

Estate Freezes for Family Business Owners

An estate freeze can make it easier for a business owner to pass on his or her company to the next generation or to an employee group. This article describes the general features of estate freezes, but every situation is different. Please contact us for advice on specific circumstances.

The aim of a freeze is to fix the value of appreciating shares of the operating company for capital gains purposes at a point in time. This is accomplished by setting up a holding company to buy the common shares of the operating company. The holding company issues preference shares to the original business owner equal to the value of the common shares of the operating company. Common shares in the holding company are issued to the individual(s) who will eventually carry on the business. Any further appreciation in the value of shares of the operating company accrues to the common shareholders of the holding company and is taxable as a capital gain when the common shares are sold.

When the original owner dies, his or her estate is responsible for the tax on the preference shares (the difference between the owner's cost base and the sale price to the holding company). Typically, the company buys the preference shares from the estate to fund the tax payment.



Common issues with estate freezes include:

Choosing Assets to Freeze: *The value of the transferred company is fixed at the time of sale, and no tax relief is available if the value later declines. So it's important to transfer assets that have a very high probability of continuing to appreciate. Land and buildings are excellent candidates; operating companies with few hard assets are not.*

Assigning Values: *The Canada Revenue Agency will want a substantiation that the value assigned to the common shares of the operating company is reasonable. For this reason, good accounting advice is essential, both to set the value and to document the reasoning behind it.*

Shareholders' Agreements: *Although the point of an estate freeze is to manage and defer taxes, the effect is to transfer ownership of the business. Well-written agreements among the preferred shareholder and the common shareholder(s) are needed.*

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Alexandra Manthorpe joins HHS as student-at-law



Alexandra Manthorpe has joined Houser Henry as an articling student after completing her B.A. with first class honours at Mount Allison University and her J.D.

at Queen's University. She worked with the firm last summer.

"When I was asked to return to do my articles, I was excited to accept," Alexandra said. "The senior lawyers are knowledgeable and friendly, and I'm involved in a wide range of files with frequent client contact. I feel part of the team."

Alexandra spent a year teaching English in Japan and has also lived in Germany, where she learned to speak German fluently. She enjoys sports, including ice hockey, and playing the piano in her free time.

Not-so-Simple Severances

Property owners sever land for many reasons, often to obtain separate financing for the severed properties or for development purposes. The mechanics of severances are straightforward. Survey the property, get the municipal planning department's blessing, get your neighbours and local councillor onside and go to the Committee of Adjustment.

But sometimes a severance becomes as complex as the project itself. For example, an owner may want to divide a property which contains a number of buildings with multiple uses and integrated

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Employment Law and the HR Professional

Companies often rely on human resources managers to deal with employment law issues. This creates a dilemma for HR people; constantly consulting their employment lawyer is expensive—but making a bad call can result in much more costly legal action.

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HR Professionals Should Call a Lawyer**

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Rooftop solar a new revenue source

Owners of warehouses and large commercial and retail buildings can use their rooftops to generate solar energy for sale under Ontario's new Feed-in Tariff (FIT) Program, provided by the Ontario Power Authority. Through the FIT program, generators of solar energy will be paid a fixed amount for a fixed period of time. The price paid for the energy will depend on the type and amount of energy produced. Ideal rooftops are flat, exposed to sun, 30,000 square feet or more, and physically capable of supporting the equipment.

One option for building owners is to lease their rooftops to third party solar developers who manage all permitting and installation and sell the power to the Ontario Power Authority. Owners choosing this option will need to review their existing lease, mortgage agreements and insurance policies, as well as the developer's rooftop lease contract.

Building owners who choose to develop and own a solar installation themselves will face a longer list of items, many of which will benefit from legal advice.

For more on the FIT program, go to <http://fit.power-authority.on.ca/>. For advice on specific client requirements, please contact Patrick Anderson at panderson@houserhenry.com.



Employment Law *cont'd...*

Fortunately there are steps HR professionals can take to minimize both legal costs and legal risks.

- **Stay current** with basic employment law, through journals, courses and on-line research, to provide context for decisions about engaging counsel;
- **Keep detailed notes, chronologies and all documents** relating to any evolving situation that may lead to a claim against the company; and
- **Develop standard employment contracts or checklists** to guide outside counsel in drafting new agreements.

When should you call a lawyer?

That's always a judgement call—but we've developed *10 HR Situations When HR Professionals Should Call a Lawyer* as a guide. Contact Roger Nainby at rnainby@houserhenry.com to receive your copy.

Estate Freezes *cont'd...*

Retirement Planning: Establishing an individual pension plan or retirement compensation arrangement for the owner will preserve peace of mind if the business becomes unable to pay amounts intended to fund the owner's retirement.

Funding the Tax Liability: A freeze does not eliminate taxes. It can be unwise to assume the holding company will be able to buy back the preferred shares when the original owner dies and his or her tax becomes payable. Provisions to fund the future tax liability make good sense when planning a freeze.

Houser Henry has advised clients on a number of estate freezes. If an estate freeze seems appropriate for your situation, please contact Bob Henry at rhenry@houserhenry.com

Not-so-Simple Severances *cont'd...*



facilities. A recent project required the severing of a downtown property containing residential apartment buildings, commercial and residential freehold properties, and vacant land for development. All of these properties were intertwined. They shared a number of facilities (driveways, parking, and recreational facilities) which required careful planning to ensure the severed properties were given all the easement rights they needed to function independently.

Severances are also done to allow one piece of land to serve multiple purposes. A recent cottage country project required the severing of surface rights for the purposes of a driving range for a neighbouring golf course. The below surface rights were used to house a large septic system for a timeshare development. Further development of the timeshare property will require future severances to create easements to allow neighbouring properties access to the beach and lake.

Multiple uses and easements, such as in the examples above, create complex webs of "what ifs" for the future rights of owners and tenants. Successful severances are durable—they anticipate and avoid potential sources of future conflicts.

For more information, please contact Patrick Anderson at panderson@houserhenry.com or Katherine Grossi at kgrossi@houserhenry.com.

CONTACT INFORMATION:

If you would like more information about this or any area of estates law, or if you would like to discuss your particular situation, please contact us:

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This update is designed to supply brief details of recent court decisions and other developments of interest, with some commentary. The summary should not be relied upon as legal advice. We encourage you to speak with a lawyer at Houser, Henry & Syron LLP for advice about your particular situation.

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