

 BARRISTERS SOLICITORS TRADEMARK AGENTS	<p>The Annual Church & Charity Law™ Webinar Continues Virtually November 4, 2021</p>		
<p>Terms and Conditions for Websites: What the Small Print Really Means</p> <p>By Esther Shainblum, B.A., LL.B., LL.M., CRM eshainblum@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p> <table border="0"> <tr> <td data-bbox="259 833 645 872"> CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001 </td> <td data-bbox="645 833 1222 872"> Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca </td> </tr> </table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca
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<p style="text-align: right;">2</p> <p>A. INTRODUCTION</p> <ul style="list-style-type: none"> • Website Terms and Conditions (“T&C”) are not boring! • T&C can do some things that you might actually find quite exciting, such as: <ul style="list-style-type: none"> – limiting your church/charity’s liability – protecting its intellectual property and the content of its website – controlling the conduct of website users • It is a good idea to have website T&C in place if your church/charity has a website or an app and/or operates in cyber “space” <p>www.charitylaw.ca www.carters.ca</p>

B. WHAT ARE WEBSITE TERMS AND CONDITIONS?

- T&C (or also referred to as Terms of Use or Terms of Service), actually constitute a contract between an organization and the users of its website
- T&C set out the rules that users must agree to comply with if they wish to use your church/charity's website
- The specific provisions can vary depending on the type of organization or the goods/services being provided but there are certain key provisions that should generally be included to protect the church/charity and its assets from liability, reputational damage and loss

C. WHAT ARE THE BENEFITS?

Benefit #1 – Limiting Liability

- One of the most important reasons to have website T&C is to help shield a church/charity against liability for claims made against it by website users
- Basic T&C provisions that should be on the website:
 - **Disclaimers** – the user agrees that:
 - they use the website at their own risk
 - there are no assurances regarding accuracy, quality, reliability, safety or ownership of content of or information obtained through the website, including third party content
 - no guarantee that the website will operate smoothly or without interruption

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– Limitation of Liability – the user, for self and for

- the church/charity is **not liable** for any error, inaccuracy, harmful components (e.g. viruses or malware) or unreliability of website content.
- church/charity is **not liable** for any loss or damage the user may incur due to use of or reliance on the website content, information provided through the website, third party content or third party services e.g. hosting
- User for self and personal representatives **releases and discharges** the church/charity from any claims or liability

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– Indemnity – a related provision, in which the user agrees to

- indemnify the church/charity for any liability, claims, damages *etc.* incurred as a result of the user's use of the website, online conduct/ misconduct on the part of the user
- Although this provision is one sided in favour of the church/charity, it is important to have as part of the T&C in the event of possible litigation

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Benefit #2 – Privacy Compliance

- Website T&C can align with and link to the church/charity's privacy policy and reinforce the church/charity's personal information management practices so that:
 - the church/charity is open and transparent about how it collects, uses, discloses and stores personal information in accordance with privacy best practices
 - the church/charity is compliant with any applicable privacy law or privacy best practices
 - the user consents to the church/charity's privacy policy - accomplishing two objectives with one action
 - the user consents to the church/charity's collection, use, disclosure and storage of their personal information

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- if applicable, the user also agrees to the collection, use, disclosure and storage of their personal information by any third party service provider e.g. cloud storage or to process donations
- the church/charity mitigates the risk of liability relating to its collection, use, disclosure or storage of personal information
- The user would also agree that the church/charity can communicate with them electronically (subject to meeting the requirements of *Canada's Anti Spam Legislation*)
- The T&C can be combined with the church/charity's privacy policy or they can be kept separate

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Benefit #3 – Protecting Intellectual Property and Website Content

- Website T&C can protect the church/charity's intellectual property ("IP") from infringement, copying or loss of value
- All churches and charities have IP, e.g. designs, logos, images, branding, trademarks, copyrights or other content of website
- IP is a charitable asset (see presentation by Sepal Bonni) and therefore the board of directors of the church/charity has a duty to protect it from loss, infringement or reproduction so that its value is preserved

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- In the IP provisions of the T&C, the user would agree that:
 - all website content and IP is owned by or licensed to the church/charity, the IP is the exclusive property of the church/charity or its licensors and the IP is protected by applicable laws
 - the user will only use the website content/IP for personal, non-commercial use and in compliance with the T&C
 - the user will not copy, reproduce, create derivative works or make any other use of the IP without prior written permission of the church/charity

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- If applicable, the T&C can outline how IP shared on the website can be used by third parties
 - for example, a church/charity may allow a third party to distribute some content provided it is not used for commercial purposes, the content is not altered, and the owner of the work is referenced
 - if this is the case, the T&C would include a license to the IP that includes the stipulations noted above

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Benefit #4 – Rules for Acceptable Use

- T&C can help a church/charity to protect itself from misuse or abuse by users of the website or its content
- Mitigate the risk of liability if users do anything unacceptable on or to the website. Examples include:
 - **Permitted Users** – users agree to any limitations or restrictions set out in the website, such as minimum age requirements for users
 - **User Representations** – users confirm that e.g:
 - they meet any minimum age requirements
 - any registration information they provided is true
 - they will not use the website for any illegal or unauthorized purpose
 - **Prohibited Activities** – the user agrees not to use the website or any of its content in a manner that would harm the church/charity or anyone else or that violates any laws e.g:

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- violating other users' privacy
- viewing, saving, distributing, sending, posting offensive, explicit, violent, inappropriate, disrespectful, harassing, intolerant materials
- malicious activities e.g. spreading viruses or hate mongering
- circumventing or attempting to breach security systems or networks
- infringing IP on the website

• Users would also agree to hyperlink conditions, and controls on what they are permitted to upload and post

• The church/charity should have the right to suspend or terminate the user's access to the website for prohibited activities, violation of the T&C or at any time in the church/charity's discretion

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Benefit #5 - Jurisdiction

- The internet is global and websites can be accessed from anywhere
- In order to avoid having the laws of another jurisdiction imposed upon them if there is a dispute arising out of the website or T&C, churches/charities should:
 - use the T&C to specify that the website is governed by the law of their particular province (governing law)
 - provide that any dispute arising out of the website or T&C will be governed by the laws of that province (choice of forum)
- The T&C could also clarify that the church/charity makes no representation that the website complies with the laws of any other jurisdiction

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D. ACCEPTANCE OF THE TERMS AND CONDITIONS – CLICK-WRAP VS. BROWSE-WRAP

- How do you obtain user consent to online/electronic T&C?
- Two main options:
 - Click-wrap agreement - user must click a button or check off a box to signify their acceptance of the T&C
 - Browse-wrap agreement - user is not expected to take any action to signify their intention to agree to be bound by T&C. Simply using the website is deemed to be acceptance of T&C by the user

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- Preferable to use a click-wrap format - users must tick off a box that says that they agree to the T&C
- Requiring the user to take an active step to demonstrate consent is more likely to be seen as constituting meaningful consent than browse-wrap, in which consent is inferred from use of the website
- Also easier to demonstrate that the T&C were clearly brought to the user's attention with click-wrap
- Therefore click-wrap T&C are more likely to be enforceable but are not always used

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E. KEY TAKEAWAYS

- Boards of directors and management of church/charity should use T&C to protect the church/charity and its assets from liability, reputational damage and loss
- Churches/charities with an internet presence should have website T&C and work with their legal advisor
- Church/charity T&C should include key provisions:
 - Disclaimer, Limitation of Liability, Indemnity
 - Personal Information/Privacy
 - IP
 - Rules for Acceptable Use
 - Jurisdiction
- The website T&C should be coupled and aligned with a robust enterprise privacy policy and anti-spam policy
- T&C are not boring!

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