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Canadian Advertisers Self-regulate Online Behavioural Advertising



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Call to Action on Online Behavioural Advertising (OBA)

The Office of the Privacy Commissioner (OPC) is aware of the challenges associated with balancing privacy in the online advertising environment, and it wants the ad industry to step up. On December 6, 2011, Jennifer Stoddart, Privacy Commissioner of Canada, announced¹ the publication of a new set of guidelines on *Privacy and Online Behavioural Advertising*.² Commissioner Stoddart said:

[t]o best address these complexities, **all stakeholders in the advertising community, including website operators and browser developers, have a role to play** to ensure that the issues of transparency and meaningful consent are addressed [emphasis added]³

In June of the following year, the OPC followed up with more specific expectations in its *Policy Position on Online Behavioural Advertising*.⁴

Industry Response: Self-regulation

In September 2013, led by the Digital Advertising Alliance of Canada (DAAC), the advertising industry responded by launching the Canadian Self-regulatory Program for Online Behavioural Advertising website geared to consumers and companies alike.⁵ The Program is not quite “made-in-Canada,” nor should it be, considering the need to integrate data governance solutions across borders. It is based on the U.S. Digital Advertising Alliance (DAA) OBA Ad Choices program and principles.⁶ The Program also shares some common principles and approaches with the European Advertising Standards Alliance (EASA) OBA Framework.⁷

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For consistency and broad consumer recognition, the “Ad Choices” program in participating countries uses the identifying icon consisting of a lower case letter *i* within a blue triangle.

The DAAC Program has been tailored to meet the requirements of Canada’s *Personal Information Protection and Electronic Documents Act* [PIPEDA]⁸ as well as the OPC guidelines. Advertising Standards Canada (ASC), the non-profit industry body, is responsible for monitoring compliance, dealing with complaints, initiating investigations, and publishing reports. The OPC will no doubt be watching closely—particularly, as the program takes its first steps in Canada—to come to its own conclusions on whether industry self-regulation is meeting its expectations under PIPEDA and its OBA guidelines. However, once the Program has matured and proved itself, there is precedent for a regulator to stand down and consider the self-regulatory body to be at least the “first resort” for complaints in the area. The Canadian Radio-television and Telecommunications Commission (CRTC) generally takes this position with respect to the ASC’s review of advertising standards.

The Canadian Self-Regulatory Program for Online Behavioural Advertising incorporates the following Principles:

1. Education (*both individuals and businesses*)
2. Transparency (*clear, meaningful, prominent notice to consumers*)
3. Consumer Control (*the ability to exercise choice with respect to the collection, use, and disclosure of data for OBA purposes*)
4. Data Security (*safeguards, data retention, and treatment of OBA data*)
5. Sensitive Data (*children and sensitive personal information*)
6. Accountability (*accountability program is managed and operated by the ASC in accordance with its Online Behavioural Advertising Compliance Procedure*)⁹

Self-regulation does not, however, cover the whole OBA territory. Certain types of activities are expressly excluded from the Program, such as *online advertising of entities within a web site they own or control* and *contextual advertising*, including ads “based on the content of the Web page being visited, a consumer’s current visit to a Web page, or a search query.”¹⁰

“Finding” and Educating Consumers

While legal compliance may have been the main driver for the implementation of the new Program, the DAAC also points to the benefits for consumers:

*As an online consumer, you can find out more about online behavioural advertising and how it helps provide you with more relevant ads on the websites that you visit. You’ll learn how online behavioural advertising supports the content, products and services that you use on the web, what online ad choices you have, and how to use browser controls to enhance your privacy [emphasis added].*¹¹

In short, while the Office of the Privacy Commissioner has noted that some consumers find OBA “downright creepy,”¹² the DAAC and its member associations know that many consumers do not

mind OBA as long as it is transparent: they do not want to see irrelevant ads, and they are comfortable with the idea of the right ads “finding them.”

It is early days for the DAAC Program. As it rolls out and expands, Canadians will become increasingly familiar with the Ad Choices icon appearing on web pages. Advertisers—and the OPC—have a lot at stake in that little blue icon.

¹ Jennifer Stoddart, Privacy Commissioner of Canada, “Respecting Privacy Rights in the World of Online Behavioural Advertising.” Remarks at the Marketing and the Law Conference, December 6, 2011, <http://www.priv.gc.ca/media/sp-d/2011/sp-d_20111206_e.asp>.

² <http://www.priv.gc.ca/information/guide/2011/gl_ba_1112_e.pdf>.

³ *Supra* note 1.

⁴ <http://www.priv.gc.ca/information/guide/2012/bg_ba_1206_e.asp>.

⁵ <<http://youradchoices.ca/>>.

⁶ See <<http://www.youradchoices.com/>>.

⁷ See <<http://www.easa-alliance.org/page.aspx/386>>.

⁸ S.C. 2000, c. 5.

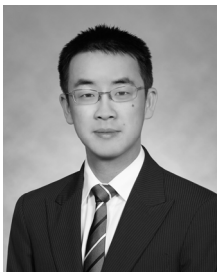
⁹ The full Principles document is available at <<http://youradchoices.ca/wp-content/uploads/2013/08/The-Canadian-Self-Regulatory-Principles-for-Online-Behavioural-Advertising.pdf>>.

¹⁰ *Ibid.*, p. 1.

¹¹ *Supra* note 5; see the *For Consumers* heading.

¹² *Supra* note 1.

Protecting an Employer’s LinkedIn Network: *Whitmar Publications Ltd v. Gamage & Ors*



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Overview

The England and Wales High Court (Chancery Division) recently granted an interlocutory injunction restraining former employees from, among other things, using confidential information gained

through the employer’s LinkedIn groups in these employees’ new competing business.¹ An employer can use groups on LinkedIn to manage and interact with its employee, customer, and supplier networks. As the issue of misappropriation of employer-managed LinkedIn networks and materials has not been addressed within Canada as of the date of this article, this case from the United Kingdom is helpful in determining the application of Canadian law to this new issue and in setting out some steps that employers can take to protect their confidential information.

Facts

The employer applicant, Whitmar, is a publication company. Three former employees, the defendants, left employment with Whitmar to work in their own allegedly competing business. The evidence