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Photo courtesy of Kay Woollam Photography

Feltmate Delibato Heagle was a table sponsor at the Oakville Chamber of Commerce Luncheon with Ontario Premier Dalton McGuinty, March 6, 2009. Cam Neil of Feltmate Delibato Heagle and also Director of Oakville Chamber of Commerce is shown here with the Premier Dalton McGuinty.

In This Issue...

Burlington's Sound of Music Festival launched the official start of the Festival's 30th year. Feltmate Delibato Heagle has been a proud Festival sponsor since 1997.

From left to right: Mayor Cam Jackson (City of Burlington), (event attendees) Nancy Penny and Rick Burgess. Also President of the Festival, James Tuck of Feltmate Delibato Heagle.

Feltmate Delibato Heagle
LAWYERS

Do Restrictive Covenants Work?

By Paul Lewis

It's a competitive world. In recognition of this, employers frequently attempt to protect themselves against their competitors through the use of non-solicitation and non-competition covenants.

A Cautionary Tale

A recent Ontario Court of Appeal decision – H.L. Staebler Company Ltd. v. Allan – serves to clarify the law.

In the Staebler case, two employees with written non-competition covenants resigned their employment and began selling commercial insurance for a competitor of Staebler. Within two weeks of their departure, approximately 120 clients moved their business from Staebler to Staebler's competitor. Not surprisingly, Staebler brought an action. The non-competition covenant that was the focus of the litigation stated:

"In the event of termination of your employment with the Company, you undertake that you will not, for a period of 2 consecutive years following said termination, conduct business with any clients or customers of H.L. Staebler Company Limited that were handled or serviced by you at the date of your termination."

At trial, the presiding Judge found that the non-competition covenant was enforceable and awarded Staebler $2,000,000 in damages. The Court of Appeal disagreed with the trial judge's decision. It proceeded to overturn the trial judge's decision. In doing so, the Court of Appeal held that restrictive covenants will be enforceable only if the covenants are appropriate to the specific situation in question, and only if their reach is both reasonable and clearly defined.

Despite the fact that the covenant was limited to conducting business with clients or customers, the Court of Appeal found that the covenant was a non-competition covenant, as opposed to a non-solicitation agreement. The non-competition covenant was held to be unreasonable for two reasons:

(1) The covenant was too wide in scope. The clause contained no geographic limit on the activities it sought to limit. The former employees of Staebler, if held to the covenant, would have been restrained from doing business with former clients of Staebler "even if they relocated to the far reaches of Ontario, or for that matter, elsewhere in Canada"; and

(2) There was no limit on the type of business restricted by the non-competition covenant. The covenant did not restrict the type of business that could be done, including work that in no way competed with Staebler.

Placing Limits On Freedom

In part, the Court's decision was likely motivated by the fact that non-competition clauses run contrary to the public interest in free and open competition. Conversely, courts are reluctant to restrict the right of employers and employees to freely enter into contracts.

Generally speaking, a restrictive covenant is enforceable only if it is reasonable between the parties and consistent with the public interest. In determining "reasonableness", the Court will consider the overall assessment of the clause, the agreement within which the clause is found, and the surrounding circumstances. Three additional factors will also be included, as follows:

1) Whether the employer has a proprietary interest that is entitled to protection;
2) Whether the time period or the geographical location that the restrictive covenant covers is too extensive; and
3) Whether the restrictive covenant is unenforceable because it is against competition generally and is not limited to prohibiting solicitation of clients of the former employer.

Non-Solicitation Vs. Non-Competition

A non-solicitation clause is normally sufficient to protect an employer's interest. Our courts will generally not enforce a non-competition clause if a non-solicitation clause would have provided the employer with adequate protection.

The use of a non-competition clause is warranted only in exceptional circumstances. Those circumstances might include those in which an owner of a company sells his or her interest to a purchaser. Thus, in conventional employment relationships, a non-solicitation clause is more likely to be held reasonable than a non-competition covenant.

In order to ensure the enforceability of a restrictive covenant, it must be drafted with care and specificity. It must also reflect not only the interest of the workplace parties, but the public interest as well. Most significantly, any failure on an employer's part to minimize the scope of the restrictions imposed by a restrictive covenant will almost certainly render the covenant unenforceable.

During these difficult and precarious economic times, employers cannot afford to overlook the important role of restrictive covenants – and how they can work to help protect their business interests.

The Personal Side of Being a Director

By Joseph Longo

Recent high-profile corporate scandals, and a subsequent tide of lawsuits, seek to hold the directors of corporations personally accountable.

Directorship – Take It Personally

The potential personal liability of a director for corporate wrongdoing, particularly for matters over which the director has little control, will make any right-minded individual think twice about accepting an offer of directorship – and can even lead to a mass resignation of directors in situations where the corporation has encountered financial difficulties.

As a result, it is imperative that individuals considering an offer are aware of their duties and obligation as a director.

Ontario – Consider The Risk

In Ontario, the personal liability of directors is an exception to the norm. In the absence of evidence to the contrary, directors are presumed to be acting on an informed basis, in good faith and with a view to the best interests of the corporation and, as such, any liability for corporate wrongdoing lies with the corporation.

The universally recognized principle is that a corporation is a separate legal entity distinct from its shareholders and directors. As a result, directors are generally afforded the protection of the "corporate veil" from personal liability.

However, the legislature and the courts are willing to disregard the separate corporate personality theory and impose personal liability in certain circumstances, this practice is often commonly referred to as "piercing the corporate veil".

The OBCA – Duty, Care And Liability

The Ontario Business Corporations Act ("OBCA") sets out the the duties and liabilities imposed on directors. In particular, every director of an Ontario corporation is obliged to exercise his or her powers and discharge his or her duties honestly and in good faith with a view to the best interests of the corporation's (fiduciary duty) and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (standard of care).

In addition to the fiduciary duty and the standard of care, the OBCA also contains the oppression remedy: a tool to review and rectify the decisions of directors through the imposition of very broad standards of fairness. Although the oppression remedy is far beyond the scope of this article, it is important to note that it has been used by the courts on several occasions to impose personal liability against directors where appropriate.

Accountability – Truth And Consequences

In addition to the obligations directors have under the OBCA, there are in excess of 200 statutory enactments which can be used to impose personal liability on Directors for the wrongdoing of their corporation, including:

- employee wages not exceeding an amount equivalent to six months' wages for services performed for the corporation that became payable while they were directors and, in addition, up to 12 months' vacation pay likewise accruing
- failing to ensure that the corporation is deducting, withholding and remitting various taxes;
- failing to take all reasonable care to ensure that the corporation complies with the Occupational Health and Safety Act, and its Regulations;
- directing, authorizing or acquiescing in or participating in the commission of an environmental office by a corporation under the Environmental Protection Act;

Limiting Risk – Use Protection

Directors must protect themselves. The use of indemnifications and liability insurance are important ways to accomplish that.

The OBCA confers upon the Board discretionary powers to indemnify current and former directors against certain costs, charges and expenses.

In addition to the provisions permitting or allowing a corporation to indemnify directors, a director has a statutory right under the OBCA to be indemnified by a corporation in respect of costs, charges and expenses reasonably incurred where the individual has been substantially successful on the merits in any defence of a civil, criminal or administrative action or proceeding.

Insurance can also provide a director with some comfort. The OBCA provides that a corporation may purchase and maintain insurance for the benefit of directors.

Insurance is extremely valuable where the corporation does not have the resources to make indemnification payments.

Step One – Look Before You Leap

Whether it is a large multi-national corporation or a small not-for-profit corporation – serving as a director is not for the faint of heart. However, if the obligations and the potential risks are apparent, the benefits of a director are rewarding and will likely make the consequent risks bearable.

FDH News

- **Feltmate Delibato Heagle** was recognized on June 23, 2009 as a Supporter on a donor recognition wall at the grand opening of the Halton Healthcare Burlington Dialysis Centre.
- **Brian Heagle** was elected in June 2009 to the Board of Directors for the Joseph Brant Memorial Hospital Foundation in Burlington.
- **Joseph Longo** was appointed to the Board of St. John Ambulance (Oakville/Milton/Halton Hills Branch) as Treasurer for a three year term.
- **Paul Lawson** was appointed to The Salvation Army's committee for the Autism Centre.
- **Joseph Longo** joined Feltmate Delibato Heagle February 23, 2009 as a member of our litigation team.

Christopher R. Neufeld of Feltmate Delibato Heagle LLP moderating the transportation and logistics industry panel at McMaster University's Translog Conference on June 17, 2009.

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, Brian Heagle at bheagle@fdhlawyers.com.

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