

## **PIPEDA and Filming/Photographing Individuals for Film and TV Projects**

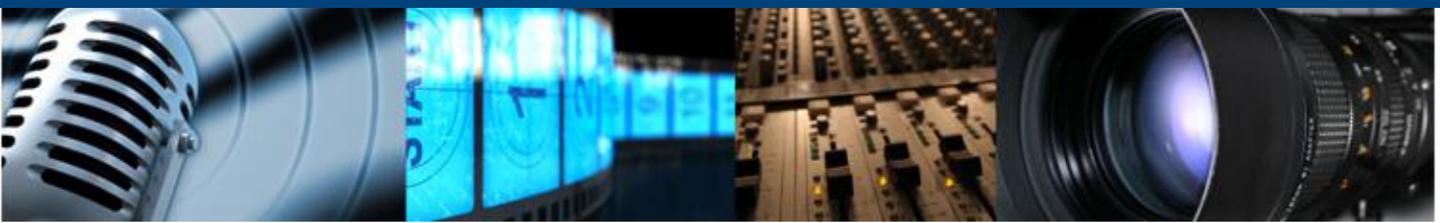
February 15, 2011 by Bob Tarantino

[The following originally appeared in the OBA's Entertainment, Media and Communications Law Section Newsletter, vol. 20, no. 2 January/Janvier 2011]

This article explores the interface between Canada's primary federal privacy legislation, the *Personal Information Protection and Electronic Documents Act* ("**PIPEDA**"), and the activity of filming or photographing an individual where the resulting film or photograph is used in a motion picture or television project. The following analysis seeks to answer the question of how and to what extent PIPEDA impacts on the ability of motion picture and television producers to film and photograph individuals for inclusion in an audio-visual project. It should be noted that the provinces of British Columbia, Alberta and Quebec have enacted legislation recognized as "substantially similar" to PIPEDA – but there are some material differences between the provincial legislative regimes and its federal cousin. The analysis below does not canvass the provincial legislation, and so caution should be exercised in transposing conclusions reached about PIPEDA to the relevant provincial context.

It is generally accepted practice among entertainment lawyers that a signed release authorizing the reproduction of a person's image is required for each individual who appears identifiably on-screen in an audio-visual project. There are some widely-recognized limited exceptions to that general rule, such as the placement of prominently-displayed notices in "public" or general access locations alerting pedestrians or attendees that filming is taking place and that entering into the area or venue will be deemed to be authorization for the filming and reproduction of their image. Such an approach ensures, for instance, that "lifestyle" shows which depict weddings do not feature simply a haze of blurred-out faces when showing the crowd at the reception.

This article is an effort to articulate one of the underlying rationales for the generally accepted practices described above – namely, that obtaining a release which evidences the consent of the individual is possibly required under PIPEDA. In doing so, the goal is to allow for systematic and comprehensive analysis of the issue, so that treatment of the matter can become standardized and predictable, which will be of benefit to both counsel and clients. In proceeding through this analysis, it may be useful to keep in mind examples of the situation in which questions of this sort may arise: in the course of filming a couple dining in a restaurant, numerous other diners seated at tables in the background are clearly visible; while filming an interview with the subject of a documentary outdoors in a public park, multiple clearly identifiable individuals walk by in the background; a producer finds a photograph of a smiling family which she thinks would be an excellent piece of set dressing as a memento on the desk of her main actor.



### ***What Does PIPEDA Require?***

In a letter written by the Privacy Commissioner of Canada (the “**Commissioner**”) to Immersive Media Corp. in connection with the Google “Street View” application,<sup>1</sup> the Commissioner provided a concise statement about PIPEDA and the obligations it imposes: “Pursuant to PIPEDA, businesses that wish to collect, use or disclose personal information about people generally require individuals’ consent, and they may only use or disclose that information for the purpose for which individuals gave consent.” Section 4(1)(a) of PIPEDA states that its personal information protection provisions apply “to every organization in respect of personal information that the organization collects, uses or discloses in the course of commercial activities”. The operative elements of the Commissioner’s statement, which reflect legal obligations imposed by Sections 4, 5 and Schedule I of PIPEDA,<sup>2</sup> are (i) the collection, use or disclosure of (ii) personal information, which requires (iii) consent, and which may only be used or disclosed (iv) for the purposes for which consent was given. One of the analytically challenging aspects of the privacy regime under PIPEDA is that it is principles-driven – Schedule I of PIPEDA sets out a series of principles which inform obligations with which those subject to PIPEDA are expected to comply. The principles include such notions as “accountability”, “consent” and “limiting collection”. Rather than close scrutiny of individual terms or setting out detailed prescriptions to guide future actions, formal PIPEDA analysis as undertaken by the Commissioner focuses on developing the content of the principles in a purposive manner and developing “recommendations” for consideration. The analysis below attempts to reconcile those approaches in order to determine the extent to which the four operative elements of PIPEDA’s obligations, noted above, are present when an individual is filmed/photographed for inclusion in an audio-visual project.

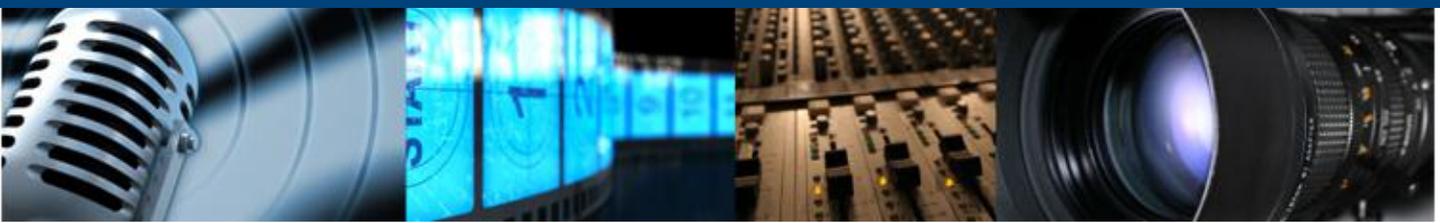
### ***Does a Person’s Image Constitute “Personal Information” About That Person?***

Does a photograph or film record of someone’s face (ie their “image”) constitute “personal information”? The answer appears to be “yes”, though that answer, somewhat surprisingly, does not appear to have been considered in detail by either the Commissioner or the courts. Section 2(1) of PIPEDA states that

““personal information” means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization”.

The threshold question is whether an individual’s image or appearance constitutes “information”. “Information” is not defined in PIPEDA, but the word appears to function as a synonym for “data”. The Commissioner has issued an “Interpretation”<sup>3</sup> on the meaning of “personal information”, which, while not legally binding, is best viewed as an authoritative guide. According to the Interpretation, “video footage” of an employee constitutes “personal information”, and “[v]ideo surveillance that captures an individual’s physical image or movement may also constitute his or her personal information”.

In the Google Streetview Letter, the Commissioner unequivocally stated that “[o]ur Office considers images of individuals that are sufficiently clear to allow an individual to be identified to be personal information within the meaning of PIPEDA”.



Despite the relative lack of scrutiny of the matter, the most cogent argument concluding that an image constitutes “personal information” is premised on the fact that recordation, whether by means of film or digital device, of an individual’s image creates “information” which itself can be used to identify an individual.

### ***Is Filming or Photographing Someone a “Collection” of Personal Information?***

The Commissioner’s decisions<sup>4</sup> and the single court ruling<sup>5</sup> which are cited in the Interpretation in support of the conclusion that a person’s image constitutes “personal information” do not themselves ever expressly consider the question of whether filming or otherwise recording a person’s image constitutes a collection of personal information – they simply assume that it does. When the Federal Court considered the matter, in the context of an appeal from the Commissioner arising from a complaint about the installation of video surveillance cameras at a workplace, the court stated “[c]learly, the factual matrix behind the applicant’s complaint to the Commissioner is the collection of personal information”, without further enquiring into the matter.<sup>6</sup>

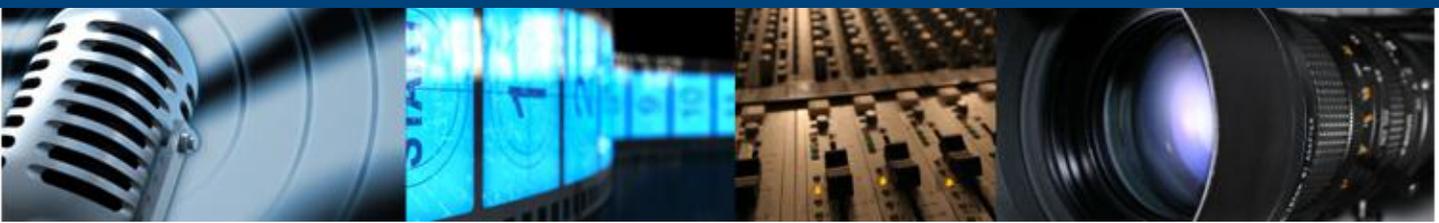
Implicit in the Google Streetview Letter, the Commissioner’s Findings cited in the Interpretation and subsequent Commissioner’s Findings involving the photographing or filming of individuals,<sup>7</sup> is the conclusion that filming or photographing an individual constitutes a “collection” of personal information. The Commissioner has also held that simply filming an individual, even without an actual recording of the image being kept, constitutes a collection of personal information;<sup>8</sup> *a fortiori* a recordation of an image is a collection.

### ***Does Exploiting an Audio-visual Project Constitute “Use” or “Disclosure” of Personal Information?***

“Use” is not defined in PIPEDA, though it is treated in the Commissioner’s various findings and court decisions as an expansive concept. Reproduction of an image for public viewing (such as in a movie theatre or television broadcast) or private viewing (such as an individual watching a DVD at home) almost certainly constitutes “use” or “disclosure” of that image.

### ***What Constitutes “Consent” in the Context of Making Use of Footage Filmed for Audio-visual Project?***

It is important to note that privacy decisions are profoundly informed by context. The reasonable expectation of privacy which an individual might have will likely be quite different in each of the examples which were described at the beginning of this article: what constitutes a reasonable expectation, and hence informs the form and substance of the required consent, is going to be different when dealing with a family photograph, as compared to dining in a restaurant, as compared to walking in a public park.



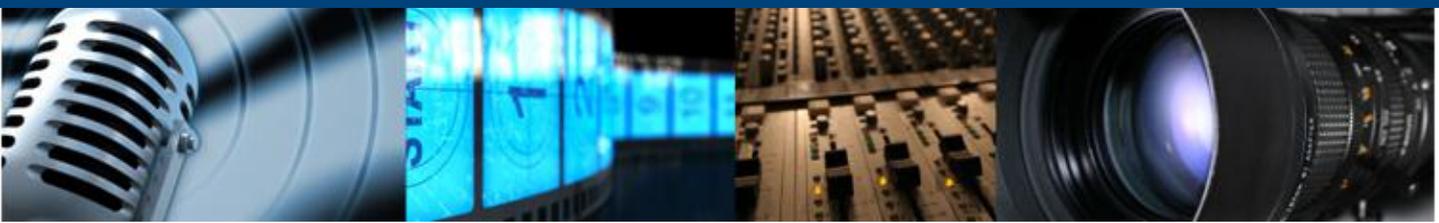
Principle 4.3 set out in Schedule I to PIPEDA states that the knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where obtaining such consent would be inappropriate (as would be the case, for example, when collecting information for fraud detection or law enforcement purposes). The Commissioner has published *Your Privacy Responsibilities – A Guide for Businesses and Organizations* (the “**Guide**”),<sup>9</sup> which attempts to clarify what constitutes valid consent. The Guide indicates that consent must be obtained before or at the time of collection (i.e., filming or photographing) and that obtaining consent requires informing “the individual in a meaningful way of the purposes for the collection, use or disclosure of personal data”. The Guide goes on to provide that requests for consent should be communicated in “a manner that is clear and can be reasonably understood”, and that consent should not be obtained “by deceptive means”. Principle 4.3.2. provides that, for consent to be meaningful, the purposes for which the information is being collected “must be stated in such a manner that the individual can reasonably understand how the information will be used or disclosed”.

A signed consent form in which the individual acknowledges that they have been or will be filmed and that the recordation is going to be included in an audio-visual project, and specifies the manner in which the project will be exploited, will almost certainly constitute sufficient consent. The Commissioner has issued guidelines applicable in the context of overt video surveillance which seem to indicate that the posting of signs on the perimeter of an area where filming is occurring, thereby giving individuals the ability to avoid entering the area, can constitute sufficient notice to give rise to a valid consent.<sup>10</sup> The guidelines also state that signs “should include a contact in case individuals have questions or if they want access to images related to them”, and Section 4.9 of Schedule I to PIPEDA provides that individuals should be granted access upon request to their personal information which has been collected.

A number of points should be made about how the foregoing principles inform the obligations of producers of audio-visual projects. As an example, it is not likely to be feasible to require filmmakers to allow individuals to have access to the images taken of them in accordance with Section 4.9 of Schedule I – most filmmakers lack the administrative wherewithal to respond to such requests. Further, while much of the discussion around obtaining “consent” presumes that written disclosure of the collection, use and disclosure of information is required, one can query whether that would apply in the context of an audio-visual project: to what extent has consent been obtained if someone is interviewed on-camera, with full awareness that they are being filmed and that the footage will be used in some kind of audio-visual project? To what extent is disclosure required of the precise ways in which that footage or project will be exploited required (e.g., in theatres, on DVD, via online streaming)?

### ***Are There Any Relevant Exceptions to the Application of PIPEDA?***

PIPEDA contains one exception to its application which is of potential relevance for film and television producers.<sup>11</sup> Section 4(2) of PIPEDA states that the relevant provisions of PIPEDA discussed in this paper do not apply to:



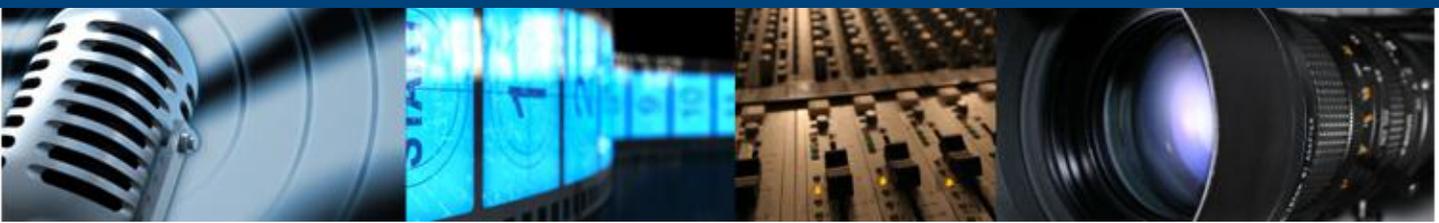
(c) any organization in respect of personal information that the organization collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose [emphasis added]

Unfortunately for our purposes, only the term “journalistic” has been considered by the Commissioner or the courts.<sup>12</sup>

Qualifying for the exception under Section 4(2) would be a boon for producers of audio-visual projects, as it would liberate them entirely from the constraints of PIPEDA obligations, at least as they pertain to the collection and inclusion of images in audio-visual projects. A tension arises from the wording of the exception. Section 4(1)(a) of PIPEDA states that its personal information protection provisions apply “to every organization in respect of personal information that the organization collects, uses or discloses in the course of commercial activities” [emphasis added]. Section 4(2) operates to limit the extent of that application – and raises the question of whether the presence of “commercial” elements in an activity will “taint” that activity such that it does not qualify as “artistic”. In the sole decision by the Commissioner which considered the nature of the “journalistic” exception, a for-profit radio station was held to fall under the ambit of Section 4(2) when it disclosed the name and recordation of the voice of a caller to its crime tip-line.<sup>13</sup> In that case, then, the presence of “commercial” elements did not “taint” the ability to qualify for the exception. Since many artistic or literary efforts are going to be undertaken in the presence of at least some commercial element or incentive, for the exception to be meaningful it would have to accommodate artistic endeavours rendered in the guise of commercial undertakings.

There are at least three areas for further inquiry under Section 4(2) for producers of audio-visual projects. First, can exploitation of *any* audio-visual project qualify as use for an “artistic” purpose, regardless of the nature of the project, or are different projects treated in different ways (eg is an over-the-top special effects-heavy action-adventure movie to be treated in the same fashion as a sombre avant-garde short film)? Second, are there *some* audio-visual projects which could qualify as “journalistic” endeavours in addition to or regardless of their qualification as “artistic” – such as documentaries? Is there a “timeliness” element to the latter analysis (eg does a subject need to be timely or of current concern in order to be “journalistic” or can “journalistic” cover a documentary about some historical event)? Finally, attention would need to be paid to the limitation imposed by Section 4(2): an image can be used or disclosed *only* for the artistic purpose. The scope of what constitutes an “artistic purpose” would require further development. For example, in light of that limitation, it is unclear whether images could *also* be used for promotional purposes – in other words, could the images be used in a “trailer” or advertisement for the project?

We can tentatively conclude that there is a strong possibility that the inclusion of an image in many audio-visual projects would qualify as a use for an “artistic” purpose, and thus outside of the scope of PIPEDA. Such a conclusion would mean that producers are free to collect, use and disclose (ie film or photograph an individual, and include that film or photograph in an audio-visual project) without the need to obtain consent from that individual in order to comply with the producer’s obligations under PIPEDA. That conclusion is, however, only tentative. It remains to be seen how the federal or



provincial privacy commissioners will resolve the tension between the conflicting commercial and artistic imperatives present in the scope of PIPEDA and its exceptions. Until there is a definitive pronouncement from the Commissioner or the courts regarding the scope of the “artistic purpose” exception, prudent lawyers will continue to counsel their clients to obtain written confirmation of authorization from individuals who appear recognizably on-screen in an audio-visual production.

### **Conclusion**

Although a definitive conclusion is difficult to arrive at, current industry practice seems to accord with PIPEDA’s requirements: producers generally obtain written authorization when recording the image of an individual and including it in an audio-visual project. In certain circumstances, primarily involving non-controlled environments such as public spaces or large private gatherings, prominently-displayed notices which permit individuals to decide whether to continue into the area where filming is taking place likely also comply with PIPEDA. The privacy regime set out in PIPEDA also offers an untested exception for “journalistic” and “artistic” projects, which may shelter audio-visual projects. The scope of the exception remains unclear, but in a worst-case scenario, where no written consent has been obtained and no written notice was provided, the exception may yet prove to be of significant value.

<sup>1</sup> Letter from Jennifer Stoddart dated August 9, 2007, to Letter to Mr. Myles M. McGovern, President, CEO and Director, Immersive Media Corp., available at [http://www.priv.gc.ca/media/let/let\\_070911\\_02\\_e.cfm](http://www.priv.gc.ca/media/let/let_070911_02_e.cfm) [the “**Google Streetview Letter**”].

<sup>2</sup> <http://laws.justice.gc.ca/eng/P-8.6/20090818/page-4.html>.

<sup>3</sup> Available at [http://www.priv.gc.ca/leg\\_c/interpretations\\_02\\_e.cfm](http://www.priv.gc.ca/leg_c/interpretations_02_e.cfm).

<sup>4</sup> PIPEDA Case Summary #264 - Video cameras and swipe cards in the workplace - [http://www.priv.gc.ca/cf-dc/2004/cf-dc\\_040219\\_01\\_e.cfm](http://www.priv.gc.ca/cf-dc/2004/cf-dc_040219_01_e.cfm); PIPEDA Case Summary #290 -Video surveillance cameras at food processing plant questioned - [http://www.priv.gc.ca/cf-dc/2005/290\\_050127\\_e.cfm](http://www.priv.gc.ca/cf-dc/2005/290_050127_e.cfm); PIPEDA Case Summary #279 - Surveillance of employees at work - [http://www.priv.gc.ca/cf-dc/2004/cf-dc\\_040726\\_e.cfm](http://www.priv.gc.ca/cf-dc/2004/cf-dc_040726_e.cfm); PIPEDA Case Summary #114 - Employee objects to company’s use of digital video surveillance cameras - [http://www.priv.gc.ca/cf-dc/2003/cf-dc\\_030123\\_e.cfm](http://www.priv.gc.ca/cf-dc/2003/cf-dc_030123_e.cfm); see also Case Summary # 2002-89 – pilot taking photograph of airplane passengers - [http://www.priv.gc.ca/cf-dc/2002/cf-dc\\_021112\\_1\\_e.cfm](http://www.priv.gc.ca/cf-dc/2002/cf-dc_021112_1_e.cfm).

<sup>5</sup> *Eastmond v. Canadian Pacific Railway*, 2004 FC 852 (CanLII), 33 C.P.R. (4th) 1 [*Eastmond*].

<sup>6</sup> *Eastmond* at para. 111.

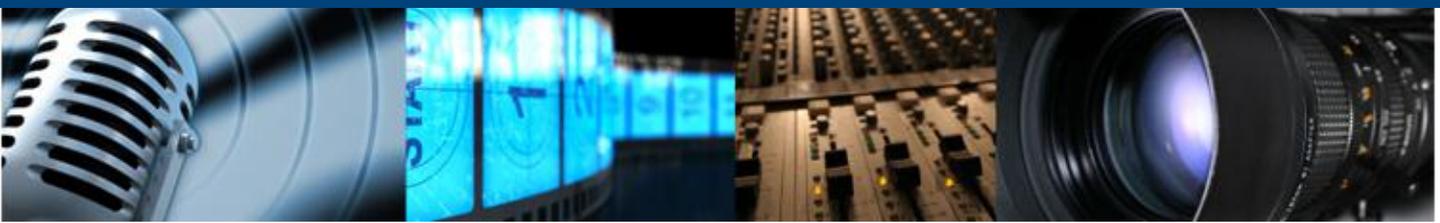
<sup>7</sup> See, e.g., PIPEDA Case Summary #2009-007, available at [http://www.priv.gc.ca/cf-dc/2009/2009\\_007\\_0504\\_e.cfm](http://www.priv.gc.ca/cf-dc/2009/2009_007_0504_e.cfm)

<sup>8</sup> PIPEDA Case Summary #2001-1, available at [http://www.priv.gc.ca/cf-dc/2001/cf-dc\\_010615\\_e.cfm](http://www.priv.gc.ca/cf-dc/2001/cf-dc_010615_e.cfm)

<sup>9</sup> Available at [http://www.priv.gc.ca/information/guide\\_e.cfm#016](http://www.priv.gc.ca/information/guide_e.cfm#016)

<sup>10</sup> See *Guidelines for Overt Video Surveillance in the Private Sector* - [http://www.priv.gc.ca/information/guide/2008/gl\\_vs\\_080306\\_e.cfm](http://www.priv.gc.ca/information/guide/2008/gl_vs_080306_e.cfm)

<sup>11</sup> Section 7(1)(c) of PIPEDA states that an organization may collect personal information without the knowledge or consent of the individual if the collection is solely for journalistic, artistic or literary purposes.



That exception, however, is of very limited utility for producers, as it only allows for the *collection* of personal information without knowledge or consent, and does not permit the use or *disclosure* of that information.

<sup>12</sup> PIPEDA Case Summary 2003-123 [[http://www.priv.gc.ca/cf-dc/2003/cf-dc\\_030228\\_e.cfm](http://www.priv.gc.ca/cf-dc/2003/cf-dc_030228_e.cfm)] – “journalistic” purposes test was satisfied where local radio station recorded a phone call and used the name of an individual who called a “tip line” to report a crime he had witnessed.

<sup>13</sup> PIPEDA Case Summary 2003-123 [[http://www.priv.gc.ca/cf-dc/2003/cf-dc\\_030228\\_e.cfm](http://www.priv.gc.ca/cf-dc/2003/cf-dc_030228_e.cfm)].

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