



# STHI LEGAL NOTES

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BARRISTERS & SOLICITORS · TRADEMARK AGENTS

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## Season's Greetings & Happy New Year

With the holiday season upon us, we thought we would provide you with a variety of information we think you will find helpful, particularly at this time of the year. There is information about gift cards, charities, vacation and your responsibilities as a host.

In addition, we talk about the potential implications of

putting title in your home into one spouse's name alone as well as the impact of generous financial gifts.

Regardless of what tradition you celebrate we send you cheer and good will and wish you health and happiness in the new year. ☺

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## The Rules of Shopping

Retail sales skyrocket at this time of year as we all rush to buy gifts and capitalize on deals. To make your holiday shopping as surprise free as possible we have prepared a list of helpful information to read.

### Gift Cards

The general rule in Ontario is that gift cards do not have an expiry date. However, if the gift card is for one specific service, for example, a gift certificate for a massage at a spa, it can have an expiry date and lose its value if not used. If you purchase a shopping mall gift card be aware that the mall can charge an activation fee up to \$1.50 at the time the card is purchased and that after 15 months a dormancy fee up to a maximum of \$2.50 per month can be charged.

### Buying on Credit

Many stores have deals to buy now and pay later. In such cases, the seller must provide the customer with a written statement detailing all financing charges as well as the annual percentage rate of the credit transaction. Any extra

charges for failing to make the payments at the designated time must also be explained in writing. Be sure you understand what your obligations are, since if you miss even a single payment all the interest you thought you saved may become due.

### Memberships

Is one of your New Year's resolutions to join a gym, learn to dance, or enroll in a weight loss program? If so, you should know that:

- You cannot be required to sign a contract for longer than 12 months.
- You must be given the option to pay your membership fees monthly, although you can be charged up to 25% more.
- You have a 10-day cooling off period to cancel your membership and get your money back.

### Unsolicited Goods

If you receive goods in the mail that you did not order, you do not have to accept them or pay for them. You can use them as you see fit or even dispose of them.

### Returns

As a matter of good customer relations, stores will accept returns or exchanges. However, the law does not require stores to do this. Therefore, it is important that you ask the store about its policy for returns, refunds and final sales before you complete the purchase.

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*The articles in **STHI Legal Notes** are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.*

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# Hosting a Party: What is Your Responsibility?

'Tis the season for cocktail parties, open houses and holiday get-togethers. If you host such a gathering at your home are you responsible for the actions of your guests who drink and drive?

A social host\* is someone who serves alcohol at his or her home, whether it is a dinner party or a BYOB party. The issue of whether a person in this scenario is responsible for the actions of a guest was addressed several years ago by the Supreme Court of Canada in the case of *Childs et. al. v. Desormeaux et. al.*

The social hosts in that case threw a New Year's Eve BYOB party at their home. At about 1:30 a.m., shortly after leaving the party, one of the guest's was involved in a head on collision. A passenger in the other vehicle was killed and another was left a paraplegic. At the time of the accident, the guest's blood alcohol was more than double the legal limit. The passenger who was paralysed sued the hosts of the party.

The Supreme Court of Canada ruled that the hosts were not liable for the actions of their guest. The Court concluded that the injury to the passenger in the other car was not reasonably foreseeable and that there was no positive legal duty on the hosts to act.

The Chief Justice, on behalf of the unanimous Court, wrote: "A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct."

The Court also stated that "...The host creates a place where people can meet, visit and imbibe alcohol, whether served on the premises or supplied by the guest. All this falls within accepted parameters of non-dangerous conduct... Suffice it to say that hosting a party where alcohol is served, without more, does not suggest the creation or exacerbation of risk of the level required to impose a duty of care on the host to members of the public who may be affected by a guest's conduct."

While this is the law as of today, it does not mean that morally there are not things you can do to try and keep everyone safe. The LCBO offers a few practical suggestions.

- Having a plan is important in making sure your guests have a safe and enjoyable time.
- Provide low-alcohol and alcohol-free drinks.
- Promote the use of designated drivers and keep cash and telephone numbers on hand for taxis.
- Encourage guests to leave their cars at home.
- Stop serving alcohol at least an hour before the party is over.
- Have food available to avoid drinking on an empty stomach. 📁

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\*This article deals strictly with social hosts. The rules that apply to employers as well as commercial hosts, such as bars and restaurants, are quite different with respect to liability.

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## What is a Gift?

### The Facts

Michael and Susan married in 1988 and separated in 2009. The couple purchased their current home in 2002, placing title to the home in Susan's name alone to protect it from potential claims by creditors arising out of Michael's employment as an investment advisor.

Throughout the marriage, Michael's parents provided substantial financial gifts for Michael's businesses and for the children's private school and camps.

Following the parties' break up both title to the home and the parents' financial gifts became key in settling the parties' affairs.

### The Matrimonial Home

The first issue was whether Michael was entitled to share in

the increased value of the matrimonial home following the separation. Susan argued that, since she was the sole registered owner of the matrimonial home, she alone was entitled to any post-separation increase in its value.

To determine whether Michael had gifted his interest in the home to Susan, the court had to consider whether he made a voluntary and gratuitous transfer, something the evidence of the parties did not in fact support. During her testimony, Susan admitted that the home was put in her name to protect it from potential claims by creditors. She further testified that it was the couple's understanding that no matter how the family held assets, their value should be shared equally, including that of the matrimonial home.

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## GIFT continued from page 2

During his testimony, Michael agreed that title had been placed in Susan's name to make her happy as she was worried about potential creditors.

The court concluded there was no finding of a clear intention to gift Michael's share of the matrimonial home to Susan. Therefore, as a beneficial owner of a one-half interest in the matrimonial home he was entitled to share in any post-separation increase in value.

### Michael's Income

The other major issue in this case was the amount of Michael's income for the purposes of child and spousal support. Specifically, the question was whether the ongoing financial gifts from his parents should be considered income.

The presumption with respect to a spouse's income for support purposes is that it is the amount entered by the spouse at line 150 of his or her income tax return. However, both the Federal and Ontario Child Support Guidelines allow a court to impute "such amount of income to a spouse as it considers appropriate in the circumstances". For instance, a spouse who is intentionally under-employed or who has unreasonably deducted expenses from his or her income. The Guidelines do not make mention of monetary gifts from parents.

The Court found that the gifts to Michael from his parents were to be considered in the determination of his income.

The trial judge had found that he had always received money from his parents and that he would likely continue to receive such gifts. Between 1990 and 2009, he received at least \$986,000 from his parents. In the five years since the separation he had received at least \$173,500.

Michael argued that imputing income on the basis of these monetary gifts had the effect of shifting the burden of sustaining Susan and his youngest child's lifestyle onto his mother, who has no legal obligation to support either. The Court disagreed, finding that imputing the gifts to his income simply reflected Michael's actual past revenues and his likely financial future. The Court acknowledged that if the situation changes it would remain open to Michael to request an adjustment accordingly.

Finances in a relationship are tricky at the best of times. When a break up occurs it can become a serious source of conflict. Our lawyers can help you to navigate these waters before, during and after your relationship. ☞

## SHOPPING continued from page 1

### The Electronic Market Place

In many ways shopping on the Internet is like shopping at a mall minus the parking hassles. The number one rule to remember is that when you click "complete purchase" you have entered into a binding contract. The electronic store, like its bricks and mortar counterpart, is entitled to create its own return and refund policies. Be sure to read the site's terms and conditions, and print all contracts and receipts.

### Charities

While there are many fine organizations doing important charitable work, there are also those who prey on generous donors. Unfortunately, these phony charities seem to spring up during the Christmas season.

Before agreeing to donate, you should carefully look at the charity's full name, since bogus organizations will often use names that are similar to the names of legitimate charities.

Be aware that one of the most common scams is a phone call telling you that you gave last year and hoping you will be generous again this holiday season.

### Complaints

If you have a complaint about a product or service you have purchased, do not be afraid to stand up for yourself. The following are a few tips for getting a satisfactory result.

- Talk to someone who has the authority to solve your problem. Often neither the cashier nor the clerk in customer service has the requisite authority to give you what you want.
- Be clear about how your complaint can be solved. Do you want the item replaced or repaired or do you want a refund?
- Write a letter of complaint to the store manager or owner.
- If your complaint is related to an unfair practice, such as deceptive promotions and sales pitches, contact the Ontario Ministry of Government and Consumer Services.
- Keep track of when and who you have spoken to.
- Be respectful, but be firm. ☞

Effective January 1, 2016

**Drivers must yield the whole roadway to pedestrians at school crossings and pedestrian crossovers.**

# The Ins and Outs of Vacation Time

*The ant is knowing and wise, but he doesn't know enough to take a vacation.*

Clarence Day

Unlike that ant, many of us look forward with great anticipation to our annual vacation. While the law requires that employers allow their employees vacation time, there are rules concerning vacation time that might surprise you.

## Two Weeks Per Year

Ontario's *Employment Standards Act* requires that employers give employees two weeks of vacation every year once they have completed their first full year of employment. The Act does not make any provision for an increase to that two weeks based on the length of employment. Having said this, parties to an employment contract are entitled to negotiate for a greater benefit.

## Vacation Pay

Vacation pay begins to accrue with your first day of work. The minimum amount of vacation pay is four per cent of gross wages. If in addition to your base salary, you earn commission, non-discretionary bonuses, overtime, pay, holiday pay, allowances for room and board, etc. vacation pay will also be calculated using these amounts. Tips, discretionary bonuses and expenses do not attract vacation pay.

Employers can choose how to pay this money out including by adding the percentage to every pay cheque or paying it out when the employee is actually taking the vacation.

## Employer's Say In Your Vacation

An employer cannot tell you how to spend your vacation time; however, he can choose, within reason, when you take your vacation. Although most of us like to decide the when and the where, an employer who, for instance, has an annual plant shut down can require his employees to take their vacation during that time. Further, an employer can insist that an employee take vacation within 10 months of it being accrued. He can also insist it be taken in one week blocks rather than as a series of mini-vacations.

An employer cannot adopt a "use it or lose it" policy regarding the statutory minimum of the two weeks of vacation. However, he can have such a policy for vacation days beyond those two weeks.

If the employee and the employer have a written agreement, the former can give up some or all of his vacation. Such agreement does not affect the employee's right to vacation pay.

## Statutory Holidays and Leaves of Absence

If during the employee's vacation there is a statutory holiday, the employee is entitled to a substitute day off within three months. In the alternative, the employer can pay the statutory holiday if the employee agrees in writing.

For the purposes of vacation entitlement, a leave of absence, a layoff, sick leave, pregnancy and parental leave all count as time employed. The reason for this is that there has been no break in the employment relationship.

## Termination of Employment

When employment ends the employer is under an obligation to remit any unpaid vacation pay. The employee is also entitled to vacation pay on any termination pay, though not on severance pay. 

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### PRACTICE AREAS

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