

ADVERTISING &

MARKETING

BULLETIN

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

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## TRADING STAMPS: THE CRIME IN COUPONS

Many merchants and their marketers are surprised to learn that the Criminal Code ban on issuing trading stamps limits what they can legally do with coupons, loyalty programs and other cross-merchandising sales promotions.

### THE PROHIBITION

The offence has its roots in the “evils” of early 20<sup>th</sup> century coupon programs. At the time, it was a pressing issue for our Members of Parliament. Even Sir Wilfred Laurier weighed in on the House of Commons debates.

The Criminal Code amendment that was eventually passed (and remains on the books to this day) prohibits merchants from providing “trading stamps” to their customers. A “trading stamp” is defined broadly as “any form of cash receipt...coupon, premium ticket or other device” which represents a discount on the price of goods or a “premium” to the buyer.

Chances are the electronic air miles you collect, the fast-food coupons you redeem and the newspaper coupons you clip, constitute “trading stamps” under the Criminal Code. The definition casts a very wide net (and possible shadow) over a great many co-promotions to which many of today’s merchants and their customers don’t give a second thought.

### FEW PROSECUTIONS

While the ban has been around since 1905, its full range remains a mystery. Despite several court decisions, ambiguities persist, and a pronounced gap has developed between the number of prosecutions and the provision’s breadth. The last round of reported prosecutions occurred in the mid-1960s.

In the most recent scholarly article to discuss the obscure provision, the University of New Brunswick’s Richard Bird calls for its repeal, arguing that the provision makes little sense in today’s marketplace<sup>1</sup>. Professor Bird’s sensible recommendation echoes the view expressed nearly a decade earlier in a *Financial Post* (as it then was) editorial, which chided: “The federal government should repeal the “trading stamps” section of the Criminal Code - if anybody in Ottawa can remember where to find it!”<sup>2</sup>.

But the provision remains. As a result, a number of highly visible promotions (advertised in all forms of media) involving well-known merchants remain on a precarious legal footing (at least in theory).

Still, the rarity of prosecution is not a sign of government approval and cannot be the test for the legality of this activity. On the positive side, many of the current and widely-advertised schemes involving reputable merchants which, at first blush, appear to contravene the section, are likely legal because they take advantage of technical exceptions to the prohibition.

<sup>1</sup> “The Legality of Frequent Buyer Plans”, Vol. 81 the Canadian Bar Review, May 2002 - pp 1-22.

<sup>2</sup> “Repeal Law on Trading Stamps” The Financial Post, April 14, 1994 - p. 12.

**PENALTIES**

The penalty for violating the ban is a fine of not more than \$2,000 or imprisonment for six months or both. As with any Criminal Code offence, persons may be parties to an offence not only if they actually commit it themselves, but also if they aid, abet or conspire in or counsel the commission of the offence.

**OTHER ENFORCEMENT CONCERNS**

Even if the Crown seems uninterested in prosecuting trading stamp issuers, violating the ban still leaves the merchant open to the risk of a private prosecution. For instance, a competitor or disgruntled customer might attempt to lay a private complaint or information.

There is also the risk of a court finding a cross-merchandising sales promotion contract unenforceable on the grounds that it is against public policy to enforce an agreement to commit a crime.

**STRUCTURING A LEGAL CROSS-MERCHANDISING PROMOTION**

When structuring a cross-merchandising promotion, the first thing that a merchant and its marketer must do in order to reduce the likelihood of prosecution is to make sure that the proposed scheme is fair to the consumer. However, running a fair scheme is not enough. Proof of fraud is not an essential ingredient of the offence; and evidence of good faith is not necessarily a defence to prosecution.

The second thing that must be done is to design a scheme falling outside the literal wording of the “trading stamp” definition because it has been interpreted by the courts as being exhaustive. This has been attempted in a number of ways, including:

- employing an electronically-operated scheme in which no physical or tangible object (like a coupon or stamp) is given to the consumer
- issuing a coupon that is not designed or intended to be given to the purchaser of goods (but rather to the public at large or to members of a consumer club)

- issuing a coupon that is not designed or intended to represent a discount on the price of goods or a premium to the purchaser
- selling the coupon or not giving it away (i.e. by asking the consumer to pay a nominal sum for it)
- having the two merchants come under, in legal terms, “one roof” (e.g., by having one act as the other’s agent)
- ensuring that the coupon shows on its face the place where it is delivered and its merchantable value
- ensuring that the coupon is redeemable on demand and
- providing that the coupon is to be returned to the manufacturer or the manufacturer’s agent

The problem is that many of these schemes remain untested in the courts and thus represent a business risk for merchants and their marketers. Also, as a matter of law, some of these methods are better than others. Indeed, in most cross-merchandising promotions, either by legal necessity or out of an abundance of caution, many of these schemes often appear in combination.

**REDEMPTION NOT AN OFFENCE**

Interestingly, despite the broad definition of trading stamps, the ban is limited to issuing them. By implication, the redemption of coupons is not an offence. This apparently creates an opportunity for a merchant to take advantage of its competitors’ coupons and other cross-merchandising schemes without the risk of prosecution.

**KEEP YOUR COUPONS LEGAL**

While it can be said that the trading stamp ban should be replaced because it is anachronistic, unnecessary, ignored and unfair, it remains on the books and merchants and their marketers should get legal advice in the early stages of developing cross-merchandising promotions in order to minimize the risk of problems in this area.

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

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