



Bob Aaron bob@aaron.ca

September 16, 2006

Draft fraud law ignores innocent buyer

Last week's announcement by Government Services Minister Gerry Phillips that he intends to introduce a law to curb mortgage fraud will result in a major overhaul of Ontario's land registration system. Unfortunately, the changes could also create far more problems than they would solve.

According to the government's announcement, the proposed legislation would ensure that ownership of a property could not be lost as the result of the registration of a falsified mortgage, fraudulent sale or a counterfeit power of attorney.

Instead, an innocent homeowner's title will be restored to him or her and the fraudulent document will be nullified even if the new owner and new lender are innocent.

In other words, says the government, forged documents will not be allowed to stand.

Here's the problem with the proposal: Under the current Land Titles system, anyone wanting to buy or lend money against a property completes a search of title and is able to rely on the title record as a government guarantee of ownership even if there was some fraud along the way, one or more owners back in the history of ownership. At least, that's the way it is supposed to work.

Now, along comes Government Services Minister Gerry Phillips, who, with the best of intentions, announces that innocent victims like Susan Lawrence, Elizabeth Shepherd and Paul Reviczky will no longer lose their houses to fraudsters. Their titles will be restored to them, Phillips announced, and "the fraudulent document will be nullified." (Whether or not any of them has actually lost his or her home or even been evicted is another story altogether, but for the moment the loss is a paper one only.)

The problem, of course, is that although an innocent buyer has unknowingly purchased a house from a fraudster, his down payment is genuine money, his mortgage to the bank is a real loan which was approved based on real income and assets, and his \$50,000 in renovations is also real money. And he still owes the bank lots of real money after the government cancels his registered deed.

Under Phillips' plan, people like Lawrence, Shepherd and Reviczky will be protected, but the unlucky purchaser will be out in the cold, and so will his bank, which will then sue for repayment of the money it loaned to him. Now, instead of the photo of Paul Reviczky on the front page of the *Star*, the innocent purchaser will be shown sitting on the front lawn surrounded by his furniture.

And what of the innocent mortgage lender? Who will protect the banks or private lenders if they lend money to an innocent owner in good faith?

If Phillips' scheme becomes the law, no one will be able to rely on the Land Titles system as proof of good and valid ownership.

Sidney Troister is a partner in the Toronto law firm Torkin Manes. He is an expert in the area of real estate fraud, and frequently represents fraud victims and title insurance companies.

Troister is not happy with the proposed legislation. "It takes away all the benefits of the Land Titles system," he said. The public won't be able to rely on the state of the registered title, he added, since if there is any fraud anywhere in the historical chain of ownership, the innocent party can have his or her title restored and the current owner and lender will be out in the cold if the law is passed.

"The integrity of the Land Titles register and reliance on government-certified titles is more important than the interests of the victims, who, according to the Land Titles Act, are supposed to be protected by the Land Titles Assurance Fund," Troister told me. "If we can't rely on the register because there may be an historical fraud some time in the past, the whole system will break down. Title searches will become meaningless."

Here's what will happen: If a house has changed hands several times in the last six years, or even 60 years, it will be impossible for a new buyer to verify that there was no fraud in any of those transactions. And yet, the new buyer will only get good title if there was no fraud in the title chain.

If a prior owner pops up at some time in the future and says, "That's not my signature on that old deed," the house will be restored to him or her under the new legislation, and the current owner would be certain to be evicted.

In effect, says Troister, no one will be able to rely conclusively on the title page (ironically, the name of this column), because every transaction will be subject to the authenticity of signatures of prior owners.

The alternative: Title would be assured not by lawyers reviewing title and giving definitive opinions based on the registered title, but by title insurers who would charge buyers and lenders to give the guarantee and the insurance that the province and the Land Titles system do not provide. People might not get their houses, but at least they would be compensated under their title insurance policy. The Land Titles system would hardly be relevant.

Sellers under the new regime will have the positive obligation of proving that there was no historical fraud going back years and years a truly impossible task, and yet that's the effect the government's proposal will have.

Title fraud which is really mortgage fraud is a lucrative scheme to make huge amounts of money quickly. Statistics show that the risks of getting caught are virtually zero if the fraud is carried out "properly."

The government's proposal to ask Ottawa to make real estate fraud a separate offence is just whistling in the wind. Increasing fines for real estate fraud from \$1,000 to \$50,000 is no deterrence at all if the police have few resources to catch the crooks.

I was hoping that Attorney General Michael Bryant would announce massive new funding for a police task force to catch the organized crooks who are perpetrating these frauds. That didn't happen.

I was also hoping that Minister Phillips would do something to make the Land Titles Assurance Fund provide compensation to victims in two or three months, rather than two or three years under the current regime, and create a speedy non-court process for restoring registered ownership.

Earlier this week, I spoke to the minister by telephone to convey some of my concerns and see if he felt they were justified.

"What we're attempting to do is only part of the solution," Phillips told me. "It's going to be a 10-year project. I want to reassure people that their titles will not be fraudulently stolen from them and someone can't fraudulently register a mortgage against their title."

When I asked him about the innocent purchaser who buys from a fraudster, and her bank, he told me that the purchasers and their lenders will have access to the Land Titles Assurance Fund.

I pointed out that the fund takes several years to crank out a decision and a cheque, and asked if it could be speeded up. "The solution is multi-faceted," the minister told me. "I'm going to look at the fund and the way it's administered. We will move (on this) as quickly as we can..."

"I don't believe the steps we announced on Friday will solve the whole problem," Phillips added. "They'll be helpful and solve a part of it. It won't be solved overnight."

If the province made the Land Titles Assurance Fund move faster, Lawrence, Sheppard, Reviczky and others like them would have had their registered titles back by now without going to court. They would already have been compensated, and these fundamental changes to the system would be unnecessary.

The government announcement made for good press, but the devil is in the details. If the minister's proposals proceed without a major overhaul, we will, more and more, become like the United States, with our title system dependent on title insurance and not on good, reliable title.

Bob Aaron is a Toronto real estate lawyer. www.aaron.ca ©Aaron & Aaron. All Rights Reserved.