# Risky Business – Risk Management

Craig R. Carter, Maria K. Holder and Neil M. Smiley

Toronto Fasken Martineau Mini-Symposium
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# Land Titles and Fraud – The New Rules

Craig R. Carter

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## General Rules

**What is fraud?**

- Stealing (intentional and knowing deceit)
- Breaching a trust (equitable fraud)
- Fraudulent conveyance (statutory fraud)
- Fraudulent misrepresentations

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## General Rules

- But innocent person may be the unintended dupe of the fraud
- So you have two innocent parties
- The innocent true owner
- The innocent purchaser who received the property from the fraudster
- Someone must lose the property

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## General Rules

- Ancient Law – Owner Wins
- Registry Act - Bona Fide Purchaser Without Notice Who Registers Wins
- Land Titles Traditional Rules – Bona Fide Purchaser Usually Wins
- Land Titles New Rules – Owner Usually Wins

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## General Rules

**Land Titles Traditional**

- Did you buy from a forger forging the owner's name i.e. someone pretending to be the true owner – you lose
- Did you buy from the fraudster who through fraud is now the registered owner i.e. you are buying from the fraudster not the true owner – you win

**Land Titles New**

- Are you buying from a fraudster – you lose
- Are you buying from an innocent person (but not the true owner – you win

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## Fraud Systems

- Nemo Dat
- Registry System-Time of Registration
- Registry System-Actual Notice
- Land Titles System- Time of Registration
- Land Titles System- Unregistered Instruments Void
- Land Titles System – Actual Notice
- Land Titles System- Immediate Indefeasibility - *Chan*
- Land Titles System- Deferred Indefeasibilty - *Durrani*
- Land Titles System- Double Deferred Indefeasibilty - *Lawrence*
- Land Titles System- Double Deferred Indefeasibilty Plus - *Reviczky*
- Land Titles System- Due Diligence Restriction – *Rabi/Reviczky*
- Land Titles System- One Transaction Restriction – *Rabi/Reviczky*

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## Nemo Dat

- If you don't own it you can't convey it
- Ancient system
- Still applies today if property is not registered
- Priority/validity depends on time of execution
- Earlier instrument/agreement is valid

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## Registry Act

- Replaces Nemo Dat with time of registration not time of execution
- A non registered instrument is void as against a registered instrument
- Equity imposes actual notice to offset harshness of time of registration
- This creates concept of bona fide purchaser for value without notice
- Two unregistered instruments - time of execution.
- One registered instrument, one unregistered instrument - registered takes precedence
- Two registered instruments time of registration governs

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## Land Titles

- Introduces concept of indefeasibility
- May treat fraudsters different from forgers
- Identity Fraud – forging someone else's signature
- Value Fraud – artificially increasing the apparent value

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## Land Titles

- Introduces new system of land registration
- Government guarantees title
- The abstract mirrors the state of title – the mirror principle
- Instruments prior to the abstract are irrelevant- the curtain principle
- Actual notice of a conflicting claim does not affect the registered title –see BC, Alberta Saskatchewan, Manitoba
- But in Ontario special rule actual notice does apply
- Time of registration wins
- Unregistered instruments are void but in Ontario only if bona fide purchaser without actual notice

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## Land Titles

- A is innocent registered owner
- R1 is Rogue, R2 is accomplice
- F is a fictitious person
- B is innocent Purchaser/Mortgagee

- R1 forges A's name on transfer to B
- R1 forges A's name on transfer to R1, R1 transfers to B
- R1 forges A's name on transfer to R2, R2 transfers to B
- R1 forges A's name on transfer to F, Someone posing as F transfers to B
- In all of the above B transfers to innocent person or gives charge to innocent bank

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## Land Titles

**Immediate Indefeasibility**

- Not the law
- Key case *CIBC vs. Chan* (Court of Appeal -2005)
- Overturned by Court of Appeal in *Lawrence vs. Wright* -2006
- Mrs. Chan is a gambler. Forges Husband's signature on a power of attorney (he is in Hong Kong) borrows money on their home from CIBC and then goes back to the casino. Husband and wife reconcile and move to set aside mortgage because husband's signature forged
- Court says as soon as you register your mortgage is valid even the if the true owner's signature was forged
- Registered owner always has good title even if based on forgery
- Treats forgeries and frauds the same

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## Land Titles

**Deferred Indefeasibilty**

- Defeasiblity of title is deferred one round
- Key case is *Durrani vs. Augier* -2000
- This was the law until a few years ago
- Augier forged Durrani's name on a mortgage to himself. He then foreclosed so he became the registered owner. He then sold property to an innocent party who wasn't very innocent and who was deemed to have notice of the irregularities.
- Court set the deed to new purchaser aside
- Court confirmed that if innocent party took from a forger no title but if forger put title in his own name then sold to innocent party innocent party gets good title
- So R1 forges A's name on deed to B – B gets no title
- If R1 forges A's name on deed to R1 and then coveys to B - good title
- Treats forgeries and frauds differently

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## Land Titles

**Double Deferred Indefeasibilty**

- Key case *Lawrence vs. Wright* -2006
- Rogue forges Lawrence's name on deed to fictitious person Wright. Wright gives mortgage to Maple Trust who is innocent
- Court sets aside mortgage to Maple Trust and gives Lawrence back her house
- Defeasibility is deferred two rounds
- New Rule: If you deal with the crook, in this case Wright, then you get no title even though Wright signed his own name to mortgage
- So to get good title you must deal with a party that is innocent of the fraud – two innocent persons
- New Test: **two innocent persons** test
- Additional New Test: were you in a position to **avoid the fraud** test

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## Land Titles

- New Legislation (2006) amends Land Titles Act
- where you take title from a "fraudulent person" or get title from a "fraudulent instrument" then void. Fraudulent instrument is any instrument that perpetrates a fraud.
- Catches value frauds and identity frauds

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## Land Titles

- R1 forges A's name on deed to innocent B
- Immediate – B wins A loses
- Deferred – B loses A wins
- Double deferred – B loses A wins

## Land Titles

- R1 forges A's name on deed to R1 and R1 sells to innocent B
- Immediate – B wins  A loses
- Deferred – B wins A loses
- Double deferred – B loses A wins
- (not two innocent parties B is innocent but R1 is not)

## Land Titles

- R1 forges A's name on deed to R2, R2 sells to innocent B
- Immediate – B wins A loses
- Deferred – B wins A loses
- Double deferred – B loses A wins
- (because there are not two innocents. B is innocent but R2 is not)

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## Land Titles

- R1 forges A's name on deed and conveys to F, F then sells to innocent B
- Immediate- B wins and A loses
- Deferred – B wins and A loses
- Double deferred – B loses and A wins
- (because not two innocent parties)

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## Land Titles

**Value Fraud**

- A owns house worth $500,000. A enters into a purchase agreement to sell his home to B for $700,000 above fair market value. A and B are colluding to defraud CIBC. B takes offer to CIBC and CIBC thinking the property is really worth $700,000 gives B a mortgage for $600,000. A and B disappear. There is no true owner being defrauded
- Immediate – mortgage to CIBC valid
- Deferred – mortgage to CIBC valid
- Double deferred – mortgage to CIBC valid

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## Land Titles

**Double Deferred Plus**

- *Reviczky* may change the rules again
- Reviczky owns home. Nephew forges a power of attorney. Home conveyed under fraudulent power of attorney to Meleknia who is innocent. Meleknia gets no title because dealt with forger.
- But Meleknia gives a mortgage to HSBC who is also innocent
- Double deferred there are two innocents HSBC and Meleknia so mortgage to HSBC should be valid
- But Court sets it aside anyway
- Court says test is did HSBC have an opportunity to avoid the fraud. It's lawyer could have called up Revitczky and asked if he had signed a power of attorney which would have disclosed the fraud. Therefore mortgage void.

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## Land Titles

**Summary**

- To get good title you must deal with an innocent person
- If you deal with a fraudster or forger you get no title even if you are innocent and maybe even if you did all the due diligence in the world
- If you deal with an innocent person who deals with a forger or fraudster you may be out of luck if (a) you were in a position that you could have discovered and prevented the fraud (b) your lawyer dealt with the lawyer for the fraudster (c) the lender gives a mortgage to facilitate the purchase by an innocent purchaser who is buying from the fraudster

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## Powers Of Attorney In Real Estate Transactions

Maria K. Holder

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## Power of Attorneys ("POAs") in Real Estate Transactions

What is REQUIRED of you when you are:

1. Acting as an Attorney in a POA (in situations where the Grantor is mentally capable or incapable)
2. Preparing a POA for a Grantor
3. Acting in a transaction where there is a POA:
   - Acting for the Attorney who wishes to rely on a previously prepared POA (purchase/mortgage transaction); or
   - Acting for a Purchaser where the Vendor is completing the transaction pursuant to a POA (or acting for a Mortgagee that is lending to a borrower who is completing the transaction pursuant to a POA)

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## Basics of Power of Attorneys

- POA is a written document given by one person or party (the "**Grantor**") to another (the **Attorney**") authorizing the latter to act for the former
- The Attorney is at law allowed to do anything on the Grantor's behalf (unless restricted) in relation to the Grantor's property that the Grantor could do if able - except make a will
- The ownership of the assets remain in the name of the Grantor
- POA's can be general or specific, limited or unlimited, for a defined term or open-ended, and granted to one or more individuals

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## Four Types of POAs

1. General Power of Attorney for Property *(Powers of Attorney Act, 1979)*— Very limited. Only pertinent with regard to POA's which deal exclusively with property or financial matters and which do not purport to survive the incapacity of the Grantor
2. **Continuing Power of Attorney for Property** *(Substitute Decisions Act, 1992)* — The type of POA which we will be discussing
3. Power of Attorney for Personal Care (not relevant to real estate matters)
4. Power of Attorney coupled with an Interest (N. Smiley's will discuss)

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## Nature of the Duties of an Attorney

- Duties depend on mental capacity of Grantor (i.e. whether the Grantor is capable of understanding the nature/risks of the POA and instructing the Attorney):
  - Where Grantor is 'capable'– **Agent/Principal Relationship**
  - Where Grantor is 'incapable'– **Trustee/Settlor Relationship**

- For a Fiduciary Relationship to exist there must be scope to exercise some discretionary power:
  - Where Grantor is 'capable' – case law has been inconsistent, but largely courts will interpret the existence of fiduciary obligations where the Attorney can exercise some *discretion*
  - Where Grantor is 'incapable' – There are fiduciary obligations.

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## Duties of Attorney where Grantor is 'Capable'

**Agent/Principal** type relationship:

- respect the Grantor's title and act in good faith
- stay within the scope of the authority delegated
- exercise reasonable care and skill in the performance of acts done on behalf of the Grantor
- refrain from making secret profits
- cease to exercise authority if the POA is revoked
- account for dealings with the affairs of the Grantor when lawfully called on to do so
- take no compensation unless agreed to or granted by the court
- not make, change or revoke a will on behalf of the Grantor

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## Duties of Attorney where Grantor is 'Incapable'

**Settlor/Trustee** type relationship:

- At common law – the duty to consider and to exercise judgment; not to act with improper motives; duty to take into account relevant considerations and refrain from taking into account irrelevant ones
- Duties codified for a **Continuing Attorney for property where the grantor is *incapable*** (refer directly to *SDA*- Section 38) include:
  - exercise powers and duties diligently, with honesty and integrity and in good faith, for the incapable person's benefit;
  - explain to the incapable person the terms, powers and duties of the Attorney;
  - encourage the incapable person to participate to the best of his or her ability in the Attorney's decisions about the property;
  - Seek to foster regular, personal contact between the incapable person and his or her supportive family members and friends;
  - Keep track of all transactions regarding the property;

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## Duties of Attorney where Grantor is 'Incapable'…Cont

- Consult with persons from whom the incapable person receives personal care and with supportive family members and friends of the incapable person;
- If not receiving compensation, manage the property using the same skill and care that a person of ordinary prudence would exercise in the conduct of his or her own affairs;
- If receiving compensation, exercise the degree of skill that a person in the business of managing the property of others is required to exercise;
- Make reasonable efforts to determine whether the incapable person has a will and, if so, what the provisions are. Do not dispose of property subject to a specific non-monetary testamentary gift unless necessary to comply with the attorney's duties; and
- Make expenditures from the incapable person's property that are reasonably necessary for the person's support, education and care and for the support, education and care of the person's dependents

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## As an Attorney – Are you permitted to use the POA for your own benefit

Can you (as the Attorney) transfer the Grantor's property to yourself ?

**IF Grantor is 'Capable':**

- The Attorney may use the POA for his or her benefit *only* if the Grantor specifically consents to such use:
  - If the POA is *specifically* worded to provide for specific benefit in favour of the Attorney, then Attorney can act to this effect.
  - If the POA is more *general/broad* in its wording, then the Attorney must seek a separate consent from the Grantor with respect to the specific benefit in favour of the Attorney.

**IF the Grantor is 'mentally incapable':**

- Law Still Evolving – but most case law provides the Attorney may not use the POA for his or her benefit:
  - The Grantor can not 'consent' to this (because grantor's mental condition has deteriorated and it can no longer be said that the Grantor fully understands the transaction). Case law is consistent in this regard. (*Egli v. Egli*, 2004 – Such a transfer is seen as a breach of fiduciary duties)

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## BE ON GUARD - POA's Are Risky

**POAs ARE OFTEN USED IN FRAUD CASES:**

- **Increases Complications/Risks** for us and our client.
- **We must use a Higher Standard of Care Now-** Recent Case Law has led to a higher level of due diligence being required by mortgagees, title insurers, and solicitors involved in Real Estate transactions involving POAs.
  - Bill 152 - Provides that an instrument is fraudulent **(and therefore null and void)** if it is given under a forged POA —An innocent purchaser's transfer will be deleted
- We should **avoid using POAs if possible** — "Using POAs should be the exception, not the rule" (LSUC)

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## *Reviczky* - Fraud Case which Alarmed the Industry

***Reviczky v. Meleknia* (2008)**

- Reviczky rented out his house to a fraudster (fake grandson) who used a fraudulent POA and sold Reviczky's house to Meleknia (innocent purchaser) and made off with the proceeds.
- Meleknia (innocent purchaser) financed his purchase with a HSBC mortgage that was title-insured by Stewart title.
- On closing HSBC advanced mortgage funds to innocent purchaser's lawyer, who cut a certified cheque (from his trust account at RBC) and gave the cheque for the purchase price to the fraudster. Fraudster forged Reviczky signature and deposited in the name of the fictitious grandson at the Korean Exchange Bank of Canada and made off the money.

1. Title to Property: It took two separate hearings before the court gave Reviczky back clear title to his Property.
2. HSBC Mortgage: The court ruled that the HSBC mortgage was invalid because the bank failed to scrutinize the bogus POA. So Stewart Title paid off and discharged the HSBC loan (and also reimbursed Meleknia for his losses for purchasing a property the seller didn't own).
3. Stewart Title. In order to recover its losses, Stewart Title sued KEBOC (bank which deposited the forged trust cheque). Court found KEBOC responsible for conversion (i.e. Cashing a cheque with a forged endorsement). Stewart Title was reimbursed by KEBOC

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## Lessons from *Reviczky* for the legal community

YOU MUST BE ON GUARD AND SUSPICIOUS OF ALL TRANSACTIONS WHERE THERE IS A POA USED:

- **If you are in proximity to the Fraud you have an obligation to avoid the Fraud.** The invalidity of the HSBC Mortgage was determined on the basis that HSBC "chose to put itself in proximity to the unknown fraudster in this transaction by dealing with him, yet it failed to make use of the opportunity to avoid the fraud, which that proximity gave it." .Ultimately, the judge decided the issue was not the actions or inaction of a solicitor, *but whether HSBC had an opportunity to avoid the fraud.*
- **If you have proximity to a transaction where a POA is used you MUST scrutinize the POA** - not only by the lawyer for the Vendor using the POA, but by the lawyer for the Purchaser and the Purchaser's bank.

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## What do we do if our client (Grantor) wishes to have a POA prepared?

- **Consider the Scope of Power** (must be limited or general in nature of assets and/or time for use) – no terms should be broader than absolutely necessary.
- **Discuss with the client the Risks and Consequences of the POA** – Take Notes. Case law has been very stringent on this point – lawyers have the responsibility to fully explain the nature of the POA to the person executing it. There must be no doubt that the person executing it was fully aware of all of the consequence.
- **Whether the client has the capacity to give the POA** (refer to Section 8(1) of the *SDA*).
- **Whether the POA should continue** after the incapacity of the client.
- **Who the Attorney is** and whether there is a familial relationship
- **Whether more than one Attorney should be appointed** – and/or in substitution
- **Whether your firm has a professional relationship with the proposed attorney/beneficiaries** of the estate (determine if any conflicts)
- **Comply with LSUCs client ID and verification rules** (Part III of By-Law 7.1).

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## What do we do if we are provided with a POA to use in a transaction?

Be Cautious when relying on a POA (when selling, purchasing, mortgaging) –

1. Obtain a complete copy;
2. Review it (indicia of fraud);
3. Ensure it meets the formal requirements (next slide); and
4. Note any restrictions listed in the POA.

*Refer to the Checklist provided

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## Checklist Highlights...Formal Requirements

**Does the POA meet the *SDA's* Formal Requirements?**

1. The Grantor must be at least 18 years of age and have capacity (presumed unless reasonable grounds to consider otherwise)

2. if it is a continuing POA (most are), it must explicitly state so and two witnesses are required

3. witnesses must not be (i) the Attorney's spouse or partner, (ii) the Grantor's spouse or partner, (iii) a child of the Grantor, (iv) a person connected by guardianship, or (v) under 18 years of age

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## Checklist Highlights cont….

- **Restrictions in the POA?** Are there any limitations to the power granted? Do these restrictions prohibit the contemplated transaction?
- **Confirm directly with Attorney and ask the following questions:**
  - Full force and effect - Grantor alive? Has it been Revoked?
  - Did the Grantor have the Capacity to give the POA when giving it?
  - Is the person purporting to be the Attorney the lawful party named in the POA? Verify I.D. of the Attorney - Copy it
  - Is the Attorney is acting within the scope of the authority granted in the POA?
- **Contact the Grantor and make enquiries:**
  - Use of the POA to complete the contemplated transaction
  - Satisfy yourself that the Grantor is still alive and the POA is not revoked; that the Grantor still has 'capacity' unless it is a continuing POA (and property not going to the Attorney); the person purporting to be the Grantor is the lawful party named in the POA (Verify I.D. of the Grantor - Copy it)
- **Advise the other party/parties** to the transaction that a POA will be used to complete this transaction (Lenders, Title Insurers)
- **Comply with LSUCs client ID and verification rules** (Part III of By-Law 7.1)

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## Checklist Highlights…Indicia of Fraud

- **Any Indicia of Fraud**?
  - Does the POA meet the formal requirements?
  - Has it been witnessed by the proper number of witnesses?
  - Do the names and signatures match?
  - was the document witnessed overseas? or yesterday?
  - Is the Grantor elderly?
  - Will the Attorney benefit personally from the use of the POA?
- **Consider the 'Real Estate Scams – Red Flag Handouts'** (LawPro).

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## Lessons To Be Learned

- **You must be on cautious with every transaction which deals with POA's**
- **Be cognizant of *any* indicia of fraud**
- **You need to scrutinize the POA if you have some proximity** (even if you are representing the Purchaser or Mortgagee, even if Vendor's counsel has looked and relied on it)
- **Use the checklist provided and make sure that the POA meets the formal requirements for a valid POA**
- **Keep Notes** to reflect your due diligence

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## Powers Of Attorney In The Corporate Context

**Neil M. Smiley**

**Toronto Fasken Martineau Mini-Symposium**
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## How Do Powers of Attorney ("POAs") Arise In The Corporate Context?

- **General Power of Attorney**
- **Power of Attorney "coupled with an interest"**

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## General Power of Attorney (corporate context)

- Terminates on the grantor's revocation, incapacity, death or dissolution
- Can be used to do anything with respect to the grantor's property that the grantor could lawfully do, except make a will (*Powers of Attorney Act*, s. 2)
  - Power normally limited by the instrument granting it
- Possible to have both a corporate grantor and a corporate attorney
- Revocable (if not "coupled with an interest")
- Third parties are entitled to rely on the authority of the attorney until notice of the POA's termination is received

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## General Power of Attorney (cont.) Requirements for validity

- **Requirements for formal validity:**
  - Very few formal requirements
  - Need to look to the common law to determine requirements
  - The grantor must be of age and have the requisite mental capacity
  - Attorney must have the capacity to act
    - Under s. 2(1) of the *Substitute Decisions Act* ("SDA") a person is presumed mentally capable at age 18
  - Note: there is no requirement for witnesses
    - It is customary for the POA to be witnessed
    - An independent witness is preferable

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## General Power of Attorney (cont.) Fiduciary duties

- A general power of attorney gives rise to an agency relationship
- The relationship of agent and principal is a "*per se"* fiduciary relationship (*Hodgkinson v. Simms,* SCC 1994)
- However, in *Hodgkinson* and other cases, the court warned against applying a categorical approach to the identification of fiduciary relationships

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## General Power of Attorney (cont.) Fiduciary duties (cont.)

- Ex: *Phillips v. R.D. Realty* (OCJ, 1995):
  - **Facts:** An agent acted for both the vendor and the purchaser company on a real estate transaction. He failed to inform the vendor that agents at his brokerage had an interest in the purchasing company. Post-sale the property was flipped and resold for a considerable profit. The purchaser sued for breach of fiduciary duty and disgorgement of profits.
  - **Held:** Action dismissed. Although the relationship of real estate agent and client is normally a fiduciary one, in this case the parties were not engaged in fiduciary responsibilities.
    - No vulnerability or trust and confidence reposed in the agent;
    - No power or discretion conferred upon the agent to act on the vendor's behalf - the vendor was sophisticated with respect to real estate transactions and did not rely on the agent's advice in making decisions about the sale.

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## General Power of Attorney (cont.) Fiduciary duties (cont.)

- To determine the nature of the relationship we look to the indicia of fiduciary relationships:
  - Scope for the exercise of some discretionary power
  - The agent is unilaterally able to exercise that discretion to affect the principal's interest
  - The principal is vulnerable or places reliance on the agent's discretion or skill
- Attorney's may act in their self-interest:
  - Where the instrument conferring the power so authorizes
  - Where the grantor consents

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## Examples of general powers of attorney in the corporate context

- **Pledge Agreement – registration of security:**
  - …"The Pledgor shall deliver to the Security Agent appropriate powers of attorney for transfer in blank, duly executed, in respect of such of the Pledged Shares as is registrable. Upon the occurrence of an Enforcement Event that is continuing, the Pledgor shall, at the request of the Security Agent, cause such of the Pledged Shares as is registrable to be registered in the name of the Security Agent or its nominee and authorizes the Security Agent to transfer such Pledged Shares into the name of the Security Agent or its nominee, so that the Security Agent or its nominee may appear as the sole owner of record of such Pledged Shares."

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## Examples of general powers of attorney in the corporate context (cont.)

- **Commercial Lease – POA to sell the Tenant's property**:
  - "It is agreed between the Landlord and the Tenant that in the event of any breach of the Tenant's covenants contained herein by the Tenant… this lease may be terminated by the Landlord…The Landlord, in additional to all other rights available to it, has the right to enter the Demised Premises as agent of the Tenant… and may take possession of the chattels…and sell such chattels and property at public or private sale… In the event of termination in accordance with this section, the Tenant hereby appoints the Landlord as his power of attorney to execute any and all documents required to complete the sale of the Tenant's chattels and property."

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## Examples of general powers of attorney in the corporate context (cont.)

- **Commercial Lease – subordination and attornment:**
  - …"It is a condition that this Lease and the Tenant's rights granted hereunder that this Lease an all of the right of the Tenant hereunder are subordinate to any and all mortgages, trust deeds or other instruments of financing, refinancing or collateral financing, from time to time in existence against the Property. Upon request, the Tenant will subordinate this Lease and all or is rights hereunder in such form as the Landlord requires to any and all mortgages [etc.], and will, if requested, attorn to the holder thereof or to the registered owner of the Property, as the case may be. If within three (3) days after request by the Landlord to the Tenant to execute the instruments or certificates to give effect to the foregoing the Tenant has not executed the same, the Tenant irrevocably appoints the Landlord as the Tenant's attorney with full power and authority to execute and deliver in the name of the Tenant any such instrument or certificate."

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## Examples of general powers of attorney in the corporate context (cont.)

- **Limited Partnership Agreement - POA:**
  - …"Each Special Partner or each Person who is the transferee of a Unit or a Partnership Interest, names and irrevocably appoints by this Agreement the General Partner, with full powers of substitution, as its agent and nominee to act in its name, with full powers and full authority to sign, under its seal or otherwise, to sign under oath, to recognize, to deliver and to have registered or filed, in its name and in its place:
    - any document or necessary amendment to the Declaration of Partnership that is required to reflect any modification to this Agreement which is authorized in compliance with its provisions;
    - any document which relates to the admission of Special Partners and to the transfer of Units, the whole in compliance with the provisions of this Agreement; and
    - any document, act, agreement or instrument signed by the General Partner in the course of the business of the Partnership, as authorized by this Agreement."

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## Powers of Attorney "coupled with an interest" ("PACIs")

- Irrevocable
- Survives the incapacity, death or dissolution of the grantor
- Simply stating that the POA is "irrevocable" or "coupled with an interest" is not sufficient
- Very little Canadian case law
- Often misused!

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## PACIs (cont.)
## Requirements for validity

- Must be given for the purpose of securing for the attorney:
  - The payment of a debt owed to the attorney
  - A beneficial interest of the attorney in the subject matter
- Consideration – agency must not be "gratuitously created"
  - Signing the POA under seal may not be sufficient:
    - *Ranger v. Ranger* (Ont HC, 1919): "there must be actual consideration and not merely the implication of consideration from the fact that the document is under seal"

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## PACIs (cont.)
## Requirements for validity (cont.)

- As with a general POA, no formal requirements of execution
- Query whether the parties are actually in a fiduciary relationship?
- Query whether the attorney may act in its self interest?

HOWEVER…

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## PACIs (cont.)
## Effect of the SDA

- Does the SDA apply to PACIs?
- SDA, s. 7(1):
  - "A power of attorney for property is a continuing power of attorney if,
    a) It states that it is a continuing power of attorney; or
    b) It expresses the intention that the authority given may be exercised during the grantor's incapacity to manage property."
- Most PACIs given by individuals express the intention that they are to survive that individual's incapacity

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## PACIs (cont.)
## Effect of the SDA (cont.)

- Why does the application of the SDA to PACIs matter?
  - The SDA codifies fiduciary obligations typically owed by attorneys, including only exercising powers for the incapable person's benefit
  - The SDA imposes specific execution requirements
    - Ex: Two witnesses, neither of whom may be in specified relationships with the grantor or attorney
  - Under s. 12 of the SDA, continuing POAs are terminated:
    - When the grantor dies; and
    - When the grantor executes a new continuing POA, unless the grantor provides that there shall be multiple POAs

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## PACIs (cont.)
## Effect of the SDA (cont.)

- Unlikely that the courts will find the SDA applies to PACIs given by individuals

- Recommend that PACIs granted by individuals explicitly state that the SDA does not apply.

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## PACIs (cont.)
## Case law – irrevocability of POAs

- *Walsh v. Witcomb* (UK, 1797): The POA authorized the attorney to collect debts on the grantor's behalf and keep the funds in payment of a debt the grantor owed to the attorney.
- *Hart Group Ltd. v. Land Securities Ltd* (NB QB, 1984): The lease authorised the landlord to re-enter and sublet the leased premises as the tenant's agent upon the tenant's default. The court found the grant of agency to be related to the landlord's securing of its interest in having the tenant carry out its obligations under the lease.
- *Smith v. Himchitt Estate* (BC SC, 1990): A POA given under a lease in consideration of the sum of $15,000 authorized the attorney to apply each year on the grantor's behalf to the Department of Fisheries and Oceans for renewal of a licence.

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## PACIs (cont.)
## Examples (cont.)

- **Loan agreement:**
  - In consideration of a loan advanced by the Company to us, and in furtherance of a mortgage of the Property granted by us to the Company to secure such loan, we, _____, as employee of the Company, and _____, spouse or co-owner, do nominate, constitute and irrevocably appoint the Company our true and lawful Attorney for us jointly and severally and in our names and on our behalf anything that we can lawfully do by an attorney…
  - AND WE HEREBY AGREE AND COVENANT for ourselves and our respective heirs, executors and administrators to allow, ratify and confirm whatsoever our said Attorney shall do or cause to be done in the premises by reason of these presents.
  - The power of attorney granted herein is coupled with an interest (this power of attorney having been granted in connection with a loan advanced by the Attorney to us and a mortgage of the properly granted by us in favour of the Attorney to secure such loan) and therefore shall be irrevocable and shall not be revoked or terminated by the death, insolvency, bankruptcy or incapacity of either of us. This power of attorney coupled with an interest is not intended to be an enduring power of attorney within the meaning of section 8 of the *Power of Attorney Act* (British Columbia) …

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## PACIs (cont.)
## Examples (cont.)

- **Loan agreement (cont.):**
  - The power of attorney granted herein is coupled with an interest (this power of attorney having been granted in connection with a loan advanced by the Attorney to us and a mortgage of the properly granted by us in favour of the Attorney to secure such loan) and therefore shall be irrevocable and shall not be revoked or terminated by the death, insolvency, bankruptcy or incapacity of either of us. This power of attorney coupled with an interest is not intended to be an enduring power of attorney within the meaning of section 8 of the *Power of Attorney Act* (British Columbia) and is not intended to be a representation agreement within the meaning of the *Representation Agreement Act* (British Columbia) or any similar legislation.

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## PACIs (cont.)
## Practice tips – irrevocable POA

- A PACI should expressly state that:
  - It is coupled with an interest and what the interest is;
  - It is given for valuable consideration and what the consideration is;
  - It may not be revoked without the attorney's consent/it is irrevocable;
  - It is not intended to be a continuing POA for property and that the SDA does not apply; and
  - The grantor permits the attorney to use the POA for his or her own benefit and agrees that the attorney does not owe any fiduciary obligations to the grantor.

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# Solicitor Duties in the Face of a Client's Dishonesty, Fraud or Breach of Duty

Neil M. Smiley

Toronto Fasken Martineau Mini-Symposium
November 3, 2011

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## Introduction

- **Considering questions such as:**
  - When is a lawyer protecting his or her client's interests and when is a lawyer engaging in sharp practice?
  - How should a lawyer respond to a client who is asking for assistance in committing fraud or engaging in dishonest behaviour?
  - When is it appropriate to withdraw from a retainer due to ethical issues?
  - What are a lawyer's obligations on withdrawal from representation?
  - When is a lawyer permitted to assist a client in breaching his or her duty?
  - When in assisting a client in breaching his or her duty, can a lawyer be liable to the other side?

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## Rules of Practice - Framework

- Rule 4.01 - A lawyer must not :
  - knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable
  - deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent
- Rule 2.02: When acting for a client, a lawyer shall not:
  - knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct
  - advise the client on how to violate the law and avoid punishment

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## Rules of Practice - Framework (cont.)

- Rule 6.03 – A lawyer must:
  - agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client
  - avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of a client's rights

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## Withdrawal - Dishonesty

- **Where an individual client requests assistance engaging in a dishonest or fraudulent course of conduct:**
  - Advise the client that the proposed conduct is illegal, unlawful, dishonest or fraudulent
  - Where the client insists on the proposed conduct, the lawyer must withdraw from representation (Subrule 2.09(7)).

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## Withdrawal – Dishonesty (cont.)

- **Rule 2.09(7):**
  - Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if
  - discharged by the client;
  - the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the tribunal and, following explanation, the client persists in such instructions;
  - the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another;
  - it becomes clear that the lawyer's continued employment will lead to a breach of these rules;
  - the lawyer is required to do so pursuant to subrules 2.02 (5.1) or (5.2) (dishonesty, fraud, etc. when client an organization); or
  - the lawyer is not competent to handle the matter.

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## Dealing with dishonest clients (cont.)

- **Rule 2.02(5.1): Dishonesty, fraud, etc. when the client is an organization:**
  - When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization intends to act dishonestly, fraudulently, criminally, or illegally with respect to that matter, the lawyer shall:
    - advise the person from whom the lawyer takes instructions that the proposed conduct would be dishonest, fraudulent, criminal, or illegal;
    - if necessary because the person from whom the lawyer takes instructions refuses to cause the proposed wrongful conduct to be abandoned, advise the organization's chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct would be dishonest, fraudulent, criminal or illegal;
    - if necessary because the chief legal officer or the chief executive officer of the organization refuses to cause the proposed conduct to be abandoned, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct would be dishonest, fraudulent, criminal, or illegal, and;
    - if the organization, despite the lawyer's advice, intends to pursue the proposed course of conduct, withdraw from acting in the matter.

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## Dealing with dishonest clients (cont.)

- What if a client provides misleading information…
  - To the other side or to the court?
    - Request that the client correct the information
    - If the client refuses to do so, withdraw from representation (Rule 2.09(7)).
  - To you?
    - Consider withdrawing from representation
    - Subrule 2.09(2): "Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw."

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## Withdrawal – Good Cause…

- Subrule 2.09(1): A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances.
  - What constitutes good cause?
    - Factors to consider: nature and stage of matter, relationship with client, lawyer's expertise and experience and any resulting prejudice to the client from the withdrawal
    - Serious loss of confidence (subrule 2.09(2))
    - Non-payment of fees, but only if no serious prejudice (subrule 2.09(3))
  - What constitutes reasonable notice?
    - Client should be able to obtain other representation and proceed with the matter without forfeiting any advantage or right obtained

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## Lawyer's obligations upon withdrawl

- Subrule 2.02(8): When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor legal practitioner.
- Subrule 2.02(9): Upon discharge or withdrawal, a lawyer shall:
  - subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;
  - give the client all information that may be required in connection with the case or matter;
  - account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;
  - promptly render an account for outstanding fees and disbursements; and
  - co-operate with the successor legal practitioner so as to minimize expense and avoid prejudice to the client.

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## Withdrawal – continuing obligation of confidentiality

- The withdrawing lawyer's duty of confidentiality to the client means that he or she cannot disclose any of his or her dealings with the client (including the reason for withdrawal), to anyone without the consent of the client.

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## Lawyer's liability at common law

- At one end of the spectrum: advising/assisting a client in breaching a contract = generally OK
- At the other end: assisting a client in committing fraud = clearly not OK
- Middle ground: when is a lawyer able to assist a client in committing a breach of trust?

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## Lawyer's liability at common law – breach of trust

- Strangers who knowingly participate in a breach of trust will be personally liable if they "assist with knowledge in a dishonest and fraudulent design on the part of the trustees" (*Barnes v. Addy*, UK, 1874)
  - **Required degree of knowledge**: actual knowledge, recklessness or wilful blindness (*Air Canada v. M &L Travel*, SCC 1993)
  - Must know:
    - of the trust's existence; and
    - that what was being done was improperly in breach of that trust

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## Lawyer's liability at common law – breach of trust (cont.)

- *Barnes v. Addy* (UK, 1874)*:*
  - **Facts:** A will appointed three estate trustees and allowed for the appointment of new trustees but did not allow for a decrease in the number of trustees. Two of the trustees died. The remaining trustee wished to retire and instructed his solicitor to prepare an instrument appointing Barnes, the husband of one of the beneficiaries, as sole trustee.
  - The solicitor advised against having only one trustee, but prepared the instrument on the instructions of his client and Barnes' solicitor approved the appointment.
  - Barnes invested the trust funds for his own purposes and went bankrupt. The beneficiaries sued the previous trustee, his solicitor and Barnes' solicitor for breach of trust.
  - **Held:** The action against the solicitors was dismissed on the basis that they had no knowledge of, or any reason to suspect, a dishonest design in the transaction, and that they did not receive any trust property.

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## Assisting a breach of duty (cont.)

- **Nature of the breach of trust:** must be fraudulent and dishonest
  - Fraud = "the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take"
  - Therefore, "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability" (*Air Canada v. M&L Travel*, SCC 1993)

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## Assisting a breach of duty (cont.)

- *Eaton v. HMS Financial* (2008, AB QB):
  - A class action brought by investors against facilitators of a ponzi scheme was certified by the Court.
  - Lawyers were accused of knowing assistance by:
    - providing legal services to the fraudsters;
    - rerouting money through trust accounts; and
    - lending an "air of legitimacy" to the scheme by suggesting that legal professional would hold bonds in trust and protect individual investors in the event of default
  - Claims against the lawyers ultimately settled.

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## Concluding remarks

1. Know your client
2. Be aware of the transaction
3. Know the relevant Rules
4. Do not be complacent
5. Withdraw as required
6. Seek LSUC support/consultation as may be required
   - LSUC Practice Management Helpline:
   - 416-947-3315 or 1-800-668-7380 extension 3315.

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# POWERS OF ATTORNEY IN REAL ESTATE TRANSACTIONS

## SUGGESTED GUIDELINES

- Avoid using powers of attorney if possible.
    - Consider alternative means of achieving client's objectives.
    - Advise client of potential issues with lenders and insurers.
- If a Power of Attorney is the only means of proceeding, and there is no existing Power of Attorney, then the solicitor should:
    - prepare the Power of Attorney in accordance with formal requirements; and
    - establish the identity of the Grantor in a diligent manger and in compliance with client identification and verification requirements.
- If there is an existing Power of Attorney, the solicitor should:
    - obtain a complete original copy (or Notarial Copy);
    - review it (look for indicia of Fraud);
    - ensure it meets formal requirements in accordance with the governing legislation;
    - note any restrictions in the powers granted; and
    - contact Grantor and Attorney to satisfy yourself as to the use of the Power of Attorney, that it is not revoked, that the Grantor is still living, and has capacity (unless it is a continuing Power of Attorney – and the property is not being transferred to the Attorney).
- Advise the other party/parties to the transaction that a Power of Attorney will be used to complete the transaction. In particular, advise any lender and title insurer regarding the use of a Power of Attorney and obtain instructions.
- Register the Power of Attorney at the earliest opportunity and provide a receipted copy to the other parties to the transaction. Avoid registering on the day of closing.
- Solicitors may rely on statements in the document registering the Power of Attorney and may rely on validly drawn powers of attorney, absent notice of fraud or other suspicious circumstances.
- If there is a notice of fraud, solicitors must decide not to act. If there are other suspicious circumstances, solicitors must satisfy themselves that the Power of Attorney and its use are legitimate, failing which the solicitor should decline to act.
- Keep notes. Remember - nothing replaces professional judgment and common sense.

** Refer to Suggested Checklist*

# POWERS OF ATTORNEY IN REAL ESTATE TRANSACTIONS

## SUGGESTED CHECKLIST

* To use when the lawyer has not prepared the Power of Attorney, but the lawyer is either (i) electronically signing documents under the authority of a Power of Attorney or (ii) is acting for a party in a real estate transaction and the other side is signing documents under the authority of a power of Attorney (i.e. you have proximity to the Power of Attorney)

- Have you reviewed the original or notarial or certified copy of the Power of Attorney to ensure that it meets formal requirements?

- Are there any restrictions in the Power of Attorney on the powers granted?

  If so, do they prevent the Attorney from using the Power of Attorney in the manner proposed?

- Have you advised the Attorney (if your client) as to his/her fiduciary responsibilities including the obligation to keep the Grantor's funds separate from his/her own and to account to the Grantor (and, after the Grantor's death, to the Grantor's beneficiaries)?

- Have you confirmed with the Attorney the following:

  - The Power of Attorney is still in full force and effect and whether the Grantor is still living

  - The Power of Attorney was lawfully given and has not been revoked

  - The Grantor had the capacity to give the Power of Attorney when giving it and was least 18 years of age when the Power of Attorney was executed

  - The Grantor has the capacity now?

    - If the Grantor does not have the Capacity now, is the Power of Attorney a *Continuing* Power of Attorney which allows for the contemplated transaction?

    - If it is a Continuing Power of Attorney and the Grantor does not have currently capacity, is the property subject to this transaction going to a person *other* that the Attorney?

  - The Attorney is the lawful party named in the Power of Attorney.

    Obtain a photo ID from the Attorney to confirm age and compare name to that in the Power of Attorney

  - The Attorney is acting within the scope of the authority granted under the Power of Attorney

- Will the solicitor who prepared the Power of Attorney provide an opinion that he/she reviewed the Power of Attorney with the Grantor, that the Grantor was competent at the time that it was signed, valid at the time it was executed and the solicitor is not aware of any revocation

- Have you contacted the Grantor and confirmed the following:
  - The Power of Attorney is still in full force and effect and whether the Grantor is still living and the Power of Attorney has not been revoked
  - the person purporting to be the Grantor is the lawful party named in the Power of Attorney

    Obtain a photo ID from the Grantor to confirm age and compare name to that in the Power of Attorney. Obtain a notarized copy if you can not do so yourself.
  - The Attorney can use the POA to do the contemplated transaction
- In our discussions with the Grantor, does he/she appear to currently have capacity ?
  - If the Grantor does not appear to currently have capacity, is the Power of Attorney a *Continuing* Power of Attorney which allows for the contemplated transaction?
  - If the Grantor does not appear to currently have capacity and it is a Continuing Power of Attorney, is the property subject to this transaction going to a person *other* that the Attorney?
- Have you asked why the Power of Attorney is being used to complete the Transaction?

  Indicate the reason(s):
- Are there any suspicious circumstances that would require you to make further inquiries?

  If so indicate below:

  If applicable, list the particulars or inquiries made and the results thereof.
- Have you notified the title insurer or its solicitor that a Power of Attorney is being used?

  If so, has the title insurer consented to its use?
- Have you notified the lender or its solicitor that a Power of Attorney is being used?

  If so, has the lender consented to its use?
- If you are acting for the lender, have you reviewed and complied with the lender's instructions
- If you your client is acting under a power of Attorney - Have you reviewed with the Attorney the contents of the documents to be signed under the Power of Attorney including all of the statements in the documents, and have you obtained the Attorney's written approval of the contents and his or her consent that you electronically sign and register the documents?
- Have you also complied with the provisions of By-Law 7.1 regarding identifying and verifying the identity of the client?

The Ontario Bar Association – February 16, 2010

# THE NEW FRAUD RULES

Craig R. Carter
Fasken Martineau DuMoulin LLP

**Introduction**

Recent case law in Ontario and recent amendments to the *Land Titles Act* have introduced several new possible rules for indefeasibility of title for Land Titles parcels. Immediate indefeasibility of title and *nemo dat* have been rejected by the Ontario Court of Appeal [1] and by the recent amendments to the *Land Titles Act*[2]. However there is an ongoing debate among practitioners, government officials and the judiciary whether the operative rule in Ontario is now deferred indefeasibility, double deferred indefeasibility, double deferred indefeasibility plus or opportunity to avoid the fraud. In addition, innocent lenders may be tainted by reason of simultaneous conveyances where their borrower or the lender's lawyer dealt with the fraudster or the fraudster's lawyer. To add to the confusion, it is not clear what kinds of fraud will cause land titles to become indefeasible, that is whether the fraud must be criminal, illegal, immoral or amount to equitable fraud and it is not clear whether one fraudulent document will taint a series of otherwise valid documents created by the fraudster. Finally, the "opportunity to avoid the fraud" that may be objective and may not depend on whether or not you did due diligence and whether normal due diligence could have avoided the fraud.

No longer is the indefeasibility of title dependent upon transactional distance from the fraudulent transaction. A more qualitative analysis is now employed to determine how "innocent" the party trying to establish indefeasibility of title is. As a result, the certainty of title in land titles has been eroded. This erosion of title arises from both the decisions of the courts and the Ontario government wanting to make it more and more difficult for an innocent homeowner to lose their home by reason of the operation of the *Land Titles Act.* While this is laudable, it creates

[1] *Lawrence vs Wright* 84 O.R. (3d) 94

[2] 2006, c. 35, Sch. C, s. 58

uncertainty. Judges find it difficult to rule that an innocent homeowner loses his or her home by reason of the operation of the *Land Titles Act*, especially when the judge can do something about it. After all, there but the grace of God goes the judge. In any available indefeasibility system, there is a profound sense of injustice when the rightful owner loses her home.

Mr. Justice Finlayson's decision in *National Sewer Pipe*[3] and Mr. Justice Echlin's decision in *Rabi v. Rosu*[4] highlight the difficulty that some judges have in applying any concept of indefeasibility of title where the result is that an innocent homeowner loses what is theirs. On the other hand, Madam Justice McKinley's decision in *Fire v. Longtin*[5] highlights a more balanced view. For title systems to work, some innocent party may suffer a loss. Surprisingly, the Ontario government has also reacted to the adverse publicity of recent fraudulent schemes and passed legislative amendments which undermine the fundamental tenets of our Land Titles system. Unfortunately, this has made the job of real estate lawyers far more complex and has thrust upon an unwilling real estate bar, the role of gatekeepers of the integrity of the land titles system.

***Nemo Dat***

Prior to the land registry and land title systems being created in England, England was a *nemo dat* system. The theory of nemo dat is that if you don't own it, you can't convey it. As a result in a *nemo dat* system, the fraudster doesn't get good title nor can the fraudster give good title. In addition, an innocent person receiving title from a fraudster can never give good title to another innocent party. Therefore the titles in a *nemo dat* system are always tainted by an historical

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[3] *National Sewer Pipe vs. Azoua Investments Ltd.* (1993) 34 R.P.R. (2d) 1

[4] 48 R.P.R. (4th) 1

[5] (1994), 17 OR (3d) 418 (CA)

fraud and the current owner, no matter how long the property has been owned by innocent persons, never receives indefeasible title. The original owner of the property prior to the fraud always owns the property. In a *nemo dat* system the only real protection for property owners was possession. While the person in possession may be unable to show a good chain of title and may have derived their title through a fraudulent transaction somewhere in the chain of title, the true owner may also have difficulty establishing their title because of the lack of title records. The true owner not in possession would have difficulty supplanting the tainted owner who is in possession.

The institution of limitations of action legislation also assisted current owners in possession since the true owner's right to recover title might be barred by the limitations of actions. However titles based on adverse possession are complicated, difficult and recently in Ontario have been all but eliminated.

The creation of a Land Registry system in England and in Ontario changed the rules somewhat.

**Registry Act System**

The institution of the *Registry Act* in Ontario did not change the basic concept of *nemo dat*. In fact, in our current *Land Registry Act* system nemo dat is the operative defeasibility of title system with respect to fraud. That is, if you derived title from a fraudulent transaction, you have no title. Only the true owner of the property can establish ownership of the property and the courts will protect the true owner. There are, however, a couple of exceptions to the *nemo dat* rule in Ontario. The first exception to the *nemo dat* rule is that an innocent purchaser for value without notice of the title defect or fraud will get good title. However, you are deemed to have notice of documents which are registered in the Land Registry office. As a result, you have to be

a *bona fide* purchaser for value without actual knowledge or deemed knowledge for your title to be indefeasible in Land Registry. If a search of the Land Registry records reveals that your chain of title did not flow from the true owner, you do not get good title. As such, it is only where the true owner's title is derived from an unregistered conveyance or an unregistered agreement of purchase and sale that a registered *bona fide* purchaser for value without notice could establish title in the face of a fraud. For instance, if the registered owner is a trustee and has no authority to sell, and there is no actual or deemed notice of the trust, a *bona fide* purchaser would get good title even if the trustee is committing a fraud. However, if there are two claimants, neither of which has registered then the *nemo dat* rule applies even if the later claimant is a *bona fide* purchaser for value without notice.

Basically, the rule is this:

1. as between two unregistered interests *nemo dat* applies;

2. as between one registered interest and one unregistered interest, *nemo dat* applies unless the registered owner who is acquiring title based on a fraudulent transfer does not have actual notice of the unregistered interest;

3. as between two registered interests priority of time governs unless the prior registered owner had actual notice of the later interest.

The second qualification to the nemo dat rule in the Registry System is the 40 year chain of title concept. The current registered owner need only prove a valid chain of title for 40 years. If outside the 40 years there had been a fraudulent transaction depriving a true owner of its property interest that would not affect or taint the current owner of the property. We therefore have a

qualified *nemo dat* system in relation to the 40 year chain of title. This is exemplified by the *Fire v. Longtin*[6] case. In *Fire v. Longtin* due to a conveyancing error, Mr. Longtin's title included part of the driveway which was owned by Mr. Fire. Because Mr. Longtin could establish that his chain of title for the prior 40 years included the driveway which his predecessors never in fact owned, he obtained indefeasible title to the driveway even though it had previously been owned by Mr. Fire. The Court of Appeal of Ontario in *Fire v. Longtin* acknowledged that the working of the 40 year search rule would result in some *bona fide* owners losing their interest in real property. As such persons should deal with their property every 40 years in order to protect it from becoming indefeasible. This can be accomplished by registering a prescribed Notice of Claim. Having said that, in Registry we have a qualified nemo dat concept, the common law rule is that the fraudster or forger can never acquire good title to the property, no matter what. In other words, the fraudster's title is always defeasible no matter what system is operative. This is the case no matter how long the fraudster has owned the property.

For completeness, it should be remembered that the 40 year chain of title concept in Registry is extended if there are no conveyances within the 40 years.

Another interesting issue in the Registry System is whether a defeasible title can be made indefeasible by reason of a conveyance from yourself to yourself. Lets say you were occupying land and you do not have paper title to it. The current owner's title was registered 50 years ago in a conveyance from the true owner. Can you by registering a deed from yourself to yourself create a 40 year chain of title in which your conveyance is the only conveyance and therefore is indefeasible. Can you by doing a conveyance from yourself to yourself effectively cut off the true owner's interest. On one hand, a conveyance from yourself to yourself knowing of the

[6] supra

existence of a true owner 50 years ago would be considered in all likelihood a fraudulent transaction. On the other hand, if you *bona fide* believed you were the owner of the property for whatever reason including possession or if it was unclear who the true owner of the property actually was then such a mechanism might be upheld by the courts.

**Lawyers Obligation to Avoid Fraud**

The next issue is what liability does a lawyer have to his client when the client does not receive good title by reason of the *nemo dat* system applicable to the Land Registry system. Generally, the rule is that lawyers are not insurers against fraud and therefore there is an implied term of the lawyer's title opinion excluding lack of title by reason of fraud. Not only does this apply where a client acquires title from a fraudster but it also applies to an historical fraud which breaks the chain of title. This protection to the opining lawyer however, would not be available where the 40 year chain of title established that there was a break in the chain of title by reason of fraud.

Because lawyers do not provide opinions against fraud, lack of title by reason of fraud is a risk that clients assume. In the days when fraud was extremely unlikely, the opinion system operated reasonably well. However, on occasion, a particular client would suffer a catastrophic loss. As fraud became more prevalent, and because title insurers did insure over fraud there was a growing appreciation in the real estate bar that title insurance served a useful purpose by eliminating this risk. While fraud protection did not drive the movement towards obtaining title insurance policies by the Ontario real estate bar, it was recognized as a real benefit to clients.

The law however does impose some obligations on real estate lawyers in limited circumstances to prevent fraud. Real estate lawyers are not required to insure against fraud but are required to

take reasonable steps to prevent fraud. There are generally three rules affecting real estate lawyers in relation to fraud.

The first rule is that a real estate lawyer in the context of acting for a borrower and lender is required to ask for identification from her new borrower/clients. The purpose here was to impose a minimum protection that the lawyer identify her client in order to make a forgery more difficult. This rule is embodied in the *Yamada vs. Mock*[7] decision. In *Yamada vs. Mock*, the court held that the lawyer who acted for both the lender and the borrower had an obligation to request that the borrower produce identification in order to make it more difficult for the borrower to commit fraud. The court felt that this was a reasonable step for a lawyer to take to make fraud more difficult to commit. In *Yamada vs. Mock*, Mrs. Yamada owned the matrimonial home. Her husband Mr. Nguyen arranged a mortgage on the matrimonial home with Mr. Mock through a mortgage broker. Mr. Nguyen brought his girlfriend in to forge his wife's signature on the mortgage. Mr. Nguyen and his girlfriend then disappeared. The mortgage was set aside by the court based on the principle of *nemo dat*. Mr. Mock then sued his lawyer. The Court held that the lawyer was negligent because the lawyer, who acted both for Mr. Mock and for Ms. Yamada did not ask the impostor for identification.

Over time, the Yamada and Mock rule has expanded to require photo identification and recently the Law Society of Upper Canada rules have extended the identification process by law firms in order to meet recent money laundering legislation.

The second obligation of lawyer to avoid fraud is not to allow mortgage or other documentation to leave the lawyer's possession for execution. That is, the client must execute the documentation

[7] 29 O.R. (3d) 731

in front of the lawyer. This rule established in *Shute v. Premier Trust*[8]. In that case, the wife forged her husband's signature on the mortgage documentation. The lawyer acting for both the lender and Mr. and Mrs. Shute prepared the mortgage and delivered it to the wife (his client) to send to Morocco to have her husband (his client) execute it in Morocco before a notary public. The husband was not in Morocco and knew nothing about the mortgage. The wife forged the husband's signature on the mortgage and returned it to the lawyer for registration. The Court struck down the mortgage. The mortgagee then sued its lawyer. The court held that the lawyer had a heightened duty of inquiry where documentation was sent out of the office. In such a case, the lawyer is required to contact the borrower and ensure that the documentation is being properly executed.

The third obligation of a lawyer to avoid fraud also arises in the *Shute v. Premier Trust* case. The court established in that case, that where a lawyer sees red flags or suspicious circumstances in the transaction, the lawyer cannot turn a blind eye. The lawyer must investigate those red flags or suspicious circumstances and satisfy him or herself that no fraud is being perpetrated. In *Shute*, the mortgage was allegedly signed in Morocco on the same day it was delivered to the lawyer, and there was no notary seal on the document.

In summary then, a lawyer is not an insurer against fraud. However, a lawyer has to take reasonable steps to prevent fraud. These reasonable steps include obtaining identification, having the parties to a document execute the document in front of the lawyer, and being vigilant wherever there are suspicious circumstances in a transaction or red flags.

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[8] 35 R.P.R. (2d) 141

**Land Titles**

Land Titles was a new system of land registration instituted in Ontario in the late 1800s based on the Torrens System originally instituted in Australia. Ontario has a modified Torrens System. Land Titles is a statutory system of land recording and land ownership. As such, it is not bound by the traditional common law system of nemo dat. The Ontario Land Titles system is based on three principles, the mirror principle, the curtain principle and the insurance principle. The mirror principle states that the title recorded by Land Titles is a mirror of the ownership of the property. All interest affecting the land must be recorded to be valid. The curtain principle means that you do not have to look behind the title abstract. The insurance principle insures a *bona fide* person who loses their title or interest in real estate by reason of the operation of the Land Titles system.

In theory, the current owner recorded on a Land Titles abstract is not affected by a prior fraud. That is the curtain principle. If a true owner loses their title because someone else manages to be registered as owner, the true owner who loses their interest can recover compensation from the insurance fund. The fund, however, is a fund of last resort, is a fault system and has a cap on compensation.

As a result of the mirror and curtain principles, Land Titles required a different mechanism for indefeasibility of title with respect to fraud. If you are shown as the registered owner of the property in Land Titles, you do not have to look beyond the title abstract and you are not bound by previous frauds in the chain of title. Nemo dat does not apply. As such, if a person is shown on the registered title as the owner you can rely on that and if you are an innocent person acquiring title from the registered owner, you will get good title to the property.

Various indefeasibility systems were contemplated by the *Land Titles Act* drafters in order to determine when the title of a person shown on the title abstract becomes indefeasible as against the true owner. The *Land Titles Act* provides that if a fraudster gains title to the property, the title of the fraudster is not indefeasible. That is Land Titles can always amend the register to show the true owner as the owner of the property and remove the fraudulent party. However, if the fraudulent party is shown on the title abstract as owner and then deals with an innocent party who relies on the register, then the integrity of the Land Titles system requires that the innocent person gets good title and the true owner loses their interest in the property. The true owner then would make a claim against the Land Titles Compensation Fund. This concept is known as immediate indefeasibility. This may seem harsh, but it was deemed necessary to ensure innocent persons could rely on the register and have confidence in the system. Some Torrens Systems employ immediate indefeasibility. Ontario does not.

In immediate indefeasibility, as soon as an innocent person gets registered on the title to the property their interest in the property is immediately indefeasible. As long as the person was innocent, it does not matter how they acquired title. Even if the true owner's signature was forged, the innocent person gets good and indefeasible title.

The difficulty with an immediate indefeasibility system is the situation where the new registered owner acquires title through a forgery (as opposed to a fraud). Conceptually, Land Titles registrar took the position that an innocent party who receives registered title by way of a forgery does not get good title because they did not receive title from the true registered owner, they got title from a forger. In the case of a forgery, the Land Titles registrar wished to defer indefeasibility one round. This was the deferred indefeasibility concept.

The difference between an immediate indefeasibility system and a deferred indefeasibility system is whether the innocent registered owner received title by way of a forgery or received title from a fraudster registered on title. In immediate it does not matter how the registered owner got title, whether from a forger or a fraudster. In deferred, title received from a forger was defeasible, from a fraudster was indefeasible. For instance if a mortgagee dealt with a forger thinking that the forger was the registered owner of the property and the forger represented that they were the registered owner of the property, in an immediate indefeasibility system the bank would get a good and valid mortgage since they were shown on the registered title as the holder of a mortgage and they were an innocent party. In a deferred indefeasibility system, even though the bank was an innocent party they did not take their mortgage from the true registered owner, they took their mortgage from a forger. While the bank in deferred indefeasibility system did not get a good and valid mortgage, the bank could convey its mortgage to a *bona fide* purchaser for value without notice who would get good title. Also, the bank could under power of sale, convey good title to a *bona fide* purchaser. Even though the bank's title was defeasible, it could convey good and indefeasible title to a *bona fide* purchaser.

Theoretically, the argument advanced was that the bank who received a mortgage by way of forgery was relying upon its forged document not upon the registered title. Reliance on the register became the operative test. If the Bank registered its forged mortgage it did not rely on the register and got no title but the next innocent party taking from the Bank relied upon the register which showed the Bank as owner of the mortgage. Another way to argue this is whether the innocent party dealt with a registered owner. When the Bank gets a forged mortgage, they dealt with a forger not a registered owner. But the Bank could convey good title to an innocent

purchaser. In that case, the innocent purchaser deals with the registered owner, the Bank, not a forger.

The complexity arose where the forger either forged a deed and put title in the forger's real name or the forger forged a deed and put title in the name of an accomplice or in a fictitious person's name. None of the forger, the accomplice or the fictitious person would get good title as against the registered owner because they had achieved registered title pursuant to a fraud (which includes a forgery). However, once the registered title was in the name of the forger, the accomplice or the fictitious person that title could form the basis of a valid conveyance to a *bona fide* third party or form the basis of a valid mortgage to a lender. The immediate title of the forger, fraudster, and fictitious person was defeasible but the deferred owner, the innocent purchaser or innocent lender, would get good title even though they received it from a forger or a fraudster. This generated the saying that the fraudster could never get good title but the fraudster could give good title. This saying works where the fraudster uses a forgery to put title in her own name, in the name of an accomplice or in the name of a fictitious person. In that case, the fraudster, forger or fictitious person doesn't get good title (because they are part of the fraud) but can give good title to an innocent person. This was the fundamental difference between immediate and deferred.

So let's see how this works.

Suppose A is the true owner. B who is a forger forges a mortgage to CIBC. In immediate indefeasibility CIBC being innocent and on title has a valid mortgage. In a deferred indefeasibility system, CIBC does not get good title because they took from a forger not the real owner. Suppose CIBC then under power of sale transfers to C. In both the immediate and

deferred indefeasible system, C gets good title because C is innocent and because C dealt with the registered owner of the charge. Now, suppose B the forger forges A's signature to a deed in favour of B the forger. B the forger then gives a mortgage to CIBC. B does not get good title in both immediate and deferred indefeasibility. He is a crook. But in both systems, B the forger can give a valid mortgage to CIBC. CIBC's mortgage is valid in immediate indefeasibility because CIBC is innocent and the CIBC mortgage is registered. In the deferred indefeasibility system, the CIBC mortgage is valid because it is not based on a forgery. The CIBC mortgage was signed by the forger B who was shown as the registered owner. The CIBC mortgage was not signed by B pretending to be B. CIBC dealt with the registered owner B (even though B was a forger).

**Oklahomas or Value Fraud**

An Oklahoma does not depend upon a forgery. An Oklahoma is a series of transactions at fraudulently inflated prices in order to deceive a lender (or possibly a purchaser) into overvaluing the property and providing a mortgage which exceeds the value of the property or a purchaser paying an inflated price. The series of transactions are not bona fide, their purpose being to create a paper trail or inflated values to fool an innocent person. In an Oklahoma the mortgagee is taking title from the true owner of the property but at a fraudulent valuation. The mortgage is given by the registered owner for the purposes of perpetrating a fraud on the financial institution, but it is otherwise a good and valid mortgage. As such, whether the system is an immediate indefeasibility system or a deferred indefeasibility system is irrelevant in an Oklahoma or Value Fraud. The innocent lender gets a good and indefeasible mortgage even though a fraud is being perpetrated on it. The fraudulent party who owns the property and is giving the fraudulent

mortgage does not lose its title to the property either. As such, the distinction between immediate indefeasibility and deferred indefeasibility only arises where there has been a forgery.

**Identify Fraud**

It is in circumstances of identify fraud where a fraudulent person has forged the true owner's signature on a conveyance or a mortgage that the distinction between immediate and deferred indefeasibility becomes important. In this situation the lender although innocent will not get a valid mortgage. The mortgage will be struck from the register. We can now see the difference between immediate and deferred indefeasibility. In a deferred indefeasibility system, if there is a value fraud and the mortgagee gets a mortgage from the fraudster, the mortgage is valid. If there is an identity fraud and the mortgagee gets a mortgage from the fraudster forging the true owner's signature, the mortgagee does not get a valid mortgage. In an immediate indefeasibility system, the innocent lender always gets a valid interest whether from a forger or a fraudster. In a deferred indefeasibility system, the innocent party does not get a valid interest if the interest they received was pursuant to a forgery.

Now imagine a circumstance where the fraudster forges the true owner's signature to a transfer in favour of the forger. That is the forger puts title in his own name (this is the *Durrani* case). In an immediate indefeasibility system, the forger would still not get good title because the forger has committed a fraud. In a deferred indefeasibility system, the forger would not get good title either because the forger committed fraud or because the forger got title pursuant to a forgery. Either way, the true innocent owner of the property does not lose her title to the property. However, once title is in the name of the forger, in both an immediate and deferred indefeasibility system, the forger has the ability to give good title to an innocent person. As

such, the forger using his own name and being the registered owner of the property, can give a valid mortgage to a mortgagee or convey the property to an innocent purchaser. The true owner loses the property. The same mechanism applies where the forger conveys title instead of to himself, to an accomplice. The accomplice does not get good title because the accomplice is complicit in the fraud and in an immediate indefeasibility system, would have his title overturned. In a deferred indefeasibility system, the accomplice would not get good title either because he was complicit in the fraud or because the accomplice relied on a forgery or default with a forger, not the true owner. Either way, the accomplice would not get good title. However, in both the immediate and deferred indefeasibility systems, the accomplice would be able to give good title to a bona fide mortgagee or a bona fide purchaser for value without notice. In both cases, the innocent party is dealing with the registered owner of the property, albeit a fraudulent person.

The final and most prevalent situation which appears often in the case law, is that the forger forges the true owner's signature and conveys title to a fictitious person (either the forger or an accomplice using the fictitious name). The forger could have conveyed title to himself or to his accomplice but naturally uses a fictitious name in order to avoid arrest and incarceration. The forger or accomplice using the fictitious name then obtains identification and obtains a mortgage or conveys the property to an innocent purchaser. The fictitious person (really the forger or his accomplice) however is shown on the title to the property that is a registered owner and is in fact a real person who intends to obtain a mortgage in his fictitious name or takes all necessary steps to convey the property to an innocent purchaser using his fictitious name. It is this fictitious person scenario which causes the most difficulty in the case law. Neither the courts nor the Province is clear how a fictitious person should be considered for the purpose of indefeasibility

of title. Is the fictitious person a forger? Is the fictitious person a fraudster? One argument is that the fictitious person is a real person using an alias. Anyone can use an alias and that does not mean a fraud is being perpetrated. In this scenario, the fictitious person is no different than a real person because in fact there is a real person just using a fictitious name or an alias. The fictitious person may be the forger using an alias. The fictitious person may be an accomplice using an alias. In either case, there is a real person: the forger or the accomplice, who is the registered owner of the property using their fictitious name or their alias and should in either an immediate or a deferred indefeasibility system be able to convey good and indefeasible title to an innocent party.

In another scenario, the fictitious person is treated in the same way as a forger. That is, the fictitious person, when they sign their fictitious name to a mortgage is committing a forgery. If the fictitious person's signature to a loan is treated as a forgery, then the decision in *Lawrence* v. *Wright*[9] is supportable. If, however, the fictitious person is not forging the mortgage but is merely complicit in a series of transactions to perpetrate a fraud, then the *Lawrence v. Wright* decision is not supportable. In my opinion, it makes no sense to call a fictitious person a forger. They are not forgering a real person's signature.

As we will see when we review the *Lawrence v. Wright* case, the Court and the Province of Ontario treated the fictitious person as a forger and as a result applied deferred indefeasibility in a new fashion. It is for this reason that it is now considered that we have a double deferred indefeasibility system; that is, indefeasibility of title is deferred two rounds instead of one round. In summary, in a deferred indefeasibility system, a person taking from a forger does not get good and indefeasible title. A person participating in a fraud does not get good and indefeasible title.

[9] 84 O.R. (3d) 94

However, an innocent person taking from a fictitious person, an accomplice to the fraud or the forger who has put title in their own name, does get good and indefeasible title. Every identity fraud initially requires a forgery. There can be a series of transactions after the forgery involving fraudsters which result in good and indefeasible title being conveyed to an innocent purchaser. Is it only the forged document that is invalid? In an immediate indefeasibility system, even the forged document is valid to convey title.

**Double Deferred Indefeasibility**

It is submitted that the new statutory amendments to the *Land Titles Act* and the *Lawrence v. Wright* decision creates a double deferred indefeasibility system. The Court of Appeal of Ontario thought in rendering the *Lawrence v. Wright* decision that they were applying deferred indefeasibility. The Court of Appeal thought this because the parties to the litigation treated the fictitious person, Mr. Wright, as though he were the forger forging title to the bank. Remember in a deferred indefeasibility system an innocent party dealing with a forger forging the real owner's name does not get indefeasible title but an innocent party dealing with a fraudster does. The theory of double deferred indefeasibility is that an innocent party dealing with either the forger forgering the real owner's name or a fraudster does not get good title. However, an innocent party who dealt with the forger or the fraudster can give good title to another innocent party. Therefore you must have two innocent parties in order for title to be indefeasible. As such, the first innocent party dealing with the forger or the fraudster does not get good title. In an immediate indefeasibility system, the first innocent party would always get good title whether they dealt with a forger or a fraudster. In the deferred indefeasibility system, the first innocent party would get good and indefeasible title if they were dealing with a fraudster who had title registered in his name but would not get good and indefeasible title if his conveyance or

mortgage was a forgery. Now in a double deferred indefeasibility system, the innocent party is in the same position as deferred indefeasibility with respect to a forgery; that is, the innocent party does not get good and indefeasible title but the innocent party is treated differently where the innocent party takes title from a fraudster who has had title put in his own name. The legislation works the same way. Any instrument, either forged or perpetrating a fraud, is a fraudulent instrument and cannot convey good and indefeasible title to an innocent person. In a deferred indefeasibility system, the fraudster who obtains title from the forger could have conveyed good and indefeasible title to an innocent person.

In order to justify the Court of Appeal's decision in *Lawrence v. Wright*, the Court of Appeal indicated that the reason a deferred indefeasibility system (read double deferred indefeasibility system) was logical, was because the first innocent party was in a position to avoid the fraud. That is, the innocent party was dealing with a forger or the innocent party was dealing with a fraudster and with due diligence could have avoided the fraud. Because the innocent person could have avoided the fraud and did not do so, the innocent party's title is defeasible. This is the case even where the innocent party did do due diligence and still did not discover the fraud. The test is not whether you do due diligence or don't do due diligence, but whether you could have avoided the fraud. This conceptual difference is very difficult to comprehend. It does not appear to be a defence to defeasibility of your title that you did due diligence.

It is suggested that this analysis of the Ontario Court of Appeal in the *Lawrence v. Wright* case that the test is "in a position to avoid the fraud" was obiter and was merely explanatory of why a deferred indefeasible system is fair. In *Lawrence v. Wright*, the Ontario Court of Appeal said it was merely interpreting the Land Titles' sections dealing with fraud. It then justified the position as being fair by the "avoidance of fraud" test. However, judges since *Lawrence v. Wright* have

applied the avoidance of fraud test as the main operative test. On this basis, the law in Ontario may not even be double deferred indefeasibility but all titles are defeasible if the person receiving title had an opportunity to or could have avoided the fraud. This opens up for litigation lawyers to argue that some due diligence could have revealed the fraud or that there were red flags or indications of fraud in the transaction which were ignored and therefor the innocent party's title is defeasible. As such, the law is moving to the point where it will take several rounds of innocent persons before title will become indefeasible.

**Durrani v. Augier or Deferred Indefeasibility**

*Durrani v. Augier*[10] is a classic deferred indefeasibility case. Mr. and Mrs. Durrani were a retired couple who owned a house at 1 Gilroy Drive in Scarborough. Their son, Auren Durrani, had retained Gideon Augier ("**Augier**"), a paralegal, to incorporate a company to assist Auren Durrani with a business venture. The fee for the incorporation was $10,000. Draft Articles of Incorporation were prepared by Augier, however neither the incorporation nor the business venture went forward. Auren Durrani did not pay the $10,000 fee to Augier. Three years later Augier forged the name of Mr. Durrani on a document called a collateral loan agreement wherein Auren Durrani, allegedly borrowed $158,000 from Augier, which loan was guaranteed by Mr. Durrani and security in the nature of a charge was given by Mr. Durrani over 1 Gilroy Drive, Mr. Durrani's home in favour of Augier. Augier then retained a shady lawyer to bring an action for foreclosure against Mr. Durrani under the collateral loan agreement. The collateral loan agreement was registered against title to Mr. Durrani's home. Augier then forged an affidavit of service, swearing that the statement of claim for foreclosure was served on Mr. Durrani. Mr. Durrani never received the statement of claim for foreclosure. Augier then obtained default

[10] 50 O.R. (3d) 353

judgment for foreclosure. Mr. Durrani had no idea that any of this had occurred. Augier by reason of his forged charge and fraudulent foreclosure judgement was now ready to sell the Durrani home. Augier then listed the property for sale. At this point, Augier's lawyer, Mr. Newbury, performed a sub-search of the Gilroy property and discovered that Mrs. Durrani had an interest in the property. Undeterred, Augier then forged another document entitled "Additional Security Addition" purportedly signed by Mrs. Durrani charging her interest in the Gilroy property and Mr. Newbury amended the statement of claim for foreclosure to add Mrs. Durrani as a defendant in the foreclosure. Augier then swore a false affidavit of service, swearing that he had served Mrs. Durrani with the foreclosure claim and obtained a default judgment against her. Again, neither Mrs. Durrani nor Mr. Durrani had any idea that this was going on.

As a result of the listing, an individual named Mr. Guarda came forward to purchase the Gilroy property with the intention of flipping it to a Mr. Mangos for $190,000. The agent for Mr. Mangos was Joanna Jones, who you will see ultimately purchases the property from Augier. Mr. Guarda would not purchase the property because Augier would not let him inspect the property. Joanna Jones then arranged for Augier to sell the property directly to Mr. Mangos for $176,000. Joanna Jones arranged for the commission on this transaction to be paid personally to her and not to the real estate company that she worked for. This transaction with Mr. Mangos also did not close. Augier then arranged to sell the property to Joanna Jones's daughters Melanie and Sophia Zettler for $116,000. This transaction did close. The price had dropped from $190,000 to $116,000 over a short period of time.

During this period, the Durranis discovered that Augier had registered the collateral loan agreement additional security interest on title to their home. Their lawyer wrote to Mr. Newbury

indicating that the Durranis would move to set aside the default judgment for foreclosure and advising that the Durranis had never borrowed any money from Augier. Mr. Newbury could not act for Augier to complete the sale to the Zettlers. Undeterred, Augier then switched solicitors. It was this new solicitor who had not received the letter from the Durrani's lawyer who was able to complete the sale to the Zettlers in the face of a motion to set aside the default judgment for foreclosure. In order to purchase the property, the Zettlers obtained a mortgage from the Royal Bank of Canada for $87,000. Jones sent the Royal Bank a purchase agreement between Augier and the Zettlers which was materially different from the actual agreement. It omitted an indemnity that Jones negotiated if the activities of Augier were set aside. The Court ultimately found that the collateral loan agreement/mortgage to Augier was a forgery, that the foreclosure was invalid and that the transfer to the Zettlers was set aside because the Zettlers, through their mother the real estate agent Joanna Jones, had actual knowledge of the fraud. Title was put back in the name of the Durranis. However, the Court found that the Royal Bank of Canada mortgage was a valid mortgage since the mortgage was obtained from the registered owner of the property, the Zettler sisters.

In order to analyze this case, you need to know the following:

1. The real registered owners were Mr. and Mrs. Durrani.
2. Augier forged a mortgage from Mr. and Mrs. Durrani to Augier as mortgagee. The forger therefore put title to the mortgage in his own name.

3. As a result of the forgery and the foreclosure proceeding, title to the house was put in the name of Augier based upon a forged mortgage.

4. Augier transferred title to the Zettlers who, for the purposes of this analysis, were fraudulent accomplices.

5. The fraudulent accomplices got a deed from the real registered owner, Augier, and gave a mortgage to the Royal Bank.

6. The Royal Bank's mortgage was not based on a forgery but was based on a mortgage from the registered owner, the Zettler sisters who were fraudsters.

We can now analyze this fact situation based on the various indefeasibility tests.

(a) **Immediate Indefeasibility.**

In an immediate indefeasibility system, Augier's mortgage would be valid from a land titles perspective because it was registered. However, because the mortgage was a forgery, it would be struck off the title register. The registration of the foreclosure and the placing of title to the property in Augier's name would operate the same way. Augier's would be immediately indefeasible but would be struck off the record as a fraudulent transaction. The conveyance from Augier to the Zettler sisters would be immediately indefeasible but would also be struck off as the Zettler sisters were accomplices to the forger and were therefore fraudsters. The mortgage from the Zettler sisters to the Royal Bank of Canada would be immediately indefeasible because the Royal Bank of Canada took from the registered owner and the Royal Bank of Canada was an innocent party.

(b) **Deferred Indefeasibility.**

In a deferred indefeasibility system, the forgery, the mortgage and the foreclosure to Augier would be defeasible because they were based on a forgery. These transactions could also be struck off the register because they were fraudulent. However, Augier, having put title in his own name through the forgery, had the ability in a deferred indefeasibility system to convey good and indefeasible title. The fraudster, Augier could not receive good title, but could convey good and indefeasible title. The Zettler sisters acquiring title from the registered owner, Augier, would get good and indefeasible title. However, because the Zettler sisters were complicit in the fraud, their title could be struck out. The Zettler sisters, being the registered owners of the property, could give a good and indefeasible mortgage to the Royal Bank of Canada. Since the Royal Bank was innocent, its mortgage would not be struck down. As such, in both a deferred and immediate indefeasibility system, the Royal Bank of Canada gets a good and valid mortgage and all of the other fraudulent transactions, whether based on a forgery or on actual knowledge of a fraud or complicit in the fraud, would be struck down. The important point here however is that the Royal Bank, having dealt with a fraudulent party but not receiving a forged mortgage, got a good and valid mortgage.

(c) **Double Deferred.**

Now it is interesting to consider what the result would be in the current system, which we call double deferred. In a double deferred system, the innocent party, the Royal Bank of Canada, getting a mortgage from a party complicit in the fraud, does not get a valid mortgage. The indefeasibility of title is therefore deferred an additional round. The

> Royal Bank of Canada however being an innocent party could then convey title to another innocent party whose title would be indefeasible. Under the new Land Titles amendment, the mortgage to the Royal Bank of Canada would be a fraudulent instrument because it was an instrument which was involved in the perpetration of the fraud. The fraud is not just the forgery and the foreclosure proceedings, but the fraud includes the sale to the Zettlers. In order for the Zettlers to complete the fraudulent transaction, they required the mortgage and therefore the mortgage is invalid because it is an instrument which is perpetrating the fraud by the Zettlers on the Durranis.

**CIBC v. Chan or Immediate Indefeasibility**

In the *Chan* decision, the Ontario Court of Appeal at least in theory applied the doctrine of immediate indefeasibility. This caused an uproar in the legal community and at the Ontario Government and precipitated the amendments to the *Land Titles Act*. In addition, because in part of the firestorm in the legal community, the Ontario Court of Appeal panelled a five-judge panel in *Lawrence v. Wright* so that it would be in a position to overturn the *Chan* decision.

*CIBC v. Chan* had unusual facts. Mrs. Chan and her husband Mr. Liu owned a property in Richmond Hill. Mr. Liu worked and lived in Hong Kong. Mr. Liu and Mrs. Chan had two children. Mrs. Chan developed a gambling addiction. She racked up $80,000 in gambling debts to a casino. Someone at the casino told her that she could resolve her gambling debt problem by forging a power of attorney from her husband and obtaining a mortgage from a bank on her home. In this way, her husband would not need to know (at least until after) that she had obtained security on her home to pay off her gambling debts.

This is what Mrs. Chan did: she forged her husband's name on a power of attorney, and then obtained a fraudulent line of credit for $150,000 from the Toronto-Dominion Bank. She signed the mortgage for herself and for Mr. Liu using the fraudulent power of attorney. She used the $150,000 to pay off her $80,000 of gambling debts and proceeded to gamble away the other $70,000 available on the line of credit. She continued to gamble and accumulated another $150,000 in gambling debts. She used the fraudulent power of attorney again to charge her home with a line of credit in favour of the CIBC in the amount of $260,000. With this she paid off her $150,000 line of credit to the Toronto-Dominion Bank and the balance was used to reduce her gambling debts. However, she needed more money to pay off her gambling debts so she used the fraudulent power of attorney again to borrow $96,000 from Household Realty secured by a second mortgage against her Richmond Hill home.

Eventually the CIBC and Household Realty mortgages went into default and the mortgagees commenced an action on the covenant against Mrs. Chan and her husband. Mrs. Chan then separated from her husband and Mr. Liu defended the law suits by CIBC and Household Realty on the basis that they were fraudulent mortgages. Mrs. Chan and her husband then reconciled and at the time of the action Mrs. Chan was living in the matrimonial home. The Ontario Court of Appeal found that the CIBC and Household Realty mortgages were valid. This was the case even though they were obtained by way of a forgery of Mr. Liu's interest in the matrimonial home.

According to the theory of immediate indefeasibility, the CIBC and Household Realty mortgages would be valid even if obtained by way of a forgery because CIBC and Household Realty were innocent parties. Once registered, the mortgages were valid according to their terms. In a deferred indefeasibility system the mortgages, being obtained based on a forgery, would be

invalid. Household Realty and CIBC although innocent, would not get valid or indefeasible mortgages in the deferred indefeasibility system.

The complexity in this case, of course, was that the forgeries related to Mr. Liu's undivided half interest in the property. The CIBC and Household Realty mortgages should have been valid as against Mrs. Chan's undivided half interest in the home. However, Mrs. Chan's interest in the home is an undivided interest in the matrimonial home, and this complicates the issue. It should be noted that in the double-deferred indefeasibility system Household Realty and CIBC, being innocent parties dealing with the fraudster Mrs. Chan, would not get valid mortgages. This is the same result as should occur in the deferred indefeasibility system. Other than immediate indefeasibility, CIBC and Household Realty should not get valid mortgages even though they were innocent parties. In addition, any person taking title from CIBC or Household Realty should get valid and indefeasible title whether you apply immediate indefeasibility, deferred indefeasibility or double deferred indefeasibility.

So how did the Ontario Court of Appeal in *Chan* avoid deferred indefeasibility which was the rule applied in *Durrani v. Augier*? First, the Court looked at the operative sections of the *Land Titles Act*; section 155 and section 78(4). Section 155 provides that:

> "Subject to the provisions of this Act, with respect to registered dispositions for valuable consideration, any disposition of land or a charge on land that, if unregistered, would be fraudulent or void is despite registration fraudulent and void in like manner."

Section 78(4) provides:

> "When registered, an instrument shall be deemed to be embodied in the Register and be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, land or estate therein mentioned in the Register."

Section 78(4) therefore provides that once a mortgage is registered it is effective according to its nature and intent. However, section 155 says "Subject to the provisions of this Act", an instrument that is fraudulent, remains fraudulent. In *Chan* the Court concluded that section 78(4) took precedence over section 155. That is, notwithstanding that the mortgage was based on a forgery and would be fraudulent at common law, section 78(4) says it is effective according to its terms. As such, the Court of Appeal found that section 78(4) of the Act took precedence over section 155. Since the mortgages were registered, they were effective.

With respect to the principles of deferred and immediate indefeasibility, the Court held:

> "To some extent, this case invites the question of whether Ontario courts should follow the doctrine of deferred indefeasibility or the doctrine of immediate indefeasibility in the interpretation of the Act . . . I am inclined to believe that the continuing discussion of theories of interpretation of the Act is better left to others. It is not necessary to resolve which of two competing theories of indefeasibility of title should govern in order to decide this case. In my view, the motion judge got it right. He focused on the language of section 155 and section 78(4) of the Act. A plain reading of section 155 and 78(4) leads to the conclusion reached

> by the motion judge that the two mortgages registered on title are effective in accordance with their terms."

The *Chan* decision clearly requires the Ontario Court of Appeal to decide between immediate and deferred indefeasibility. The two theories result in different outcomes. The Court avoided the discussion but the result was to support immediate indefeasibility.

But what of the *Durrani* decision which supports deferred indefeasibility? The motion Judge and the Court of Appeal distinguished the *Durrani* case as follows:

> "While both *Durrani* and *Toronto-Dominion Bank v. Jiang* refer to the doctrine of deferred indefeasibility, the result in those cases is that the fraudulent document did not give good title to the person who perpetrated the fraud. Rather, it created rights for the person who subsequently dealt with the property on a *bona fide* basis and for good value. This is different from the result that Mr. Liu is proposing, whereby *bona fide* parties would be disentitled from pursuing their claims."

While it is certainly true in *Durrani* that the fraudulent document, that is, the fraudulent mortgage, and the conveyance to the Zettler sisters with actual notice of the fraud did not give fraudulent persons good title, and that eventually the first innocent person, the Royal Bank, got good title, that is because the Royal Bank took title not on the basis of a forgery but on the basis of a conveyance from a fraudulent person.

It is my opinion that the Ontario Court of Appeal in Chan misunderstood the decision in *Durrani*. The Court ignored the distinction in *Durrani* that the innocent party, the Royal Bank, dealt with a fraudster (the Zettlers) not a forger. The Royal Bank mortgage was not forged. In *Chan*, the innocent party, CIBC and Household Realty, took title from a forger, Mrs. Chan, and the mortgages were forged. This is exactly what deferred indefeasibility was intended to distinguish and what the Ontario government always believed was how the *Land Titles Act* operated. That is CIBC and Household Realty would not get indefeasible mortgages because they were forged mortgages.

**Rabi v. Rosu and the Lower Court Decision in Lawrence v. Wright**

Following the *Chan* decision, two cases went before the Ontario Superior Court. In *Lawrence v. Wright* the trial judge felt compelled to follow *CIBC v. Chan*. In the trial decision in *Rabi v. Rosu*, Mr. Justice Echlin was determined to strike down the mortgages and exercised judicial gymnastics in order to achieve the result that he felt was just in the circumstances.

In *Rabi v. Rosu*, Rabi and Shafiei were the owners of a condominium at 28 Hollywood Avenue in Toronto. They resided there with their children. There were no mortgages on their home.

In May of 2004, a fraudster forged Rabi and Shafiei's signatures to a transfer and conveyed title to the home to a person posing as Rosu. Rosu was either an accomplice or a fictitious person. A real estate lawyer acted for both the forgers pretending to be Rabi and Shafiei, theVendor and the fraudster Rosu the purchaser. The lawyer was presented with identification documents which appeared to be genuine from the forger posing as Rabi and Rosu. Rosu took title to the property based on the forgery from the persons masquerading as Rabi and Shafiei and gave a mortgage to the Toronto-Dominion Bank. The Toronto-Dominion Bank was not aware of the fraudulent

transactions and believed that its borrower, Rosu, was the bona fide owner of the property. The fraudsters produced an agreement of purchase and sale which appeared ordinary in the circumstances.

Once the sale transaction was completed and the fraudsters obtained the mortgage money from the Toronto-Dominion Bank, they disappeared.

Based on immediate indefeasibility, the conveyance to Rosu would be defeasible because Rosu was a participant in the fraud. However, even if Rosu could not get good title to the property, in immediate indefeasibility the mortgage to the Toronto-Dominion Bank would be valid. The mortgage would be valid because it was registered on title to the property and TD was innocent.

In deferred indefeasibility, the conveyance to Rosu would be overturned because it was based on a forgery. However, the Toronto-Dominion Bank did not receive a forged mortgage but received a mortgage from a real person Rosu, even if Rosu was a fictitious party or an alias of the forger or an accomplice of the forger. Rosu was registered on title as the owner and the Toronto-Dominion Bank took a mortgage from the registered owner. In deferred indefeasibility the mortgage to the Toronto-Dominion Bank would therefore be valid and indefeasible. As such, whether *Durrani* is the correct law (deferred) or *Chan* is the correct law (immediate), Mr. Justice Echlin would be required to find that the Toronto-Dominion Bank had a valid and indefeasible mortgage.

This, however, is not what happened. Mr. Justice Echlin found that the mortgage to the Toronto-Dominion Bank was invalid even though the Toronto-Dominion Bank was an innocent party. How did Mr. Justice Echlin achieve this result?

First of all, it should be noted that the Toronto-Dominion Bank argued that *Chan* was the correct law and that immediate indefeasibility was the operative principle. It didn't need to do so since it was regardless of which system is applicable. However, Chan was the law of the land at that time. As in Chan, the Toronto-Dominion Bank argued that Section 78(4) takes precedence over Section 155.

The first thing that Mr. Justice Echlin did was to find that the combination of Section 155 of the *Land Titles Act* and Section 78(4) of the *Land Titles Act* cannot totally override the common law nemo dat rule with respect to fraudulent. Clearly Mr. Justice Echlin is leaning towards the mortgage to the Toronto-Dominion Bank being void on the basis that it was not given by the true owner of the property. It was given by a fraudster who was not the real owner. But Rosu was registered on title as the owner. The Toronto-Dominion Bank doing a search would rely upon Rosu being the registered owner. While Rosu's interest could be struck down by a court or could be rectified by the Land Registrar because Rosu was participating in the fraud, at the time the mortgage was given to the Toronto-Dominion Bank, Rosu not Rabi was shown as the registered owner.

Mr. Justice Echlin, contrary to Chan, takes the position that Section 155 is the more important provision and overrides Section 78(4). Section 155 concludes that, subject to the *Land Titles Act*, fraudulent transactions are still fraudulent transactions. Since Land Titles does not override the common law, *nemo dat* applies and the Toronto-Dominion Bank mortgage is defeasible. The next thing Mr. Justice Echlin does is distinguish the *Chan* decision, because *Chan* is a Court of Appeal decision, which would have required Mr. Justice Echlin to find the Toronto-Dominion Bank mortgage was valid. Mr. Justice Echlin must follow Chan. Mr. Justice Echlin distinguishes Chan on the basis that the facts in *Chan* are different from the Rabi facts. He

distinguishes the case because in *Chan*, one of the owners of the property committed the forgery whereas in the Rabi case, neither of the registered owners was involved in the fraud.

With respect, this is not a valid way to distinguish *Chan*. In Chan, one registered owner was a fraudster/forger, the other was not. But the fraudster also validly charged her own half interest. The Court conceptually found it difficult to find the mortgage was valid against Chan but not Liu plus Liu had taken his wife back so striking out the mortgage would have indirectly benefited the fraudster. However, the principles are the same between Chan and Rabi with respect to Liu's interest and Rabi's interest. As such, the cases are not really distinguishable on that issue.

The next thing the Court does is establish that there were red flags in the Rabi transaction that the Bank could have discovered or the Bank's lawyer could have discovered. First, the Bank did not do an interior inspection of the home nor did the appraiser inspect the home. Secondly, the legal description of the property mortgaged did not include the locker and 2 parking units which were part of the unit. A bona fide purchaser would have purchased the locker and the parking units. Thirdly, the agreement of purchase and sale prepared by the fraudsters did not provide for a deposit. This is a classic red flag of fraud. Mr. Justice Echlin uses these red flags as a mechanism to disentitle the mortgagee from relying on the deferred indefeasibility system. Presumably, he could have followed Chan and accomplished the same result.

The next thing that Mr. Justice Echlin did was review Section 68, 186(1) and 93(1) of the Land Titles Act which provides that only the registered owner can give a valid charge. This argument was strongly argued by Sid Troister in his annotations of Chan but was rejected by the Court of Appeal. But Mr. Justice Echlin revives the concept. Mr. Justice Echlin found that the fraudulent registered owner created a fraudulent mortgage. Because the transfer was void, the fraudulent

owner did not have any title to charge therefore the fraudulent charge was also void. To the extent that the lower court decision in *Lawrence v. Wright* came to a different conclusion, Mr. Justice Echlin distinguished the trial decision in *Lawrence v. Wright* because it had relied on Chan which Mr. Justice Echlin had already distinguished. This argument of Mr. Justice Echlin is very close to a *nemo dat* concept. Since Rosu was not the registered owner of the property, Rosu could not give a charge on the property. Carrying on with Mr. Justice Echlin's "nemo dat" argument, Mr. Justice Echlin finds that "rather, title of all property continues to derive from the original crown grant, and thereafter, only from each successive lawful successor in title." This is suggesting that only the registered owner can create valid instruments and that any person taking title through or following a fraud gets no title. This is *nemo dat*. To emphasize this point, Mr. Justice Echlin also finds that Section 78(4) was meant to be merely an administrative provision and was not intended to alter the basic foundation of real estate law existing in Ontario, that is *nemo dat*.

Having applied *nemo dat*, or at least acknowledged that that rule should be preserved to the extent possible, Mr. Justice Echlin then looks at the principles of immediate and deferred defeasibility. The first thing that Mr. Justice Echlin does is distinguishes Durrani as follows "the result in Durrani is distinguishable because it involved a series of transactions including a foreclosure judgment vesting title in Augier, a sale to the real estate agent's daughter, and then a mortgage to the Royal Bank, unlike in this instance where the fraudsters transferred the property and obtained the mortgage in one transaction". This is not a *bona fide* distinguishment of Durrani at all. The Court seems to say that because there were a series of transactions resulting in a fraud, therefore the case is different from a single transaction resulting in a fraud.

Mr. Justice Echlin then reviews and approves of the concept of deferred indefeasibility as the operative doctrine in Ontario relying in part on the *Gibbs* case[11]. The Court acknowledges that there are three Ontario cases and one case in the Supreme Court of Canada which have considered the *Gibbs* decision. Court then distinguishes all of those cases on their facts although the Court acknowledges that each case supports the doctrine of deferred indefeasibility. It appears that Mr. Justice Echlin has not met a case that cannot be distinguished on its facts.

Having concluded that the doctrine of deferred indefeasibility applies in Ontario, the mortgage to the Toronto-Dominion Bank on the Rabi home should be valid. Mr. Justice Echlin, however, says that the mortgagee cannot rely upon deferred indefeasibility. How does he do this? First he finds that the forgery to Rosu and the mortgage to the Toronto-Dominion Bank were, in effect, one transaction. The same lawyer acted for the Toronto-Dominion Bank and for the forger and the fraudsters. The Bank's lawyer therefore dealt directly with fraudsters. This taints the Toronto-Dominion Bank, tarring the Toronto-Dominion Bank with the fraudster's misdeeds. Secondly, Mr. Justice Echlin finds that the Toronto-Dominion Bank must exercise due diligence in order to prevent the fraud in order to reply upon deferred indefeasibility. In the Rabi case, the Toronto-Dominion Bank did not do so. Mr. Justice Echlin then reads into the *Land Titles Act* a requirement that some due diligence must be undertaken in order to rely upon deferred indefeasibility. He says “the principle of deferred indefeasibility cannot be relied upon where there is or ought to be notice of a problem. While this approach may introduce some uncertainty about when deferred indefeasibility applies, the right to rely on the Register is not automatic for deferred indefeasibility".

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[11] *Gibbs v. Messer* [1891] A.C. 248

And then in a curious statement, Mr. Justice Echlin says “If subsequent innocent parties were to come along later and rely upon the abstract of title and the accuracy of the registrations, they might be found to be entitled to rely upon the register”. Note that future innocent parties do not have an automatic right to rely upon the Register.

In order to complete the circle, Mr. Justice Echlin looks at the Land Titles Compensation Fund and concludes that it is completely ineffective to protect innocent homeowners in Rabi’s position. While the court's criticism is correct, this should play no role in interpreting the *Land Titles Act*.

As a result, Mr. Justice Echlin introduces several new concepts into the fraud analysis. First of all, he distinguishes the *Chan* decision and the *Durrani* decision which applied respectively immediate and deferred indefeasibility. He then looks at the *Land Titles Act* and concludes that *nemo dat* is the order of the day unless amended by the *Land Titles Act*. He then reviews the *Land Titles Act* and determines that deferred indefeasibility is the operative principle which is what Durrani concluded. He then determines that in order to rely on deferred indefeasibility a certain amount of due diligence is required. Finally, he determines that where a mortgage is given simultaneously with a fraudulent conveyance, that the mortgage is tainted by the forgery or the fraud and is itself invalid.

**Lawrence v. Wright**

The decision of the Ontario Court of Appeal in *Lawrence v. Wright* is a very troubling decision. While the result might be applauded, the decision creates uncertainty in the law of Ontario. While one might argue that the decision is limited to fact situations arising before the new amendments to the *Land Titles Act*, the reality is that courts in Ontario are applying the decision

in *Lawrence v. Wright* as an interpretation tool for the legislative amendments. That is regardless of what the legislative amendments actually say, courts in Ontario are applying *Lawrence v. Wright* to post-land titles amendment cases. Rather than looking at the amendments, the courts are using *Lawrence v.* Wright as the law of Ontario both before the amendments and now after. In *Lawrence v. Wright*, Susan Lawrence is the owner of property in Toronto. The Lawrence home was encumbered by a mortgage in favour of the TD Bank in the amount of $120,000. In October 2005, an impostor posed as Susan Lawrence and retained a lawyer to act for her in the sale of the Lawrence home to a fictitious person named Thomas Wright. Thomas Wright and the forger were accomplices. One fraudster pretended to be Susan Lawrence. The other fraudster pretended to be Thomas Wright. However, there was a real person posing as Susan Lawrence who forged her signature on the transfer to Thomas Wright. In addition, there was a real person posing as Thomas Wright. Whether it was the real Thomas Wright or someone using that name only, Thomas Wright obtained a mortgage from Maple Trust Company ("**Maple Trust**"). Maple Trust went through its normal due diligence procedures and approved Thomas Wright for the mortgagee. The court described Thomas Wright as a forger, an impostor, a fictitious person or a fraudster. Susan Lawrence moved to set aside the transfer to Thomas Wright and the mortgage to Maple Trust.

The Province of Ontario intervened in the *Lawrence v. Wright* decision, ostensibly as a friend of the court and also to ensure that the *Chan* decision was overturned. Remember that at the time of the hearing, Land Titles had passed the new amendments and I submit that the Province of Ontario signalled to the court the result it wanted in *Lawrence v.* Wright. It is not surprising that the court applied the law in *Lawrence v.* Wright consistent with the amendments. One might think that the court might interpret the amendments as a new change from the existing law and

therefore look at the case without applying the amendments. I believe, however, that the court was told that the amendments were passed to make it clear that Chan was wrong not to change the law which then existed.

In the Court of Appeal, Susan Lawrence argued that the law of Ontario should be *nemo dat*, and as such the Toronto Dominion Bank should never get a valid and indefeasible mortgage on her home. Fortunately, the court rejected nemo dat as the operative principle of the *Land Titles Act*.

The TD Bank argued that the decision in *Chan* was correct and that the law of Ontario was immediate indefeasibility. However, it should be noted that while the TD Bank took title from a fraudster, that is Thomas Wright, their mortgage was not obtained by way of a forgery. That is the TD mortgage was not a forgery. The forgery occurred in the transaction before where the impostor posing as Susan Lawrence forged her signature and transferred the home to Thomas Wright. In a classic deferred indefeasibility system, the TD Bank mortgage should still be a valid and indefeasible mortgage because the TD Bank took title from a real person, Thomas Wright, even if Thomas Wright was a fictitious person or an alias of the fraudster. Again, even if Thomas Wright was fictitious, there was a real person who had identification from Thomas Wright who was using the name 'Thomas Wright' as their alias. There is no question that the mortgage from Thomas Wright to the Bank was not a forgery. To be a forgery, the mortgage would have to have come from Susan Lawrence. Thomas Wright, the impostor, did not forge the real 'Thomas Wright's' signature; Thomas Wright applied his own signature being his alias. On this theory, TD Bank did not need to rely on the *Chan* decision which is and was discredited but could have relied on Durrani which applied deferred indefeasibility. The reality is that the result for the TD Bank would have been the same whether the principle of law was deferred indefeasibility or immediate indefeasibility. Unfortunately, by aligning itself with Chan, the TD

Bank misled the Court of Appeal into believing that if it rejected Chan, it must also reject the validity of the TD mortgage. This was not the case, and it is suggested that the TD Bank made a strategic error.

The Province of Ontario (representing Land Titles) intervened and argued that the law of Ontario was deferred indefeasibility and then proposed a system of indefeasibility which was decidedly not deferred indefeasibility.

The Province of Ontario argued that, based upon the principle of deferred indefeasibility, the mortgage to Maple Trust was invalid. On a classic deferred indefeasibility theory, the mortgage to Maple Trust should be valid because it was not based upon a forged mortgage. So how did the intervener and the Court of Appeal (which accepted the intervener's arguments) strike down Maple Trust's mortgage?

The first thing the Province of Ontario did was create three classes of parties: the original owner, the intermediate owner (who is the person who dealt with the party responsible for the fraud and must be an innocent person), and the deferred owner (the bona fide innocent purchaser for value without notice who takes from the intermediate owner who must also be innocent). This was a completely novel argument created by the Province of Ontario in order to strike down the Maple Trust mortgage. It required two innocent parties, the intermediate owner who while innocent does not get indefeasible title and the deferred owner who does get indefeasible title. This was not deferred indefeasibility as classically understood and as championed by Land Titles up until the *Lawrence* decision. The Province of Ontario effectively, in my respectful opinion, hoodwinked the Court of Appeal by creating a new system or indefeasible title that Land Titles had never supported in the past. This new system, however, was consistent with the new

amendments that Land Titles had passed. The Ontario Government argued that “only a deferred owner (that is an innocent person who takes titles from another innocent person) would defeat the original owner’s title.” This is because the intermediate owner, as the party who acquired an interest in title from the fraudster, had an opportunity to investigate the transaction and avoid the fraud, whereas the deferred owner did not. There is nothing inherently wrong with this new theory of indefeasible title, but it is not deferred indefeasibility. The Court of Appeal, not surprising, followed the Province's argument, and concluded on the theory of deferred indefeasibility, registration of a void instrument does not cure its defect, thus neither the instrument nor its registration gives good title. However, good title can be obtained by a deferred owner from an intermediate owner. The flaw in this argument is that the mortgage to Maple Trust is not a void instrument. The conveyance by forgery to Thomas Wright is void but not the mortgage to Maple Trust. By inserting the concept of an "intermediate owner" the courts have deferred indefeasibility an additional round, hence double deferred indefeasibility.

On this argument made by the court, the fraudulent conveyance by the impostor pretending to be Susan Lawrence to Thomas Wright is the void transaction. As such, Thomas Wright does not get valid title. However, Thomas Wright can give good title to the deferred owner, Maple Trust. However, Land Titles did not take this position. Land Titles took the position that Mrs. Lawrence is the original owner and Maple Trust, having dealt with the fraudster Thomas Wright, is the intermediate owner. There is no deferred owner. However, this is incorrect. Thomas Wright is the intermediate owner because Thomas Wright took title based on a forged instrument. Thomas Wright is a fictitious person but is a real person registered on title to the property. As such, Maple Trust is the deferred owner.

Where Land Titles changed the rules is that they argued that Thomas Wright and the forger are to be treated as one party and Maple Trust then, taking title from the fraudster (read forger), is the intermediate owner and gets no title.

The Ontario Government then took the position that the test is fair because Maple Trust had an opportunity to investigate the transaction and avoid the fraud. If they had this opportunity, then they're an intermediate owner and they do not get good title if a fraud has occurred. To emphasize, this was never the theory of deferred indefeasibility until the political pressure put on the Government of Ontario resulting from the Lawrence and Revisky frauds required the Province to come up with rules that made it less likely for Ontario homeowners to lose their homes.

Subject to this fundamental flaw as to who the deferred owner is and what the role of Thomas Wright (the fictitious party) is, the analysis by the Court of Appeal is thorough and cogent with respect to whether immediate or deferred indefeasibility is the law of Ontario.

Looking at the Court's analysis, the Court examined section 155 and section 78(4) of the *Land Titles Act* and properly concludes, that at common law Maple Trust's mortgage would be void based on the theory of *nemo dat*. Next, the Court looks at the theory of immediate indefeasibility and again comes to the right decision. In an immediate system, since Maple Trust was not a party to the fraud, it was entitled to rely on the register and need not go behind it. Maple Trust's title is effective and 78(4) is the operative section. The court rightly concludes that if the theory is deferred indefeasibility, then Section 78(4) must be read subject to Section 155 and the provisions that say only the registered owner can transfer title or charge the property.

However, the analysis breaks down when the Court of Appeal looks at the theory of deferred indefeasibility. Again, in defence of the Ontario Court of Appeal, they accepted the Ontario Government's position. Where the analysis breaks down is that the Ontario Government and the Court of Appeal accepts that the Maple Trust mortgage is not valid because it was obtained from a fraudster. This was never the law of deferred indefeasibility. The law of deferred indefeasibility was always that if you took from a forger, you did not get good title but if you took from a fraudster, you did.

In order to support its position, the Court of Appeal reads into section 68(1) of the *Land Titles Act* an interesting distinction. Section 68(1) says that only the registered owner can give a valid charge or transfer. The Court says that since Wright was a fraudster, Wright cannot validly charge the property in favour of Maple Trust. It is for this reason that Maple Trust's mortgage isn't valid. However, if Maple Trust's mortgage isn't valid, then one might also argue that Maple Trust could not transfer a valid mortgage or transfer the property. However, the Court says, "Unlike Wright, Maple Trust did not take by way of fraud so it is the registered owner for the purposes of 68(1) and the deferred owner is therefore entitled to rely on the charge pursuant to section 78(4)." The court reads into Section 68(1) the concept that "a registered owner who is innocent". Thomas Wright is a registered owner but he is not an innocent registered owner.

It should be emphasized that this reading of sections 68(1), 78(4) and 155 is perfectly valid and, in support of the Ontario Court of Appeal, is perfectly acceptable. However, that is not a deferred indefeasibility system: it is a double deferred indefeasibility system. What is annoying however is that the Ontario Government, for political expedience, effectively changed the law without telling the Ontario Court of Appeal that that is what it was doing. It wanted the decision

in *Lawrence v. Wright* to be the same as the legislative changes it made and argued the case on that basis.

A serious problem with *Lawrence v. Wright* case is that the Ontario Government justified its double deferred indefeasibility system by arguing that Maple Trust should not get a valid charge because it had an "opportunity to avoid the fraud". This new test has since the *Lawrence v. Wright* case become the operative test for determining if title is defeasible or indefeasible. This was an unexpected and potentially disastrous result of the Lawrence case that the Province did not anticipate.

**Reviczky v. Meleknia – Opportunity to Avoid the Fraud**

The *Reviczky* case takes *Lawrence v. Wright* a step further. In *Reviczky*, Mr. Reviczky owned residential property; like *Chan*, a fraudster created a forged power of attorney in favour of somebody posing as Mr. *Reviczky's* nephew. The nephew then sold the property to an innocent person, Mr. Meleknia, who gave a mortgage to HSBC Bank of Canada ("**HSBC**"). Like the *Rabi v. Rosu* case, the judge in *Reviczky* was not prepared to allow the HSBC mortgage to be indefeasible.

On the facts of the *Reviczky* case, Meleknia took title pursuant to a forgery (that is the forged power of attorney). HSBC then took a mortgage from the innocent Mr. Meleknia.

In an immediate indefeasibility system, Mr. Meleknia would get good title even though the title came from a forgery. He was registered on title and he was innocent. As such, both Mr. Meleknia and HSBC would have valid interests in the property.

In a deferred indefeasibility system, Mr. Meleknia taking title on the basis of a forgery, would not get indefeasible title but would be in a position to a mortgage to HSBC which was indefeasible.

In a double deferred indefeasibility system, Mr. Meleknia is the intermediate owner, having taken title based on the forgery, and HSBC would be a deferred owner. As such, even in a double deferred indefeasibility system HSBC should get a good, valid and indefeasible mortgage. In a double deferred indefeasibility system, you need two innocent parties for the second innocent party to have a valid interest. In this case, Mr. Meleknia and HSBC were both innocent parties and therefore the HSBC mortgage should be valid. However, the judge in *Reviczky* found the HSBC mortgage to be invalid. How could this have happened?

What the Court does in *Reviczky* is to say that the indefeasibility of title in Land Titles no longer depends upon transactional proximities; that is, it does not depend upon where you are in the chain of ownership. What matters is whether you had an "opportunity to avoid the fraud". The Court states,

> "However, I read the reasons in *Lawrence* as refining and changing the traditional analysis. In *Lawrence*, the chargee Maple Trust acquired its interest in the land from the fraudster. Gillespie, J.A. therefore could have relied on the traditional basis for holding the chargee's interest was defeasible in favour of the true owner. That was not the ratio of the decision. Gillespie, J.A. looked deeper into the transactional dynamics, isolating a factor inherent in Maple Trust Company having acquired its interest from the fraudster which, I believe, was a factor which

determined that Maple Trust Company's interest was defeasible – was that it had an opportunity to avoid the fraud. As Gillespie, J.A. stated in paragraph 67,

> "Parties acquiring an interest in land from the fraudster (called intermediate owners) are vulnerable to the true owner's claim 'because' it had an opportunity to avoid the fraud.
>
> Gillespie, J.A. did not hold that Maple Trust Company's interest was defeasible because it acquired its interest from the fraudster. Consequently, within the broader notion of transactional proximities to the fraudster is the more specific, determinative factor, the opportunity to avoid the fraud. …To my mind, that indicates that the opportunity to avoid the fraud is now central to the theory of deferred indefeasibility as a rationale for allocating loss".

The Court in *Reviczky* then factually concludes that since HSBC had an opportunity to avoid the fraud its mortgage is indefeasible. The court's analysis is dependant upon the forged power of attorney being given by an elderly person and being signed by only one witness and no evidence of it not being revoked. Because the bank's lawyer also dealt with the fraudster's lawyer, the court also applied the simultaneous conveyances test which had been first used in Rabi v. Rosu.

**Salna v. Chetti – Related Fraud Test**

The decision at *Salna v. Chetti* in theory takes the defeasibility title argument a little further. In this case, the registered owner of the property forged a discharge of mortgage from its lender. It then obtained a new mortgage. The new mortgagee dealt with the registered owner and therefore received a good and valid mortgage. Whether the test is immediate or deferred indefeasibility, the mortgage should be valid. In a double deferred indefeasibility system, the mortgage should also be valid because the mortgagee took title from the registered owner. However, the fact that the registered owner had forged a discharge of mortgage as part of the transaction in theory taints the innocent mortgagee. The innocent mortgagee loses its indefeasible mortgage because the borrower was defrauding another party. Even though the new mortgage itself wasn't fraudulent and was not perpetrating a fraud, the mortgagor had committed a fraud by discharging a prior encumbrance and therefore in theory the new mortgage is invalid.

Now one might argue that the borrower was still a fraudster because he was committing a fraud on a related transaction. As such, the mortgage dealt with a fraudster and is an intermediate owner with a defeasible mortgage. However, this is a priority fight. Also, how close in proximity must the fraudulent transaction be to taint what would otherwise be a valid mortgage.

**Title**

The final case is St. Onge v. Willow Bay Investments Inc.[12]. In this case a developer sold a subdivision lot and home to be built to a purchaser. The developer was then approached by another unrelated developer who owned the adjoining parcel of land. The second developer needs a small corner of the already sold lot in order to build a house. The first developer agreed

[12] (2008) 73 R.P.R. (4th) 294

to sell the small corner of the lot to the second developer. The second developer did not have actual knowledge that the subdivision lot (which he was acquiring a corner of) had already been sold to the innocent purchaser.

The first developer applied to the Committee of Adjustment for the local municipality and obtained a severance of the small corner and conveyed the severed parcel to developer two. The innocent purchasers completed their home purchase and discovered after closing that a corner of their property had been sold off to the neighbouring developer.

The innocent purchaser applied to recover the severed parcel of land on the basis that the conveyance to the second developer was a fraud and was therefore defeasible. The second developer argued they were a bona fide purchaser for value without notice. The Court took the position that the application by the first developer for a severance without disclosing that the property had been sold to an innocent purchaser constituted a fraud. Since the developer was committing a fraud when it obtained the severance and conveyed the small parcel to the second developer, the second developer got no title and the property was transferred by the Court to the innocent purchasers. This case takes the analysis further. Fraud does not require the committing of an indentity fraud or a value fraud but an equitable fraud such as a breach of trust would now be sufficient to make title indefeasible to an innocent party.