



# SMHI LEGAL NOTES

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BARRISTERS & SOLICITORS • TRADEMARK AGENTS

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## Buying a home - the legal aspects

Buying a house involves one legal step after another, some of which you may not have thought of. From your initial dealings with the real estate agent through to your involvement with the movers, you should be aware of the various legal implications. The following provides an overview of some of the more common as well as most important aspects of buying a house.

### Talk to your lawyer

Once you decide to go house hunting, besides getting financial pre-approval and contacting a Realtor, one of your first stops should be your lawyer's office. Let him/her know that you will soon be purchasing a house.

### Real Estate Agents

When you are selling your home you expect to sign an agreement with your Realtor. However, these days, buyers are also being asked to sign an agreement, either a Buyer Representation Agreement or a Buyer Customer Service Agreement.

The Buyer Representation Agreement states that for a designated period of time, the buyer has engaged a specific real estate company to work exclusively on his or her behalf. The agreement also indicates that the realtor will make his or her best efforts for the buyer.

The Buyer Customer Service Agreement is an acknowledgment by the buyer that he or she has been provided with writ-

ten information explaining agency relationships including Seller Representation, Sub-Agency, Buyer Representation, Multiple Representation and Customer Service.

### Agreement of Purchase and Sale

Once you have found the house of your dreams, you will enter into an agreement of purchase and sale. It is generally a good idea to have your lawyer look over the agreement prior to signing it. Unfortunately, many people tend to forget that they are signing a contract and that once signed you have to live with it, including any less than favourable terms.

By waiting to sign the agreement, you can benefit from your lawyer's advice and experience in this area. Your lawyer will ensure that all the chattels you are buying (e.g. appliances, blinds) are included and properly described in the agreement. If the purchase is conditional, for instance on obtaining financing, the sale of your current home and/or a satisfactory home inspection, your lawyer will advise you on a proper escape clause.

### Caveat Emptor

When you are buying a home, particularly a resale, you should always make a careful inspection of the house. Inspections should be done before you sign the agreement of purchase and sale or within a negotiated conditional period. Once you have bought the house, with a few exceptions, it is yours defects and all.

### Surveys

A survey is a picture of what you own and lets you know the extent of your title. The exact location of all buildings on the property will be shown on the survey as well as whether they comply with local building and zoning bylaws. A survey shows how much area is located on the four sides of the house, the access to the property as well as any easements over the property. A survey will also tell you whether you or your neighbours are exceeding the boundaries of each other's property.

The vendor is not legally required to provide the purchaser with an up-to-date survey unless it is part of the agreement of

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*The articles in SMHI 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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# Duties of Departing Executive Employees

Executive employees owe their employer a duty of loyalty as well as a fiduciary duty. They must act in a loyal manner, in good faith and avoid self-interest or situations which precipitate a conflict of duty. Top management and other executives assume this mantle since they are normally charged with an initiative and responsibility far greater than the ordinary employees.

To determine whether a particular employee owes a fiduciary duty, courts look not only at an employee's title, but also to the actual degree of authority and control that the person has over the employer's affairs. The twin obligations continue not only during the term of employment but subsist even after the employment relationship has terminated. Further, they exist even in the absence of a specific written non-competition agreement.

A former employee is not prohibited from joining a competitor or making use of the skills and general knowledge accumulated during the period of employment. Rather, he or she is under an obligation to refrain from directly soliciting clients of the former employer for a reasonable period of time following the termination and/or from using confidential information.

The case of *Sanford Evans List Brokerage v. Trauzzi et al.* provides a good illustration of these principles.

## Background

Linda T. began her career at Sanford Evans as a secretary. Over the years she rose through the ranks and eventually became an officer of the company and the manager and vice-president of the list brokerage division. In that role, she was responsible for managing day-to-day operations. She was a key employee with extensive knowledge and responsibility in all aspects of the Sanford Evans operations.

The company was bought out by Quebecor. Linda T's overall role and mandate with the company did not substantially change, nor was there any fundamental effect on her authority under the new ownership. Lisa M., the office manager, and Rosalyn D., a junior sales trainee and sales account representative, also played important roles on the Sanford Evans team.

Several years later, while still employed with Sanford Evans, Linda T entered into talks with Watts to form a competing company. Ultimately, she, Lisa M, Rosalyn D (both of whom had been recruited by Linda T) and Watts Distributors formed a new company known as Watts List Brokerage. They immediately and aggressively began to solicit business for the new company. This campaign included a letter from the CEO

of the Watts Group, which was sent to the entire trade announcing the change and soliciting their continued business. In addition, the three employees began contacting clients of Sanford Evans to announce their move.

During Watts' first year of operation, 84% of its business involved former clients of Sanford Evans. For its part, Sanford Evans experienced lost income in the amount of \$500,000.

## The Lawsuit

Sanford Evans sued its three former employees as well as Watts for the losses it had suffered. It claimed that by reason of their activities, they had breached the fiduciary duties of loyalty and good faith which they owed to Sanford Evans. Sanford Evans' lawsuit was successful and it was awarded damages.

## The Court's Reasons

The Court found, that at the time of her resignation, Linda T stood in a fiduciary position within Sanford Evans. This finding was based on her power and responsibility within Sanford Evans. Lisa M and Rosalyn D were also fixed with fiduciary responsibility. Further, the Court found that all three had breached this fiduciary duty by having chosen to place their own self-interest above that of their former employer. They had accepted the offer from Watts long before they had tendered their resignations. Immediately following their departure, they embarked upon a deliberate campaign to solicit clients of Sanford Evans, and divert its business to Watts. By engineering a situation favourable to their new company, they had failed to act in good faith and had prejudiced Sanford Evans.

## The Damages

In assessing damages, the Court found that in the circumstances, Sanford Evans had done all it reasonably could have to sustain its list brokerage business and mitigate its losses. The Court accepted that it had suffered a \$500,000 loss. However, in determining the actual quantum of damages, the Court took into account:

- that some of the clients would have stayed with Sanford Evans had Linda T stayed during the transitional period,
- that a certain quantity of business would have been lost by attrition even had there been no breach,
- the usual risks of commerce endemic to the particular industry, and

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# Personal Property Security Act: Establishing Your Priority

## The registry system

Every day, throughout Ontario, people are borrowing money to buy cars, appliances, equipment and businesses and they are putting up a variety of personal property as collateral. But who keeps track of all these loans and collateral?

The Ministry of Consumer and Commercial Relations oversees the province's Personal Property Security Registry (PPSR) system. This system records information about consumer and business loans when personal property is used as collateral.

The reason for a registry system is to bring simplicity and certainty to commercial transactions. In addition, it provides a process for determining priorities among secured creditors who may have an interest in the same goods. *The Personal Property Security Act (PPSA)* sets out a series of steps which must be followed in order to protect the lender's rights against third parties in the event of default by the borrower.

## Security agreement

The lender and borrower enter into a security agreement. This agreement sets out the details of the parties' agreement, from the amount of the loan to the collateral and whether a receiver can be appointed in the event of default. Security agreements can be lengthy and complex documents. Whether you are the borrower or the lender, it is a good idea to review it with your lawyer. Once signed, the debtor is entitled to receive a copy of the security agreement within 10 days.

Although the creditor now has a satisfactory security agreement, two key things must still happen to establish his/her priority rights as against third parties under the PPSA - Attachment and Perfection.

## Attachment

For the security interest to attach the following must occur:

1. The debtor must sign a security agreement containing a description of the collateral, sufficient to identify it, or in the alternative the creditor obtains possession of the collateral;

2. Value/consideration must flow from the creditor to the debtor;
3. The debtor must have some rights in the collateral.

## Perfection

Perfecting the security interest is accomplished once it has attached and a financing statement has been registered in the PPSR system. There are a number of detailed and technical requirements for the actual registration as well as maintaining that registration. Your lawyer can make certain they are adhered to.

Although the financing statement sets out only basic information about the parties, the loan and the collateral, it does let potential lenders and buyers know that the creditor has a security interest in the debtor's property. Anyone with a legitimate interest can contact the lender to obtain further details as well as a copy of the actual security agreement.

In addition to the above, certain types of collateral can also be perfected if in the possession of the creditor. These include chattel paper, goods, instruments, securities, negotiable documents of title and money.

## Priority

Only after the security agreement is in place and the security interest has attached and has been perfected does the secured creditor have priority over trade creditors, other unsecured creditors and future secured creditors. In effect, the process can be a race to see who accomplishes all the steps first.

The rules for securing your priority as a creditor are reasonably straightforward but if not followed the consequences to the creditor can be unforgiving.

## Useful Tip For Shareholders

Shareholders are often owed a significant amount of money by the companies they own. These are debts that can be secured just as any other loan.

A security agreement provides the shareholder priority for his loan to the company.

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purchase and sale. Therefore if the agreement of purchase and sale is silent on this issue, you should seek to have it amended

### Good Title

Although you are buying the physical land and house, neither are worth much if you don't have good title to them. Good title means that the house or property you have purchased is really yours and that no one else has a claim to it that you do not know about. Good title also means that your property is correctly described in all official documents and that those documents are properly registered. It is your lawyer's job to examine the title and ownership history.

### Title Insurance

Title insurance offers home buyers another way of guaranteeing good title. If there are any problems after closing, the buyer will be covered for losses up to the amount of the policy. For some, title insurance might be the answer to the survey question, since it may allow you to bypass the requirement for an up-to-date survey.

### Paperwork

There is lots of paperwork involved in the purchase of a house, including the deed, the proper description of the land, the mortgages, the affidavit of residence and the affidavit for the land transfer tax. And of course just about everything has to be done in triplicate. It is important that all the documents are filled out correctly and that they are registered in a timely fashion and in the correct order. When you are selling one house and buying another on the same day, the complications are doubled!

### Land Transfer Tax

Land transfer tax is a tax paid by the purchaser, usually at the time the deed to the property is registered. In Toronto there are two land transfer taxes to be paid, one to the province and one to the municipality. The amount of tax is based on the purchase price of the house. For instance, if you are buying a house for \$485,000 you will pay \$6,175 in Provincial Land Transfer Tax and \$5,425 for Toronto Land Transfer Tax.

### Movers

Once you finally have the keys to your new home, you can give the movers the go-ahead. Remember that your dealings with the movers are governed by a contract. In all likelihood it is a standard contract that all their customers sign. Be sure and look it over carefully and ask questions. Make certain you understand who is liable for what. For instance if something is broken en route to your new home, who will be responsible? Never assume it will be the movers. Consider insurance.

Buying a home can be an exciting time. However, it can also be a daunting experience because of the big money involved, the enormity of the commitment and the many legal aspects it entails. An experienced real estate lawyer will guide you through the process and will free you up to organize the actual move. Happy house hunting!

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- the overall economic downturn at that time.

The final result was that the figure of \$500,000 was discounted by 60% and Sanford Evans was awarded \$200,000. Damages were awarded against all four defendants, allocated in accordance with their respective shareholdings in the new company.

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### PRACTICE AREAS

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