



# THE FINE PRINT



*Tibor Sarai is pictured with Burlington Mayor Rob MacIsaac and Scott McGillvray of Mediterraneo Restaurant which hosted a dinner event in support of Aldershot's Maplehurst Project.*

*Photo Credit: Barrie Erskine The Burlington Post.*



*Anna Veghelyi, bookkeeper with Feltmate Delibato Heagle, shortly after her hair was cut by John Yokarinis of Wigsville in Burlington. Anna donated her beautiful blonde hair to be used in the manufacture of wigs for cancer patients.*

## **We Want Your Feedback!**

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**Feltmate Delibato Heagle**

L A W Y E R S

**Lawyer Profile - Henry Krupa**



Henry has joined the firm as Counsel for Environmental, Energy and Government Relations. Most recently the Director of Legal Services for the Ministries of the Environment and Energy, Henry played a leading role in the Province’s responses to the Walkerton water crisis, the Walkerton Public Inquiry, Adams Mine and the implementation of the Electricity Act, 1998 and Electricity Restructuring Act, 2004.

Henry is available to advise clients on all matters relating to environmental law, municipal and planning law, natural resources, energy and utilities law and regulatory and government relations.

**A New Lease on Life for Contaminated Properties**

*By Henry Krupa*

The enactment of the *Brownfields Statute Law Amendment Act* in 2001 heralded Ontario’s new approach to assisting and promoting the development of neglected properties. The last part of this scheme became effective on October 1, 2005, with new duties imposed on landowners and municipal staff who review and issue building permits.

“Brownfields” are properties that are under-used or held-back from redevelopment by environmental contamination. An estimated 10%-15% of industrial sites located in the Toronto and Hamilton area form part of Ontario’s known Brownfield inventory. Brownfields can also occur in small or rural communities, where contamination from leaking storage tanks, vehicle repairs and poor pesticide and waste disposal practices may have rendered properties unsuitable for immediate redevelopment.

While Brownfields may be dysfunctional environmentally, many do offer excellent opportunities for redevelopment in that they are generally located near existing infrastructure, facilities, transportation and downtown cores or large markets,

Ontario’s new approach to Brownfields attempts to address a number of issues associated with contaminated properties. The following is a brief overview of the new approach to Brownfields development.

First, protection from environmental liability is provided to municipalities, secured creditors, trustees-in-bankruptcy, receivers

and others where these parties have assumed responsibility for a property arising from actions taken by them to merely manage the property or an insolvent estate or realize on their security. Previously, it was common for these properties to be abandoned in order to avoid liability for restoration.

Second, a qualified (not unlimited) protection from most administrative orders issued by the Ministry of the Environment (MOE) is available for landowners, future parties that acquire an interest in the property and those involved in environmental site assessments and remediation, in return for satisfying mandatory remediation standards and making the information available to the public. The owner and a “qualified person” must sign a Record of Site Condition (RSC) that confirms that the property is clean enough to meet the regulated standards for the proposed use and register the RSC on the Environmental Site Registry. Filing a RSC is mandatory for changes in land use whether or not the property is contaminated and is triggered by redevelopment to a more sensitive land use, such as industrial to commercial or commercial to residential, or if the property was used for high-risk uses such as bulk liquid dispensing, motor vehicle repairs or dry cleaning even if redevelopment does not change the land use category.

RSC filing is voluntary if an existing use is being maintained or the change in use involves a less stringent remediation standard, with the exceptions previously noted. However, a property owner may consider

voluntarily compliance, even when faced with the consequences - the costs and the potential liability arising from making the RSC-based public representations - in order to get the benefit of some immunity from administrative orders and to enhance the perceived value of the property. Lenders and purchasers may also require a voluntary RSC filing be made.

Third, the scheme attempts to address the fact that some properties are prohibitively expensive to remediate to a “clean” standard. “Certificates of Property Use” (CPU) are available in cases of contamination-based limitations to a property use where the assessment, clean-up and development and future use of the property is based on a “Site Specific Risk Assessment” rather than the complete treatment or removal of the contamination. Although seemingly beneficial, CPUs are subject to time-consuming, intensive consultations with the public and the municipality and should not be seen as a means of avoiding the costs of a full clean-up. Further, a number of stakeholders – neighbors, the general public with an interest in the development and the municipality – can seek to appeal the CPU once it is issued. Accordingly, it is important for the landowner to consult with his or her professional advisors early in the preparation of the risk assessment to identify and mitigate stakeholder concerns.

Fourth, clean-up standards are now regulated. Soil, groundwater and sediment standards

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## Protecting Your Business From Departing Employees

by Debi M. Sutin

Employers are legitimately concerned with the consequences surrounding the departure of a valued employee, whether the departure is voluntary or due to termination of employment.

We are frequently asked to prepare non-competition agreements to be signed by employees, as a condition of their employment, and particularly for employees who have direct contact with their employer's customers or suppliers. Is there something that is of greater value to an employer?

It is a long-standing principle of law that a blanket restraint on freedom to compete is unenforceable. However, courts in Canada are willing to enforce a restriction on competition by a seller of a business so long as the restriction is reasonable, both in time and with respect to the restricted territory. The courts are less willing to enforce such a restriction made between an employer and employee on the grounds that other restrictions are available to adequately protect an employer's interests. In fact, the courts are unwilling to enforce a non-competitive covenant between an employer and employee except in the rarest of circumstances.

The decision of the Court of Appeal for Ontario in *Lyons v. Multari* confirmed the law regarding the enforceability of non-competition covenants between employers and employees. Both Drs. Multari and Lyons were oral surgeons practising in association in the City of Windsor. The dentists' very simple hand-written agreement setting out the terms of their association included the clause "Protective covenant 3 years – 5 miles". Although the Court acknowledged the importance of freedom of contract, particularly between parties of equal bargaining strength, it nonetheless struck out

the non-competition covenant as unnecessary. The Court held that a non-solicitation clause would have been sufficient to protect Dr. Lyons' legitimate interest in protecting his patients and his referring dentists. In rendering its decision, the Court followed the leading Canadian case on non-competition clauses in an employment context, in which the Supreme Court of Canada stated:

*"Although blanket restraints on freedom to compete are generally held unenforceable, the courts have recognized and afforded reasonable protection to trade secrets, confidential information and trade connections of the employer".*

What then can employers do to protect their trade secrets and confidential information?

1. Non-Solicitation – The Court in *Lyons v. Multari* concluded that "as a general rule, non-solicitation clauses are permissible". Accordingly, employers are well advised to obtain the written agreement of their employees, particularly those that have direct contact with the customers, not to solicit customers of its former employer.

Notwithstanding that it may be difficult for an employer to prove that a former employee actively solicited the customers, rather than the customers initiating the contact, the existence of such a covenant may allow the employer an opportunity to re-establish its contact with the customers and ensure that they remain loyal to the business of the employer rather than follow the departed employee.

2. Confidentiality – Even without a written agreement, employees are obliged to maintain the confidentiality of the trade secrets of their employers. Similarly, employees have a duty to be loyal and faithful to their employer, even in the absence of a contract. If you, nonetheless, wish to reduce these covenants to writing,

they must be drafted so that they are not less restrictive than what you are entitled to at law.

3. Fiduciary Duty – Senior management employees have a greater obligation, at law, to their employer than do employers who are not the decision makers. This duty prohibits employees from soliciting customers of their former employer and from taking advantage of opportunities that arose through the course of their employment. Again, this duty exists at law and not from a written agreement.

Employers should seek the advice of their legal counsel to ensure that their business and proprietary interests are protected well before the loss of a valuable employee.

**FDH News & Legal Tidbits**

- We are pleased to announce that **Henry Krupa** has joined our firm as Counsel. Henry's practice areas include environmental law, municipal and planning law, natural resources, energy and utilities law and regulatory and government relations. Henry will work out of the firm's Oakville office.
- We welcome articling student, **Paul Lawson**, who will work out of our Burlington office.
- On February 16, 2006, **Paul Lewis** addressed the Burlington Dental Academy on matters relating to employment law and human rights.
- **Debi Sutin** will serve as Co-Chair of the Spring/Summer Dinner Program sponsored by the Ontario Bar Association's Joint Subcommittee on Franchising. The program, "Mediation and Arbitration in Franchising" will held on June 8, 2006.
- **Markus Cohen** has been appointed Chair of the Ontario Bar Association's 6th Annual Franchise Law Conference to be held November 16, 2006;
- Feltmate Delibato Heagle is a Ruby Sponsor of the **Joseph Brant Memorial Hospital's 6<sup>th</sup> annual Crystal Ball** to be held on April 8, 2006 at the Burlington Convention Centre.
- Feltmate Delibato Heagle is a Local Sponsor of **Comic Vision** supporting the **Foundation Fighting Blindness** to be held on May 3, 2006 at the Oakville Conference Centre
- Feltmate Delibato Heagle was a Corporate Table Sponsor for the **Carpenter Hospice 2006 Winter Wonderland Gala** which was held on February 11, 2006 at the Burlington Convention Centre.

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... tied to the proposed property use are now incorporated into the Record of Site Condition regulation.

Finally, primary responsibility for enforcement falls on the municipalities through the issuance of building permits. Building permits cannot be issued without a registered RSC and cannot contravene restrictions on property use or construction that are detailed in the CPU.

Ontario's new legal framework for Brownfields' development seeks to provide transparency, certainty, and selective qualified immunities, as well as a scheme to govern the relationship between the community – landowners, developers, municipalities, lenders – and the MOE to assist and promote property redevelopment. Current and prospective landowners should consult their legal counsel to advise on the new legal requirements and the risks and benefits of voluntary compliance.

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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