

CANADA'S ANTI-SPAM LAW:

PRACTICAL TIPS FOR REQUESTING CONSENT

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Agenda

- Update on status of CASL
- Update on timelines
- Critical consent requirements
- Practical tips for requesting consent
 - Commercial electronic messages
 - Computer programs

What we're not covering today

- CASL's rules regarding:
 - Form and content of commercial electronic messages
 - Unsubscribe mechanisms
 - Altering transmission data
 - Address harvesting
 - Unlawful accessing of computer to collect PI without consent
 - Misleading messages
- Remedies
- Due diligence

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Overview

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Representative Work

▶ CASL Compliance

CASL Compliance: More than Spam. Understanding Canada's Anti-Spam Law

Don't be fooled by its name. You don't need to be a spammer, or even be located in Canada, for legislation known as "Canada's anti-spam law" or "CASL" to regulate important elements of your business.

Many everyday activities – such as sending an email message to a customer, operating a company website and making a mobile application available for download – will soon be subject to new, detailed rules that will likely require you to make significant changes to your operational practices or face significant fines.

The new rules will be enforced by three regulators with active enforcement offices and by the courts. Anyone who believes they have been affected by your non-compliance will have standing to commence a private action. Class actions are widely expected.

The time to prepare for the new rules is now. The Minister of Industry has committed to bringing the law into force in 2013 and the regulator with chief enforcement responsibility, the CRTC, has warned that businesses should not expect a grace period before enforcement activities begin.

[What does CASL Mean for Business?](#)

[What Do I Need to Do?](#)

Contacts

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Additional Information

▶ International CEBS Society – Canada's Pending Antispam Legislation and Privacy Law –

Key Terminology

- CASL – Canada’s Anti-Spam Law
- Industry Canada
- Governor in Council
- CRTC – Canadian Radio-television and Telecommunications Commission
- CRTC Regulations
- Industry Canada Regulations
- CRTC Enforcement Bulletins
- PIPEDA – Personal Information Protection and Electronic Documents Act

Where does CASL stand today?

- Enacted in 2010, but not yet in force
- Final CRTC Regulations published in 2012
- Draft Governor in Council Regulations published in January
 - Final regulations as early as June (October more likely?)

Why is it taking so long?

- Example of issues raised by industry groups:
 - Scope of what is a commercial electronic message
 - Scope of what is an electronic address
 - Meaning of “installation of a computer program”
 - Narrow scope of computer program exemptions
 - Failure to “grandfather” PIPEDA consents
 - Failure to address unintended impacts of extraterritorial reach
 - Likelihood of nuisance lawsuits and class actions

When will CASL come into force?

- Mid or late 2014?
- Delayed application of private right of action?
- Announcement expected with publication of final GIC regulations

Why act before CASL comes into force?

- Timeframe for development and implementation of compliance plan
- Loss of ability to obtain fresh consent using electronic messaging
- Collect information needed to rely on exceptions to consent
- Trigger transition provision for commercial electronic messages

But what about the 3 year transition provisions?

- Transition provisions are narrow
 - Commercial electronic messages
 - Limited to existing business relationships/existing non-business relationships
 - Limited to relationships that already include sending of CEMs
 - Onus of proof
 - Computer programs
 - “implied” consent may be inadequate
 - Limited to updates/upgrades
 - Life cycle of most programs is longer than 3 years

How to Request Consent

- Section 10 of CASL
 - Purpose of the communication
 - Identifying information of sender and person on whose behalf consent is sought
- Final CRTC Regulations – content of request
- CRTC Enforcement Bulletins

How to Request Consent

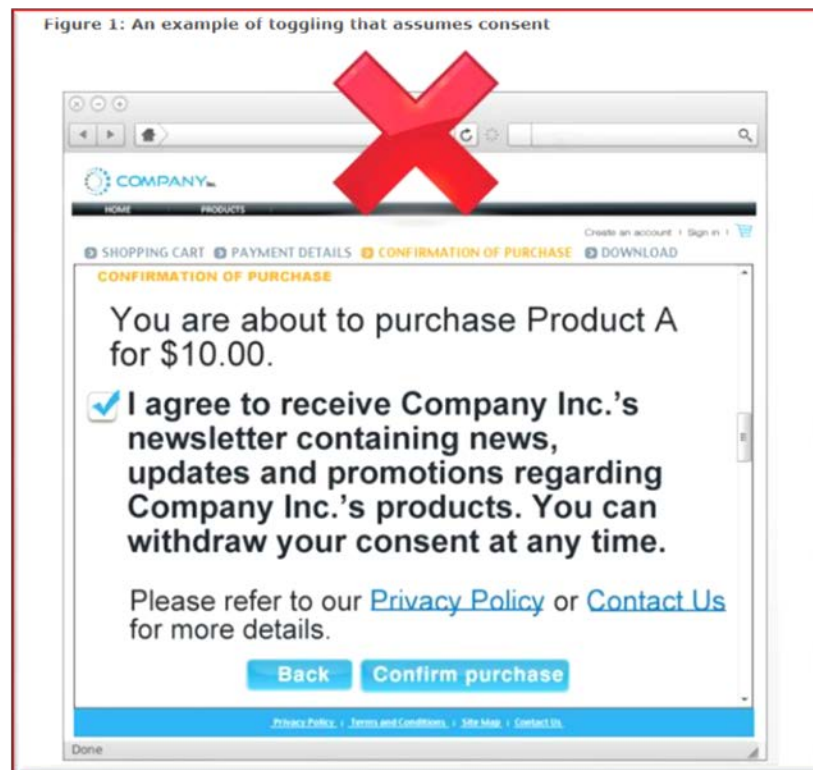
- Must be express consent
- Must be sought separately for each act
 - the sending of CEMs
 - the alteration of transmission data
 - the installation of a computer program
- May be obtained orally or in writing

What Does Your Request Need to Say?

- Request for Consent must include:
 - Name of person seeking consent
 - Name of person on whose behalf consent is sought and a statement indicating who is seeking consent and on whose behalf consent is sought, if applicable
 - Contact information (mailing address and either a phone number, email or web address)
 - Statement that individual can withdraw consent

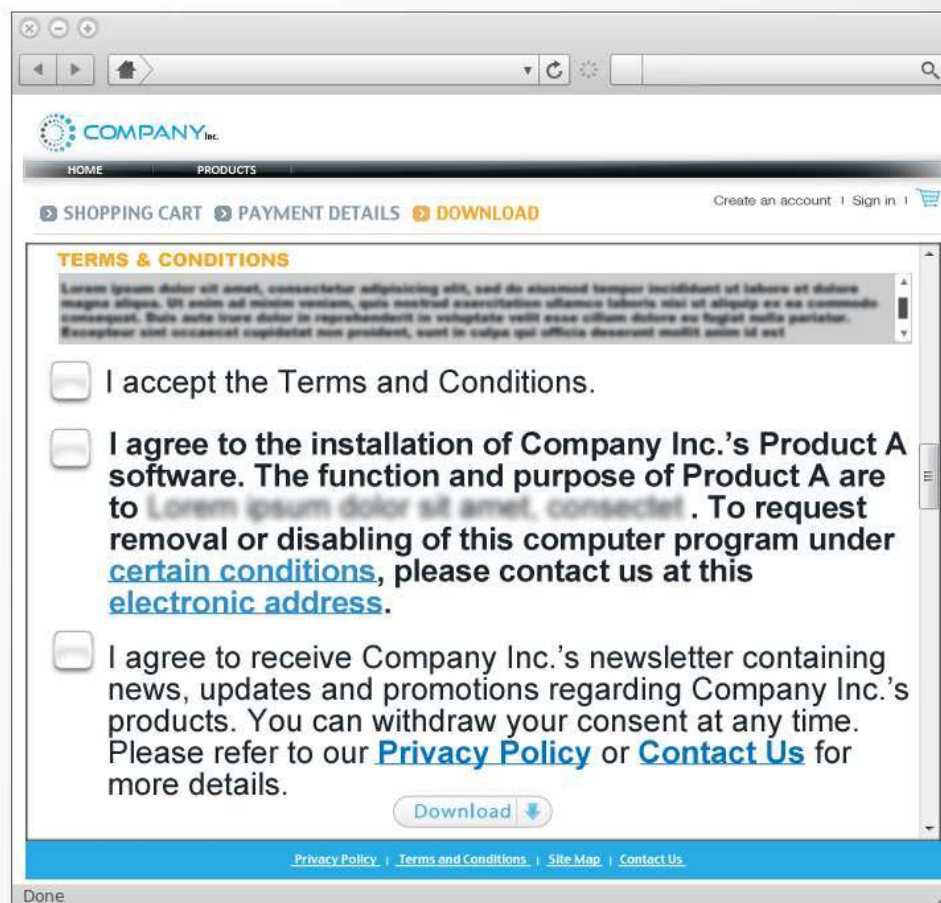
What has CRTC Said?

- Opt-out consent is not permitted
- Can't pre-check toggle box



What has CRTC Said?

- No bundled consent



What has CRTC Said?

- Stringent requirements/narrowing ability to obtain oral consent

23. The Commission considers the following forms as sufficient to discharge the onus of demonstrating oral consent:

- ▶ where oral consent can be verified by an independent third party; or
- ▶ where a complete and unedited audio recording of the consent is retained by the person seeking consent or a client of the person seeking consent.

For example, a person may request and obtain oral consent in situations where information is collected over the phone (e.g. call centres) or consent may be given at the time that individuals use a product or service (e.g. point of sale purchases).

What has CRTC Said?

- Very specific requirements when obtaining written consent

b) Consent obtained "in writing"

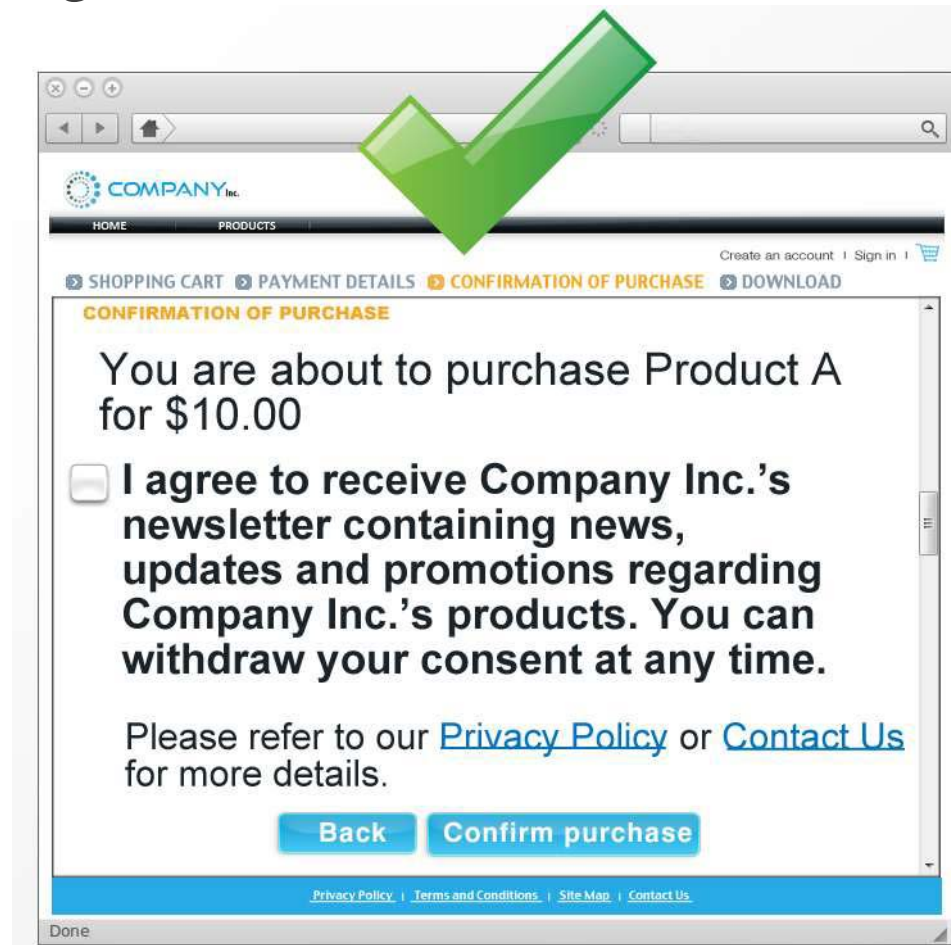
24. The Commission notes that for the purposes of section 4 of the Regulations, the term "in writing" includes both paper and electronic forms of writing.

25. The Commission considers that the requirement for consent in writing is satisfied by information in electronic form if the information can subsequently be verified.

26. Examples of acceptable means of obtaining consent in writing include checking a box on a web page to indicate consent where a record of the date, time, purpose, and manner of that consent is stored in a database; and filling out a consent form at a point of purchase.

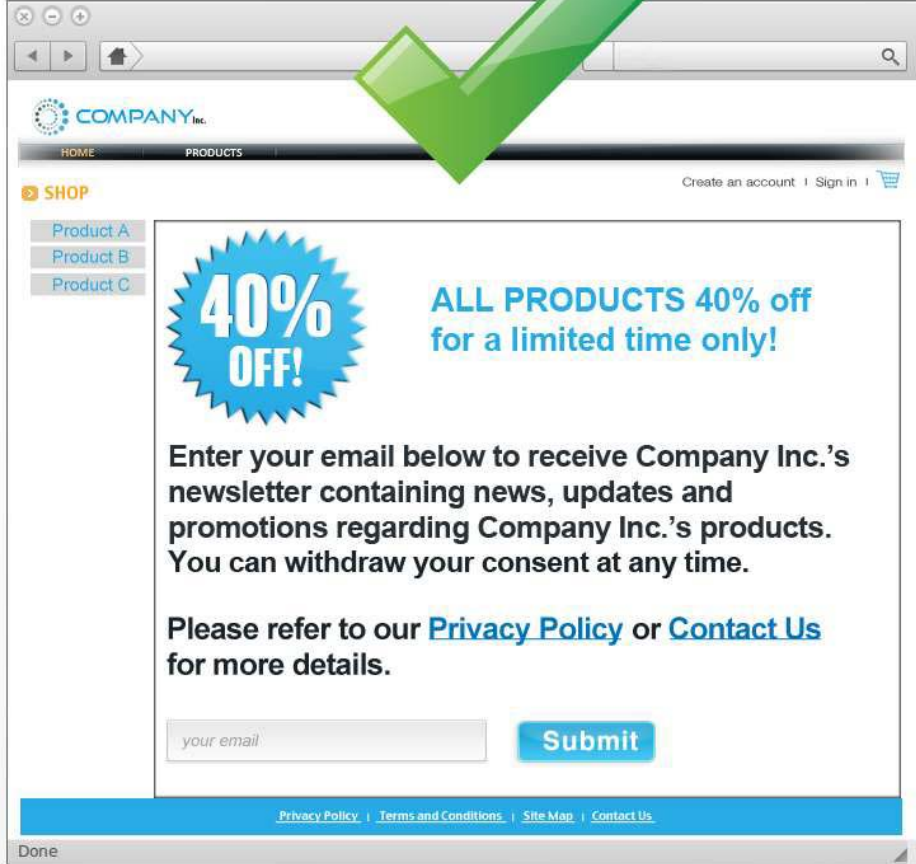
CRTC Sample Request for Consent

- Checking a box to indicate consent



CRTC Sample Request for Consent

- Typing an email address into a field



The screenshot shows a web browser window displaying a website for "COMPANY Inc.". The page features a navigation bar with "HOME" and "PRODUCTS" links, and a search bar. A large green checkmark is overlaid on the page. The main content area includes a "SHOP" section with links for "Product A", "Product B", and "Product C". A prominent blue starburst graphic reads "40% OFF!". To the right, text states "ALL PRODUCTS 40% off for a limited time only!". Below this, a text block reads: "Enter your email below to receive Company Inc.'s newsletter containing news, updates and promotions regarding Company Inc.'s products. You can withdraw your consent at any time." Further down, it says: "Please refer to our [Privacy Policy](#) or [Contact Us](#) for more details." At the bottom of the form, there is an input field labeled "your email" and a blue "Submit" button. The footer contains links for "Privacy Policy", "Terms and Conditions", "Site Map", and "Contact Us". The browser's status bar at the bottom shows "Done".

Open Issues

- Do you need to include both the corporate name and the business name?
- What if requesting consent on behalf of multiple affiliates? Can you use a link to provide this information?
- How specific does the purposes statement need to be?
- Do you need to specify device that will receive the CEMs?
- Can you use a link to provide the detailed contact information?
- Is contact information to exercise a global opt-out sufficient?

Sample Language

- Names and Affiliate Information
 - ABC Co. doing business as Brand A and Brand B, on behalf of itself and its affiliate XYZ Co., doing business as Brand C and Brand D, would like your consent ...

Sample Language

- Purposes
 - “... about products, services, special events and offers, surveys, updates....”
- Contact information to withdrawing consent
 - “You can withdraw your consent at any time by contacting Brand A and Brand B at [mailing address] or Brand C and Brand D at [mailing address] or at [joint email address]...”

Is Express Consent Required?

- Express consent is required to send a CEM unless:
 - a statutory exemption applies
 - Full exemption
 - Partial exemption
 - one of the limited implied consent exceptions applies

Full Exemptions

- Statutory – Section 6(5)

Category of CEM	Duration of Exemption
Family relationship	Lifetime
Personal relationship	Unclear, can opt-out
Inquiry re: commercial activity	Ongoing during recipient's continued commercial activity

- No need to comply with form and content requirements

Full Exemptions

- Industry Canada Draft Regulation

Category of CEM	Duration of Exemption
“Internal” business CEMs	Duration of relationship
Between businesses	Unclear
Responding to request, inquiry or complaint	One time
“Roamer” CEMs	One time, as needed
Satisfying or enforcing a legal right	One time, as needed
Referral CEMs	One time

- No need to comply with form or content requirements

Partial Exemptions

- Statutory – Section 6(6)

Category of CEM	Duration of Exemption
Quote or estimate	One time
Facilitates or completes a transaction	One time
Provides warranty or safety information	One time, as needed
Subscription or membership	Ongoing during term
Employment	Ongoing during term
Delivery of product or service pursuant to a previous transaction	Based on the nature of the transaction

Implied Consent

- Statutory – Section 10(9) – Implied Consent

Category of CEM	Duration of Exemption
Published “Business card” exception	Unclear
Disclosed “Business card” exception	Unclear

Implied Consent

- Statutory – Section 10(10) – Existing Business Relationship (EBR)

Category of CEM	Duration of Exemption
Purchase transaction*	2 years
Business, investment or gaming opportunity*	2 years
Bartering of the above*	2 years
Written agreement*	2 years
Responding to an inquiry	6 months

*If ongoing, duration is term of interaction, etc., plus 2 years

Implied Consent

- Statutory – Section 10(13) – Existing Non-Business Relationship

Category of CEM	Duration of Exemption
Political or charitable donation*	2 years
Political or charitable volunteer work*	2 years
Membership	Term of membership + 2 years

*If ongoing, duration is term of interaction, etc., plus 2 years

Should We Act Now?

- Consider:
 - Wait and see approach?
 - Will express consent be required?
 - If any exemptions apply or if implied consent exists:
 - Can your organization prove it?
 - Can your organization manage the various timelines?
 - Can your organization manage multiple databases?
 - Using the transition period

When to Solicit Express Consent

When?	Benefits	Drawbacks
Now	<ul style="list-style-type: none"> • No restriction on means of solicitation (other than privacy) 	<ul style="list-style-type: none"> • Dealing with no responses • Pre-culling lists
Once final date of coming into force is announced (assuming there is a warning period)	<ul style="list-style-type: none"> • No restriction on means of solicitation (other than privacy) • Shorter period of pre-culling 	<ul style="list-style-type: none"> • Dealing with no responses • Pre-culling lists • May not happen!
During the Transition Period	<ul style="list-style-type: none"> • Can rely on implied EBR in some circumstances 	<ul style="list-style-type: none"> • Need to be able to establish an EBR
After Transition Period	<ul style="list-style-type: none"> • ? 	<ul style="list-style-type: none"> • Need an exemption or consent and be able to establish it

Are the consent rules different for computer programs?

- No and yes
- Express consent requirements applicable to CEMs apply
- But there are additional requirements:
 - “Basic” disclosures
 - General function and purpose of the computer program
 - “Higher risk function” disclosures
 - Nature and purpose
 - Reasonably foreseeable impacts
 - Must be separate and apart from licence agreement
 - Written acknowledgement

When do the higher risk function requirements apply?

- Two part test:
 - Program must perform one of these functions:
 - Collecting PI stored on computer
 - Changing or interfering with settings without the knowledge of the owner
 - Changing or interfering with data that interferes with lawful use or access
 - Causing a computer to communicate with another computer without the authorization of the owner
 - Installing a program that may be activated by a third party without the knowledge of the owner
 - Person must know and intend that computer will operate contrary to reasonable expectations of user or owner

When do the consent rules apply?

- “Install or cause to be installed a computer program on any other person’s computer system”
- “Having so installed or caused to be installed a computer program, cause an electronic message to be sent from that computer system”
- Meaning of “computer program”
- Meaning of “computer system”
- Meaning of “install”

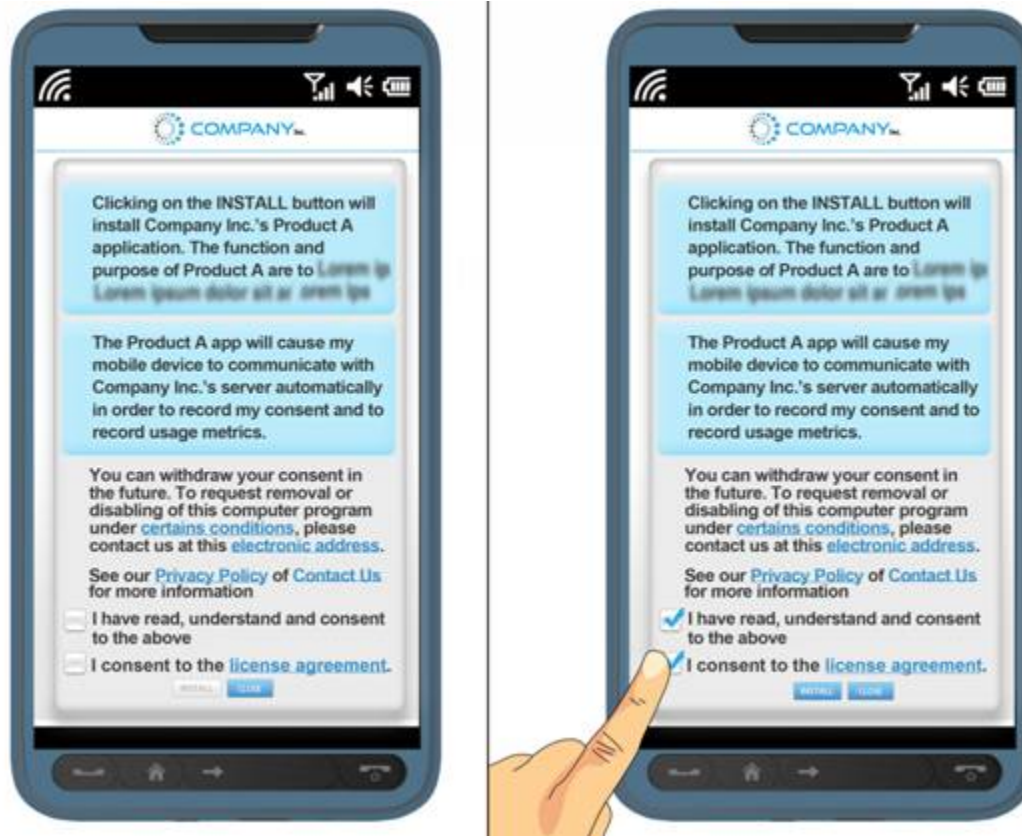
What are the open issues about scope?

- Downloads?
- Pre-installed software?
- Embedded software?
- Cookies?

Can you take advantage of an exception to consent?

- Update or upgrade
 - but only where “qualifying” express consent given to original installation and update/upgrade program
- Where person’s conduct makes it reasonable to believe consent has been given to installation of:
 - a cookie
 - HTML code
 - Java script
 - an operating system
 - an program executable only through another program for which express consent to installation or use has been given

What does the CRTC expect?



What are the key issues that you need to consider?

- Does CASL apply?
- Can you use a licence agreement to request consent?
- Are there situations in which pre-checked boxes are acceptable?
- Can you use links to disclose required information?
- Do you need to use “I consent” language?
- What do you need to say in your “consent may be withdrawn” statement?
- When do you need to disclose higher risk functions?
- Is the CRTC’s written acknowledgement requirement enforceable?

Tips for requesting consent

1. Develop a strategy (including timelines) for scrubbing existing mailing lists and seeking fresh consent
2. Do not wait until CASL comes into force to request express consent (at least if no exceptions to consent will apply)
3. Adjust current opt-in consent practices to make them CASL compliant
4. Avoid (or carefully consider) use of pre-checked toggle boxes
5. Avoid (or carefully consider) reliance on agreements or privacy policies to obtain consent

Tips for requesting consent

6. Avoid (or carefully consider) the use of links when requesting express consent
7. Seek consent separately for sending CEMs, altering transmission data and installing computer programs
8. Develop a strategy for addressing the requirement that consent be obtained from the account holder and authorized users
9. Develop a strategy for obtaining consent on behalf of affiliates, franchisees, dealers and other third parties
10. Monitor “open” issues in respect of obtaining consent to install computer programs