

PAUL McENERY

Our second profile of the firm's lawyers takes us to the other founding member of the firm: Paul McEnery.

An Ottawa native, Paul began his climb to becoming one of the top solicitors in Ottawa at St. Pat's College, where he obtained his Bachelor of Commerce degree in 1969. He then went to Queen's University to study law. Coincidentally, that is also where he began his association with Eric Williams as both Paul and Eric were in the class of 1972.

Upon completing his law school education, Paul returned to Ottawa to article with the law firm, Charleson Clarke. After he was called to the Bar of Ontario in 1974 Paul returned to Charleson Clarke. However, in 1978 he left that firm to join Eric Williams in founding Williams McEnery.

Paul has a fast paced practice in the sale and purchase of residential/commercial real estate, estates, commercial and corporate law. Since 1981, he has also taught advanced Real Estate Transactions at the University of Ottawa Law School. In addition, he has taught at the Law Society of Upper Canada Bar Admission Course. He also conducts seminars and legal information sessions for various financial institutions, including all the major banks and trust companies.

In whatever spare time Paul can find, you will find him playing tennis with his regular tennis partners at either the Rideau Tennis Club or the Ottawa South Club. He also spend weekends at Tremblant where he enjoys time with his wife, Nancy, and their son Matthew. ☞

Now that's creative lawyering!

A Charlotte, NC lawyer purchased a box of very rare and expensive cigars, then insured them against fire. Within a month, having smoked his entire stockpile of these great cigars, and not yet having made even his first premium payment on the policy, the lawyer filed a claim against the insurance company. In his claim, the Lawyer stated the cigars were lost "in a series of small fires."

The insurance company refused to pay, citing the obvious reason: the man had consumed the cigars in the normal fashion. The lawyer sued....and won! In delivering the ruling, the judge agreed with the insurance company that the claim was frivolous, however, the judge stated that the lawyer held a policy from the company in which it had warranted that the cigars were insurable, and had guaranteed that it would indeed insure them against fire, without defining what is considered "unacceptable fire" and was obligated to pay the claim. Rather than endure a lengthy and costly appeal process, the insurance company accepted the ruling and paid \$15,000.00 to the lawyer for his incendiary bamboozle.

NOW FOR THE GOOD PART.....After the lawyer cashed the check, the insurance company had him arrested on 24 counts of arson!!!! With his own insurance claim and testimony from the previous case being used against him, the lawyer was convicted of intentionally burning his insured property and sentenced him to 24 months in jail and a \$24,000 fine. ☞



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We Have A New Look!

In this issue of the *Legal Observer* we have decided to focus our attention on the real estate side of the firm. Although most of our lawyers practice in the area of litigation, Paul McEnery is our resident real estate expert. In the article *Buying a Home* we provide you with an overview of the many legal aspects involved in buying a house. On page 3, you will find a helpful checklist of things you should look for when purchasing a home, particularly a resale. Finally we profile Paul in the second of a series.

While the focus is on real estate we have also included an article concerning an insurance company's duty to defend its insured. Finally we give you something to tickle your funny bone in *Now that's creative lawyering!* This is a true story and one 1st place in a Criminal Lawyers Award Contest.

This month we welcome on board our new articling student, ?. He is a graduate of the University of ? and will be with us for the next 12 months. We also said goodbye to last year's articling student, Wendy, We wish her well in the bar admission course.

We recently expanded into cyberspace and we invite you to visit us at

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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.

As the saying goes, "knowledge is power" and the more you know about all the different facets of selling a house the less apt you are to run into problems. The following provides an overview of some of the more common as well as most important aspects of buying a house.

Real Estate Agents

Like most purchasers, your first stop will probably be to see a real estate agent. Although the real estate agent's commission will be paid by the vendor, as a purchaser you will probably sign a buyer agency agreement. This agreement will contain a clause wherein your realtor agrees that the terms of any offer or agreement to purchase will not be disclosed to any other buyer.

Agreement of Purchase and Sale

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

The agreement should include:

- a properly described list of chattels you are buying (e.g. appliances, blinds)
- an escape clause in the event your current home does not sell; and
- a condition that the purchase is dependant upon a satisfactory home inspection.

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. Once you have bought the house it is yours defects and all (with a few exceptions).

Good Title

Although you are buying the physical land and house, neither are worth much if you do not 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. It also means that your property is correctly described in all official documents and that those documents are properly registered.

see **Legal Aspects** on page 3



In Defence of Indemnity

Learning that you are a Defendant in a lawsuit by receiving a Statement of Claim is likely an overwhelming prospect for most people. Generally, people are not used to being sued, therefore to receive a Statement of Claim would trigger many concerns. Equally concerning, would be the receipt by the insurance company of notification that one of their insureds is being sued.

The first step following the receipt of the Statement of Claim should be a consideration of whether there is any insurance to cover the claim. The second step, if there is insurance, is to determine whether there is coverage for the claim. The terms used in cases concerning insurance coverage are, *the duty to defend*; meaning whether the insurance company has an obligation to investigate and pay for a lawyer to defend the insured, and *the duty to indemnify*; meaning, the obligation of the insurance company to pay any judgment or damages as a result of the claim.

People purchase insurance in order to defend themselves from lawsuits. The distinction between the duty to indemnify and the duty to defend is important. While the duty to indemnify only extends to claims which are actually covered by the policy, the duty to defend is much broader. It even applies to claims that are groundless, fraudulent or false.

The insured purchases liability insurance in part to have protection from the cost of defending lawsuits, even if the claims are groundless or false. The promise to defend the insured, as well as the promise to indemnify, is the consideration received by the insured for payment of the policy premiums. Although the type of policy here he is often referred to as liability insurance, it is "litigation insurance" as well in that it is protecting the insured from the expense of defending lawsuits brought against her. There is an expectation by the insured that the insurer will employ its vast legal and investigative resources to defend the action for the mutual benefit of both the insurer and the insured.

The coverage of defence costs is often more important than the amount of coverage for payment of damages. In many cases, the cost of defending is more than the cost of any damages that may be awarded to it. Therefore the duty to defend is an extremely important part of the insurance policy. A wrongful denial of coverage can have serious consequences for the insureds as the cost of defending a lawsuit can be extremely high.

To determine if an insurer has a duty to defend, the court examines the pleadings against the insured and the terms of the insurance policy. Fortunately, the Supreme Court of

Canada has given a direction on this point recently by releasing several decisions dealing with the duty to defend vs. duty to indemnify. Additionally, the Ontario Court of Appeal has also considered this point.

The leading case is now *Lloyds of London vs. Scalera*, a Supreme Court of Canada decision released in 2000.

Should a court be called upon to determine whether or not a given claim can trigger indemnity the Supreme Court has set out a three-step process. First, a court should determine which of the Plaintiff's legal allegations are properly pleaded. In doing so, the courts are not bound by the legal labels chosen by the Plaintiff. A Plaintiff can not change an intentional tort into a negligent one simply by choice of words or vice versa. Therefore, when ascertaining the scope of the duty to defend, a court must look beyond the choice of labels, and examine the substance of the allegations contained in the pleadings. This does not involve deciding whether the claims have any merit; all the court must do is decide, based on the pleadings, the true nature of the claims.

At the second stage, having determined what claims are properly pleaded, the court should determine if any claims are entire derivative in nature. The duty to defend will not be triggered simply because a claim can be cast in terms of both negligence and intentional tort. If the alleged negligence is based on the same harm as the intentional tort, it will not allow the insured to avoid the exclusion cause for intentionally caused injuries.

Finally, at the third stage, the court must decide whether any of the properly pleaded, non-derivative claims could properly trigger the insurers duty to defend.

As with any case, the facts are extremely important. Therefore, should a matter arise which triggers the application of an insurance policy, consideration must be given to all factors. Any of our lawyers would be pleased to review the facts of any particular case plus your insurance policies with you.

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Caveat Emptor or Buyer Beware

If 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, because once you have bought the house it is yours defects and all (with a few exceptions). The following is a list of some of the major items that require careful examination.

- exterior of house - roof, shingles, eaves troughs, siding, yard, windows
- building structure - exterior walls, foundation walls
- basement - look for open or large cracks, signs of moisture
- energy efficiency - type of heating system and insulation, is attic adequately insulated and properly ventilated
- floors - are they even? are there squeaks when you walk?
- plumbing system - water pressure, taste water, check pipes and fixtures
- heating system - turn on furnace, check that air is coming out of all vents
- electrical system - is system grounded?
- pests - dry rot, bugs and termites
- is there an up to date survey?
- are there any right of ways or easements? Do you have access to your property? (in the case of rural properties)
- septic system, water potability and flow rate (in the case of rural properties) ☞

LEGAL ASPECTS cont'd from page 1

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

Title Insurance

Title insurance offers home buyers a 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 affidavits of residence and the affidavits for the land transfer tax. And of course just about everything has to be done in triplicate. It is important that all the documents be filled out correctly and that they be registered in a timely fashion and in the correct order.

Land Transfer Tax

Land transfer tax is a tax paid by the purchaser, usually at the time the deed to the property is registered. The amount of tax is based on the purchase price of the house. The following is a break down of the calculation.

\$0 - \$55,000 - .5%
\$55,001 - \$250,000 - 1%
\$250,001 - \$400,000 - 1.5%

For instance, if you are buying a house for \$187,500 you will pay \$1,600 in land transfer tax.
 $(\$55,000 \times .005) + (\$132,000 \times .01) = \$1,600$

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.

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! ☞

