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CANADA'S ANTI-SPAM LEGISLATION (CASL): Compliance Map of the Consent Requirements for Computer Programs[1]

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"**Commercial activity**" means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, whether or not the person who carries it out does so in the expectation of profit, other than any transaction, act or conduct that is carried out for the purposes of law enforcement, public safety, the protection of Canada, the conduct of international affairs or the defence of Canada. (Section 1(1)).

A "**computer program**" means data representing instructions or statements that, when executed in a computer system, causes the computer system to perform a function. (Section 1(1)).

A "**computer system**" means a device that, or a group of interconnected or related devices one or more of which,

(a) contains computer programs or other data, and

(b) pursuant to computer programs,

(i) performs logic and control, and

(ii) may perform any other function. (Section 1(1)).

An "**electronic message**" means a message sent by any means of telecommunication, including a text, sound, voice or image message. (Section 1(1)).

A "**person**" means an individual, partnership, corporation, organization, association, trustee, administrator, executor, liquidator of a succession, receiver or legal representative. (Section 1(1)).

"Transmission data" means data that,

(a) relates to the telecommunications functions of dialling, routing, addressing or signalling;

(b) either is transmitted to identify, activate or configure an apparatus or device, including a computer program, in order to establish or maintain a communication, or is generated during the creation, transmission or reception of a communication and identifies or purports to identify the type, direction, date, time, duration, size, origin, destination or termination of the communication; and

(c) does not reveal the substance, meaning or purpose of the communication. (Section 1(1)).

Is there a **computer program**? (Section 1(1)).

NO → CASL does not apply.

YES

Is there a **commercial activity**? (Section 1(1)).

NO → CASL does not apply.

YES

Is a computer program being installed, or caused to be installed, on another person's **computer system**? (Section 1(1), Section 8).

NO → Has a computer program been installed or caused to be installed on a computer system and, if so, is an **electronic message** being caused to be sent from that computer system? (Section 1(1), Section 8).

YES

NO → YES

Is this being done in accordance with a court order? (Section 8(1)(b)).

YES → CASL does not apply.

NO

Is the computer system located in Canada at the relevant time? (Section 8(2)).

NO → Is the person in Canada at the relevant time or acting under the direction of a person who is in Canada at the time when they give the directions? (Section 8(2)).

YES

NO → YES

Is the installation an update or upgrade to a computer program the installation or use of which was expressly consented to in accordance with the express consent requirements (see page 2) (Section 10(7))?

NO → CASL does not apply.

NO → Express consent is required. Proceed to page 2.

YES

Is the person who gave consent entitled to receive the update or upgrade under the terms of the express consent (Section 10(7))?

NO → Express consent is required. Proceed to page 2.

YES

Is the update or upgrade being installed in accordance with those terms? (Section 10(7))?

YES → The update or upgrade may be installed without further express consent.

NO → Express consent is required. Proceed to page 2.

1 Bill C-28 received Royal Assent on December 15, 2010 and the Canadian Radio-television and Telecommunications Commission regulations ("CRTC Regs") were finalized in March 2012. Industry Canada regulations ("IC Regs") were finalized in December 2013. Not intended to be legal advice. Excerpt from Anti-Spam Legislation Content Hub in AccessPrivacy.com private sector source subscription-based website.

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(a) Is the computer program:

(i) a cookie;

(ii) HTML code;

(iii) Java Scripts;

(iv) an operating system;

(v) any other program that is executable only through the use of another computer program whose installation or use the person has previously expressly consented to (Section 10(8));

(vi) a program that is installed by or on behalf of a telecommunications service provider solely to protect the security of all or part of its network from a current and identifiable threat to the availability, reliability, efficiency or optimal use of its network;

(vii) a program that is installed, for the purpose of updating or upgrading the network, by or on behalf of the telecommunications service provider who owns or operates the network on the computer systems that constitute all or part of the network;

(viii) a program that is necessary to correct a failure in the operation of the computer system or a program installed on it and is installed solely for that purpose (IC Regs, s.6); and

(b) the person's conduct is such that it is reasonable to believe that they consent to the program's installation? (Section 10(8)).

YES →

The person is considered to expressly consent to the installation of the computer program. (Section 10(8)).

← Express consent is required to install or cause to be installed a computer program on another person's computer system or, having so installed or caused to be installed a computer program, cause an electronic message to be sent from that computer system. (Section 8(1)).

NO ↓

When requesting express consent, a person must set out orally or in writing clearly and simply, the function and purpose, in general terms, of the computer program that is to be installed, and the following information:

(a) the purpose or purposes for which the consent is being sought;

(b) prescribed information that identifies the person seeking consent and, if the person is seeking consent on behalf of another person, prescribed information that identifies that other person; and

- the name by which the person seeking consent carries on business, if different from their name, if not, the name of the person seeking consent; (CRTC Regs, s.4(a)).
- if the consent is sought on behalf of another person, the name by which the person on whose behalf consent is sought carries on business, if different from their name, if not, the name of the person on whose behalf consent is sought; (CRTC Regs, s.4(b)).
- if consent is sought on behalf of another person, a statement indicating which person is seeking consent and which person on whose behalf consent is sought; (CRTC Regs, s.4(c)).
- the mailing address, and either a telephone number providing access to an agent or a voice messaging system, an email address or a web address of the person seeking consent or, if different, the person on whose behalf consent is sought; (CRTC Regs, s.4(d)).
- a statement indicating that the person whose consent is sought can withdraw their consent. (CRTC Regs, s.4(e)).

(c) any other prescribed information. (Section 10(1); Section 10(3)).

↓

Does the computer program perform any one or more of the following functions:

(a) collecting personal information stored on the computer system;

(b) interfering with the owner's or an authorized user's control of the computer system;

(c) changing or interfering with settings, preferences or commands already installed or stored on the computer system without the knowledge of the owner or an authorized user of the computer system;

(d) changing or interfering with data that is stored on the computer system in a manner that obstructs, interrupts or interferes with lawful access to or use of that data by the owner or an authorized user of the computer system;

(e) causing the computer system to communicate with another computer system, or other device, without the authorization of the owner or an authorized user of the computer system;

(f) installing a computer program that may be activated by a third party without the knowledge of the owner or an authorized user of the computer system; and

(g) performing any other function specified in the regulations? (Section 10(5)).

NO → There are no additional consent-related requirements.

NO ↑

YES → Does the person who seeks express consent know and intend that the function (as described in Section 10(5)(a)-(g)) will cause the computer system to operate in a manner that is contrary to the reasonable expectations of the owner or authorized user of the computer system? (Section 10(5)).

YES ↓

Does the computer program perform a function (as described in Section 10(5)(a) – (g)) that only collects, uses or communicates transmission data or performs an operation specified in the regulations? (Section 10(6)).

YES → ↑

NO ←

The person who seeks express consent must, when requesting consent, clearly and prominently, and separately and apart from the licence agreement,

(a) describe the program's material elements that perform the function or functions, including the nature and purpose of those elements and their reasonably foreseeable impact on the operation of the computer system; and

(b) bring those elements to the attention of the person from whom consent is being sought separately from any other information provided in a request for consent and the person seeking consent must obtain an acknowledgement in writing from the person from whom consent is being sought that they understand and agree that the program performs the specified functions. (Section 10(4); CRTC Regs, s. 5).

↓

A person who has the express consent of an owner or authorized user must:

(a) for a period of one year after any computer program that performs one or more of these functions is installed under the consent, ensure that the person who gave their consent is provided with an electronic address to which they may, if they believe that the function, purpose or impact of the computer program installed under the consent was not accurately described when consent was requested, send a request to remove or disable that computer program; and

(b) if the consent was based on an inaccurate description of the material elements of the function or functions, on receipt within that one-year period of a request to remove or disable that computer program, without cost to the person who gave consent, assist that person in removing or disabling the computer program as soon as feasible. (Section 11(5)).

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