



Session #402:
Some Aspects of The Law
Applicable to Privacy
in the Context of Residential
Tenancy Arrangements in Ontario

Presented by Joseph Debono of Dentons Canada LLP
 for the Ontario Non-Profit Housing Association on
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What is this presentation about?

- This presentation is merely an overview of some of the principal components of the law imposing a duty upon a residential landlord to respect and safeguard the privacy of a residential tenant in Ontario.

What do we mean by the “privacy” of a tenant for the purposes of this presentation?

- “Privacy” for the purposes of our discussion is:
 - The protection of the personal information of a tenant.
 - Privacy in the enjoyment of the premises occupied by the tenant.
 - The level of “surveillance” a tenant may be exposed to in the common areas of a building she/he occupies.



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What this presentation is not about.

- This presentation does not address the obligations of “personal health custodians” under the *Personal Health Information Protection Act*, which is said to apply, for example, to the operator of a “care home” under the *Residential Tenancies Act* and a “retirement home” within the meaning of the *Retirement Homes Act*.



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What laws apply to Personal Information in the context of residential tenancies in Ontario?

- The most important statute which applies in this context is the federal *Personal Information Protection and Electronic Documents Act* (the “*Personal Information Act*”).
- Other relevant statutes include the *Residential Tenancies Act* and the *Criminal Code*.
- The “common law” also applies, creating other remedies available to a tenant in certain circumstances.

What is the purpose of the *Personal Information Act*?

- The *Personal Information Act* describes the purpose of Part 1 (Protection of Personal Information in the Private Sector) as follows:

“The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.”

What does the *Personal Information Act* apply to?

- The *Personal Information Act* applies to every organization that collects, uses or discloses personal information in the course of commercial activities, being “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character”.
- Accordingly, this would apply to a landlord, including a “not-for-profit” landlord, in a residential tenancy arrangement.

What is Personal Information?

- The *Personal Information Act* defines Personal Information as information about an “identifiable individual”.
- The Privacy Commissioner has interpreted these provisions to mean any factual or subjective information, recorded or not, about an individual. This includes information such as age, name, personal identification numbers, income, ethnic origin and blood type.

What is Personal Information?

- In a decision concerning the meaning of personal information, the Federal Court stated:
 “information is personal if it is “about” an identifiable individual. A person will be identifiable if the information disclosed, together with other publicly available information, would tend to or possibly identify them.”
- The key element in the definition of personal information is whether a person is “identifiable” not whether that person is actually identified.



What is not Personal Information?

- The law excludes a variety of types of information from the definition of Personal Information, including information which is “publicly available” and prescribed in the regulations, such as:
 - (i) “personal information consisting of the name, address and telephone number of a subscriber that appears in a telephone directory that is available to the public, where the subscriber can refuse to have the personal information appear in the directory;”
 - (ii) “personal information that appears in a registry collected under a statutory authority and to which a right of public access is authorized by law, where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the registry;”
 - (iii) “personal information that appears in a record or document of a judicial or quasi-judicial body, that is available to the public, where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the record or document;” and
 - (iv) “personal information that appears in a publication, including a magazine, book or newspaper, in printed or electronic form, that is available to the public, where the individual has provided the information.”



Can a landlord use Personal Information?

- Yes, subject to a complex set of rules, with the basic principle being:
“An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.”



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The Ten Principles

- The *Personal Information Act* includes Schedule 1 to the statute, which identifies Ten Principles.
- Every organization must comply with these Ten Principles set out in Schedule 1, if it is subject to the *Personal Information Act*, subject to other applicable provisions of the statute, which modify the Ten Principles.



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The Ten Principles

- The Ten Principles in general terms require organizations subject to the *Personal Information Act*:
 - (1) collecting, using or disclosing personal information to be accountable for such activity;
 - (2) to ensure that subjects receive an explanation of the purposes underlying any collection, use or disclosure of their personal information;
 - (3) to obtain informed consent prior to collection, use or disclosure;

The Ten Principles

- (4) to limit collection;
- (5) to limit use, disclosure and retention;
- (6) to ensure that personal information is accurate;
- (7) to implement appropriate safeguards for personal information;
- (8) to provide “openness” in regard to the policies and practices of the management of personal information;

The Ten Principles

- (9) to facilitate individual access by individuals to their personal information; and
- (10) to establish means by which individuals can challenge an organization's compliance with the obligations imposed by the statute.



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The Ten Principles

4.1 Principle 1 - Accountability

“An organization is responsible for personal information under its control and shall designate an individual or individuals who are accountable for the organization's compliance with the following principles.”



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The Ten Principles: Accountability

4.1.1

“Accountability for the organization’s compliance with the principles rests with the designated individual(s), even though other individuals within the organization may be responsible for the day-to-day collection and processing of personal information. In addition, other individuals within the organization may be delegated to act on behalf of the designated individual(s).”



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The Ten Principles: Accountability

4.1.2

“The identity of the individual(s) designated by the organization to oversee the organization’s compliance with the principles shall be made known upon request.”



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The Ten Principles: Accountability

4.1.3

“An organization is responsible for personal information in its possession or custody, including information that has been transferred to a third party for processing. The organization shall use contractual or other means to provide a comparable level of protection while the information is being processed by a third party.”



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The Ten Principles: Accountability

4.1.4

“Organizations shall implement policies and practices to give effect to the principles, including

- (a) implementing procedures to protect personal information;
- (b) establishing procedures to receive and respond to complaints and inquiries;
- (c) training staff and communicating to staff information about the organization’s policies and practices;
- (d) developing information to explain the organization’s policies and procedures”.



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The Ten Principles

4.2 Principle 2 – Identifying Purposes

“The purposes for which personal information is collected shall be identified by the organization at or before the time the information is collected.”



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The Ten Principles: Identifying Purposes

4.2.1

“The organization shall document the purposes for which personal information is collected in order to comply with the Openness principle (Clause 4.8) and the Individual Access principle (Clause 4.9).”



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The Ten Principles: Identifying Purposes

4.2.2

“Identifying the purposes for which personal information is collected at or before the time of collection allows organizations to determine the information they need to collect to fulfil these purposes. The Limiting Collection principle (Clause 4.4) requires and organization to collect only that information necessary for the purposes that have been identified.”



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The Ten Principles: Identifying Purposes

4.2.3

“The identified purposes should be specified at or before the time of collection to the individual from whom the personal information is collected. Depending upon the way in which the information is collected, this can be done orally or in writing. An application form, for example, may give notice of the purposes.”



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The Ten Principles: Identifying Purposes

4.2.4

“When personal information that has been collected is to be used for a purpose not previously identified, the new purpose shall be identified prior to use. Unless the new purpose is required by law, the consent of the individual is required before information can be used for that purpose. For an elaboration on consent, please refer to the Consent principle (Clause 4.3).”



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The Ten Principles: Identifying Purposes

4.2.5

“Persons collecting personal information should be able to explain to individuals the purposes for which the information is being collected.”



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The Ten Principles: Identifying Purposes

4.2.6

“This principle is linked closely to the Limiting Collection principle (Clause 4.4) and the Limiting Use, Disclosure and Retention principle (Clause 4.5).”



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The Ten Principles

4.3 Principle 3 – Consent

“The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.”



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“Note: In certain circumstances personal information can be collected, used, or disclosed without the knowledge and consent of the individual. For example, legal, medical, or security reasons may make it impossible or impractical to seek consent. When information is being collected for the detection and prevention of fraud or for law enforcement, seeking the consent of the individual might defeat the purpose of collecting the information. Seeking consent may be impossible or inappropriate when the individual is a minor, seriously ill, or mentally incapacitated. In addition, organizations that do not have a direct relationship with the individual may not always be able to seek consent. For example, seeking consent may be impractical for a charity or a direct-marketing firm that wishes to acquire a mailing list from another organization. In such cases, the organization providing the list would be expected to obtain consent before disclosing personal information.”



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The Ten Principles: Consent

4.3.1

“Consent is required for the collection of personal information and the subsequent use or disclosure of this information. Typically, an organization will seek consent for the use or disclosure of the information at the time of collection. In certain circumstances, consent with respect to use or disclosure may be sought after the information has been collected but before use (for example, when an organization wants to use information for a purpose not previously identified).”



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The Ten Principles: Consent

4.3.2

“The principle requires “knowledge and consent”. Organizations shall make a reasonable effort to ensure that the individual is advised of the purposes for which the information will be used. To make the consent meaningful, the purposes must be stated in such a manner that the individual can reasonably understand how the information will be used or disclosed.”



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The Ten Principles: Consent

4.3.3

“An organization shall not, as a condition of the supply of a product or service, require an individual to consent to the collection, use, or disclosure of information beyond that required to fulfil the explicitly specified, and legitimate purposes.”



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The Ten Principles: Consent

4.3.4

“The form of the consent sought by the organization may vary, depending upon the circumstances and the type of information. In determining the form of consent to use, organizations shall take into account the sensitivity of the information. Although some information (for example, medical records and income records) is almost always considered to be sensitive, any information can be sensitive, depending on the context. For example, the names and addresses of subscribers for a newsmagazine would generally not be considered sensitive information. However, the names and addresses of subscribers to some special-interest magazines might be considered sensitive.”



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The Ten Principles: Consent

4.3.5

“In obtaining consent, the reasonable expectations of the individual are also relevant. For example, an individual buying a subscription to a magazine should reasonably expect that the organization, in addition to using the individual's name and address for mailing and billing purposes, would also contact the person to solicit the renewal of the subscription. In this case, the organization can assume that the individual's request constitutes consent for specific purposes. On the other hand, an individual would not reasonably expect that personal information given to a health-care professional would be given to a company selling health-care products, unless consent were obtained. Consent shall not be obtained through deception.”



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The Ten Principles: Consent

4.3.6

“The way in which an organization seeks consent may vary, depending on the circumstances and the type of information collected. An organization should generally seek express consent when the information is likely to be considered sensitive. Implied consent would generally be appropriate when the information is less sensitive. Consent can also be given by an authorized representative (such as a legal guardian or a person having power of attorney).”



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The Ten Principles: Consent

4.3.7

“Individuals can give consent in many ways. For example:

- (a) an application form may be used to seek consent, collect information, and inform the individual of the use that will be made of the information. By completing and signing the form, the individual is giving consent to the collection and the specified uses;
- (b) a checkoff box may be used to allow individuals to request that their names and addresses not be given to other organizations. Individuals who do not check the box are assumed to consent to the transfer of this information to third parties;
- (c) consent may be given orally when information is collected over the telephone; or
- (d) consent may be given at the time that individuals use a product or service.”



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The Ten Principles: Consent

4.3.8

“An individual may withdraw consent at any time, subject to legal or contractual restrictions and reasonable notice. The organization shall inform the individual of the implications of such withdrawal.”



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4.4 Principle 4 – Limiting Collection

“The collection of personal information shall be limited to that which is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means.”



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The Ten Principles: Limiting Collection

4.4.1

“Organizations shall not collect personal information indiscriminately. Both the amount and the type of information collected shall be limited to that which is necessary to fulfil the purposes identified. Organizations shall specify the type of information collected as part of their information-handling policies and practices, in accordance with the Openness principle (Clause 4.8).”



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The Ten Principles: Limiting Collection

4.4.2

“The requirement that personal information be collected by fair and lawful means is intended to prevent organizations from collecting information by misleading or deceiving individuals about the purpose for which information is being collected. This requirement implies that consent with respect to collection must not be obtained through deception.”



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The Ten Principles: Limiting Collection

4.4.3

“This principle is linked closely to the Identifying Purposes principle (Clause 4.2) and the Consent principle (Clause 4.3).”



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4.5 Principle 5 – Limiting Use, Disclosure, and Retention

“Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes.”



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The Ten Principles: Limiting Use

4.5.1

“Organizations using personal information for a new purpose shall document this purpose (see Clause 4.2.1).”



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The Ten Principles: Limiting Use

4.5.2

“Organizations should develop guidelines and implement procedures with respect to the retention of personal information. These guidelines should include minimum and maximum retention periods. Personal information that has been used to make a decision about an individual shall be retained long enough to allow the individual access to the information after the decision has been made. An organization may be subject to legislative requirements with respect to retention periods.”



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The Ten Principles: Limiting Use

4.5.3

“Personal information that is no longer required to fulfil the identified purposes should be destroyed, erased, or made anonymous. Organizations shall develop guidelines and implement procedures to govern the destruction of personal information.”



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The Ten Principles: Limiting Use

4.5.4

“This principle is closely linked to the Consent principle (Clause 4.3), the Identifying Purposes principle (Clause 4.2), and the Individual Access principle (Clause 4.9).”



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The Ten Principles

4.6 Principle 6 – Accuracy

“Personal information shall be as accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used.”



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The Ten Principles: Accuracy

4.6.1

“The extent to which personal information shall be accurate, complete, and up-to-date will depend upon the use of the information, taking into account the interests of the individual. Information shall be sufficiently accurate, complete, and up-to-date to minimize the possibility that inappropriate information may be used to make a decision about the individual.”



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The Ten Principles: Accuracy

4.6.2

“An organization shall not routinely update personal information, unless such a process is necessary to fulfil the purposes for which the information was collected.”



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The Ten Principles: Accuracy

4.6.3

“Personal information that is used on an ongoing basis, including information that is disclosed to third parties, should generally be accurate and up-to-date, unless limits to the requirement for accuracy are clearly set out.”



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The Ten Principles

4.7 Principle 7 – Safeguards

“Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.”



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The Ten Principles: Safeguards

4.7.1

“The security safeguards shall protect personal information against loss or theft, as well as unauthorized access, disclosure, copying, use, or modification. Organizations shall protect personal information regardless of the format in which it is held.”



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The Ten Principles: Safeguards

4.7.2

“The nature of the safeguards will vary depending on the sensitivity of the information that has been collected, the amount, distribution, and format of the information, and the method of storage. More sensitive information should be safeguarded by a higher level of protection. The concept of sensitivity is discussed in Clause 4.3.4.”



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The Ten Principles: Safeguards

4.7.3

“The methods of protection should include:

- (a) physical measures, for example, locked filing cabinets and restricted access to offices;
- (b) organizational measures, for example, security clearances and limiting access on a “need-to-know” basis; and
- (c) technological measures, for example, the use of passwords and encryption.”



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The Ten Principles: Safeguards

4.7.4

“Organizations shall make their employees aware of the importance of maintaining the confidentiality of personal information.”



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The Ten Principles: Safeguards

4.7.5

“Care shall be used in the disposal or destruction of personal information, to prevent unauthorized parties from gaining access to the information (see Clause 4.5.3).”



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The Ten Principles

4.8 Principle 8 – Openness

“An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.”



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The Ten Principles: Openness

4.8.1

“Organizations shall be open about their policies and practices with respect to the management of personal information. Individuals shall be able to acquire information about an organization’s policies and practices without unreasonable effort. This information shall be made available in a form that is generally understandable.”



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The Ten Principles: Openness

4.8.2

"The information made available shall include:

- (a) the name or title, and the address, of the person who is accountable for the organization's policies and practices and to whom complaints or inquiries can be forwarded;
- (b) the means of gaining access to personal information held by the organization;
- (c) a description of the type of personal information held by the organization, including a general account of its use;
- (d) a copy of any brochures or other information that explain the organization's policies, standards, or codes; and
- (e) what personal information is made available to related organizations (e.g., subsidiaries)."



The Ten Principles: Openness

4.8.3

"An organization may make information on its policies and practices available in a variety of ways. The method chosen depends on the nature of its business and other considerations. For example, an organization may choose to make brochures available in its place of business, mail information to its customers, provide online access, or establish a toll-free telephone number."



The Ten Principles

4.9 Principle 9 – Individual Access

“Upon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.”



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The Ten Principles: Individual Access

“Note: In certain situations, an organization may not be able to provide access to all the personal information it holds about an individual. Exceptions to the access requirement should be limited and specific. The reasons for denying access should be provided to the individual upon request. Exceptions may include information that is prohibitively costly to provide, information that contains references to other individuals, information that cannot be disclosed for legal, security, or commercial proprietary reasons, and information that is subject to solicitor-client or litigation privilege.”



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The Ten Principles: Individual Access

4.9.1

“Upon request, an organization shall inform an individual whether or not the organization holds personal information about the individual. Organizations are encouraged to indicate the source of this information. The organization shall allow the individual access to this information. However, the organization may choose to make sensitive medical information available through a medical practitioner. In addition, the organization shall provide an account of the use that has been made or is being made of this information and an account of the third parties to which it has been disclosed.”



The Ten Principles: Individual Access

- Please note that the statute provides that:
 - “(1) Despite clause 4.9 of Schedule 1, an organization shall not give an individual access to personal information if doing so would likely reveal personal information about a third party. However, if the information about the third party is severable from the record containing the information about the individual, the organization shall sever the information about the third party before giving the individual access.
 - (2) Subsection (1) does not apply if the third party consents to the access or the individual needs the information because an individual's life, health or security is threatened.”



The Ten Principles: Individual Access

- Furthermore, there are various other exemptions to this principle of individual access including where:
 - (i) “the information is protected by a solicitor-client privilege, or, in civil law, by the professional secrecy of lawyers and notaries;”
 - (ii) “to do so would reveal confidential commercial information;”
 - (iii) “to do so could reasonably be expected to threaten the life or security of another individual;”
 - (iv) the information was generated in the course of a formal dispute resolution process;” or
- However, “if giving access to the information would reveal confidential commercial information or could reasonably be expected to threaten the life or security of another individual, as the case may be, and that information is severable from the record containing any other information for which access is requested, the organization shall give the individual access after severing”.
- Furthermore, these exemptions to the principle of individual access “does not apply if the individual needs the information because an individual's life, health or security is threatened.”

The Ten Principles: Individual Access

4.9.2

“An individual may be required to provide sufficient information to permit an organization to provide an account of the existence, use, and disclosure of personal information. The information provided shall only be used for this purpose.”

The Ten Principles: Individual Access

4.9.3

“In providing an account of third parties to which it has disclosed personal information about an individual, an organization should attempt to be as specific as possible. When it is not possible to provide a list of the organizations to which it has actually disclosed information about an individual, the organization shall provide a list of organizations to which it may have disclosed information about the individual.”



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The Ten Principles: Individual Access

4.9.4

“An organization shall respond to an individual’s request within a reasonable time and at minimal or no cost to the individual. The requested information shall be provided or made available in a form that is generally understandable. For example, if the organization uses abbreviations or codes to record information, an explanation shall be provided.”

- The statute also prescribes the time period and process for such a request for access.



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The Ten Principles: Individual Access

4.9.5

“When an individual successfully demonstrates the inaccuracy or incompleteness of personal information, the organization shall amend the information as required. Depending upon the nature of the information challenged, amendment involves the correction, deletion, or addition of information. Where appropriate, the amended information shall be transmitted to third parties having access to the information in question.”



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The Ten Principles: Individual Access

4.9.6

“When a challenge is not resolved to the satisfaction of the individual, the substance of the unresolved challenge shall be recorded by the organization. When appropriate, the existence of the unresolved challenge shall be transmitted to third parties having access to the information in question.”



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The Ten Principles

4.10 Principle 10 – Challenging Compliance

“An individual shall be able to address a challenge concerning compliance with the above principles to the designated individual or individuals accountable for the organization’s compliance.”



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The Ten Principles: Challenging Compliance

4.10.1

“The individual accountable for an organization’s compliance is discussed in Clause 4.1.1.”



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The Ten Principles: Challenging Compliance

4.10.2

“Organizations shall put procedures in place to receive and respond to complaints or inquiries about their policies and practices relating to the handling of personal information. The complaint procedures should be easily accessible and simple to use.”



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The Ten Principles: Challenging Compliance

4.10.3

“Organizations shall inform individuals who make inquiries or lodge complaints of the existence of relevant complaint procedures. A range of these procedures may exist. For example, some regulatory bodies accept complaints about the personal information handling practices of the companies they regulate.”



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The Ten Principles: Challenging Compliance

4.10.4

“An organization shall investigate all complaints. If a complaint is found to be justified, the organization shall take appropriate measures, including, if necessary, amending its policies and practices.”



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Compliance with the Ten Principles

- It is apparent that an organization cannot hope to comply with the *Personal Information Act* without a specific program aimed at compliance, which adopts the requisite policies and practices for the organization.
- Although it is outside of the scope of this presentation, a compliance program will address:
 - (i) key responsibilities within the organization to implement, monitor and evaluate the program;
 - (ii) a clear explanation of the purposes for which personal information is collected and why such personal information is collected;



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Compliance with the Ten Principles

- (iii) the manner in which consents are to be secured and evidenced;
- (iv) an inventory of personal information and practices for the secure retention of personal information;
- (v) training of all staff who must understand their obligations;
- (vi) a protocol for addressing enquiries;
- (vii) a protocol for dealing with breaches; and
- (viii) communication with the public.
- Every organization will require specific advice based upon its circumstances as to how to develop a compliance program and how to comply with these obligations.

Interpretation of the Ten Principles

- The Federal Court of Appeal has identified two basic objectives in the Ten Principles, being:
 - (i) to protect the right of privacy; and
 - (ii) to facilitate the collection, use and disclosure of personal information.
- The Court recognized that these competing objectives must be balanced, so that a flexible common sense and pragmatic approach is to be applied.

Exceptions to The Ten Principles

- There are a variety of exceptions to the Ten Principles. For example:
 - (i) personal information may be collected without the knowledge or consent of the person if:

“it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province”.



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Exceptions to The Ten Principles

- (ii) personal information may be used without the knowledge and consent of the individual if:

“in the course of its activities, the organization becomes aware of information that it has reasonable grounds to believe could be useful in the investigation of a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, and the information is used for the purpose of investigating that contravention;” or

“it is used for the purpose of acting in respect of an emergency that threatens the life, health or security of an individual.”



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Exceptions to The Ten Principles

(iii) personal information may be disclosed without the knowledge or consent of the person if:

“for the purposes of collecting a debt owed by the individual to the organization;”

“made to another organization and is reasonable for the purposes of investigating a breach of an agreement or a contravention of the laws of Canada or a province that has been, is being or is about to be committed and it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the investigation;” and

“made to another organization and is reasonable for the purposes of detecting or suppressing fraud or of preventing fraud that is likely to be committed and it is reasonable to expect that the disclosure with the knowledge or consent of the individual would compromise the ability to prevent, detect or suppress the fraud”,

without being in contravention of the *Personal Information Act*.



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Exceptions to The Ten Principles

- These are only examples of circumstances in which the collection, use and disclosure of personal information are not prohibited by the *Personal Information Act*.
- The disclosure of personal information is also permitted in a variety of other circumstances, including, for example, circumstances where a person is injured, ill, deceased or in emergency circumstances.



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Enforcement of the *Personal Information Act*

- The statute established the Office of the Privacy Commissioner of Canada (the “Privacy Commissioner”), who has the authority to receive complaints, conduct investigations and issue reports. However, although the Privacy Commissioner has this authority, she/he may not order a penalty for any breach.
- The Federal Court of Canada has the authority to issue an order or make a ruling to enforce this statute.



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Enforcement of the *Personal Information Act*

- In interpreting the powers of the Federal Court, it has commented that the factors to be considered where a person has applied for damages arising from a breach of the statute include:
 - “Whether awarding damages would further the general objects of *PIPEDA* and uphold the values it embodies;
 - “Whether damages should be awarded to deter future breaches; and
 - “The seriousness or egregiousness of the breach.”



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Enforcement of the *Personal Information Act*

- In assessing the seriousness of the breach the Court may consider factors such as:
 - “The impact of the breach on the health, welfare, social, business or financial position of the applicant;”
 - “The conduct of the respondent before and after the breach;”
 - “Whether the respondent benefited from the breach;”
 - “The nature of the information at stake;”
 - “The nature of the relationship between the parties;”
 - “Prior breaches by the respondent indicating a lack of respect for privacy interests.”



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Enforcement of the *Personal Information Act*

The Federal Court also commented that:

“Parliament has ensured that Canadians have the right to file complaints with the PCC for investigation without fear of having their personal information disclosed other than in certain constrained circumstances. That right should be protected by the Courts. To that end, an award of damages would further the general objects of *PIPEDA* and uphold the values it embodies. A damage award would also send the message to lawyers and individuals with increased public responsibility that they must proceed prudently when dealing with private information.”



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The *Residential Tenancies Act*

- The *Residential Tenancies Act* does not contain any express right to privacy, but does contain various provisions which protect privacy rights.
- For example, a landlord:
 - may not substantially interfere with the reasonable enjoyment of the rental unit demised to a tenant or the residential complex in which the rental unit is located for all usual purposes;
 - may not harass or interfere with a tenant;
 - may not enter a rental unit without compliance with the provisions governing entry, which ordinarily requires consent or prior written notice.



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Privacy and the Landlord and Tenant Board

- In interpreting and enforcing the obligations of a landlord, the Landlord and Tenant Board (the “**Board**”) will have regard to the privacy of tenants, so that “privacy” is a right to be protected in the appropriate circumstances.
- In one decision, the Board considered circumstances in which a tenant made several complaints to the landlord regarding the downstairs neighbour who regularly smoked (in a smoke-free residential complex) and played loud music late into the evening. Following unsuccessful attempts by the landlord to meet with the tenant and neighbour to resolve the issue, the landlord provided the neighbour's mother the contact information of the tenant. The landlord believed that the mother would be better suited to mediate the problem. The tenant received two voicemail messages from the neighbour's mother.



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Privacy and the Landlord and Tenant Board

- The Board found that it was “clearly inappropriate” for the landlord to disclose the name and contact information of the tenant to a third party without consent. The Board had regard to the *Personal Information Act* and explained that a landlord and tenant relationship is a business relationship. Consequently, when a landlord collects personal information from a tenant in the course of doing business, it is a reasonable expectation of the tenant that the landlord will not share that information without consent.



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Privacy and the Landlord and Tenant Board

The Board stated:

“As I explained the nature of the relationship between the Tenants and the Landlord is a business relationship. When a business has to collect personal information from its clients in the course of doing business, it is a reasonable expectation of the clients that the business will not pass that information around without their consent. When we use our credit cards in stores we expect the store not to give our credit card data to strangers. We expect the airline company not to tell tour operators our addresses; and we expect our dry cleaner not to sell data about the kinds of clothes we wear. That is why the federal government has passed the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) which basically says that information collected in the context of a business relationship cannot be disclosed to a third party without consent.”

- As the landlord had disclosed personal information without the tenant's consent, the landlord was found to have substantially interfered with the tenant's reasonable enjoyment and breached the *Residential Tenancies Act*.



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Is a landlord permitted to place cameras in the common areas of a residential complex?

- The Privacy Commissioner has developed Guidelines for Video Surveillance, which ought to be reviewed and considered by any landlord which is considering employing cameras.
- Video surveillance is a form of collection of personal information, for which the knowledge and consent of those who are subject to surveillance is ordinarily required. Consent from tenants is best secured in the tenancy agreement.
- For third parties, notice in a clear and obvious place must ordinarily be provided advising of the use of video surveillance, before individuals enter the complex, which should include contact information for those who may have questions.



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Is a landlord permitted to place cameras in the common areas of a residential complex?

- The Privacy Commissioner has taken the position in the Guidelines for Video Surveillance that covert video surveillance is an extremely invasive form of technology and may be permitted in only limited circumstances.
- If covert video surveillance is to be employed, it must satisfy one of the exceptions to the need for consent specified in the *Personal Information Act*, which include an exception where:
 - (i) it is reasonable to expect that the collection of personal information with the knowledge and consent of the individual could compromise the availability or accuracy of the information; and
 - (ii) the collection is reasonable for purposes related to investigating a breach of an agreement or the contravention of the laws of a province or the laws of Canada.



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Is a landlord permitted to place cameras in the common areas of a residential complex?

- In such circumstances, the landlord must be prepared to demonstrate a clear purpose for the covert collection and confirmation of what personal information would be collected.
- The Privacy Commissioner would consider in such circumstances the following questions:
 - 1) Is the measure demonstrably necessary to meet a specific need?
 - 2) Is the measure likely to be effective in meeting that need?
 - 3) Is the loss of privacy proportional to the benefit gained?
 - 4) Is there a way of achieving the same end by less invasive means?



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Is a landlord permitted to record sound as well as visual images?

- The Criminal Code states that the willful interception of a private communication by any “electro-magnetic, acoustic, mechanical or other device” is an offence.
- To “intercept” is defined as to “listen to, record or acquire a communication or acquire the substance, meaning or purport thereof”.
- A “private communication” is defined as:

“Any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it...”



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Is a landlord permitted to photograph a rental unit during an entry which is otherwise permitted by law?

- Although a landlord may enter a rental unit, subject to compliance with the statute, the landlord nevertheless requires consent from the tenant to photograph the unit in many circumstances. The Privacy Commissioner has held that taking photographs of an individual's apartment is collection of personal information. In that case, the photographs were taken for insurance purposes and the objective was to show the state and conditions of the walls, washrooms and kitchen. The Privacy Commissioner found that these photographs revealed information about the residents and their standard of living, so that the absence of consent by the tenant amounted to a breach of the *Personal Information Act*.



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Is a landlord permitted to photograph a rental unit during an entry which is otherwise permitted by law?

- However, there are exceptions to the rule that knowledge and consent are required prior to the collection of personal information. For example, an organization may collect personal information without the knowledge or consent of the individual if:
 - (i) if it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information; and
 - (ii) the collection is reasonable for the purposes related to the investigating a breach of an agreement or a contravention of the laws of Canada or a province.



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Is a landlord permitted to photograph a rental unit during an entry which is otherwise permitted by law?

- The Privacy Commissioner considered a case in which the tenancy agreement restricted the number of marijuana plants that a tenant could grow for medical purposes in the dwelling unit. After the tenant had been in possession for two years, the landlord contacted the tenant for access to the unit in order to perform a plumbing repair. However, the tenant refused access to the unit citing the reason as the disruption in marijuana production. As a result, the landlord was suspicious and sent a notice of entry. The landlord then performed an inspection of the unit, taking photographs of the unit.



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Is a landlord permitted to photograph a rental unit during an entry which is otherwise permitted by law?

- The Privacy Commissioner held that photographing a tenant's apartment constituted a collection of personal information. However, the Privacy Commissioner found that the tenant's knowledge of and consent for the collection of personal information was not required. Based upon the circumstances, the landlord reasonably anticipated that a breach of the rental agreement had occurred and that the landlord was acting in accordance with an exemption from the requirement for consent under the *Personal Information Act*.



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The Approach of the Landlord and Tenant Board

- The Board has also considered this issue. In one case, the tenant made an application to the Board, claiming that the landlord entered the rental unit illegally and substantially interfered with the reasonable enjoyment of the rental unit. In that case, the landlord was required to conduct repairs and provided written notice before entry to the tenant's unit. While inside the unit, the landlord discovered a substantial leak in the washroom. As the washroom was cluttered and unclean, a plumber was unable to carry out the requisite repair work. The landlord photographed the washroom of the unit in order to document the circumstances.
- The Board found that "given the state of the unit, which was unfortunately highly cluttered and unclean, I do not find it unreasonable for the Landlord to document its condition...that any reasonable and prudent Landlord would have taken these photographs, which were not an attempt to invade the Tenant's privacy."



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The Approach of the Landlord and Tenant Board

- In another recent decision of the Board, the tenant requested that the landlord perform certain repairs to the rental unit. In response, the landlord took photographs to document the repairs, after giving notice of entry.
- The Board held that:

"As I informed the parties at the hearing, as long as proper notices of entry were given, and as long as nothing of a personal nature was photographed, such as, for example, the inside of a dresser drawer, these photos did not constitute a substantial interference with reasonable enjoyment, and they were admissible at the hearing. The Landlord had the right to take photographs of the condition of the unit if they were taken for a building-related purpose."
- The photographs taken by the landlord were admissible at a hearing.



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The Common Law approach to “Intrusion upon seclusion” - Ontario

- The Ontario Court of Appeal has confirmed the existence of a cause of action for intrusion upon seclusion. The Court adopted the “tort” (civil wrong) principle that a person may be liable for the “intrusion upon a person’s seclusion” in the appropriate circumstances. The Court referred to a general “right to privacy” which includes three additional torts, being:
 - “Public disclosure of embarrassing private facts about the plaintiff”
 - “Publicity which places the plaintiff in a false light in the public eye”
 - “Appropriation, for the defendants’ advantage, of the plaintiff’s name or likeness”
- The Court commented upon the need for the common law to evolve and respond to the advances of technology, which pose privacy concerns as a result of the unprecedented power to collect and store personal information. The Court adopted the statement made in a textbook as follows:

“One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of its privacy, if the invasion would be highly offensive to a reasonable person.”



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The Common Law approach to “Intrusion upon seclusion” - Ontario

- The existence of a tort of intrusion upon seclusion may create a remedy for a tenant in Ontario who alleges any privacy violation by the landlord. The cause of action requires that the tenant must demonstrate that:
 - the conduct of the landlord must be intentional, which would include reckless,
 - the landlord must have invaded, without lawful justification, the private affairs or concerns of the tenant, and
 - a “reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish”.

The Court stressed that the elements required for this action will not open the “floodgates” and would exclude claims from individuals who are overly sensitive or concerned about their privacy.



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“The Privacy Tort” – British Columbia

- British Columbia has enacted a *Privacy Act*, which establishes a statutory cause of action as follows:

“It is a tort, actionable without proof of damage for a person, wilfully and without a claim of right, to violate the privacy of another”.
- The British Columbia statute also provides that:

“The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interest of others.”

“In determining whether the act or conduct of a person is a violation of another’s privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.”



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“The Privacy Tort” – British Columbia

- In a decision of the Supreme Court of British Columbia, the Court applied this statutory tort where it found that the placement of a surveillance camera (disguised initially as a smoke detector) outside the apartment occupied by a tenant was intrusive and a violation of the tenant's right to privacy.
- In this case, the landlord installed video surveillance cameras ostensibly in response to concerns regarding security and the suspicion that the tenant was “letting undesirable people” into the building. The landlord installed surveillance cameras in the parking garage, the main lobby, and on the twelfth (12) floor of the apartment building. A notice was given to residents advising that the landlord was “installing video cameras throughout the building”.



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“The Privacy Tort” – British Columbia

- The Court determined that the camera on the twelfth floor was placed in close proximity to the tenant’s apartment door, so that one would be able to see in great detail a close up image of any person entering or exiting the unit. The camera did not record accurately the presence of persons elsewhere on the twelfth floor. The Court found that if the legitimate aim of surveillance was to record trespassers, then a camera would have been placed elsewhere or otherwise used differently.
- The Court also acknowledged that it was “apparent that a great deal of animus existed between” the landlord and the tenant, and that there had been a number of unsuccessful attempts at eviction.



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“The Privacy Tort” – British Columbia

- The Court considered the crucial question of whether the tenant was entitled to privacy in the hallway common to all tenants. In the analysis, the Court distinguished the public area in the twelfth floor hallway from the “very public areas of the entrance way and parking garage”. The Court focused on the location of the camera in determining whether an individual possessed a reasonable expectation of privacy in the circumstances. The Court held that the tenant had a reasonable expectation of privacy and therefore a right to be left alone entering and exiting her apartment. Despite the fact that the hallway of the building is a public place, the Court determined that the tenant was:

“reasonably entitled to be free from the scrutiny of a surveillance camera recording her every movement in and out of her suite especially where the positioning of the camera allows the person watching the video a view that is disturbingly intrusive”.



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“The Privacy Tort” – British Columbia

- The Court also had regard to the facts that:
 - (i) the video surveillance continued after the security problems had been resolved;
 - (ii) the landlord did not have strict policies regarding the use of cameras;
 - (iii) the landlord did not consider alternative means to address concerns regarding security; and
 - (iv) the landlord monitored the video recordings regularly, rather than when necessary,
- which indicated that the use of the video surveillance was not a legitimate exercise by the landlord to promote security and protect the property.



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“The Privacy Tort” – British Columbia

- The Court found that there was no “legitimate reason” for this video surveillance on the twelfth floor and that the reason was to “facilitate” the efforts of the landlord to evict the tenant. The Court also considered a claim under the British Columbia *Residential Tenancies Act* for breach of the right to quiet enjoyment, but made no order as that claim had to be dealt with by the residential tenancy dispute officer under that statute, not by the Court.
- The Court held that the violation of privacy was willful and as a result awarded damages in the sum of \$3,500.00 to the tenant for breach of privacy, with \$500.00 awarded for other costs. The Court described the damages as “nominal”, although not “deminimus”.



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108

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Caution

This presentation is meant to provide a very general discussion about some of the key legal principles which apply to privacy in the context of residential tenancies in Ontario. It is not exhaustive and is not a substitute for legal advice. Please review these issues with a solicitor experienced in this area of the law in order to understand your obligations as a housing provider.

Joseph Debono

October 17, 2015.