

Consent - Express, Deemed, Exceptions

Quebec's Private Sector Privacy Law Amendments C. 25
(ss.8, 8.3, 12-14)

Introduction

On September 22, 2021, Quebec passed [*An Act to modernize legislative provisions as regards the protection of personal information*](#) (2021, c. 25) ("the Act") updating public and private sector privacy laws. The provisions of the Act come into force over a period of 3 years.

This document was created by leading Canadian privacy experts working with national and regional industry associations. We believe a harmonized approach to privacy law across Canadian jurisdictions is important so that the rules are understandable for individuals and enterprises. Interpretations of privacy laws should be pragmatic, reasonable and focus on the privacy outcomes for individuals and practical implementation for enterprises. With this in mind, we have created what we think is appropriate guidance for interpreting some of the more challenging provisions of the Act.

This document can be shared and used by enterprises. This is not legal advice; it is suggested best practices for entities wishing to work pragmatically on their compliance with the Act before any additional guidance from the *Commission d'accès à l'information* (the "CAI") or regulations are made available. We encourage enterprises to monitor developments in CAI and government guidance on these and other topics related to the Act.

Quebec's Approach To Consent Is Similar To PIPEDA

C.25 takes an approach to consent that is similar to the *Personal Information Protection and Electronic Documents Act* (PIPEDA) at the federal level.

- valid consent to the collection, use or communication (disclosure) of personal information requires proper advance notice (transparency);
- consent can be either express or implied, depending on the circumstances;
- limited exceptions to the consent requirement; and
- explicit notice requirements consistent with PIPEDA guidance and best practices.

Following best practices for PIPEDA notice and consent should satisfy the requirements of c.25.

Consent

Express consent is mandatory for sensitive information (s.12)

Express consent is only mandatory when it relates to “sensitive information”. The Act states that personal information is sensitive if, *“due to its nature, in particular its medical, biometric or otherwise intimate nature, or the context of its use or communication, it entails a high level of reasonable expectation of privacy.”*

Sensitivity depends on factors such as reasonable expectations and risk of harm, and is contextual. While there is no exhaustive list of sensitive personal information, information such as ethnic and racial origins, political opinions, genetic and biometric data, an individual’s sex life or sexual orientation, and religious or philosophical beliefs will normally be considered sensitive.¹

Deemed consent (s.8.3)

If notice is provided pursuant to section 8 (discussed below) and an individual provides their personal information, they are deemed to have consented. Deemed consent is not valid if sensitive personal information is being collected.

Conditions for all forms of Consent (ss.13 and 14)

It must be clear to the individual that they are giving their consent; consent must be unambiguous and without duress. The notice supporting consent must be given in advance and not misleading in ways that are material to the consent. C.25 requires “clear and simple language”. The purposes for which consent is being requested must be sufficiently described to be meaningful. Purposes must not be vaguely described or overly broad.

- **Identify each purpose:** Each purpose must be specified; however, it is not necessary for a unique consent to be obtained separately for each purpose – this could result in a very poor experience for individuals. It is reasonable to collect a single consent for multiple purposes if doing so is not misleading. The personnel responsible for providing notice and collecting consent should be properly trained to be able to help individuals understand the nature of the consent, if asked by an individual.
- **Request in writing:** If the request for consent is made in writing, it must be presented separately from any other information provided to the person concerned but the request may be in the same document as other terms of the agreement.
- **Duration:** Once consent has been obtained, it is only valid for as long as is necessary to achieve the purpose(s) specified, unless the consent is given for a specified time or the individual withdraws their consent earlier.
- **Minors:** Special care should be exercised when obtaining consent from minors. Consent from an individual under the age of 14 must be given by a parental authority. Consent from

¹ In assessing the sensitivity of information, the federal OPC’s guidance is a useful reference: [Guidelines for obtaining meaningful consent](https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/consent/gl_omc_201805/), Office of the Privacy Commissioner of Canada, https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/consent/gl_omc_201805/

minors aged 14 to the age of majority can be obtained from the minor or from a parental authority. Currently in Quebec, the age of majority is 18.

- **Third parties:** Pursuant to s.13, consent is necessary for anyone to communicate personal information they hold to a third person, unless c.25 allows for such communication without consent. Express consent must be obtained when disclosing sensitive personal information.

Exceptions to Consent requirement when using personal information for another purpose (s.12)

Personal information that was previously collected for one purpose may be used for a different purpose without the individual's consent if it is:

- used for purposes consistent with the purposes for which it was collected;
 - this requires a direct and relevant connection with the purposes for which the information was collected; commercial or philanthropic purposes (ex. marketing) are not considered consistent with other service or operational purposes.
- used for the benefit of the person concerned;
 - because this use is without additional consent, it should be reserved for situations where the benefit is tangible, such as avoiding harm or a missed opportunity that can have a real impact on the person; it would not be appropriate to rely on this exception for commercial or philanthropic purposes (i.e. marketing)
- necessary for the purpose of preventing and detecting fraud or of assessing and improving protection and security measures;
- necessary for the purpose of providing or delivering a product or providing a service requested by the person concerned; or
- necessary for study or research purposes or for the production of statistics and if the information is de-identified.

Notice (s.8)

Valid and informed consent is based, in part, on proper notice to the individual before the personal information is collected. Section 8 requires that, in advance of collection, the individual must receive notice of:

- the purposes for which the personal information is being collected;
- the means of collection;
- the individual's right to access and rectification;

- the individual's right to withdraw consent; and,
- the name of the third person for whom the information is being collected, categories of third persons to whom it is necessary to communicate the information for the purposes of the collection (i.e. service providers) and whether it may be communicated outside Québec.

The notice must be provided to the person concerned in clear and simple language, regardless of the format of the notice. Organizations should have an easily accessible privacy policy that is sufficiently detailed, and uses clear and simple language. Additional notice is needed for the collection of personal information that are unrelated to the core functionality, such as for secondary uses or for unexpected disclosures to third parties.