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FOCUS ON REAL ESTATE LAW

New legislation to combat mortgage fraud – will it work?



Sidney H. Troister

Identity theft, fraudulent transfers of properties, and forged mortgages have become front page news over the last several months.

A minor public panic has arisen as a result of reports that peoples' homes have been "stolen," that they face eviction because of forged mortgages registered against their homes, or face substantial costs to have title to their property restored. In one very recent court decision, an Ontario Judge wrote: "Ontario is currently experiencing a serious mortgage fraud plague."

The question that homeowners are increasingly asking is, "How can I protect myself from what appears to be a rampant problem in Ontario?"

This type of fraudulent activity is not new. It is also hardly an epidemic; homeowners are not losing their properties. On the other hand, it has become more sophisticated in recent years and the subject of greater public focus. This is despite the introduction in Ontario of a sophisticated electronic registration system and efforts on the part of lenders and lawyers to change the way they do business in order to prevent fraud.

In one typical situation, a fraudster acquires false identification for a homeowner and "sells" the house to an accomplice, who grants a mortgage against title to finance the "purchase." Relying on appropriate documentation and identification (all of which is fraudulent), the lawyers and lenders for the parties complete the transaction. The fraudsters receive the mortgage proceeds and disappear. Registered title shows that the owner transferred the property to a purchaser who granted a mortgage

against the property. The real owner, who knows nothing about the fraud, is no longer the registered owner of the property until the courts restore title to the owner. Under current law, as interpreted by the Ontario Court of Appeal in 2005, while title is reinstated in the name of the proper



owner, the forged mortgage is valid. The real owner of the property faces several unpleasant prospects, including getting the new valid mortgage discharged from title. In some circumstances, the innocent owner can claim compensation from a government

fund called the Land Titles Assurance Fund, but that process has been recently described by an Ontario Court as "time-consuming, expensive, uncertain and tortuous."

The goal of these schemes is not to steal houses, but to steal money from lenders. A lender advances mortgage funds to a borrower that it thinks is the buyer and owner of the property.

(continued next page)

Inside...

COMMERCIAL LAW	3
CONSTRUCTION LAW	4
FAMILY LAW	5
BUSINESS LAW	7
TORKIN MANES UPDATE	8

Focus Facts

Conducting credit checks without permission may now be considered an invasion of privacy and could lead to a civil lawsuit and even a judgment for damages. In a recent Ontario case, the Court refused to dismiss at a pre-trial stage, an action in which the plaintiff alleged that an unauthorized credit check constituted an actionable invasion of his privacy. Businesses regularly conducting credit checks on individuals may want to discuss their practices with their professional advisor.

Contact any member of our Business Law Group for more information.

In the last *Focus*, we reported that an Ontario trial judge awarded \$500,000 in punitive damages against Honda Canada for its “mistreatment” of a disabled employee, leading up to his dismissal. The Court of Appeal recently released its decision of Honda’s Appeal, upholding the wrongful dismissal award, but significantly reducing the punitive damages to \$100,000, stating that the original award was disproportionate under the circumstances.

Contact any member of our Labour Relations and Employment Law Group for more information.

Mortgage fraud (cont’d.)

If the mortgage is held to be valid, the government fund pays off the mortgage. If the mortgage is invalid, the bank loses the entire amount of the mortgage it has advanced. The issue depends on the interpretation of the *Land Titles Act*.

The judicial response to this problem has not been completely consistent. In 2005, the Court of Appeal held that two mortgages given on the authority of a fraudulent power of attorney were valid because, according to the Court, the *Land Titles Act* provides that any document registered and certified in the Land Titles System is valid. In October of this year, however, a lower court ignored the Court of Appeal’s pronouncement of the law and held a similar mortgage to be invalid. The entire issue is being revisited by the Court of Appeal.

The outcome will probably be irrelevant since the Province has recently introduced legislation to clarify the matter. The new legislation declares that any forged title document is void. Innocent purchasers or lenders who purchase from or lend to a fraudster will have recourse against the Land Titles Assurance Fund to compensate them. Title to the property will remain with the real owner and the fraudulent mortgage will be declared void.

Title insurance provides the best protection against fraud. If you have purchased a property recently, in all likelihood you obtained a title insurance policy. In that case, in the event of a fraud on your title, the title insurer would pay for title to

your property to be restored to you and would be responsible for paying off the fraudulent mortgage.

What if you purchased your property before title insurance was available? If a fraud occurs on your title, you are responsible to get title restored yourself. Homeowners can now purchase title insurance for their existing homes to protect themselves against fraud, as if the insurance was obtained when they bought their homes.

Title insurance may become more important as a result of the new legislation. One anticipated effect of the new legislation is that lawyers may be reluctant to give a purchaser or a lender an unqualified opinion on the validity of title. Lawyers can never guarantee that a transfer or mortgage has not been given by a fraudulent person and the new legislation renders fraudulent instruments void.

Since purchasers and lenders will probably want some protection against fraud, it is likely that more and more real estate transactions, including corporate and commercial transactions, will be title insured, primarily to protect against the possibility of unauthorized or fraudulent signatures on documents. Of course, and regrettably, the cost of title insurance policies will be borne by purchasers and borrowers.

Sidney Troister is a senior partner of our Commercial Real Estate Group and is certified by the Law Society of Upper Canada as a Specialist in Real Estate Law. He can be reached at 416 777 5432, or stroister@torkinmanes.com.

FOCUS ON COMMERCIAL LAW

You paid for this but they gave you that – important new Tribunal decisions for the Canadian retail industry

Violet French
& Chaim Sapirman

Several recent decisions from the federal Competition Bureau may signal that the notion of *caveat emptor* (buyer beware) is

becoming a thing of the past in Canadian retailing.

The cases in question were based on the "ordinary-sale-price" provisions of the *Competition Act*; provisions that regulate how a retailer may advertise prices to the public. In order to claim that a product is being offered at a discounted price, the retailer must be able to demonstrate that a substantial quantity of the product has been sold at the "ordinary," or higher price; or the higher price must be shown to have been in place for a significant length of time before the offered discounted price.

In 2005, the Competition Tribunal issued a decision against Sears Canada Inc. for exaggerating the ordinary selling price of automobile tires that had been advertised as being "on sale." The decision came on the heels of large penalties imposed by the Tribunal against Suzy Shier Inc. and The Forzani Group for misleading marketing practices. The Sears decision was seen at the time

as a strong wake-up call to other retailers – one that would persuade them to review their pricing policies to ensure compliance with the *Competition Act's* ordinary-selling-price provisions.

The message, however, may not have been clear enough.

In the last few months, the Competition Tribunal has dealt with two more complaints against retailers. The first involved a promotion accompanying the monthly statements of CIBC Visa cardholders, offering to sell them binoculars or a blood-pressure device at a price claimed to be substantially lower than the regular price. The second



complaint arose from price discounts in promotional material and price tags of items of clothing in stores owned by Grafton-Fraser Inc. In both cases, the Competition Tribunal ruled that the "regular price" advertised – which was intended to reflect the price at which the item is generally sold by retailers – had been inflated. Consumers were thereby misled into thinking that the projected savings were greater than they actually were.

In all these cases, the repercussions were substantial. In four of the five matters, administrative penalties imposed on

the retailers ranged from \$100,000 to \$1.2 million. In some cases, the retailer was liable for legal costs as well. The retailers in the CIBC matter agreed to refund the difference between the sale price and the purported regular price to all the purchasers of the promotional product. In several cases, the retailers agreed to publish corrective notices in major national newspapers and implement a comprehensive

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Focus Facts

Lenders should take note of two recent court cases, including one from the Supreme Court of Canada, that underscore the need for a clear (and signed) security agreement over the assets of the debtor. In one case, the Court refused to enforce an alleged oral agreement to grant security over the assets of a company in receivership. In the other case, an agreement by the debtor to grant security to a creditor at a later date was held to be insufficient to qualify as a security interest over the assets of the debtor.

Contact any member of our Restructuring and Security Realization Group for more information.

Focus Highlights

Neil Abramson recently won a precedent-setting case in the Ontario Court of Appeal against the Discipline Committee of the Royal College of Dental Surgeons. In an important development for appeal procedure in Ontario, the Court held that where a party has already commenced an appeal, the other side may launch a cross-appeal, without first seeking leave of the Court to do so.

You paid for this... (cont'd.)

Corporate Compliance Program to promote adherence to the *Competition Act*.

If it was not clear before, then it should be clear now that retailers need to recognize that the Competition Bureau is using its resources to ensure compliance with the *Competition Act*. Retailers should also be aware of the potential consequences of violating those provisions. Deputy Commissioner of Competition Raymond Pierce said recently that "the Bureau continues to commit its energies to cleaning up all deceptive marketing practices. Consumers must

feel confident that they are receiving truthful information about the price of goods they purchase." If the Competition Bureau stays the course, we may be seeing the new era of *caveat venditor*, or seller beware.

Violet French is a partner in our Business Law Group. Her practice includes advising on marketing practices and privacy matters. She can be reached at 416 777 5437, or vfrench@torkinmanes.com.

Chaim Sapirman is a student-at-law at Torkin Manes and is currently in the Business Law rotation. He can be reached at 416 863 1188 x 382, or csapirman@torkinmanes.com.

FOCUS ON CONSTRUCTION LAW

No more Mr. Nice Guy – environmental protection legislation and the construction industry



Gregory D. Hersen & Michael Panacci

Since 1994, environmental regulations have been in force in Ontario which deal with the disposal of waste on construction and demolition sites. Under these regulations, general contractors, property owners, architects and engineers are, or could be, responsible for ensuring

compliance with various waste-disposal requirements. Prosecutions may result

and fines may be imposed if these regulations are not complied with.

Surprisingly, many players in the construction industry are not aware of the requirements of these regulations. A key reason for this is that until recently, these regulations were not consistently

enforced by the Ministry of the Environment. Lately, however, municipalities and the provincial government have increased their focus on waste reduction and diversion. These regulations are now being much more diligently enforced.

“ Prosecutions may result and fines may be imposed if these regulations are not complied with... ”

What do the Regulations Say?

In March 1994, the Province enacted the "Waste Audits and Waste Reduction Work Plans" regulation and

the "Industrial, Commercial and Institutional Source Separation Programs" regulation under the *Environmental Protection Act*. These

Regulations apply to either a construction project or a demolition project with a total floor area of 2,000 square metres or more. Any person who undertakes a construction or demolition project – whether on their own behalf or on behalf of

another person – is required to complete a waste audit and prepare and implement waste-reduction plans and source-separation programs for the waste that will be generated during the construction or demolition. The exact requirements are set out in detail in the regulations, and it is not only the owner or the contractor who may be held liable for compliance.

To whom do the regulations apply?

You may be surprised at how far-reaching environmental statutes can be. Obviously, owners and general contractors are affected. Architects and engineers who are acting in a pure consultancy role may not be liable for compliance, but they may have potential liability for compliance to the property owner, depending on the terms of their contract. In circumstances in which a design consultant is participating in a more direct role as a design-builder, or in any capacity that involves more than pure consultancy, the regulations

may become directly applicable to them. In these cases it would be prudent for the design consultant to seek professional advice regarding their potential obligations under the regulations.

In addition to the construction context, these regulations apply to retail establishments, shopping complexes, office buildings, restaurants, hotels and motels, hospitals, educational institutions, large manufacturing establishments, and multi-unit residential buildings. Owners and property managers will certainly wish to ensure compliance with the regulations.

Greg Hersen is a partner in our Construction Law Group and is certified by the Law Society of Upper Canada as a Specialist in Construction Law. He can be reached at 416 777 5400, or ghersen@torkinmanes.com.

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Focus | Facts

Since January 1, 2004, a two-year “limitation period” for suing another party has been in force in Ontario. The basic rule is that you must sue the other party within two years of the date on which your cause of action arose, and you were aware, or ought to have been aware, that you had a cause of action. Since this regime has now been in place for two years, limitation periods are expiring every day. If you think you have a claim against someone, don't wait to contact your legal advisor.

Contact any member of our Litigation Law Group for more information.

FOCUS ON FAMILY LAW

Better late than never – the Supreme Court rules on retroactive child support



Jennifer Marston

Parents paying child support who do not voluntarily disclose increases in their income now face a greater risk of being ordered to pay retro-

active support. A recent decision of the Supreme Court of Canada strengthens

the onus on payor parents to ensure that their child support payments rise along with their incomes.

Child support in Ontario is calculated under the *Federal Child Support Guidelines*, based on the payor's income and the number of children receiving support. In most cases, when separated parents reach an agreement or obtain a divorce order, an amount of child support is

specified, based on the payor's income at that time. Although parents can request financial disclosure from one another annually under the *Guidelines* and adjust support accordingly, many choose not to do so. In such cases, the payor continues to pay the original amount of support despite any changes in income.

How do the courts respond when the recipient parent later learns of a payor

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Better late than never... (cont'd.)
parent's increased income and seeks a retroactive increase in child support?

Prior to the Supreme Court's decision in *D.B.S. v. S.R.G.*, released this summer, the recipient parent would have been required to satisfy a fairly strict test in Ontario in order to obtain an award of retroactive

Focus | Facts

You may be surprised to learn that under new federal lobbyist regulations, you or your employees may be classified as "lobbyists" and may need to be registered. Do you or any of your employees communicate with a public office holder (i.e., an officer or employee of the federal government or a federal agency) about the awarding of a contract by the government or agency? Do you or any of your employees arrange meetings between a public office holder and another person? These are two examples of "lobbying" as that term is defined in the legislation.

Contact any member of our Litigation Law Group for more information.

support. The Supreme Court's recent decision has lowered the bar, however. The Court made it clear that parents have an obligation to ensure that they are paying the appropriate amount of child support. If a payor's income rises and the amount of child support paid by that parent does not, the courts will view the payor as having an unfulfilled obligation towards his or her children.

Whether the unfulfilled obligation will be enforced by way of a retroactive child support order will depend on a number of factors, including whether the recipient has a reasonable explanation for the delay in claiming increased support, whether the payor has engaged in blameworthy conduct, whether the child has suffered hardship, and whether the payor will suffer hardship if the order for retroactive support is granted.

If the order is granted, it will normally be retroactive to the date on which the recipient first raised the topic of disclosure or increased child support with the payor. In most cases, however, courts will not award support retroactive to a date more than three years before formal legal notice was given.



If you are a payor, the best protection is to ensure that you are paying support in accordance with your current income at all times. Disclose your income annually to the recipient, and make any adjustments that are necessary. If you do not, you will run the risk of having to make those payments as a lump sum later.

Recipients should ensure

that they request full disclosure from payors annually, and request that support be increased if the disclosure shows increased income.

Parents who have been paying or receiving the same

amount of support for several years and who have not exchanged disclosure should consider discussing their options with a family lawyer. If you are a recipient, your lawyer will be able to advise you on the merits of a potential retroactive support claim. If you are a payor, your lawyer may be able to assist you in reaching an agreement with the recipient parent that will allow you to move forward with a clean slate.

Jennifer Marston is an associate in our Family Law Group. She can be reached at 416 643 8813, or jmarston@torkinmanes.com.

Is there a topic you would like us to cover in a future issue of *Focus*?

Visit torkinmanes.com and let us know.

Getting to know directors' and officers' insurance: Part 3



Allan S. Bronstein

Parts one and two of our series on directors' and officers' insurance, addressed coverage basics, costs, and deductibles.

In this issue, we review various aspects of making a claim and possible reasons an insurance company might deny coverage.

Denial of coverage

A claim under a D&O insurance policy may be denied for a number of reasons, including:

- the claim does not result from a covered risk under the policy;
- the claim is specifically excluded under the policy;
- the person is not a director or officer as defined in the policy; and
- the claim is reported late.

Each claim notification to an insurer will be evaluated on its own merits, but early notification to your broker is important in all claims.

Rescinding a policy

A D&O insurance policy is an insurance contract, and like any such contract, can be rescinded in the event that the information provided to the insurer by the client, for the purposes of procuring insurance, contained material misrepresentations. Accounting restatements and corporate fraud have been common reasons for rescission.

The severability clause

A "severability clause" is contained in most D&O insurance policies. This clause states that the insurer has relied upon the information provided in the application and its attachments, and that such information will be construed as a separate application for insurance from each director and officer. Therefore, it is important for you to ensure that the statements of one director or officer are not attributed to the others.

The typical D&O policy can often contain other provisions that reduce the effectiveness of the severability clause, making it important to review the policy with your broker to ensure you have true severability.

Warranty statements

The concepts of warranty and continuity are not well understood and can lead to unnecessary gaps in coverage. By way of explanation, D&O insurance coverage is provided on a "claims made" basis. In other words, it covers claims today for wrongful acts that may have occurred in the past or over a period of time. When the insurance is initially purchased, the underwriter will request a warranty statement, which requires the directors and officers to state that they are not aware of any past acts that may give rise to a claim in the future. Problems can arise, however, when the policy is renewed. The original warranty statement should be incorporated into the renewal.

Resources

There are now more than 20 insurers that are licensed carriers of D&O insurance in Canada. There are insurers in the US, Bermuda, the UK and Europe that regularly compete on large, multi-national projects. These foreign markets are often used in situations where the domestic capacity cannot provide the necessary limits required.

Making a claim

Most D&O insurance policies include a reporting clause for any facts or circumstances that an insured believes may give rise to a claim under the policy. The first step is to contact your broker and begin an evaluation process to determine if notification should be given to the insurer. You must have the insurer's authorization to incur defence costs in a claim. If you are sued in your capacity as an officer or director, do not have your lawyers or the company lawyers, take any steps until you have discussed the claim with your insurer. Handling of a potential claim requires a broker that is experienced in claims advocacy and well-versed in the intricacy of the policy wording.

If you missed any part of this series, please visit our website at torkinmanes.com/publications.

Allan Bronstein practises in our Business Law Group and advises clients on corporate finance and corporate /commercial legal issues. He can be reached at 416 777 5369, or abronstein@torkinmanes.com.

Torkin Manes Update

NEW LAWYERS

We are pleased to announce that the following lawyers have joined the firm.

Jeffrey Alpert – *Business*
Nili Birshtein – *Real Estate*
Jodi Kovitz – *Family*
Michael Panacci – *Construction*
Laurie Pawlitzka – *Family*
Christopher Valente – *Insurance*
Jason Wang – *Commercial Litigation*

ANNOUNCEMENTS AND NEWS

Lorne Wolfson and Max Shafir were each named one of Canada's 500 Leading Lawyers in the "2006 Lexpert American Lawyer Guide to Lawyers in Canada."

Our Health Law Group will present the seminar, "Your Prescription for Legal Health" for GTA pharmacists at the Westin Prince Hotel, on November 29.

Neil Abramson recently joined the adjunct faculty at the University of Toronto, Faculty of Law, where he is now teaching Trial Advocacy.

Gregory Hersen was recently elected chair of the Ontario Bar Association's (OBA) Construction Law Section. He chaired the Construction Law Section's program "An Evening with the Construction Lien Masters" on November 23.

At our annual breakfast seminar on November 22, members of our Business Law Group presented "The Rules of the Game Have Changed - Advising the Professional

Corporation," to accountants, bankers and financial advisors.

Laurie Pawlitzka spoke on "Opening Statements" at a joint presentation by The Advocates' Society and The Law Society of Upper Canada on October 20-21 called "The Conduct of a Family Law Trial."

Lisa Corrente co-chaired a joint program hosted by the OBA and the Medico-Legal Society of Toronto on September 26, speaking on the proposed changes to the *Regulated Health Professions Act*.

On September 14, Linda Godel chaired the OBA Charity and Not-For-Profit Law Section Program.

In June, John Rowinski was elected Chair of the Aboriginal Law Section of the OBA. He chaired a legal education program, "Partnerships in Sustainable Development: Relations with First Nations in Ontario's Forest Industry," on September 12.

In August, Sidney Troister presented his paper on "Mortgage Fraud" at the Uniform Law Conference of Canada in Edmonton.

Lorne Wolfson presented "Unjust Enrichment" at the National Family Law Conference in Kananaskis, Alberta on July 2. On July 13 at that same conference, he presented "Family Trusts Under Canadian Family Law" which was co-authored by Ann Elise Alexander and Jennifer Marston.

Leonard Rodness was a presenter at the Annual Conference of the Ontario Association of Committees of Adjustment and Consent Authorities, on June 5, speaking about "Reciprocal Easements and Rights-of-way."

Members of the Bar and Judiciary recently "Peer Review Rated" Irv Kleiner in Martindale Hubbell, with a BV rating. This rating attests to a lawyer's superior legal ability and professional ethics.

8th Annual Charity Golf Tournament

Our sincere thanks to all our clients and friends who helped make our 8th Annual Torkin Manes Charity Golf Tournament another success. Together, we donated more than \$36,700 to the SickKids Foundation, bringing our total contribution to almost \$240,000 since we began holding the event.

In October, in recognition of our continuing support of the SickKids Foundation we were once again honoured as a "Donor of the Week" by the Hospital for Sick Children.

Mark your calendars for our 9th Annual Charity Golf Tournament, to be held on June 14, 2007.

2006 Becel Ride for Heart

Torkin Manes raised \$36,656 for the Heart and Stroke Foundation in this year's Ride for Heart on June 4. We were the top fundraising team in our category for the fourth year in a row, and second overall for the entire event.

Focus is published regularly by Torkin Manes Cohen Arbus LLP, Barristers & Solicitors. The contents are of a general nature and are not intended to be a full and complete analysis of the topics. Before applying the concepts discussed in *Focus*, it is imperative that you consult your legal advisor.

If you would like to receive *Focus* by e-mail, please visit our Web site at www.torkinmanes.com, or call Michelle Thompson at 416 643 8816, or e-mail mthompson@torkinmanes.com.

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