

**BILL 152—**

**WHAT EVERY LAW CLERK (AND LAWYER)  
NEEDS TO KNOW**

**ALAN G. SILVERSTEIN\***

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**\*Barrister and Solicitor (Ontario)**

**Certified as a Specialist in Real Estate Law by the Law Society of Upper Canada**

**Director, National Legal Engagements, Emergis Inc., Mississauga, Ontario**

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**The purpose of this material is to provide information as to developments in the law. These documents do not contain a full analysis of the law, nor do they constitute a legal opinion.**

## BILL 152—WHAT EVERY LAW CLERK (AND LAWYER) NEEDS TO KNOW

ALAN G. SILVERSTEIN<sup>1</sup>

MAY 2007

Bill 152 (*Ministry of Government Services Consumer Protection and Modernization Act, 2006*) received Royal Assent on December 20, 2006<sup>2</sup>. An omnibus bill amending 26 acts (including the *Land Titles Act*<sup>3</sup> (the “LTA”) and the *Land Registration Reform Act*<sup>4</sup> (the “LRRA”)), it was the provincial government’s response to the flurry of real estate fraud<sup>5</sup> cases that followed the Court of Appeal’s shocking November 2005 decision in *Household Realty Corporation Ltd. v. Liu*<sup>6</sup>.

What caused the LTA itself to become a victim of real estate fraud? Has the fraud problem finally been solved? Does Bill 152 really contain an unprecedented attack on people who register fraudulent documents? To answer these questions, it’s necessary to travel back to the future.

For over a century the LTA provided effective and inexpensive protection against real estate fraud. Unlike the *Registry Act*<sup>7</sup> which established a system of registration of title, the LTA created a system of title by registration.

Professor Marcia Neave detailed the origins and philosophy behind land titles legislation in her 1976 article “*Indefeasibility of Title in the Canadian Context*”<sup>8</sup>

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<sup>1</sup> Barrister and Solicitor; Director, National Legal Engagements, Emergis Inc. This paper was delivered at the 17<sup>th</sup> Annual Conference of the Institute of Law Clerks of Ontario on May 11, 2007, held in Halifax, Nova Scotia.

<sup>2</sup> Now S.O. 2006, c. 34. Bill 152 as enacted is available at [http://www.e-laws.gov.on.ca/DBLaws/Source/Statutes/English/2006/S06034\\_e.htm](http://www.e-laws.gov.on.ca/DBLaws/Source/Statutes/English/2006/S06034_e.htm) accessed April 28, 2007

<sup>3</sup> R.S.O. 1990, c. L.5. Unless otherwise indicated, it is assumed that all registrations are made under the LTA.

<sup>4</sup> R.S.O. 1990, c. L.4

<sup>5</sup> Two distinct activities are often called “mortgage fraud”: (a) “title theft”, where a fraudster steals a Real Owner’s title, and (b) true “mortgage fraud” or “equity theft”, where a phony mortgage is registered on title, scooping the Real Owner’s equity but not their title. (“Real Owner” in this paper means the true owner of a property). Being a more encompassing term, “real estate fraud” is used when referring to both activities. Real estate fraud also must be distinguished from “value fraud”. There, “the true value of the property is artificially inflated to deceive the mortgage lender. This is accomplished in one of two ways, either through “flip” deals or misrepresentations of the original purchase price”. Mortgage Fraud, Law Society of Upper Canada Report to Convocation, March 24, 2005, paragraph 45, <http://www.lsuc.on.ca/media/convmar05mortgagefraud.pdf>, accessed on April 28, 2007

<sup>6</sup> 2005 CanLII 43402

<sup>7</sup> R.S.O. 1990, c. R.20

<sup>8</sup> (1976), 26 U.T.L.J. 173.

It was to overcome the insecurity inherent in the deeds registration system, and to achieve cheapness and simplicity in conveyancing that Sir Robert Torrens introduced the Real Property Bill into the South Australian parliament in 1857. The basis of this act, which was subsequently followed by the passing of similar legislation in the other Australian states, New Zealand, and most Canadian provinces, was the notion of title registration. The state establishes title by setting up a register and guaranteeing that a person named as the proprietor in the register has a perfect title subject only to registered encumbrances and to enumerated statutory exceptions. The philosophy of a system of title registration is often described as depending on three principles. The first is the '**mirror principle**' under which the register is a perfect mirror of the state of title. The second is the '**curtain principle**' under which the purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register. The third is the '**insurance principle**' under which the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. Together these concepts form 'the principle of indefeasibility' frequently referred to by commentators, though the phrase is not used in the legislation itself (emphasis mine)<sup>9</sup>.

To the surprise of many, Ontario's LTA is not true Torrens legislation. Ontario favoured the English Land Transfer Act of 1875 over the Australian model when enacting the LTA in 1885<sup>10</sup>.

At common law and under the *Registry Act*, no title was indefeasible.<sup>11</sup> All fraudulent documents were null and void; only the Real Owner could grant a valid and enforceable deed or mortgage.<sup>12</sup> In addition, all subsequent transactions (i.e. all deeds and mortgages registered after the fraudulent instrument) were nullities. A title obtained by fraud could never form the root of title for any further dealings, even if subsequent buyers or lenders were "innocent" (i.e. bona fide, for valuable consideration, and without notice of the fraud). Despite the registration of a fraudulent instrument, Real Owners always retained title to their property.

That rule was modified by the LTA, which provides "indefeasibility of title". Two competing theories of "indefeasibility" under Torrens-type legislation have evolved over the years—immediate and deferred. Ms Neave contrasted them as follows:

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<sup>9</sup> Footnote 8 at pages 173-174

<sup>10</sup> Footnote 8 at 184

<sup>11</sup> The dictionary definition of "indefeasible" is "not capable of being annulled or voided." *Merriam-Webster's Dictionary of Law*. <http://dictionary.reference.com/browse/indefeasible> accessed April 28, 2007

<sup>12</sup> This is also known as the "nemo dat" rule, from the Latin maxim "*nemo dat quod non habet*"--no one give that which they do not have.

Proponents of **immediate indefeasibility** take the view that an innocent purchaser of land, who registers an instrument which is void through forgery or breach of some statutory or common law requirement, should attain an indefeasible title by registration. It is argued that the policy of a system of title registration is to protect a person who registers without fraud. The fact that the instrument registered was void before registration is regarded as irrelevant. On the other hand, proponents of **deferred indefeasibility** argue that Torrens legislation was not intended to override the fundamental common law rules governing void instruments. The registration of a void instrument cannot cure its defect. Nevertheless the Torrens system ensures that the void instrument, when registered, can form the root of a good title. A person who registers an instrument executed by the innocent registered proprietor attains indefeasibility on the registration of his own dealing. Thus indefeasibility is 'deferred' to the second purchaser. (emphasis mine)<sup>13</sup>.

Unlike most crimes, real estate fraud produces at least two innocent victims: Real Owners, and buyers/lenders. By its inherent nature, indefeasibility sparks a battle of the innocents. Legislators and judges then face a tough decision. In a contest between two validly competing interests, which “innocent” is more innocent? Which “innocent” should the law champion? The innocent Real Owner or the innocent buyer/lender? Deferred indefeasibility is pro-Real Owner, while buyers/lenders clearly favour immediate indefeasibility.

By 1976 “the principle of deferred indefeasibility was firmly entrenched<sup>14</sup>” in Ontario. What does that mean, practically speaking? Section 155 initially codifies the common law rule that fraudulent documents were a nullity. So a deed from Frankie the fraudster to Brenda the buyer (Owen being the property’s Real Owner) was null and void, even if Brenda was “innocent”. Same result for a fraudulent mortgage from Frankie the fraudster to Lou the lender.

Deferred indefeasibility then created a mind-boggling legal fiction about Brenda’s status in a subsequent transaction. If Charlie (an innocent buyer) dealt with Brenda as the supposed owner of a property, Charlie acquired a valid deed, even though the deed to Brenda was null and void. Ditto for a mortgage. So if Wally (an innocent lender) dealt with Brenda as the supposed owner of a property, Wally acquired a valid and enforceable mortgage, even though the deed to Brenda was null and void. Only Charlie or Wally, the second person dealing with a property following a

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<sup>13</sup> Footnote 8 at page 174

<sup>14</sup> Footnote 8 at page 178

fraud, could get good title (or a valid mortgage), if they were “innocent”. Brenda, the first person involved, who had dealt with the fraudster directly, could not acquire good title/a valid mortgage.

What about Owen, the innocent and defenceless Real Owner? Can his title or equity literally be stolen from beneath his feet? Yes. Title theft is difficult, as deferred indefeasibility requires a two-step process, two separate transactions where the second document alone is validated. But it is easier to mortgage a property to an innocent lender than transfer its title to an innocent buyer, making equity theft a very legitimate threat. While deferred indefeasibility may favour Real Owners, it is no guarantee they won’t be victimized. Even with deferred indefeasibility the twin nightmares of title theft and (especially) equity theft are real.

Title insurance is not the perfect solution for Real Owners, either. Title insurance insures homeowners against “actual loss” resulting from stated title risks: (a) pre-closing items including forgery, fraud, and impersonation, plus (b) post-closing items like forgery of an instrument whereby a third party claims an ownership interest in or a lien against a title. If a Real Owner’s equity is stolen arising from the registration of a rogue mortgage, title insurance will compensate them for the cost (including legal fees and expenses) of removing it from title. What if a Real Owner’s title is stolen, and a court rules a that third party acquired valid title under the theory of deferred indefeasibility? Having fought the battle (unsuccessfully) to regain title, all title insurance can do at that stage is compensate the Real Owner for their loss. It can not reinstate the Real Owner as lawful owner. This inability to provide an absolute guarantee against title theft is a little-known Achilles Heel of title insurance.

Two recent Ontario cases exposed the shortcomings of deferred indefeasibility for Real Owners. In 2000 and 2003, Ontario courts applied it to validate mortgages in *Durrani v. Augier*<sup>15</sup> and *The Toronto-Dominion Bank v. Jiang*<sup>16</sup>. In both, following an initial transaction where the fraudster took title to a property in their own name, mortgages to an “innocent” lender were held to be valid, meaning the Real Owner’s title was subject to a mortgage they had never signed!!<sup>17</sup>

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<sup>15</sup> (2000), 50 O.R. (3rd) 353 (Superior Court of Justice)

<sup>16</sup> (2003), 63 O.R. (3rd) 764 (Superior Court of Justice)

<sup>17</sup> Compare that with *Credit Foncier Franco-Canadian v. Bennett* (1963), 43 W.W.R. 545, where the B.C. Court of Appeal held that a forged mortgage was a nullity and invalid against a Real Owner’s title.

Was that mortgage also enforceable by the “innocent” lender against the Real Owner, a question left unanswered in *Durrani*? Yes, according to *Jiang*. “With deferred indefeasibility, while Mr. X (the “fraudster”) doesn’t get title simply by being the registered owner, anyone who innocently deals with him as the registered owner, regardless how Mr. X became the registered owner, and without actual notice of the fraud will acquire an interest in the land. It is the second person relying on the registered title and not the fraudulent title owner that gets title. An indefeasible title is deferred to the innocent person dealing with the person registered as owner<sup>18</sup>.”

Compounding the problem for Real Owners was the Land Titles Assurance Fund (the “LTAF”). “The Fund is not an insurance company, nor is it title insurance. In Ontario, it is a discretionary fund of last resort. This means a claimant must first attempt to recover from all other sources. This can involve years of proceedings and tens of thousands of dollars in legal expense, not to mention heartbreak and aggravation. Victims of the system are essentially re-victimized”.<sup>19</sup>

In her paper, Ms Neave called the LTA “an unfortunate hotch-potch of ill-matching sections drawn from widely different sources<sup>20</sup>”. Further judicial scrutiny could see the LTA being interpreted as an “immediate indefeasibility” statute.<sup>21</sup> Her statement was prophetic.

As the curtain fell on the 20<sup>th</sup> Century, a Perfect Storm hit Ontario and the LTA. Its components:

- Ontario’s unique way of going high-tech. First, *Registry Act* lands (initially the vast majority of properties) had to be converted to LTA parcels, and then automated<sup>22</sup>. Then, unlike other jurisdictions, Ontario adopted an open model of access to its automated land records. Pay the prescribed amount and virtually anyone could become an authorized user. That included the ability both to search titles and register most documents, since

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<sup>18</sup> Footnote 16 at pages 767 and 768, citing Sidney Troister, Report on Fraud, Lawyers Professional Insurance Company, Summer 2001, pages 6 and 7

<sup>19</sup> *Rabi v. Rosu*, 2006 CanLII 36623 (Ontario Superior Court of Justice), paragraph 51

<sup>20</sup> Footnote 8 at page 192.

<sup>21</sup> Footnote 8 at page 186

<sup>22</sup> Of the provincial parcel base, 90% has been automated. Teranet Income Fund, Third Quarter Report 2006, page 8, [www.sedar.com/CheckCode.do;jsessionid=0000EHsnUX3MKJLrNPH61AMNFa:-1](http://www.sedar.com/CheckCode.do;jsessionid=0000EHsnUX3MKJLrNPH61AMNFa:-1) accessed April 28, 2007

only a handful contained “law statements” requiring the involvement of a lawyer before registration.<sup>23</sup> Contrast that with British Columbia. Before a document can be registered electronically in B.C., a lawyer must certify in writing that “the individual appeared before and acknowledged to the (lawyer) that he or she is the person named in the instrument... and the signature witnessed by the (lawyer) is the signature of the individual who made the acknowledgment.”<sup>24</sup> As the number of users with limited real estate credentials increased, so did the likelihood real estate fraud in Ontario

- New life for a neglected amendment to the LTA. Section 78(4) was introduced in 1960. It deems a registered document “effective according to its nature and intent”. Section 155 says a registered document, even if fraudulent and void at common law, is “subject to the provisions of this Act with respect to registered dispositions for valuable consideration.” If Section 78(4) trumped Section 155, immediate indefeasibility was possible under the LTA (calling the wording of these sections inelegant is an understatement)
- Ontario’s highest court re-examining on three separate occasions the “vexed question<sup>25</sup>” of immediate and deferred indefeasibility

That judicial review began innocently with the 1999 Ontario Court of Appeal decision in *R.A. & J. Family Investment Corporation v. Orzech*<sup>26</sup>. Despite being ignored for years, the Orzech case clearly set the stage for what would follow. For the first time an Ontario court read Sections 78(4) and 155 of the LTA together. But it wouldn’t be the last

They were next re-considered in November 2005 by the Ontario Court of Appeal in *Household Realty Corporation Ltd. v. Liu*.<sup>27</sup> Besides turning the law on its head and discarding over a hundred years of judicial thinking about the LTA, *Household Realty* quickly sparked mass paranoia about real estate fraud across the province.

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<sup>23</sup> See Section 40 of O.Reg. 19/99 under the Land Registration Reform Act (footnote 2)

<sup>24</sup> Section 43, Land Title Act, R.S.B.C. 1996, c. 250. “Given the importance of dealings in land, Section 43...is intended to prevent persons fraudulently signing instruments dealing with interests in land.” (*First Canadian Title Company Limited v. The Law Society of British Columbia*, 2004 BCSC 197 (CanLII) (Supreme Court of British Columbia))

<sup>25</sup> *Lawrence v. Maple Trust Company*, 2007 ONCA 74 (CanLII) (Ontario Court of Appeal), paragraph 40

<sup>26</sup> (1999), 44 O.R. (3rd) 385 (Ontario Court of Appeal)

<sup>27</sup> 2005 CanLII 43402 (Ontario Court of Appeal). The motion for summary judgment is reported at 20 R.P.R. (4<sup>th</sup>) 151 as *CIBC Mortgages Inc. v. Chan*

In *Household Realty*, Liu and his wife Chan owned their home as joint tenants. After forging Liu's signature on a Power of Attorney, she used it to book two mortgages—with CIBC Mortgages and Household Realty (on the mortgages Liu under Power of Attorney and Chan were the borrowers). Unlike *Durrani* and *Jiang* (where a mortgage [step 2] was registered following an initial fraudulent transaction [step 1]), there was only one transaction in the *Household Realty* case—the mortgage using the fraudulent Power of Attorney to the “innocent” lender.

After revisiting the relevant sections of the *Land Titles Act*, the Court of Appeal upheld the lower court decision. Each mortgage was valid despite the direct dealing with the fraudster, as the lenders were bona fide mortgagees for valuable consideration without notice of the fraud. Echoing words from *Orzech* six years earlier, the Court of Appeal in *Household Realty* said:

“the motion judge got it right. She focused on the language of s. 155 and s. 78(4) of the Act. A plain reading of s. 155 and s. 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. To use the motion judge's language: ‘In the result, the two mortgages in this case, having been given for valuable consideration and without notice of the fraud are, once registered, effective and can be relied on<sup>28</sup>’.

Deferred indefeasibility was dead, long live immediate indefeasibility. Sort of, as the Court of Appeal pussyfooted around using those words or specifically applying those theories.

*Household Realty* effectively erased the need for two transactions to validate a fraud. Eliminating one step in the process made it easier for fraudsters to strip Real Owners of their titles, and not just their equity. Real Owners were more vulnerable and defenceless than ever. Both a registered deed or mortgage would be recognized as valid and enforceable under immediate indefeasibility, even though the transferring party was a fraudster, if the purchaser or lender was “innocent”. Unintentionally, the Court of Appeal had sided with the fraudsters.

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<sup>28</sup> Footnote 27, paragraph 43

Before long, all hell broke loose. A tsunami of fear and panic gripped the province. Existing property owners were petrified. Who would be the next victim of real estate fraud? The stampede to book title insurance policies, despite that Achilles Heel, was underway.

For nearly a year after *Household Realty*, the McGuinty government went through a period of denial. It was a deer paralyzed by the headlights. Inaction was its reaction. It ignored the simmering public backlash until fraudulent transactions involving innocent Real Owners like Susan Lawrence, Elizabeth Shepherd and Paul Reviczky became media darlings in summer 2006. To quell the uproar, Minister of Government Services Gerry Phillips tabled Bill 152 in October 2006. To some, that move reeked of desperation. A month earlier, opposition MPP Joseph Tascona had upstaged Phillips by stick-handling a private member's bill on real estate fraud through second reading.<sup>29</sup> In Spring 2006, real estate fraud wasn't on the radar at Queens Park. Now, it was the focus of two separate bills.

The *Lawrence* case quickly and deeply captivated the public's attention. A fraudster posing as Susan Lawrence arranged for her home to be sold to another impostor, "Thomas Wright". Wright in turn arranged a new mortgage with Maple Trust to finance the purchase. Neither Lawrence nor Maple Trust was aware of the fraud being perpetrated. When payments on the mortgage stopped, Maple Trust launched enforcement proceedings against Lawrence. She countered with an application to set aside both the fraudulent deed and the mortgage.

In the trial decision released on June 27, 2006,<sup>30</sup> Mr. Justice Belobaba ordered that the fraudulent transfer of title be set aside, but not the mortgage to Maple Trust. "The reasoning of the Court of Appeal in *Household Realty* applies herein... The Court of Appeal decided unequivocally that s. 155 of the *Land Titles Act* is "subject to" and must yield to s. 78(4)...In my view, *Household Realty* is determinative and dispositive of the issues regarding the Mortgage and its validity."

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<sup>29</sup> Bill 136, *Restore the Deed Act*. Disclosure: I was a consultant on Bill 136. Like most private members bills, it ultimately went nowhere.

<sup>30</sup> *Lawrence v. Wright*, 2006 CanLII 24129 (Ontario Superior Court of Justice)

Then came the Halloween Massacre, when *Rasi v. Rosu*<sup>31</sup> was released, with facts virtually identical to those in *Lawrence*. (Bill 152 was before the legislature, and the *Lawrence* appeal was pending). Mr. Justice Echlin easily set aside the fraudulent transfer. But unlike *Lawrence*, he also ordered that The Toronto-Dominion Bank mortgage be removed from the Real Owner's title

How, and why? According to the Court of Appeal in *Household Realty*, fraudulent mortgages could only be validated for "innocent" lenders. The court in *Rasi* found that TD was far from innocent, due to lax lending practices. TD "did not even perform rudimentary due diligence and had notice of irregularities."<sup>32</sup> Four smoking guns were cited: a no-deposit offer; \$30,000 mortgage broker fee (on a \$270,000 condominium purchase); no on-site appraisal; and locker and parking units missing from the fraudulent documents.

If any of these simple matters had been noticed, the fraud might have come to light. The appraisal exercise failed to even send an appraiser into the unit. A simple interior house inspection could have thwarted a mortgage fraud attempt such as occurred in this instance. Where the lender is granted an interior inspection, a fraudulent mortgagor would be less likely to be able to pull off its scam.<sup>33</sup>

As TD wasn't an "innocent" lender, its mortgage was quashed. Rather than blazing new trails, Justice Echlin merely applied the controversial law from *Household Realty* to the facts. But he did add one further condition to the term "innocent"—a bona fide purchaser (or lender) for value ***without notice of a fraud after conducting reasonable due diligence***. Wilful blindness won't cut it anymore. Lenders will be judged both by what they know, and what they ought to know. "Notice" means both actual and constructive notice.

On February 6, 2007 the Ontario Court of Appeal released its long-awaited decision in *Lawrence v. Maple Trust Company*.<sup>34</sup> It's a text-book analysis of Sections 78(4) and 155 of the LTA, immediate and deferred indefeasibility, and the policy considerations behind each.

The composition of the court was somewhat unusual, as:

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<sup>31</sup> Footnote 19

<sup>32</sup> Footnote 19, paragraph 50

<sup>33</sup> Footnote 19, paragraph 29

<sup>34</sup> Footnote 25

- 5 judges heard the appeal, not the typical 3
- Chief Justice Roy McMurtry was one of the judges
- So was Mr. Justice James MacPherson, a member of the *Household Realty* appeal panel

Madam Justice Gillese begins her reasons in the *Lawrence* case succinctly: “Ownership of a person’s home is fraudulently transferred. The property is then mortgaged. In a contest between the two innocent parties – the homeowner and the lender of mortgage monies – who wins?”<sup>35</sup>

Understandably, Section 78(4) of the LTA came under great judicial scrutiny. At second reading in 1960, the government said: “Basically these changes are simply to get the Act in tidier form for revision of the 1960 statutes. Changes clarify the intent and improve the nomenclature of the existing Act.”<sup>36</sup> In other words, the amendment was designed to be administrative in nature, and not introduce any substantive changes.<sup>37</sup>

The court then described the three different theories being considered:

- a) the common law or registry position, by Ms Lawrence. According to a legal principle with origins in Roman law, fraud vitiates everything. Only the Real Owner can transfer or mortgage property. All fraudulent documents are void, regardless of registration. “At common law, Maple Trust’s charge was void. Why? Because it took from Wright and Wright could not give a better title than he had. He had nothing because he obtained title by fraud”.<sup>38</sup> Since Wright had nothing to convey, all documents registered on title subsequent to the fraud would be null and void, too.
- b) immediate indefeasibility, by Maple Trust, relying on *Household Realty*. Once registered, an instrument is valid even if obtained by fraud. Title is conclusive proof of ownership.

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<sup>35</sup> Footnote 25, paragraph 1

<sup>36</sup> Footnote 25, paragraph 29.

<sup>37</sup> The relaxed rule allowing courts to use legislative history as an aid in statutory interpretation appears as a footnote to paragraph 56 of the *Lawrence* decision

<sup>38</sup> Footnote 25, paragraph 35

The parcel register is “it”, the absolute authority for title. Although Wright became the registered owner of the Lawrence property by fraud, the mortgage from Wright to Maple Trust as a bona fide lender for value without notice of the fraud was valid and enforceable. This argument is reinforced by Sections 78(4) and 155 of the LTA.

“Although s. 155 provides that Maple Trust’s charge remains void despite having been registered, it is to be read subject to the other provisions in the Act, including s. 78(4). Maple Trust relies on s. 78(4) to treat the transfer to Wright as effective. The combined effect of ss. 78(4) and 155 results in its charge being immediately indefeasible<sup>39</sup>,” and

c) deferred indefeasibility, by the Province of Ontario as Intervenor.

As Wright obtained title to the Property by means of a fraudulent transfer, the transfer was void. As the transfer was void, it was of no effect and Wright never became the registered owner. Section 68(1) of the Act provides that only the registered owner may dispose of an interest in land, Maple Trust never took from the registered owner and therefore cannot rely on s. 78(4) vis-à-vis Ms. Lawrence, the true owner. However, Maple Trust was a bona fide purchaser (sic) for value without notice. It registered its charge. The fact of registration enables Maple Trust to pass a valid title to a third party, so long as the third party is also a bona fide purchaser for value without notice... Unlike Wright, Maple Trust did not take by way of fraud so it is a registered owner for the purposes of (the LTA). And, the (third party) is, therefore, entitled to rely on the charge pursuant to s. 78(4)<sup>40</sup>.

Put another way:

“(On the theory of deferred indefeasibility), there are three classes of parties: the original owner; the intermediate owner, who is the person who dealt with the party responsible for the fraud; and, the deferred owner, a bona fide purchaser or encumbrancer for value without notice who takes from the intermediate owner. Only a deferred owner would defeat the original owner’s title... 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<sup>41</sup>.”

At first glance, the facts in *Lawrence* appear identical to those in the *Durrani* and *Jiang* cases, the first transaction being a fraudulent deed, the second being a mortgage to an “innocent”

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<sup>39</sup> Footnote 25, paragraph 37

<sup>40</sup> Footnote 25, paragraph 39

<sup>41</sup> Footnote 25, paragraph 21

lender. But there is a critical difference which the Court of Appeal regrettably failed to highlight adequately. In both *Durrani* and *Jiang*, the fraudster first transferred title to a property into their own name first, and then granted the mortgage. In *Lawrence*, the fraudster transferred title to the Lawrence home into the name of a fictitious person first, who then granted the mortgage. In both *Durrani* and *Jiang*, the fraudster (a real person) was the intermediate owner, while the lender was the deferred owner. In *Lawrence*, where the fraudster was not a real person, “Ms Lawrence is the original owner and Maple Trust, having dealt with the fraudster, Thomas Wright, is the intermediate owner. There is no deferred owner<sup>42</sup>,”

The Court of Appeal quickly rejected Lawrence’s “common law” or no-fraud theory for the LTA. It “would defeat the entire purpose of the Act, which is to establish a land titles system, simplify conveyancing and overcome the insecurity of title inherent in a registry system ...Notwithstanding the registration of a series of transfers and/or charges, a person could never rely on the register since title would depend on the validity of all past transactions in the chain of ownership. The chain of title would be forever broken by any fraudulent link<sup>43</sup>.”

Reconciling the other two theories was not so easy, as “the interpretations urged by both Maple Trust and Ontario are available on the wording on the Act<sup>44</sup>”. In deciding which indefeasibility theory best accords with the LTA, the Court of Appeal relied heavily on the Supreme Court of Canada decision in *United Trust Co. v. Dominion Stores Ltd.*, [1977] 2 S.C.R. 915,. There, the majority rejected the argument that LTA titles are absolute (subject only to statutory exceptions and fraud). Instead, it overlay actual notice as another unlegislated exception, besides fraud.

In deciding that actual notice still had life under the LTA, the Supreme Court of Canada in *United Trust* recognized how courts had consistently ruled that common law principles affecting

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<sup>42</sup> Footnote 25, paragraph 22

<sup>43</sup> Footnote 25, paragraphs 41 and 42. Despite the Court’s sound argument, the Land Titles parcel register in Ontario has never been a complete and accurate mirror of the current state of title. With numerous unregistered overriding interests affecting every title in Ontario (see Section 44 of the LTA), the mirror always has cracks. More importantly, fraud has long been recognized as an unlegislated exception to the mirror principle. As Supreme Court of Canada Chief Justice Bora Laskin said in *United Trust Co. v. Dominion Stores Ltd.*, [1977] 2 S.C.R. 915: “Fraud is, of course, an exception to the integrity of the register under the Ontario Act.” The Court of Appeal in *Lawrence* agreed with that contention (see paragraph 49--“Only fraud is an external qualifying condition”). For that reason, every LTA title opinion issued by a lawyer should be qualified as being “subject to fraud.”

<sup>44</sup> Footnote 25, paragraph 40

land in Ontario would only be abrogated or displaced by clear and unequivocal language to that effect in the LTA. To the Court of Appeal in *Lawrence*, deferred indefeasibility, “a theory which permits the common law to remain a part of Ontario, unless expressly abrogated<sup>45</sup>”, was consistent with the majority decision in the *United Trust* case plus the wording in the LTA.

But the Court of Appeal in *Lawrence* also favoured deferred indefeasibility for policy reasons. “Under the theory of immediate indefeasibility, the innocent homeowner has no defence to a mortgagee’s action for possession. The homeowner is exposed to the loss of her home through eviction with the only available remedy being to make a claim for loss of value of the property from the Fund.... Moreover, unlike the intermediate owner (Maple Trust), the homeowner has no opportunity to avoid the fraud. Ms. Lawrence had no ability to discover that her home was being fraudulently sold and mortgaged. By contrast, Maple Trust made the decision to advance money and had the opportunity to avoid the fraud...(Under deferred indefeasibility, the law) places the burden of the fraud on the party that has the opportunity to avoid it, rather than the innocent homeowner who played no role in the perpetration of the fraud.”<sup>46</sup>

How could the Court of Appeal in *Lawrence* explain its 180 degree turn from *Household Realty*, delivered just 15 months earlier? It tersely noted:

- The *United Trust* decision was not considered in *Household Realty*<sup>47</sup>
- In *Household Realty*, the wife’s title to the property was valid; it had not been obtained by fraud. However, the husband’s interest in the property had been mortgaged fraudulently. “The result in *Household Realty*, at least in respect of the husband’s interest in the property, is inconsistent with the theory of deferred indefeasibility<sup>48</sup>”
- “The language in *Household Realty* fails to recognize that the Act gives statutory effect to the theory of deferred indefeasibility<sup>49</sup>”

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<sup>45</sup> Footnote 25, paragraph 54

<sup>46</sup> Footnote 25, paragraphs 57 and 58

<sup>47</sup> Footnote 25, paragraph 66

<sup>48</sup> Footnote 25, paragraph 65

<sup>49</sup> Footnote 25, paragraph 66

So the Court of Appeal swallowed its pride and boldly declared it had goofed big-time in *Household Realty*. “Both the result and that reasoning<sup>50</sup>” were incorrect. Ontario’s brief experiment with immediate indefeasibility was history<sup>51</sup>.

While the *Lawrence* appeal was pending, Bill 152 became law. What changes implemented by Bill 152 affect real estate conveyancing?

- 1) Section 23(4) of the LRRRA gives the Director of Land Registration the option of sending notices when deeds or mortgages (but not discharges) are registered. To date, the Director of Land Registration has not exercised this option.
- 2) When it comes to lawyers and staff registering fraudulent documents, even innocently, the government’s new philosophy appears to be “shoot first and ask questions later.”

First, a new term was introduced, “electronic document submitter<sup>52</sup>” (simply called “submitter” in this paper). It’s a person authorized by the Director of Land Registration “to submit electronic documents by direct electronic transmission to the electronic land registration database”.

Then there’s Sections 23.1 to 23.4 of the LRRRA, legislation teeming with discretions, undefined terms, open-ended time frames, and untold opportunities for abuse.

Under Section 23.1, if the Director of Land Registration has “reasonable grounds” to believe that an unauthorized document (i.e. one not authorized by the property owner, by a lender, or by law) has been submitted, or if the Director considers a suspension to be in “the public interest” (an expression that remains undefined), **a submitter’s electronic registration privileges can be**

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<sup>50</sup> Footnote 25, paragraph 66

<sup>51</sup> Ironically, by amendments to the Land Title Act in 2005, British Columbia adopted immediate indefeasibility over deferred indefeasibility. Now, a purchaser who acquires the fee simple interest in a property through a forged transfer and who becomes its registered owner will obtain good title, provided they did not participate in the fraud. For an excellent commentary on the B.C. switch, see Bob Reid’s article “Recent Amendments to the *Land Title Act*: a Torrens System of *Immediate Fee Simple Title*” published in *The Scrivener*, Spring 2006, Volume 15, Number 1, [http://www.notaries.bc.ca/images/stories/PDF/ScrivenerMagazine/2006\\_spring/scriv\\_mar\\_2006%2062.pdf](http://www.notaries.bc.ca/images/stories/PDF/ScrivenerMagazine/2006_spring/scriv_mar_2006%2062.pdf) accessed April 28, 2007

<sup>52</sup> LRRRA, Section 17

**suspended immediately, without notice or a hearing.** No distinction is made between submitters who register fraudulent instruments innocently, after taking reasonable precautions, and those privy to a crime. Even duped lawyers who conduct full due diligence on their clients can be arbitrarily suspended, if a registered document proves to be fraudulent.

Within 2 business days of the suspension, if not withdrawn<sup>53</sup>, the Director of Land Registration must notify a suspended submitter that they propose to revoke the submitter's electronic registration privileges<sup>54</sup>. Reasons for the proposed revocation must appear in the notice.

Bill 152 then contains two perverse reverse presumptions. First, hearings are not automatic. A suspended submitter must specifically file a written request for a hearing, within 15 days of the notice of proposed revocation being served<sup>55</sup>. During this time, the submitter's electronic registration privileges remain suspended.<sup>56</sup>

If no hearing is requested, the Director of Land Registration can revoke a submitter's electronic registration privileges for the same reasons as they were suspended in the first place, or "if the past conduct of the submitter affords reasonable grounds for belief that (i) the submitter will submit an (unauthorized) electronic document, or (ii) the submitter will act in a manner that is contrary to the public interest."<sup>57</sup> (again, the term "contrary to the public interest" is not defined).

Second, it is not enough for a submitter to simply request a hearing. Prima facie it will be a written hearing, unless an oral hearing is specifically requested<sup>58</sup>. Either way, the hearing must be held within 10 business days. Who conducts it? The Director of Land Registration, the same person who initiated the suspension!<sup>59</sup> All the while, the suspension of privileges continues.

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<sup>53</sup> LRRR, Section 23.3 contains a process the Director of Land Registration must follow, to withdraw a suspension

<sup>54</sup> LRRR, Section 23.2(1)

<sup>55</sup> LRRR, Section 23.2(2)

<sup>56</sup> LRRR, Section 23.1(3) Suspensions remain in effect until the earlier of (a) its withdrawal by the Director of Land Registration, or (b) a final determination is made on the revocation of electronic registration privileges.

<sup>57</sup> LRRR, Section 23.2(4)

<sup>58</sup> LRRR, Section 23.2(6)

<sup>59</sup> LRRR, Section 23.2(5)

Nothing in Bill 152 states when the Director of Land Registration must render a decision. During this indeterminate period of time, the submitter remains suspended (unless the suspension is withdrawn), causing irreparable harm to their practice, their staff, and their clients.

Following a hearing, the Director of Land Registration can revoke a submitter's electronic registration privileges on the same basis as if no hearing were held, or for one more reason—the submitter fails to provide proof that they were authorized to register the document in question<sup>60</sup>.

Suspensions and revocations can be appealed to the Divisional Court.<sup>61</sup>

Any revocation of electronic registration privileges must state when the submitter can apply for reinstatement.<sup>62</sup> Who hears that application? Surprise—it's the Director of Land Registration again! Details of the reinstatement process are very sparse. The LRRRA simply says “the Director of Land Registration shall give the applicant an opportunity to be heard...(Furthermore), the Director of Land Registration may, if of the opinion that it is appropriate to do so, reinstate the applicant's authorization”.<sup>63</sup> Nothing elaborates what is “appropriate”. Nothing indicates if electronic registration privileges can be reinstated subject to conditions.

Imagine. One person, the Director of Land Registration, calling the shots on suspensions, revocations and reinstatements. Is it a denial of natural justice for one person to adjudicate on the same matter three times? And why does Bill 152 presume guilt if a fraudulent instrument is registered? Why should the real estate profession be treated any differently than criminals?

A razor-sharp sword now hovers over everyone who registers documents electronically in Ontario. Even an innocent breach of this draconian law could prove fatal.

3) Two new definitions were added to Section 1 of the LTA. Their importance in the fight against real estate fraud is explained below.

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<sup>60</sup> LRRRA, Section 23.2(9)

<sup>61</sup> LRRRA, Section 23.2(10)

<sup>62</sup> LRRRA, Section 23.4(1)

<sup>63</sup> LRRRA, Sections 23.4(2) and (3)

“Fraudulent instrument” means an instrument

- (a) under which a fraudulent person purports to receive or transfer an estate or interest in land,
- (b) that is given under the purported authority of a power of attorney that is forged
- (c) that is a transfer of a charge where the charge is given by a fraudulent person, or
- (d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument

Mortgage discharges are missing from the list of potential fraudulent instruments, but that hole has been filled by O. Reg. 53/07, s. 3, provided a fraudulent person registers it.

Forgers, fictitious persons, and fraudsters now come under the umbrella definition of a “fraudulent person.” In the exact words of the LTA:

“Fraudulent person” means a person who executes or purports to execute an instrument if,

- (a) the person forged the instrument,
- (b) the person is a fictitious person, or
- (c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument

4) New rules now govern the Land Titles Assurance Fund (“LTAF”). One major change: compensation hinges on claimants demonstrating “the requisite due diligence as specified by the Director (of Titles)<sup>64</sup>.” What that expression means is still unknown.

Imposing a due diligence requirement on lenders is great in theory but meaningless in practice. Most mortgages today are title insured, meaning lenders won’t be seeking compensation from the LTAF. As for buyers, what’s the criteria for compensation? Full title search? Lawyer’s title opinion? Title insurance? ID verification from the vendor? Site visit before offer is signed? And what about Real Owners? What due diligence is expected from existing property owners, to qualify as a LTAF compensation claimant? What can Real Owners do, to safeguard themselves from the nightmare of real estate fraud? The devil is in the yet-to-be-released details.

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<sup>64</sup> LTA, Section 57(4).

The new basic compensation claim provision is Section 57(4) of the LTA. It reads as follows:

A person is entitled to compensation from the Assurance Fund if,

- (a) the person is wrongfully deprived of land or of some estate or interest in land by reason of,
  - (i) the land being brought under this Act,
  - (ii) some other person being registered as owner through fraud, or
  - (iii) any misdescription, omission or other error in a certificate of ownership or charge or in an entry on the register;
- (b) the person has demonstrated the requisite due diligence as specified by the Director if the person is wrongfully deprived of land or of some estate or interest in land by reason of some other person being registered as owner through fraud;
- (c) the person is unable under subsection (1) or otherwise to recover just compensation for the person's loss; and
- (d) the person makes an application for compensation within the time period specified in subsection (5.1)<sup>65</sup>

Taken literally, Section 57(4)(c) appears to retain the traditional concept of the LTAF as a fund of last resort. For many persons, it does (see below). However, an “express service” has been established for two “prescribed classes” of people<sup>66</sup>.

One is individuals buying residential property who have been wrongfully deprived of or do not receive land because (i) a fraudulent instrument is registered after October 19, 2006<sup>67</sup> and deleted from title<sup>68</sup>, or (ii) title is rectified deleting a void instrument<sup>69</sup>. Also, the due diligence test must be met and an application filed on time.<sup>70</sup> But Bill 152 alone does not determine who is eligible. Section 3 of O. Reg 53/07 restricts the class to individuals who are “purchaser(s) in good faith for valuable consideration ...where the land is used for residential purposes.”

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<sup>65</sup> That period is 6 years from the time of having suffered the loss or, in the case of a person under the disability of minority, mental incompetency or unsoundness of mind, within 6 years from the date at which the disability ceased.

<sup>66</sup> Details how to file a claim under this new “express” service still have not been announced.

<sup>67</sup> The day Bill 152 was introduced in the legislature

<sup>68</sup> Either the Director of Titles or a court can direct that its registration be deleted from the register

<sup>69</sup> The rectification process appears in LTA section 57(13),

<sup>70</sup> LTA, Section 57(4.1)

Individuals who are Real Owners of residential property are the other prescribed class of persons, the criteria being somewhat less stringent<sup>71</sup>. To seek compensation, the Director of Titles or a court must have directed that a fraudulent instrument be deleted from title, the person has suffered a loss<sup>72</sup> as a result of the deletion, and the application is filed on time.<sup>73</sup>

For many people, the rules in Section 57(4) remain in effect, including the “fund of last resort”. Excluded from the “express service” are all buyers of commercial property; corporate buyers of residential property; individual Real Owners of commercial property; corporate Real Owners of residential and commercial property; and all lenders on residential and commercial property

One more key limitation is added by O.Reg 53/07:

No individual or person who is entitled to receive compensation from an insurer for any part of the loss for which the individual or person applies for compensation from the Assurance Fund shall be part of a class prescribed under subsection (1).

In other words, even individual Real Owners of residential properties and individual buyers of residential properties (the only two parties entitled to use the “express service”) are disqualified from using it if they arrange title insurance to protect their titles

5) A number of administrative changes to the LTA are introduced, including the payment of compensation if a person suffers damage because of an error in recording an instrument<sup>74</sup>; the ability of the Director of Titles to recover compensation paid from the LTAF in error<sup>75</sup>; and the right of subrogation in favour of the Director of Titles for any payment from the LTAF<sup>76</sup> (the importance of this last point is discussed below)

6) Section 57(13) of the LTA deals with the rectification of a parcel register. The Director of Titles (either directly or after a reference to a court) or a court itself can direct the rectification

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<sup>71</sup> O.Reg 53/07, Section 3, adding Section 16(1) to the O. Reg 26/99 under the LTA

<sup>72</sup> LTA, Section 57 (4.2)(b). The type of losses that will be compensated remains unanswered—i.e. will it be limited to out of pocket expenses and legal expenses, or will it include pain and suffering?

<sup>73</sup> LTA, Section 57(4.2)

<sup>74</sup> LTA, Section 57(5)

<sup>75</sup> LTA, Section 57(11.1)

<sup>76</sup> LTA, Section 57(12)

of title if “(a) a registered instrument would be absolutely void if unregistered”; (b) the Director of Titles or a court is satisfied “that a fraudulent instrument has been registered on or after October 19, 2006”; or “(c) the effect of the error, if not rectified, would be to deprive a person of land of which the person is legally in possession or legally in receipt of the rents and profits”

7) An existing administrative practice is now law. The Director of Titles may, “of his or her own accord and without affidavit”, enter a “No Dealings” caution on the parcel register “if it appears to the Director of Titles that a registered instrument may be fraudulent<sup>77</sup>”. No criteria have been established elaborating on that very loose and non-legalistic expression “if it appears”. Whether a hearing precedes the Director’s action is optional<sup>78</sup>

8) Payments from the LTAF will not be authorized in three new situations: (i) the person knowingly participates or colludes in a fraud; (ii) subrogated claims on or after October 19, 2006; and (iii) claims made on or after October 19, 2006 on behalf of an insurer.

Title insurers got whacked by Bill 152. Anyone who arranges title insurance on residential property can’t file LTAF claims using the new express service. More importantly, title insurers can’t pay out claims under a title insurance policy, and then file a subrogated claim seeking reimbursement from the LTAF. Dumping the financial burden of real estate fraud on title insurers will inevitably drive-up premiums for consumers.<sup>79</sup>

9) Extensive powers of inspection were added to the LTA<sup>80</sup>. It is now illegal to obstruct an inspector from conducting an inspection, to withhold or conceal information relevant to the inspection, or to withhold, conceal, alter or destroy documents relevant to the inspection<sup>81</sup>. The penalties for non-compliance: a fine up to \$50,000 and/or jail-time not to exceed two years less a day for individuals, and a fine of not more than \$250,000 for corporations<sup>82</sup>.

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<sup>77</sup> LTA, Section 57(15)

<sup>78</sup> LTA, Section 57(16)

<sup>79</sup> LTA, Section 59(1)(d), (e) and (f)

<sup>80</sup> LTA, Section 59.1

<sup>81</sup> LTA, Section 59.1(5)

<sup>82</sup> LTA, Section 59.2

10) Bill 152 reverses the Court of Appeal decision in *Household Realty*. As stated in the explanatory notes: “a fraudulent instrument will not have any effect on the title register. Instruments registered subsequent to a fraudulent instrument are deemed to be effective”. This was accomplished by amending Section 155 of the LTA (which codifies the common law rule on real estate fraud “subject to this act”)<sup>83</sup>, and introducing Sections 78(4.1) and (4.2) to the LTA.<sup>84</sup>

Section 156 of the LTA makes it an offence “if the person fraudulently procures or attempts to fraudulently procure a fraudulent entry on the register, an erasure or deletion from the register or an alteration of the register.” Proceedings can only be launched up to 6 years after the facts first come to Director of Titles’ attention<sup>85</sup>. (Unlike the balance of Bill 152, the focus in Section 156 is the register, not the documents or the parties registering the documents). As with the new inspections section, the penalties for non-compliance are a fine up to \$50,000 and/or jail-time not to exceed two years less a day for individuals, and a fine of not more than \$250,000 for corporations<sup>86</sup>. On conviction, the court can also order compensation or restitution payments.<sup>87</sup>

So the theory of “deferred indefeasibility”—axing fraudulent deeds and mortgages, but validating subsequently registered documents—is back. Rejected by the Court of Appeal in *Household Realty* in 2005 and approved by the Court of Appeal in *Lawrence* in 2007, it was restored by Bill 152<sup>88</sup> but not retroactively<sup>89</sup>. The deferred indefeasibility rules set out in the *Lawrence* case govern up to and including October 18, 2007. Bill 152 applies starting October 19, 2007.

But Bill 152 also goes one step further, introducing “deferred indefeasibility plus” to Ontario.

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<sup>83</sup> The new Section 155 says “Subject to this Act, a fraudulent instrument that, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner.”

<sup>84</sup> (4.1) Subsection (4) does not apply to a fraudulent instrument that is registered on or after October 19, 2006.

(4.2) Nothing in subsection (4.1) invalidates the effect of a registered instrument that is not a fraudulent instrument described in that subsection, including instruments registered subsequent to such a fraudulent instrument.

<sup>85</sup> LTA, Section 156(4)

<sup>86</sup> LTA, Section 156(2).

<sup>87</sup> LTA, Section 156(3)

<sup>88</sup> In the *Lawrence* case, counsel for the Ontario government said that Bill 152 was intended to have the LTA operate on the basis of deferred indefeasibility. See footnote 2 within footnote 25.

<sup>89</sup> LTA, Section 78(4.1)

Before Bill 152, the deferred indefeasibility theory produced different results, depending on the nature of the transferee in the first transaction.

DURRANI CASE AND JIANG CASE	LAWRENCE CASE
<ul style="list-style-type: none"> <li>• the fraudster transferred title <u>into their own name (a real person)</u></li> <li>• despite being fraudulently registered as owner, a real person (the fraudster) granted a mortgage (in <i>Jiang</i>, to TD Bank)</li> <li>• As the fraudster was a real person, he became the intermediate owner. TD Bank was the deferred owner.</li> <li>• Only an innocent deferred owner could obtain a valid deed or an enforceable mortgage. As TD met that test, its mortgage was valid and enforceable.</li> </ul>	<ul style="list-style-type: none"> <li>• the fraudster transferred title <u>into the name of a fictitious person (Thomas Wright)</u></li> <li>• despite being fraudulently registered as owner, a fictitious person (Wright) granted a mortgage to Maple Trust</li> <li>• As the fraudster was not a real person, it did not become the intermediate owner. Maple Trust was the intermediate owner. There was no deferred owner.</li> <li>• Only an innocent deferred owner could obtain a valid deed or an enforceable mortgage. As Maple Trust could not meet that test, its mortgage was null and void.</li> </ul>

The Court of Appeal in *Lawrence* also warned how deferred indefeasibility could still pose problems for Real Owners. In considering whether Maple Trust acquired an interest in the Property that would allow it to make a claim against the LTAF, the Court of Appeal said

“it is at least arguable that it did acquire such an interest. However, the interest that it acquired was subject to defeat by the true registered owner of the Property... (On the other hand), if a bona fide third party took from Maple Trust, for value and without notice (i.e. a deferred owner), its interest would be indefeasible... **In an action between the deferred owner and the true owner, the deferred owner would win...** Section 155 provides that Maple Trust’s charge, which would have

been void if unregistered, remains void despite registration. However, that result is expressly made “Subject to the provisions of this Act”. As previously explained, the provisions of the Act made Maple Trust a registered owner and enabled a deferred owner to take good title from it...Once s. 155 is understood in accordance with the theory of deferred indefeasibility, it has the effect of transforming what would have been a void interest on the part of Maple Trust at common law into a valid interest that was defeasible by the true owner. This view is consonant with the conclusion that, **as an intermediate owner, Maple Trust’s interest in the Property had to yield to the rights of the true owner but that, because of registration of its charge, a deferred owner could rely on Maple Trust’s charge to obtain an indefeasible title**<sup>90</sup> (emphasis mine)

Deferred indefeasibility would render a deed **TO THE FRAUDSTER** null and void, but it also would validate mortgages **FROM THE FRAUDSTER** to an “innocent” lender (as it would a deed to an “innocent” buyer), if title was fraudulently registered in the name of a real person (as in *Durrani* and *Jiang*). But deferred indefeasibility would not validate that mortgage or deed if title was fraudulently registered in the name of a fictitious person (as in *Lawrence*). As deferred indefeasibility would allow the Real Owner’s equity to eroded by a mortgage they had never signed (or their ownership interest snatched away totally) in certain situations, the *Durrani* and *Jiang* cases remained good law in Ontario.

All that has changed with Bill 152, which broadened the scope of deferred indefeasibility beyond its traditional limit to create “deferred indefeasibility plus”

Bill 152 defines “fraudulent instrument” to include deeds and mortgages where “a fraudulent person<sup>91</sup> purports to receive or transfer an estate or interest in land”. As always, a deed or mortgage **TO** a fraudulent person would be null and void. But now the same is true for a deed or mortgage **FROM** a fraudulent person.

If *Durrani* or *Jiang* were being decided under Bill 152 today, the result should be different. Like those cases, the fraudulent deed into the fraudster’s own name would remain null and void. But unlike those cases, Bill 152 also would nullify a deed or mortgage from the fraudster to an innocent third party. Under Bill 152 it does not matter if title to the property was first registered

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<sup>90</sup> Footnote 25 paragraphs 73 to 75

<sup>91</sup> “Fictitious person” now includes forgers, fictitious persons, and fraudsters. See amendments to Section 1, LTA.

in the fraudster's own name or in the name of a fictitious person; both are a "fraudulent person". As an instrument to or from a fraudulent person is a fraudulent instrument, the mortgage to the "innocent" lender in *Durrani* and *Jiang* would now be tainted as a fraudulent instrument. By expanding the reach of deferred indefeasibility to include deeds and mortgages from a fraudulent person, Bill 152 introduced the concept of "deferred indefeasibility plus" to Ontario.

In a November 22, 2006 letter to the Standing Committee on Social Policy, Minister of Government Services Gerry Phillips noted three additional steps to implemented after Bill 152 became law: i) streamlining the LTAF; ii) controlling access to register documents electronically; and iii) tightening the standards on powers of attorney. Quoting from his letter:

"We will transform the LTAF to ensure that the fund will be immediately responsive to each individual case that comes before it. For example, when a fraud has clearly occurred and an innocent property owner has suffered a loss, we will set a service standard to rectify title and compensate loss as soon as possible. For these standard cases of fraud, in which there is no court action and both the victim and their lawyer are cooperating, we will ensure that title is returned and an LTAF decision (e.g. compensation) is made within 90 days.

We will be introducing a new set of criteria for those who wish to register documents through the electronic land registration system. We have developed this criteria based on three standards: identity, financial solvency and appropriate qualifications...Currently, we are proposing restricting the right to register a transfer of title to lawyers, while allowing other documents to be registered by those who meet the additional criteria...By restricting access, we can isolate one of the main documents involved in title fraud and provide consumers with additional protection.<sup>92</sup>

Whenever a power of attorney is used by an individual, a lawyer will be required to discuss it with their clients and provide a statement to that effect.<sup>93</sup>

Details of these changes are now beginning to emerge<sup>94</sup>. Clearly they are all interrelated:

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<sup>92</sup> Note how the changes will only govern the registration of documents, not total access to the electronic database for searching and other purposes.

<sup>93</sup> Besides this, meaningful rules are needed governing the use of powers of attorney. Can a lawyer rely on a power of attorney they did not draft? If so, can it be relied upon at face value? Must a lawyer take extra steps to authenticate that the power of attorney is valid, and in full force and effect? If so, what steps must be taken? The involvement of the Law Society of Upper Canada in setting clear practice standards is greatly needed.

<sup>94</sup> I am a member of the CEO's Working Group on Real Estate Issues at the Law Society of Upper Canada. We have been reviewing the government proposals on changes to real estate conveyancing, following the passage of Bill

- a) Lawyers would be the only party authorized to register deeds
- b) As a condition of (a), changes would be necessary to both the LawPRO insurance coverage and the Lawyers' Fund for Client Compensation<sup>95</sup> established by the Law Society of Upper Canada (the "Comp Fund").
- c) The exclusive right in (a) would only apply to deeds. Mortgages, discharges and other documents could be registered by lawyers and other "authorized persons", to include chartered banks, credit unions, caisse populaires, insurance companies, Ontario Land Surveyors, registered real estate agents and brokers, and other parties who have specified insurance coverage (including coverage against fraud).
- d) Every registered transfer must involve two lawyers, one for the transferor and one for the transferee, with no exceptions

Granting lawyers the exclusive right to register deeds is viewed by the government as a key fraud prevention measure. No longer could rogues pilfer a title armed with little more than a laptop computer. By insisting on lawyer involvement when titles are transferred, the entire regulatory framework and safeguards associated with the legal profession—rules of professional conduct, educational standards, errors and omissions insurance, compensation fund, and accountability—would always be available to protect the public.

But allowing only lawyers to transfer title would also be a monumental step towards our very survival. Never before have real estate lawyers received such a strong vote-of-confidence from the provincial government, endorsing our work on behalf of the consumers of Ontario. For years we have talked about marketing ourselves to the public, explaining who we are, what we do, and the valuable services we provide the public in a real estate transaction. This proposal could be the stepping-stone from which to launch that unprecedented promotional campaign, and possibly a long-overdue upward adjustment in fees.

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152. These are the proposals publicly announced as of May 5, 2007. Some of the following material comes from reports to be published shortly after that date. That explains the absence of footnotes or sources.

<sup>95</sup> Established under Section 51 of the Law Society Act, R.S.O. 1990, c. 8. Payments from the fund are totally discretionary (see Section 51(5)).

But there is a cost associated with this privilege, a significant trade-off. First, the province wants lawyers to backstop the cost of any fraud claims against lawyers. To accomplish this, a “fraud endorsement” must be added to the basic LawPRO errors and omissions policy. Participating lawyers will be saddled with the tab where other lawyers register fraudulent documents

LawPRO pegs the estimated cost for this additional coverage at \$500 per participating lawyer each year, provided the “bad apples” can be excluded. They include bankrupt lawyers; lawyers convicted or disciplined in real estate fraud cases; and lawyers under investigation, where the Law Society obtains an interlocutory suspension/restriction on their practice or the lawyer undertakes not to practice real estate.

Second, the provincial government wants the Law Society to amend its Comp Fund guidelines so the LTAF would qualify for reimbursement under its new “right of subrogation” power in the LTA, where a lawyer participates in a fraud and the LTAF pays a claim to an innocent property owner or buyer. (To qualify for Comp Fund payments today, a solicitor/client relationship must exist, and the lawyer must have received funds or property from the claimant in their capacity as a solicitor)<sup>96</sup>. While the government has denied the right of subrogation against the LTAF for fraud claims paid by title insurers, it is now seeking to exercise a similar right of subrogation in favour of the LTAF against the Comp Fund for fraud claims paid by the LTAF. How ironic.

The provincial government’s approach to the legal profession is simple: give them what they, but make them pay for it.

The exclusive right of lawyers to register deeds would not extend to mortgages, discharges and other documents. Clearly, other real estate professionals must be able to register documents in connection with their businesses. However, these professions are statutorily-licensed. Allowing

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<sup>96</sup> General Guidelines for the Determination of Grants From the Lawyers Fund for Client Compensation, Law Society of Upper Canada, item 1  
<http://www.lsuc.on.ca/public/b/compensation/general-guidelines-for-the-determination-of-grants/> accessed on March 31, 2007. Under those guidelines, “no grant shall be made to a bank or other financial institution engaged in the business of lending money”. No request has been made to change this guideline where the LTAF pays a claim to an innocent lender, presumably because the LTAF “express service” (under which most of these claims would be paid), is limited to innocent property owners and buyers”.

non-regulated parties to register “other” documents on title, if they maintain specified insurance coverage, perpetuates the “open” access system that contributed to the increased incidence of fraud in recent years. More importantly, it clearly allows title insurers whose business model sidesteps lawyers, to continue processing mortgage refinance transactions. That’s a sad reflection how deeply entrenched those title insurers have become in Ontario over the last decade, diverting “refi” business from the real estate bar<sup>97</sup>

Expect the government’s proposed “two-lawyer rule” (two lawyers on every deed) to generate the most controversy. In 2006, the Law Society of Upper Canada, as part of its province-wide consultation on real estate issues, proposed amending the Rules of Professional Conduct to prohibit lawyers from acting for both sides in a real estate transaction, with limited exceptions<sup>98</sup>. Eventually the proposed amendment was withdrawn, the greatest backlash coming from lawyers in smaller communities. Only a handful of lawyers practice real estate in these areas, and joint retainers are quite common, the relationships with clients often going back generations<sup>99</sup>. To ensure compliance with the proposed rule, clients would often be forced to travel outside their local community to another lawyer. Lost business could lead to practice shut-downs, creating an access to justice crisis. .

As proposed, the government’s two-lawyer rule is much broader in scope than the Law Society’s recommendations. First, it is not limited to separate representation in real estate transactions; it would encompass all deeds registered on title. Second, “no exceptions” are proposed. This last point is most unfortunate as it ignores numerous transactions where the “identical” party or parties are involved as transferor and transferee. Forcing clients to retain two lawyers (and pay two bills) in these situations is impractical, inappropriate and unnecessary. Logic is being sacrificed at the altar of expediency.

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<sup>97</sup> “First Canadian Title is the largest single customer of Teranet. We do approximately 25% of the registrations on the land title system in Ontario.” Susan Leslie, Vice-President of Claims and Underwriting, First Canadian Title, speaking to the Legislative Assembly of Ontario Standing Committee on Social Policy, Official Reports of Debates (Hansard) November 27, 2006;

[http://www.ontla.on.ca/committee-proceedings/transcripts/files\\_pdf/2006-11-27\\_pdfSP035.pdf](http://www.ontla.on.ca/committee-proceedings/transcripts/files_pdf/2006-11-27_pdfSP035.pdf) page SP-1356 accessed on March 27, 2007

<sup>98</sup> For the original proposal, see [http://www.lsuc.on.ca/media/mar3006\\_draft\\_amendments.pdf](http://www.lsuc.on.ca/media/mar3006_draft_amendments.pdf) Amendment #1, accessed on April 28, 2007

<sup>99</sup> As a member of the CEO’s Working Group on Real Estate Issues, I heard many of these concerns first-hand.

“Identical party” situations that should override this proposed two-lawyer rule are:

- a) unilateral severance of a joint tenancy, thereby creating a tenancy in common. In 1987, the Ontario Court of Appeal in *Horne v. Horne Estate*<sup>100</sup> confirmed that one joint tenant could unilaterally sever a joint tenancy without notice to, or the consent of, the other joint tenant, calling it “a long-recognized common law right<sup>101</sup>.” If Angela and Frank are joint tenants, and Angela arbitrarily wants to sever the joint tenancy, why should she have to retain two lawyers—one to represent her as transferor, and a separate one to represent her as transferee?<sup>102</sup>
- b) Change of legal tenure—joint tenants to tenants in common. Marlon and Mary Lou own property as joint tenants. If they both want to sever the joint tenancy, why engage two lawyers?
- c) Change of legal tenure—tenants in common to joint tenants. John and Wayne bought a property as tenants in common. Now they wish to re-register title as joint tenants. Does it make sense to have two lawyers—one for them as transferors, the other for them as transferees?
- d) A corporate “rollover” under Section 85 of the federal *Income Tax Act*<sup>103</sup>. Raj owns a piece of real estate. His accountant recommended a transfer to The Raj Corporation, a company in which Raj is the sole shareholder. What is accomplished by forcing Raj to hire two lawyers?
- e) Winding-up a corporation, under Section 193 of Ontario’s *Business Corporations Act*<sup>104</sup>. Monsieur Pierre Inc. owns a piece of land. Pierre is the sole shareholder of Monsieur Pierre Inc. Pierre decides to wind-up the corporation and transfer its assets to Pierre in his personal capacity. A “no exceptions” rule means Pierre must retain two lawyers—one lawyer acting for Monsieur Pierre Inc. as transferor, and a second lawyer acting for Pierre personally as transferee.

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<sup>100</sup> (1987), 45 R.P.R. 223

<sup>101</sup> the deed generated under the electronic registration system specifically allows a joint tenancy to be severed unilaterally. See Electronic Procedures Guide, 2005, page 13, box 4, accessed on April 28, 2007 at [http://www.teraview.ca/resupgrades/downloads/V5\\_ProGuide.pdf](http://www.teraview.ca/resupgrades/downloads/V5_ProGuide.pdf)

<sup>103</sup> R.S.C. 1985, Chapter 1 (5th Supp.)

<sup>104</sup> R.S.O. 1990, c. B.16

f) Estates where the executor and beneficiary are identical. Widow June dies, leaving all her assets (including her home) to her only child Keith. Keith is also her Estate Trustee. Two documents must be registered to deal with her home: a Transmission Application (registering it in Keith's name as Estate Trustee), followed by an Executors Deed (transferring the house to Keith in his personal capacity. Just one lawyer is needed when Keith registers the Transmission Application. But two lawyers would be necessary when Keith registers the Executors Deed, despite him being Estate Trustee, beneficiary, transferor and transferee. Where is the logic?

g) a deed from a property owner to themselves, to effect a severance of land under Part VI of the *Planning Act*<sup>105</sup>. It is not uncommon for a property owner like Guy to register a deed from himself to himself to finalize a severance of land, especially when the severed land will not be transferred for some time.<sup>106</sup> Try explaining to Guy that one lawyer must represent him as transferor on the severance deed, and another represent him as transferee on the same deed.

While the proposals may be coming from the provincial government, the bills will be coming from the lawyers—two lawyers if the “no-exceptions” rule is implemented as proposed.

Blaming the government won't ease the financial pain clients must endure.

Ontario's real estate lawyers are at a crossroads. The decisions we make today could affect the very survival of our profession. Do we accept the government's far-from-perfect proposals or reject them? While the anticipated debate among lawyers will be heated, we have little choice but to say “yes”. Sure, we would like the exclusive right to register both deeds and mortgages on title, but that is not going to happen. Like the horse that bolted before the barn door was closed, most mortgage refinance business today (regrettably) has evaporated. That's reality. Whether that business is recoverable is another topic worthy of discussion.

Allowing only real estate lawyers to register deeds, despite the added cost, represents our last, best opportunity to remain an integral part of real estate conveyancing in this province. Not only that, but this privilege would make it harder for independent closing centres to operate again in

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<sup>105</sup> R.S.O. 1990, Chapter P.13

<sup>106</sup> Consents under Section 53(43) of the Planning Act lapse two years after a consent certificate is issued (or any shorter time appearing in the certificate) if the deed completing the severance is not stamped and registered.

Ontario. No lawyer can be happy that the government is dumping on the real estate bar the financial burden of real estate fraud involving lawyers. But we are not alone. That move mirrors how the government handled title insurers in Bill 152. Unquestionably there's a cost associated with these privileges, one that may be prohibitive to some lawyers. Individual lawyers will argue they can't afford to say yes. But as a profession, can we afford to say no?

Assume the Ontario real estate bar declined this one-time offer. How long before a different group that includes title insurers are offered a similar privilege, allowing them to register mortgages, discharges and deeds? That would be the death knell for Ontario's real estate lawyers

Accepting the government proposals will likely see some attrition—"dabblers" who only close a few deals each year, for whom the higher insurance premium makes no sense. On the flip side, lawyers whose primary area of practice is real estate will benefit from that newly-available work, helping offset the extra cost of doing business. While the overall number of lawyers practicing real estate may shrink, the percentage of full-time real estate lawyers will increase. So the pains of change may not be as deep as first thought.

Significant initiatives affecting real estate lawyers and their staff are now in place. Further changes are imminent, with even more to come. The final chapter of the real estate fraud saga in Ontario still has not been written.