

# MAINE STATE LEGISLATURE

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# STATE OF MAINE

Inter-Departmental Memorandum Date November 5, 1974

To Christo Anton, Director

Dept. Lottery Commission

From Harrison B. Wetherill, Jr., Assistant

Dept. Attorney General

Subject Instant Winner Game

You have informed me that the Lottery Commission is exploring the concept of an Instant Winner Game and you have asked whether the Commission is authorized under State law to conduct such a game. The answer is yes. The wisdom of such a game is a policy question for decision by the Lottery Commission.

The Instant Winner Game, as you have described it to me, involves the purchase of a ticket by a player from a Lottery Ticket Sales Agent. Each ticket will contain essentially three types of games. The first game involves a number on the ticket which, through a drawing to take place sometime after the purchase of the ticket, might entitle the purchaser to a prize. This game is essentially the same as the game you are presently conducting. The second game involves a space on the ticket covered by an opaque substance, which substance may be rubbed off to reveal a letter of the alphabet. If the purchaser collects tickets containing letters spelling certain pre-selected words, he becomes entitled to a prize. There is no drawing involved in this game. The third game is the basic Instant Winner Game and involves several spaces on the ticket covered by an opaque substance. Each of these spaces contains a number which is revealed when the opaque substance is rubbed off. When the numbers in these spaces on the same ticket are matched in certain ways, the purchaser might become immediately entitled to a prize. As in the second game described above, no drawing is involved in this game.

8 M.R.S.A. Chapter 14, which created the Lottery Commission and which defines the powers of the Commission, grants broad discretion to the Commission to determine the specifics of the game or games that they choose to conduct. 8 M.R.S.A. § 353(1)(A), (B), and (F) give the Commission authority to promulgate rules concerning "the types of lotteries to be conducted," "the manner of selecting winning tickets or shares," and "the frequency of the drawings or selections of winning tickets or shares."

While indicating a legislative intent to grant the Commission broad discretion in devising a game or games, Chapter 8 limits this discretion to the conduct of some form of "lottery." This limitation is apparent throughout the Chapter; however, the limitation most clearly appears in § 353(1)(A) giving the Commission the authority to determine "the types of lotteries to be conducted" (emphasis mine) and in § 363 which limits the applicability of other laws "providing any penalty or disability for the sale of lottery tickets or any acts done in connection with a lottery" (emphasis mine).

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There is no statutory definition of the word "lottery" as that word is used in connection with the powers of the Commission.

It is generally agreed among the authorities that there are three essential elements necessary to constitute a lottery: (1) prize, (2) chance, and (3) consideration. State v. Bussiere, 155 Me. 331, 154 A.2d 702 at 705 (1959). As stated in Shelton v. State, Md., 84 A. 848 (1951), the essential element of a lottery is the awarding of a prize by chance, and the exact method adopted for the application of chance to the distribution of the prizes is immaterial. As phrased by the Maine Court in State v. Goggin, 2 A. 848 (1918), "A lottery is nothing more nor less than a scheme or device of chance."

Each of the three games proposed by the Commission contains the three essential elements mentioned above, which are necessary to constitute a lottery. The fact that two of the games do not involve an actual drawing is irrelevant as long as the awarding of the prize is wholly dependent on chance and in no part dependent upon the skill of the player.

This conclusion is consistent with that reached in the states of New Hampshire and Massachusetts. Both of these states have statutes granting authority to a state agency to conduct lotteries (in New Hampshire "both pure lotteries and horserace sweepstakes") and both states have interpreted their statute to include the type of instant game discussed herein.

The above very broad definition of a lottery is restricted in only one respect by Chapter 8. The awarding of the prize must depend upon a ticket or share which has been purchased by or for the player. This limitation is apparent from the wording of § 353 authorizing the payment of prizes only to the holders of winning "tickets or shares." The games now being proposed by the Commission do come within the Commission's powers since, in addition to the presence of the three essential elements mentioned above, the awarding of the prizes is based on a "ticket or share."

  
HARRISON B. WETHERILL, JR.  
Assistant Attorney General

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