



# Real estate fraud legislation: shaping the new practice reality

*Prompted largely by extensive media coverage of title and mortgage fraud, the Ontario government last year embarked on extensive consultations with the various parties involved in real estate transactions. Among the issues discussed were: how the land titles system works; who can access it to register title documents; what lenders do before they make mortgage loans; and lawyers' role in the transactions.*

*In the fall of 2006, the Ontario government announced a two-phase program of reform that will reshape residential real estate practice.*

## **Phase one: Taking care of problems**

This first phase was reflected in the Ontario *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*, released in October 2006 and often referred to as Bill 152.

Phase one focused on:

- increased Ministry ability to suspend and/or revoke electronic registration credentials;
- clarification of the effect of registration of fraudulent documents; and

- clarification that title insurers cannot seek reimbursement from the Land Transfer Assurance Fund (LTAF).

For real estate practitioners, the Bill raises a number of practice issues.

- First is the need to learn the substantive provisions of Bill 152's treatment of fraudulent instruments (found in the provisions which amend the *Land Titles Act*). You can access the most current version of the *Land Titles Act* at [www.e-laws.gov.on.ca/DBLaws/Statutes/English/90105\\_e.htm](http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90105_e.htm).
- A major practice issue for lawyers is how to reduce the risk that they become a target for the Director of Land Registration to suspend, and potentially revoke, the lawyer's ability to submit documents electronically. These powers were incorporated in the *Land Registration Reform Act* by virtue of the Bill 152 amendments.

The Director has the power to issue an immediate suspension where it is in the public interest or the Director has reasonable grounds to believe that an electronic document is not authorized. When a lawyer receives a notice of proposal to revoke the authorization to register (that is, to make the suspension permanent), the lawyer has 15 days to serve a written request for a hearing on the Director. If the lawyer wishes an oral (as opposed to written) hearing, that must be specified.

#### PRACTICE IMPLICATIONS

From your client's perspective, your suspension could have disastrous consequences in terms of an upcoming closing. You should note that the Director has the power under the Act to withdraw the suspension, pre-revocation, where the Director considers the withdrawal in the public interest. So, don't hesitate to advise the Director immediately if you believe that you have been the target of a suspension by mistake.

For a variety of reasons, it is worthwhile for lawyers who practise in a firm to ensure that at least one other lawyer in the firm has electronic registration credentials. That way another partner or associate would be able to assume carriage of a file on short notice, if necessary. (The definition of "electronic document submitter" in the Act indicates that the power to suspend is on an individual person, not firm-wide, basis. Therefore, it is reasonable to expect that firm members will be able to back each other up this way.)

For sole practitioners, the Joint Committee on the Electronic Registration of Title Documents has long recommended that lawyers have an understanding with another lawyer in the community who could provide assistance in appropriate circumstances. Traditionally this has been discussed in the context of registrations needing compliance with law statements when a sole practitioner is on vacation. However, it could apply where there is need to refer a client on short notice. (Of course, the practitioner agreeing to assist needs to assure him or herself that there is nothing suspicious in connection with the client or transaction being referred.)

If you think that a suspension or revocation may cause a loss for one or more clients, contact LawPRO immediately as those clients may have a potential claim against you, depending on the circumstances.

Do not forget that complying with the Law Society's Residential Real Estate Transaction Practice Guidelines may be the best way to ensure that you never get caught up in this problem.

The Guidelines suggest that you:

- Check the client's identification carefully, retain details of the I.D. presented and get an authorization signed in your favour to make the registration.
- Keep the back-up documentation for any compliance with law statements you make to facilitate the registration.
- Look at the pattern of deleted instruments on title: apply your common sense to what the title of the average client looks like. Does this look different? Don't act where you are suspicious about the client, the circumstances of the deal or your referral source!

#### Phase two: Tightening the ground rules

In phase two, rolled out this spring, the government focused on increasing accountability for access to the electronic registration system and processes, among other things.

One of the major proposed changes will restrict access to the electronic registration system to lawyers for certain document types. Specifically,

- only lawyers will be able to register transfers, and
- registration of a transfer will involve two lawyers, one for the transferor and one for the transferee.

It is expected that there will be very few exceptions to this two-lawyer requirement – the exceptions are still under consideration – but as a matter of principle will likely only include same-party transfers. However, the Ministry of Government Services is prepared to continue the dialogue with the Law Society on this issue in the future, after an initial rollout period.

Many lawyers are surprised that transactions between family members are unlikely to be exempt from the two-lawyer requirement. Unfortunately, there is evidence that in the modern world, identity theft often involves a family member or co-worker<sup>1</sup>. In terms of real estate fraud, there have been high profile cases in Ontario where a family member was the first true victim of the fraud, often because a power of attorney was fabricated or used incorrectly. Spousal impersonation has also been a problem for many years. Further complications arise because it can be challenging to establish the good faith of the alleged victim once a family member, now outside the jurisdiction, obtained significant proceeds from a real estate fraud.

Non-lawyers who meet certain standards of identity, financial solvency and appropriate qualifications regarding character and/or regulatory oversight will be allowed to register mortgages,

