

THE FINE PRINT

OCTOBER 2007

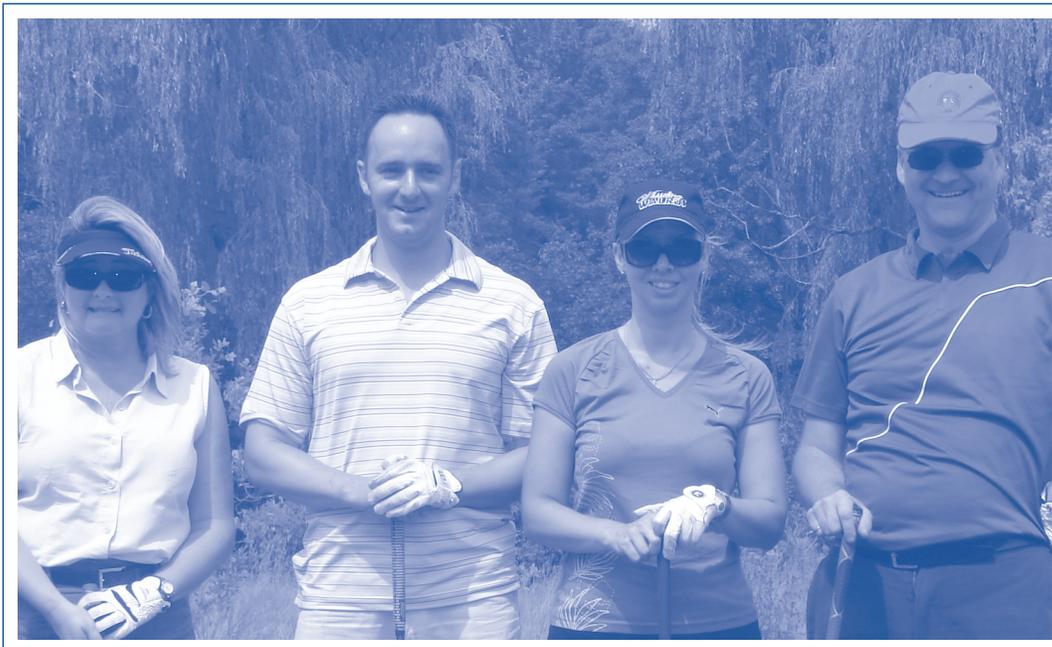
Suite 200, 3600 Billings Court
Burlington, ON L7N 3N6
Telephone: 905.639.8881
Fax: 905.639.8017
Toll Free: 1.800.636.6927

Suite 301, 2010 Winston Park Drive
Oakville, ON L6H 5R7
Telephone: 905.829.3200
Fax: 905.829.3277
Toll Free: 1.800.636.6927

www.fdhlawyers.com

In This Issue...

- Lawyer Profile - Tibor Sarai
- The Elimination of Mandatory Retirement: Its Impact
- Incorporation of the Professional Practice
- FDH News & Legal Tidbits
- InProfile - Telecom Computer



Natalie Duda and Adrianna Dekker, both of Fibrewired Hamilton, joined Christopher Neufeld and CN Rail's Andris Baders at the Hamilton Port Days Golf Tournament



Ron Weston, Paul Gyorgi, Gary Calhoun and Don Harder participated in the Straight from our Hearts Golf Classic



Feltmate Delibato Heagle

L A W Y E R S

Lawyer Profile - Tibor Sarai



Tibor practiced with a Toronto law firm before he joined the Feltmate Delibato Heagle litigation team in the summer of 2003. Tibor carries on a varied commercial litigation practice since his call to the bar in 1989, with an emphasis on shareholder and partnership disputes, oppression remedies, franchise issues, creditor's rights, estate litigation, intellectual property litigation and employment related matters. Tibor is a member of the Civil Litigation, ADR and Intellectual Property sections of the Canadian Bar Association as well as the Advocate's Society and Intellectual Property Institute of Canada.

The Elimination of Mandatory Retirement: Its Impact

By Paul Lewis and Tibor Sarai

On December 12, 2006, the Ontario Government passed legislation eliminating age 65 as the age of mandatory retirement. As a result, employers with employees at or approaching age 65 years are faced with the continuing prospect of making adjustments and planning for the employment of an aging workforce.

With the elimination of mandatory retirement at age 65, employers are now faced with the fact that workers compensation insurance does not cover those over age 65 who suffer workplace injury or illness. It is therefore incumbent upon employers to ensure that appropriate and separate insurance is in place for those employees who are 66 years of age or older. An employer should also review its insurance policies in order to ensure they will provide coverage to employees beyond the age of 65. In many cases, policies exclude coverage for employees who are beyond age 65.

An employer must now also be concerned with Section 5.1 of the Ontario Human Rights Code (the Code), which guarantees equal treatment with respect to employment without discrimination on the grounds of age. With the removal of mandatory retirement, the employer is faced with potentially much higher payouts in the event of termination of employment of an older employee. Pursuant to the Code, an employee cannot be terminated simply because he or she is 65 years of age, unless

the employee is an airline pilot or fighter pilot, or is engaged in some other occupation where the level of performance is justifiably linked to age. Policy grounds may justify mandatory retirement at age 65 in certain other occupations or professions, such as university professors and doctors.

Strategies for Employers

Depending upon the corporate structure and the type of business endeavour, there are advantages and disadvantages associated with an arbitrary retirement age of 65. It is definitely beneficial to having an older, experienced employee, and indeed, given certain skill shortages, some sectors may have no choice but to continue to employ individuals beyond the age of 65. However, an employer must be concerned with the potentially high cost of terminating an employee of age 65 years or older, especially if that employee has been a long service employee (20 years or more). The reasonable severance expectations of such an employee could equal 24 months wages, including bonus and benefits, notwithstanding the receipt of pension benefits to which he or she would additionally be entitled.

In light of the potential for increased costs for severances, increased diligence is now required in the performance management process and an increased requirement to manage disability and insurance issues. This necessitates that an employer survey the landscape with respect to senior employees,

consider whether they are in a position to institute a retirement policy, institute the process by which the retirement policy will be introduced and at what stage of the employee's tenure, whether by employment contract at the beginning of employment (preferably) or at a later stage where a "quiet settlement" might be in order, consider options to suggest to employees near retirement, such as flexible part-time or non-traditional working arrangements, while at all times assuring the employee that the options being presented do not smack of age discrimination.

Without a policy in place, an employer may consider "working notice", which would allow the older worker to work towards his or her end of employment instead of being "packaged out". Of course, there can be a combination of both working notice and a severance package. The latter holds some attraction to both employer and employee, the former not wanting to risk deterioration in performance, and the latter wishing to have some lump sum award to take with him or her as a bonus at the end of his/her working life.

The most important consideration is to be aware of the "65" issue so as not to be caught off-guard. An employer cannot terminate older employees who have reached the age of 65 simply because they have reached what used to be retirement age.

Incorporation of the Professional Practice

By Ron Weston

Until recently, professionals were unable to utilize a corporation to operate their practice and to enjoy many of the benefits derived by other individuals operating non-professional businesses through corporations. Changes to the *Ontario Business Corporations Act* were effected in 2001 which allowed physicians, lawyers, accountants, veterinarians and social workers to incorporate. The technical rules for such incorporations were simple, requiring restrictions only on share ownership (limited to the professional and not family members) and the authorized scope of business for such corporations.

The question that arose at the time of evaluating professional incorporation was whether there were sufficient benefits to make incorporation attractive to the practitioner and which would outweigh the cost of the reorganization and maintenance of a corporate entity. Due to the fact that the professional was not sheltered from malpractice liability nor could there be income splitting to lower earning spouses or family members, the reaction of professionals to the new opportunity was modest. It was perceived that incorporation was only beneficial to a practitioner who was able to leave excess earnings in the corporation which would attract a lower rate of tax as a result of the small business deduction (approximately 20%). Since most professionals tend to draw as

much income out of the business as possible to defray personal and living expenses, very few chose to avail themselves of the corporate form of business association.

Presumably in recognition of the limited appeal of the professional incorporation initiative, the Ontario government expanded the share ownership eligibility requirements in medicine and dental professional corporations to include family members, provided that the shares owned by family members are non-voting. This has created the tax incentives necessary to make corporations attractive as an income splitting device. Hence, spouses and adult children with lesser marginal tax rates can participate in the distributed earnings of professional corporations resulting in a lesser overall tax cost on distributed earnings. Unfortunately, the “kiddie tax” restrictions continue to apply where minors hold shares.

The legal steps necessary to transfer an individual’s professional practice to a professional corporation are relatively straight forward. The value of the individual’s practice must be ascertained and the assets comprising the practice transferred or “rolled into” the professional practice in exchange for shares of equal value. This is a classic freeze technique which then allows the corporation to issue new non-voting equity shares to family members for nominal share subscription prices. If a professional has previously incorporated and

transferred the business assets to the corporation, a simple exchange of shares can be used to freeze the value of those shares with family members free to subscribe for share capital immediately thereafter at a modest share price. Each profession’s governing body has certain restrictions concerning share ownership, corporate names, etc., but these restrictions tend to be consistent with the restrictions imposed by the government.

Now a professional has the opportunity to enjoy most of the typical benefits of incorporation, including limited asset protection from creditors, perpetual existence, income splitting and tax deferral. The major downside is the expense of establishing the corporation and rolling in the existing business assets as well as the ongoing accounting and legal costs associated with maintaining the corporate entity. Whether this opportunity makes business sense to any specific professional is a matter that ought to be discussed between the professional and his or her accounting, tax and legal advisors.

Together with the City of Hamilton, Hamilton International Airport, Hamilton Port Authority, Canadian International Freight Forwarders Association and Supply Chain & Logistics Canada, Feltmate Delibato Heagle will host the **Southwestern Ontario Transportation & Logistics Conference** to be held in March, 2008. For more information contact Christopher Neufeld at cneufeld@fdhlawyers.com or 905-631-3662

FDH News & Legal Tidbits

- **Ron Weston** attended the 2007 Straight from our Hearts Golf Classic at Glen Abbey Golf Club on July 10, 2007. The tournament raises funds annually for the Hospital for Sick Children Foundation – Division of Cardiology.
- **Debi Sutin** has been named to the 2008 edition of *The Best Lawyers In Canada* in the specialty of Franchise Law.
- **James Tuck** was elected President of Burlington’s Sound of Music Festival for a two-year term. The Festival is held annually in June on the City’s Downtown Waterfront and has been voted one of the Top 50 Festivals in Ontario for the 6th year in a row. The 2008 Festival will run from June 12th to 15th
- **Feltmate Delibato Heagle** was a hole sponsor at the 9th Annual Carego Golf Tournament, attended by **Miles Feltmate** at Willow Valley Golf Club on September 14, 2007. Proceeds raised from the tournament were donated to the United Way “From Here to the Bay” Program
- **Debi Sutin** has been invited to speak at the “How to Franchise Your Business Seminar” hosted by the Canadian Franchise Association on Wednesday October 24, 2007.
- **Feltmate Delibato Heagle** was a lead sponsor at the YMCA-Brady Financial Golf Tournament, held on September 12, 2007. **Paul Lewis** and **Brian Heagle** participated in the tournament which raised more than \$60,000 for the Y’s “Strong Kids” program.
- **Debi Sutin** will lead a workshop on Alternative Franchise Expansion Models at the Ontario Bar Association’s 7th Annual Franchise Law Conference, to be held on November 15, 2007.
- **Christopher Neufeld** has been elected to the Board of Directors of Burlington’s Sound of Music Festival. He will serve as Chair for Special Projects and Legal Counsel for the Festival.

BURLINGTON OFFICE

Miles Feltmate - Managing Partner
Corporate/Commercial
Direct Line: 905-631-3653

Fulvio J. Delibato - Real Estate, Wills,
Family Law
Direct Line: 905-631-3644

Ronald Weston - Corporate/Commercial,
Real Estate
Direct Line: 905-631-3656

Brian Heagle - Corporate/Commercial
Direct Line: 905-631-3642

Paul Lewis - Litigation
Direct Line: 905-631-3650

James Tuck - Corporate/Commercial,
Litigation, Real Estate
Direct Line: 905-631-3646

Debi Sutin - Corporate/Commercial,
Franchise Law
Direct Line: 905-631-3643

Christopher Neufeld - Corporate/Commercial,
Finance and Transportation
Direct Line: 905-631-3662

Paul Lawson - Corporate/Commercial, Real Estate
Direct Line: 905-631-3663

OAKVILLE OFFICE

Tibor Sarai - Litigation
Direct Line: 905-287-2205

Cam Neil - Corporate/Commercial, Litigation
Direct Line: 905-287-2200

Lori K. Brown - Wills and Estate Planning
Direct Line: 905-287-2206

COUNSEL

Gordon Morton Q.C. - Family Law
Telephone: 905-522-8147

Peter Welsh - Corporate/Commercial
Telephone: 905-337-3121

Henry J. Krupa - Environmental,
Energy & Government Relations
Direct Line: 905-287-2207

Pam Teckoe - Director Of Administration
Direct Line: 905-631-3654

If you would prefer to receive The Fine Print in electronic format, please contact Pam Teckoe at pteckoe@fdhlawyers.com



Paul Lewis and Brian Heagle teamed up with Wayne Ruttle of AdFlow Networks and Bruce Heagle of NSBL International at the YMCA-Brady Financial Golf Tournament