



# THE FINE PRINT

## ■ Upcoming Seminars

Please visit our website at [www.fdhlawyers.com](http://www.fdhlawyers.com) for information on our upcoming Fall/Winter Seminars.

## ■ FDH Staff



*Our behind the scenes Burlington & Oakville support staff are an essential part of the team at Feltmate Delibato Heagle.*

## ■ InProfile

In each issue of The Fine Print, beginning with the October 2005 issue, we will include a profile of one of our clients, showcasing its initiatives and providing insight into its growth and success.

## ■ We Want Your Feedback!

We would like your comments on our recent seminars as well as your suggestions for future seminar topics. Please visit our website at [www.fdhlawyers.com](http://www.fdhlawyers.com), click on "Feedback" and give us your thoughts.

## JULY 2005

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Feltmate Delibato Heagle

L A W Y E R S

## Lawyer Profile - Ian R.A. Macmillan

Ian R.A. Macmillan, who has practiced with Feltmate Delibato Heagle LLP since July, 2001, is the firm's senior litigator and head of our Litigation Department. Ian has practiced almost exclusively in the area of Civil Litigation and is devoted to protecting the interests of his clients within the civil justice system, believing passionately in the right of every individual to unfettered access to justice.

Ian has appeared as counsel in the Supreme Court of Canada, the Courts of Appeal of Ontario and Manitoba, the Ontario Superior Court of Justice, the Manitoba Court of Queens Bench and provincial courts in both Ontario and Manitoba. As an advocate, Ian has participated in various alternative dispute resolution processes and is an experienced arbitrator and trained mediator.

## Oppression Remedies - Part 2

By Ian R.A. Macmillan

*This is the second of a two-part series relating to oppression remedies in Ontario and Canada. Part 1 of this article appeared in the January 2005 issue of this Newsletter.*

At the end of Part 1, the allegedly oppressed individual was encouraged to seek legal counsel. In many oppression remedy actions, the individual is a minority shareholder in a privately-owned family business.

Let's presume that the business was started in the 1960s and the father owns 100% of the shares in the operating company. His two children, a son and a daughter, learned the business as they grew up and when the younger turned 23 years old, each of them received a gift of 20% of the shares of the company and were made directors. They remained active participants in the business. The father continued to work into his 70s and relinquished little control in the decision-making process. It became clear, however, that he was grooming his daughter, his favourite, to take over when he retired. The older son felt a growing sense of isolation. Financial records were not made available to him and years went by without any formal shareholders' or

directors' meetings. His sister, on the other hand, seemed to know exactly what was going on. The relationship between the son and his father and sister deteriorated. Questions about the affairs of the business went unanswered. The son eventually consulted a lawyer regarding his options.

Both the *Canada Business Corporations Act* and the *Ontario Business Corporations Act* (the "OBCA") provide comprehensive remedies for individuals in the position of the son. This article will focus on the remedies available under the OBCA.

Section 248 of the OBCA gives an aggrieved individual the right to complain to the Court that the affairs of the corporation and the powers of the directors are being carried out in a manner that is oppressive or unfairly prejudicial or unfairly disregards his interests. An action under Section 248 may be commenced by notice of application or by statement of claim. In either case, the Court has jurisdiction to grant interim relief pending resolution of the matter.

The powers of the Court in making oppression remedy orders are virtually limitless and can include orders:

(a) directing the corporation to pay to the son interim costs to assist funding his action against the corporation; (b) restraining the defendants from changing the "status quo" such as disposing of substantial assets, transferring shares or terminating senior employees; (c) appointing a receiver to oversee the business of the corporation on an interim basis; (d) directing the corporation to produce financial statements within a stipulated time period; (e) directing that the affairs of the corporation be investigated by an inspector appointed under Part XIII of the OBCA; or (f) winding up the corporation.

In our scenario, the interests of all parties are probably best served if the son is provided with the financial information which has been withheld from him, his shares are appraised by an independent business valuator, his shares are then purchased for fair market value and he seeks his livelihood elsewhere.

One final observation – oppression remedy litigation can create or destroy. Seek creativity. It is better for the soul – and a whole lot less expensive.

## Powers Of Attorney

*By Lori Brown*

The preparation of a Power of Attorney is both relatively straightforward and inexpensive. It does, however, require planning on the part of the “donor”, both with respect to the powers to be granted and the person to whom the powers are to be given. Professional assistance in the preparation and signing of a Power of Attorney is always recommended.

A Power of Attorney is a document that enables you to appoint another person to make decisions on your behalf in certain circumstances. There are two types of Powers of Attorney – one that deals with property (real estate, investments, bank accounts, etc.) and one that deals with personal care matters (medical treatment, shelter, nutrition, hygiene, etc). These documents are called, respectively, Power of Attorney for Property and Power of Attorney for Personal Care. They are sometimes also referred to as a Power of Attorney for Financial Matters or Continuing Power of Attorney, and Living Wills or Health Care Directives.

A Power of Attorney is used during a person’s lifetime. Once a person has died, any Power of Attorney which he/she has granted is void, and all matters regarding the deceased’s estate are then subject to the terms of the deceased’s Will.

The person named to act on behalf of another under a Power of Attorney is called an “attorney”, the meaning of that term being akin to “representative” or “decision maker”.

When choosing an attorney, a number of factors should be taken into account.

Do you trust the person implicitly? Is the person willing to take on this task? Would they be available if called upon to act? Are they close enough geographically? (Anyone out of province may be required to post a bond equivalent to the value of your assets.) Do they have the level of sophistication necessary to handle your various financial matters? Will they expect to be compensated? How many attorneys do you want to name? Do you have an alternate to your first choice? Do you want the Power of Attorney to be effective from the moment it is signed, or only upon incapacity?

A trust company can also be appointed to act under a Power of Attorney. However, trust companies require that the grantor of the Power of Attorney first meet a financial threshold. Trust companies charge fees for acting under a Power of Attorney, as can anyone, and such fees are calculated based upon the value of your estate and the management which they provide.

An attorney who charges fees is held, in law, to a higher standard of care than those who do not receive compensation. The compensated attorney must exercise the degree of care, diligence and skill that is required of a person in the business of managing the property of others while an uncompensated attorney is held to the lesser standard of care of a person of ordinary prudence conducting his or her own affairs.

Attorneys are subject to certain restrictions and obligations which are imposed, both under the common law

and under statute pursuant to the Substitute Decisions Act (Ontario). An attorney must not allow his or her own personal interests to conflict with those of the donor and an attorney cannot, among other things, make a gift or dispose of the donor’s property for the benefit of anyone but the donor. The Attorney also cannot delegate his or her authority under the Power of Attorney to perform acts which are personal to the donor (such as swearing an affidavit).

The need for Powers of Attorney will only increase over time as the “boomer” generation ages. The prudent thing is to make arrangements now, while still healthy, for someone to manage both our financial and our health care matters, should we ever become unable to do so ourselves. A family faced with having to assist an incapacitated family member, without a valid Power of Attorney, will face significant delays and expense in providing proper care and assistance. With the advice of experienced professionals, Powers of Attorney can be easily prepared in order to plan for your future care.



## FDH News & Legal Tidbits

- The new *Consumer Protection Act, 2000* will be proclaimed into force on July 30, 2005.
- The **Ontario Government** recently proposed allowing family members to hold non-voting shares in **professional corporations**. No details or an implementation date were announced but, if passed, this new measure will allow certain professionals greater income-splitting opportunities.
- On May 12, 2005, we were delighted to host **"Business after Hours"** for members of the Oakville Chamber of Commerce at our Oakville office. "Business After Hours" allows local business owners an opportunity to network with other business owners in an informal social setting
- **Debi Sutin** participated as a seminar leader at the Women in Business Symposium held on May 17, 2005 at the Burlington Convention Centre. The full day event was an educational project bringing together senior female high school students and women in business.
- **Debi Sutin** has been invited to join the Editorial Board of *Franchise & Distribution*, a journal devoted to the legal issues of franchise and distribution, which is published quarterly by Federated Press.
- **Lori Brown** spoke on "Cottage Succession Planning" at an event hosted by Scotia McLeod on May 3, 2005.
- **Lori Brown** has joined the Board of Directors of The United Way of Oakville.
- On May 17, 2005, **Lori Brown** delivered presentations on "Powers of Attorney" and "Capacity Issues" on behalf of Equinox Financial Services at the Spring Symposium of the Peel Institute of Applied Finance.
- **Feltmate Delibato Heagle** is a proud sponsor of Burlington's "Lakeside a la Carte", a fundraiser for Rotary charities and The Hamilton Spectator's Summer camp fund.
- Our signage in **Copps Coliseum** has been erected, a visible and permanent sign of our proud support of the **American Hockey League's Hamilton Bulldogs**



*Pam Teckoe, Ian Macmillan (seen hoisting a Scottish power drink) and Jenée Weessies participated in Burlington's Moon In June Run on June 11, 2005 in support of the Burlington Art Centre.*

*Missing from Photo: Ron Weston*

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