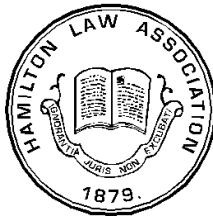


After Closing Real Estate Brochure



Prepared by the
Hamilton Law Association
Real Estate Subcommittee

November 2005



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This brochure is available on-line at
www.hamiltonlaw.on.ca

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Matters outlined in this booklet do not constitute legal advice.

Please consult a lawyer regarding all aspects of your transaction.

The legal requirements of a real estate transaction arise from the unique facts of each transaction and will vary as circumstances vary.

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Conveyancing on an Estate Matter

When, as an Executor you are asked to sign a deed to a Beneficiary entitled by a Will to receive property, ask the solicitor to also check title to the property for any outstanding liens and mortgages and other title issues and to check with the City for outstanding realty taxes. Great disservice may be done to a Beneficiary without providing some assurance that what they are receiving is free and clear of defects. This also applies of course to the Beneficiary of the property: don't accept the title blindly.

Discharging Your Mortgage or Secured Line of Credit Mortgage

When your mortgage or secured line of credit is paid out, the lender should provide a "Discharge of Mortgage" and a "Release of Interest of Insurance" to the homeowner. The Discharge of Mortgage is a document signed by the lender as evidence to the Land Registry Office that the lender no longer has an interest in the property. The Discharge of Mortgage must be registered on title to the property in order to delete the mortgage from the title. Lenders sometimes register the Discharge directly and provide notice to the homeowner of registration after the fact. If the Discharge is not registered, it will continue to form an apparent lien against the property and will have to be removed when the property is sold, transferred or remortgaged.

Mortgage lenders customarily charge an administration fee or "discharge fee" for processing the mortgage pay-out and the discharge documentation. There is also a fee payable to the Minister of Finance for Ontario to register the Discharge document. The costs associated with the payout and discharge are the homeowner's responsibility.

The Release of Interest of Insurance is evidence to the insurer that the lender has no further interest in the homeowner's insurance policy. The Release of Interest should be sent to the homeowner's insurance agent for processing.

Easements

An easement is a right of one land owner (the dominant tenement) to use some aspect of another land owner's property (the servient tenement) for the purposes outlined in the grant of easement. The types of easements include the right to lay cables, pipes, conduits, a right-of-way for the purpose of walking or driveway, and similar rights and privileges.

A mutual right-of-way is one where both parties have the right to use a right-of-way to pass and re-pass, such as a common driveway between houses leading to two separate garages at the rear of the two properties. Obviously, the owners of such a mutual right-of-way have a right to pass and re-pass but may not remain in the right-of-way as it would be blocked to the other.

Not all easements are registered on title, but some are obvious, such as overhead wires etc. Sometimes, however, wires are buried and a special search may be necessary to ascertain whether such a right-of-way exists, such as a hydro easement.

The servient tenement continues to own the property, but cannot use it in such a way as to interfere with the easement.

Fences

Many aspects of fence construction are controlled by local by-laws.

Fences as Pool Enclosures

At the present time there is a unified by-law applicable to the recently amalgamated City of Hamilton that deals with fences erected as pool enclosures.

Pool enclosure fences are fences that enclose the yard in which the pool is located or they are the fences that surround the pool only and are not used as a perimeter or boundary fence.

The by-law contains requirements about: the location of the fence in relation to the water's edge; the height of the fence; the type of gate; and other construction specifications.

A permit application is required prior to the installation of the pool and the enclosure as is inspection after construction to confirm that the enclosure has been properly constructed.

Particular attention is required in situations where a pool is installed in a yard with an existing fence.

Other Fences

At the present time there is not a unified by-law applicable to the amalgamated City of Hamilton dealing with fences that are not pool enclosures.

Therefore before undertaking any new fence construction you will need to consult with the by-laws in effect in your particular former municipality.

These by-laws govern various aspects of fence construction including: maximum height; the use of barbed wire, or electricity; type of material and location.

There may be different requirements for commercial, residential and agricultural properties.

Some of the by-laws require adjoining land owners to share the basic costs of a fence erected on a boundary between two properties. Failure to pay your share may result in proceedings under the Provincial Offences Act and fines.

A provincial statute called the Line Fences Act contains provisions that may require cost sharing for boundary fence construction in the absence of existing municipal by-laws dealing with that issue.

Floating Rate Closed Mortgages

Be prepared to lock in if rates are climbing. If you do not, and your payments do not cover the increased interest costs, you will be charged interest on the interest not paid and you may have to make a lump sum payment or dramatically increase your minimum monthly payment. If you lock in, you may have to pay a penalty to the lender for doing so. You will also have to pay the lender an administrative charge for changing the mortgage. Please note that not all floating rate mortgages are open.

READ YOUR MORTGAGE COMMITMENT AND THE STANDARD CHARGE TERMS CAREFULLY.

“Home Offices” – Tax Implications

In cases where a homeowner has an office in the dwelling for business purposes, and chooses to avail himself or herself of available deductions for a portion of mortgage interest or for depreciation, the homeowner should be aware that such deductions could trigger capital gains tax on the resale of the dwelling on a portion of the sale price. In addition, the proportion of the property which is deemed a “commercial” use could be subject to Goods and Services Tax (“GST”) on the sale of the property. In such cases, the homeowner should ensure that he or she obtains advice from a qualified accountant or solicitor as to the resulting tax issues.

Homeowners should also ensure that any home office is permitted by the zoning by-laws applicable to the property.

If prospective purchasers anticipate that a portion of the property will be used for a home office, they should advise their real estate agent and lawyer of this fact prior to signing the agreement of purchase and sale. Often agreements of purchase and sale stipulate only that use as a “single family residential” property is permitted. If other uses are required, it is essential that the agreement of purchase and sale specify what uses are required.

**If your home has an attached garage and no side drive,
you cannot turn the garage into a family room**

This depends on the existing municipal by-laws for where you live. For example, the by-laws in Ancaster, which were enacted in 1987 state that 2 parking spaces are required for every residential dwelling - one of which must be in an attached garage. Anyone considering converting a garage to residential uses must contact the Building Department, as a building permit would be required.

Joint Tenancy

Property held in joint tenancy normally becomes the property of the surviving joint tenant(s) when another joint tenant dies. An exception in Ontario arises where the property was the deceased's matrimonial home and the spouse of the deceased was not one of the joint tenants. In that case, the interest of the deceased is treated as if he or she were a tenant in common; instead of passing to the other joint tenants, it passes into the estate of the deceased.

Joint tenancies may be broken by mutual agreement or even by the action of one of the joint tenants. A joint tenant who secretly registers a deed to himself or herself successfully breaks the joint tenancy.

Seniors often arrange to transfer to themselves and one of their children as joint owners as a way to save on probate fees. There is usually a verbal understanding that the child is to act in a trustee capacity, but nothing specific in writing. There can be income tax implications of this arrangement. Moreover, if the child develops financial or matrimonial difficulties, or misunderstands the nature of the verbal trust, the intentions of the seniors may be frustrated. It is important that a lawyer be consulted before such a transfer is undertaken.

Maintaining your Mortgage in Good Standing

It goes without saying that maintaining your mortgage in good standing is of the utmost importance. If for reasons beyond your control you are unable to do so, you should consult with your lawyer without delay. There are often provisions in your mortgage or in the law or through professional legal negotiations with your lender that can assist you in maintaining and/or returning your mortgage to good standing in the event of temporary economic difficulty. Do not delay in seeking your lawyer's assistance!

Municipal Realty Taxes

Municipal realty taxes are adjusted between the Buyer and Seller on closing. In your report letter from your lawyer, there will be a Statement of Adjustments detailing this tax adjustment. From and after closing, the Buyer is responsible for all additional municipal realty taxes. Failure to pay those realty taxes will involve interest charges at relatively high rates. Furthermore, after those taxes are in arrears for a period of time, the municipality can sell your property. Therefore, it is very important to ensure that your realty taxes are kept up to date.

When the transaction is closed, the Buyer signs a Land Transfer Tax affidavit. The registry office provides a copy of that affidavit to the assessment office. The information in the affidavit advises as to who the new Buyer is and when the title changed hands. Therefore, the Buyer should receive all new tax bills after closing of their residence. However, it often takes time for the assessment office and the municipality to change their records, and sometimes, the tax bills are not received by the Buyer in a timely fashion.

Each municipality bills taxes in installments. In Hamilton, there are four installments at the end of February, April, June and September. If you don't get the next billing following your closing, then you should follow up either with your lawyer or directly with the municipal tax office. If you are paying your taxes to your bank with your mortgage payments, then the bank will be paying each installment, but the same issues regarding mislaid tax bills apply even if the bank is paying the taxes. On closing your lender may require you to pay the balance of the year's taxes. If there is any confusion or doubt in your mind regarding the payment of taxes, then you should contact your lawyer.

**New Construction: Do decks above ground
and sheds over 8 x 10 require building permits?**

For properties in the City of Hamilton, detached decks and sheds greater than 10 square metres (108 square feet) require building permits. Decks that are attached to the dwelling always require building permits in Hamilton. Building permits applications can be obtained at the City of Hamilton Building Department located at Hamilton City Hall - 71 Main Street East, 3rd Floor, Hamilton, Ontario. The City of Hamilton Building Department has a booklet that explains the application process in greater detail.

Overhanging Trees and Shrubs

If you are concerned about the branches of a tree or shrub overhanging your property or growing through the fence from an adjoining property there are a number of things to consider:

First of all, you need to know who owns the tree or shrub.

If the tree or shrub belongs to the municipality there may be by-laws in place that prohibit anyone from cutting or trimming the tree or shrub. Doing so in contravention of the by-law could result in fines being levied.

If the tree or shrub overhanging your property belongs to a private property owner, you may be entitled to remove the offending branches by relying upon the basic premise that ownership of land extends upward and downwards from the property boundaries to the depths of the earth and the heights of heaven.

Based upon this premise, anything overhanging the property boundary or growing under the property boundary becomes the property of the owner of the land.

Therefore, you may be entitled to remove overhanging branches from your neighbour's tree or shrub.

However, before resorting to this, or any other self-help remedy, you ought to consult with a lawyer and consider the effect such action may have upon your relationship with your neighbour.

You should also be aware of that the same remedy may apply to any trees of yours that overhang or grow onto your neighbour's property.

Title Insurance

Historically, lawyers provided their opinion on title to purchasers and mortgagees. Recently title insurance has been introduced to Ontario. Your lawyer certifies title to the title insurance company and the title insurance company insures you against damage for title and off-title matters.

Off-title matters include such things as compliance with zoning, the absence of work orders or deficiency notices (issued by the local municipality requiring you to meet various property standards), satisfaction of subdivision agreement requirements, etc. The cost of these enquiries are several hundreds of dollars (considerably more than the title insurance premium) and the likelihood of an outstanding deficiency is relatively slight.

After discussion with you, a lawyer may recommend title insurance for the following reasons:

- a. The extent of coverage is as broad as that provided by a lawyer's "title opinion".
- b. Only title insurance will cover losses due to after-purchase fraud on the public records, or if someone builds a structure on the property after closing.
- c. The coverage will last longer given the lawyer's insurance will be in effect only as long as the lawyer lives, and has assets to satisfy a judgment.
- d. It will be easier to recover losses under a claims procedure than by trying to prove solicitor negligence or breach of fiduciary duty.
- e. Title insurance includes Defensive Title Coverage pursuant to which the insurer will pay the cost for the owners to defend their title.

Title by Possession and the Qualified Land Title

In modern times, it has become important to know exactly what land you own, and what rights accompany or modify that ownership. To lend precision to that knowledge, governments have adopted a system of land titles, whereby all boundaries and rights are recorded precisely and guaranteed. In most new subdivisions and condominiums, surveys and plans create exact definition. However, older properties and parcels in small communities often rely on a register of documents where the paper boundaries and rights may vary greatly from the actual fence lines and use.

In the early 1960's, the government of Ontario experimented with the development of a guaranteed title system for older properties. It surveyed the old village of Waterdown. What it learned from that experiment is that the cost was enormous, and the problems in defining boundaries and rights of passage, rights of support, and so on, were endless. What the government hoped to create was a system that could be computerized. What it eventually did, to save the cost of surveying and to sweep all the problems under the rug, was to create a new type of ownership which it described as the Qualified Land Title.

In the Qualified Land Title, registered instruments have been permitted to create specified boundaries and specific rights, with glaring exceptions. Those boundaries and rights which had been created by long usage and old fence lines were to remain, unwritten but unimpaired. A fence that had been in place for 10 years or more as of the creation of the new Title could thumb its nose at the computer. A right of support or passageway that had endured for twenty years remained legally enforceable.

Nonetheless, the Qualified Land Title, once created, with the date of conversion recorded, put an end to the creation of new departures from lot lines and new easements. A fence that had been boldly placed nine years before conversion brought no right of enclosure. Nineteen years of trespassing failed to create any right of passage.

One word of caution, before you tear down that nine year old fence -- there is a section of the Criminal Code which criminalizes the removal of a boundary marker of any kind. Only with consent or a Court Order should boundary fences be taken down.

NOTES



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The Hamilton Law Association exists to enable its members to become successful, respected and fulfilled in their profession.