

# NEWSLETTER

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**New format, new directions**– This edition of the Newsletter introduces more than just a new look. Although Norman Bowley, Philip Kerr and Robert Nadeau will continue to work very closely together, Bowley & Associates will be the core general practice, continuing a twenty-six year tradition of ‘hands on’ legal service to businesses, professionals and families, while Kerr & Nadeau will be the name of an IP, Technology, Procurement and Employment Law boutique. We will be counsel to one another’s firms and share some infrastructure. We are also very pleased to announce that Alan R. Winship will become counsel to Bowley & Associates. Mr. Winship was called to the bar in 1968.

Please note that our address remains unchanged, but the phone number reverts to our “old” number, 613-233-9541. Please also note our new web and e-mail addresses: [www.bowley.ca](http://www.bowley.ca) and [info@bowley.ca](mailto:info@bowley.ca).

Only after the last tree has been cut down  
Only after the last river has been poisoned  
Only after the last fish has been caught  
Then will you find that money cannot be eaten.

- the “Cree Prophecy”

**Joint tenancy**– Seemingly simple but in reality tricky, joint ownership can provide a smart way for spouses and others to avoid taxes, probate fees, and legal bills. But it can also prove a trap for the unwary.

Lawyers say that a true joint tenancy is characterized by the “Four Unities”, namely unity of possession, unity of title, unity of time, and unity of interest. Destroy one of these, and you are said to “sever” the joint tenancy into a tenancy in common. However, if one of the joint tenants dies while the four unities remain intact, the surviving joint tenants take the deceased’s interest by right of survivorship (*jus accrescendi*). It is as if the deceased simply evaporated from title.

But things are never as simple as they seem, and not all

joint ownership situations include an automatic right of survivorship. Particularly if the joint owners are not spouses, one must determine whether survivorship is intended. The doctrine of *presumption of advancement* presumes survivorship in favour of spouses and children, but amongst siblings, common law spouses, or non-related persons, a *presumption of trust* will often militate against survivorship. Each case is fact-specific.

The moral of the story? If you’re talking about serious money, get a legal opinion.

**Implied terms of sale**– Generally speaking, unless expressly negated, any contract for the purchase of goods, whether written or oral, contains implied terms that the goods will be of “merchantable quality”, that they will be reasonably fit for the purpose described by the buyer and that the purchased goods will correspond to the sample used by the seller to convince the buyer to buy. This is the law in nearly every common law jurisdiction in the world. You may read both the International Sale of Goods Act and the Sale of Goods Act at <http://www.e-laws.gov.on.ca>.

If my doctor told me I had only six minutes to live, I wouldn't brood. I'd type a little faster. - Isaac Asimov

**Mortgage fraud revisited**– We wish to remind clients who did not take title insurance at the time of purchase that “after market” title insurance is an inexpensive and effective protection against loss by title fraud or mortgage fraud. Call for further details.

**Don’t hire a lawyer**– to go to Small Claims Court. Very much a “People’s Court”, Small Claims is designed for self-representation. Generally, the only lawyer there should be the judge.

That said, we offer you a secret weapon: our free Small Claims Assistance service. Check out our website at <http://www.bowley.ca/services/Litigation/SmallClaims.shtml> for a comprehensive guide to your day in court.

## BOWLEY & ASSOCIATES

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**Covenants that “run with the land”**– Very often, when you purchase a home, your lawyer will tell you that your deed contains certain covenants, often called “restrictive covenants” and that they “run with the land”. In an urban setting, these are typically covenants which were laid down by the original developer in your area (and mostly because he was strong-armed by the city) to set certain minimum standards. The first purchaser had to promise certain things and had to require that any subsequent purchaser agree to the same.

What are typical covenants? Not to plant certain undesirable trees, not to leave debris in the front yard, not to keep livestock in the city, not to paint your house purple, not to change the slope of your lot..... generally speaking, not to do the things which would annoy you if your neighbor did them! This early yet effective form of town planning lives on in today’s deeds.

**New home purchases**– Every year, thousands of new homes are sold in Ottawa. Although nearly every such transaction brings great pride and joy to the purchaser, problems can arise. A purchase of a home from a builder differs significantly from the purchase of a used residence and requires particular vigilance on the buyer’s part.

These deals work, and work well, most of the time. The consumer wants a nice new home and the builder wants to make money. He understands that his reputation depends on great, honest and timely work.

Because builders face unpredictability in weather, labour and material, they try to reduce their exposure as much as possible by passing many of the risks to the buyer. This is why you need to pay very close attention to the language and the implications of the contract.

For instance, all builder’s agreements allow a *right to extend* the closing date on one or more occasions. This is particularly acute if you are selling an existing residence– you might get caught without a dwelling for days, weeks, or even months. While rare, the situation is not unknown.

Most such agreements give the builder considerable latitude to make changes to materials, specifications and plans without your consent, or to buy its way out of non-compliance by reducing the closing price for items it forgot or chose not to include. Given that builders want

you to be happy, this does not happen often, but if butternut panelling is more important to you than life, you need to make sure that the agreement does not allow the builder to substitute.

You particularly should understand that these contracts emphasize the “Entire Agreement” clause, which means that the document represents *all* of the contract between the parties and that there are no side deals, winks or nods. No matter what the glossy brochures say, no matter what is in the model home, and no matter what the sales agent told you, *if it is not in writing in the agreement (or subsequently modified in writing by the parties) then it simply is not enforceable.*

All these agreements will contain covenants, reservations and restrictions which were imposed upon the developer by the City when he was obtaining the subdivision agreement. The developer is required to pass them along to you and you will have to pass them along to whomever buys from you, and so on and so on. This is not a bad thing– generally, these all go to ensuring you are the kind of property owner you want your neighbour to be, but you should read and understand them before you sign.

Nearly all builders are registered with Tarion, the regulator of the new home industry in Ontario and the administrator of the Ontario New Home Warranty Program. You should be extremely cautious in dealing with a builder who is not. This program is crucial for peace of mind and you should visit the Tarion website to become fully familiar with it.

One key difference from buying a used home is that GST *does* apply to new construction. Typically, it is *included* in the purchase price of a new home, but you are required to assign the GST rebate to the builder.

An amplified version of this article is available on our website.

**Robert Oppenheimer** was known as the “father of the atomic bomb”. Having given man such power, he said this: “We do not believe any group of men adequate enough or wise enough to operate without scrutiny or without criticism. We know that the only way to avoid error is to detect it, that the only way to detect it is to be free to inquire. We know that in secrecy error undetected will flourish and subvert.”