

ADVERTISING &

MARKETING

BULLETIN

*A Report on Recent
Developments in Advertising
& Marketing Law*

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CASHING-IN WITH MONEY ADS

You are considering a major direct mail advertising campaign for a hospital lottery. You would like to use the picture of a woman surrounded by piles of \$50 and \$100 bills with a description of the hospital foundation and a list of the prizes available to be won. Did you know that your advertisement might be illegal? Unless prepared appropriately, the reproduction of Canadian (and possibly foreign) bank-notes in advertising is prohibited by the *Criminal Code* of Canada.

THE PROHIBITION

While seemingly misunderstood, the prohibition has been on the books for over a century. In 1887, the federal government first enacted legislation prohibiting the reproduction of currency in advertising. The debates surrounding the enactment of the legislation suggest that the government was concerned with protecting consumers from counterfeit bank-notes, even if it was clear that the bank-notes were being used as an advertisement.

In 1954, the government re-visited the issue and amended the legislation. The debates indicate that the government had new concerns with the reproduction of currency. The Minister of Justice read a letter to the House of Commons written by the Deputy Governor of the Bank of Canada which explained the prohibition on bank-note reproduction as follows:

- reproduction of currency will encourage others to develop new ways of reproducing currency;
- plates made for the innocent reproduction of currency may fall into the wrong hands; and
- reproduction generally cheapens the position of bank-notes in the public eye.

Following amendments in 1999, section 457(1) of the *Criminal Code* now reads as follows:

No person shall make, publish, print, execute, issue, distribute or circulate, including by electronic or computer-assisted means, anything in the likeness of

(a) a current bank-note; or

(b) an obligation or security of a government or bank.

A person who contravenes this provision is guilty of an offence punishable on summary conviction.

The legislation provides that any reproduction portraying the likeness of bank-notes is prohibited even if the reproduction is an obvious advertisement and the marketer has no intention of passing-off the reproduction as currency. Any likeness of a bank-note is illegal unless the following exemption applies.

THE EXEMPTION

Section 457(4) of the *Criminal Code* states:

No person shall be convicted of an offence . . . in relation to the printed likeness of a Canadian bank-note if it is established that the length or width of the likeness is less

than three-fourths or greater than one-and-one-half times the length or width, as the case may be, of the bank note and

(a) the likeness is in black-and-white only; or

(b) the likeness of the bank-note appears on only one side of the likeness.

Section 457(4) permits advertisements that portray Canadian bank-notes of a different size and use black and white or illustrate only one side of the likeness. It may be concluded that an advertisement that depicts a bank-note with such characteristics is not easily counterfeited and the prestige of true bank-notes remains intact.

It can be argued that the wording of section 457 also permits the portrayal of Canadian coins (as opposed to bank-notes). Marketers may be able to run advertisements with the likeness of a loonie or toonie, for example.

Furthermore, with successive amendments to the *Bank of Canada Notes Regulations* removing from circulation \$1, \$2 and more recently \$1000 bills, it can be argued that advertisements which reproduce such bank-notes are not caught by the prohibition because they are no longer “current”.

PROSECUTIONS

To date, there has been only one reported case involving a prosecution under the bank-note prohibition. In *R v. Giftcraft*¹, the defendant was importing and distributing various novelty items such as ceramic mugs and ashtrays, which carried resemblances of bank-notes. The defendant was charged under the predecessor of section 457 of the *Criminal Code* which provided that everyone who publishes or prints anything in the likeness or appearance of all or part of a current bank note or paper money is guilty of an offence on summary conviction.

¹ (1984), 13 C.C.C. (3d) 192 (Ont. H.C.)

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

For further information, please contact your McMillan Binch LLP lawyer or one of the Practice Leaders of our Advertising & Marketing Group listed below:

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The court held that the word “publishes” is not restricted to the production of materials but that importing and distributing items carrying the resemblance of bank-notes is an illegal act. By distributing the novelty items and making them available to retailers in Canada, the court held that the defendant was a publisher.

Although the court was clear that any distribution of material carrying the likeness of currency that does not fall under the exemption violates the *Criminal Code*, the provision is rarely prosecuted.

LEGAL ADVERTISEMENTS

Recently an Ontario charity distributed a flyer advertising its lottery, which portrayed a man surrounded by money. Although the advertisement reproduced Canadian currency, in our view, it did not violate section 457 of the *Criminal Code* as the reproduced bank-notes were approximately 2 centimetres long and only portrayed one side of the likeness.

The bottom line is that the venerable prohibition on reproducing currency in advertising (even if honoured more often in the breach than in the observance) is something that marketers must account for when dreaming up advertisements.

Even when there appears to be less than vigorous enforcement of the prohibition by the Crown, marketers are well advised to ensure that their reproductions of currency in advertisements fall within the permitted exemption. After all, the section was revised (not repealed) in 1999.

Otherwise, portraying money in ads may be costly and bring the wrong kind of attention to your company’s product or service.