

MAKE MORTGAGE FRAUD A CRIMINAL OFFENCE

Make mortgage fraud a specific criminal offence with a mandatory minimum penalty and restricting access to Ontario's land title registry are initiatives that need to accompany the provincial government's crackdown on real estate fraudsters, argues Toronto-area lawyer Alan Silverstein, a benchner with the Law Society of Upper Canada and a certified specialist in real estate law.

"We have very laws under the Criminal Code against branding cattle fraudulently and obtaining food and lodging fraudulently. If we can protect cattle and innkeepers, why can't we protect homeowners?" he says.

Silverstein notes one U.S. state did that very thing for homeowners last year. Under the Georgia Residential Mortgage Fraud Act, a person commits an offence, "with the intent to defraud," if he or she makes, uses, or facilitates the use of a "deliberate misstatement, misrepresentation, or omission during the mortgage lending process" to mislead lenders or borrowers; "receives any proceeds or any other funds in connection with a residential mortgage closing" resulting from the above; or files with the official registrar of deeds of any county in the state "any document such person knows to contain a deliberate misstatement, misrepresentation, or omission."

Anyone convicted of such fraud affecting one residence faces imprisonment with a minimum term of one year to a maximum of 10 years, or a fine not to exceed US\$5,000 fine, or both.

If the mortgage fraud involves "a pattern" (two or more residential properties), the penalties upon conviction jump to a minimum of three years and a maximum of 10 years in prison, or a maximum US\$100,000 fine, or both — per property involved.

Ontario Government Services Minister Gerry Phillips has called on the federal government to add real estate fraud as a separate offence under the Criminal Code, which deals with fraudulent transactions involving concealment of title documents, registration of title, and sale of real property.

Under his proposed legislation, fines for real estate fraud-related offences would be raised from \$1,000 to \$50,000, and new "safeguards" would be introduced to prevent the fraudulent registration of documents by suspending and revoking the accounts of con artists and identity thieves.

(The proposed legislation would ensure that in situations involving fraud, title would remain with the original homeowner, whereas British Columbia's Land Title Act was amended last year to give title to the innocent purchaser.)

Silverstein says the Ontario government should begin by limiting access to POLARIS, the province's electronic land registration information system, and follow the approach taken in Australia, where access to its e-land registration system is restricted to those directly involved in real estate transactions.

"In Ontario, it's an open system where anyone can go in and tinker with titles," says Silverstein. "While it's been criticized in other jurisdictions, the government's position has been that everybody should have

access to land titles."

Moreover, Silverstein says that unlike in New Zealand, where the vendor's lawyer certifies that prescribed steps have been taken to verify the vendor's identity and the veracity of the information contained in the document being registered, lawyers in Ontario receive none of those assurances.

In its draft residential real estate transactions practice guidelines, the LSUC's working group on real estate issues states that a lawyer "shall undertake steps to verify that the person retaining the lawyer and/or signing documents under the lawyer's supervision has reasonable identification to substantiate that he/she is the named client/party and should retain details or information about the identification obtained."

Silverstein says that in Alberta, anti-mortgage fraud legislation dealing with proof of identity is awaiting proclamation.

Under Alberta's Bill 12, the Land Titles Amendment Act, the registrar of titles "may require satisfactory proof of identity" (photo ID, statutory declarations, etc.) "of any person whose name appears" on a transfer, mortgage, encumbrance or other instrument.

The registrar may refuse to register any of these "if for any reason it appears . . . that the transaction may involve fraud" or if the person "fails or refuses" to produce the requested identification documentation. Land registrars in New Brunswick, Manitoba, and Saskatchewan already can refuse to register a deed or mortgage to prevent "threatened" or "apprehended" fraud, says Silverstein, who was recently hired by Emergis Inc. as its director of national legal engagements.

In Ontario, under s. 157 of the Land Titles Act, the registrar cannot reverse a fraudulent transaction unless there has been a conviction under the legislation or the Criminal Code.

"Unlike the other provinces that follow a preventative technique, Ontario is closing the barn door after the horse has left," says Silverstein.

He also wants the law society's Rules of Professional Conduct to provide some guidance on what real estate lawyers should do when they are presented with powers of attorney they have not drafted. "In the wrong hands a power of attorney is a very dangerous document — the equivalent of a bearer instrument — granting the attorney extensive powers to deal with the donor's property," Silverstein said in a lecture series he delivered for Stewart Title Guaranty Co. earlier this year.

He pointed to the precedent-setting case, *Household Realty Corp. Ltd. v. Liu, and CIBC Mortgages Inc. v. Chan and Liu*, heard by the Ontario Court of Appeal last year (see article page 14).

Chan forged Liu's signature on two separate powers of attorney to secure mortgages on the couple's Richmond Hill, Ont., home from CIBC and Household Realty in order to pay off her sizable gambling debts. Both mortgages went into default and, on a motion of summary judgment brought by CIBC and Household Realty, Ontario Superior Court Justice Thea Herman ruled that "once registered" the two mortgages were "effective and can be relied on" — in other words, enforceable — as long as the lender was unaware of the fraud.

The Ontario Court of Appeal upheld her decision and dismissed Liu's appeal. Silverstein argues that without a requirement to have an affidavit of execution, "lawyers can do little more than exercise their best judgment whether to rely upon a power of attorney they have not drafted."

However, most of Canada's major banks provide specific details on the use of PoAs. When a power of attorney is to be used, CIBC informs lawyers to "immediately advise" its regional mortgage centre. Furthermore, "no funds are to be disbursed until written instructions are received from us."

Under Ontario's proposed legislation, fraudulent mortgages, transfers, powers of attorney and other instruments would be "nullified," according to Phillips.

But Silverstein, a founding member of the Real Estate Council of Ontario, would also like to see legislation to prevent mortgage fraud affecting the major parties to a real estate transaction.

Ontario's Real Estate and Business Brokers Act (REBBA), which came into force on March 31, gives RECO greater power to deter brokerages, brokers, and salespeople from getting involved in mortgage fraud and severely penalize those who falsify or provide false information in a real estate transaction.

Says Silverstein: "Why can't there be legislation that also applies to lawyers and everybody else involved in real estate?"