



*Feltmate Delibato Heagle was a proud sponsor of Burlington's 27th annual Sound of Music Festival held on the City's Downtown Waterfront in June. The Festival has been voted one of the Top 50 Festivals in Ontario for the 6th year in a row.*

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## Franchise Legislation Extends to PEI

Prince Edward Island is the most recent province to require pre-sale disclosure in the sale of franchises. Until recently, only the Provinces of Alberta and Ontario had franchise legislation, requiring, among other things, that a franchisor provide a prospective franchisee with a disclosure document prior to entering into a franchise agreement.

Although the PEI legislation came into force on July 1, 2006, those provisions relating to the delivery of a disclosure document will not come into force until on January 1, 2007. At that time franchisors granting a franchise in PEI will be required to provide a prospective franchisee with a disclosure document prior to the franchisee signing any agreement related to the franchise or paying any money to the franchisor.

The Province of New Brunswick may follow PEI's lead on the east coast. The consultation period on Bill 6, the *Franchises Act* (New Brunswick) was recently closed and a final draft of the proposed legislation is expected to be introduced during the fall session of the New Brunswick legislature.



Feltmate Delibato Heagle

L A W Y E R S

**Lawyer Profile - Paul G. Lewis**



Paul joined Feltmate, Delibato, Heagle in July 1998. He is a member of the firm’s Litigation Department where he practices general commercial litigation and specializes in Employment Law litigation and Human rights.

Paul appears regularly before the Superior Court of Justice, the Federal Court, the Ontario Human Rights Commission and the Ministry of Labour.

**Accommodating Disabilities In The Workplace**

by Paul G. Lewis

Under the Ontario Human Rights Code, everyone has the right to be free from discrimination because of handicap in the social areas of employment, services, goods, facilities, housing, contracts, and membership in trade and vocational associations. This means that persons with disabilities have the right to equal treatment, including the right to accessible workplaces, public transit, health services, restaurants, etc.

The right to be accommodated, and the corresponding duty of an employer to accommodate, are now well established. Accommodation is a fundamental and integral part of the right to equal treatment. The duty to accommodate means that the conditions of the workplace, or the functions of a job, may have to be changed. This requires that an employer be aware of the standards for accommodation. In assuming what should be a pro-active approach to accommodating disability, employers should keep in mind that the needs of persons with disabilities must be accommodated in the manner that most respects their dignity, that each employee has unique needs, and that it is important to consult the person who will receive the accommodation to ensure that adequate accommodation is made available.

The accommodation process is a shared responsibility. Everyone involved should cooperatively engage in the process, share information, and avail themselves of potential accommodation solutions. An individual with a disability is required to:

- Advise their employer of the disability;
- Make his or her needs known to the best of their ability, in order that the employer may make the requested accommodations;

- Provide information regarding relevant restrictions or limitations, including information from health care professionals;
- Participate in discussions regarding possible accommodation solutions;
- Co-operate with any experts whose assistance is required to manage the accommodation process;
- Meet agreed upon job performance and job standards once accommodation has been provided;
- Work with the employer on an ongoing basis to manage the accommodation process;

The employer is required to:

- Accept the employee’s request for accommodation in good faith;
- Obtain expert opinion or advice where needed;
- Take an active role in ensuring that alternate approaches to accommodation are investigated;
- Grant accommodation requests in a timely manner;
- Maintain confidentiality.

**Terminating or Disciplining an Employee with a Disability**

Before terminating or sanctioning an employee for “unacceptable behaviour”, an employer might first consider whether the actions of the employee are caused by a disability, especially where the employer is aware, or perceives that, the employee has a disability. Employers are under an obligation to inform all employees that a disability related-assessment or accommodation can be provided as an option to address performance issues. Progressive performance management and discipline as well as employee assistance programs ensure

that all employees have a range of opportunities to address performance issues on an individualized basis before sanctions or termination are considered.

**Policy Considerations**

Employers are responsible for dealing effectively, quickly and fairly with situations involving claims of harassment or discrimination. An employer can be held liable where they or staff members in authority do not act to end discrimination or harassment in the workplace. When an act of harassment or discrimination is ignored, there are costs in terms of low morale, high stress, damage to professional reputations, and employee absences. Developing internal anti-discrimination policies and procedures to resolve complaints as part of a broad program to build a harassment free and a discrimination free environment offers many benefits. Dealing promptly with these issues saves time and money.

Employers must develop the necessary strategies to avoid and resolve human rights issues that arise in the workplace. This strategy includes an anti-harassment or anti-discrimination policy, disability accommodation policies, a complaint resolution procedure, and on-going educational programs for employees.

## The Importance of Having Employment Contracts Before Economic Problems Arise

by Christopher Neufeld

Well-drafted employment contracts can be very important in securing the future of your company when economic difficulties arise, i.e. industrial downturn, market shift, loss of a major customer/contract. At this critical juncture, non-unionized companies frequently seek to downsize their workforce, even temporarily, yet are shocked to learn that they are legally unable to take the necessary remedial action without taking a substantial financial hit – that is unless they have previously implemented some basic legal strategies to weather these challenging economic times.

Ensuring the survival of your business begins during the ‘good times’ with written employment contracts that deal with the possibility of ‘bad times’ in the future. The importance of legally compliant employment contracts during a downsizing cannot be understated, as the following examples demonstrate:

**Lay-Offs.** In the absence of an employment contract, temporarily laying off an employee can leave your company vulnerable to a constructive dismissal charge. Should the laid off employee not return to their job, even if you want them back, you could be responsible for as much as 18 to 24 months of salary.

**Termination.** The terms governing termination need to be clearly set out in an employment contract and be legally compliant, should you seek to take advantage of the Ontario Employment Standards Act’s permitted termination on 8 weeks notice (or less) (The statutory notice period may be greater than 8 weeks in certain circumstances, such as large-scale lay-offs of 50 or more employees where the employer’s payroll exceeds \$2.5 million). Without an up-to-date employment

contract, an employer could be responsible, under the common law, to provide an extended notice period and be responsible for as much as 18 to 24 months of salary.

**Demotions.** Not all promotions are successful, as previously capable employees can become a serious liability when they cannot cope with new responsibilities and job demands. In the absence of an employment contract that addresses that specific promotion, an employer could be hurt by having the wrong person responsible for such an important position. Only with the appropriate contract in place can an employer take the necessary corrective action.

**Best Person for the Job.** There is a commonly misplaced belief of entitlement based upon length of service, forcing far too many companies to increase responsibilities and compensation based on one’s length of service. Unfortunately this hinders many companies from getting the best person for the job. By having employment contracts with all employees, an employer can more easily get the best person for the job, while reducing their legal exposure from mediocre employees whom the employer appropriately chose to pass-over.

A well drafted employment contract that establishes the rights and obligations between employer and employee, is a legally binding contract that will govern the employment relationship, including the employer’s ability to demote, hold-back, lay-off and terminate the contracting employee. These are important powers, which can be critical to a company’s survival when faced with economic difficulties.

### Legal Alert: Mandatory Retirement is Prohibited as of December 12, 2006

Imposing mandatory retirement at age sixty-five (65) will not be permitted after December 12, 2006. Any existing contract that requires mandatory retirement after that date is not enforceable. Only in rare circumstances, where the nature of the job requires an earlier retirement (i.e., firefighters), will the new law make an exception to the rule.

It is still permissible to offer voluntary early retirement, by having the individual accept a legally permissible incentive to depart at an earlier age. Employer obligations to provide certain benefits and/or benefits may still be terminated at age 65. As such, specific legal counsel is important to avoid a human rights violation, while securing the appropriate staffing of your company. Not only should employment contracts be reviewed and updated, pension and group insurance plans may require revisions (compliance with ESA 2000 Benefit Regulations is paramount).

**FDH News & Legal Tidbits**



- **Brian Heagle** announced in June that he will be a candidate to represent Burlington as a Member of the Provincial Parliament. The next provincial election is scheduled to occur in October 2007 though a by-election is anticipated later this year.

- **Debi Sutin** will be a speaker at the seminar series hosted by the Canadian Franchise Association to be held at the Franchise Show on October 29, 2006.
- **Christopher Neufeld** was elected by the Executive of the Ontario Bar Association to serve as the Regional Coordinator for Business Law for the Province of Ontario.
- Feltmate Delibato Heagle fielded a team of 11 for the Terry Fox Run which was held on September 17th in Burlington. The team raised more than \$ 1,000 for cancer research. Participants included **Emily Henneberry, Anna Veghelyi, Brian Heagle, Kathy Hall, Rachel Dunlop, Pam Teckoe, Chris Neufeld, Katie Teckoe, Katharine Cocklin, Cam Neil and Monica Befu.**
- Feltmate Delibato Heagle was once again a Platinum sponsor at the **5th annual Brady Financial Group-YMCA of Hamilton-Burlington** golf tournament. The tournament has raised over \$200,000 in support of the local “Strong Kids” campaign, providing children and youth with the opportunity to participate in YMCA programs, regardless of their ability to pay the fees.



*Feltmate Delibato Heagle was again proud to sponsor the Mississauga Hurricanes Bantam Girls Fastpitch team. The team took the silver medal at the Provincial Championships and then travelled to New Brunswick where they placed 4th in the Eastern Canadian Championships!*

If you would prefer to receive The Fine Print in electronic format, please contact Jenee Weessies at [jweessies@fdhlawyers.com](mailto:jweessies@fdhlawyers.com)

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