

LegalEase[®]

A straightforward look at law and business

Sorbara, Schumacher, McCann LLP is a fourteen-lawyer local law firm with offices in Kitchener and Guelph specializing in all areas of business law

The Beat Goes On...

Over the past few years, we have witnessed a growing phenomenon of music swapping over the Internet. This trend involves Internet users sharing music files with other users in order to copy songs and other audio tracks from popular music artists. Although this may seem harmless, the music industry claims to be suffering debilitating losses as a result. In fact, the Canadian Recording Industry Association estimates losses related to music uploading and downloading to be approximately \$250 million in sales over the last 3 years.

In 2003, the Recording Industry Association of America first took action by launching suits against over 200 randomly selected targets from across the United States. The Recording Industry had no difficulty launching these suits because the *Millennium Copyright Act of 1998* forces Internet service providers to supply the personal information of their users for the purpose of music swapping lawsuits. This legislation was introduced to address the issue of music swapping and was necessary because most individuals use a pseudonym or a "handle" for online purposes.


There is no corresponding law in Canada which requires Internet service providers to disclose the personal information of Internet users. However, last winter, BMG Canada Inc. attempted to bring similar suits in Canada against "all persons who [were] infringing copyright in [their] sound recordings". At the outset, BMG brought a motion against a number of Internet service providers to compel them to produce the actual names and addresses of those individuals who were swapping music over their Internet sites. The Federal Court of Canada denied BMG's

motion and ruled that Internet service providers were not obligated to disclose the personal information of their users. As a result, BMG was not able to obtain the personal information of the music swappers and its lawsuit was stopped in its tracks. The Court also ruled that downloading music, whereby a user copies music from others on the Internet, and uploading music, which involves a user allowing others to copy music from his or her files on the Internet, do not infringe the *Copyright Act*. For many Canadians who advocate the free exchange of music over the Internet, this was seen as an early victory.

In a separate but related case, the Canadian music industry also brought an action against several Internet service providers to recover music royalties related to the downloading of music by their users. The case eventually reached the Supreme Court of Canada. In a unanimous decision released on June 30, 2004, the Supreme Court of Canada ruled that Internet service providers are only "intermediaries" and cannot be responsible for

what their customers do on the Internet. The Court also confirmed that downloading a song for personal use is not an infringement of copyright laws, and that placing a song on an online music sharing site is not considered "distribution" under the *Copyright Act*.

The standing committee on Canadian Heritage has released its recommendations on how to solve this problem. It would like to see a revised definition of "distribution" of music which reflects the new advancements in technology. It would also allow the music industry to use technology that would limit the number of copies that can be made from a recording and make the software used to download and upload music illegal.

For the time being, however, individual Canadians remain at liberty to swap music over the Internet without the fear of being identified for the purposes of music swapping lawsuits and the Internet service providers who service these individuals are also not required to pay royalties for the downloads of their users. 

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Medical Malpractice

Medical malpractice cases are difficult and trying cases which often involve highly charged emotions and tragic circumstances. They embody complex evidentiary and legal issues and require the testimony of specialized medical experts.

The starting point of any medical malpractice analysis is to determine whether or not the doctors and nurses treating the patient were negligent. All doctors and nurses must meet an appropriate standard of care when dealing with their patients. The standard of care is determined by the normal practices of similarly qualified doctors or nurses. If it can be shown that a doctor's or nurse's care did not meet the applicable standard, the next step is to prove that this failure to meet the standard, in fact, caused or contributed to the harm suffered by the patient. It is possible for a doctor to provide care below the accepted standard, but not be responsible for the harm suffered by a patient.

A doctor must always explain the normal risks associated with medications or medical procedures. The patient can then decide whether he or she will assume the risks. If the doctor does not explain the risks associated with a medication or procedure and the patient suffers a known risk (not caused by anyone's negligence), the doctor will be responsible for the harm suffered if the Court finds that the patient would not have taken the medication or undergone the procedure had he been properly advised. In drawing this conclusion, the Court will consider what an average person would have done in the same circumstances.

Courts often grapple with medical malpractice decisions because they are required to draw conclusions in hindsight. It is, therefore, imperative that judges gain an understanding of the complete circumstances of the situation and do not take the erroneous approach of focusing on the result rather than the means. Medical professionals have an obligation of means, not outcomes. That is to say, judges must be

careful not to focus on the end result which is often a tragic accident of some sort. Instead, they must consider whether or not that tragic result was caused by the negligence of a medical professional.


Malpractice can arise in many different circumstances including misdiagnosis, negligent performance and failure to adhere to standards and procedures. In a recent case, the Ontario Superior Court of Justice found that doctors' failure to communicate effectively amongst themselves can also amount to medical malpractice.

In *O'Neill v. Hamilton General Hospital*, a patient was admitted to the emergency department of Greater Niagara General Hospital with heavy gastrointestinal bleeding due to a recurrent peptic ulcer. After having numerous procedures performed, he was transferred to Hamilton General Hospital for specialized care. Upon arrival at Hamilton General Hospital, the patient was treated by a surgeon who performed a diagnosis and developed a specific treatment plan for the patient's immediate needs and to treat any further internal bleeding. At the end of his shift, the surgeon went on holidays. Before leaving, he did not properly communicate the patient's treatment plan to the doctor on call, in part because he felt uncomfortable in providing direction and instructions to a more senior doctor. As a result of this lack of communication, the patient did not receive proper observation or care and he experienced serious complications which led to his death.

The Court was critical of the surgeon's conduct and found him to be negligent. The judge noted that it was an inappropriate time for the surgeon to adhere to medical etiquette. After hearing testimony from various medical experts, the Court concluded that the surgeon's plan of action was very specific. It involved monitoring the patient closely, and required action upon the first sight of bleeding. Once the surgeon's plan had been put into operation, it was critical

that it be followed through with precision. There was no room for the discretion of a senior colleague. In addition, the surgeon was considered an expert but his more senior colleague was not.

In finding the surgeon negligent, the Court noted that he breached his duty of care to Mr. O'Neill by failing "to make sure he was safe during [the doctor's] absence. This was not just an accidental slip or omission but a failure to discharge a fundamental duty of care." In addition, "a continuing duty rests upon a surgeon to provide adequate post-operative care or to give adequate advice and direction as to such care. Post-operative duty of care is particularly high in high-risk cases." The Court further found that the surgeon's negligence resulted in the death of the patient.

There are strict limitation periods for commencing medical malpractice claims and these types of matters often involve significant preparation, research and consultation with potential experts. It is important, therefore, that anyone who may have a potential claim for medical malpractice contact a lawyer as soon as possible. If you would like more information regarding medical malpractice or should you wish to discuss a potential claim, please contact either Greg Murdoch or Steve Kenney at either our Kitchener or Guelph offices. 



The Partners and staff of Sorbara, Schumacher, McCann LLP are pleased to announce the addition of two new members to the firm, Steve Kenney and Nadia Singh.

Steve has joined the firm as counsel for medical malpractice and catastrophic injury matters. After being raised in the small northern town of Kapuskasing, Steve has traveled the countryside pursuing his education. He obtained an Honours Degree in Psychology from Brock University, a Masters Degree in Psychology from the University of Guelph and a diploma in Human Resources from the University of Toronto before graduating from the University of Windsor's



Steve Kenney

Faculty of Law. He was called to the Bar of British Columbia in 1982 and the Bar of Ontario in 1988. Steve is certified as a specialist in Civil Litigation by the Law Society of Upper Canada and currently practices primarily in the area of medical malpractice and catastrophic injury.

Nadia Singh is a lifelong resident of the Kitchener-Waterloo area. She was raised in Kitchener and graduated from Forest Heights Collegiate before attending the University of Waterloo, where she earned an Honours Degree in Sociology with an interdisciplinary certificate in Legal Studies and Criminology.

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From there, Nadia attended the University of Western Ontario's Faculty of Law and




Nadia Singh

graduated in 2003. After completing her articling term with the firm, Nadia was called to the Ontario Bar in the summer of 2004. Nadia has joined the firm as an associate and will be focusing her practice in the areas corporate/commercial and real estate.

In addition, we are proud to announce that Sam Sorbara's assistant, Lisa Hummel, recently celebrated her 20th anniversary with



Lisa Hummel

the firm. Lisa has been an exemplary employee and an integral part of our team over the past twenty years. She continues to demonstrate loyalty, dedication, leadership and a commitment to excellence in everything that she does for us. In recognition of this anniversary, the firm has arranged for Lisa and Dan to celebrate her upcoming birthday with a weekend stay in New York City at the historic Waldorf Astoria hotel. We take this opportunity to once again thank Lisa for all of her contributions to SorbaraLaw. 



Domestic Contracts

Many family law matters involve disputes arising from a domestic contract. There are three types of domestic contracts: cohabitation agreements, marriage contracts and separation agreements. Cohabitation agreements may deal with any issues between a couple arising during the course of cohabitation or upon termination of cohabitation (with the exception of custody and access to children). In a marriage contract, parties can agree on certain issues at the outset of the marriage. A marriage contract is often referred to as a pre-nuptial agreement. Separation agreements deal with matters relevant to the settlement of affairs upon separation.

The *Family Law Act* provides that the provisions of these contracts will prevail over any statutory rights that may arise. However, Courts are often asked to vary the terms of these agreements or set them aside altogether.

This issue typically arises with separation contracts. Often times, parties sign these agreements and later seek to vary the terms when they become dissatisfied with the arrangement, or after a change in the circumstances of one or both parties. Courts have been known to set aside terms of the agreement if it is found that the agreement was entered through undue influence or fraud, or if one of the parties misrepresented a material fact at the time of the agreement. In these circumstances, setting aside provisions of the contract is both logical and reasonable.

However, Courts have also been inclined to vary the terms of separation contracts where there has been a material change in circumstances. This is more problematic because it leaves a great deal of uncertainty for parties and their counsel. The ultimate goal of these agreements is to eliminate litigation after a breakdown of the relationship by setting out a scheme for the settlement of the outstanding issues between the parties. The finality of this settlement is

eroded significantly if Courts continually vary the terms of such agreements.

A recent decision by the Supreme Court of Canada demonstrates the Courts' growing reluctance to interfere with otherwise valid separation agreements.

In *Hartshorne v. Hartshorne*, the husband had brought a significant amount of wealth into the relationship, while his wife had brought in significant debt. When the parties separated, they agreed to enter a separation contract. Each party retained independent legal advice prior to signing the agreement. The wife's lawyer advised her not to sign the contract but she chose to do so regardless. The contract divided the couple's assets 80/20 in favour of the husband and provided for spousal and child support for the wife. The British Columbia Court of Appeal found the contract to be substantively unfair and reapportioned the assets 60/40 in favour of the husband.

The Supreme Court overturned the Court of Appeal and reinstated the original terms of the contract. In so doing, the Court noted that the circumstances of the parties at the time of separation were in the contemplation of both parties when the contract was formed. The Court emphasized the need to respect the spouses' private arrangements regarding the division of property especially where they obtain

independent legal advice prior to entering such agreements.

The decision is a clear indication that couples can enter into domestic contracts with the confidence that their arrangements will be upheld in Court, so long as both parties understand what they are signing, have had an opportunity to obtain independent legal advice and are fully aware of one another's circumstances.

A properly drafted separation agreement can save the parties from expensive and emotional litigation. Where there has been no fraud, undue influence or material misrepresentation of the facts when the contract is executed, it is now becoming more and more likely that the contract will be upheld as the Courts will not interfere with the arrangements of the parties lightly.

Parties should take great care in drafting and reviewing domestic contracts. It is also critical that parties obtain independent legal advice and fully disclose their financial circumstances before they enter into any type of domestic contract. [LegalEase](#)



Anticipatory Breach of Construction Contract

It is quite common in the construction industry for subcontractors and contractors to work together on more than one project at the same time. It is also common for disputes in one project to affect the completion of another project. This issue was recently addressed in a case before the Ontario Superior Court of Justice.

In *Trio Roofing Systems Inc. v. Atlas Corp.*, the Court was asked to consider whether or not a fundamental breach by the defendant in honouring the terms of one contract can amount to an anticipatory breach of a second, separate and discrete contract between the same parties. The case involved two contracts between a roofing subcontractor and a general contractor for the completion of two separate roofing jobs. The general contractor failed to make payments for the first job in accordance with the terms of the contract. Because of this non-payment, the roofing subcontractor was hesitant to start work on the second roofing project. The general contractor took the position that the roofer had abandoned the second contract and it hired another roofing company to complete the work at a higher cost.

The general contractor asked the Court to set off the amount due for completion of the first contract against the increased cost it was forced to incur to retain the replacement company to complete the second roof. The roofing subcontractor alleged that the general contractor was in anticipatory breach of the second contract "on the basis that its handling of the first contract demonstrated how it was going to carry out the second contract, i.e. by "shortchanging", or holding up payment even though the job had been substantially completed." It also argued that general contractor breached the second contract by hiring another roofing company before it could begin carrying out its obligations.

The Court found that the general contractor was, in fact, in anticipatory

breach of the second contract which entitled the roofing subcontractor to refuse to carry out its side of the bargain. The Court confirmed that an "anticipatory breach occurs when a party, by express language or conduct, or as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due...The conduct of the party who has broken the contract is such that the other party is entitled to conclude that the party breaching the contract no longer intends to be bound by its provisions." The Court went on to clarify that, in order for anticipatory breach to be found, it must be established that the conduct in question amounted to a total rejection of the obligations of the contract and there is no justification for the conduct. This rejection, combined with acceptance of the repudiation by the innocent party, results in the termination of the contract.

In making its ruling, the Court determined that the general contractor's failure to make payments on time, its artificial claims of deficiencies in work on the first project and its hiring of the new roofing company without notice amounted to evidence that the general contractor did not intend to honour its contractual obligations. The roofing subcontractor was entitled to collect the remaining balance due to it under the terms of the first contract without setting off the additional costs to the general contractor on the second project.

It remains to be seen whether or not this case can be extended to an anticipatory breach midway through a project, i.e. when the breach of the first contract occurs midway through completion of the second job. However, it is quite likely that the same reasoning will apply. Regardless, this case serves as a good reminder to parties in the construction industry or otherwise that their conduct on one project may affect their rights and obligations on another project. [LegalEase](#)



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Art Flip No Longer a Tax Shelter

On December 5, 2003, Parliament released draft legislation intended to put an end to the tax planning technique commonly known as the “art flip”.

The art flip is a tax shelter used to maximize the realization of accrued capital gains or losses on property. Typically, a donor purchases artwork or other property in large quantities at a low price and then donates individual items to a charity at a higher value. The donor receives a donation receipt which he or she can then claim as a tax credit. The donor is then required to pay tax on the capital gain which represents the difference between the original purchase price and the amount set out in the donation receipt. Since investment income is fully taxable but only 1/2 of capital gains are taxable, this tax strategy can create a tremendous advantage for the donor.

The proposed legislation will deem the fair market value of the gift to be the lower of the price at which the property was acquired or the property's fair market value. This will essentially remove the incentive which had typically accompanied an art flip. There will be a number of exceptions to this general rule, including non-applicability to gifts of inventory, publicly traded securities, certified cultural property, ecological gifts or real estate situated in Canada.

The proposed legislation also incorporates charitable gifting changes that were originally announced in December, 2002. This amendment provides that the value of a donation must be reduced by any advantage which the donor receives as a result of making the donation. If the advantage exceeds 80% of the gift's total value, the entire donation may be disqualified unless the

donor can establish that there was an intention to make a gift.

Tax legislation can often be confusing and complex and it is constantly being updated and amended by Parliament. Accordingly, it is important to consult a knowledgeable financial and/or legal professional before entering into any complex tax planning arrangements, including those involving charitable gifts. [LegalEASE](#)

New Criminal Liability For Workplace Safety Violation

On March 31, 2004, Bill C-45 came into force in Canada. This legislation makes several amendments to the Criminal Code which are designed to increase corporate responsibility for workplace safety.

Bill C-45 creates a new section of the *Criminal Code* which imposes a new legal duty on anyone who “undertakes or has the authority to direct how another person does work or performs a task to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.” Pursuant to this section, individuals or organizations can face criminal liability if they breach this duty with a wanton or reckless disregard for the lives or safety of others.

Bill C-45 also expands the types of entities that may now be subject to criminal liability. Under this new legislation, any “organization” may be subject to criminal liability. An “organization” is defined in the *Code* to include a corporation, society, company, partnership, trade union, and any association of person which has been: created for a common purpose; has an operational structure; and holds itself out to the public as an association of persons. As a result of this amendment, a wider range of employers and different types of organization must now be concerned with safety issues and the criminal liability that may flow therefrom.

Another significant feature of Bill C-45 is that it has greatly expanded the class of persons who can attract criminal liability on behalf of an organization. In the past, only the intent of a “directing mind” of an organization, meaning the organization's owner or those in control of its day to day operations, could attract criminal liability for organization. Pursuant to Bill C-45, the intent of an organization's “senior officer” can now attract criminal liability on behalf of the organization. A “senior officer” is defined as a representative of the organization who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a corporation, includes a director, its chief

executive officer and its chief financial officer.

Under this new regime, organizations may also now be subject to criminal liability on the basis of the actions of its “representatives”. A “representative” is broadly defined in the *Code* as a director, partner, employee, member, agent or contractor of the organization. For example, an organization can be found liable for criminal negligence if the unsafe actions of any representative of the organization causes injury or death where a senior officer was responsible for overseeing the work of the representative and the senior officer departed markedly from the standard of care required to prevent the injury or death. Likewise, an organization can be convicted of an intentional crime if a senior officer, while acting in the scope of his or her authority, actively engages in unsafe conduct, directs a representative to do so, or becomes aware of unsafe conduct and does not take appropriate steps to stop the same and the unsafe conduct results in injury or death. In this case, the senior officer must also intend, at least in part, to benefit the organization through the unsafe conduct or the failure to stop the same.

Bill C-45 has also enumerated several different considerations which the Court shall consider with respect to sentencing and it has stiffened the potential penalties which organizations can face upon conviction of a criminal offence. In assessing an appropriate sentence, the Court shall consider: any advantage realized by the organization as a result of the offence; the degree of planning involved in carrying out the offence and the duration and complexity of the offence; as well as the impact that the sentence may have on the financial viability of the organization or that of its employees. With respect to the types of sentences, the maximum fine applicable to organizations for a summary conviction offence has increased from \$25,000 to \$100,000. Moreover, Bill C-45 has also introduced “corporate probation” as a potential sentence. Corporate probation can include numerous different terms such as: restitution for any loss or damage suffered as a result of the offence; a requirement to establishment

policies, standards or procedures to reduce the likelihood of the organization committing a subsequent offence; and a requirement to provide information to the public, including details about the offence of which the organization was convicted and the sentence imposed by the Court.

It is important to note that these amendments to the *Criminal Code* are not intended to replace any other provincial regulatory regimes that are currently in place. For example, an organization could face liability under these provisions of the *Criminal Code* and also be subject to prosecution under provincial health and safety legislation. However, if the organization has been convicted under any regulatory regime, the Court must consider the penalty imposed when sentencing under the *Criminal Code*.

With these new changes to the *Criminal Code*, it is more important than ever for employers and other organizations to ensure that proper steps are taken to avoid health and safety mishaps that could result in serious injury or death. As a starting point, organizations should identify all potential safety risks that are inherent in the scope of their day to day activities. Organizations should also create clear written policies and procedures which set out employee expectations and address any such risks. Likewise, organizations must ensure that these policies and procedures are communicated to, and followed by, their representatives and they must ensure that their representatives have received proper and appropriate training. Lastly, organizations should use existing health & safety committees (or form new committees) as a forum to ensure that questions, complaints and concerns regarding workplace safety can be addressed. By taking these steps, organizations can help to minimize their exposure to criminal liability and otherwise ensure that those whom they employ are able to work in a safe environment. [LegalEASE](#)



Commercial Agreements & Contractual Relations

A recent decision by the Ontario Court of Appeal dealing with the interpretation of commercial contracts and the conduct of parties serves as a reminder that parties should carefully consider the terms of their agreement and any conduct which may be inconsistent with the agreement.

In Shelanu Inc. v. Print Three Franchising

Corp., the parties had entered into a standard form franchise agreement for the operation of a printing franchise. The agreement contained a common “entire agreement” clause which provided that the written agreement constituted the entire agreement between the parties and which excluded enforcement of any oral contracts or other written agreements of the parties. During the course of the contractual relationship, the parties altered the terms of the agreement and acted in a manner that was inconsistent with the terms of the contract. In particular, the franchisor allowed the franchisee to change the way it operated and allowed it to operate under a different name. Eventually the relationship broke down and the franchisor brought an action for unpaid royalties on the basis of the terms of the original agreement. The franchisor argued that the subsequent changes to the contractual relationship were unenforceable by operation of the “entire agreement” clause.

The Court ruled in favour of the franchisee and found that the “entire agreement” clause could not be used to vitiate any subsequent contractual arrangements or alterations to the original terms of the contract. In so doing,

the Court found that the parties, by their conduct, intended to alter the terms of their agreement and the Court gave effect to the new contractual arrangement.

Further, the Court of Appeal affirmed that a duty of good faith exists between the parties to contracts of adhesion including franchise agreements and other commercial contracts. This duty of good faith is not a fiduciary duty which requires one party to act selflessly for the best interests of the other. Instead, the Court commented that during the course of a contractual relationship, parties to a commercial contract have a duty to have regard for the legitimate interests of their counterparts by acting “promptly, honestly, fairly and reasonably”.

This case illustrates that certainty of contractual terms can often be difficult to achieve especially when parties are involved in a long term contractual relationship which evolves over time. Wherever possible, parties should reduce to writing any changes, alterations or updates to the contractual relationship. Parties must also be cognizant of their duty to act in good faith as Courts may be inclined to favour fairness and equity over written words. [Legal Edge](#)

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