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Why risk court appeal? Just change the law Homeowners need protection now from title fraud artists

Last week's decision by the Ontario government to intervene in the case of an innocent homeowner who had her house title stolen represents a calculated risk by the province, which could backfire if the Court of Appeal refuses to overturn one of its own rulings.

It may also be too little, too late for the homeowner.

Susan Lawrence has owned her century-old Victorian house for the past 30 years. Earlier this year, a very sophisticated identity thief stole the title to her home and mortgaged it to Maple Trust for almost \$300,000.

Using the name Thomas Wright, the fraudster obtained the mortgage using a bank statement, deposit certificate and letter of employment all of which were in the fake name. The employment letter was verified by a phone call to a fake employer and the lender even obtained a real Dunn and Bradstreet credit report showing that the phony Thomas Wright had established a credit rating.

In March, Maple Trust sued Lawrence, demanding possession of the property as it was perfectly entitled to do under a rather bizarre decision of the Ontario Court of Appeal.

Last November, the province's highest court ruled that when a wife signed her husband's name with a forged power of attorney, the mortgage was valid and could be used to evict the couple and sell the property.

That decision, in the case of *Household Realty v. Chan*, turned a century of Ontario land titles law upside down. It also opened the doors for lenders and title insurers to claim that forged mortgages are valid. The Court of Appeal has decided that once any document genuine or forged is registered in the land titles system, it is valid.

Lawrence retained Toronto lawyer Morris Cooper to help straighten out her problem. In the glare of publicity, Maple Trust agreed not to pursue its eviction action against Lawrence and, last month, Cooper asked Justice Edward Belobaba to restore the title to her home and declare that the Maple Trust mortgage was void.

Cooper argued that the Court of Appeal did not appreciate the implications of its decision last year, and the profound misery it created for innocent victims of title fraud.

In a one-page ruling last month, the judge returned ownership of the home to Lawrence, but ruled that he was "unfortunately" bound by the Household Realty decision. He decided he could not discharge the mortgage, since the Court of Appeal has held that registered forged mortgages are valid against an innocent homeowner.

As the law now stands, an innocent victim of mortgage fraud like Lawrence has absolutely no defence to an eviction action by the bank or trust company that holds a fraudulent mortgage.

Cooper filed an appeal of the decision and, earlier this month, was advised by Ronald E. Carr, acting as lawyer for the Attorney General, that the government would intervene in the appeal in support of the request to have the mortgage voided.

The government's intervention in the Lawrence appeal is effectively asking the Ontario Court of Appeal to reverse its decision in the Household case, and admit it was wrong.

For the province to ask a three-judge panel in the Lawrence appeal to change the law established by three fellow appeal judges only last November is a very risky move.

Courts occasionally overrule the law established by their earlier decisions, but only after many years have elapsed.

I can't recall another case where the appeal court reversed its own decision just months after it was released.

Another option for the court would be to say the Household case and the Lawrence case are based on different fact scenarios, and make a ruling on the specific facts in the Lawrence case. That would probably be a stretch, since the court's reasons in *Household Realty* involved a detailed analysis of the law and was not based on the particular facts of the case.

A forged mortgage is, after all, a forged mortgage, whether it's signed with a forged power of attorney or the name of a non-existent scam artist.

"It's like closing the barn door after the horses have escaped," one lawyer familiar with the case told me last week. "The province has the power to change the law and should amend the legislation."

If Lawrence and the government lose the appeal, the legislature may be forced to do just that. In the meantime, the Land Titles Assurance Fund is proceeding at its usual glacially slow pace with applications for millions of dollars in claims from parties like Maple Trust.

The question is, why isn't the government stepping in to help Lawrence by paying off the Maple Trust mortgage, instead of just joining in a lawsuit with uncertain results?

The fund uses public money to reimburse those who have lost their interest in property as a result of fraud in the land titles system. Applications to the fund have increased since last year because title insurers are now justified in quoting the Ontario Court of Appeal to refuse claims. If a forged mortgage is valid, the insurers may say, why should they pay out claims?

Ultimately, the law is going to have to change. Either the Court of Appeal will have to reverse itself or the legislature will have to amend the Land Titles Act to protect innocent victims of fraud like Susan Lawrence.

If the law is going to change one way or another, why waste time with a court case? Shouldn't the legislature simply amend the statute now and pay existing claims? It's not helping Lawrence, and others like her, by prolonging their grief.

Meantime, the only way homeowners can give themselves a measure of protection is to obtain existing owner title insurance. It's available from Ontario real estate lawyers.