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No correct answer or easy solution to title fraud dilemma

The governments of Ontario and British Columbia have taken directly opposite positions on how to protect the public from title fraudsters.

Earlier this month, Ontario Government Services Minister Gerry Phillips announced that he would introduce legislation to restore ownership of a home to anyone who lost it as a result of registration of a falsified mortgage, a fraudulent sale, or a counterfeit power of attorney.

Under the proposed legislation, an innocent homeowner's title will be restored to him or her and the fraudulent document will be cancelled even if the new owner and new lender are also innocent and had no knowledge of the fraud.

In sharp contrast to Ontario's position, last November British Columbia passed a law that gives ownership of a home in these circumstances to the innocent purchaser who has bought the house in good faith, even though the transaction involves a forged transfer.

Prior to the amendment to the B.C. Land Title Act, if Allan forged a transfer of Bill's title and sold the property to Charlie, Bill would have his ownership restored even if Charlie was a completely innocent purchaser with no knowledge of the fraud.

Charlie would be left with no remedy except to sue Allan and make a claim against the provincial assurance fund.

After the amendment came into effect in November, Charlie gets to keep the title of the home under the forged deed, and Bill the original owner will be compensated by the government's assurance fund for the loss of his ownership.

If Ontario introduced legislation similar to that in B.C., innocent homeowners like Susan Lawrence and Elizabeth Shepherd both of whom had the title to their houses stolen would only lose their houses if the purchaser was innocent. But in both those cases, since the purchaser had never taken possession and could not claim innocence, the only injured party would be the lenders.

The B.C. legislation only applies to ownership, so the lenders in either province would still be left with a claim against the assurance fund or their title insurance.

In other words, in British Columbia, an innocent purchaser who buys a house from a fraudster in good faith and does not participate in the fraud, gets to keep the title regardless of the fact that a prior owner has been defrauded in the process.

The new legislation is retroactive, and applies to title frauds committed before proclamation of the law last November.

My view of the B.C. legislation is that the only way a purchaser could claim innocence is if he or she actually took possession of the property, either personally or through his or her tenants. Without taking possession, there might be a presumption that the purchaser was aware of the fraud.

The Law Society of British Columbia was represented on a task force that led to the new legislation. According to an announcement on its website, the Law Society "endorsed the reforms as a means of better protecting the public and enhancing public confidence in B.C.'s respected land title system."

At the time the new legislation was proclaimed, Ralston Alexander, president of the Law Society of B.C., said, "The ... changes will work to ensure legal fairness and protection to both owners and purchasers of property in British Columbia. The Law Society supports these amendments..."

As a result of the new legislation, British Columbia now has a land titles system that strictly adheres to what lawyers call the "mirror principle." Whatever appears on the title index whether fraudulent or not is an exact mirror of who owns the property.

Under Ontario's proposed legislation, the title index will not be a true indicator of the state of the title, and will be conditional on the lack of fraud in the chain of ownership. Any fraudulent dealing with the ownership will result in cancellation of the current deed and a rollback to the state of the title as it stood before the fraud or forgery took place.

Don Bergeron is the manager of title insurance for St. Paul Guarantee Insurance Company at its Toronto office. In an email last week, he told me, "B.C. believes in the true mirror principle that Land Titles is supposed to represent."

"In the end," he added, "unless the Ontario provincial government is prepared to set up and capitalize an efficient and effective payout fund to settle land titles claims quickly, then title insurance is effectively the only true fraud protection device available to the public today."

As I wrote in this column two weeks ago, the proposed Ontario legislation would not protect an innocent buyer one who unknowingly buys a house from a fraudster, even if he or she moves into the property.

I've had a number of emails in recent weeks complaining about my concern for the innocent buyer. "When I buy a stolen car," one reader wrote, "and the police come knocking at my door, I will automatically lose the car and I, and/or the bank that advanced my car loan, will be on the hook."

Another reader wrote, "I know of no other situation where stolen property legally ceases to be the property of the rightful owner."

The readers make good points, but the difference here is that the government maintains a guaranteed title registry for real estate, but not for cars or coin collections.

When a house title is stolen the government has a fund to compensate the injured party. There is no fund for other stolen property, and no government ownership guarantee either.

When it comes to stolen real estate titles, it's ultimately a policy decision for the Ontario government to make: Who will get hurt, the innocent owner or the innocent purchaser?

B.C. has already moved in one direction, with the support of the province's legal community. Ontario is heading in the exact opposite direction.

Unfortunately, there is simply no correct answer or easy solution. Whichever way Ontario moves will be right for some stakeholders, and wrong for others.

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Recent amendments to the *Land Title Act* provide greater certainty to BC home buyers who, through no fault of their own, become entangled in a fraudulent transfer. Although fraudulent land transactions are rare, section 25.1 of the *Land Title Act* now creates immediate certainty of land title for a person who has acquired a fee simple interest in a property in good faith and for valuable consideration although, unknown to that person, the transaction involved a forged transfer.

Lawyers will wish to be aware of this protection on behalf of their clients.

Prior to the amendment, if A forged a transfer of B's title to C and C was a completely innocent purchaser with no knowledge of the fraud, B would have been restored on title and C would be left with no remedy except against A.

After the amendment, which seeks to uphold the principle of immediate indefeasibility of title and ensure public protection, C would keep the title acquired and B would be compensated by the Assurance Fund.

As lawyers know, the Assurance Fund has long provided compensation to individuals who are deprived of title to real property due to an error in the operation of the *Land Title Act* or the administration of the land title system under the Registrar's direction. With the most recent round of legislative amendments, this basic protection has been extended.

Previously it was necessary for a claimant to show that an administrative error had been caused solely by an act of the Registrar, but now the concept of contributory negligence is recognized. If a claimant contributes to a loss caused by the Registrar, the liability is shared. The claimant accordingly bears his or her portion of the loss, but can claim against the Assurance Fund for the amount of the loss caused by the Registrar.

The *Land Title Act* changes came into effect as part of Bill 16, the *Miscellaneous Statutes Amendment Act (No. 2)*, SBC 2005, c.35, on November 24. On behalf of the Law Society, Su Forbes, QC, Director of the Lawyers Insurance Fund and Ron Usher, Policy Staff Lawyer, Practice Opportunities served on the task force behind these reforms. The Law Society has endorsed the reforms as a means of better protecting the public and enhancing public confidence in BC's respected land title system.

For more information, contact the Land Title and Survey Authority or visit online at www.ltsa.ca.

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