,³⁶⁴ Saskatchewan.³⁶⁵
Advertising permitted subject to Provincial Regulations:
 Manitoba,³⁶⁶ Nova Scotia,³⁶⁷ Ontario,³⁶⁸ Quebec.³⁶⁹
No Regulations:
 Newfoundland.

Provincial regulation over alcoholic beverages will be considered in greater detail in Chapter IX.

CHAPTER IX

THE REGULATION OF ADVERTISING ON RADIO AND TELEVISION

Pursuant to its authority over the field of communications,³⁷⁰ the federal government is primarily responsible for the regulation of commercial advertising on radio and television. As shall subsequently be seen however, this power is not absolute, with provincial laws playing a vital part in determining the scope of advertising in the broadcast media.

The federal enactments directly touching commercial broadcasting are the *Broadcasting Act*³⁷¹ and the *Regulations* thereto. Under the terms of the Act, the Canadian Radio-Television Commission (C.R.T.C.) is charged with the responsibility for administering the statute, including the advertising aspect of commercial broadcasting. As a guide for advertisers, the C.R.T.C. periodically publishes circular letters, which are distributed to broadcasters throughout Canada. These circulars, coupled with those issued by the Commission's predecessor, the Board of Broadcast Governors, are important in clarifying certain sections of the legislation, as well as serving as a policy statement on important matters of broadcasting. Those circulars directed at advertising are thus of particular import to advertisers and their agencies, since they provide an insight into the type of advertisement likely to be accepted or rejected by the Commission. The importance of such knowledge will become apparent when pre-clearance procedure is discussed below.

The general rule pervading the regulation of broadcast advertising is that no advertisement may be aired which is contrary to law.³⁷² This blanket prohibition includes all federal and provincial laws.³⁷³ Thus what has already been discussed in this work pertaining to prohibited and permitted forms of advertising in its various forms, would be applicable in determining a breach of federal broadcasting laws. Further, certain items which may legally be advertised through other media cannot be promoted via radio or television. The advertisement of private bonds, shares or other securities is prohibited on the broadcast media.³⁷⁴ The exception is in regard to bonds of the Government of Canada, province, municipality or other public authority, which may be advertised. A further exception is deposit certificates of a recognized trust company, which may also be promoted. As well, stations are enjoined from broadcasting the sale of mining, oil or natural gas property or any interest in any mining, oil or natural gas property.³⁷⁵ Where a broadcaster is found to be in breach of the *Regulations* for allowing the presentation of an advertisement which is in contravention to some federal or provincial enactment, he would become liable to prosecution under the *Regulations*,³⁷⁶

subject of course to any "acceptance in good faith"³⁷⁷ provision of the particular enactment.³⁷⁸ Advertisers, and possibly advertising agencies,³⁷⁹ responsible for the creation of the illegal advertisement would be prosecuted under the relevant statute which was breached.

In regard to federal statutes, certain factors would tend to minimize the likelihood of any prosecution being commenced against a broadcaster. The first, as we have seen is the, "good faith" concept, although a broadcaster with suspicions about the legality of an advertisement could not conveniently avoid investigating the promotion fully. Second, the extensive pre-clearance procedure³⁸⁰ required before certain products (whose advertising falls under federal jurisdiction) may be advertised on radio or television virtually eliminates the likelihood that the advertisement presented for broadcasting contravenes any law. Provincial regulations, however, pose something of a problem, albeit a technical one. The fact that most of the provincial statutes touching advertising³⁸¹ are little-known, if known at all, to either the advertiser or the broadcaster, could result in the broadcasting of a commercial message which breached one of the provincial regulations. For example, the *Closing-Out Sales Act*³⁸² of British Columbia makes it an offence to advertise a closing-out sale by including in the advertisement goods which are not part of the vendor's regular stock. Were a broadcaster to innocently accept a commercial in contravention of this Act, he would technically be in breach of the Regulations and liable to prosecution thereunder. Practically speaking, however, the majority of these "hibernating" provincial statutes are rarely, if ever, enforced. Those provincial enactments of consequence, such as the various liquor control statutes, or margarine acts, would, however, be known to the broadcaster, and would be taken into consideration in his programming.

Basically, commercial advertisements can be divided into two categories: those which require government pre-clearance before they may be advertised; and those where such procedure is unnecessary, remembering always, however, that an advertisement must not be in violation of any federal or provincial law. Encompassed in the former category, that is, commercials which must be submitted for pre-clearance, are advertisements for all products coming under the *Food and Drugs Act*; the *Proprietary or Patent Medicine Act*; and commercials for alcoholic beverages. Generally then, there are two broad classifications for mandatory pre-clearance: (a) food and drugs and (b) beer and wine. These areas will now be discussed in turn.

A. Food and Drug Advertising

Section 11 of the A.M., F.M., and T.V. Regulations reads:

11(1) No station or network operator shall broadcast any advertisement or testimonial for any article to which the *Proprietary or Patent Medicine Act* or the *Food and Drugs Act* applies unless the continuity of the advertisement or testimonial has been approved by the Department of National Health and Welfare (and in the case of goods, by the Bureau of Consumer Affairs of the Department of Consumer and Corporate Affairs) and by a representative of the (Commission)³⁸³ and bears the registration number assigned by the (Commission);

(2) No station or network operator shall broadcast any recommendation for the prevention, treatment or cure of a disease or ailment unless the continuity thereof has been approved by the Department of National Health and Welfare and by a representative of the (Commission) and bears the registration number assigned by the (Commission);

(3) Continuities submitted for approval pursuant to these Regulations shall be forwarded to the (Commission) in triplicate at least two weeks in advance of intended use;

(4) Every station (and network operator) shall maintain and produce to a representative of the (Commission) upon request, a record of each continuity approved under subsection (1) or (2) (and broadcast by the station or network operator) which record shall contain

(a) the name of the product;

(b) the name of the advertiser or advertising agency submitting the continuity; and

(c) the registration number assigned to the continuity by the (Commission).

(5) Inspectors (of the Department of Consumer and Corporate Affairs) are authorized to act as representatives of the (Commission) for the purposes of the enforcement of this section. (A.M. and F.M. radio only).

An exception to this mandatory requirement, is where an advertisement for a food, drugs, patent medicine, cosmetic or device makes no claim as to the merits of the product:

Food, drug, cosmetic and patent medicine commercials which do not contain any claims on behalf of the manufacturer or producer and mention only the name of the product, the name of the place where the product may be obtained and the price of the product do not require clearance prior to broadcast. No descriptive words or phrases are to be used in such copy.³⁸⁴

Thus, the following advertisement would not need to be cleared before broadcasting, since no descriptive claims are advanced regarding the advertised product:

For this week only, X store, located at 1234 2nd Street in Doesville are offering Y's Beans with Pork at the price of 2 for 10c. Shop early and get your supply of Y's Beans with Pork. Remember, that's 2 for 10c at X store located at 1234, 2nd Street in Doesville.³⁸⁵

If a descriptive word such as "delicious" had been used to describe the Beans with Pork, it would be necessary to obtain pre-clearance prior to broadcasting.

Where an advertisement is for a product covered by one of the two Acts it faces a double test:

- (a) it must be approved by the Department of Consumer and Corporate Affairs—in the case of food—, or by the Department of National Health and Welfare—in the case of drugs, devices, cosmetics or patent medicines— to ensure
- (i) that the advertisement is not false, misleading or deceptive;
 - (ii) that no prohibited product under the *Act* is being advertised.
- (b) it must then be sanctioned by the C.R.T.C. as to "good taste".

Prior to the establishment of the Canadian Radio-Television Commission, the Board of Broadcast Governors had laid down certain principles and rules in relation to the somewhat nebulous and highly subjective "good taste" test. These policies have subsequently been adopted by the C.R.T.C. In B.B.G. Circular 123, 1 December, 1965, the philosophy behind the "good taste" requirement was stated:

It should be realized that the message of broadcasting is received at the fireside in the relatively unguarded atmosphere of the home, reaching old and young alike. Certain subjects, while meriting discussion elsewhere in the public interest are not necessarily suitable for this ultimate medium.

The (Commission) bases its good taste policy on the premise that all advertising matter and commercial announcements should be of such a character that they can be freely introduced into a mixed company of adults and children as a subject of ordinary conversation.

In the application of this policy, the acceptance of words and phrases of claims or qualification naturally depends upon the context.³⁸⁶

In light of this policy statement the Board promulgated certain specific rules to guide an advertiser in creating commercials. The following represents the most recent pronouncement on the subject of good taste, the Circular³⁸⁷ indicating however, that the list is by no means exhaustive, but merely indicative of the type of language not favoured by the Board (now Commission):

- (1) Continuity on behalf of laxitive products must be prepared with finesse. Where the registered name of a product includes the word "laxitive", the registered name may be used once per commercial. The words "regulation", "irregularity" or "regularity" will be limited to three per commercial.
- (2) No reference to excessive drinking in any form.
- (3) Scripts which describe soft, spongy, bleeding gums or gums that seem to shrink away from your teeth, subject to pyorrhoea or conditions such as gingivitis, trench mouth, etc. will be deleted.
- (4) Avoid all reference to menopause.
- (5) Avoid all reference to conditions or other causes which result from the neglect of personal hygiene.
- (6) Such terms as, "waste matter", "function" or "deranged kidneys" will be modified.
- (7) Reference to fleas, bed bugs, body lice, etc. will be modified
- (8) Terms such as, "eruptions", "pimples", "blotches", "boils" and "blackheads" are deleted and replaced by such words as "blemishes".
- (9) In deodorant commercials, reference to "embarrassment" or "offence" will be deleted.
- (10) Television continuities cannot present anatomical charts or forms showing directly or indirectly the emplacement of various human organs and their functions.

- (11) All reference to "bad breath" will be deleted.
- (12) The following words and phrases will be deleted:
 - unclog, clogged up or plugged up in cold remedy
 - constipation
 - elimination
 - post nasal drip
 - "drain" sinus cavities
 - cramps
 - periodic pain
 - bilious
 - lower tract
 - mucous
 - phlegm
 - runny nose
 - gas
- (13) The following products may not be advertised:
 - (a) Those manufactured for the relief of menstrual pain, piles, hemorrhoids, or menopause conditions.
 - (b) Sanitary pads or any such product. (Note: this rule no longer applies.)

Certain of these rules, would already seem dated. The wave of mouth-wash commercials, for example, are based upon the premise that people have "bad breath", although the actual wording used in such commercials is possibly more akin to "breath problem". The distinction, of course is meaningless. Many deodorant commercials on television convey the message—if not in words then in facial expressions—that body odor results in social embarrassment. Yet Commission policy appears more centered on the actual phraseology employed rather than the innuendo. This disparity is of course especially prevalent in television commercials.

Statistics reveal a fairly minor incidence of rejection and alteration of advertisements, both by the Department of Consumer and Corporate Affairs (or the Department of National Health and Welfare as the case may be); and the C.R.T.C. under its good taste requirements. In the six-month period ending 31 March, 1969, approximately 170 commercials for drugs and cosmetics were denied approval (out of some 3,446 commercials reviewed). Some 300 commercials for food were rejected (out of a total of 9,618).³⁸⁸ Rejections on the grounds of good taste appear even fewer, with one writer estimating that during the six month period ending 30 July, 1969, probably fewer than ½ of 1% of all advertisements submitted were altered to comply with Commission policy.³⁸⁹

Despite the relatively small number of modifications made to broadcast commercials during preclearance, the argument has been advanced that the entire procedure as relates to the Commission is *ultra vires*.³⁹⁰ The basic reason given is that the power to "censor" commercials is beyond the administrative authority of the C.R.T.C. That its authority has never been tested in court by an advertiser whose commercial has been rejected or altered, is due to the very practical fact that advertisers do not wish to alienate the Commission and prejudice their positions in having other commercials cleared. Yet in this writer's opinion

at least, criticism leveled at the C.R.T.C. and its good taste policies is rather fatuous. We have seen that the incidence of rejection is extremely small so that the procedure is really not a handicap to advertisers. Is it really a matter of concern that the term "blemishes" is preferred to, "pimples"? Finally, it is submitted that pre-clearance really works in favour of the advertiser and broadcaster, assuring him that in the food, drug and cosmetic fields, when an advertisement is broadcast, it meets all necessary standards.

B. *The Advertising of Alcoholic Beverages*

Jurisdiction over the advertising of alcoholic beverages is divided between the federal and provincial governments. As discussed above, communications has been held to be a matter of exclusive federal jurisdiction, extending *inter alia* to the regulation of radio and television.³⁹¹ Pursuant to this power, the Dominion operating first through the Board of Broadcast Governors and now the Canadian Radio-Television Commission, has enacted regulations governing the advertising of alcoholic beverages on the broadcast media. We have also seen in Chapter VIII that provincial jurisdiction extends over alcoholic beverages, including whether or not they may be advertised in the province, and if so, on what terms.³⁹² To summarize the federal and provincial positions:

- (a) The Federal Government, through the C.R.T.C. has jurisdiction over:
 - (i) whether or not liquor advertisements will be allowed access to the broadcast media.
 - (ii) Since in fact there is no blanket prohibition, it controls:
 - the content of the liquor advertisement, including the type of alcoholic beverage which may be advertised
 - good taste in the presentation of commercials for alcoholic beverages
 - the amount of advertising which will be permitted for alcoholic beverages
- (b) The provincial governments have jurisdiction over:
 - (i) whether or not alcoholic beverages may be advertised within the province,
 - (ii) content of liquor advertisements
 - (iii) the amount and time placement of liquor advertising
 - (iv) what type of alcoholic beverage may or may not be advertised.

Obviously there is a great deal of overlapping between the provincial and federal jurisdictions. The problem of the national advertiser is further compounded by the fact that he must consider not only the federal regulations in preparing his advertisement, but those of the various provincial governments as well. Later in this Chapter, we shall examine how some semblance of order has been reached out of this potential chaos.

(a) *Federal Regulations*

(i) *What may be advertised*

Where a province permits the advertising of beer or wine, advertisements for these products may be carried on radio and television within the sanctioning province.³⁹³ The promotion of spiritous liquor is, however, completely forbidden, even if it were approved by a province.³⁹⁴ As well, a distiller is forbidden from advertising non-alcoholic products which it might also manufacture, the net effect being that the name of a distiller is not permitted under any circumstances to be associated with a broadcast commercial. There appears to be no exception taken, however, to the airing of a programme where a distillery sponsors the event being broadcast (as long as it does not sponsor the programme itself). An example would be the televising of the Canadian Open Golf Tournament, which event until 1972, was sponsored by the House of Seagram, a distillery.³⁹⁵

(ii) *Policy*

Commission philosophy in regard to beer and wine advertising is best expressed in the negative: commercials for alcoholic beverages are not to be designed to convert non-drinkers into drinkers. Rather, the persuasion of the advertisement is to be aimed at encouraging brand preference and convincing *existing* drinkers to change their brand of beer or wine. The relevant *Regulation* reads:

the advertising shall not be designed to promote the general use of beer or wine, but this prohibition shall not be construed so as to prevent industry, institutional, public service or brand preference advertising.³⁹⁶

As the altruistic forms of commercials are of minor importance, being relatively few in number, the key advertisements are the "sell" messages, designed to promote "brand preference". In emphasizing its policy, the Board (now C.R.T.C.) has stated:

Advertising therefore, must be designed and directed at those who are legally entitled to consume and who in fact do consume alcoholic beverages. In short, the advertising should be directed at having drinkers change their brand to that of the advertiser, rather than influence non-drinkers to use the product.

Advertising which is designed or created to show or infer that the consumption of beer or wine is a necessary or desirable part of any social activity will not be approved.

. . . Any attempt in the advertising made to establish the product as a status symbol or a necessity for the enjoyment of life or an escape from life's problems will not be permitted.³⁹⁷

Consequently certain techniques are enjoined from use in beer or wine commercials:

Advertisers shall not:

- (a) show their product, except, incidentally in describing the manufacturing process (this rule appears dated)
- (b) show family or other scenes which include minors or persons who appear to be minors.
- (c) show glasses, bottles, steins or cans³⁹⁸ except that these may be shown in sequences of cartoon animation or puppetry. (this rule appears dated)
- (d) show persons engaged in any activity in which the consumption of alcohol is prohibited, either prior to or during such activity, e.g. driving a motor car.
- (e) use as a sound effect the sound of pouring the product.³⁹⁹ (this rule too, appears dated)

(iii) Time Factors

Strict rules are laid down in the *Regulations* as to the length of a beer or wine commercial and where and when such advertisements may be placed in relation to other programming. The relevant *Regulations* read:

- 2(b) spot and flash announcements are prohibited.
- (c) no opening or closing billboards⁴⁰⁰ identifying the sponsor or his product or both by name slogan or music shall exceed fifteen seconds in length.
- (d) no commercial announcement shall exceed sixty seconds duration.
- (e) no programme shall contain more than two billboards and not more than (in the case of both A.M. and F.M. radio) the number of announcements as listed below, or (in the case of T.V.) the aggregate duration of commercial messages in minutes as listed below.
- (f) no announcements other than the commercials and billboards allowed under paragraph (c) shall be made or devices used in any programme to advertise directly or indirectly the sponsor or his product except that in programmes sponsored alternatively with another sponsor, one commercial position may be traded with that alternate sponsor.⁴⁰¹

Length of Programme in Minutes	(A.M. or F.M. Radio)	(Television)
	Maximum Number of Commercials permitted besides billboards	Length of Commer- cials permitted in minutes, besides billboards
5	1	—
10	2	2.00
15	2	2.00
30	4	4.00
45	5	6.00
60	8	8.00
90	10	12.00 ⁴⁰²

(b) Provincial Regulations

Provincial law dictates whether or not advertisements for alcoholic beverages will be permitted within the province. Where permitted, such commercials must comply not only with the federal *Regulations* discussed

above, but also with any relevant provincial enactments. As noted, Manitoba, Nova Scotia, Ontario and Quebec are the only provinces which currently allow the advertisement of alcoholic beverages, with Newfoundland having no law on the subject.

For details of the provincial regulations, the relevant statutory authorities; Orders and Board policy statements should be consulted.⁴⁰³ Generally however, provincial enactments relate to basically the same areas as those dealt with by the federal regulations. All provinces which allow for the advertisement of alcoholic beverages for instance permit both beer and wine to be promoted. (As already noted, a province could not sanction the promotion of distilled spirits, on radio and television since federal *Regulations* specifically prohibit them from being advertised. A province could however stipulate that either beer or wine could not be advertised). The "brand preference" philosophy has been adopted by these provinces, as well as the general requirements that minors or persons appearing to be under the age of 21 years are not to be used in liquor advertisements; that no scenes depicting the use of alcohol under prohibited circumstances (e.g. driving a motor vehicle) are to be employed in commercials; and that the actual drinking of the beverage must not be shown. In Quebec, "Illustrations (for beer and wine) may not show . . . women, save if they are represented as persons of maturity, dignity and moderation and engaged in dignified activities of a wholesome nature. Women shall not be shown in immodest, vulgar and provocative dress or situations and there shall be no exploitation or utilization of the female form as the primary theme".⁴⁰⁴ Nova Scotia has a similar regulation,⁴⁰⁵ as has Ontario.⁴⁰⁶

It is in the area of time and placement of liquor advertisements that the greatest variance is seen between provincial and federal regulations. Contingent on the length of the programme, federal regulations have stipulated the maximum length of advertisements allowed on television. In view of these limits, it would not be open for a province to permit greater frequencies of beer and wine advertising based on its own standards. It could however, permit *fewer* than the federal maximums. Further, federal regulations do not specify *when* beer and wine commercials can appear, enabling the province to rule on the placement of such commercials.

In Manitoba, therefore, beer and wine advertisements are permitted only during the period 10 p.m. to 7 a.m.,⁴⁰⁷ while in Nova Scotia such commercials may only be broadcast after 8 p.m.⁴⁰⁸ Although Ontario has no regulation governing the placement of commercials, it does set maximum weekly and yearly limits for beer and wine advertising:

No company may sponsor more than three hours of radio and three hours of television programming on any radio or television station in any calendar week with a maximum of 78 hours in any calendar year. The time limitation may be extended in the case of cultural or sporting events to cover the entire broadcast or telecast of such events.⁴⁰⁹

In Nova Scotia, the following provisions apply:

No company may sponsor more than 1 1/2 hours radio and 1 1/2 hours television on any radio or television station in any calendar week. This time limitation may be extended in the case of cultural or sporting events to cover the entire broadcast or telecast of such event.⁴¹⁰

(c) *The Beer and Wine Clearance Committee*

Earlier, mention was made of bringing a semblance of order to the maze of federal and provincial laws relating to beer and wine advertising. In 1964 a move in this direction was made with the establishment of an *ad hoc*, informal body to review liquor advertisements. Consisting presently of the assistant General Counsel of the C.R.T.C. and representatives of the Liquor Control Board of Ontario and the Quebec Liquor Board, the Beer and Wine Clearance Committee has attempted to set a standard policy for beer and wine advertisements acceptable to both the C.R.T.C. and the two provincial representatives. The obvious advantage of the Committee is for the advertiser who needs only to obtain clearance from one body, rather than three (if he wishes to advertise in both Ontario and Quebec). Manitoba and Nova Scotia do not participate in the Committee. Thus beer and wine advertisements intended for these provinces must be cleared with the respective boards. However, provincial approval is virtually guaranteed once a commercial is cleared by the C.R.T.C. General Counsel. As Newfoundland has no legislation governing beer and wine advertising, what is approved by the Commission may be broadcast in that province.

As the standards of the C.R.T.C., Quebec and Ontario in relation to beer and wine advertising, are basically similar, Committee policy has in effect been a synthesis of the three, or in certain instances a restatement of existing regulations. Thus the "brand preference" philosophy, common to the three bodies, is a basis of Committee policy. Other rules of the Committee are as follows:

- (a) Copy containing women, provided the women are shown as mature and in dignified situations, is acceptable.
- (b) Brand identification will be by label only, which must be flat.
- (c) Advertisers must not (i) show their product except incidentally in describing the manufacturing process; (ii) show family or other scenes which include minors or persons who appear to be minors; (iii) show glasses, bottles, steins or cans, except that these may be shown in sequences of cartoon animation or puppetry; (iv) show persons engaged in any activity in which the consumption of alcohol is prohibited, either prior to or during such activity, e.g.: driving a motor car; (v) use as a sound effect the sound of pouring the product. (as above, certain of these rules appear dated)
- (d) With certain limited exceptions, copy will not be cleared containing the words, "case", or "cases", "glass" or "glasses" or "bottle" or "bottles".⁴¹¹

Finally, the general requirement of "good taste" would have to be met in order for a beer or wine commercial to obtain Committee approval. This requisite would equally apply to commercials cleared by the C.R.T.C. alone (Manitoba, Nova Scotia and Newfoundland).

As with pre-clearance for food and drug advertisements, the submission of beer and wine commercials for pre-broadcasting approval is ultimately to the benefit of the advertiser. Of some concern to the advertiser however, is the non-binding nature of Committee or C.R.T.C. decisions, allowing the C.R.T.C. to call for the withdrawal of a beer or wine commercial *after* it has passed through pre-clearance and is being aired.⁴¹² In the interests of certainty, Commission approval should be irrevocable, considering the high cost of producing a radio and even more so, television, commercial.

C. Advertising of Products not falling in the Beer and Wine or Food and Drug Categories.

Only advertisements for products encompassed within the food and drug; or beer and wine categories need be submitted for pre-clearance. Advertisements for products outside these areas must, of course, comply with all federal and provincial laws but when in doubt about a commercial, an advertiser may obtain an unofficial clearance, generally from the Department of Consumer and Corporate Affairs.⁴¹³

D. Further Powers of the C.R.T.C. in relation to Advertising

In addition to its requirement for mandatory pre-clearance for beer and wine and food and drug products, the Commission possesses an all-encompassing power to interdict the advertisement or promotion of *any* product on the ground of its being, "offensive or objectionable". The relevant sections of the *Regulations* read as follows:

The (Commission) may, by notice in writing to any station or network operator, require that station or network operator to modify the character of any advertisement broadcast by that station where, in the opinion of a representative of the (Commission) the advertisement is of an offensive or objectionable nature.⁴¹⁴

Where, in the opinion of a representative of the (Commission) a promotional program broadcast by a station is of an offensive or objectionable nature, or is likely to create or contribute to any public disturbance or disorder, that representative may, by notice in writing, require that station to show cause in the manner and within the time indicated in the notice, why the character of that program should not be modified.

If the Executive Committee of the (Commission) is not satisfied that the station has shown cause in the manner and within the time prescribed by the notice described in subsection (1) as to why the character of the promotional program described in that subsection should not be modified, the (Commission) may by written notice require that station to make such modifications to the program as the (Commission) may deem necessary.⁴¹⁵

Under the *Regulations*, "offensive or objectionable" findings may be applied both to pure advertisements, or to programmes in the nature of promotions. Presumably, it could be adopted against commercial broadcasts which do not require pre-clearance (e.g.: commercials promoting high phosphate detergents), where the Commission felt that the quality of commercial message did not meet its standards or was not in the public interest. The scope of the Commission's powers to interdict on the grounds of advertisements being "offensive or objectionable" is however unclear, there never having been a formal show-cause or modification order issued by the B.B.G. or C.R.T.C. under the *Regulations*.⁴¹⁶ Further, there appear to be no instances where an advertiser or agency has been cited for employing deceptive "props" or "mock ups" in its television commercials, whereby the advertised product is presented—by false means—as having qualities which it does not possess under ordinary use.⁴¹⁷ Similarly, the *manner* in which a product is advertised on television may ascribe to it greater qualities than it in fact possesses.⁴¹⁸ Again, there are no C.R.T.C. or judicial pronouncements on this point, although, pre-clearance would catch such deceptive practices in relation to food and drug and beer and wine commercials. It would also be open to the Combines Branch of the Department of Consumer and Corporate Affairs to recommend prosecution in regard to any television commercial which it deemed deceptive or misleading.

CHAPTER X

NON-GOVERNMENTAL REGULATION

Attempts have been made to minimize government regulation of advertising, through such techniques as: (a) voluntary restraints by advertisers and their agencies on potentially deceptive or tasteless advertisements; (b) national advertising codes and; (c) the works of such private agencies as the Better Business Bureau and the Consumers' Association of Canada. These non-governmental efforts flow largely from the desire of free enterprise entrepreneurs to maintain maximum trade freedom and correspondingly to reduce government legislation over commercial promotions. Whether the various private segments of the economy involved can, so to speak, "Keep their own homes in order" is the question to which we now turn.

A. *Advertisers: Manufacturers of Goods and Suppliers of Services*

The free enterprise economy in which Canada operates is based upon competition. The most successful enterprise, in terms of revenue, will be that one which increases sales at the expense of competitors. Advertising is one of the key means of increasing sales.

Chief among the problems facing advertisers' self-restraint is competitive pressure. Unless some generally binding consensus is reached among all major advertisers of a particular product or service, then self-discipline stands little chance of success. Should one break ranks, the others—out of economic necessity—are forced to follow. Where a new entry into the competitive field resorts—with success—to excessive advertising campaigns, the established enterprises are similarly compelled to take retaliatory action to preserve their existing market positions. Obviously then, self-restraint possesses the best chance of success in a monopolistic or perhaps oligopolistic market. The former is relatively rare in our economy while the latter has shown itself to be no guarantee against excesses in advertising. The competition between the "Big Three" automobile manufacturers (General Motors, Ford and Chrysler) bears witness to this fact.

Our economic system, therefore precludes effective curbs on excessive advertising from happening via self-regulation. Even if such efforts were to prove workable however, another question remains: What is the objective of self-regulation? Does the technique imply a mere decrease in advertising expenditures, or is it aimed at commercial content itself? If the latter is a goal of self-regulation, what aspects of commercial advertising are to be curtailed? As laws already exist which prohibit false, misleading and deceptive advertising, it would appear that self-regulation would be directed at commercial quality, aimed at eliminating offensive or distasteful (though perhaps technically legal) promotions. Yet, it is difficult to conceive of an advertiser excising an objectionable or tasteless advertisement which would likely increase sales. "If it sells, use it", would more likely than not be the response.

In the final analysis, an advertiser will exercise self-regulation in relation to advertising only if its profits are not seriously impaired. Self-regulation cannot, after all, become self-extinction,⁴¹⁹ and it is not to be expected that individual advertisers will curb or censor promotions if competitors do not follow suit.

B. *Advertising Agencies*

Perhaps even more so than with their principals, advertising agencies are part of a highly competitive market which minimizes any potential "censorship" role they might play over commercial promotions.⁴²⁰ Thus few agencies are likely to run the risk of losing clients by asking that product claims be justified before promotion;⁴²¹ or that certain objectionable aspects of an advertising campaign be eliminated, especially an agency dependent on one, or a very small number of clients, for its billings. It is therefore unlikely that Canadian advertising men will organize to press for the right to refuse to write advertisements that conflict with

their own values and conscience as their Swedish counterparts have allegedly done.⁴²²

C. National Codes

In Canada, private advertising standards have been set by the Canadian Advertising Advisory Board and the various Better Business Bureaux throughout the country. Their objective is to obtain compliance with a minimum standard of advertising ethics and thus make unnecessary further government regulation over commercial advertising.

(a) *The Canadian Advertising Advisory Board*

A Code, "The Canadian Code of Advertising Standards",⁴²³ was published by the organization in 1967, and was subsequently endorsed by an impressive list of organizations involved in commercial advertising.⁴²⁴ The Code, in the words of the Board represents "... the minimum ethical standard for . . . advertising,"⁴²⁵ and attempts to regulate "... those areas in which it is possible to make an *objective* appraisal of advertising content".⁴²⁶ Matters of taste, however, because of their subjective nature, are not covered by the Code:

It (the Code) 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.⁴²⁷

The supervising bodies under the Code are the Advertising Standards Council⁴²⁸ (English) and the Conseil des Normes de Publicité,⁴²⁹ (French), each of which has been established by the Board. The councils are composed of individuals with extensive experience in business and advertising who act as arbitrators to secure adherence to the Code. When a complaint is received by one of these councils alleging a violation of the Code, the complaint is investigated and if found to be factual, the advertiser responsible is contacted and asked to modify or remove the advertisement. Penalty for non-compliance with a council request is potential loss of access to the advertising media. In the words of the Code:

In the event that correction satisfactory to the Council cannot be obtained by co-operation of an offending advertiser, the media groups — who are among the sponsors of the Canadian Advertising Advisory Board, its Advertising Standards Council(s) and the Advertising Code—are advised not to accept the advertising until a correction is made.

Thus, the penalty the Council would impose would be to deprive the offender of the use of normal advertising outlets.⁴³⁰

The obvious weakness of the Code is that it deals with areas which are largely regulated by government legislation and waives jurisdiction

over objectionable and offensive promotions by avoiding the field of "taste". "False or Misleading Advertising", the initial paragraph of the Code, is for instance already dealt with comprehensively under federal legislation. Similarly, rules governing "Professional or Scientific Claims" have been promulgated in the *1961 Guide for Manufacturers and Advertisers* in relation to food, drug and cosmetic products. Yet the Code appears to have had little, if any, effect on the psychologically-orientated advertisements where sex, virility or status are often the basic themes. And it is precisely these types of advertisement that require scrutiny.

In an effort to regulate the subjective area of "taste", one writer has proposed the establishment of an Audit Bureau of Criticism to review commercial messages.⁴³¹ The Bureau would consist of persons not earning their livelihoods directly from the creation of advertising (e.g.: retired advertising men) plus a legal staff, semanticists and independent creative people capable of suggesting ways and means by which distasteful promotions might be modified without loss of persuasive power. The Bureau would be a totally private body, deriving its operating revenue from voluntary contributions of advertisers, advertising agencies and the media.

Unlike the Canadian Advertising Advisory Board, the proposed Bureau would be vitally concerned with subjective advertisements and matters of taste. By means of a field research staff, public opinion would be gathered so that thoughts on particular advertisements would not merely be those of the Bureau. Members would agree to modify advertisements in the manner decided by the Bureau and failure to comply would result in wide publicity being given to the advertiser. Lacking the power of legal sanctions however, it is questionable whether the decisions of such a body could be implemented, for like any voluntary association, too much depends on co-operation and continued adherence to organizational goals.

(b) *Better Business Bureau*

Located in six provinces of Canada,⁴³² the Better Business Bureau is a non-profit organization established by the business community to protect the interests of business and the public from unprincipled marketing methods. The result is the preservation of the good name of the honest entrepreneur and the safeguarding of the consumer from unethical business conduct. As noted, the Association of Canadian Better Business Bureaux Inc. has approved, *The Canadian Code of Advertising Standards*, 1967.

While Bureaux principles advocate honesty in all forms of advertising, they are concerned basically with retail sales and advertising. Thus, for example, the *Toronto Advertising Standards* published by the Better

Business Bureau of Metropolitan Toronto is interested primarily that advertisers and agencies "... prepare retail advertising which is truthful, informative and constructive and that they ... aid media in judging the acceptability of copy submitted to them for publication or broadcast".⁴³³ The *Standards* provide illustrations for the proper and improper use of such terms as, "Wholesale",⁴³⁴ "Factory Price",⁴³⁵ "First in Toronto",⁴³⁶ etc. as well as providing a guide to comparative pricing and saving claims.⁴³⁷

As does the Canadian Advertising Advisory Board, the Better Business Bureau relies on the voluntary compliance of advertisers in removing objectionable advertisements. Similarly, the advertising media is informed of any failures to observe a Bureau request for modification. Finally, the Bureaux do not attempt to adjudicate on "subjective advertisements" and in this regard, the comments made above would be equally applicable here.

D. *Consumers' Associations*

Private consumers' groups, such as the Consumers' Association of Canada, have been established to inform the public of the relative merits of consumer products. Tests on a variety of consumer goods—from automobiles to frozen desserts—are carried out by the association, and results published in its monthly reports. Readers of the reports are thus able to gauge a manufacturer's claims about his product in light of the tests, prior to purchase. Trial and error shopping is therefore minimized. As well, tests will often reveal the equality or superiority of lesser advertised (and invariably less expensive) goods over nationally advertised, brand-name products.⁴³⁸

While private consumers' groups provide a valuable service in stripping away exaggerated product claims, their effectiveness is limited. The prime limitation is size, with only a small percentage of the consuming public being members. The Consumers' Association of Canada for instance has a membership of approximately twenty-two thousand⁴³⁹ out of a total Canadian population of over twenty million. Consequently its impact on hyperbolic product claims is slight. Further, the Association deals only with substantive product merit and not with offensive or tasteless advertising as such.⁴⁴⁰

E. *Conclusion*

The effectiveness of non-governmental regulation is contingent on the co-operation and sincerity of all major industries involved in commercial advertising—the advertiser, the advertising agency and the media. To date, this complete co-operation has not been forthcoming. Despite

the common desire on the part of all these elements for less government regulation over advertising, economic pressures have thus far minimized the effectiveness of self-regulation. Advertising codes and the self-regulation of advertisers have produced no tangible effects on the excesses of commercial advertising, including psychologically-orientated promotions. Only government regulation appears to have had any real effect on advertising abuses.

CHAPTER XI

SOME SUGGESTED REFORMS

Governmental regulation—especially at the federal level—has done much to curb some of the more flagrant abuses made of commercial advertising. In this Chapter, we shall examine areas where reform of existing laws would be desirable and others where increased government presence would appear necessary to curb certain advertising abuses.

A. *Reforms of the Sale of Goods Act*

As discussed in Chapter II, the *Sale of Goods Act* as in force in the various common law provinces gives a right of action to a purchaser of goods only as against the vendor. It is submitted that the various enactments be amended to allow a suit to be instituted directly against the manufacturer—notwithstanding the absence of privity—for products which do not meet their advertised qualities. Such a reform would only be recognizing an obvious fact in our commercial society, namely that the vendor of goods is largely a conduit through which pass a myriad of mass-produced, nationally advertised goods.

Secondly, it is suggested that “services” be encompassed within the scope of the legislation, with the title of the statute perhaps being changed to the, *Goods and Services Act*. As opposed to those dealing with tangible goods, however, the suppliers and “vendor” of services are generally the same. Accordingly the problem of vendor and manufacturer would not present itself in regard to services.

B. *Packaging*

Although the *Regulations to the Food and Drugs Act* stipulate that ingredients, net content and the name and address of the manufacturer be shown on the label of the product,⁴⁴¹ a manufacturer is free to package his goods in whatever size and shape container he chooses. The result is a proliferation of package sizes, with some goods being sold in such odd-size quantities as 1 lb., 3 oz. or 5 lb., 7 oz. Where equivalent products are

sold in such varying sizes, accurate price comparison becomes exceedingly difficult if not impossible. To complicate the shopper's task still further, such nebulous and unqualified promotional terms as, "Giant Size", "Economy Size", "Family Size" or "Makes 4 Generous Servings"⁴⁴² often appear on the face of the package.⁴⁴³

It is expected that within the next few months, federal legislation will be forthcoming governing the packaging and labelling of commercial products.⁴⁴⁴ C. G. Sheppard, food advertising specialist with the food division standards branch of the Department of Consumer and Corporate Affairs, has indicated that the proposed legislation will give the government authority to set uniform standards for the packaging and labelling of Canadian consumer goods; including declarations of net quantity on package labels; and standardizing the sizes and shapes of containers.⁴⁴⁵

C. *Federal Directives*

For the benefit of advertisers, advertising agencies and retailers, directives and guides similar to the *1961 Guide for Manufacturers and Advertisers*, or C.R.T.C. directives should be periodically published. In the United States, the Federal Trade Commission has published several such directives on a variety of products,⁴⁴⁶ in which illustrations of prohibited and permitted advertising techniques are given. Consequently, an advertiser, agency or retailer is able to gauge his marketing programme in light of the directives and thus avoid breaching an advertising regulation. In Canada, a directive from the Department of Consumer and Corporate Affairs in regard to section 36 would be especially welcome for despite a significant number of judicial decisions, there yet exists a "gray area" in relation to wording for comparative pricing advertisements. Often those in breach of the *Combines Investigation Act* are small merchants unaware of its existence; or if they are aware, confused as to the type of promotional language they may legally employ. A federal directive would go far in alleviating this problem. Similarly as the Department develops a policy in relation to section 37, periodic directives should be issued for the benefit of the business community. The paucity of judicial interpretation of the section has undoubtedly left many questions as to what will or will not be considered misleading advertising. A bulletin outlining the Department's attitude on the use of the word, "Free", for example would be of great assistance to retailers in planning sales promotions.

D. *Publication of Government Test Results*

In our discussion of section 37 of the *Combines Investigation Act*,⁴⁴⁷ it was noted that subsection (4) prohibits the publication of test results for tests conducted by the National Research Council or other public

department without the consent in writing of the relevant body. In the interests of comparative shopping and the breakdown of illogical "brand loyalties", it is submitted that government policy should be to encourage publication of such test results. Hence, this subsection should be excised from the section.⁴⁴⁸

E. *Advertising aimed at Children*

A paragraph of the Canadian Code of Advertising Standards,⁴⁴⁹ reads:

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

Conspicuous by its absence is any reference to advertisements programmed toward children with the intention that the child will in turn persuade his or her parents to purchase the product.⁴⁵⁰ Consequently children are utilized by advertisers as conduits, through which the promotional message is passed to the parents. In most cases, a mother or father will find great difficulty in not yielding to the child's pleadings.

The exploitation of children by advertisers is particularly prevalent on television, where the selling message assumes greater force due to the intimacy of the medium. Recognizing this factor, the Independent Television Companies Association Limited of Great Britain⁴⁵¹ has issued strict rules regarding television advertising and children. To cite some examples:

- (a) . . . no method of advertising may be employed which takes advantage of the natural credulity . . . of children. Therefore every statement that "everyone can win a prize", "wonderful prizes", etc. and the method of presentation must be closely examined to be absolutely certain that children cannot be misled.⁴⁵²
- (b) . . . appeals to children to "ask their parents" are not allowed; phrases such as "Ask Mummy and Daddy", cannot therefore be accepted.⁴⁵³
- (c) Offers of cards to collect premiums, etc will be accepted only for products the brand selection of which is of interest to children. For these products where children have a genuine reason to express a preference, e.g.: cereals, confectionery, etc., then the content of the commercial featuring premiums, coupons, competitions, etc., should effectively advertise the product itself and not the "give-away" alone.⁴⁵⁴

It is suggested that the C.R.T.C. adopt similar rules in regard to advertisements aimed at children, and further, that it be mandatory for all such promotions to be submitted for pre-clearance.⁴⁵⁵ The latter would occur automatically if all broadcast media commercials were required to be submitted for pre-clearance.⁴⁵⁶ Short of such rules and compulsory screening, the C.R.T.C. should issue advertising guides and letters (as it has done for beer and wines and food and drug commercials) to all broadcasters outlining Commission policy on promotions geared for children.

F. Conclusion

That further government regulation over commercial advertising will be met with opposition from the advertising fraternity is not necessarily true. Indeed, it would probably be welcomed by those wishing to restore and preserve public confidence and respect in marketing practices. Recently Mr. Keith Garrett, vice-president of the Federation of Canadian Advertising and Sales Clubs⁴⁵⁷ has advocated a federal licensing scheme for all advertisers, together with stringent government penalties for breaking the advertising code.⁴⁵⁸ Elaborating, Mr. Garrett noted:

There have been a lot of rumblings from Mr. Basford's department about controls of advertising. My idea is that every advertiser be issued a permit with a permanent number much as a sales tax license is issued . . .

This (loss of permit for breach of the advertising code) would tend to make advertisers gain more respect for the privilege of advertising.⁴⁵⁹

Without discussing the feasibility of Mr. Garrett's proposal on a constitutional basis,⁴⁶⁰ it does demonstrate a support by more concerned advertisers for further government regulation. As public criticism of advertising mounts and confidence in current practices is eroded, segments of the industry are re-evaluating the purposes, objects and techniques of modern advertising. One Canadian advertising executive, after calling on his colleagues to ". . . stop insulting them (the public)" and to cease viewing them as statistics rather than as human beings through the use of low-standard commercials; has candidly stated:

Our occupational requirement is that we be evangelists of the easy way (of life). Our occupational risk is that we may come to worship our own gospel (that consumption is everything).⁴⁶¹

Conscientious advertisers are coming to realize the many failings of their profession, and the fact that the industry cannot, so to speak, "Put its own house in order".⁴⁶² It is precisely this class of advertiser — and of course the general public — which would most benefit from further government control over hitherto unregulated areas of advertising abuses.⁴⁶³

CHAPTER XII

CONCLUSION

Today, the concept of *caveat emptor* must be seen as a legal anachronism. It has been noted that due to the development of mass merchandising techniques, based on scientific studies of consumer habits and psyche, the advertiser had gained a distinct advantage over the average citizen in the market place. The common law proving itself unable to accord adequate protection to the consumer in a system of depersonalized merchandizing, government was forced to correct the consumer-advertiser imbalance.

Thus far, the federal government has ventured basically into the area of objective abuses of advertising. Health, personal safety; protection from fraudulent promotions—these have been the touchstones of government regulation. Through the federal Department of Consumer and Corporate Affairs, the consumer has been given a voice in the market place approximating that of the commercial community. To a lesser degree, provincial legislation has also worked to redress some of the most flagrant evils of the marketplace, notably in the area of consumer protection. With the adoption of those proposals outlined in Chapter XI, the gap between consumer and advertiser would be narrowed still further.

Government regulation over commercial advertising then, should have as its objective the achievement of consumer-advertiser parity, by denying the business community the unfair advantage it once held through the operation of the *caveat emptor* doctrine. Yet short of abolishing all forms of commercial advertising—a step which even advertisings' most severe critics would be loath to advocate—government regulation can achieve only so much. In the final analysis, it rests upon each individual consumer to be his own judge in entering into a commercial transaction, after having some assurance that standards of safety and honesty have been set for his protection. Regulations may put the vendor and purchaser on an equal footing, but after that, each party is free to seek his personal economic advantage. There will always be among us the unthinking, careless individual whose personal shortcomings will be the prey of anyone with something to sell. When Lincoln stated that, "You can fool some of the people all of the time" he spoke of the political arena. In the world of commerce, it is an axiom.

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