

THE LEGALITY OF FREQUENT BUYER PLANS

Richard W. Bird*
Fredericton

At the beginning of the twentieth century, the Criminal Code declared some trading stamp programs illegal. Modern frequent buyer programs are a reincarnation of trading stamp programs. This article traces the history of the trading stamp legislation, the questions surrounding its constitutionality, the purpose of the legislation and its possible application to today's frequent buyer programs.

Au début du XX^e siècle, le Code criminel a déclaré illégaux certains programmes de timbres-primés. Des programmes modernes visant les gros acheteurs constituent une réincarnation des anciens programmes de timbres-primés. Cet article retrace l'histoire de la législation sur les timbres-primés, les questions constitutionnelles qui l'entourent, le but de cette législation et son application possible aux programmes d'aujourd'hui visant les gros acheteurs.

I.	Introduction	2
II.	Historical Background	3
III.	The Evil at Which the Trading Stamp Act is Aimed	14
IV.	Are Modern Frequent Flyer Plans Legal?	18
V.	Other Issues	20
VI.	Conclusion	22

I. Introduction

There is nothing novel about a business offering its customers a bonus or reward. Indeed, the practice dates back, at least, to the late nineteenth century. The current favorite bonus is air travel tickets. The primary objective of the bonus or reward is to develop customer loyalty. If a firm

*Richard W. Bird, Q.C., of the Faculty of Law, University of New Brunswick, Fredericton, N.B. and of Clark, Drummie, Saint John, N.B.

can induce a customer to participate in its reward scheme, there is a greater possibility of the customer returning with repeat business. Reward programs are easily established in businesses that experience frequent return shopping. The food industry is a prime example. In other businesses infrequent purchases lessen the impact of reward programs on the consumer. But if non-competing lines of business join together to create a reward program, customer loyalty to the rewards plan may attract business to a participating firm. Air Miles is organized on this principle. Thus, the Bank of Montreal, Shell Canada, and Century 21, along with many others, award Air Miles for purchasing their goods or using their services. Air Canada's Aeroplan program has grown from an in-house plan to one with many participating firms. Aeroplan has been so successful that Air Canada is planning to spin-off the division as a separate company.¹

Initially, the bonus offered may seem a gift, but few would doubt that the cost of the giveaway has been factored into the price of the merchandise and services purchased to earn the bonus or reward. What is surprising is how successful these marketing schemes have become. They were so successful in the past, that in the last century, Parliament declared many of them illegal.

The American Scrip Company of Los Angeles is credited with originating the "mile in travel for a dollar in trade" scheme.² The company sold coupons to retail merchants. The retailers gave the coupons to customers and the company undertook to redeem them in railway and steamship mileage. In 1915 the American Scrip Company was fined for carrying on business in Calgary under the *Trading Stamp Act*.³

Parliament passed the *Trading Stamp Act* to curtail the use of some of these plans. Such plans have been referred to as "one of the most delusive and pernicious schemes for making money that has ever found favor with the public."⁴ In essence, the plan of the American Scrip Company is the same as many frequent buyer programs now in operation in Canada. The *Trading Stamp Act* is now, with minor changes, part of the *Criminal Code*.⁵ Are today's frequent buyer plans legal? Is there any policy reason for declaring them illegal? Or, is it time to repeal these provisions in the *Criminal Code*? These questions will be examined below, but first a little history.

¹ A. Robinson, "Air Canada still likes Aeroplan spinoff" *Globe and Mail* (24 March 2001) B3.

² "Retailers Lose Again", *Canadian Grocer* (10 September 1915) 20.

³ *An Act in Amendment of the Criminal Code*, 1892 (1905), 4-5 Ed. VII, c. 9.

⁴ "The Premium Question", *Canadian Grocer* (14 October 1904) 31.

⁵ R.S.C. 1985, c. C-46, ss. 379, 427.

II. *Historical Background*

At common law there was nothing illegal about offering a reward or premium to promote the sale of goods and services. The practice was particularly common in the tea trade in the nineteenth century. Often tea merchants included some sort of premium or coupon redeemable from the merchant for other items to create brand loyalty among consumers. The coupon system encouraged the consumer to continue to purchase the same brand so to accumulate enough coupons to redeem them for premiums. In both legal and economic terms, the most one could say about the practice is that for the consideration paid by the purchaser, he or she received the goods or services bargained for which included the cost of both the premium and the tea. Usually the law did not find it necessary to allocate the consideration between the two items. In a truly competitive environment, the purchaser might have negotiated a lower price for the goods or services without the premium, but that was a matter of bargaining between the parties. At the beginning of the twentieth century, the tea market may not have been what is called perfect competition in economic terms, but tea merchants were numerous. Many tea merchants offered premiums along with their product. But many others went out of their way to advertise that they did not offer premiums.⁶ The practice expanded beyond the tea trade. Retail establishments issued coupons to customers in proportion to the amount of money spent in the store. The coupons were redeemable for other merchandise. In this instance the objective of the loyalty program shifted from the product to the retailer.

Before long it was realized that some businesses were either too small or because of the nature of their product could not expect frequent repeat business to make the setting up of an individual reward program practical. Here, there was an opportunity for a third party. A promoter could sell coupons or stamps to merchants who would give them to their customers. Often the promoter would undertake to sell the coupons to only one grocer, one druggist and one hardware merchant in any one town. The idea was to give these merchants an edge over the competition. By having several merchants using the same coupons, the consumer would be in a position to redeem them earlier. This would encourage the consumer to deal with the selected group of merchants. Sometimes the offer was made to a limited number of manufacturers. The promoter would also undertake to handle the redemption of the coupons. Of course, there was nothing to stop another promoter from setting up a similar program. Premiums were as popular at the beginning of the twentieth century as they are at the beginning of the twenty-first century.

⁶ Red Rose Tea owner, T.H. Estabrooks placed a full-page advertisement against the use of premiums in the *Canadian Grocer* (28 October 1904) at 47.

One of the most successful promoters in the early 1900's was J. E. Wilder. He sold stamps to merchants and set up stores in Montréal and Québec City where the only consideration accepted was his stamps. His success led to the suggestion that the stamps of his firm, Traders Advertising Co., had become illegal because they were a form of currency.⁷ The Retail Merchants' Associations in Montréal, Toronto and elsewhere moved to have these businesses outlawed. Nova Scotia early took up the gauntlet. In 1899 legislation was passed by Nova Scotia's government for the City of Halifax prohibiting the sale of trading stamps, tickets or cards to merchants and prohibiting the merchants from passing them on to their customers whereby the customer would be entitled to redeem them for money, goods or chattels.⁸ And for greater certainty, the legislation went on to specifically prohibit the Trading Stamp Company from doing business in the City of Halifax. The penalty for doing so was nine months in prison at hard labour.

The Montréal Trading Stamp Company immediately challenged the constitutionality of the provincial legislation. The legislation was upheld as a matter of "Property and Civil Rights" or "Matters of a merely Local or Private Nature within the Province" and not a matter of criminal law.⁹ Whether the Montreal Trading Stamp Company was a Wilder enterprise is unclear.

Ontario¹⁰ and Québec¹¹ enacted similar legislation in 1901 and 1903. It differed slightly from that of Nova Scotia. A strict reading of the Nova Scotia legislation leads one to the conclusion that it did not prohibit a merchant from issuing his or her own trading stamps and coupons. It only prohibited the selling of stamps to merchants that were intended to be passed on to others. Both the Ontario and Québec legislation made it abundantly clear that merchants and manufacturers were not prohibited from issuing their own trading stamps and coupons. The Montréal by-law that was first proposed pursuant to the Québec legislation would have prohibited the use of all trading stamps in that city and had to be redrafted to exempt the retailers and manufacturers.¹² The exemption raises the question of the real objective of the legislation and puts in doubt the arguments advanced for its enactment. The Québec Act appears to have, like its Nova Scotia counterpart, been directed primarily at one enterprise this time — clearly J. E. Wilder.¹³ Even before the legislation was enacted, Wilder promised to take the matter to the Privy Council, if necessary.¹⁴

⁷ "Will Trading Stamps Go?", *Canadian Grocer* (29 April 1904) 29.

⁸ (1899), 62 Vic., c. 57, s. 2 (N. S.).

⁹ *Montreal Trading Stamp Co. v. City of Halifax* (1900), 20 C.L.T. 355.

¹⁰ *Municipal Amendment Act* (1901), 1 Edw. VII, c. 26, s. 26 (Ont.).

¹¹ (1903), 3 Edw. VII, c. 39 (Qué.).

¹² "Trading Stamps Must Go" *Canadian Grocer* (20 May 1904) 174.

Meanwhile the question of the constitutional validity of the Ontario legislation had been referred to the Ontario Court of Appeal and an opinion in its favour had been pronounced. The decision does not appear to have been published but a reference to it can be found in A. H. F. Lefroy, *Canada's Federal System*.¹⁵ Wilder instituted two actions in Québec, one directed at the by-law passed by the Montréal City Council, the other at a similar by-law passed in Québec City. Wilder lost both cases at trial,¹⁶ but succeeded in the case against the City of Montréal in the Québec Court of Appeal.¹⁷ The majority was of the view that trading stamps were a matter of trade and commerce and within the jurisdiction of the federal parliament.

Before the Québec Court of Appeal judgment was rendered on April 6, 1905, the Montréal Retail Grocers' Association prepared a petition asking the Senate and the House of Commons to amend the Criminal Code to declare the use of trading stamps illegal.¹⁸ The *Canadian Grocer* estimated that on March 9, 1905 over 500 retailers marched to Parliament Hill in support of the a new federal law outlawing that "modern bête noir," trading stamps that were issued by third parties.¹⁹ It was reported that the Prime Minister was impressed by the magnitude of the delegation. M. Honoré Gervais, M.P. explained the operations of The Trading Stamp Company, alleging that the stamps were issued at "a highly fictitious value" and that "their operations were really a conspiracy in the restraint of trade."²⁰ It was also alleged that the trade was an indirect taxation on retailers and had driven many of them to bankruptcy. The Prime Minister said he would give the matter serious consideration but would wait until the Trading Stamp Company had further opportunity to present its side.

The national trade magazine, *Canadian Grocer*, fully supported the associations in their attempt to prohibit the use of trading stamps. Quoting an unnamed source:

It is one of the most delusive and pernicious schemes for making money that has ever found favor with the public. It is more objectionable than a lottery or gambling device, because it lives upon an assumption that something is obtainable for nothing. The deception is transparent to anyone; a dollar that is paid to a purchaser of goods in trading stamps or coupons comes out of the price or profit

¹³ "Trading Stamps" *Canadian Grocer* (1 April 1904) 34; "Trading Stamps and the Law" *Canadian Grocer* (6 May 1904) 29; "Trading Stamps Must Go", *ibid.*

¹⁴ "Trading Stamps", *Ibid.*

¹⁵ A. H. F. Lefroy, *Canadian Federal System* (Toronto: Carswell, 1913) 592-3.

¹⁶ *Wilder c. La Cité de Québec* (1904), 25 R. J. Q. 128 (C.S.); *Wilder v. The City of Montréal* (1904), 26 R. J. Q. 504 (Sup. Ct.).

¹⁷ *Wilder c. La Cité de Québec* (1905), 14 R. J. Q. 139 (B.R.).

¹⁸ "Montreal Retail Grocers' Association" *Canadian Grocer* (10 February 1905) 27.

¹⁹ "Trading Stamp Legislation Wanted" *Canadian Grocer* (17 March 1905) 49.

²⁰ *Ibid.*

of what is purchased. It is an insidious method of deception that has a serious effect upon legitimate trade, since it obliges one merchant to use the stamps if his competitor does, and in the end the trading stamp company gets the margin which the buyer and seller would otherwise have.

The trading stamp agent claims that articles may be secured without cost by a purchaser who has collected a certain number of dollars' worth of stamps. Such a claim is, of course, misleading and false and contrary to the standards of legitimate business. The buyer and seller, in paying tribute to the trading stamp companies, maintain a system that is obviously detrimental to fair and honorable dealing. The stamp companies make excessive profits on stuff that is 'given' in return for stamps presented for redemption, which stamps are sold only for cash, while their gains, by reason of the stamps that are never presented, are said to be enormous.

The reputable retail merchants, in their own interests and that of their patrons, are united in condemning the system and in opposing its growth.²¹

The merchants' associations were successful. Royal assent was given on July 20, 1905 to what became known as the *Trading Stamp Act*.²² In three separate subsections, the issuer of the trading stamps, the merchant who disposed of them, and the consumer who accepted them were all made guilty of an indictable offence. But the convoluted definition of "trading stamps" made it clear that retailers and manufacturers, if careful, could still use such devices:

(a) The expression "trading stamps" includes, besides trading stamps commonly so called, any form of cash receipt, receipt, coupon, premium ticket or other device, designed or intended to be given to the purchaser of goods by the vendor thereof or his employee or agent, and to represent a discount on the price of such goods or a premium to the purchaser thereof, which is redeemable either

(i) by any person other than the vendor, or the person from whom he purchased the goods, or the manufacturer of the goods, or

(ii) by the vendor, or the person from whom he purchased the goods, or the manufacturer of the goods, or in cash or goods not his property, or not his exclusive property, or

(iii) by the vendor elsewhere than in the premises where such goods are purchased,

or which does not show upon its face the place of its delivery and the merchantable value thereof, or is not redeemable at any time; but an offer, printed or marked by the manufacturer upon any wrapper, box or receptacle in which the goods are sold, of a premium or reward for the return of any such wrapper, box, or receptacle is not a trading stamp within the meaning of this section:

The legislation might have been more appropriately labeled the *J. E. Wilder Act*. It could hardly be said that the actions of J. E. Wilder were any more harmful than the schemes that were excluded by the definition. With a century of hindsight, the legislation appears to be little more than a

²¹ "The Premium Question", *supra* note 4.

²² *Supra* note 3.

successful attempt to lessen competition. It is hard to accept that trading stamps issued by some are a legitimate means of commerce while those issued by others constitute “Fraudulent Transactions Relating to Contracts and Trade.”²³

The constitutionality of the federal legislation has been generally accepted as a matter of criminal law. There is, however, some doubt as to its validity. In the *Margarine Case*²⁴ Rand J., referring to legislation prohibiting the manufacture and sale of margarine, asked:

What, then, in that whole background is the true nature of the enactment?...

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law, but they do not appear to be the object of the parliamentary action here. That object, as I must find it, is economic and the legislative purpose, to give trade protection to the dairy industry in the production and sale of butter; to benefit one group of persons as against competitors in business in which, in the absence of the legislation, the latter would be free to engage in the provinces. To forbid manufacture and sale for such an end is *prima facie* to deal directly with civil rights of individuals in relation to particular trade within the provinces: *Shannon v. Lower Mainland Dairy Board*, [1938] A.C. 708.

The public interest in this regulation lies obviously in the trade effects: it is annexed to the legislative subject-matter and follows the latter in its allocation to one or the other legislature. But to use it as a support for the legislation in the aspect of criminal law would mean that the Dominion under its authority in that field, by forbidding the manufacture or sale of particular products, could, in what it considered a sound trade policy, not only interdict a substantial part of the economic life of one section of Canada but do so for the benefit of that of another. Whatever the scope of the regulation of interprovincial trade, it is hard to conceive a more insidious form of encroachment on a complementary jurisdiction.²⁵

Essentially, Rand J. raises the question of the colourability of the federal legislation. The question is equally applicable to the *Trading Stamp Act*. In 1962 in *R. v. Fleming*²⁶ Buchanan J. concluded that even if the Criminal Code provisions are constitutional, there is also ample room for provincial regulation of trading stamps. Later, this application of the double aspect doctrine in Canadian constitutional law to trading stamps was acknowledged by the Supreme Court of Canada in *Multiple Access Ltd. v. McCutcheon*

Concurrent matters or fields have been recognized, among others, in the realms of temperance, insolvency, highways, trading stamps and aspects of Sunday observance.²⁷

²³ The heading to Part X of the *Criminal Code*, R.S.C. 1985, c. C-46 where the definition of “trading stamps” is found.

²⁴ *Ref. Re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1.

²⁵ *Ibid.* at 49, 50.

²⁶ (1962), 38 W. W. R. 513 (Alta. Dist. Ct.).

²⁷ (1983), 138 D. L. R. (3d) 1 at 17. (S. C. C.).

Notwithstanding the constitutional question, the *Trading Stamp Act* was made effective November 1, 1905. The *Canadian Grocer* announced:

[I]t is with an immense degree of satisfaction that the death of the system will be heralded. The law is a very strong one...Already there are signs that the corporations which were recently prominent in this line of business are endeavoring to devise means to evade the provisions of the new law, and there is no doubt that these institutions will 'die hard,' but it was clearly expressed at the passing of the Act that if any part of it needed strengthening or amending it would receive consideration at the next session of Parliament.²⁸

J. E. Wilder publicly announced that The Traders Advertising Company would continue in business.²⁹ Others were eager to let the public know that their plans were not in violation of the *Act*. The National Cash Register Company was one of the first to advertise that their method of using receipts from their cash registers for discounts came within the exemption provisions of the *Act*.³⁰ The Crown Silver Plate Co. made it known that their scheme to give tableware as premiums was "strictly legal,"³¹ as did The Cranston Novelty Co. regarding their aluminum trade checks.³² Some manufacturers proudly announced that their products contained "No Premiums No Coupons No Schemes."³³ Others, especially soap and cereal manufacturers, took advantage of the exemption in the *Act* and continued to promote their products with premium inducements. The E. W. Gillett Co. Ltd coupon was obviously rewritten in light of the new legislation:

This coupon is redeemable on the basis of its merchantable value by articles listed in our premium catalog in effect at the time of redemption and is issued subject to conditions named in catalog. Its merchantable value is one cent for one coupon in exchange for articles. The place of issue and delivery thereof is our manufacturing premises, corner Fraser Avenue and Liberty Street, Toronto, where any and all coupons issued by us will be accepted and redeemed by us at any time on the above basis.

Their earlier coupons read, "For 25 coupons we will send absolutely free a nice premium..." The requirement in the legislation that the merchantable value be stated on the coupon led some to express it in terms of Canada's smallest possible denomination, the mill, being one tenth of a cent.³⁴

²⁸ "The Trading Stamp Evil" *Canadian Grocer* (3 November 1905) 27.

²⁹ "A New Trading Stamp Plan" *Canadian Grocer* (20 October 1905, 27).

³⁰ "Advertisement" *Canadian Grocer* (29 December 1905) 7.

³¹ "Advertisement" *Canadian Grocer* (2 February 1906) 18.

³² "Advertisement" *Canadian Grocer* (16 February 1906) 15.

³³ "Advertisement" *Canadian Grocer* (26 January 1906) 47.

³⁴ *Currency Act*, R.S.C. 1985, c. C-52, s.3; See also "Is the Mill a Coin of the Realm?" *Canadian Grocer* (20 June 1924) 27.

The exemptions in the *Trading Stamp Act* did not sit well with many. Moves to abolish all premiums continued. In 1915 the New Brunswick Retail Merchants' Association passed a resolution in support of the abolition of "all lottery, guessing and voting contests, as well as premiums placed in or on products by manufacturers."³⁵ In Ontario the legislation authorizing municipalities to pass by-laws regulating trading stamps and coupons that was first enacted in 1901³⁶ continued to be part of the law of Ontario until 1927.³⁷

Reported decisions of prosecutions under the *Trading Stamp Act* are sporadic.³⁸ However, charges under the *Trading Stamp Act* were not uncommon.³⁹ In the 1920's there was a possibility that price maintenance agreements would lessen the use of trading stamps and coupons used by retailers. Some manufacturers took the position that for retailers to give coupons would be a breach of their price maintenance agreements.⁴⁰ Of course, price maintenance agreements themselves came under attack and they were made subject to legislative control.

The use of trading stamps is more common in hard times. The Great Depression saw an increase in their use. During the late 1920's and the 1930's both the legality and business efficiency of trading stamps were questioned. On the business side, some tobacco manufacturers agreed to terminate coupons in packages of cigarettes for general merchandise and henceforth redeem them only for playing cards. It was claimed it would give retailers a better margin.⁴¹ The legality of particular schemes was often raised. Some plans involved issuing a card to the customer that the retailer marked with a special punch to keep track of purchases. One legal opinion was that these punch cards were legal if the cards were kept by the retailer for record-keeping purposes but it would constitute a violation of the *Trading Stamp Act* if it were in the possession of the customer.⁴² A

³⁵ "Live Problems of New Brunswick Merchants", *Canadian Grocer* (23 April 1915) 18 at 19.

³⁶ *Municipal Amendment Act* (1901), 1 Edw. VII, c. 26, s. 26 (Ont.).

³⁷ S.O. 1927, c.61, s.39.

³⁸ See *R. v. Pollock* (1916), 28 D.L.R. 545 (Ont. C.A.); *R v. Smith*, [1932] 1 W.W.R. 131 (B.C.C.A.); *R. v. Western Automobile Club Ltd.*, [1934] 3 D.L.R. 592 (Alta C.A.); *R v. McManus* [1939] 1 D.L.R. 98 (Sask. C.A.).

³⁹ "Operator of Popular Voting Contest Fined \$100 and Costs" *Canadian Grocer* (3 September 1926) 19, 38; "Coupon Plan of Giving Away Small Bicycle Considered Illegal" *Canadian Grocer* (17 November 1933) 26.

⁴⁰ "Price Maintenance Would Stop Use of Coupons and Premiums" *Canadian Grocer* (19 March 1926) 31.

⁴¹ "Resentment of Merchants Said to be Reason for Cigarette Firms Eliminating Premiums" *Canadian Grocer* (29 November 1935) 17; "Withdraw Cigarette Premiums and Give Retailers Better Margin" *Canadian Grocer* (24 January 1936) 30.

⁴² "Is This Coupon Legal?" *Canadian Grocer* (13 February 1931) 24.

coupon plan for giving away a bicycle each week to the holder of the most coupons was stopped in Toronto in 1933, citing the *Act*.⁴³ And in Montréal a soap manufacturer was charged under the *Act* for offering a coupon with three bars of soap that entitled the holder to a photograph taken at another location at a cost of fifteen cents.⁴⁴

The bickering between those for and those against premiums continued until World War II, the Retail Merchants' Association contra; many others, for. In one case the Association obtained a legal opinion that the premium plan of a large chain store was in violation of the *Act*. The opinion was forwarded to the chain store, who in turn forwarded it to their own counsel. The main issue got lost when their counsel disagreed and requested further information from the Association's counsel who then threatened the Association with "a libel suit for passing along its counsel's opinion."⁴⁵

World War II brought an end to the widespread use of trading stamps. The Wartime Trade and Prices Board played a part in this with price controls. In addition, it was a seller's market and incentives to purchase goods were not necessary.⁴⁶

Post-war the trading stamp legislation was amended in 1953.⁴⁷ The major changes were to remove the consumer from the list of potential violators and change the violation from an indictable to a summary offence. In addition, part of the 1905 definition was repealed. It had stated that "the expression 'trading stamps' included, *besides trading stamps commonly so called...*" The words in italics were removed from the *Act*. With the benefit of hindsight, it would have been appropriate at the same time to have changed the word "includes" to the word "means." Since the change was not made, it left open the question whether the definition was exhaustive.

The next major attack on trading stamps took place in the 1960's. If the reported cases are any indication, Loblaw's was the major target. At least five separate actions were commenced against the grocery chain, primarily for its participation in the Lucky Green Stamp Savings Plan.⁴⁸ The plan appears to have been promoted by the B.C. Premium Company of

⁴³ "Coupon Plan of Giving Away Small Bicycle Considered Illegal", *supra* note 39.

⁴⁴ "Trading Stamp Court Case" *Canadian Grocer* (18 September 1936) 57; see also *R. v. McManus*, *Supra* note 38.

⁴⁵ "Coupon Scheme Before Attorney-General" *Canadian Grocer* (2 April 1937) 33.

⁴⁶ "Are They Sound: Free Deals, Premiums, Special Discounts?" *Canadian Grocer* (15 October 1947) 9.

⁴⁷ (1953-54), 2-3 Eliz. II, c. 51, ss. 322, 369.

⁴⁸ *R. Ex. Rel. Kuhn v. Loblaw Groceterias Co. (Saskatchewan) Ltd. (No. 1)* (1960), 127 C.C.C. 348 (Sask. Dist. Ct.); *R. Ex. Rel. Kuhn v. Loblaw Groceterias Co. (Saskatchewan) Ltd. (No. 2)* (1960), 127 C.C.C. 351 (Sask. Dist. Ct.); *Hrycyk v. Loblaw Groceterias Co. (Man.) Ltd.* (1960), 127 C.C.C. 168 (Man. C.A.); *R. v. Loblaw Groceterias Co. (Man.) Ltd.* (1960), 129 C.C.C. 74 (Man. C.A.); *aff'd* (1960), 129 C.C.C. 223 (S.C.C.); *R. v. Robert Simpson Co. Ltd. and Loblaw Groceterias Co. Ltd.*, [1964] 3 C.C.C. 318 (Ont. H.C.).

Scarborough, Ontario,⁴⁹ which it was alleged, actually redeemed the stamps. The plan required the customer to fill a number of books with stamps, present the book to the Loblaw's store, which in turn would provide the premium or order it from B.C. Premium Company. Some items had to be specially ordered. The stamps had printed on them:

Redeemable at any time
LUCKY
GREEN
Merchantable Value 2 mills
625 Osborne St.
Winnipeg
B.C. Premium Company

The address was that of the Loblaw's store where the stamps were given out.⁵⁰ Today, the facts of each case seem more comic than criminal. In the first case⁵¹ a detective named Kuhn took two ladies to the Loblaw's store. They purchased goods to the value of \$5.26 and received 52 stamps and a stamp saver book and saw the catalogue that listed the premiums that could be obtained for completed books. One of the ladies contacted the manager and asked what she could get for 1 or 10 stamps. The manager contacted his provincial superintendent and they finally took the position that the stamps would only be redeemed as provided in the catalogue and that nothing was obtainable for less than one complete stamp saver book. Loblaw's was convicted for violating the *Act*.

The other cases are much the same with a technical twist that could be considered a sham. In *R. Ex. Rel. Kuhn v. Loblaw Groceries Co. (Saskatchewan) Ltd. (No. 2)*⁵² 22 stamps were received with the purchase of \$2.23 worth of goods. The manager was asked to redeem 1 stamp and did so, offering a book of matches. Then the redemption of 17 stamps was requested and eventually 4 paper bags were accepted for them. In *Hrycyk*⁵³ the policeman purchased a "utility pitcher" for 69 cents and received 6 stamps. Nothing was obtainable for 6 stamps. Also, there was evidence that Loblaw's only had about 40 of the premiums listed in the catalogue on the premises. The rest would have had to be ordered from the B. C. Premium Company in Scarborough, Ontario. In another test case, 1 stamp was issued along with the purchase of a 10 cent can of sardines.⁵⁴ The stamp was immediately redeemed for 2 paper baking cups.

⁴⁹ See *Hrycyk v. Loblaw Groceries Co. (Man.) Ltd., Ibid.* at 185 (Man. C. A.).

⁵⁰ *Ibid.* at 189, 187.

⁵¹ *R. Ex. Rel. Kuhn v. Loblaw Groceries Co. (No. 1), supra* note 48.

⁵² *R. Ex. Rel. Kuhn v. Loblaw Groceries Co. (No. 2), supra* note 48.

⁵³ *Hrycyk v. Loblaw Groceries Co. Ltd., supra* note 48.

⁵⁴ *R. v. Loblaw Groceries Co. (Man.) Ltd., supra* note 48.

Loblaws was not the only one accused of violating the *Trading Stamp Act*. The Niagara I.G.A. Grocery was charged after redeeming a slightly different stamp (a "Thank You Stamp") for a safety pin,⁵⁵ and in an O.K. Economy Store in Saskatchewan the customer received 2 jelly beans for 1 stamp and a package of chiclets for 5 stamps.⁵⁶ O. K. Economy may have been a wholly owned subsidiary of Loblaws.⁵⁷

The cases of the two paper baking cups and the safety pin went to the Supreme Court of Canada.⁵⁸ The question as to whether the 1953 amendments made the definition of trading stamps exhaustive was answered in the affirmative - it was indeed exhaustive. Kerwin C.J.C. concluded, "The stamp ... could be redeemed only from [Loblaws] from whom the tin of sardines 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."⁵⁹ Loblaws was acquitted.

The question of whether all the premiums had to be kept at the premises where the stamps were issued was raised again in *R. v. Kleckner*.⁶⁰ The Saskatchewan Court of Appeal determined that the entire plan had been before the Supreme Court of Canada and it had given implicit approval to the entire scheme. Therefore, all prizes need not be kept on the premises. Implicit in the decision is that "redeemable at any time" did not necessarily mean immediately but within a reasonable time.

In 1964 another charge was laid against Loblaws and the Robert Simpson Co. Ltd.⁶¹ A complete Lucky Green Stamp book could be exchanged for a \$2 merchandise certificate issued by Simpson-Sears and the Robert Simpson Co. The plan had the attraction of enticing the consumer to shop at Loblaws and then Simpsons. Simpsons would benefit by selling the merchandise certificates to Loblaws. Loblaws would be spared the handling of the ultimate premiums. The essence of the plan reminds one of the days of J. E. Wilder. The magistrate who heard the case held that the certificate was not a "trading stamp ... or other device" but a good and dismissed the charge against Simpsons. The judgment was affirmed on appeal. While Loblaws had been convicted at trial, on appeal,

⁵⁵ *R. v. Thompson (Niagara IGA Grocery)* (1960), 129 C.C.C. 223 (S.C.C.).

⁵⁶ *R. Ex. Rel. Juno v. O.K. Economy Stores Ltd.* (1959), 30 W.W.R. 529 (Sask. D. Ct.); (1960), 128 C.C.C. 247 (Sask C.A.).

⁵⁷ See "Stamps, games, contests are prime targets of proposed legislation" *Canadian Grocer* (November 1966) 3.

⁵⁸ *R. v. Loblaw Groceries Co. (Man.) Ltd.*, *Supra* note 48; *R. v. Thompson (Niagara IGA Grocery)*, *supra* note 55.

⁵⁹ *R. v. Loblaw Groceries Co. (Man.) Ltd.*, *Ibid.*, at 227.

⁶⁰ *R. v. Kleckner* (1961), 132 C.C.C. 12 (Sask. D. Ct.); *rev'd* [1963] 1 C.C.C. 64 (Sask C.A.).

⁶¹ *R. v. Robert Simpson Co. Ltd. and Loblaw Groceries Co. Ltd.*, *supra* note 48.

Landreville, J. was of the opinion that the charge that had been laid was really one of conspiracy and that if one party was acquitted (Simpsons), so must the other (Loblaws).

In the same year, Lloyd H. Alford & Son Ltd. was acquitted of a charge under the Act on the grounds that their "cash bonus discount notes" were not "trading stamps" because they represented an incentive to pay cash rather than a discount on the price of goods.⁶² It is unclear from the report of the case why even if the notes did represent a discount on the price of goods that they did not come within the vendor exclusion clause in the Act.

Despite the constitutional uncertainty, attempted control of trading stamps was not restricted to the criminal law. In 1956 in Altmere, Alberta a licence fee of \$2000 was imposed on any firms dealing in trading stamps in that community.⁶³ The four western provinces enacted legislation to curtail the use of trading stamps. Manitoba had enacted *The Food Products Minimum Loss Act* in 1938.⁶⁴ That statute prohibited the sale of a food product at a price less than five per centum above the cost of the same to the retailer. The sale of a food product with a premium was deemed a violation of that provision. Saskatchewan enacted the *Retailers Act*⁶⁵ in 1960. It required retailers to obtain a license to carry on business. The Act gave the Lieutenant-Governor in Council the power to prohibit "practices that are considered to be detrimental to retailers..."⁶⁶ It was said that the Act was passed specifically to enable the government to outlaw trading stamps.⁶⁷ Earlier, Alberta had enacted similar legislation.⁶⁸ British Columbia's *Trading Stamp Act* was enacted in 1960.⁶⁹ The latter was later amended to require trading stamps to have a minimum value of ten cents.⁷⁰

The pharmaceutical societies moved to eliminate trading stamps in their business in the 1960's and 1970's. The issuing of trading stamps was made a matter of professional misconduct by the Ontario College of Pharmacy. A pharmacist working for the Tamblyn chain, a pharmacy associated with Loblaws, was disciplined for distributing trading stamps.⁷¹

⁶² *R. v. Lloyd H. Alford & Son Ltd.* [1965] 3 C.C.C. 70 (Ont. H. C.).

⁶³ "2,000 License Fee For Trading Stamps" *Canadian Grocer* (1 September 1956) 25.

⁶⁴ S.M. 1938, c. 16, ss. 3, 5.

⁶⁵ S.S. 1960, c.73.

⁶⁶ *Ibid.* s. 16(2)(d).

⁶⁷ "Sask. Government Takes Second Look at Laws Prohibiting Trading Stamps" *Canadian Grocer* (9 April 1960) 48.

⁶⁸ *Licensing of Trades and Businesses Act*, R.S.A. 1955, c. 175.

⁶⁹ S.B.C 1960, c. 58.

⁷⁰ *Trading Stamp Act Amendment Act*, 1962, S.B.C. 1962, c. 63, s. 3.

⁷¹ *Re Stout and Ontario College of Pharmacy* (1977), 15 O.R. (2d) 650 (Ont. C.A.)

The Gold Star Trading Company, a distributor of trading stamps, unsuccessfully challenged a similar regulation in Québec. Not being a member of the college, the company was held to have no standing to contest the regulation.⁷²

The United Kingdom enacted trading stamp legislation in 1964. Under the British legislation, the holder is given the right to have the stamps redeemed in cash and the stamps must have a value stated on them expressed in or by reference to current coin of the realm.⁷³

In the United States, where it has been suggested that such schemes started, the Federal Trade Commission took the largest distributor of trading stamps in the United States, Sperry & Hutchinson & Co., to the Supreme Court successfully alleging that trading stamp plans could constitute an unfair trade practice. At the same time, trading stamp plans were the subject of state legislation.⁷⁴

Since the 1960s prosecutions are rare and frequent buyer plans have proliferated.

III. *The Evil at which the Trading Stamp Act is Aimed*

When asked in 1905 for the policy behind the proposed legislation and the constitutional litigation surrounding it, the Minister of Justice of Canada replied, "I can give a statement with respect to the position of the litigation but as to the other matter, I think we will have to rely largely on the general outcry which has been raised in the community for this change."⁷⁵ It is an unusual response for a Minister responsible for maintaining rights and freedoms.

The publicly offered complaint by the editors of the *Canadian Grocer* to trading stamps was that they deceived the public into thinking that they were receiving something for nothing. It was on this basis that they would have liked the legislation to have banned all trading stamp schemes. Since under the *Trading Stamp Act* retailers and manufacturers were permitted to continue to use their own stamps or coupons, this rationale does not appear to be the one accepted by Parliament in enacting the legislation.

It was also argued that often trading stamps were never redeemed because many consumers did not accumulate enough stamps to be able to

⁷² *Gold Star Trading Company Limited v. College des Pharmaciens de la Province de Québec*, [1964] B.R. 49.

⁷³ *Trading Stamps Act* 1964, 1964 c. 71, s. 3 (Imp.).

⁷⁴ See E. Gellhorn, "Trading Stamps, S & H, and the FTC's Unfairness Doctrine" [1983] Duke L. J. 903.

⁷⁵ *House of Commons Debates* (1905) vol. 5 at col. 9412.

⁷⁶ *Ibid.* at col. 9432.

use them. The consequent profits went to the promoter. If this were true, it is doubtful that the scheme would have become so popular. And, if this were the basis for the legislation, it should have applied to all equally. Later studies have suggested that the redemption rate usually exceeds 90%.

Another argument was that the price at which the stamps were redeemed by promoters was “fictitiously” high. When the bill to enact the legislation was before Parliament it was said, “When a customer gets a hundred dollars’ worth he can go and exchange it for some article valued at from 25 cents to \$1.”⁷⁶ What was probably meant by this objection was that one dollar of “stamp currency” was not the equivalent of one dollar of Canadian currency. Consider, for example, the Zellers, Inc. Club Z program where one point is given for each cent spent. The *Club Z* catalogue offers a \$50 Certificate for 455,000 points.⁷⁷ Put another way, at that rate, a Club Z point has a value of \$0.0001099. A large difference in the relationship between two measures of value does not make one of them fictitious.

It was also alleged that when people came to redeem the stamps they would be told that the store was out of the goods and to come back later. This is a more serious problem. It goes to the heart of one of the evils that can be perpetrated on the public by those in control of financial instruments. We have found it necessary to regulate the issuance of currency, banks, trust companies, insurance companies, and securities to protect the public from the unscrupulous. The public has needed protection from fly-by-night and other dishonest operators. But again, if this is the rationale for the offence, there is no reason to exempt the retailers and manufacturers. They may be less likely to vanish, but that is no reason to exempt those who do from prosecution for fraudulent practices. The “we are out of goods /come back later” excuse has resurfaced in airline points programs where it is increasingly difficult to redeem points for airline tickets to desired destinations and at desired times.⁷⁸

In 1905 the Member of Parliament, M. Honoré Gervais, identified the operation of J. E. Wilder’s Trading Stamp Company as really a conspiracy in the restraint of trade. The argument was that stamps were sold to only one retailer in each line of business. The Trading Stamp Company then advertised to the public to deal with retailers that offered its stamps. This, it was argued, tended to create a monopoly for those merchants.⁷⁹ He implied that if the stamps were issued without discrimination that they would be acceptable. When one recalls that the trading stamp by-law first introduced by the Montréal City Council had to be redrafted so that it did not apply to retailers and manufacturers this adds some support to the perverse nature

⁷⁷ *HBC Rewards Catalogue*, (Canada: Hudson’s Bay Company, 2001) 5.

⁷⁸ Laslo Buhasz, “Millions of miles and nowhere to go”, *The Globe and Mail* (1 November 2000) R5 (Atlantic ed.); T1 (Metro ed.).

⁷⁹ *Supra* at note 75, col. 9421-22.

of the argument. The retailers and manufacturers wanted their own monopoly and did not want competition from third parties. Gervais' arguments about indirect taxation and driving retailers to bankruptcy can be rejected as mere political rhetoric.

Gervais also alluded to the trading stamp business violating accepted principles of currency. Today, the Bank of Canada has the sole right to issue notes intended for circulation in Canada.⁸⁰ It is doubtful that it could be proved that trading stamps are intended for circulation as currency. If the currency issue is the perceived evil, then a revision of the *Bank of Canada Act* would be more appropriate than a convoluted Criminal Code provision dealing with trading stamps.

Similar attacks on trading stamps were made in the United States. In passing upon a statute seeking to destroy the trading stamp business, the Supreme Court of New York said:

The method of inducing trade by giving stamps redeemable in merchandise to the purchaser has become very extensive, and the device has developed in a variety of ways. The practice has been quite vigorously assailed, especially by those who have suffered from it in trade competition, and the legislature, possibly under the spur of this opposition, has endeavoured, in the guise of regulating the business, to curtail it so effectively as to be equivalent to its prohibition. It is not a novel expedient for the legislature to interfere with trade....

This statute, in brief, prohibits dealing in trading stamps or coupons unless the stamp or device 'shall have legibly printed or written upon the face thereof the redeemable value thereof,' in money. The second provision requires that the ticket or stamp, upon presentation, be redeemed in goods or money, at the option of the holder, if presented 'in a number or quantity aggregating the money value of not less than five cents.'...The rock on which the system is built is the redemption of the stamps in merchandise. The enormous quantities of this merchandise disposed of enables the company of redemption, acting for a multitude of business concerns, to purchase very close to actual cost, so that each person or firm in trade is not called upon to contribute the full sum with which it would be chargeable upon a cash redemption. While, therefore, the present statute is sought to be vindicated as mere regulation of the traffic, it is apparent that, if the ticket must be redeemed in money, the business must cease, and the statute is consequently prohibitory.

It is urged that the statute is within the range of the police power, on the ground that it is in the support of good morals.... It is no more against good morals to issue a ticket redeemable in merchandise than to redeem in money or merchandise at the election of the holder... It may be that people in moderate or straightened circumstances are prone to purchase beyond their means by the excitement of a gift after a stated amount has been expended.... The slight derelictions may be imprudent, but they are not the subject of legislative control...

But the moral question is eliminated by subdivision 5 of the act, which excludes from its provisions tickets or coupons issued by a merchant or manufacturer in his own name, and redeemable by him. It cannot be so reprehensible as to be a crime to issue a coupon ticket redeemable by a third person, but be without sin to issue one

⁸⁰ *Bank of Canada Act*, R.S.C. 1985, c. B-2, s. 25. The definition of "notes" states that "'notes' means notes of the Bank intended for circulation in Canada."

redeemable by the seller of the goods. A similar statute was considered by the Supreme Court of Rhode Island, and held to be an invasion of the liberty of the individual, and not sustainable under the police power.⁸¹

The opinion of the Supreme Court of New York is as *à propos* in Canada as it is in the United States. The New York legislation appears to have been the model for Canada. It is of interest to note that the clause in the New York legislation requiring that the stamp or coupon show its merchantable value and be redeemable upon demand in goods *or money* at the option of the holder makes much more sense in the context of the rest of that statute than it does in its Canadian counterpart. *The Trading Stamp Act* requires that the merchantable value be stated on the stamp and leaves it to the issuer to set the price of the goods for which the stamps are redeemable. Some issuers in Britain have circumvented a similar United Kingdom requirement by stating the cash redemption value of the coupon at the lowest valued coin of the realm, 1 pence, but having a much higher value in goods or services.⁸²

In commenting on the reason for the enactment of the British legislation, it was said, "The justification is that they (the stamps) hamper consumers from comparing values and establish artificial ties with particular retailers which make it difficult for consumers to transfer their custom without loss to take advantage of superior service and value offered by others."⁸³

A secondary evil of premium plans is the possibility of their use to contravene other legal prohibitions; for example, bribery. The issuance of trading stamps to an employee personally for purchases made on behalf of and paid for by the employer without the employer's consent technically is a form of bribery, but it has been generally accepted by the public as not immoral. Such plans encourage an employee to deal with businesses that offer premiums. The terms of some frequent flyer programs require that the points be awarded to the person in whose name the airline ticket is issued and not to the person who pays for the ticket. The objective of that term is suspect. It should be noted that some employers have curbed this practice. Specifically, some employers require all points obtained for air travel be used towards business air travel.⁸⁴ And the Canada Customs and Revenue Agency has succeeded in having bonuses and rewards issued to employees for goods and services paid for by the employer

⁸¹ C. Chapman, *The Law of Advertising and Sales* (Milwaukee: Wright & Joys, 1908) at 87-90.

⁸² See, for example, the voucher discussed in *Allied Carpets Group Plc. v Commissioner of Customs and Excise*, (G.B. VAT and Duties Tribunals), Transcript (14 April 1997) at 12 online: LEXIS.

⁸³ R. Cranston, *Consumers and the Law* (London: Weidenfeld and Nicolson, 1978) at 342.

⁸⁴ See, for example, M.R. O'Connor, P.-J. Sidebottom, & D. White, *Conduct Handbook for Municipal Employees and Officials* (Toronto: Butterworths, 1999) at 94-5; see also *Adams v. Comark Inc.*, [1992] 5 W.W.R. 306 (Man. C.A.) where an employer reversed its policy of allowing employees to keep frequent flyer points and the employee refused to abide by the new policy.

declared taxable benefits.⁸⁵ The evil, however, is not inherent in the plans; it is the use of the plan that is questionable.

In summary, the mischief to which the *Trading Stamp Act* is directed is difficult to discern, and so it's been generally ignored. But as long as it remains in the Criminal Code, it may have unforeseen consequences. For example, in *United Dominion Promotion Sales, Inc. v. Shaw*⁸⁶ Shaw was appointed sales representative of the promoter of a trading stamp scheme that was held to fall within the *Criminal Code*. The promoter had advanced the salesperson \$80 and a supply of 38 books of trading stamps to sell to retailers at \$15 per book. The promoter sued the salesperson for the value of the books and a return of the advance. The salesperson counterclaimed for commission on repeat orders that the promoter had received from retailers first approached by the salesperson. Keirstead, J. held that as the employment contract was founded on an illegal transaction it too was illegal and unenforceable. Neither party could enforce their claim.

IV. *Are modern frequent buyer plans legal?*

Many frequent buyer point schemes are a reincarnation of the old trading stamps. They are “designed or intended to be given to the purchaser of goods by the vendor thereof on his behalf, and to represent a discount on the price of the goods or a premium to the purchaser thereof.”⁸⁷ In establishing many modern frequent buyer plans the architects of these plans appear to have forgotten about the *Trading Stamp Act*. Retailers who could legally set up these plans often have failed to show upon the face of the stamp or coupon “the place of its delivery,” “the merchantable value thereof,” and that it is “redeemable at any time.” For example, my Second Cup card reads, “Buy 6 cups of coffee or tea and receive a regular 12oz. cup of coffee or tea free.” Canadian Tire “money” shows the merchantable value and implies that it is redeemable at any time, but it does not show the place of delivery. It could have been delivered, and is redeemable, at any associate Canadian Tire store. Neither the Second Cup card nor the Canadian Tire “money” has the technical precision of the coupon of the E. W. Gillett Co.⁸⁸ or the Loblaw trading stamp.⁸⁹ These deficiencies are remediable by the retailers.

Other plans are less so. In the early 1990's Sears issued a plastic token redeemable at McDonald's. If the token were given as a bonus upon making a purchase at Sears, the *Trading Stamp Act* was violated. The involvement of a third party was decisive in 1936 when a soap manufacturer was convicted for offering a coupon with three bars of soap that entitled the holder to a photograph

⁸⁵ *Mommersteeg v. The Queen*, [1996] D.T.C. 1011 (T.C.C.).

⁸⁶ (1957), 9 D.L.R. (2d) 759 (N.B. Co. Ct.).

⁸⁷ Criminal Code, R.S.C. 1985, c. C-46, s. 379.

⁸⁸ See above part II.

⁸⁹ See above part II.

taken at another location at a cost of fifteen cents.⁹⁰ It is difficult to distinguish the Sears/MacDonalds plan.

Still other plans are sponsored by a promoter who sells the plan to a retailer who, in turn, offers a premium to its customers. Like trading stamps, one advantage of an intermediary is the availability of quantity discounts. Air Miles is an example. It is believed that the promoter of Air Miles, Loyalty Management Group Canada Inc., charges participating businesses 28.5 cents for every air mile point issued. (If an individual wants to purchase air miles to make up any deficiency for a trip, that person is charged 50 cents a mile.⁹¹) A typical business issues 5 air mile points for \$100 of business, although other rates are not uncommon. The cost to the firm is \$1.43 or 1.43% of sales.⁹² To travel in the off season from Fredericton to Toronto, an air miles collector needs a minimum of 1000 points. Thus the cost of the ticket to the participating businesses is \$285. At the rate of 5 air miles per \$100, purchases totaling \$20,000 are required to obtain 1000 points. The lowest quoted prices from a local travel agency for a similar trip from Fredericton to Toronto varied from \$342 to \$593.⁹³ If only \$285 were collected to buy a similar ticket, it would appear that the promoter, Loyalty Management, is able to purchase tickets at a lower price than individuals and at least some of the wholesale discount is passed on to the customer.⁹⁴ It should be noted that as the Air Miles points system is based on regional travel rather than from specific departure and destination locations, some specific trips are conceivably more expensive. But generally, the advantage to the collector of Air Miles is the same as that to the collector of trading stamps whereby lower prices of premiums was an attractive feature. Compare the case for trading stamps:

The arithmetic foundation of S & H trading stamps can be easily sketched. The consumer saves the stamps in books which hold 1200 "Green Stamps," representing \$120 of retail purchases. The retailer will have paid S & H from \$2.40 (for larger volume retailers) to \$2.65 (for smaller stores) for each book of stamps; consumers can exchange a stamp book for merchandise that retails between \$2.86 and \$3.31. The number of stamps that purchasers finally redeem is uncertain, although S & H has until recent years experienced an annual redemption rate of ninety-five percent. Promotional expenditures are justified, of course, only if they produce additional revenues which exceed the cost of the promotion, and trading stamps are no

⁹⁰ *Supra* note 44.

⁹¹ Airmiles Homepage, Terms & Conditions, online: www.airmiles.ca.

⁹² In the days when trading stamps were a contentious issue, concerns were raised over who would ultimately bear this extra expense. Would it be passed on to the consumer or would the plan increase sales to more than justify the expense?

⁹³ In *Mommersteeg v. The Queen*, *supra* note 85 at 1016-17, the judge stated that the value of a reward travel ticket is not as high as other tickets because of the restrictions placed on them. In addition, only a limited number of seats are made available for reward tickets. At 1014, the cost to the airline was said to be about \$50. See also, V. Krishna, "Quasi-Monopoly Weighs on Value of Frequent-Flier Points", *The Globe & Mail* (March 4, 2002) B9.

⁹⁴ The terms of the contract between Canada's major airline, Air Canada, and Air Miles has not been disclosed. See "Air Canada to accept Airmiles", *The Toronto Star* (28 April 2000) BU3.

exception. In order for stamps to justify their cost, it is estimated that the retailer's "sales volume must increase by about twelve percent" over pre-stamp sales.⁹⁵

A retailer who gives 1 Air Mile for every \$15 of purchases would be nearly in the identical position of a large volume retailer under the S & H plan. The only difference between the trading stamps of old and the reward programs of today is the method used to keep a record of the points. Rather than paste stamps in books, points are electronically recorded. Does this remove it from the *Criminal Code*?

Although electronically recorded points are in essence trading stamp schemes, their legality, depends on the interpretation that one gives to the definition of "trading stamps." "Trading stamps," it will be recalled, "includes any form of cash receipt, receipt, coupon, premium ticket or other device..."⁹⁶ A frequent buyer point could be described as a "form of cash receipt" or "other device" and thus within the definition. They certainly fall with the object and spirit of the legislation. However, given the limited, if any, justification for the legislation, one might expect a court to apply the *ejusdem generis* rule to the words quoted and conclude that electronically recorded points are not a "form of cash receipt" or "other device."⁹⁷

The magnetically encoded frequent buyer card that is issued to the customer to record the points may present an additional argument that the card comes within the definition of "trading stamp." It, however, has more resemblance to the old stamp saver books than the stamps. It is issued as a means of keeping track of purchases and points rather than being issued as a receipt.

Some issuers of frequent buyer points are not selling goods but services.⁹⁸ The legislation is only directed to the selling of goods. Thus the affinity programs that are attached to many bank credit cards do not come under the legislation. But, if one concludes that a point system is an "other device," the purchase of goods at a service station and the receipt of points would constitute an offence, but the points awarded by a real estate agent selling your house would not. These fine distinctions cannot be said to make good law.

V. Other Issues

There are rules other than the criminal law that, in some cases, prohibit the use of bonus and reward schemes. A bonus or reward program offered in conjunction with a retirement pension plan contribution is considered a

⁹⁵ Gellhorn, *supra* note 74, 908-909.

⁹⁶ *Criminal Code*, *supra* note 87.

⁹⁷ See U. Gautier, "Sales Promotions and the Criminal Law" (1988-89), 31 *Crim. L. Q.* 142 at 161-62.

⁹⁸ The British legislation applies to both goods and services. See *Trading Stamps Act* 1964, *supra* note 73 at s. 2.

“prohibited advantage” under the *Income Tax Act*. If a bonus or reward program is offered, the plan will not qualify for registration. If the bonus scheme is established after registration, the issuer is liable to a penalty. Free trips are specifically mentioned as an example of a “prohibited advantage” in a Canada Customs and Revenue Agency information circular.⁹⁹ The purpose of the rule is to make certain that all of the tax benefit from the contribution is directly attributable to the establishment of a pension. The reverse is not true. There is no prohibition to making a contribution to the customer’s RRSP as a bonus or reward. And indeed, such a bonus plan is available.¹⁰⁰ Advertisements for one plan suggest that the contributions vary from 1% to 10% of purchases.¹⁰¹ The transparency of the value of this type of reward scheme, if successful, raises doubts as to the validity of the argument that if cash payments were required, the scheme would not function as suggested by the Supreme Court of New York.¹⁰²

If loyalty is the root of frequent buyer plans, a surprising development is the ability to transfer points in one plan for points in another. From the consumer’s point of view it means that points in different plans can be consolidated into one plan and used to buy goods and services earlier. But, the ability to exchange points in one plan for points in another means that the issuer has lost the tie that encourages the purchaser to return to its firm. For a fee, points in many plans are exchangeable by a third party for points in many others of the holder’s choice.¹⁰³ As well, points in some plans may be bequeathed to another person.¹⁰⁴ The ability to transfer and consolidate points may have a direct impact on the legality of points. If some points were originally lawfully issued and others were issued in violation of the *Criminal Code*, are the lawfully issued points tainted by the illegal points or does the commingling make the distinction impossible with the result that the unlawfully issued points have been “purified”? In other words, are points like negotiable instruments whereby a bona fide purchaser for value receives good title to the points? Maybe M. Gervais was more correct than he has been given credit for when he stated that trading stamps are a “form of currency.” Points.com, a points transfer service, refer to their business as a “program currency exchange.”¹⁰⁵

⁹⁹ *Income Tax Act*, R.S.C. 1985, c.1, (5th Supp.) s. 146 (2) (c.4), (13.1); Interpretation Bulletin IT-415R2, (9 August 1995) at para. 9.

¹⁰⁰ See www.equity.ca/eqdoc/frameset_program_info.html.

¹⁰¹ Advertisement, *The Globe & Mail*, (1 November 2000) at A9 (Atlantic ed.); A14 (Metro ed.)

¹⁰² Chapman, *supra* note 81.

¹⁰³ See www.points.com/aboutProductServices.jsp.

¹⁰⁴ P. Dawson, Letter to the Editor, *The Globe & Mail* (20 June 2000) A16.

¹⁰⁵ *Supra* note 103.

VI. Conclusion

The debate over trading stamps in earlier times has not recurred over frequent buyer programs. Yet the objective and mode of operation of both is practically identical. J. E. Wilder was born a century too early. Despite the proliferation of frequent buyer programs, the *Trading Stamp Act* has received little attention in the past few years.. There has been no outcry today for the laying of charges under the provisions in the *Criminal Code*, nor has there been any suggestion that the law be amended.

And, the constitutionality of the legislation is questionable. It is doubtful that it is a matter of criminal law. It is more likely that it is a matter of property and civil rights or possibly trade and commerce.

Industry Canada's Office of Consumer Affairs issued a Consumer Advisory in December 1999 setting out the reward points that were offered by general credit cards. Their advice was, "No one who carries a monthly balance should be tempted to use their cards more in order to accumulate reward points. Reward cards should not encourage overspending!"¹⁰⁶ Surprisingly, the legality of the rewards points system was never questioned. Surely the time has come to remove any doubt about the legality of frequent buyer programs. The repeal of section 427 and the definition of "trading stamps" in section 379 of the *Criminal Code* is long overdue.

¹⁰⁶See Industry Canada, Consumer Advisory. "Credit Card Costs" (1999) online: Office of Consumer Affairs.