

Publisher's Note

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Young & Fraser

Canadian Advertising & Marketing Law

This publication provides an in-depth examination of both the federal and provincial laws affecting advertising, packaging, pricing, promotion and distribution. Clear, detailed commentary is presented on such issues as labelling requirements, total price disclosure, advertising content restrictions and permitted promotions and contests. Specific products that are specially regulated receive individual attention including food and drugs, cosmetics, liquor and tobacco products and hazardous products.

This release features the addition of Food-Specific Labelling Requirements for Retail Foods, Salt, Shipping Containers, and Prepackaged Water and Ice to the Canadian Food Inspection Agency - Food Labelling for Industry - Industry Labelling Tool in Chapter 23 (Food, Drugs, Cosmetics, and Medical Devices - Guidelines). This release also includes the addition to Chapter 27 (Intellectual Property) of the updated Canada Border Services Agency's Memorandum D-19-4-3 Copyright, Trade-marks and Geographical Indications dated September 21, 2017. This release also includes the addition of case law annotations to *Personal Information Protection and Electronic Documents Act* in Chapter 28 (Privacy). This release also features updates to the Administrative Monetary Penalties and Monetary Penalties Pursuant to Undertaking under *Act to Promote the Efficiency and Adaptability of the*

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Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying Out Commercial Activities (CASL) in Chapter 28B (Anti-Spam).

Highlights

- **Privacy — *Personal Information Protection and Electronic Documents Act* — Section 4** — OPCC received complaints from individuals alleging that links to Canadian court and tribunal decisions containing their personal information were appearing prominently in search results when their names were entered in common search engines. One question to be addressed was whether PIPEDA can apply to activities abroad that have an impact on persons resident in Canada. Section 4 of PIPEDA is silent with respect to the statute’s territorial reach. However, there is no language expressly limiting its application to Canada. In the absence of clear guidance from the statute, the Court can interpret it to apply in all circumstances in which there exists a “real and substantial link” to Canada, following the Supreme Court’s guidance in *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 (S.C.C.). Justice Mosley observed that the Federal Court has applied PIPEDA to a foreign-based organization where there was evidence of a sufficient connection between the organization’s activities and Canada. The relevant connecting factors include (1) the location of the target audience of the website, (2) the source of the content on the website, (3) the location of the website operator, and (4) the location of the host server. However, when an organization’s activities take place exclusively through a website, the physical location of the website operator or host server is not determinative because telecommunications occur “both here and there”. The Court was satisfied that the respondent was an “organization” within the meaning of paragraph 4(1)(a) of PIPEDA. The respondent was collecting, using and disclosing Canadian court and tribunal decisions containing personal information of litigants and other individuals named in the decisions. The respondent’s activities were commercial in nature as he generated revenue from advertisements on his website and he charged a transaction fee before agreeing to remove the personal information of concerned individuals: *T. (A.) v. Globe24h.com*, 2017 CarswellNat 184, 2017 CarswellNat 904, 2017 FC 114, 2017 CF 114, 143 C.P.R. (4th) 483, 275 A.C.W.S. (3d) 155, 373 C.R.R. (2d) 344, 407 D.L.R. (4th) 733 (F.C.)

- **Sentencing Table — Administrative Monetary Penalties and Monetary Penalties Pursuant to Undertaking under Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying Out Commercial Activities (CASL** — CompuFinder provided unaudited financial statements indicating that it had annual revenues of \$1.5 million, but profits of under \$100,000. The investigation report pointed to certain transactions of interest that served to lower the company's overall profits, including an advance to shareholders, an advance without interest to another corporation, and mortgages given to an employee. The investigation report also noted a property owned by the company valued at approximately \$1.5 million, for which there did not appear to be a mortgage. The report suggested that the property could be leveraged to satisfy an AMP. In the Commission's view, the annual revenues of an organization, particularly a small one that is privately and closely held, are in general a more reliable indicator of ability to pay than are the organization's annual profits. This is because there are many ways for a corporation to choose to minimize its net income, whether through reinvestment in the company, ongoing or capital expenditures, or other means of moving money out of the business, such as those identified in the investigation report in this case. Further, CompuFinder did not provide a detailed analysis or evidence to support its assertion that the proposed penalty would force its owners to sell their home or force the closure of the business. In the circumstances, the record contained certain indications that CompuFinder had the ability to pay the proposed penalty, but other indications that doing so could place CompuFinder's ability to continue doing business at risk. On balance, the Commission considered that CompuFinder had some ability to pay, though consideration of this factor, especially taken together with the other prescribed factors, suggested that a lower penalty than the one set out in the notice of violation would be appropriate. An administrative monetary penalty of \$200,000 was imposed: *3510395 Canada Inc., operating as Compu.Finder* (October 19, 2017) File number PDR 9094-201400302-001.