MILLER THOMSON LLP

Barristers & Solicitors
Patent & Trade-Mark Agents

CHARITIES & NOT-FOR-PROFIT NEWSLETTER

June 2006

The Charities & Not-for-Profit Newsletter is published monthly by Miller Thomson LLP's Charities & Not-for-Profit Group as a service to our clients and the broader voluntary sector. We encourage you to forward the e-mail delivering this newsletter to anyone (internal or external to your organization) who might be interested. Complimentary e-mail subscriptions are available by contacting charitieseditor@ millerthomson.com.

TRADE-MARK USE

Eve Munro
Vancouver
604.643.1262
emunro@millerthomson.com

While registration of an organization's trade-marks provides important protection for those trade-marks, it is not the only issue for brand protection. If trade-marks are not used properly on an ongoing basis, rights can be lost. For that reason an important part of a good brand protection program for any organization is monitoring the organization's advertising and marketing materials, website and other public communications to ensure that the organization's trade-marks are used properly.

The concern is to use marks in a way that prevents the marks from losing their distinctiveness. Marks should be used in a way such that they do not become the *name* of the type of goods or service and so become "generic" and not distinguish the organization's wares and services from others. If your trade-mark loses its uniqueness, it will lose its value to your organization. Its registration may also be found to be invalid.

Examples of this problem are marks such as ASPIRIN and ESCALATOR, which have come to identify a type of product and not a particular brand. Some simple rules that can be followed to avoid the problem of genericism are:

- Always use your trade-mark with its generic term. For example, don't say "always use a KLEENEX". Say, rather, "always use a KLEENEX tissue".
- Don't use your trade-mark in the plural form or in the possessive form. Use "buy BAND AID bandages", and not "buy BAND AIDS".
- Don't use a trade-mark as a verb. Correct usage is "photocopy the document", and not "XEROX the document".
- Distinguish your trade-mark from the rest of the text by bolding, putting in capitals or italics, or other design.

Companies with famous brands, such as XEROX, often have to pay considerable attention to these issues. Because of the worldwide recognition that a name like XEROX enjoys, there has been a tendency for the mark to be used as a generic name to describe photocopiers and photocopying. Similarly KLEENEX is sometimes used as a generic name for tissue. These issues can also be extremely important in emerging industries, where a company's trade-mark can quickly become the generic term commonly used with the industry. Not all brand owners are in these unique positions, but the simple rules stated above are always recommended practice, as these problems can arise in many contexts.

Inside

Trade-mark Use

Pooling Segregated Funds in Ontario

Cyber-giving: A Non-Tax Legal Primer

"That Director is Such a Pain: How do we get rid of him?" Some Issues in the Removal of a Director

What's Happening Around Miller Thomson LLP

It is also recommended to use trade-mark symbols in order to indicate to the public that your organization uses a word or design as one of its trade-marks. For unregistered marks you may use the trade-mark symbol ™, and for registered marks use the symbol ®. This latter symbol should not be used unless the mark is in fact registered in the jurisdiction in which the material is being used.

Use of proper trade-mark notices is also important in protecting your brand. Even in a case where a mark is used by the organization that owns it, it is good practice in public-facing documents to identify your trade-marks with symbols, as described above, and to include a trade mark notice identifying the owner of the mark. This again serves the function of alerting the public to the fact that your organization considers the words and designs in question to be your trade-marks.

The question of trade-mark notices becomes even more important where licensing is involved. Unlicensed use of a trade-mark by anyone other than its owner may lead to that trade-mark becoming non distinctive of the owner and, potentially, its registration being found to be invalid. The problem is avoided if the use by the other party is a licensed use by the owner of the trade-mark and the owner has, under the license, direct or indirect control of the character or quality of the wares or services.

The Canadian *Trade-marks Act* provides that, to the extent that public notice is given of the fact that the use of the trade-mark is a licensed use and of the identity of the owner, it is presumed unless the contrary is proven, that the use is licensed by the owner of the trade-mark and the character and quality of the wares or services is under the control of the owner. Accordingly, the recommended best practice is for marketing materials, through use of proper notices, to identify the trade-marks, identify the owner of the trade-marks and identify any parties who have use of the marks under license.

This issue will arise if you license your trade-marks to other organizations for use in association with their own activities. For example, this could happen if a charity co-sponsored an event provided by another organization. It can also happen with affiliated organizations where marks of one member of the group are used by all members of the group. Use by any members of the group other than the owner will give rise to the issues described here.

Please contact us if you require assistance with a review of your advertising and marketing materials, website and other communications, licensing and use arrangements, to ensure that your trade-marks are being properly used.

POOLING SEGREGATED FUNDS IN ONTARIO

Rachel Blumenfeld
Toronto
416.596.2105
rblumenfeld@millerthomson.com

and

Amanda Stacey
Toronto
416.595.8169
astacey@millerthomson.com

Charities are often the recipients of gifts that are subject to restrictions or specific purposes. In Ontario, the *Charities Accounting Act* ("CAA") regulates how a trustee of such funds (which by definition includes a charity for purposes of the CAA) may combine funds that have been received by the trustee for a restricted or special purpose. The regulations to the CAA permits a charity to hold funds that are subject to a restricted or special purpose with other such restricted funds in one account with a financial institution or invest it as if it were a single property, provided certain requirements are met. In the charitable context, restricted or special purpose funds are funds donated for a special purpose, rather than simply being available to cover the general expenses of a charity.

Under the common law, the pooling or commingling of trust funds by a trustee is generally considered a breach of trust. Indeed, it was not until the amendments to the *Trustee Act* (Ontario) in 2001 that the investment of trust funds into pooled, segregated or mutual funds was permitted. However, these

amendments do not apply to permit the pooling of assets of different trusts held by a trustee, even if only for investment purposes. Where a commingling of trust funds has occurred, the funds may be traced, particularly where funds have been commingled with the funds of the trustee and where losses have been sustained.

In contrast, the *Loan and Trust Corporations Act*, R.S.O. 1990, c. L.25, expressly allows the pooling of trust assets by a corporate trustee.

In the charities context, the commingling of restricted or special purpose funds with the general funds of a charity is considered particularly problematic. The Ontario Public Guardian and Trustee's office has suggested this is so because once the two types of funds are pooled, the restricted funds become available to creditors of a charity in the same way as would the non-restricted funds.

Subsection 3(3) of Regulation 4/01 to the CAA provides that restricted or special purpose funds may be combined only with other such funds if the administration and management of each fund is advanced. Subsection 3(4) provides that all gains, losses, income and expenses must be allocated rateably and on a fair and reasonable basis in accordance with generally accepted accounting principles. Subsections 3(5) and 3(6) contained various record-keeping requirements.

Specifically, subsection 3(5) provides that the executor or trustee (i.e., charity) must maintain the following records for each of the individual properties, in addition to such other records as may be required by law:

1. The value of the individual property immediately before it becomes part of the combined property, and the date on which it becomes part of the combined property.
2. The value of any portion of the individual property that does not become part of the combined property.
3. The source and the value of contributed property relating to an individual property, and the date on which the contributed property is received.
4. The value of the contributed property immediately before it becomes part of the combined property, and the date on which it becomes part of the combined property.
5. The amount of the revenue received by the combined property that is allocated to the individual property, and the date of each allocation.
6. The amount of the expenses paid from the combined property that is allocated to the individual property, and the date of each allocation.
7. The value of all distributions from the combined property made for the purposes of the individual property, and the purpose and date of each distribution.

Subsection 3(6) provides that an executor or trustee must maintain the following records for the combined property, in addition to such other records as may be required by law:

1. The value of each individual property that becomes part of the *combined property*, and the date on which it becomes part of the combined property.
2. The value of contributed property that becomes part of the combined property, the date on which it becomes part of the combined property, and details of the individual property to which the contributed property relates.
3. The amount of the revenue received by the combined property, the amount allocated to each individual property and the date of each allocation.
4. The amount of the expenses paid from the combined property, the amount allocated to each individual property and the date of each allocation.
5. The value of all distributions from the combined property made for the purposes of an individual property and the purpose and date of each distribution.

The Public Guardian and Trustee discusses this regulation in its *Charities Bulletins # 6 and #7. Bulletin #6* sets out the requirements for pooling restricted or special purpose funds in detail. In *Bulletin #7*, the PGT states:

> Sometimes charities hold funds for special or restricted purposes. Examples of special purpose funds are money given to a university for a scholarship fund or money given to a medical charity for cancer research. <u>Charities must keep special or restricted purpose funds separate from their general funds</u>. This means that special or restricted purpose funds must be invested separately from a charity's general funds. Charities must also keep separate records for those investments.

This Bulletin emphasizes the importance of keeping general funds separate from pooled restricted or special purpose funds.

It is important to keep in mind that to the extent that a written document governing a gift to a charity sets out restrictions on how that money can be invested, the charity must comply with that document. The Regulation does not override agreements made with donors or the provisions of a trust deed or Will.

CYBER-GIVING: A NON-TAX LEGAL PRIMER

Eamonn Flaherty
Markham
905.415.6795
eflaherty@millerthomson.com

As more charitable and not-for-profit organizations capitalize on the use of the Internet to raise funds, it is essential that they manage their online activities to ensure their assets are protected, risks are minimized and e-donations are enforceable. When an organization goes beyond simply informing the public of its mandate and actively fundraises online, it needs be cognizant of the legal implications of users' interactions with its website. Donating online has many of the hallmarks of a 'business-to-consumer' (B2C) e-commerce transaction and must be viewed in such light.

Privacy

Making a donation via the Internet typically involves an individual providing credit card and other personal information. The organization may subsequently wish to provide the individual with news and information of interest, and also to create a personal account. While the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") applies to personal information collected, used and disclosed in the course of commercial activities, and therefore may not always apply in the charities context, it is highly recommended that charities implement this legislation, especially where they are collecting credit card and similar information. Depending on where the organization operates, provincial privacy legislation may apply. The charity should provide an online privacy statement regarding use of the online visitor's information. This should be carefully drafted to adhere to the specific requirements of the federal PIPEDA and any applicable provincial privacy legislation. In addition to describing the organization's collection, use and disclosure of personal information submitted by users, the organization should ensure that each user's consent is expressly given in relation to use of his or her personal information.

Enforceability

In addition to managing the proper use of donors' personal information, organizations must attempt to ensure that their online transactions are binding on donors. The structure of the website, the specific online steps required to make a donation and the content of the various webpages must be scrutinized carefully. Such an approach will minimize the risk that a cyber-gift is not binding on the donor. The overall mechanism for entering into the transaction must contemplate who the parties to the transaction are and how the transaction is concluded by the online visitor. It must be clear to a user that all of the elements of the transaction (including the organization's privacy statement) have been brought to his or her attention, and any unusual terms should be specifically highlighted. Post-transaction confirmation and facilitating a printable copy of the receipt will assist in ensuring that the donation is binding.

Terms and Conditions

Certain risks faced by charitable and not-for-profit organizations online include many of the liability issues facing private businesses operating for profit. Organizations should implement specific terms and conditions that bind users of the website. These terms are designed to minimize risks that the organization may be exposed to and include restrictions on website use or access, limitations of liability and disclaimers, ownership of users' submissions and proprietary trademarks of the organization, copyright information and any unique provisions required in relation to the organization's method of soliciting donations online. Finally, the issue of determining the appropriate jurisdiction that will govern these types of online transactions requires careful planning. It is key that the organization establish its 'donor-reach' policy at the outset. Soliciting donations from users located in particular jurisdictions may require compliance with complex local registration and reporting requirements.

Charitable and not-for-profit organizations should pay as much attention to the legal issues surrounding Internet fundraising as they do to the potential increase in revenues from using this method of solicitation. Planning beyond the straightforward implementation of a 'donate' button on a website is central to maximizing revenue while minimizing legal headaches.

"THAT DIRECTOR IS SUCH A PAIN: HOW DO WE GET RID OF HIM?" SOME ISSUES IN THE REMOVAL OF A DIRECTOR

Hugh Kelly
Toronto
416.595.8176
hkelly@millerthomson.com

Carefully

Thoughtfully

Respectfully

Compassionately

By-The-Book

And sometimes, Never

Few issues that emerge in the operation of a Board of Directors are more difficult to resolve than the removal of a difficult, disruptive Director. There is no one formula because, to state the obvious, every Board is different, and every Director is different. How a Board severs its relationship with one individual reflects not only upon the individual, but also, and more significantly, upon the Board itself.

Consider how the following example (based upon an actual series of events) played out:

> A. B. CeeDe is a director of the Haiche I-Jay Association Inc. ("HIJ"), having been nominated by his "best buddy" who was already a director. Shortly after he was elected as a Director of HIJ, he became, for some inexplicable reason, a member of Ee-Ef Gee Association Inc. ("EFG"), a militant lobby group that is strongly opposed to the operations and future direction of HIJ. He has been disturbingly aggressive and disrespectful to his fellow Directors in putting forth the position of EFG at HIJ Board meetings. But outside of Board meetings, his conduct has been particularly egregious, publicly criticizing HIJ, his fellow Directors on the HIJ Board, and the HIJ staff, by means of a multitude of intemperate e-mails widely distributed, promoting EFG views at every opportunity including at public meetings and in volunteering those views to the media, all the while identifying himself as a Director of HIJ. He has used his position as, and his knowledge obtained as, a Director of HIJ to make public statements criticizing the standards and actions of HIJ, and has intimidated and interfered with staff at all levels within HIJ.
>
> His conduct had become so intolerable that the Chair felt action must be taken, but wished to be certain that his judgment was being exercised appropriately. He therefore met privately, confidentially and individually with Mr. CeeDe's "best buddy" and two other Directors, seeking views as to how to proceed. All three were of the view that Mr. CeeDe's conduct had become insupportably offensive. Each advised the Chair to speak to the offending Director, and

recommended that if that was not effective, the Board should commence proceedings to remove him from the HIJ Board.

The Chair advised Mr. CeeDe, privately and confidentially, that his conduct did not conform to his duty of loyalty as a Director of HIJ, and that he would have to cease and desist such conduct. Not only did Mr. CeeDe bluntly refuse, but his critical and intimidating conduct, both publicly and with staff, actually escalated.

The HIJ Executive Committee then decided to implement the process of removal set out in the HIJ by-law. Notice was given to all Directors of the date, time and place of a special meeting, the agenda of which included only a recommendation to the membership that Mr. CeeDe should be removed from the Board. Mr. CeeDe was given a special invitation, and allocated a reasonable period of time to present whatever information or submissions he might choose in opposition to the possible recommendation for his removal.

The night before the meeting Mr. CeeDe tendered his resignation.

This example illustrates a number of points:

First, although it is entirely appropriate for a Director to put forward his own views, or that of some other organization in which he has an interest, there is no need or justification for an aggressive and disrespectful attitude in presenting those views.

Second, the duty of loyalty owed to the Board of which the person is a Director, arising out of the obligation to act in the best interest of the corporation, obliges the person to respect the decisions made by the Board notwithstanding that such decisions may not have the support of the Director personally or of some other organization in which he has an interest. A dissenting Director may not publicly:

"bad-mouth" the organization, or the other Directors, or its staff;

disclose information (unless otherwise in the public domain) obtained in the course of his/her duties as a Director;

hold him/herself out as speaking for the organization.

Third, the inappropriate conduct should be carefully documented in detail. If it becomes necessary to initiate removal proceedings against the offending Director, it is important that the relevant details of the inappropriate conduct be recorded. Bear in mind that the notes should be expressed as objectively as possible, without any personal reflections or inflammatory condemnations. After all, those who lead the removal resolution will have to produce objectively valid reasons for the removal, sufficient to persuade the members that the best interest of the organization requires such harsh measures.

Fourth, when a dissenting Director acts as inappropriately as did Mr. CeeDe, the Chair, or another Director who has the ear and the confidence of the offending Director, should respectfully and privately address the issue of such unacceptable conduct directly with the offending Director, seeking to have the Director reform his/her behavior. This should afford the offending Director a reasonable opportunity to "clean up his act". This is the time and place for the Chair or other Director to be both respectful and compassionate.

Fifth, if private persuasion is unsuccessful, then resort should be had to the authority if any contained in either the relevant statutory or By-laws provision permitting removal of a Director. In British Columbia, such removal may be authorized by special resolution which requires a 75% vote of members; and in Ontario, if authorized in the Letters Patent or By-laws, removal requires a 2/3 vote of members; the legislation is silent in other provinces.

Sixth, if it becomes necessary to resort to removal action, both adequate notice of that proposed action, and an opportunity to respond, must be given to the offending Director. If there are specific processes contained in the By-laws - and experience suggests the wisdom of setting out either in the By-laws or in explicit policies - such processes should be carefully followed.

Finally, experience suggests that there is wisdom in having criteria for removal set out either in the By-laws or in explicit policies. Care in establishing such criteria is absolutely necessary, for the criteria can be a sword that cuts both ways. For example, if the only criteria for removal is failure to pay fees, such a criterion could represent the outside limit for removal, and conduct, no matter how egregious, might not support removal.

On the other hand, "conduct unbecoming a Director or Member" may be insufficiently narrow to permit removal; by the same token, "conduct that, in the unrestricted opinion of the Board of Directors, is contrary to the best interest of the organization" makes the Board of Directors the judge of what is or is not acceptable. In any event, once established, care should be taken to ensure that the offending conduct falls within whatever the criteria.

And when all is said and done, there will be times when prudence suggests that the remaining Directors simply wait out the expiry of the term of office of the offending Director, especially when, on an objective assessment, the conduct of such Director is harmless to the best interest of the organization itself, but ultimately just irritates his or her colleagues. A person who is so offensive will often find that his/her name is omitted from the list of candidates for the election of Directors, or that the other Directors actively promote the election of others to his/her exclusion.

WHAT'S HAPPENING AROUND MILLER THOMSON LLP

Arthur Drache published "SCC Refuses Leave in Art Valuation Cases" in the *Canadian Taxpayer* in May.

Stuart Rudner presented on "Employment Law" at a May seminar arranged by the Volunteer Lawyer Service and the City of Toronto, Community Services Unit.

Hugh Kelly presented on "What Boards of Directors Should Know: Directors' Liability & Accountability" at a May seminar arranged by the Volunteer Lawyer Service and the City of Toronto, Community Services Unit.

The May issue of *Canadian Not-For-Profit News*, edited by **Arthur Drache**, contained the following articles by him: "FCA Gives Short Shrift to Agency-Based Appeal", "Whither the Public Reporting Form?", "Quebec Budget Enhances Tax Relief for Donations", "New Revocation Tax Guide and Form", "Americans Change Car Donation Rules", and "Acceptable Lawbreaking", as well as "A Legal Risk Management Primer" by **Peter Jarvis**.

Canadian Fundraiser included a May article "How to guard against charge of using undue influence" reporting on a recent Canadian Association of Gift Planners Presentation by **Sandra Enticknap**, **Michael Kerr** and **Dragana Sanchez-Glowicki**.

Robert Hayhoe and Marcus Owens (of Caplin and Drysdale in Washington, DC) published "The New Tax Sanctions for Canadian Charities: Learning from the US Experience" in the *Canadian Tax Journal* in May.

Rachel Blumenfeld and **Susan Manwaring** contributed "Tax and Estate Planning After the 2006 Budget" and **Amanda Stacey** and **Martin Rochwerg** contributed "Ways to Leave Your Legacy" to *Your Guide to Charitable Giving and Estate Planning*, published as an insert to the Toronto Globe and Mail in late May by Leave a Legacy Greater Toronto Area, a project of the Greater Toronto Area Roundtable of the Canadian Association of Gift Planners.

The May issue of *Charitable Thoughts* included "Dealing with Older Donors" by **Michael Kerr**, "2006 Federal Budget Changes" by **Robert Hayhoe**, as well as "Federal Court of Appeal Rejects Amateur Sport as being Charitable" by **Arthur Drache**.

Arthur Drache attended the International Council of the Jerusalem Foundation in May in Jerusalem.

Rachel Blumenfeld presented a seminar on "Privacy for the Not-for-Profit Sector" for the Leadership Development Services of the United Way of Durham Region in May.

Rachel Blumenfeld, **Peter Lauwers**, **Josh Liswood** and **Susan Manwaring**, presented on "Protecting Charitable Property Under The New LHN Legislation" for the Catholic Hospital Association of Ontario in late May.

Sandra Enticknap presented a paper on "Using Trusts in Estate Planning for Blended Families" in May for Continuing Legal Education British Columbia.

MILLER THOMSON LLP CHARITIES & NOT-FOR-PROFIT GROUP

Toronto/Markham

Jennifer E. Babe	416.595.8555
Rachel L. Blumenfeld	416.596.2105
Arthur B.C. Drache, Q.C., C.M.	416.595.8681
Mark R. Frederick	416.595.8175
Kathryn M. Frelick	416.595.2979
Robert J. Fuller, Q.C.	416.595.8514
Eugene J.A. Gierczak, P.Eng.	416.596.2132
Robert B. Hayhoe	416.595.8174
Hugh M. Kelly, Q.C.	416.595.8176
Michael Kerr	416.595.8620
Jacqueline L. King	416.595.2966
Peter D. Lauwers	905.415.6470
Susan M. Manwaring	416.595.8583
Nora F. Osbaldeston	416.595.8680
Rosanne T. Rocchi	416.595.8532
Martin J. Rochwerg	416.596.2116
Amanda Stacey	416.595.8169
Brenda Taylor (Corp. Services)	905.415.6739
Michael J. Wren	416.595.8184

Vancouver

Sandra L. Enticknap	604.643.1292
Martin N. Gifford	604.643.1264
Alan A. Hobkirk	604.643.1218
Peter M. Jarvis	604.643.1273
Eve C. Munro	604.643.1262
Donald H. Risk, Q.C.	604.643.1207
Monique P. Trépanier	604.643.1274

Calgary

William J. Fowlis	403.298.2413
John D. Phillips, Q.C	403.298.2431
Gregory P. Shannon	403.298.2482

Edmonton

Bruce N. Geiger	780.429.9774
Dragana Sanchez-Glowicki	780.429.9703

Kitchener-Waterloo

Stephen R. Cameron	519.593.3207
John J. Griggs	519.593.3231
J. Jamieson K. Martin	519.593.3247
Richard G. Meunier, Q.C.	519.593.3251

Guelph

Frank O. Brewster	519.780.4618
Lorelei Graham	519.780.4650
Robin-Lee A. Norris	519.780.4638

Montréal

Ronald Auclair	514.871.5477
Richard Fontaine	514.871.5496
Marie-Michele Lavigne	514.871.5490
Louise Tremblay	514.871.5476

Note:
This newsletter is provided as an information service to our clients and is a summary of current legal issues. These articles are not meant as legal opinions and readers are cautioned not to act on information provided in this newsletter without seeking specific legal advice with respect to their unique circumstances. Miller Thomson LLP uses your contact information to send you information on legal topics that may be of interest to you. It does not share your personal information outside the firm, except with subcontractors who have agreed to abide by its privacy policy and other rules.

www.millerthomson.com