



David Rickards, Cam Neil, Kimberley Wolfe, Tibor Sarai and their guests attend a Halton County Law Association Event.

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From the Editor's Desk...

By Brian Heagle



mark as a lawyer.

To help put that achievement in perspective, when Miles was starting out as a lawyer - Pierre Trudeau was

It's often important to pause and recognize milestones in life. At FDH Lawyers, we achieved a very special "Milestone" in 2011 when co-founder and Managing Partner, Miles Feltmate, passed the 30-year

Prime Minister, Bill Davis was Ontario's Premier, Terry Fox and Bob Marley passed away, IBM introduced the first PC, Britney Spears was born, McEnroe beat Borg at Wimbledon...and I was still playing high school basketball.

Most significantly for us, of course, 1981 is when Miles began a distinguished professional career which led to the formation of FDH Lawyers in 1997.

Many congratulations, Miles!



Feltmate Delibato Heagle

L A W Y E E R S

A Scout's Guide To Selling Your Business

by David Richards



Thinking of Selling your Business? Stop focusing on the purchase price and start thinking about profits. A clean, well-protected and tax-efficient sale requires planning to maximize profits and minimize liability.

Key themes reminiscent of Boy Scout mottos:

Do your best; and be prepared.

Due Diligence

Whether the transaction will be the sale of assets or shares, the purchaser is going to conduct due diligence to get a clear picture of a business beyond the balance sheet. As the vendor, you should openly and honestly respond to all questions put to you. The due diligence process can consume a great deal of time, so it pays to keep your records in order. To assist your lawyer in satisfying the inquiries of the purchaser it could be necessary to have certain key employees assist in that process; enlisting an employee can free up your time to focus on sustaining the value which the purchaser is looking to buy.

The purchaser will investigate issues such as leases, litigation, employee remuneration and outstanding tax liabilities. Many vendors try to conceal the flaws, hoping this will drive up the purchase price. Remembering that the goal is profit over purchase price, the savvy vendor will address their flaws during the due diligence process to limit their post closing liability. A decision to mask a flaw at this stage of the sale could result in costly litigation after closing and erode profits.

Structure

The structure of the deal can further maximize your profits. We all know that one of the certainties in life is taxes: with some planning and foresight those taxes can be minimized, resulting in greater profit.

The purchaser will focus on paying the lowest purchase price and this can be used to your advantage if you are prepared. The vendor can use tax advantages of a share sale at a lower purchase price to

maximize profits. In particular provided your corporation meets certain asset and shareholder tests and is a Canadian Controlled Private Corporation, then the individual vendor may qualify for the capital gains exemption (the "CGE") selling up to \$750,000.00 worth of shares without paying any tax on the capital gains. As most private corporations shares are initially purchased for nominal value, it is conceivable that you could sell the shares for \$750,000.00 taking full advantage of the CGE.

Your accountant will be able to review your books and advise you whether the shares of your corporation qualify for the CGE.

Focusing on the difference between maximizing the profits over purchase price we can see that selling the shares of your corporation for an amount that falls within the CGE can produce greater profit than selling the assets at the same or even a higher purchase price. With this knowledge, a vendor can determine the purchase price at which an asset sale (less tax liability) is as profitable as a share sale under the CGE.

A further benefit of the CGE is that it applies per individual. A well planned corporation will have maximized the number of shareholders so that multiple individuals will qualify for the CGE. This planning must occur at least two years in advance, however a husband and wife who each own the shares of a private corporation could sell their shares for \$750,000.00 under the CGE. Conversely, an individual shareholder could not sell the shares of a corporation for \$1,500,000.00 without encountering tax liabilities. A corporation with two shareholders will derive greater profit than a single shareholder corporation sold for the same purchase price if that price exceeds the CGE.

Profitable Planning

The goal when selling your business is profits. This goal is achieved not through seeking the highest purchase price, but by preparing your business for sale and structuring it with focus on profits. Do your best, be well prepared and you will sell a business, perhaps not for the highest purchase price- but certainly for the most profit.

How to Keep Distrain On Track

By Kimberley Wolfe



Commercial landlords often ask whether they are allowed to sell their tenants' assets in order to recover some of the monies owed to them by the tenant. This question relates to a commercial landlord's right to "distrain" against the tenant's assets and the answer is never straightforward, as is usually the case in legal disputes.

The landlord's right to distrain, or in plain terms, to keep a tenant's assets as partial payment of rental arrears, is a legal right that carries with it ramifications and penalties if exercised improperly.

The landlord's right to distrain against the tenant's assets arises under the terms of the lease and the *Commercial Tenancies Act*¹. Quite often, commercial landlords attempt to exercise this right without following the proper steps. Doing so may give rise to the ability of the tenant to seek damages against the landlord for wrongful conversion of the tenant's assets. For this reason, it is helpful to briefly outline the basic steps involved in exercising this right.

1 – Notice

To properly distrain the landlord must first provide notice. Notice may be sent to the tenant's last known address and/or posted in a conspicuous location at the premises. A minimum of 5 days notice of the landlord's intention to exercise its right to distrain must be provided. Failure of the tenant to rectify the breach of the lease gives rise to the landlord's right to sell the assets.

It is imperative that the notice does not indicate that the lease has been terminated. This is because where a lease has been terminated, the tenant may argue that the landlord has no right of distress under the terminated lease.

Section 55 of the *Commercial Tenancies Act*, also cautions that:

55. (1) A distrainer who takes an excessive distress, or takes a distress wrongfully, is liable in damages to the owner of the goods or chattels distrained.

(2) Where a distress and sale are made for rent pretended to be in arrear and due when, in truth, no rent is in arrear or due to the person distraining, or to the person in whose name or right such distress is taken, the owner of the goods or chattels distrained and sold, the owner's executors or administrators are entitled, by action to be brought against the person so distraining, to recover full satisfaction for the damage sustained by the distress and sale.

This means a landlord is not entitled to distrain against assets when no rental amounts are owed, nor is a landlord entitled to retain assets whose value far exceeds the value of the rental amounts

owing. However, often the terms of the lease may modify the landlord's right to distrain by providing that the landlord could rely on the lease agreement for its right to distrain in order to collect any rental arrears owed.

Depending on the circumstance, clauses such as these may add strength to a landlord's claim that it has a right to distrain against the tenant's assets regardless of their value.

2 – Lien Searches

The landlord is only entitled to retain those assets that are owned by the tenant. Further, if there is a lien registered against the assets, the landlord must ensure that the lien holder is notified of the impending sale of the asset. The lienholder is entitled to be paid out of the proceeds of sale or the lien holder may agree to assign their lien to the new owner of the asset.

To ensure that the assets are owned by the tenant and that there are no liens registered against the assets, the landlord must conduct all necessary searches including those searches under the *Personal Property Security Act* and the *Bulk Sales Act*.

3 – Appraisal

At the expiration of the 5 day period, the landlord must have the tenant's assets appraised by a minimum of two appraisers. The appraisers must promise to appraise the items fairly according to their best understanding of the assets' value. The promise must be in the form of a sworn declaration. Again, before selling any equipment left at the premises, it will be necessary to ensure that any liens registered against the equipment are paid out.

4 – Sale

Once these steps have been followed, the landlord may lawfully sell the tenants assets. The sale must be designed with a view toward obtaining the best price possible. Any surplus remaining following the sale must be held in trust for the benefit of the tenant and paid to the tenant upon its demand².

These four steps are the basic ones involved in seizing and selling a tenant's assets. However, the process is riddled with complications along the way. If you are a commercial landlord and your rent has not been paid for some time, before locking your tenant out and attempting to navigate these steps on your own, it is best to consult your lawyer.

1. R.S.O. 1990, c. L.7 [hereinafter the "CTA"]. 2. Section 53 of the CTA.

FDH News



Feltmate Delibato Heagle is pleased to announce that **David Boxen** was called to the Bar January 28, 2011 and has joined the corporate commercial law team at FDH.



Vince Rinaldi joined Feltmate Delibato Heagle LLP on March 8, 2011 as a member of our real estate team.

- **Fulvio Delibato** was one of the artists featured by The Hamilton Conservatory for the Arts Gallery presentation, “The Academy Way”, on February 13, 2011.
- **Ron Weston** participated in a panel before MBA students enrolled in an Entrepreneur course at the Degroote School of Business in February 2011.
- **Ron Weston** presented “Purchase and Sale of a Business” to the members of the Hamilton Law Association in November 2010.
- Feltmate Delibato Heagle (led by **David Rickards**) & SB Partners presented an informative breakfast seminar, “Preparing your Business for Sale” on January 26, 2011.
- **Brian Heagle** was a panelist on Career Information Afternoon held at Hillfield Strathallan College in November 2010.
- **Brian Heagle** was re-elected to the 2010 – 2011 Board of Directors for the Joseph Brant Memorial Hospital Foundation.



Miles Feltmate & Kathy Hall present Kevin Sheehan of Sheehan’s Truck Centre Inc. with gifts donated by FDH Lawyers and staff. Sheehan’s works in conjunction with local churches and schools to give gifts and food to needy families at Christmas time.



Brian & Ria Heagle were recently inducted into the prestigious YMCA Heritage Club for Planned Giving.

F E E D B A C K

We are always interested in hearing what you think about our Newsletter. If you have any comments or suggestions, or a topic that you would like to see covered, please contact our Editor, Brian Heagle at bheagle@fdhlawyers.com.

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