



Bob Aaron bob@aaron.ca

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## Loyalty programs could be illegal

Frequent buyer plans violate obsolete sections of Criminal Code, professor argues

Whenever I buy something for the house, the office or the car, whenever I shop in a drug store, Canadian Tire or a fast-food franchise, the chances are better than even that I'm participating in some sort of frequent-buyer program.

When I travel by plane, it's always free with Aeroplan or Air Miles rewards. Every now and then, my purchase of a tool or gadget at Canadian Tire is free using the company's cash bonus coupons. After 10 lunches at my favourite Japanese fast-food kiosk or sandwich shop, the next one is free using a frequent-buyer card.

All of my book purchases at Coles, Chapters and Indigo earn free rewards using my iRewards loyalty card. Even some Century 21 realtors reward their clients with Air Miles points.

Given the popularity of these loyalty programs in today's economy, I was quite surprised last month to read an article in the scholarly Canadian Bar Review which questions the legality of these programs and calls for the repeal of two obsolete sections of the Criminal Code.

Professor Richard W. Bird teaches at the Faculty of Law at the University of New Brunswick in Fredericton. In his bar journal article, *The Legality of Frequent Buyer Programs*, Bird suggests that modern frequent-buyer programs are reincarnations of trading stamp programs introduced a century ago. Some of these programs were declared illegal by the 1905 Trading Stamp Act, which is still part of our Criminal Code.

In the early 1900s, a promoter named J. E. Wilder set up a business to sell trading stamps to merchants. The merchants would give the stamps to customers according to the amount of money spent in each establishment. When the customer had accumulated enough coupons, they could be redeemed for merchandise at Wilder's stores in Quebec City and Montreal.

Under the heading *Fraudulent Transactions Relating to Trade*, Section 427 of the Criminal Code makes it an offence for a merchant to give trading stamps to a customer. Section 379 contains a complicated definition of trading stamp, but boiled down to its basics, it says that a trading stamp includes any form of "cash receipt ... coupon, premium ticket or other device" given by a retailer to represent a discount on the price of the goods or a premium to the purchaser. In this definition, the stamp is illegal if it may be redeemed:

By the retailer or the manufacturer in cash or goods that are owned by someone else, or

At a location other than where the goods are purchased, or

By a third party.

It's also illegal if the stamp does not show the place where it is delivered and its "merchantable value," or if it may not be redeemed on demand at any time.

Many prosecutions were launched under this legislation over the years, including a number against Loblaws in the 1960s over its Lucky Green Stamps. Test cases made their way to the Supreme Court of Canada, where the legislation was ruled valid.

In his article, Bird suggests that modern frequent-buyer point schemes are a reincarnation of the old trading stamps, and fall squarely within the Criminal Code definition of trading stamps. He thinks that even electronic points (like Aeroplan or Air Miles points) could be caught by the definition of "a form of cash receipt" or "other device."

Bird says the objective and operation of the old trading stamp schemes are practically identical to modern frequent-buyer programs. It's time, Bird argues, to remove any doubt about their legality and repeal sections 379 and 427 of the Criminal Code.