

# THE FINE PRINT



Multimodal Gateway 2008 Conference participants (l. to r.): **Henry Krupa**, Feltmate Delibato Heagle, **Steve Howse**, Director of Communications, Hamilton International Airport, **Angela Gravelle**, Senior Economic Development Officer, Burlington Economic Development Corporation, **Sandro Caccaro**, Canadian General Manager, Scheider National, **John Gibson**, Vice-President, Hamilton International Airport and **Christopher Neufeld**, Feltmate Delibato Heagle.

## FELTMATE DELIBATO HEAGLE IS PLEASED TO PRESENT

### "Multimodal Gateway 2008 Conference"

South Western Ontario's premier conference for transportation, logistics and manufacturing, to be held on June 4, 2008 at Liuna Station in Hamilton, Ontario.

Attendees will hear from Key Note speakers Rob MacIsaac, Chairman of Metrolinx and Dr. Jayson Myers, President and Chief Economist of the Canadian Manufacturers and Exporters and 4 panels of leading industry representatives and government officials. For more information or to register visit [www.multimodalgateway.com](http://www.multimodalgateway.com) or contact Supply Chain & Logistics Canada at 905-513-7300.

## APRIL 2008

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Feltmate Delibato Heagle

L A W Y E R S

## Presumptions Behind Joint Ownership of Property

By Lori Brown

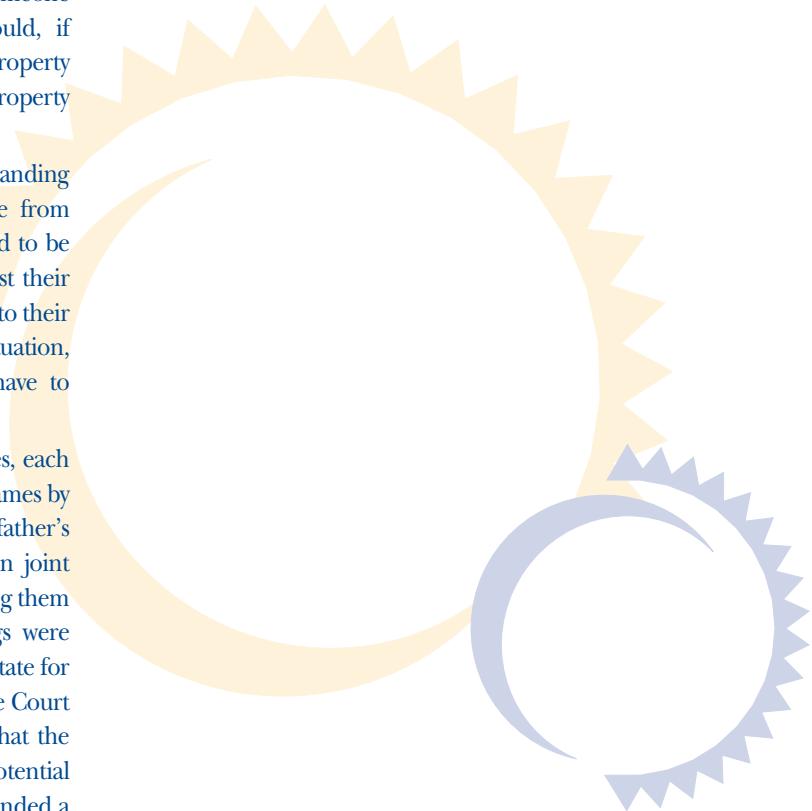
Over the years, many parents have opened joint bank and investment accounts with an adult child. Others have put title to houses, cottages or investment properties into joint names with one or more of their children. They have done so for a variety of reasons: (i) for the ease of financial management (ii) instead of having to rely upon a power of attorney for property; or more often than not, (iii) to avoid payment of probate fees upon their death. I have discussed this issue for over twenty years and know that there is much confusion over the legal presumptions surrounding these issues.

In order to fully understand the current law, it is necessary to look at what the law terms “presumptions”. In general, the law presumes equitable bargains, not gifts. That is, a transfer made without consideration (i.e. no value is given to the person doing the transferring) is called a gratuitous transfer. People are not expected to get something for nothing. In such cases, the onus is on the person receiving the gift to prove that a gift was intended. If that fails, the person receiving the gift (the transferee) is said to hold the asset on a “resulting trust” for the person who gave gift the (the transferor) or for his or her estate. This “presumption of resulting trust” has always been rebuttable. For example, if a person transferred title to property from his or her own name into joint names with someone else, for no money or value whatsoever, the transferee would, if challenged, have to prove that he or she had in fact received the property as a gift, and that the intention of the transferor was that the property would remain with the transferee upon the transferor’s death.

To complicate matters somewhat, there has been a long-standing “presumption of advancement” that applies to transfers made from parents to adult children. These types of transfers are considered to be gifts, based on the notion that parents had an obligation to assist their children (even adult ones) and commonly intended to make gifts to their children. This presumption is also rebuttable. However, in this situation, the onus is on the person challenging the gift who would have to convince the Court that a gift was not intended.

In May, 2007, the Supreme Court of Canada dealt with two cases, each involving an estate in which significant assets were held in joint names by elderly fathers and their daughters. In one case, following her father’s death, the daughter, claiming rights of survivorship inherent in joint ownership, cashed in the investments for herself rather than adding them to the father’s estate to share with her siblings. The siblings were successful in having the large investment account paid into the estate for the benefit of all of the children. In the second case, however, the Court concluded that the father had intended a gift, with the result that the daughter did not have to share the property with the other potential beneficiary. It is not always easily determined if the deceased intended a joint account as a gift to the other joint owner, or if the establishment of a joint account was simply a matter of convenience or to reduce probate fees.

Accordingly, what is clear from these two different results is that extreme care must be taken when putting property into joint names with the transferor being very clear as to its intentions. Is it truly a gift that is intended or is the transfer for convenience or other reason? There is currently a debate among estate practitioners as to what constitutes proper documentation to establish intention. It is now my recommended practice that those who hold property jointly with their children (or others) expressly declare in writing their intentions. Matters such as who uses the property, who pays taxes on it, who controls it, the banking or title documents that created the ownership in the first place, and matters relevant to the particular parties at hand, are all items that should be addressed. The time and cost of preparing such declarations are minimal compared to the time and expense that an estate may be put to if these matters are not addressed before death.



## Franchise Expansion Goes Global

By Debi M. Sutin\*

*Part 1 of this article, in the January 2008 issue of The Fine Print, discussed the various methods used by franchisors to expand beyond their local market. In this issue, we will review the investigations that must be made before a franchisor embarks on expansion.*

The decision to expand a franchised business outside of a franchisor's home market, whether provincially, nationally or internationally, cannot be taken lightly. It requires immense planning, investigation and resources. Consultation and advice from the franchisor's professional advisors, both at home and in the target market, are a must to ensure that the venture meets the political, legal and cultural conditions of the target market and to avoid having to face head-on a myriad of "surprises" once the franchisor has granted rights in the foreign jurisdiction.

Expansion must be done cautiously and with a complete legal and business analysis of any new market. Although this does not ensure success, a cautious, well-planned expansion may protect the franchisor from a "venture gone bad".

Prior to pursuing an expansion program, a franchisor must first decide on the jurisdiction it wishes to expand into. Some of the questions that a franchisor must ask in determining the appropriate market include:

1. What is the political climate and stability of the target jurisdiction?
2. Is there a demand for the product or service being offered? In many cases, the products or services of the franchisor may have to be adapted to meet the tastes and ethnic differences of the population in the target market.
3. What is the existing level of competition for the franchisor's product or service in the market?
4. Are there import restrictions or tax considerations that will impact upon expansion into the target jurisdiction or any other legal or business constraints on the supply of the franchisor's goods or services within the target market? Franchisors will not be equipped to answer this question unless local legal counsel and other professional advisors are retained for professional advice and direction.
5. Does the franchisor have the financial and human resources necessary to devote to the expansion? Many franchisors underestimate the capital cost of expansion and the fact that valuable resources (travel time and costs, training, administrative support, operating assistance and supervision) are inevitably drawn away from domestic operations. Franchisors should, as well, expect to incur legal, accounting and franchise consulting fees as well as administrative costs as part of its expansion.
6. Can the franchisor's trade-marks and other intellectual property be used in the target market? The franchisor may have to modify its

name or trade-mark, particularly where the language in the target market would give the trade-mark a different or secondary meaning.

7. Are there any immigration restrictions that would prevent the franchisor's personnel from visiting the target market for franchisee recruitment, training and support?

Unfortunately, franchisors often forego consideration and analysis of these matters and instead simply respond to unsolicited inquiries to bring the franchise system into the target market. Responding favourably to the first overture of interest from abroad by immediately granting rights in a foreign market, without sober thought and analysis, is not advisable and is often counterproductive.

Once the franchisor has determined an appropriate market for expansion, it should then focus its attention on the appropriate candidate, who must have sufficient expertise, management skills and business acumen to sustain the long term growth of the franchise system in the target market. The candidate must also not only have sufficient capital at its disposal to obtain the rights but it must be capable of financing the expansion of the system on an ongoing and long term basis.

It is then critical to the success of the venture that the parties choose the best method of expansion for that market. Serious consequences may flow from both a business and legal perspective if the chosen structure is inappropriate. The grant of master franchise rights to a foreign entity, while tempting for the franchisor for various reasons (most significantly, the infusion of cash), may be entirely premature. If there is a lack of brand awareness or little demand for the product or service in the targeted marketplace, for example, the master franchisee may find it entirely impossible to meet the development schedule. The resulting failure by the master franchisee may seriously undermine the brand and the reputation of the franchisor's system and ultimately, the franchisor's ability to expand within that market in the future. Similarly, the incremental sale of unit franchises may not be the most appropriate or cost effective method of expansion. The grant of one or more unit franchises in a major urban centre with large exclusive territories may preclude or hinder the sale in the future of area development or master franchise rights for a market which would otherwise include those territories.

Irrespective of how a franchisor ultimately decides to expand its system, it is most important that the proposed legal structure not dictate the terms of the business arrangement. Instead, the franchisor must first be satisfied that the business deal is worth pursuing, and potentially profitable for both parties, before taking the necessary steps to have the legal documentation put in place to reflect the terms of the business relationship.

*continued on page 4*

## FDH News & Legal Tidbits

- **Debi Sutin** will be co-chairing the annual Spring Dinner meeting of the Ontario Bar Association's Joint Subcommittee on Franchising to be held on May 29, 2008
- **Feltmate Delibato Heagle** is a lead sponsor of Multimodal 2008: South Western Ontario's Gateway to the World, a full day conference on global logistics and transportation to be held in Hamilton, Ontario on June 4, 2008. **Chris Neufeld** is the Conference Co-chair and **Henry Krupa** is a speaker at the Conference which will focus on the growth of Southwestern Ontario as a hub for Canadian logistics and transportation throughout the world.
- **Fulvio Delibato** will be submitting charcoal drawings in a juried Invitational Art Exhibition of former students of local artist Bruno Cavolongo to be held at the Hamilton Conservatory for the Arts from March 29, 2008 to April 10, 2008. Away from the office, Fulvio pursues his interest in art by attending the Academy of Realist Art and by sketching and painting in his spare time.
- **Henry Krupa** spoke on Ontario's Waste Management Regulations at the Waste Disposal and Land Disposal Restrictions Conference held on March 27, 2008.
- **Debi Sutin** has been appointed to the Planning Committee for the Ontario Bar Association's 8th Annual Franchise Law Conference taking place on November 25, 2008.
- **Henry Krupa** will speak at the Ontario Ground Water Associate Conferences to be held March 5, 2008 and March 12, 2008 on Policy and Legislative Decision Making in Government and Anatomy of an Inspection and on April 23 and 24, 2008 on Hazardous Waste Compliance at the Hazardous Waste Management and Land Disposal Restrictions conference.

### *Franchise Expansion Goes Global continued from page 3*

Finally, in addition to laws of general application which may be applicable to the business arrangement, a franchisor must investigate whether there is any franchise-specific legislation that governs the relationship. Local counsel needs to be retained to advise on the legal issues and other requirements applicable in the target market and to ensure that the agreement ultimately negotiated between the parties does not run afoul of local law in the target jurisdiction.

Franchisors must recognize that expansion carries with it several significant risks, including the possible risk of investing their financial and other resources in a failing endeavour, losing control over the sales process as well as the possible dilution of the brand in the target market. These risks must be weighed against the potential, significant rewards that can be achieved before embarking upon any expansion strategy.

\* This article is based upon a paper presented by Debi Sutin and Joseph Adler of Hoffer Adler LLP at the Ontario Bar Association's Annual Franchise Law Conference in November, 2007.

### FEEDBACK:

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, Debi Sutin at 905-631-3643.

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