

April 2007

## LAND FRAUD #2

The Ontario Court of Appeal has now decided the case of Lawrence v. Wright. The facts were simple: fraudster#1 sold a property to fraudster#2. At the time of the closing, fraudster#2 mortgaged the property to Maple Trust and paid out an existing first mortgage. The original owner discovered the fraud two months later. The trial judge held that Maple Trust had priority over the original owner; the original owner appealed.

### Overturn

A five-judge panel of the Court of Appeal overruled that Court's previous decision in Household Realty Corp Ltd. v. Liu, on which the trial judge had relied, and overturned the trial judge's decision. The Court stated, "*Further the language in Household Realty fails to recognize that the Act gives statutory effect to the theory of deferred indefeasibility. For the reasons already given, I consider both the result and that reasoning to be incorrect.*"

### Reasoning

We will spare you the legal analysis and give you the conclusions of the case. The Court adopted the doctrine of deferred indefeasibility and then interpreted it according to the submissions of the government of Ontario, who had intervened in the case. According to the

doctrine that the Court applied, there are three classes of people:

1. the original owner;
2. the intermediate owner (i.e. a person, be it a purchaser or a mortgagee, dealing with the fraudster); and
3. the deferred owner (i.e. a person, be it a purchaser or mortgagee, dealing with the intermediate owner).

As between the original owner and the intermediate owner, the original owner wins because the intermediate owner dealt with the fraudster and, unlike the original owner, at least had the opportunity to prevent the fraud. As between the original owner and the deferred owner, the deferred owner wins because the deferred owner relied on the parcel register and had no opportunity to catch the fraud.

In Lawrence, Maple Trust was the intermediate owner, having dealt directly with the fraudster. Therefore, as between it and the original owner, the original owner wins. Using this analysis, the decision in TD Bank v. Jaing (see our February 2007 newsletter) would have been different. Note that if Maple Trust had assigned its mortgage to another mortgagee before the original owner notified it of the fraud, the assignee, as the deferred owner, would have had good title and the original owner would have been the person traipsing off to the Land Titles Assurance Fund. Note also that, unlike in Rabi v. Rosu, where due diligence

was held to be all-important, due diligence from an intermediate owner is meaningless. An intermediate owner will not win over the original owner, regardless of its due diligence.

### The Fund

The Ontario government has taken the position that an intermediate owner, such as Maple Trust, has no right to receive compensation from the Fund because the intermediate owner never had an interest in land. The Court rejected this contention. It stated that the intermediate owner has an interest in land, just one that the original owner can defeat. For example, how could an intermediate owner pass good title to the deferred owner if it did not have an interest in land?

Accordingly, although the Court did not decide on whether a defrauded intermediate owner could apply successfully to the Fund, its analysis went a long way to that conclusion.

### The New Act

How will the Lawrence case affect applications to the Fund given the enactment of the new Act that we discussed in our newsletter of February 2007? Perhaps the concept of due diligence will be imported into the analysis. We do not know how it will shake out, but, no doubt, another mortgagee will soon be defrauded and will make an application to the Fund. We expect that if the powers-that-be refuse the application, we can expect an

appeal to the courts.

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## CREDIT CARDS

We all know that if the balance owing from use of a credit card is not fully paid, the financial institution charges interest from the date that the owner uses the card to purchase goods and services from a merchant (i.e. the "transaction date"). The date that the financial institution actually credits the merchant, which may be 2-5 days later, is ignored in the interest calculation. Should this be? By way of class action, a credit cardholder challenged this in Dahl v. Royal Bank of Canada; in 2006, the British Columbia Court of Appeal decided the matter.

### Issue

The issue was whether a charge between the transaction date and the date of posting the credit to the merchant could be characterised as interest. If it could, the plaintiff lost; if it could not, then, we gather, that under the Interest Act, the Bank Act, and the B.C. Consumer Protection Act, the plaintiff might have a case.

### Interest

The cardholder's position was that since banks advance no funds either to cardholders or to merchants on the transaction dates, then there could be no principal amounts on which interest could be calculated. The banks countered by saying that they advance credit to cardholders on the transaction dates by undertaking to pay the

merchants. They are obliged to pay the merchants because, upon presentation and acceptance of the credit card, a cardholder's obligation to a merchant is absolutely discharged.

Accordingly, there were two questions: could the banks legally charge interest on credit, as opposed to funds actually advanced to the merchant; and is credit advanced to the cardholder on the transaction date?

### Agreements

There are three main agreements in play on a credit card transaction:

1. The agreement between the bank and the cardholder;
2. The agreement between the bank and the merchant; and

3. The agreement, usually oral, between the cardholder and the merchant.

The Court held that the problem with the cardholder's argument was that the argument assumed that these agreements were all one agreement, rather than three separate agreements.

The Court reviewed the cardholder agreements of RBC, CIBC, and Bank of Montreal. These agreements made it apparent that the banks charged interest from the transaction dates and that they charged interest on the advances of credit. Accordingly, the fact that there were also agreements with the merchants allowing the banks to credit the merchants within 2-5 days of a transaction date was irrelevant.

The Court dismissed the class action.

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