LawPRO®
A publication to help lawyers
Volume 3, Issue 2 June 2004

The many faces of fraud

A special report on identity & value frauds: What they look like, how they work and how lawyers can protect themselves

Also:

The effects of Beals v Saldanha

Pro bono legal services: insurance coverage

Metadata: The hidden dangers

Fraud a reality for all lawyers

In mid 2001, LawPRO raised an issue that was causing some concern in the legal and financial communities.

*The issue was fraud. Our response was the **Special Report on Fraud**, a publication that provided insights into how fraudsters work, and was aimed at helping lawyers avoid becoming victims of fraudsters. It is still one of our most requested risk management tools.*

Three years later, fraud is more prevalent, more complex and often more sophisticated than first envisaged.

How prevalent is fraud?

Although no one has complete insight into the scope of the problem – or the size of the losses suffered by various parties involved in real estate – we know the problem is significant.

- First Canadian Title has gone on the record as saying that 28 per cent of all fraud claims it has received since it went into business in Canada in 1991 were reported in the month of January 2004, alone.
- The Canadian Institute of Mortgage Brokers and Lenders says that industry exposure to mortgage fraud has doubled or even tripled, to as high as $300 million in 2001 from about $73 million in 1999.
- PhoneBusters, the anti-fraud call centre operated by the RCMP and other Canadian law enforcement agencies, reports that in 2003, 13,400 Canadians reported being victims of identity theft, representing losses of more than $21.5 million.
- At LawPRO, we're seeing a significant increase in the number of reported claims with a fraud component in both our liability and TitlePLUS title insurance programs. Although it is too early to put a figure on the potential costs (investigation of these claims is ongoing), our losses may be significant.

Why is fraud on the increase?

The explanations are as complex as the subject itself. But some opportunities that fraudsters are exploiting are apparent.

First, technology has fundamentally changed how real estate deals are conducted.

Lawyers and lenders alike are increasingly using electronic processes to complete various aspects of the real estate transaction.

For example, titles can now be searched and registered online. Mortgages can be discharged and registered from our desktops. Although this ability to work online offers many advantages, it also comes at a cost: It is easier for a fraudster to act in the impersonal electronic environment than it was to commit the same fraud when real estate deals involved more person-to-person contact.

Second, lenders are looking for ways to streamline their costs: They are working through mortgage brokers, and outsourcing mortgage administration to third party suppliers who then electronically issue instructions to lawyers. Client meetings, personal contact, on-site appraisals are increasingly rare.

In other words, while technology makes lawyers' work easier, it has also reduced the personal contact at every step of the real estate transaction – and opened to door to abuse of the process.

As well, the basic nature of real estate transactions can make them more vulnerable to potential fraud. It is not unusual for real estate lawyers to deal with clients who are new and unknown to them; as well, real estate transactions are often "one-offs" in which the lawyer has neither a pre-existing nor ongoing relationship with the client.

Finally, and most importantly, the lawyer has a unique and essential tool that aids in the commission of a fraud: the trust account through which a fraudster's funds can be moved and disbursed legitimately.

In this update to our ***Special Report on Fraud***, we explore the types of frauds being perpetrated, alert lawyers to some typical "red flags", and profile a lawyer whose life was changed forever by the fraudulent activities of a partner he trusted.

Michelle L.M. Strom
President and CEO

Table of Contents

COVER

FEATURES

DEPARTMENTS

Identity fraud

Sidney Troister
Torkin Manes Cohen Arbus LLP

Simple yet sophisticated

In the past, the typical real estate fraud or forgery case involved a homeowner who obtained a mortgage loan against property that the borrower owned but where an impostor executed the mortgage as co-owner or consenting spouse. Often, the culprit was caught. Frequently the lawyer acting on the loan did not ask for or obtain photo identification of both parties to be satisfied as to the identities of the signing parties.

The newest brand of fraud in real estate transactions is far more outrageous and bold, seems highly organized and strikes at people totally unrelated to the fraudsters. It is sophisticated and yet simple and it is not easily detected, if detectable at all. Even the most diligent lawyer can be easily duped. We are all vulnerable to it. We probably can't stop it. It involves identity theft, fraudulent documents, impostors and forgery.

The fraud operates with some variation as follows.

Mr. and Mrs. Smith bought a new home in an upscale subdivision in Newmarket for $500,000 in the summer of 2000. They gave a mortgage to the bank for $350,000. Their property is registered in the Land Titles system. They live in the property.

Their home has been targeted by the fraudster, perhaps with the help of someone in a real estate broker's office who knows when properties get bought and sold. The fraudster, presumably with some assistance from a well-trained law clerk or other paralegal, does the following.

Step 1: "Buying" a property

First, the fraudster prepares, and then registers a Deed from Mr. and Mrs. Smith to Mr. X and declares that the purchase price is $550,000. He pays Land Transfer Tax on $550,000. Mr. X is now the registered owner of the property. He has had Mr. and Mrs. Smith's signatures forged, he has signed a Land Transfer Tax affidavit which appears to have been sworn, he names a law firm as preparer of the Transfer and he names a new law firm as the lawyers who prepared the Land Transfer Tax affidavit and who will appear to have acted for him on the purchase.

A week later, he prepares a discharge of mortgage from the Bank using phoney names as signing officers and naming either the Bank's mortgage processing centre or a law firm as the preparer of the document. He may even include the name or initials of a lawyer in the law firm on the document. He registers the discharge.

Mr. X is now the registered owner of the property free and clear of encumbrances. (In some cases, the fraudster uses his own name as transferee. In other cases, the transferee is a fictitious name or the name of some other innocent person whose identity has been stolen.)

Step 2: Accessing mortgage funds

The fraudster then goes to a mortgage broker or a bank and applies for a loan of $275,000 against this property. The fraudster will indicate that he buys and sells real estate frequently, buys for cash and then obtains his financing later and is willing to pay a sizeable mortgage brokerage or placement fee if a mortgage can be arranged easily and quickly.

The broker finds a lender who is more than happy to lend on 50 per cent of the value of this relatively new house. Mr. X may also tell the broker or lender that the property has just been rented out to tenants and he doesn't want the tenants disturbed by someone doing an interior inspection or appraisal of the property. Given the loan to value ratio, the lender or broker will decide that a drive-by appraisal is sufficient, or a property database valuation is done instead. Forged documents, including income references from an employer, are provided or alternatively Mr. X indicates that he is self-employed so that there is no employment record. Any sense of an inflexible lender will move the fraudster to some other lender.

The lender appoints the usual lawyer it uses for these types of deals to do the legal work on the mortgage loan. The lender sends out its typical commitment and letter of instructions. The fraudster, who is now the borrower, indicates that he wants the deal done quickly and is most flexible about who does the legal work for the lender. To expedite the deal, he is content that any lawyer the lender wants can do the deal.

Step 3: Working with the duped lawyer

The lawyer receives the instructions and searches title. The lawyer discovers that Mr. X is the registered owner, free and clear of encumbrances and that he bought the property a few days or weeks ago. If the Land Titles system has not certified the deed to Mr. X and the mortgage discharge yet, the lawyer will review them to see that they are satisfactory. They will be flawless documents. He searches realty taxes and discovers that the taxes are up to date but of course the tax certificate indicates Mr. and Mrs. Smith as owner. That is simply explained since Mr. X recently bought the property and the records at the tax office have not been changed. The lawyer searches executions and they too are clear.

The lawyer may ask the borrower if he has a survey of the property. Most likely he does not. The lawyer might think about calling the lawyer who appears to have acted on Mr. X's purchase recently, but the borrower will instruct him not to do so, explaining he and the lawyer had a falling out or he doesn't want his purchase lawyer contacted.

It may well be that the lender will waive the survey since this is a relatively new house and what kind of problems could there be in any event? There can't be much risk given the loan-to-value ratio. The lawyer may be instructed to obtain title insurance to insure over the absence of a survey or the lender may require title insurance for the loan in any event. Some title insurers don't require a survey on whole lots on a plan of subdivision.

The lawyer prepares the usual mortgage documents. Of course, Mr. X is anxious to get the deal done and has already pressed the broker and the lawyer to expedite matters because he "needs the money for another deal" or "is going out of town."

The borrower attends at the lawyer's office to sign documents. The lawyer asks for and sees his driver's licence or other photo identification as proof of identity. Sure enough, there is Mr. X's picture on the driver's licence. The address on the driver's licence is not the property address, which makes sense; the borrower has indicated that it is an investment property. The birth date on the driver's licence matches the birth date of Mr. X on his deed.

Mr. X may also advise the lawyer that he deals frequently in real estate and there may be more deals to follow. Mr. X receives his $275,000 loan, from which the brokerage fee is paid to the broker, the lawyer deducts his fees from the advance, and Mr. X receives his advance. Mr. X then deposits $20,000 into a bank account to cover the post-dated cheques that he has written to cover the mortgage payments that will be made on this mortgage for the

next few months. The balance of the funds is given directly to Mr. X, or is directed by Mr. X to a foreign exchange office, converted into U.S. dollars and moved offshore.

This scenario, with some variations, has been discovered in the greater Toronto area on numerous occasions. In one situation, Mr. X did this six times over a five-month period on different properties. After about six or seven months, the money in the bank account ran out and the new mortgages were in default. Mr. X had stolen $1.5 million. In another case, $850,000 was stolen on two mortgages over three months. In yet another case, $700,000 was stolen on two mortgages in two weeks.

Step 4: The plan unravels

In the meantime, in each case, a lawyer has certified to the new lender that it has a first mortgage on the property. The bank, whose mortgage has been improperly discharged from title, is still receiving payments from Mr. and Mrs. Smith who live in the house but who do not have registered title. When the new mortgage goes into default, and demand is made on the occupants, everyone starts scratching their heads wondering who has what and who is to blame.

There is little or nothing that would make this loan transaction suspicious in the ordinary course. Presumably, the lender has already checked out the borrower. Even then, Mr. X is the registered owner of the property under Land Titles; he produced acceptable photo identification. What circumstances would there have to be for the lawyer to blow the whistle on a straight-forward residential mortgage loan?

Unfortunately, real estate lawyers seem to be necessary pawns in the fraud because they act for the new lenders and they certify title and the validity of the mortgages that they register. The legal issues that arise not only in this type of fraud but in any fraud, forgery and impostor cases, including such questions as who is entitled to relief and what is the role of the lawyer, are complicated.

Sidney Troister is a partner with Torkin Manes Cohen Arbus LLP.

Can we really rely on the Land Titles Register?

What may be more shocking than the brazen conduct of the fraudsters is the damage done by the fraud and how the authorities react to it.

The lawyer's first reaction is probably that these instances of identity fraud are a case for the Land Titles Assurance Fund since, of course, Land Titles guarantees titles and guarantees against fraud. Surely, the new lender and the lawyer were entitled to rely on the title register to take a mortgage from Mr. X. Surely Land Titles has responsibility for registering and vouching for the deed to Mr. X and the bank's mortgage discharge.

Most lawyers would, without hesitation, come to the defence of a lawyer who clearly followed accepted conveyancing practice. The lawyer relied on the Land Titles system that guarantees title to the registered owner and received photo identification from the borrower.

Unfortunately, the Land Titles system does not do that or if it does, it does so in a very limited way. The Land Titles system, and all rights arising under it, depend on the statutory provisions contained in the *Land Titles Act*. The two major principles of Land Titles that arise from the Act, the mirror principle (the title

register reflects ownership) and the curtain principle (one does not have to look behind the title of the person shown as registered owner) do not operate without qualification when there is fraud. Specifically, a forged document is null and void even in Land Titles and, but for certain provisions in the *Land Titles Act*, it has no effect. It is for this reason alone that lawyers giving opinions on the validity and enforceability of documents must consider confirming the identity of signing parties.

The ability of lawyers to rely on the title register in Land Titles has its theoretical roots in the interpretation of the *Land Titles Act* and the application of one of two doctrines: immediate indefeasibility and deferred indefeasibility of title. In fact, and as discussed later, the provisions of the *Land Titles Act* and not the application of these theories govern.

Immediate indefeasibility

The doctrine of immediate indefeasibility would find that once Mr. X was registered as owner of the land, he is, in fact, the owner, even if he became the registered owner fraudulently. That does not appear to be the law in Ontario and nothing in the *Land Titles Ac*t supports that conclusion. The person who has fraudulently been registered as owner does not acquire good title. The title register does not guarantee good title to the fraudster simply by virtue of being named the owner on title.

Deferred indefeasibility

However, with deferred indefeasibility, while Mr. X does not get title simply by being the registered owner, anyone who innocently deals with him as the registered owner, regardless of how Mr. X became the registered owner, and without actual notice of the fraud, will acquire an interest in the land. It is the second person relying on the registered title and not the fraudulent titled owner that gets title. An indefeasible title is deferred to the innocent person dealing with the person registered as owner.

In our case, Mr. X never gets title to the property just because he is registered as owner. The mirror principle and the right to rely on the title register breaks down.

However, the new lender can obtain a valid interest in land and can rely on the mirror principle and the curtain principle to obtain a valid interest in land since the lender relies on deferred indefeasibility.

This principle is embodied in the *Land Titles Act* which provides in Section 45 that only the first registered owner in Land Titles is declared the owner of property. Thereafter, and according to Sections 66, 68, 86, 87 and 93, only the registered owner can transfer or charge land. If Mr. X is noted on title as the registered owner by virtue of a forged transfer, the transfer is invalid since it was not signed by the registered owner. But if Mr. X, as registered owner, transfers or charges the land, Mr. X will, according to the Act, transfer or charge the land to the innocent purchaser or chargee.

A good example of this principle is set out in the recently reported *Durrani v. Augier* (50 O.R.(3d) 353) case where an innocent bank's mortgage was valid even though the borrower was held ultimately not to be the owner of the property.

However, there is a catch to this doctrine of deferred indefeasibility embodied in the above sections of the *Land Titles Act* which explains why impostors and forgers, signing for registered owners, can never create valid interests in land for subsequent holders, unless they have previously put title into their own real names.

The *Land Titles Act* specifies that only the person registered as owner can charge land. Thus, the new mortgage is valid according to the Act and the principle of deferred indefeasibility applies only if the person who is the registered owner has signed the mortgage. If, after the initial step of the fraud, the person who is registered on title does not exist or if the registered owner is a made-up name, or if the fraudster registered title in the name of another person and then used phoney identification to pose as that person, the mortgage is invalid and deferred indefeasibility does not apply. The Act requires that the registered owner transfers or charges land, and that the registered owner must be the real person who deals with the property in his or her own name.

Similarly, if there was a real Mr. X, but the person who attended at the lawyer's office was an impostor for Mr. X, then the mortgage is invalid according to the doctrine of deferred indefeasibility and the *Land Titles Act* because only the registered owner has the right to charge the property. This is the common problem when Mr. X appears with his impostor spouse to sign a mortgage or when, in the case of identity theft, the fraudster poses as some other person with forged or fraudulent identification. The real person did not charge the property; the lender gets no interest in land.

If, however, the real Mr. X took title and signed the documentation, then the new mortgage would qualify for deferred indefeasibility (even though it was a forgery that got title to Mr. X in the first place). The new mortgage is valid *vis a vis* the fraudulently discharged bank mortgage. As for the owners who are no longer registered as owners, they are entitled, presumably, to be reregistered as owners but now they are subject to the mortgage that they had nothing to do with, and their mortgage to the bank, on which they are still liable presumably on the covenant, is not registered on title.

What about the Land Titles Assurance Fund?

Many lawyers would react to identity frauds by looking for relief from the Land Titles Assurance Fund. The Land Titles Assurance Fund is a creation of the *Land Titles Act*; it is not an insurance company and it is not title insurance. An application to the Fund can only be made where a person has been "wrongfully deprived of land or of some estate or interest in land through fraud."

The threshold question, however, is whether the applicant had an interest in land that was lost through fraud. Since deferred indefeasibility operates only where one deals with the true registered owner, a mortgage signed by an impostor for the then-registered owner is invalid and the lender never receives an interest in land. Since the lender has lost no interest in land (since he never had one), the lender does not qualify for compensation under the Act.

This is another reason why obtaining identification of the parties is so critical. To rely on the Land Titles system, one must be certain they are dealing with the registered owner. It is the reason why in all of the impostor cases, the defrauded lender gets no compensation from the Fund. The Fund has jurisdiction only where one had an interest that has been lost. With imposter fraud, a lender never had a mortgage on the land. It did not lose an interest in land. It simply lost its money by lending to a person who did not own the property.

Even if the party had an interest in land that was lost, the *Land Titles Ac*t does not make compensation easy. The fund is an assurer of last resort. To qualify for compensation, the applicant must first attempt to recover from the wrongdoer or from any other sources of compensation as may be available. Moreover, the Fund cannot compensate where the claimant is seen to have substantially contributed to its own loss.

In simple terms, one can rely on the Land Titles register only when one is dealing with the registered owner and not with an impostor. As for the government standing behind the system and guaranteeing good title, it is an over simplification of the basis on which the Land Titles system works and a misunderstanding of the *Land Titles Act*.

Sidney Troister is a partner with Torkin Manes Cohen Arbus LLP.

Warning signs of...

identity/ forgery fraud

What can you, as a real estate practitioner, do to prevent the fraud? If you act reasonably and follow the acceptable standard of searching title, relying on the title register and obtaining identification, what else could or should you be doing?

Arm yourself with knowledge. Understand and recognize the conduct characteristics that appear to be common in many of these frauds. Ask questions. Understand and believe that you can be targeted by a fraudster.

What makes real estate transactions vulnerable?

The fraudsters in identity/forgery scams understand the real estate business and the way lawyers, mortgage brokers and lenders work. They know that:

- Lenders will happily lend on 50 per cent of value or significantly more on an insured loan.
- Brokers will happily find mortgage money on this basis.
- Lenders will probably waive detailed appraisals.
- Lawyers will rely on the Land Titles system to assume that there is good title.
- Lawyers ask for photo identification.
- Everyone is prepared to expedite transactions where premium fees are paid.
- Everyone is prepared to expedite transactions where the client promises more deals in the future.

The warning signs of frauds

Typically the client is a borrower who has recently purchased the property on an all-cash basis and is now borrowing against the property. Some key characteristics for which you should be on the lookout include the following:

- The borrower has the deed but no other purchase documents. S/he has no survey, although in one recent identity fraud, the fraudster even had a survey.
- The borrower is in a very big hurry. The turn-around time on the deal is one to three days.
- The lawyer who acted on the "purchase" is not acting on the loan or acting for your borrower.
- The borrower instructs you not to contact the lawyer who acted on his recent "purchase."
- The borrower may not have placed fire insurance on his house.
- The mortgage brokerage fee seems generous on what should be a simple residential loan.
- Part of the mortgage advance is directed to third parties, including foreign exchange companies or off-shore recipients.
- The borrower indicates that he is quite active in real estate investing and does deals like this frequently; more deals may come your way.
- The utility companies have no knowledge of the borrower owning the property. By way of contrast with the realty tax department, utility companies should have been given notice before closing that the borrower was purchasing and should have set up new accounts in the borrower's name.

Neil M. Smiley
Fasken Martineau DuMoulin LLP

Corporate fraud:
identity theft with a difference

Whether it's a simple house deal or a complicated corporate-based transaction, real estate lawyers have always had to be on the lookout for both the obvious and hidden pitfalls in their transactions.

But today – in addition to the substantive and practical issues involved in completing a purchase, sale or mortgage transaction – real estate practitioners are faced with a new challenge: fraudsters whose brazen attempts to take on a corporate persona has caught seasoned practitioners, regulatory bodies, law enforcement agencies, governmental bodies and title insurers by surprise.

Corporate identity fraud is the wrongful taking of the identity of a corporation. For a real estate lawyer, such a fraud could lead to a property being sold or mortgaged (less likely purchased) by an entity that holds itself out to be the rightful "owner/mortgagor" of the property, but in fact has been merely created to defraud the rightful owner of its title or of its equity in its property.

Perhaps we should not be so surprised by the jump from personal identity fraud to the corporate version. The basic elements are the same, with just the means for achieving it requiring a bit more sophistication.

A sample situation

The following is a synopsis of a sample fact situation that serves to illustrate the point:

Lawyer Smith is asked to create a company (the "Client's Company") on behalf of a client to take title to a property (the "Client's Property"). The client wishes to maintain absolute anonymity and has asked Lawyer Smith to stand as sole director and officer of the Client's Company. Lawyer Smith incorporates the Client's Company, files appropriate notices with the Ministry of Consumer and Commercial Relations ("Ministry") and completes the transaction.

Several years later, Lawyer Smith receives a phone call from someone at the local utility provider's office confirming they received a request for a final meter reading (on account of a sale of the property), and requesting confirmation of where the final utility bill should be sent. Lawyer Smith knows that the property has not been sold, and is advised by the utility employee that a Mr. Nester is the lawyer purporting to act on behalf of the owner of the Client's Property.

Lawyer Smith recalls that some four months earlier he had discovered that a realtor had, without instructions from the true owner, listed the Client's Property for sale. The realtor had received instructions by telephone and had acted upon a listing returned by fax (from Florida of all places).

At the time, Lawyer Smith concluded that a prior tenant of the Client's Property (who was jailed on fraud charges) had somehow orchestrated the "bogus" listing. Even though the agent had retracted the listing, Lawyer Smith could not shake the fact that someone had tried to defraud his client. Lawyer Smith felt that if a mortgage were registered on title to the Client's Property, an unauthorized dealing or "title-theft" could not occur without the mortgage being dealt with.

Accordingly, Lawyer Smith obtained instructions and registered a mortgage (the "Protective-Charge") on title to the Client's Property, in favour of second client-related company (Client-Company2") for which another lawyer, Lawyer Smith's Associate, stood as sole director and officer.

Lawyer Smith contacts Mr. Nestor and learns from him that he is receiving instructions from a third party (the "Third Party Rogue") who holds itself out as the guiding mind of the Client's Company and that the closing of a sale transaction of his Client's Property is imminent. Lawyer Smith is also advised that Mr. Nestor has obtained a discharge statement from a lawyer who purports to act for Client-Company2 in the discharge of the Protective Charge.

This too is of course impossible as Lawyer Smith, through Lawyer Smith's Associate, would be the only party who could sign a discharge statement/discharge in connection with the Protective Charge.

Lawyer Smith immediately advises Mr. Nestor verbally (and follows up in writing) that he has care and control of the corporate minute books of the Client's Company and stands as sole officer and director thereof. He also advises that no third party would have any colour of right to provide instructions with respect to the Client's Property, including, of course, the Third Party Rogue.

Moreover, Lawyer Smith advises Mr. Nestor that Client-Company2 had in no way provided a discharge statement for the Protective Charge and that if the sale transaction is completed, the Client's Company will be defrauded of its title and Client-Company2 will be defrauded of its mortgage (albeit one for which no funds were advanced). Mr. Nestor agrees not to act on the closing until the matter is sorted out.

While on the phone with Mr. Nestor, Lawyer Smith conducts an on-line search of corporate records at the Ministry and discovers that the corporate profile of the Client's Company was recently changed to recognize the Third Party Rogue as the sole director and officer. He checks the corporate profile of Client-Company2, the holder of the Protective-Charge, and is relieved to learn that those records had not been similarly changed.

In the days and weeks that follow, Lawyer Smith learns that Mr. Nester is in possession of corporate minute books of what would purport to be his Client's Company, which include original resolutions purportedly signed by Lawyer Smith, effectively resigning as director and taking such corporate action to place control of the Client's Company in the hands of the Third Party Rogue.

Lawyer Smith is also advised that the corporate minute book includes the original share certificate issued in the capital of the corporation, being issued in the name of the Third Party Rogue. To cap matters off, Lawyer Smith learns that the Mr. Nestor is holding a mortgage discharge statement for the Protective-Charge purportedly signed by Lawyer Smith's Associate on behalf of Client's Company2. The discharge statement indicates that a six-digit amount is owing. Luckily, in this instance, Lawyer Smith averted the completion of the fraudulent dealing with the help of an innocent call from a utility provider.

Understanding how fraudsters work

As this fact situation illustrates, fraudsters who are perpetrating corporate identity theft enlist some expertise to create and falsify corporate minute books. To do this, they likely search the corporate records for a "target" company at the Ministry, order a copy of the Articles of Incorporation and Corporate Profile, and then recreate the minute books of the target company from scratch.

In stealing the corporate identity of the company, the fraudsters would also steal the personal identity of one of its controlling individuals, usually of its incorporator (disclosed by the Articles of Incorporation) and/or of its director and officer (disclosed by a Corporate Profile). They could adopt the identity of the actual innocent controlling mind of the "target" company, whether of innocent lawyers as in the above situation, or of any individual for that matter as the need arises, or create a new rogue identity to act as the controlling mind of the "target" company. Corresponding filings at the Ministry could be made to reflect the rogue(s) as the individual(s) behind the company.

Either way, the fraudster, now seamlessly in control of the company, could perpetrate a fraudulent transaction, either through a sham sale or mortgage of a corporation's property. You will see that even the use of the Protective-Charge in the above example was no match for the unscrupulous element involved.

Tips on fighting corporate identity fraud

- Ask for photo ID: While we know that lawyers should be asking for photo identification of individuals who sign documents in personal transactions, there is no reason why this standard should not extend to transactions involving individuals who sign for corporations.
- Ensure that the party signing for the corporation is an authorized signing officer and that all formalities with respect to the execution of a document on behalf of a company are taken and adhered to, particularly the requirement for multiple signing officers as per the by-laws of the company.
- Obtain an updated status certificate and corporate profile. Lawyers should carefully consider with their clients whether title insurance policies provide better client protection, to the extent elements of fraud are covered. Solicitor's opinions must always include assumptions that the genuineness of signatures and material provided to the lawyer has been relied upon and that said opinions are qualified to the extent said signatures and documentation are not genuine.

All of this is not to suggest that lawyers become forensic fraud detectors for corporations. But we are in a position to help reduce the incidences of fraud and claims related to transactions involving fraud.

Treat any irregularity with a transaction involving a corporation's identity and that of its "guiding mind" with heightened awareness and defence. If presented with something that does not pass the "smell test" insist on the evidence required to put you, and your client(s) at ease.

If you still have reservations, contact the Law Society immediately, as their staff are quite experienced in these matters and can assist you in determining how to proceed, particularly if a report to law enforcement officials is warranted.

If you suspect that title to a property is about to be dealt with fraudulently, consider obtaining instructions to register a restriction under Section 118(2) of the *Land Titles Act*, which will invoke a "no-dealings" indicator light on the property, until you can further investigate the matter.

Furthermore, consider contacting the Director of Titles Office at the Ministry with your concerns and consider what other means might be available to protect against an unauthorized transfer or mortgage.

Neil Smiley is a Partner at Fasken Martineau DuMoulin LLP.

corporate identity fraud

By the very nature of the work they do, real estate law practitioners are vulnerable to those who wish to expend some effort to defraud corporations. Particular care should be taken by lawyers to ensure that corporate records are maintained safely and securely when created through the law office and/or when presented with corporate records by a client.

With that in mind, here are some corporate identity theft flags to be aware of:

- Original minute books for a company are not available.
- Minute books that contain irregularities, including the lack of the "pinked-stamped" articles of incorporation, should draw particular attention from the lawyer attending to a transaction involving a company.
- New clients who materialize "out of the blue" and/or transactions that seem "to good to be true" and the unnecessarily "rushed" deal are always good indicators to heighten one's defenses.
- Being asked to contact a client exclusively by cell phone with no office back-up phone and/or to correspond with the client at an address different than that set out in the Corporate Profile Report should also be considered with some reservation.
- Properties of corporations that are vacant seem to attract attention.

Robert J. Potts and Mirilyn R. Selznick
Blaney McMurtry LLP

Flip fraud schemes:

When all that glitters is not gold

When we first wrote about real estate flips and how easy it was for lawyers to become pawns in this type of fraudulent activity, we believed we had seen the worst of it.

Three years later, it appears that we were wrong: Real estate scams today are both more sophisticated and prevalent, despite efforts by LawPRO to educate lawyers about these frauds through warnings and education efforts, and despite efforts by financial institutions to refine their instructions to lawyers.

Evidence appears to be emerging that in some cases lawyers are masterminding the schemes that have left financial institutions "holding the bag" when their mortgage security is little more than a vacant lot, worth far less than the principal amount of the mortgage. Fraud, which once involved primarily real estate agents and financial advisors, is now being stick-handled by lawyers themselves.

This article updates the material published in LawPRO's Special Report on Fraud, first published in 2001.

The lawyer as mastermind

One type of scheme involves a lawyer seeking the assistance of another lawyer in processing mortgages, because the "mastermind" lawyer is allegedly "too busy" to handle the transactions on his own. He enlists the help of other lawyers to prepare the mortgage document, obtain title insurance, and register the mortgage. Lawyer B is told that the mastermind will do all the title searches and that he/she need not concern him/herself in that regard.

As part of the scheme, the mastermind lawyer sends Lawyer B the Agreement of Purchase and Sale, the title documents and various directions which require the lawyer to process a transaction in which:

(a) the vendor listed on the Agreement of Purchase and Sale is not the same person who appears on the title search as the last registered owner;

(b) the consideration set out in the Agreement of Purchase and Sale is significantly higher than the consideration set out in the title search documents in respect of the last transfer;

(c) the bank lends money on the inflated purchase price set out in the Agreement of Purchase and Sale;

(d) a series of directions require payment of the mortgage proceeds to persons and entities who appear to have no connection whatsoever to the parties listed on the Agreement of Purchase and Sale.

Some financial institutions have attempted to eliminate the incidence of these flip frauds by requiring their lawyer to:

(a) obtain photo identification of the mortgagor/purchaser;

(b) advise the financial institution of any significant change in the apparent value of the property or of any other matter that might affect the value of the property; and

(c) advise the bank if the vendor on the Agreement of Purchase and Sale is different from the last registered owner on title.

However, these frauds continue as the lawyers processing the transactions are either careless in their work or, it seems, complicit in or wilfully blind to the fraud being perpetrated on their lender clients. Although the promise of a stream of files and high fees is enticing to any lawyer, it is important to be diligent in ensuring that all that glitters is, in fact, gold.

The lawyer as "pawn"

In this scenario, a lawyer with too much time and too little work on his hands finds himself face-to-face with a golden opportunity: a new contact who is a real estate agent, a financial advisor, or just someone who seems to have a lot of connections.

The lawyer has never met this person before, but is told this person has the ability to bring in a lot of business, either directly or through another person the lawyer may or may not ever get a chance to meet. This person is the "mastermind".

The lawyer wonders only briefly why a sole practitioner in his position would be chosen by this client, but his concerns are soon allayed when promises of high fees in exchange for quick processing of real estate transactions are presented.

The real estate deals start coming to the lawyer directly from the mastermind. They may appear somewhat unusual in that they

The issue of liability coverage

LawPRO has become involved in some fraud situations when the financial institutions seek to hold their lawyer responsible for the shortfalls. Our involvement starts with the retention of coverage counsel to determine whether the lawyer was a willing participant in the fraudulent scheme, wilfully blind to it, or merely an innocent dupe when processing the transactions involved. There is no coverage under the LawPRO professional liability policy for situations in which lawyers were complicit in fraudulent activities.

These fraudulent schemes can be very costly to the profession.

So the next time you are sitting in your office on a rainy day, keep in mind that if an opportunity presents itself that seems too good to be true, it just may be.

appear to all have short closing dates that require immediate processing, often without time to conduct proper searches. Often there is a flip involved, in which the financial institution has agreed to lend money on the higher purchase price of the flip agreement. The lawyer often acts for all parties. But all directions and information come from one party: the mastermind.

Typically, the scam works like this: Jane Doe is a legitimate vendor with property for sale. The mastermind of the fraudulent scheme submits an offer to purchase the Doe property with Mr. Smith posing as the purchaser.

A purchase price is agreed on, as is a closing date for the transaction (the "original agreement"). The mastermind then prepares a second agreement of purchase and sale whereby:

- Smith sells to Black for a price in excess of the original purchase price (the "flip agreement"); or
- Doe sells to Black for a price in excess of the original purchase price (the "fake agreement").

In situations where there is a flip agreement, both the original agreement and the flip agreement are sent to the lawyer for processing.

In situations where there is a fake agreement, the bank is usually provided with a copy of the fake agreement as part of an application to obtain mortgage financing on the basis of the higher consideration.

In both cases, the bank lends money on the strength of the higher purchase price contained within the flip or fake agreement.

In that regard, the mastermind also provides the bank with false information about the proposed borrower Black, such as false letters from employers allegedly verifying Black's income, false social insurance numbers, and false addresses, etc.

Once the mortgage funds have been paid out by the bank, and the mortgage has been registered on title, the mastermind rents out the property and makes the monthly mortgage payments presumably using the rental proceeds.

It is believed that both Smith and Black are "straw men" posing as vendors and/or purchasers, and that the true purchaser is the mastermind.

The police and some of the financial institutions involved have been alerted to these fraudulent schemes, and have conducted their own investigations into the matters.

As a result of these fraudulent transactions, a number of financial institutions have been left "holding the bag" when the mastermind stops making the monthly mortgage payments and the property is sold under power of sale for significantly less than the principal amount of the loan.

Mirilyn R. Selznick and Robert J. Potts are partners at Blaney McMurtry LLP.

value fraud

Value frauds can be fairly complicated transactions with enough twists and turns to keep even the most conscientious lawyer on his or her toes. When identity mortgage frauds are coupled with value fraud, where a fraudster buys and then flips the property at a higher value to an accomplice – who can be a fictitious person or an imposter – the picture gets more interesting still.

The following are some of the most telling indicia of these types of frauds, some of which have an identity fraud component, as noted by LawPRO examiners, coverage counsel and adjusters who examined files involving fraud and potential fraud. While it is not fair to assume that every deal is fraudulent, the presence of some of these flags in a transaction should put every lawyer on alert.

Client characteristics

- A new "client" starts to send the lawyer numerous real estate files, many of which are "flip" deals.
- The client – the scheme's mastermind – appears to be in control of the files:
  - he/she sends the Agreement(s) of Purchase and Sale to the lawyer;
  - he/she is the primary contact for any issues that arise prior to closing;
  - he/she provides the particulars such as who is to take title to the property; the date of birth of the transferees, and so on;

- he/she often arranges insurance on the property;
- he/she arranges the "sign up" meeting with the vendor/purchasers;
- the "sign up" meetings often take place in odd locations.

- The client does not have a personal cheque for his/her pre-authorized debit plan and uses a bank "counter cheque."
- The client tells the lawyer s/he is in the business of renovating homes.

Transaction characteristics

- The Agreement of Purchase and Sale contains no handwritten amendments: It is too clean.
- No real estate agent is listed on the agreement; or
- A real estate agent is listed, but you receive no communication from the agent, particularly with regard to his/her commission. Apparently the vendor has made a private deal with the agent so that no commission is payable or the "deposit" exceeds the commission; or
- The same real estate agency appears regularly on a number of Agreements of Purchase and Sale.
- The lawyer is consistently told to act for the ultimate purchaser on the flip agreement (and/or, in some cases, the vendor and purchaser on the flip agreement).
- The transactions often involve short time frames, last-minute changes in meetings, dates and documents.

"Client" communication

- The lawyer is never contacted directly by his/her so-called "purchaser (or purchaser and vendor) clients" to discuss the transaction, arrange a closing meeting, request an extension, discuss mortgage particulars, etc.
- When and if the lawyer actually meets his/her purchaser (or purchaser and vendor) client, it is apparent that this so-called purchaser (or purchaser and vendor) is very much being directed by the mastermind.
- There is often an absence of written directions for matters, such as funds, in the files, and the lawyer is persuaded by the fraudster that such written directions are unnecessary.
- The mastermind often convinces the lawyer that he or she need not contact the lender about the flip or the fact that the lender is loaning money on the higher consideration.

Search, inquiry findings

- The same purchasers and vendors often reappear time and time again on various transactions.
- Signatures on closing documents often do not match signatures on the corresponding Agreements of Purchase and Sale.
- Your search of title indicates several deeds and transfers of the property recently, in each case with significantly higher prices. The same lawyer may have acted on all of these "transactions".
- The title discloses a pattern of mortgages being registered, discharged shortly thereafter, and new mortgages being put on, all for successively higher amounts to suggest legitimate increases in value.
- The Land Transfer Tax Affidavit for the subject transaction shows the higher consideration.
- The mortgages are usually insured by a mortgage insurer.

Monetary aspects

- The deposit is paid to the vendor and not to a real estate agent or lawyer in trust.
- There may be an amending agreement to the Agreement of Purchase and Sale giving the purchaser a credit, discount or abatement. The vendor's statement of adjustments may provide for a large abatement or reduction in the purchase price or credit for monies exchanged between the parties (e.g. a private note or a further deposit). In these cases, invariably, little or no money is exchanged on closing other than the amount provided by the lender which is also an amount that was advanced on a much higher purchase price.
- When calculating how much money the purchaser has to bring in to close the deal, there is a surplus owing to the purchaser.
- There is a vendor-take-back mortgage instead of cash on closing, the amount of which covers all of the equity in the property over and above the new first mortgage. No money other than the lender's money changes hands.
- The funds to close the transactions often come only from the bank, which is lending money on the strength of the higher consideration in the flip agreement.
- If the purchaser does provide any closing funds, those funds are minimal and usually are not drawn from the purchaser's bank account (i.e. often there are money orders or cash payments involved).
- The lawyer is often instructed by the mastermind to pay the excess mortgage proceeds to the mastermind, despite the fact that he/she has no apparent interest in the transaction.
- In some situations, the mastermind instructs the lawyer to use the mortgage proceeds for another purchase.
- In some instances, the lawyer is paid premium legal fees for each transaction.

– Compiled from materials provided by Mirilyn R. Selznick and Robert J. Potts of Blaney McMurtry LLP, and Sidney Troister of Torkin Manes Cohen Arbus LLP.

Fighting fraud: tips for lawyers

What can be done when fraudsters continue to refine their schemes? Obviously the financial institutions should be more diligent in researching and reviewing the proposed transactions before agreeing to lend money. But the lawyer acting for the financial institutions also has an important role to play.

Obtain photo identification

The examples listed on the previous pages emphasize the need for lawyers to obtain photo identification of borrowers to protect themselves from negligence claims.

In *Yamada v. Mock*, the court clearly said that lawyers cannot prevent fraud but can make it a little more difficult for the fraudster and should at least obtain identification from the borrower. This seems to be the current standard of care for lawyers. Failing to do so will no doubt bring a claim against the lawyer in a fraud or impostor case.

The proliferation of identity theft today means you must be on guard. Lawyers should ensure that they keep copies of the identification in the file and ensure that it is legible. It is critical to proving that you met the standard of care that you have the evidence in your file of your confirmation of the borrower's identity.

Keep the lender informed

If the vendor on the Agreement of Purchase and Sale is not the same as the person listed as the last registered owner on the search, questions should be asked. If there is a flip involved, advise the financial institution of this information. If the price from one sale to the next has escalated significantly, the lawyer should also consider advising the financial institution, so that the final decision as to whether or not to proceed with the loan transaction is made on the basis of all relevant information.

Question unusual directions

As well, the lawyer should carefully scrutinize and critically assess any directions he/she receives to determine whether persons seemingly unrelated to the transaction (other than a recognized creditor) are to receive significant amounts from the mortgage proceeds. If a large percentage of the mortgage proceeds are to be paid out to the borrower themselves, or to parties other than a financial institution or recognized creditor, questions should be asked.

Consider title insurance.

Most title insurance policies insure against fraud. Discuss the title insurance option with your clients, so they fully understand the scope of coverage that title insurance provides. At the same time, appreciate the impact of these frauds on title insurers. Follow all of their procedures carefully to be certain that a policy is issued and coverage is available.

– Based on contributions from S. Troister, R. Potts and M. Selznick

What if you suspect a fraud?

The Law Society advises that lawyers become familiar with the indicators of fraud in real estate transactions to avoid becoming the tool or dupe of their clients.

Lawyers should also know that the Law Society can help answer questions about lawyers' ethical obligations should they be acting in a transaction where a client is or may be committing a fraud. For example, the Society's Practice Advisory department can give guidance to lawyers on their obligations regarding disclosure of confidential client information to third parties, obligations when acting on a joint retainer for both the lender and the borrower in a transaction, and withdrawal of their services.

The *Rules of Professional Conduct (Rules)* specifically prohibit lawyers from assisting in any dishonesty or fraud. Subrule 2.02(5) provides that a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct or instruct the client on how to violate the law and avoid punishment. The commentary to the subrule warns lawyers to guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client.

Lawyers with questions about their ethical and regulatory responsibilities can access practice tips, the *Rules* and other resource materials on the Law Society's Web site at: www.lsuc.on.ca. The Practice Advisory department is also just a phone call away at 416-947-3315 or toll-free at 1-800-668-7380, ext. 3315.

Fighting fraud:

build a better checklist

The first thing Stephen Shub did when he learned of the proliferation of real estate frauds was to beef up his already-extensive intake form/checklist guide to include a series of fraud flags.

"It might take an additional minute or two to ask a few more questions in my initial conversation with our client when we're doing a purchase or refinance transaction – but in my mind, that's time well spent," says Shub, a sole practitioner based in North York. "Because in the long run, these flags save us time. We don't end up spinning our wheels on garbage or nonsense transactions. We don't end up doing all our searches and documentation only to find out that there's a real issue here.

"I think that's the problem in so many situations: The lawyer cranks up the file too quickly only to find out too late – when the pressure to close is tremendous and he's invested a lot of time and effort – that there's an issue that could come back to bite him.

"Our view is that we want to take the time to identify these potential issues before we do a whole lot of work on the file. I don't want to end up the duped lawyer – because even if you are totally innocent, the consequences are huge: The investigative process exacts a huge toll on your practice and on you personally."

The fraud flags he's incorporated into both a form he completes as part of his initial conversation with his clients, and into his refinancing pre-closing checklist, are based on common indicia of fraud that he learned about from readings and attending various seminars on the subject of real estate fraud. The fraud flags used on his refinancing intake form/initial conversation with the client are reproduced on this page. To see the complete opening checklist Shub uses, go to www.practicepro.ca/refinancechecklist.

Fraud Flag Questions:

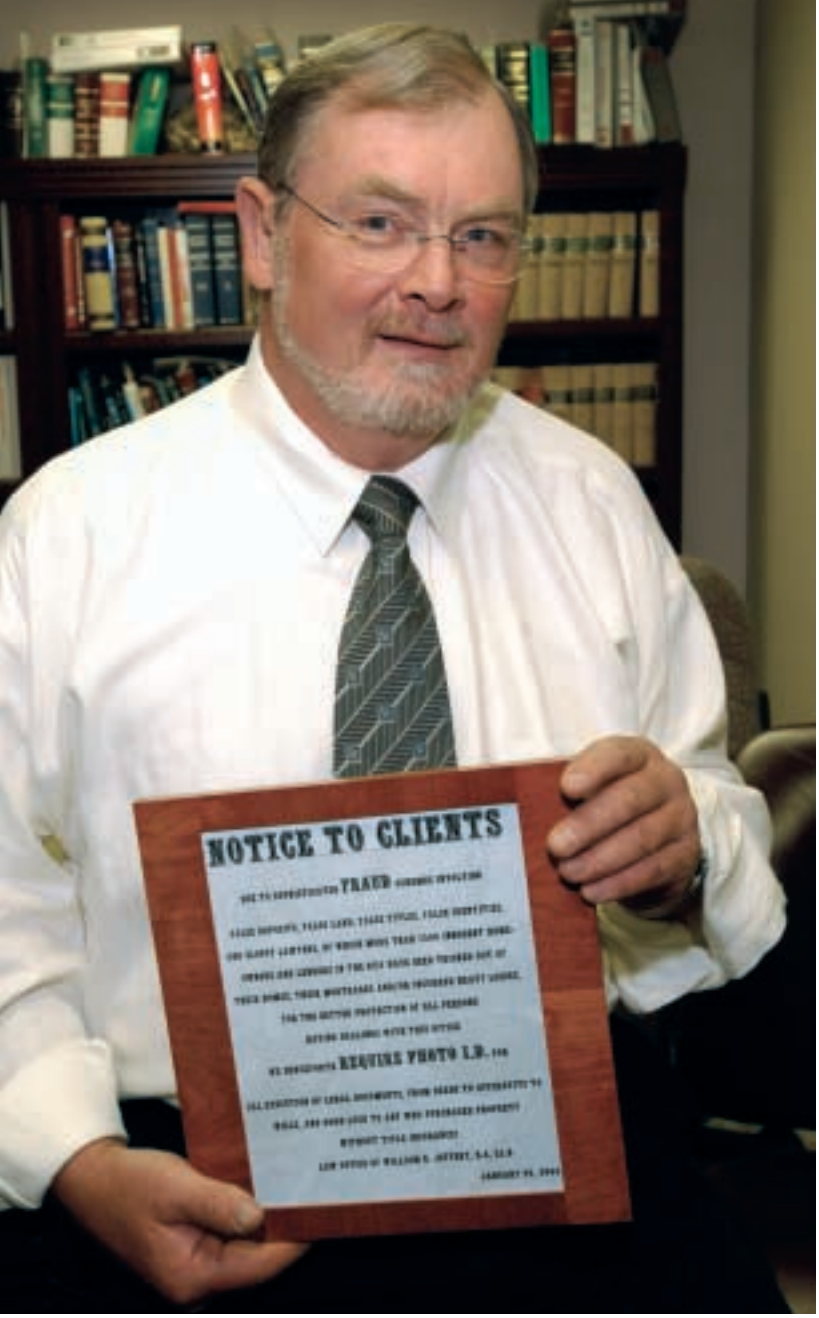
Yes	No	Client **not** known to us before
Yes	No	**No** existing first mortgage to discharge
Yes	No	Client wants $$ paid to unsecured 3rd party by us
Yes	No	411.ca does **not** confirm that residence telephone connects to address given
Yes	No	Client appears to have problem providing documents
Yes	No	Financing is based on a concocted purchase agreement
Yes	No	Property is vacant or tenanted

Total number of "yes" answers: _____

If there are two or more "yes" responses, staff are instructed to check with Shub after obtaining a copy of register showing deleted documents to check for any recent mortgage discharge or title transfer, and before opening the file and "before leaving initial conversation in a prospective client filing system which is alphabetical by surname."

Shub also must sign an internal acknowledgement on his own pre-closing checklist acknowledging that if there were two or more "yes" responses to the fraud flag questions, he has been consulted and has given permission for the transaction to proceed.

Reproduced courtesy of Stephen Shub.



Fighting fraud:

be wary of providing ID services

The sign in his office says it all: If you want William Jeffery LL.B to act for you, you'd better be prepared to produce proper identification.

In fact, Bill's so aware of the value of proper ID that he quickly saw through a request to have his office provide "identification services" for a third party intermediary providing mortgage administration services for financial institutions. "This is nothing more than a rube's game to give them access to my insurance coverage if this 'client' turned out to be a fraudster," says Jeffery. "They were in fact making me a stooge."

For a $40 fee, the intermediary wanted Jeffery to verify the identity of clients it sent his way: He had previously signed on with this organization, which had provided him with software to be used in his real estate practice, and had promised a supply of referrals for refinance and purchase transactions.

"I did three transactions for them, they did everything at their end and I got a lower fee than I had been promised when I signed on."

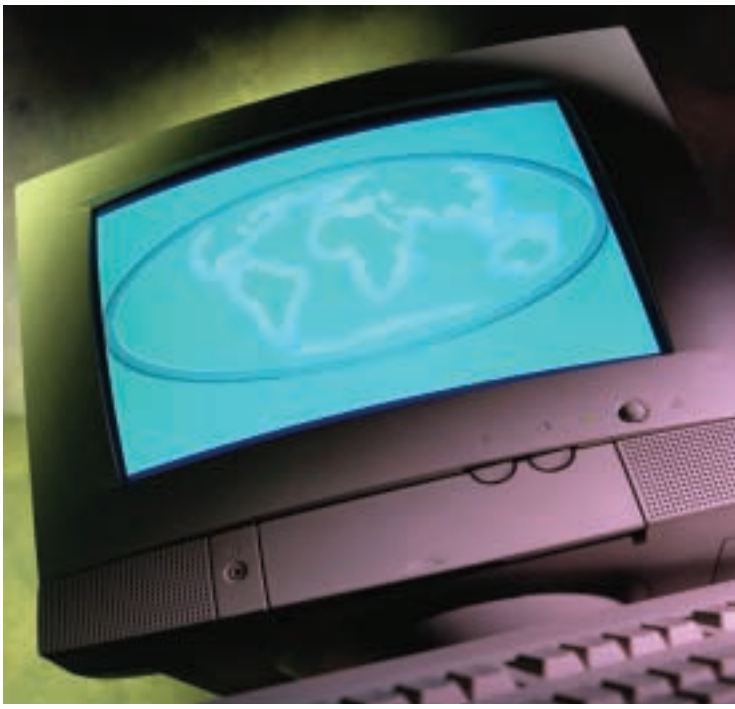
So when the fax came asking him to provide client identification services, Jeffery balked. "That fax – in connection with the information I was reading about real estate fraud – raised a red flag for me. To provide this kind of service would be like sticking my hand in a mosquito pen: I'd get bitten for sure."

His reply letter, in which he called the fee an "access cost to obtain indemnification from a lawyer's insurer for having acted in this sort of transaction, without any real or substantial involvement in the investigation of its bona fides," has gone unanswered.

What's worse, he says, is that he believes other lawyers in today's competitive environment may just be willing to take on this kind of risk. For his part, Jeffery explains to clients the significance of obtaining personal ID: "It's the first thing I ask for when they walk in – and I show them the printed notice plaque (shown above). It sparks a lot of interest and discussion – and they're happy to provide that identification with the understanding that I do this for their protection – and my own."

Fighting fraud:

protect security of PSPs



PSPs – personal security packages – issued under a lawyer's Teraview account – are key to accessing Ontario's electronic registration (e-reg™) system. Their security is vital to the integrity of the e-reg system. Recognizing this, the Law Society in June 2002 approved additions to the *Rules of Professional Conduct* and new practice guidelines for the electronic registration of title documents.

Subrules 5.01(7) and (8) to rule 5.01, impose obligations on a lawyer regarding the use of PSPs issued under the lawyer's Teraview account:

- Each user under a Teraview account, that is, each person in a law firm that accesses the e-reg system, must obtain a PSP (a personalized, specially encrypted diskette and corresponding pass phrase) to access the system.
- Subrule 5.01 (7) provides that a lawyer shall not permit others, including a non-lawyer employee, to use the lawyer's personalized specially encrypted diskette and shall not disclose his or her personalized e-reg pass-phrase to others.
- Subrule 5.01(8) provides that when a lawyer has a non-lawyer employee who has a personalized, specially encrypted diskette and personalized e-reg pass-phrase to access the system, the lawyer shall ensure that the non-lawyer employee does not permit others to use the diskette and does not disclose his or her personalized e-reg pass-phrases to others.

These subrules aim at preserving the integrity and security of the e-reg system which is achieved, in part, through Teranet maintaining an audit trail of all transactions and the parties who performed them identified by the pass phrase used.

They also emphasize to lawyers the importance of maintaining and ensuring the security and the exclusively personal use of the lawyer's PSP. The e-reg system permits only lawyers in good standing to make statements professing compliance with law without the registration of supporting documents.

Commentaries to subrules 5.01 (2) and (3) provide that a lawyer not delegate the signing for completeness of any document that requires compliance with law statements, and that a lawyer who approves the electronic registration of title documents by a non-lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

A commentary to subrule 6.03(8), the rule dealing with undertakings given by lawyers, provides that in real estate transactions using the system for the electronic registration of title documents, lawyers acting for the parties (with their consent) will sign and be bound by a Document Registration Agreement that will contain undertakings.

When entering into a Document Registration Agreement, a lawyer should have regard to and strictly comply with his or her obligations under subrule 6.03(8). This subrule provides that a lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given.

For the full text of the Rules and commentaries, go to www.lsuc.on.ca/services/RulesProfCondpage_en.jsp

(e-reg is a registered trademark of Teraview Enterprises Inc.)

Fighting fraud:

implement appropriate internal controls

Ed note: The following is excerpted from **Managing the Finances of Your Practice**, *the sixth in a series of booklets published by practicePRO, LawPRO's risk management initiative, to help lawyers more effectively manage the risk associated with law practice. The booklet is available in PDF format at www.practicepro.ca/financesbooklet.*

Ideally, your office should have clearly established internal controls for handling and documenting all types of financial transactions. These internal controls are really just policies and procedures that direct what steps should be taken when various financial transactions occur. Although a lack of internal controls does not necessarily constitute a breach of the Rules of Professional Conduct or By-laws, you may consider implementing internal controls to assist your efforts to comply.

The following are some suggested internal controls you may consider implementing at your office[1]:

Cheque requisitions

When dealing with cheque requisitions for both your general and trust accounts, consider the following:

- All cheque requests are accompanied by a signed cheque requisition evidencing approval.
- Only certain designated lawyers may authorize trust account payments.
- Only certain designated individuals may authorize general account payments.
- Firm personnel responsible for preparing cheques are instructed not to prepare cheques unless the requisition includes a signature of approval.
- Supporting documentation (such as an original invoice, reporting letter, statement of receipts or disbursements) accompanies the cheque requisition, where possible.
- Original copy of the invoice is stamped paid (to prevent an individual from using an invoice more than once to obtain funds).
- Photocopies of invoices are not generally accepted as support for cheque requisitions.

Cheque signing policies

When dealing with cheques requisitions for both your general and trust accounts, consider the following:

- Cheques in excess of a threshold amount require the signatures of two partners.
- Cheques are never to be signed in blank.
- Cheques made payable to financial institutions include details of the transaction.

- Cheques are in numbered order and the sequence is checked.
- At least one of the individuals signing the cheques always reviews the request for payment to determine if the request relates to trust funds and reviews the client file, to determine:
  - validity of the request for payment;
  - reasonableness of the amount requested;
  - if sufficient funds are available to pay the amount of the cheque; and
  - that an accounting to the client for receipts and disbursements is completed.

Trust records

Trust accounts are an essential part of the practice of law. When dealing with trust accounts and trust records consider the following suggestions:

- Monthly reconciliations and adjustments are reviewed and signed by someone other than the individual who prepared the reconciliation.
- Reviewer of the reconciliation ensures that:
  - reconciliations are prepared on time;
  - reconciled items are cleared promptly;
  - all unusual items are questioned and an adequate explanation is given for the unusual nature of the item and noted in the firm records and client file.
  - a list of trust balances is periodically reviewed for closed or completed matters including trust balances that have not changed in the past twelve months.
- Trust transfer requisitions are prepared to transfer funds from one client's trust ledger account to another trust ledger account; and:
  - written authorization from the client to transfer funds to another trust ledger is always obtained prior to the trust transfer;
  - the trust transfer requisition is signed by the responsible lawyer and an explanation is provided; and
  - the accounting department, or personnel responsible for accounting, has been instructed to process trust transfer requisitions only if the criteria for signatures and explanations has been met;
- A senior partner or office manager periodically reviews the client's trust ledger accounts for unusual items.
- Blank trust cheques should be kept in a secure manner.

Staffing policies and procedures

Law firm staff are an essential part of getting all work done in a law office. The following are some suggested staffing policies that can operate as internal controls:

- The firm has a policy respecting an individual's need to take regular holidays.
- The firm conducts periodic reviews of lawyers' work.
- Periodic reviews of client files are conducted by a senior partner or office manager to ensure:
  - the client receives an accounting for trust receipts and disbursements;
  - the details of the accounting to the client match with the trust ledger; and
  - the file is maintained in an orderly fashion.
- Lawyers are required to consider whether their outside interests may put them in a conflict of interest situation.

The firm should also be aware of indicators of potential problems which may result in inappropriate activities or conduct, including:

- a lawyer who is consistently too busy to take holidays;
- a lawyer who appears to be living beyond his or her means;
- sudden and significant increases in advances for entertainment expenditures;
- large increases in unbilled disbursements;
- a lawyer whose production has fallen off for no apparent reason;
- a lawyer who appears withdrawn or nervous;
- a lawyer who continually makes last-minute requests for funds.

Segregation of duties

Lawyers should segregate firm duties so that the same individual does not have complete control over the management of funds. Consider the following suggestions:

- The individual who opens the mail is different from the individual responsible for preparing a listing of all cash and cheques received.
- All cheques received are stamped "deposit only."
- The firm issues receipts for all cash or cheques received to:
  - provide client with proof of payment;
  - help prevent funds from being redirected to another client's account; and
- The numerical sequence of receipts is checked to ensure that all funds receipted are also recorded in accounting records and deposited into the bank.

1 This section is based in part on the Financial Management Guideline prepared by the Law Society of Upper Canada (www.lsuc.on.ca/services/pmg_summary.jsp).

Fighting fraud: organizations collaborate

If there's one thing all parties concerned about real estate fraud agree on, it's that there is no silver bullet with which to fight fraud. Instead, it will take a multi-faceted effort on the part of all players in the mix – lawyers, lenders, real estate agents, mortgage insurers, industry associations and provincial ministries and agencies – to address the problem.

To this end, the Ministry of Consumer and Business Services (MCBS), Teranet Enterprises Inc., and LawPRO, have joined together on a committee to examine how to work together in dealing with and preventing fraud. This committee consists of representatives from the lending and legal communities, title insurers, mortgage insurers, provincial ministries, law enforcement agencies and others.

The committee's existence is a first, acknowledges Kate Murray, Director of Titles for Ontario's land registration system of MCBS and one of the key committee organizers, and reflects a recognition that a collective effort is needed to combat fraud.

"We are working on many fronts: What reforms, for example, might be needed to existing regulatory and legislative frameworks that deal with the reporting, monitoring and action on real estate fraud allegations. How do we best share information among committee members and organizations? What do we need to do to educate all participants in a real estate transaction – from realtors and financiers to lawyers, regulators and government – about the issue and how do we best deliver these educational initiatives?"

Individually, organizations are also taking action. The Canadian Institute of Mortgage Lenders and Brokers (CIMBL) for example, has issued a revised draft of its best practices document – a standard of practice guide that is aimed specifically at mortgage originators, both independents and those still working within financial institutions.

"In the late 1990s, the independent mortgage originator channel accounted for about 10 per cent of mortgages; today, this channel accounts for more than 25 per cent of all mortgages," reports Mark Webb, CIMBL's Senior Director of Professional Affairs. And with the incidence of fraud on the rise, lenders, insurers and brokers recognize the need to set a practice standard for this source of business. "The mortgage community is concerned about the deals they are seeing and the losses they are experiencing. Fraud is no longer just a cost of doing business – its scope is such that action needs to be taken."

The new standards suggested in CIMBL's "Origination Standards for Fraud Avoidance" document significantly raise the bar when it comes to the mortgage originator, requiring documentation, identification and investigation. The document reflects a new set of higher expectations that, Webb believes, are an inevitable outcome of fraud. "The lenders, insurers and brokers all have an increased awareness of the need to raise expectations – of themselves, of lawyers and all other parties to a mortgage transaction." Similarly, he points out, there are signs that the Office of the Superintendent of Financial Institutions, which oversees the financial sector, is likely to tighten the standards to which the lenders are held accountable. 'I think we're going to see stricter standards all around."

CIMBL and the Canadian Mortgage and Housing Corporation (CMHC) are working individually to train lenders and brokers on the issue of fraud, adds Marie Dyck, Senior Advisor – Fraud for CMHC's Insurance Servicing Division.

"The entire mortgage industry – lender, insurer, agent, broker, lawyer – need to act together to address this problem. Fraud will always target the weakest link: So if only one of us implements anti-fraud controls, fraud will simply move to another segment of the industry where the controls are weakest."

For its part, the Real Estate Council of Ontario (RECO) – the regulatory body through which real estate salespeople and brokers are registered – is stepping up its member- and consumer-oriented educational efforts, as well as its investigative/reporting activities.

RECO currently publishes the names and disciplinary proceedings of those who are subject to internal disciplinary action by the Council as a result of violations of RECO's Code of Ethics. RECO will publish the particulars of revocation proceedings and the names of those who have breached the Real Estate and Business Brokers Act (REBBA), the legislation governing the real estate industry in Ontario. A new newsletter to be launched this fall will focus on fraud as part of the Council's effort to raise agent and broker knowledge of mortgage fraud.

RECO also aims to better educate consumers about what to expect in a real estate transaction, and to inform consumers about the services already available to help them check out their real estate agent or broker.

The RECO Web site, for example, lets anyone do a real-time search of its 39,000-member database – enabling any member of the public to verify the identity and credentials of individuals who hold themselves out to be licensed real estate professionals. Plans are to highlight this service to the public, as well as enlist consumers in helping spot fraud by educating them about the details of a real estate transaction.

"The key message we want to get out is that registrants who participate in mortgage fraud not only face the prospect of being charged criminally but could lose their registration," says Prendergast. "We also recognize that no one organization alone

can solve this problem. We know from experience that fraud often happens when many players in the mix are complicit. There is no single solution that will work for each of us. To address the problem, the many organizations that have a stake in this issue – lenders, lawyers, insurers, agencies such as ours and others – have to work together to fight fraud."

Law Society initiatives: CLE, training, resources

The Law Society of Upper Canada is developing a range of informational resources for lawyers, and is working with other organizations as part of a collaborative approach being taken to deal with and help prevent mortgage fraud.

In addition to the guidance available to lawyers through the Law Society's Practice Advisory department, the Law Society is developing reference materials and continuing legal education (CLE) programs to help lawyers involved in real estate transactions avoid becoming the tool or dupe of unscrupulous clients.

The Law Society is currently developing CLE programs on the topic of fraud that will be presented in Fall 2004. The Law Society previously presented a CLE program titled "Real Estate Fraud: Protecting Your Practice from the Brazen New Breed of Fraudster" on January 26, 2004. Materials from the program are currently available on the Law Society's e-Transactions site at: http://ecom.lsuc.on.ca or by calling the Law Society's Member Resource Centre at 416-947-3315 or toll-free at 1-800-668-7380, ext.3315.

The Law Society is also working with other organizations as part of a multi-faceted approach to dealing with and preventing fraud.

"All institutions, lenders and regulatory bodies touched by this issue must work together to attack the problem and to develop safeguards against future occurrences," says Zeynep Onen, Director of Professional Regulation for the Law Society.

In April 2002, the Law Society created a special mortgage fraud team in its Investigations department to concentrate its full-time focus on complaints of alleged mortgage and real estate fraud involving lawyers. In the course of its work, Law Society staff have developed expertise on the issue which has been shared with various lending institutions and regulatory bodies.

"The Law Society has presented seminars to share the learning coming out of our investigations," notes Onen. "Our hope is that together we can develop methods that will help better identify possible fraudulent transactions before they are completed."

The Law Society is currently coordinating additional workshops, and will include seminars for Crown Attorneys and police officers.

Online reference materials for lawyers will include:

- Fact scenarios, which will provide examples of how frauds may occur in the context of a mortgage transaction, including identity fraud.
- A list of potential fraud indicators.
- Useful practice tips.
- References to the *Rules of Professional Conduct*, including some of the lawyer's ethical obligations when acting in a transaction where a client may be engaged in a fraud.
- Questions and answers (Qs and As), which are being developed based on a sample of the questions received from lawyers by the Law Society's Practice Advisory department and from the experience gained by the Law Society during its investigation of mortgage fraud-related disciplinary matters.

These reference materials will be available on the Law Society's Web site at: www.lsuc.on.ca/services_en.jsp. The online materials will be supplemented with links to additional resources available on the Web sites of other partners in the fight against fraud, such as the Ministry of Consumer and Business Services, LawPRO and the Canadian Institute of Mortgage Lenders and Brokers.The Law Society is also publishing information and promoting the online resources in a special section of its July/August 2004 issue of the Ontario Lawyers Gazette. In addition, the Law Society's Practice Advisory department is available to provide assistance to lawyers with ethical questions on the topic and can be contacted at 416-947-3315, or toll-free at 1-800-668-7380, ext. 3315.

For continuing updates and resources related to this issue, visit the Law Society's Web site at: www.lsuc.on.ca.

Heather MacDonnell is a communication advisor with the Law Society.

TitlePLUS fraud measures

The increased attention being paid to fraud has prompted LawPRO to increase its scrutiny of applications for TitlePLUS coverage.

This additional fact-checking will happen automatically and in an automated fashion to all TitlePLUS applications submitted over the Web. The application system now will run a number of fraud prevention checks which may increase by a few seconds the time it takes to obtain a pre-approval on a TitlePLUS application; in some instances, the application may trigger the need for a manual review by one of the TitlePLUS underwriters. Additional anti-fraud measures are being contemplated.

The toll fraud takes

A victim's story

The lawyer profiled in this article was the victim of fraud: His partner, a prominent member of the community, defrauded the law firm's clients of several million dollars, none of which has been recovered. Both the Lawyers' Fund for Client Compensation and LAWPRO were involved in helping settle claims that arose out of this fraud. Like all lawyers in partnership, Bill (a pseudonym used at his request) had $250,000 Innocent Partner Coverage, much of which was ultimately consumed by legal costs.

No one was more surprised than Bill when the bank refused to let him deposit a client cheque to his firm's trust account.

The same morning, firm employees had been notified of a few "irregularities" by the bank, but had been assured by the guilty partner that everything would be cleared up quickly.

The "irregularities" turned out to be a $2.2 million kiting scheme that the firm's managing partner had been stickhandling for the better part of two or more years, prompted, suspects Bill, by investment ventures that went bad.

Seven years and many sleepless nights later, Bill is sanguine about the fraud that cost him $100,000 or more of his own money, forced his wife to put off her retirement for a few years, put an end to family holidays, and deprived his two teenage children of their father's time and the financial security that comes with a successful law practice. "You have no choice but to get on with life, hard as it sometimes is."

But he's still shaken by the death of his other partner, John, at the age of 42 two months after the bad news broke. "He paid the hardest . . ."

His recollection of those first few days are as sharp as if the events had occurred yesterday. "At first, you're absolutely paralyzed – it is so unreal, unbelievable that this can happen without you knowing. But then your sense of obligation takes over, you want to get back on an even keel."

Initially, Bill believed that he and John could cope. "Our game plan was to collect receivables so we could generate cash flow, to open a new bank account and establish new lines of credit – but all that was impossible. We were frozen out of every single bank in town because almost every bank was involved."

Much of their time was spent assembling materials requested by the Law Society (the managing partner himself had called in the Law Society, which promptly locked him out of the law firm offices). The arrival of the police on the scene a few months later really complicated maters: "They want everything but never give you anything back – so that just added to the tons of paperwork we were dealing with."

Bankruptcy at bay

"I'd spend eight to ten hours doing law, then another eight to ten hours cleaning up the bad accounts mess, discharging this, paying that bill, trying to keep the firm open and the staff employed."

He was dealing with about 30 major claimants, and another 60-70 minor claimants who stood to lose less than $1,000 each. And he was dealing with the inevitable, adverse publicity that a major case like this generates, and the "irrelevant side issues that come with publicity.

"Some people couldn't look you in the face, or did not know what to talk about or how to approach you. Or you'd feel awkward walking into a crowd, or walking on the street because everyone recognizes you, and knows, and wonders . . ."

And he was trying to stave off personal bankruptcy, despite legal advice to the contrary. "The nature of the beast is to put up a good fight and I was determined to do what I thought was right."

The goodwill he enjoys as a long-time practitioner in the community stood Bill in good stead: The local bar rallied to support him, helping him clear up files, stepping into his shoes in awkward or difficult situations such as when he had to register a construction lien or discharge a mortgage, agreeing to continue to take his undertakings, or letting him use their trust account to close transactions in those early days when no bank would deal with him. When he realized he had to dissolve the practice after a few months, he quickly found employment with a local firm that bent over backwards to accommodate his truckload of files and the time it took to work his way through the fraud quagmire.

The fallout from this fraud reverberated in the local legal and financial community. Within weeks, lawyers and lenders were operating under a new set of directives: mortgage proceeds would have to go directly to mortgagee, not to the vendor lawyer trust account; there would be no more undertakings where private mortgages were involved.

"Everything about real estate practice was tightened up and it's stayed that way," says Bill.

His advice to others: "Really know your partner and make sure you really do share goals in common. Also, always get two signatures on every cheque that's drawn on a firm account. And make sure you buy up your Innocent Partner coverage – don't leave yourself vulnerable because that $250,000 in coverage that LawPRO provides disappears quickly."

But it was the personal fallout that was the most telling and taxing. For the first four months, Bill took no salary or draws: Every penny in receivables went to settle with clients or accounts payable. He made it a personal commitment to make sure "no one was really hurt, that everyone recovered at a minimum their principal. No one was left hanging."

What was once a burgeoning general practice is now restricted to only real estate work: "I had to leave the fun stuff to focus on my battles; I couldn't afford the time it takes to do litigation." His higher end clients went elsewhere – "they don't like the stigma of being attached to this kind of situation." Some cases he just shied away from, simply because he himself was on the docket defending a specific claim. But worst of all is the disillusionment and despair: "I don't enjoy law practice as much, and I never will.

"Sometimes you come close to losing it – but then reality hits and you keep going. The first four years are the hardest because there are always surprises lurking in your files. But even after that, even after you've been able to finally put those mountains of boxes into storage and try to get on with life, you never sleep well.

"Because you're always going to worry that there is something lingering somewhere that comes back to bite you."

The toll fraud takes

A discipline counsel perspective

In more than 20 years of representing lawyers at the Law Society, Bill Trudell has heard many tales of woe: But common to them all, he says, is the shame/ego dichotomy that prevents lawyers from being able to admit they've made a mistake – the same shame that then leads to misappropriation and to investigative and disciplinary action by the Law Society.

"Every lawyer who gets called has altruistic ambitions: We all want to change the world. And the world looks at us this way – we're not supposed to make mistakes, we're not supposed to fail,'' says the Toronto-based practitioner.

"So when we do make a mistake, shame stands in the way of being able to admit we have erred. We try to 'fix' things – but that only compounds the problem because we only dig ourselves in deeper."

His experience representing both high profile lawyers and those assigned as part of a new duty roster system at the Law Society indicates that very few lawyers set out to deliberately defraud clients. "More than 90 per cent of the time the lawyer has all the right intentions, but makes just one mistake, or has just one bounced cheque. Without anyone to ask, without proper book-keeping (most sole practitioner lawyers do their own books even though we're not all well equipped to run a business), they just get into more and more trouble.

"And then stress takes over: We have to keep going because we cannot admit to anyone – not to our family, our peers, not even to the person closest to us – that we have failed. So we go into denial: We fail to respond to the Law Society inquiries. We're afraid to call for help. We struggle on – frozen by fear and shame. It's this overblown notion that we cannot admit that we are wrong that gets lawyers into trouble."

A devastating toll

The toll that disciplinary action by the Law Society takes on lawyers, adds Trudell, is devastating. "The lawyers I see at discipline are truly shell-shocked: they try to slide in and out without being noticed." And realistically, even a minimal suspension can spell the death of a law practice. "In six months, you can lose all of your clients, contacts, sometimes even your family – everything."

The solution? Lawyers, he says, need a sounding board, someone to bounce around ideas with, an ombudsman at the Law Society – "a lifeline that they can turn to early on to prevent them from getting into more trouble than they may already be in." Mentors for young lawyers and sole practitioners can play such a role, he says. It's a role he'd also like to see the Law Society play. "Lawyers should not be afraid to call on the Law Society for help. We need to find creative solutions to this problem – because the more complex law practice becomes, the more complex the problems that we'll see facing lawyers."

Can you ever advise a client to ignore foreign proceedings?

The effects of *Beals v. Saldanha*


J. Brian Casey

Your client, the owner of an electrical supply company in Gravenhurst Ontario, arrives with a claim issued out of the courts of Xanadu. The claim alleges damages of "at least $15,000" for failure to deliver electrical parts under a purported supply contract. Your client says he has never been to Xanadu and does not do business there. He does recall answering a general inquiry e-mail requesting information about high-voltage circuit breakers that the company advertises on its Web site. Your client recalls he e-mailed the price for the devices and possible delivery dates, but no contract was ever entered into.

The recent Supreme Court of Canada decision in *Beals vs. Saldanha* has settled many open issues with respect to the treatment of foreign claims and foreign judgments in Canada. While the Supreme Court may have settled the law, its decision has unsettling consequences for Canadian businesses wishing to sell products or do business in foreign jurisdictions, including your client from Gravenhurst.

In a 6-3 split decision, the *Beals vs. Saldanha* court upheld a default judgment for US$260,000 from a Florida state court, which arose out of an $8,000 real estate transaction. With interest and costs, by the time of the Supreme Court decision, the judgment was in excess of CDN$1million.

At its essence, the *Beals* case established the test that Canadian courts should apply in determining if a foreign court properly took jurisdiction over a Canadian defendant and the defences available to a defendant in Canada who wishes to dispute recognition and enforcement of a foreign judgment. This article will look at the practical consequences of the Court's decision and end with a short discussion as to how clients may avoid some of the pitfalls of doing business internationally.

In 1981 the Saldanhas and the Thivys, who had been friends for many years, bought a lot in a Florida subdivision for $4,000,[1] thinking that one day they might build a vacation home on it. They never visited the lot nor saw pictures of it.

In the summer of 1984, Rose Thivy was telephoned by a real estate agent in Florida, who said he had a prospective purchaser for the lot. After discussing the call with her co-owners, Mrs. Thivy advised they would sell the lot for U.S. $8,000. A written offer arrived in the mail. Mrs. Thivy noticed it referred to "Lot 1" in the subdivision while the lot owned by the Thivys and Saldanhas was "Lot 2." After discussions with the agent, she changed the figure from "1" to "2." The counteroffer was accepted and the transaction closed in late September, 1984, transferring Lot 2 to Mr. and Mrs. Beals.[2],

In January, 1985, Mr. Beals telephoned Mrs. Thivy and told her he had been sold the wrong lot. She told him of her discussion with the agent and suggested that Mr. Beals contact him.

In February, 1985, the purchasers commenced an action in Florida (the "first Florida action") against the Thivys, the Saldanhas, the agent and others. The Complaint alleged the purchasers and vendors had agreed to sell lot 1, but that after closing, and after commencement of construction of a model home on the property, the Beals learned they didn't own

Lot 1. The Complaint sought damages "which exceed $5,000."

The Saldanhas and Thivys did not hire a lawyer but collectively filed a defence setting out the facts as they knew them. In September, 1986, a Notice of Dismissal of the action was received and they thought that was the end of the matter.

In September, 1986, a second Florida Complaint was served. The claims were identical to the first action, but with the added claim that the defendants had represented they owned Lot 1, and that this representation was "knowingly and willfully false and fraudulent." Mrs. Thivy again filed a joint defence, exactly as had been done in the first action.[3]

Two Amended Complaints were subsequently received, but the amendments were directed against the other defendant, the agent and title insurer, with no new claims made against the Saldanhas or Thivys. The Saldanhas and Thivys did not deliver a defence to these Amended Complaints. Unknown to the defendants, under Florida procedural law, there was an obligation to deliver a defence to each and every amended Complaint even if no new allegations are made against you. Accordingly, default judgment was entered for failing to file a defence, with a jury trial directed to assess damages. The jury awarded the plaintiffs $210,000 for compensatory damages and US$50,000 for punitive damages.

An action was then commenced in Ontario to enforce the Florida judgment. In the course of the Ontario action it was determined that there was no transcript of the oral evidence at the Florida trial, but all of the exhibits filed were with respect to expenses claimed for preparing the lot for construction and a claim for lost profits related to a corporate entity owned by the plaintiffs. This corporation, which had been dissolved prior to the Florida judgment being obtained, was not a party to the Florida action.

The Ontario trial judge, Mr. Justice Jennings, dismissed the action on a number of grounds, including fraud in relation to the claim for damages and on the ground of public policy. In so doing he broadened the defence to include what he called a "judicial sniff test."

On appeal, the majority of the Court of Appeal overturned the decision. On the issue of fraud, in addition to disagreeing with the trial judge on his factual findings, the court held that while fraud which goes to the merits of the claim may be a ground for setting aside a foreign judgment, it is only applicable to cases where the fraud is revealed through newly discovered facts that could not have been discovered through the exercise of reasonable diligence. Since the Saldanhas had chosen to ignore the Florida proceedings, the majority held the trial judge erred in failing to limit the evidence to those facts that would not have been discovered if the defendants had appeared and defended the Florida action.

The majority of the Court of Appeal also disagreed with the trial judge's conclusions regarding public policy. They held the trial judge's reasoning was an unwarranted broadening of the doctrine.

The Supreme Court by a 6 to 3 majority dismissed the appeal. In so doing, the Court clarified the common law regarding the recognition and enforcement of judgments from foreign jurisdictions.

The real and substantial connection test

Although not necessary for the determination of the case, the Court took the opportunity to settle the question of whether the real and substantial connection test, as set out in the *Morguard* decision for inter-provincial cases, ought to be used in determining jurisdiction in foreign court proceedings.

The Court held that the "real and substantial connection" test is the appropriate test for both foreign and inter-provincial cases. The Court also clarified the meaning of the test to confirm that the "connection" may be a personal connection the defendant has with the jurisdiction, or it may be a connection with the subject matter of the action. Where a Plaintiff seeks to have the foreign court take jurisdiction based on the defendant's personal connection with the forum, a fleeting or relatively unimportant connection will not be sufficient. Personal connection would include circumstances where the defendant had a plant or office in the jurisdiction or was carrying on business there. Also, if the defendant, by contract or by conduct, has submitted to the jurisdiction, there is clearly a real and substantial personal connection between the forum and the defendant. In most cases, it will be sufficient to satisfy the real and substantial connection test if harm is occasioned in the jurisdiction by a defendant who "knew or ought to have known damage could occur in that foreign jurisdiction by reason of his actions" on the basis that there is a connection with the subject matter of the action.

In keeping with recent Ontario Court of Appeal decisions, the Supreme Court also held that reciprocity is part of the real and substantial connection test. The concept of reciprocity provides that if a Canadian Court would take jurisdiction over a foreign defendant in similar circumstances, then the Canadian Court should recognize the foreign court's jurisdiction over a Canadian defendant.

In our example, if the circuit breakers had been shipped to Xanadu and were faulty, the courts of Xanadu would have a real and substantial connection with the subject matter of the action, just as a Canadian court would do if the fact situation were reversed.

Difficulties arise under our example, where the claim is for damages for failure to deliver in Xanadu and your client states there never was a contract for delivery and, if there were, goods would not be shipped until paid for. In this case the plaintiff in Xanadu can say damages were suffered there, but there appears to be no other connection with that jurisdiction.

If the Canadian defendant decides not to appear in Xanadu the court there may well take jurisdiction, and it becomes difficult to determine what a Canadian court

would decide when the judgment is brought here for enforcement. Under the reciprocity theory, a Canadian court might well decide it had jurisdiction solely on the grounds that damages were suffered here, particularly where the defendant does not appear and where provincial rules of civil procedures permit service out of the jurisdiction based solely on damages having been suffered in that jurisdiction.

The impeachment defences

In our example, let's presume your client decides not to go to the time and expense of defending the action in Xanadu. Nothing is heard for two years until your client shows up with a Statement of Claim from the Ontario court claiming $100,000, based on a judgment from the High Court of Xanadu. The claim is based on a default judgment entered against your client and includes judgment for quadruple the amount of the contract, based on a Xanadu statute designed to prevent internet fraud.

In *Beals*, the Supreme Court confirmed that absent very extraordinary circumstances (which the court did not articulate) the defences to the enforcement of a foreign judgment are (1) fraud, (2) the denial of natural justice, and (3) public policy. It is clear from the Court's decision that the impeachment defences are to remain narrow in scope, notwithstanding the broadening of the real and substantial connection test for jurisdiction.

Fraud

The Supreme Court has clarified the issue of whether intrinsic or extrinsic fraud may be raised as an impeachment defence. The Court has done away with the distinction which had been applied in some provinces that only fraud going to the foreign court's jurisdiction (extrinsic fraud) could be raised as a defence in Canada.

In our Xanadu example, if your client was correct that no contract was ever entered into, yet the plaintiff fraudulently convinced the Xanadu court that a contract existed and goods which ought to have been delivered were not, then this would be considered fraud going to the foreign court's jurisdiction. In fact, there was no real and substantial connection to the court.

Intrinsic fraud, on the other hand, deals with the evidence actually led by the plaintiff during the hearing of the proceedings. In many cases, there is a concern that the failure of the defendant to defend the claim gives the plaintiff a licence to exaggerate or mislead the court during the proceedings. Henceforth either extrinsic or intrinsic fraud to the recognition or enforcement of a foreign judgment may be a defence. The restriction on raising the defence of intrinsic fraud, however, is that the allegation of fraud must be based on new and material facts, or newly discovered facts, which the defendant could not have discovered and brought to the attention of the foreign court through the exercise of reasonable diligence.

In the *Beals* case, the Supreme Court held the trial record did not disclose any new facts that could not have been discovered had the defendants appeared in the foreign court. Had the defendants appeared in the Florida action, they would have discovered the existence of the documents which appeared to show the losses were from a corporate entity and not the plaintiffs. By introducing the concept of discoverability of evidence and due diligence, the Court has determined that if the foreign court has properly taken jurisdiction, a Canadian defendant cannot raise allegations of fraud if the material facts upon which the defendant now wishes to rely could have been detected by the exercise of reasonable diligence using the foreign court's procedure.

In our example, if there had been a contract and the Xanadu court had jurisdiction, any fraudulent inflation of the damages claim in the Xanadu court would not be grounds for refusing enforceability in Canada, unless the evidence could not have been discovered at the time by reasonable diligence. A Canadian party cannot fail to appear in foreign legal proceedings that are properly constituted and then complain later of an excessive or fraudulent judgment. Once the Xanadu court had properly taken jurisdiction under the real and substantial connection test, the failure of the defendant to appear and defend would seem to preclude any allegation of fraud in Canada, as to do so would be an attempt to re-litigate the foreign decision. The Gravenhurst electrical contractor ignores the foreign proceeding at his peril.

Natural justice

The Supreme Court also held in the *Beals* decision that the defendants had sufficient notice of their jeopardy, notwithstanding that the claim contained less information than would be required in a Canadian pleadings. The Court stressed, however, that a Canadian court must be satisfied that the foreign court has followed and applied minimum standards of fairness. In Canada, it is fundamental that the judicial process is such that the defendant knows the case to be met and a fair opportunity to be heard.[4] The burden remains on the defendant to demonstrate, on the balance of probabilities, that these minimum standards were not met.

The domestic court must also be satisfied that the defendant was granted fair process by means of both judicial independence and fair ethical rules. In the *Beals* case, the fact that the Complaint simply claimed "an amount in excess of $5,000" was not a problem, as Florida's extensive discovery rules gave the defendants an opportunity to know the case against them. Similarly a reference

to "lost profits" in the Complaint was sufficient to inform them of their jeopardy that some amount under this head of damage was being claimed.

The Court also found that there was no evidence that the process used by the Florida Court could be considered unfair. The defendants were advised of the case they had to meet and were given a fair opportunity to defend under U.S. law. The fact they were noted in default by reason of their failure to understand Florida court procedure was their fault, as the Florida court clearly had jurisdiction over the subject matter of the action, namely the land.

The lesson is that so long as the pleading sets out the types of damages claimed by a plaintiff this would be sufficient notice to satisfy Canadian standards of natural justice. In addition, if the foreign court has a real and substantial connection with either the Canadian defendant or the subject matter of the action, the Canadian defendant is now responsible for understanding that foreign court's rules of procedure. Ignorance is no excuse.

In our example, if our Gravenhurst contractor had concerns about the court process, in Xanadu it would be up to him to show that the foreign court has not followed or applied minimum Canadian standards of fairness. The onus is on him. If there was a concern about judicial corruption, it is unclear whether it would be necessary to show that the particular judge in this particular case was corrupt, or whether it is sufficient to show that the judicial system generally is corrupt. The latter test is followed in the United States.

Public policy

With respect to the impeachment defence of public policy, the Supreme Court has confirmed that this defence is directed at the concept of repugnant laws, not repugnant facts. Public policy remains a very narrow ground of defence and will be used sparingly. There is no "judicial sniff test" under Canadian law. The Court has confirmed that substantial damages beyond that which a Canadian court might award is not, in and by itself, sufficient to raise a public policy defence.

In our Xanadu example, the fact that a local statute provided for quadruple damages may not be sufficient to raise a public policy defence. As Xanadu had jurisdiction over the defendant, the defendant cannot now complain about how it was treated, but rather must establish the Xanadu law regarding quadruple damages is somehow repugnant to Canadian public policy generally and ought not be enforced. It is doubtful a law purporting to deliver harsh penalties for internet fraud would be considered against Canadian public policy.

The lessons of *Beals v Saldanha*

As can be seen from this review of the impeachment defenses, there will be little for a Canadian defendant to argue if the foreign court has properly taken jurisdiction. The defenses of fraud, natural justice and public policy remain narrow in their application. Counsel faced with a client who has been sued in a foreign jurisdiction must be careful not to downplay the possibility of the foreign court's jurisdiction being upheld in Canada, or exaggerate the prospect that a Canadian court will apply one of the impeachment defenses to a resulting foreign judgment.

While most of the following points are self-evident, they bear repeating in light of the problems exemplified in *Beals* and the difficulties which may be encountered when advising a Canadian defendant who has been sued in a foreign jurisdiction.

1. Remind the client that you are only advising with respect to the law in the Canadian jurisdiction in which you are qualified. Any attempt to interpret the foreign proceeding or opine as to its reasonableness is dangerous, and would not be covered under the LawPRO liability policy.
2. Advise your client you can only give an opinion based on the material which is presently before you. The discovery process will likely turn up facts which could alter your opinion.

   Also, should your client receive further documentation from the court or the foreign plaintiff, your opinion may change. A full and complete inquiry of the facts known to your client must be undertaken so as to determine all the connections that might exist under the real and substantial connection test.
3. Initially, without the assistance of foreign counsel, your advice must be limited to an assessment, based on the facts as you have them, of whether a Canadian court will eventually take jurisdiction under the real and substantial connection test if your client decides not to appear in the foreign jurisdiction. While the impeachment defences can also be explained and discussed, it is almost impossible to determine whether any of the impeachment defences will be applicable. It is dangerous to provide any opinion with respect to the impeachment defences prior to the full extent of the foreign case and the foreign procedures being known.
4. You should urge the client to retain foreign counsel if for no other purpose than to provide an opinion as to whether the foreign court will take jurisdiction and what applicable procedural rules apply. It is only when the client is fully informed of the risks of attending in the foreign jurisdiction against the risks of waiting for the judgment to come to Canada to be enforced that he or she can make a reasoned decision. You can only provide an opinion respecting what a Canadian court might do with a foreign default judgment. You are not providing your client with the other half of the equation that he or she will need before deciding what course of action to take.

5. Paper the file and do a full report to the client. It may be years before a foreign judgment is brought to Canada for enforcement. It is also important to remind the client that if other documentation is received from the foreign court or new facts uncovered, this may well affect either your opinion, or that of foreign counsel who has been retained to assist.
6. Consider a declaratory application in Canada or the prospects for an anti-suit injunction. Foreign counsel should also be asked about conditional appearances to challenge the foreign jurisdiction.[5]

Avoiding foreign court proceedings

The example of a Gravenhurst electrical contractor being sued in a foreign court is no longer far-fetched. Canadian goods and services are sold worldwide and the number of Web-based transactions continues to grow. When advising a client with respect to carrying on business internationally, a lawyer should keep in mind that disputes will arise and that the client should do everything possible to avoid being sued in a foreign court.

While local businesses may be able to get away with a somewhat casual use of its commercial paper, uncertainty as to the details of an international commercial contract is dangerous. The more uncertainty as to the terms of the contract, the more likelihood there is the Canadian party will be a defendant in an unwelcome and unfriendly foreign jurisdiction.

The usual approach in international contracts has been to include a clause providing that the contract is to be interpreted under provincial and/or Canadian law with the exclusive jurisdiction of a provincial court. While this may be sufficient in many cases, there are a number of jurisdictions that will not enforce such a clause by reason of their local public policy. In other cases, the foreign party will refuse to accept such a clause but will instead either insist on its laws and its jurisdiction or, at the very least, a non-exclusive jurisdictional clause.

The most common method used by international business to avoid foreign court proceedings is by the use of a properly crafted arbitration agreement. International commercial arbitration is not mediation or conciliation. It is litigation, but the case is presented to a neutral arbitral tribunal. A property drafted arbitration clause is capable of having all disputes arising out of or in any way connected with a particular contract arbitrated rather than litigated. Claims sounding in contract, tort, equity, or statute, are all capable of being arbitrated. Legal and equitable relief can be granted including injunctions, specific performance and punitive damages.

New York Convention

One hundred and thirty four countries[6] have signed the United Nations Convention on the Reciprocal Enforcement and Recognition of Foreign Arbitral Awards, commonly referred to as the New York Convention.

Under this Convention, the courts of a signatory country must refer a matter to arbitration if the parties have entered into an international commercial arbitration agreement. The wording of the Convention is mandatory and the court must refer the parties to arbitration unless the arbitration agreement is null and void, inoperative, or incapable of being performed. The test as to whether the clause is null and void, inoperative or incapable of being performed will be determined under the law that the parties have agreed governs the arbitration agreement. Local law may have no application.

In Canada, each province has adopted the New York Convention either directly or through the adoption of the International Arbitration legislation[7].

Our Xanadu example also points out some of the additional problems which can occur with sales over the internet. By its nature, the internet is global and clients should be advised to make sure any sales over the internet require a purchaser to click and accept the terms of sale which includes a provision that the contract is governed by provincial and Canadian law, and that any dispute controversy or claim arising out of or in any way connected with the contract will be resolved by international commercial arbitration.

If Xanadu is a signatory to the New York convention, then the court will be faced with very strict limits on its jurisdiction. Should the plaintiff fail to disclose the arbitration clause, it can be argued the foreign court took jurisdiction by reason of the fraud of the plaintiff. As Xanadu has no personal jurisdiction over the defendant, there cannot be any real and substantial connection with the cause of action as the court was to refer the parties to arbitration under the New York Convention.

J. Brian Casey is a partner at Baker & McKenzie.

1 All amounts are in U.S. dollars

2 The agreement also involved another couple as purchasers, but they transferred their interest to the Beal's after judgment in Florida.

3 This was done without the consent or knowledge of the Saldanha's, but in the result nothing turned on this.

4 Rodaro v. Royal Bank of Canada (2002) 59 O.R. (3d) 74 (Ont. C.A.)

5 Amchem Products Inc. v. British Columbia Workers' Compensation Board [1993] 1 S.C.R. 897

6 Available at www.uncitral.org/en-index.htm

7 In Ontario, see the Ontario International Commercial Arbitration Act, R.S.O. 1990, c. I.9, which adopts the UNCITRAL Model Law.

Are your pro bono legal services covered by LawPRO?

The announcement this spring by Ontario Attorney General Michael Bryant of a provincial Pro Bono Law Task Force designed to encourage government lawyers to provide *pro bono* legal services, has prompted inquiries to LawPRO about the liability insurance coverage for these types of services.

In 2003 changes were made to insurance coverage to further encourage Ontario lawyers to provide *pro bono* legal services. The changes apply specifically to *pro bono* legal services provided by lawyers after January 1, 2003, for LawPRO-approved programs associated with Pro Bono Law Ontario.

Coverage summary

Whether or not a lawyer has coverage for *pro bono* legal services depends on the lawyer's current insurance status as well as on the type of *pro bono* legal services to be provided.

If you are purchasing the standard professional liability insurance coverage through LawPRO, you generally have coverage for professional services that are performed, whether they are paid services or provided *pro bono*.

If you are claiming exemption under the policy, but wish to provide *pro bono* legal services through an approved *pro bono* legal services program, you may have reduced limit coverage for such services.

What is Pro Bono Law Ontario?

Pro Bono Law Ontario (PBLO) was established in 2002. Its objective is to foster the development of *pro bono* projects in Ontario for low-and modest-income individuals and voluntary organizations. This includes creating and promoting opportunities for lawyers to provide free legal services, to foster *pro bono* projects and to act as a resource centre for PBLO programs. PBLO will provide a coordinated approach to the delivery of *pro bono* legal services in Ontario. For a list of *pro bono* legal programs under PBLO, and approved by LawPRO, see www.lawpro.ca/probono. For further information on PBLO, visit http://www.probononet.on.ca/main.cfm.

Providing pro bono legal services through a LawPRO-approved program associated with Pro Bono Law Ontario

Exempt lawyers

Lawyers who claim an exemption, and also provide approved *pro bono* legal services through a LawPRO-approved *pro bono* legal services program associated with Pro Bono Law Ontario (PBLO), have insurance coverage as follows:

- They are provided with the standard run-off insurance coverage of $250,000 per claim/in the aggregate for their approved *pro bono* legal services, even though the services are provided while exempt under the program; and
- They are NOT required to pay any deductible amount for claims relating solely to such services.

This coverage applies to legal services provided through approved programs associated with Pro Bono Law Ontario, and does not include legal services beyond the following:

(a) those rendered to low income persons in civil matters or in criminal matters for which there is no government obligation to provide counsel;

(b) services that simplify the legal process for, or increase the availability and quality of legal services to persons of limited means; and/or

(c) those rendered to charitable, non-profit and public interest organizations with respect to matters or projects to address the needs of low-income and disadvantaged individuals.

It is important to note that if a lawyer otherwise engages in the private practice of law, she or he would be considered to be providing legal services in private practice and would not qualify to maintain their exempt status, and would have to pay the LawPRO insurance premium and levies, as required by the Law Society.

Lawyers who buy the standard insurance program coverage

If you purchase the standard insurance program coverage and provide *pro bono* legal services through a LawPRO-approved program associated with Pro Bono Law Ontario, you are insured for claims arising out of these services.

As well, to encourage lawyers to provide these types of *pro bono* services, LawPRO implemented the following insurance program enhancements:

- You are not required to pay any deductible amount or claims history levy surcharge for claims relating solely to such services;
- Those applying for the part-time practice option are not required to consider any hours of professional time or past claims relating solely to these services in their application for this part-time practice option.

For a listing of PBLO programs approved by LawPRO, see www.lawpro.ca/probono.

Providing pro bono legal services to a non-profit organization not associated with Pro Bono Law Ontario

Exempt lawyers

Generally, lawyers who provide professional services (even on a *pro bono* basis), must obtain the standard insurance program coverage.

However, this does not necessarily mean that exempt lawyers are unable to provide *pro bono* legal services. Provided you meet the following criteria, you may be able to maintain your exempt status **and** lend your legal expertise on a no-charge basis to non-profit organizations not associated with PBLO. In so doing, you will not be insured for these *pro bono* services

1. You must obtain pre-approval from LawPRO: Contact Customer Service for a copy of the *pro bono* application for exempt lawyers. You must complete and return this application prior to providing the *pro bono* legal services.
2. The organization must meet specific conditions to be approved by LawPRO, as follows:
   - The organization benefiting from the *pro bono* work must be a not-for-profit organization; and
   - The lawyer must be providing *pro bono* legal services specifically for the organization, and not for any individual(s) in that organization or its clients.

No insurance for these pro bono services

If you receive approval from LawPRO to maintain your exempt status while providing *pro bono* legal services for an organization not associated with Pro Bono Law Ontario, you will NOT have any liability insurance coverage for any legal services provided while exempt. You will have only basic Run-Off Insurance coverage (with limits of only $250,000 per claim and in the aggregate) for services that you provided before becoming exempt.

In other words, the LawPRO insurance program would provide no coverage if a claim were to arise relating to your *pro bono* legal services. You would be responsible for all defense and indemnity costs associated with the claim.

Lawyers who are exempt should note that if they provide *pro bono* legal services for an organization that is not approved by LawPRO, they would no longer qualify for an exemption as they will be considered to be practising law in private practice. So, if you provide professional services but are simply not billing for them, (e.g. providing legal services to family, friends, or organizations on a *pro bono* basis), you would not qualify for an exemption and must pay the insurance premium and levies.

Lawyers who buy the standard insurance program coverage

Lawyers who purchase the standard insurance program coverage and provide *pro bono* legal services through programs or to organizations not associated with Pro Bono Law Ontario, are insured for claims arising out of these services.

However, you are required to pay any deductible amount or claims history levy surcharge associated with that claim. Furthermore, those applying for the part-time practice option are required to consider any hours of professional time or past claims relating solely to these services in their application for this part-time practice option.

For more information

If you have further questions regarding the provision of *pro bono* legal services as it relates to professional liability insurance issues, please visit the LawPRO Web site at http://www.lawpro.ca/probono or contact LawPRO Customer Service at (416) 598-5899 or 1-800-410-1013 or by e-mail at service@lawpro.ca.

Nanette O'Connor is Legal Counsel, Underwriting and Customer Service at LawPRO.

Communication-related issues

account for about 38 per cent of real estate malpractice claims

Most real estate lawyers will be surprised to learn that communications-related issues accounted for 37.5 per cent of real estate malpractice claims between 1995-2003.

The errors on communications-related real estate claims fall into one of three basic types: poor communications with a client; a failure to obtain a client's consent or to inform the client; or a failure to follow a client's instructions.

How do you avoid these types of real estate malpractice claims? Two things can help. One of the best ways is taking steps to educate your client about what will happen in the course of the transaction.

As a real estate lawyer you are intimately familiar with everything involved in a real estate deal. But remember, the purchase or refinancing of a home is something that most people go through only once or a few times in their lifetimes. Do not take for granted that your clients are familiar with the process, options, timing or costs.

Information pamphlet

One of the best tools to educate to your clients about real estate transactions is the *Working With a Lawyer When You Buy a Home* pamphlet. Prepared by the Ontario Bar Association and the Law Society of Upper Canada, this pamphlet is an ideal educational tool for clients who are embarking on a real estate transaction.

This pamphlet will help you market your services and comply with your obligations under the *Rules of Professional Conduct*. It explains in lay-person terms the legal aspects of the purchase of a residential property and the role of the lawyer to protect a client's interest in that property. Lastly, it outlines the options available in terms of solicitor's opinion on title and title insurance.

View an online copy of the pamphlet, at www.oba.org/en/pdf/lawyer1.pdf. Hard copies to give out to your clients are available for a nominal cost at www.oba.org/en/pdf/workingwithalawyer_order.pdf.

Checklist

A file-opening checklist is a second tool that can help make sure you review all necessary information with your client, and at the same time, collect all the details you need to complete the deal.

A sample opening checklist for a refinancing transaction is available at www.practicepro.ca/refinancechecklist. This checklist was prepared by Stephen H. Shub. He uses it when handling refinance deals.

The checklist systematically walks you though the process of gathering the information that is necessary to prepare for a refinancing deal. It highlights the issues on which information should be sought from or provided to the client. In doing so it helps a lawyer complete an appropriate review and investigation as to the details of the transaction. To help you avoid being the victim of a fraud, it also includes questions that highlight the flags of fraudulent transactions (see page 16 of this magazine).

With a bit of extra effort on your part you can prevent many communications-related malpractice claims on real estate transactions. Consider being more proactive in educating clients on what will occur in the course of their transaction, and in using an appropriate checklist to ensure all necessary steps and investigations are completed by you and your staff.

Dan Pinnington is Director of practicePRO. You can reach Dan at dan.pinnington@lawpro.ca.

Computer Troubleshooting:

top ten steps

practice PRO

Your computer is never going to crash at 4:29 p.m. on a Friday before a long weekend when you couldn't care less if it stopped working. It will crash 20 minutes before a critical deadline when you are trying to get something done.

While solving computer problems can be complex, more often than not some basic troubleshooting will help you quickly fix the more common problems, which are often simple ones. Here are ten steps you should go through to systematically troubleshoot basic computer problems.

#1 Take a deep breath and don't panic. Stand up and step back from your computer. You want to approach things in a systematic and controlled manner. Panicking won't help solve your problem, and it could cause you to lose valuable data.

#2 Save your current work. Before doing anything, make sure you save your current work so that you don't lose it.

#3 Back up your critical data. If it looks like your hard drive may crash or the computer may not start up again, take steps to back up your critical data while it is still working and before you turn it off. Hopefully you have a recent full backup and will only have to back up your most recent documents. Consider copying the data to a network drive or burning it onto a CD-ROM.

#4 Reboot your computer. Turn your computer off, let it sit for two minutes, and reboot it. Sometimes one command of the hundreds a computer executes every second can cause temporary, unexplainable problems. Rebooting gives everything as fresh-start.

#5 Is everything plugged in properly? Asking this question can seem very basic, but it can often be the fix you are a looking for. Cables get bumped or work themselves loose over time. Make sure they are all snug and tight. Ideally you should check the cables within your computer case as well, and make sure all cards and memory are firmly seated by gently but firmly pushing them into their respective slots.

#6 Ask yourself what you did last. Did your problems start just after you installed new software programs or updated hardware drivers? This can be a clue as to the source of a problem.

#7 Is your hardware happy? Unhappy hardware is often the source of problems. To check your hardware, right-click on My Computer, select Properties, click on the Hardware tab, and then the Device Manager button. This will open the Device Manager. It lists all the hardware devices on your computer. Devices that aren't working properly will have a yellow exclamation mark next to them. Double-click on them for details on the problem, and a listing of suggestions on how to fix it.

#8 Check you computer for nasties. Run a complete system scan with your anti-virus software (make sure you update your virus definitions). You can do a free online scan at TrendMicro's site (www.trendmicro.com/).

Running anti-virus software is just the first step. You should also scan your computer for adware and spyware with products such as Ad-aware (www.lavasoftusa.com/), and SpyBot (www.safer-networking.org/).

#9 Install software or driver updates. If it seems one program or device is acting up, check the manufacturer's Web site for updates. As people discover problems, software and hardware manufacturers often release revised software or updated drivers that include new code to address newly discovered problems.

#10 Check online support. If you get as far as this step, your problem is probably more complex. Most hardware and software manufacturers now offer extensive support information online in searchable databases. Microsoft's support page is at http://support.microsoft.com/. Odds are someone else has experienced the same problem, and you can find a solution online.

Dan Pinnington is Director of practicePRO. You can reach Dan at dan.pinnington@lawpro.ca.

Beware the Dangers of Metadata

Are you unwittingly sending confidential information to clients or opposing counsel? If you have e-mailed a Microsoft Word or Corel WordPerfect document to either, the answer to this question is likely yes.

When you create and edit your Word or WordPerfect documents, information about you and the edits you make is automatically created and hidden within the document file. This information is called metadata.

Litigators need be aware of metadata for an additional reason: It can provide extensive information for building an electronic paper trail as to who created, read, or even deleted text from a particular document, whose computer it was stored on, and more.

What is metadata?

Metadata can be simply described as "data about data." Think of it as a hidden level of extra information that is automatically created and embedded in a computer file.

On its Web site, Microsoft indicates that the following metadata may be stored in documents created in all versions of Word, Excel and PowerPoint:

- your name and initials (or those of the person that created the file);
- your firm or organization name;
- the name of your computer;
- the name of the local hard drive or network server where you saved the document;
- the name and type of the printer you printed the document on;
- other file properties and summary information (see below);
- non-visible portions of embedded OLE objects;
- the names of previous document authors;
- document revisions, including deleted text that is no longer visible on the screen;
- document versions;
- information about any template used to create the file;
- hidden text; and
- comments.

Similar metadata exists within WordPerfect files, and metadata data security issues affect most software programs.

While some metadata can easily be viewed within the program that has created a file, in most circumstances hidden metadata can usually only be seen by using a binary file editor. However, sometimes hidden metadata can become visible accidentally – for example, when WordPerfect opens and improperly converts a Word file, or when a corrupted file is opened. In these instances, both of which are quite possible in a law office, both the normally visible text and hidden metadata can appear on a computer screen.

Metadata is very useful in some circumstances. Document management and precedent systems make extensive use of metadata. Information such as: who created or edited a document; the document's usage and distribution history; and relevant keywords, subject or matter information, is essential for helping other users find a relevant document within a precedent databank or other document repository.

The problem with metadata, especially for lawyers, comes when people electronically share files as an attachment via e-mail, on a floppy disk or CD-ROM, over a network, or through an extranet. Electronic document files include both the information you see on the screen, and all the metadata you don't see. This metadata can often be confidential information, and can be potentially damaging or embarrassing if seen by the wrong eyes.

Metadata in Word

How can you view metadata in one of your Word documents? (WordPerfect users should jump ahead three paragraphs) Find and open a letter or agreement you recently emailed to a client or opposing counsel. Click on File, then Properties. This opens the Properties dialog box. It contains a variety of summary type information about the file.

On the General tab you can see what hard drive the document was stored on, and the time and date it was created, last modified and viewed. On the Summary tab you can see the name of the author, your firm name, as well as the name of the template that was used to create the document.

The Statistics tab contains information about the size and structure of the document, including the Total Editing Time in minutes. This statistic is really the total amount of time the file was open on a computer, regardless of whether someone was editing it or not. What if a client saw this information, and the time indicated was significantly less than the amount of time you docketed for working on this document? This discrepancy could be completely justifiable, but you could find yourself explaining it to an upset client.

Metadata in Wordperfect

In WordPerfect you can see the basic file summary type of metadata you see in Microsoft Office documents by selecting File, then Properties.

WordPerfect also has a feature called Undo/Redo History. It can allow you to view hundreds of past changes in terms of what text was cut, copied and even deleted from the document. Open a WordPerfect document. Click on Edit, then Undo/Redo. This opens the Undo/Redo History which lists past changes to that document, assuming Undo/Redo is turned on. Click on the Options button, and then uncheck "Save Undo/Redo items with document" to turn it off. Look at some of your WordPerfect files to see if you can view summary metadata or the Undo/Redo History.

In many instances lawyers will reuse and adapt a document they created for a previous client. This makes perfect sense from an efficiency point of view. However, note that deleted text can remain within a document. This is especially a danger if you use features that track document changes, allow for commenting, or keep versions of documents. What would happen if your client sees confidential information about the client the document was originally created for, or if opposing counsel saw changes that were made in an agreement at the drafting or client review stage?

How do you remove metadata?

Being aware of metadata is just the start. Obviously you must take steps to reduce or eliminate the metadata in your documents. Sending a fax or paper copy by regular mail would solve the problem, but will likely not be an option in many circumstances. If you want your client to review and edit a document, sending it electronically is the only practical option. Indeed, in many cases, clients, opposing counsel and even the courts expect to receive documents electronically.

You have a number of options to reduce or eliminate metadata from your documents.

Word, PowerPoint and Excel users should turn off the Fast Saves feature. To do this click on Tools, then Options, then the Save tab, and uncheck "Allow fast saves." In older versions of Microsoft Office products it will be turned on by default. This feature lets a computer more quickly save a file by not removing deleted text from it. When computers were much slower it was perhaps a helpful feature. With the more powerful computers we now have, you won't notice any difference with this feature turned off.

If you used features such as tracked changes, document versions or comments, make sure you delete the information that is being kept within the document with these features.

Office XP includes some new features to help reduce the accidental disclosure of metadata. Even more features are included in Word 2003 and the other Office 2003 applications. They now include a Security tab in the Options dialog box (select Tools, then Options to view this tab). You can specify that some metadata not be saved in a document in this dialog box. The Information Rights Management feature in Office 2003 can also be used to reduce paper trail types of metadata being stored within documents.

Converting files to PDF format with Adobe Acrobat or other PDF creators will strip out most metadata. For this reason many have adopted a practice of sending only PDF documents to clients or opposing counsel, especially if the recipient doesn't need to edit the document. Sending documents in a format that prevents a document from being changed can actually be helpful or even necessary in some cases. Ideally you should clean out metadata such as tracked changes, versions and comments as it can end up being included in the PDF file after conversion.

While converting a file to PDF format will help strip out metadata from the original document, remember that PDF files can also contain their own metadata. This is usually basic information such as the name of the person who created the file, date of creation, file location etc. Select File, then Document Properties to view the summary metadata information within a PDF file. In this same dialog box you can add further restrictions on how the document can be accessed, used, copied and printed in the Security Options settings.

If you want the recipient to edit the document, you need to send it in its native format, but without metadata. There are several programs that can help you identify and clean metadata from your documents.

In February this year Microsoft released the Remove Hidden Data Add-In. It will permanently remove hidden and collaboration data, such as change tracking and comments, from Word, Excel, and PowerPoint files in Office XP and Office 2003 only.

For Word, Excel and PowerPoint documents, the most widely used metadata scrubber is the Metadata Assistant, sold by Payne Consulting Group (www.payneconsulting.com) for US$79. A free demo version of the program will show you the metadata within a Word document, but won't clean it out.

Other metadata removal programs for the Microsoft suite of products include Out-of-Sight by SoftWise Consulting (www.softwise.net), ezClean from KKL Software (www.kkl.com) and Workshare Protect by Workshare (www.workshare.net). For Word only there is Doc Scrubber (www.docscrubber.com).

Unfortunately there is no software program for easily and automatically removing metadata from WordPerfect documents.

For more information on metadata, see the following resources:

- Word, Excel and PowerPoint users should visit the Microsoft support page at http://support.microsoft.com/. For more detailed information on removing metadata from Word 97, 2000 or 2002, see respectively, Knowledge Base articles 223790, 237361 or 290945.
- WordPerfect users should visit the Corel knowledge base at http://support.corel.com/ and search for "minimizing metadata."

Take some time to understand more about metadata, and how you can take steps to eliminate it from your documents. This will help you prevent an unwanted or embarrassing disclosure of confidential information.

Dan Pinnington is Director of practicePRO. You can reach Dan at dan.pinnington@lawpro.ca.

The Online COACHING CENTRE

Workshop: *business development*

Module: *#16 – Developing business by ...finding referral sources*

Coaching

CONSIDER REFERRAL SOURCES.

Referral Sources are people who direct prospects, clients or additional referral sources to you.

Referral Sources are often called centres of influence. They would know many people and have some advisory relationship with them. Examples are investment advisors, accountants, doctors and insurance agents.

About the OCC

The Online COACHING CENTRE (OCC) is LAWPRO's innovative online education tool. It lets you quickly and easily enhance a variety of "soft skills" that not only help you survive and thrive, but also help reduce malpractice claims.

The OCC is entirely Web-based, allowing lawyers across Ontario to use it at a time and place convenient to them. It is organized into six workshops, each of which contains approximately 25 learning modules, such as the one profiled on this page. Modules encourage self-teaching and self-evaluation; answers you provide when working in the modules should be saved for review at a later time.

To access the OCC, go to www.practicepro.ca/occ

Mentoring

Who are your Referral Sources now? Who directs clients, prospects and other referral sources to you?

What are their common characteristics?

What more can you do to build your list of Referral Sources? Fill out the following chart to move through the four stages of personal services marketing to build your list of referral sources. The four steps are Plan, Plant seeds, Cultivate and Harvest. The notes in the brackets are thought starters. Think about how people who are marketing to you, try to reach you.

Farming/Marketing Stage	Your New Activities	Do Date
Plan: Develop a list of who to target as referral sources (Who would be ideal?)	Who is on your target list? • •	
Plant Seeds to let them know what you want (Write, phone, lunch, get introduced)	What will you do to approach each person? • •	
Cultivate to build the relationship (Stay in touch regularly, write, phone, lunch, be actively patient etc.)	How will you cultivate the relationships? • •	
Harvest/Close (Listen, offer, be actively patient, tell them that you want them to refer to you)	Where and when will you let them know that you want them to refer to you? • •	

Update on anti-money laundering legislation

A number of recent initiatives by law enforcement agencies and law societies have again put anti-money laundering legislation in the news.

A recent report prepared for the RCMP, but not released to the public, indicated that in half of the 149 dirty money cases tracked by the RCMP between 1993 and 1998, the proceeds of crime slipped into the legitimate economy through the hands of a lawyer. Given that a lawyer's trust account is an essential part of money laundering transactions, the federal government likely will push to have lawyers subject to the anti-money laundering legislation.

Officials with the Departments of Justice and Finance have been meeting with representatives of the Federation of Law Societies and the Canadian Bar Association to reach an agreement on if, when and how a lawyer should be caught by the anti-money laundering legislation. There are no public details as to the substance of their discussions.

For the time being, however, lawyers are exempt from the obligations imposed by Part I of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, including the recording and reporting required respecting suspicious, large cash and terrorist financing related transactions, and the requirement to implement a compliance regime. Lawyers are exempt from reporting further to the terms of the consent filed April 15, 2003, in B.C. Supreme Court on the constitutional challenge of the PCMLTFA legislation. The trial for that challenge is set for November 2004.

Ontario lawyers remain subject to the cross-border reporting obligations imposed by Part II of the PCMLTFA.

The Law Society of British Columbia recently adopted a rule prohibiting lawyers from accepting $10,000 or more in cash in other than a limited set of enumerated circumstances. This new rule took effect on May 7, 2004.

LawPRO admitted to North American bar-related title insurance association

LawPRO has become the first and only Canadian member of the National Association of Bar-Related Title Insurers (NABRTI), a North American association of title insurance companies which are owned and controlled by a broad base of lawyers and operate primarily through lawyers who issue the title policies.

Admission to NABRTI represents a milestone for LawPRO's TitlePLUS program as applicants have to demonstrate compliance with 10 operating principles such as a commitment to working with the real estate bar in the public interest over the long term, delivering the title product only through lawyers, demonstrated financial strength and viability, and evidence of educational initiatives aimed at informing both the public and lawyers about the role of the lawyer and title insurance in real estate transactions.

"Our goals are very much consistent with the vision of NABRTI members for title insurance companies: We all believe that lawyers should be at the centre of a real estate transaction and that title insurance is a tool that enables lawyers to better serve and protect the public," says TitlePLUS Vice President Kathleen Waters.

"As NABRTI itself says: 'Since the evaluation of the status of real estate title involves many constantly changing laws, lawyers are well suited to be involved in title insurance policy insurance. Those who receive lawyer-issued title insurance policies benefit from this professionalism. Many legal rights are affected by real estate transfers besides that title itself, and a lawyer's involvement through a bar-related title insurer helps make the other legal services in real estate transactions more readily available and affordable.'"

NABRTI has its roots in the Florida Fund, founded in 1948. Excluding LawPRO, NABRTI now encompasses eight companies operating through approximately 35,000 lawyers which service 14 states, including Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Massachusetts, Minnesota, Missouri, Pennsylvania, Rhode Island, Vermont, Wisconsin, and Utah.

TitlePLUS coverage in Manitoba and Saskatchewan

LawPRO's TitlePLUS program has recently signed agreements that will enable lawyers in Manitoba and Saskatchewan to offer TitlePLUS coverage to their clients.

In Manitoba, lawyers will be able to secure TitlePLUS coverage through Winnipeg-based insurance brokerage, Reider Insurance Services. Reider is an independent insurance brokerage, founded in 1966 and still owned and operated as a family business by members of the Reider family. It currently manages more than $12 million in insurance premiums annually with a staff of 21 people. The company provides Manitoba consumers with a full range of insurance products and services, including autopac, tenants, home and business insurance.

In Saskatchewan, an agreement between LawPRO and the Insurance Brokers Association of Saskatchewan (IBAS) paves the way for IBAS member brokers to facilitate the process of obtaining TitlePLUS coverage. As part of their initial discussions with clients, lawyers will direct clients to seek advice from an IBAS brokerage member on the options for protecting both their ownership interests when they purchase or refinance a property, and the priority of a lender's security interest in a property. (Consumers may also seek information from an IBAS broker member before consulting with a lawyer). Once consumers have signed a document indicating they understand their options and have opted for TitlePLUS coverage, the broker will forward that document back to the lawyer who will complete the process of securing a TitlePLUS policy

for that client. Brokers will assist in delivering the issued TitlePLUS policy to insured consumers through their lawyers.

These agreements mean TitlePLUS is now available in all provinces of Canada, except Quebec.

Technology for Lawyers 2004 Conference

The Law Society/OBA 2004 Technology for Lawyers Conference and Vendor Expo will be held November 11-12, 2004, at the OBA Conference Centre in Toronto.

The two-day conference, sponsored by LawPRO, will feature 28 unique CLE sessions presented by a faculty of practitioners and legal technology experts, and a Vendor Expo with approximately 30 vendors.

The CLE sessions are organized in four tracks. The **E-Discovery Track** will teach you about the tools to handle all aspects of an electronic discovery; feature a plain English primer on computer forensics; and demonstrations of the latest software tools for dealing with electronic evidence. Closing out this track will be an electronic mock trial that will highlight the latest in trial technology in a two-hour presentation by a team of experienced technology litigators.

Participants in the **Getting Things Done Track** will learn how to use Adobe Acrobat™ and PDF™ files, and the latest ways to capture and use electronic content in a paperless office environment. Other sessions will demonstrate how technology can help you better manage time and information, and will feature a face-off between two leading practice management software products: Time Matters™ versus Amicus Attorney™

The **Better, Faster, Cheaper Track** will offer candid assessments and tips for various marketing techniques; teach you to better manage law practice finances using the advanced features of PCLaw™; and showcase document automation.

The **Tech University Track** will provide practical tips from seasoned "road warriors" who will help take your office on the road; highlight how to make maximum use of online resources such as CanLII™, Quicklaw™, and e-Carswell™; cover PowerPoint™ and presentation basics from the absolute beginners' point of view; teach you how to prevent security breaches and "clean" a compromised computer; and reveal how to do more with the advanced features of the DIVORCEmate™ products.

The Vendor Track (back after its successful launch last year) will feature a wide array of vendor product demonstrations.

Register through the Law Society, or online at ecom.lsuc.on.ca. Register before October 4, 2004, to take advantage of the early bird discount.

CLE Premium Credit deadline: September 15, 2004

How would you like to save up to $100 on your 2005 insurance premium? It's easy, with the LawPRO CLE Premium Credit program – a risk management initiative that provides a $50 credit for each qualifying CLE program you have completed between September 16, 2003, and September 15, 2004 (to a maximum of $100 per lawyer). Your credit will be automatically applied to your 2005 insurance premium invoice.

To obtain the credit, you must complete the online Survey and Declaration on the LawPRO Web site at www.lawpro.ca/cledec no later than September 15, 2004.

Two types of programs currently are eligible for this premium credit initiative:

- **LawPRO-approved CLE programs:** LawPRO has worked closely with major CLE providers over the past three years to develop CLE programs that include a risk management component and therefore qualify for the CLE Premium Credit program. A list of CLE programs that qualify for the premium credit is available online at www.lawpro.ca/clelist. Promotional material for programs that qualify for the credit also carry the LawPRO "seal of approval."
- **The practicePRO Online Coaching Centre (OCC):** This online, self-help tool offers 150 modules that help lawyers enhance the "soft skills" that are vital to law practice. To qualify for a $50 premium credit, you must complete three OCC modules that you have not completed previously. The maximum credit for using the OCC in 2003-04 is $50. Access the OCC at www.practicepro.ca/occ

To learn more about the CLE Premium Credit program contact practicePRO by e-mail: practicepro@lawpro.ca, or call 416-598-5899 or 1-800-410-1013.

Deadline reminders

Please note the following deadlines:

- Real estate and civil litigation transaction levy surcharge payments for the second quarter of the year ending June 30, 2004, are due on July 31, 2004.
- Real estate and civil litigation transaction levy surcharge payments for the first quarter of the year ending March 31, 2004, were due on April 30, 2004.

2004 Insurance premium payment deadlines:

- The final quarterly instalments by pre-authorized bank account withdrawal or credit card will be processed on July 15, 2004, and October 15, 2004.

Events calendar

2004

The following is a listing of events at which LAWPRO representatives, including staff from TitlePLUS and practicePRO, will be presenting and/or participating in the coming months.

August 15-17
Canadian Bar Association Annual Trade Show
Canadian Legal Conference and Expo 2004
TitlePLUS exhibiting
5th Annual Technology Primer
Dan Pinnington, practicePRO
Winnipeg Convention Centre, Winnipeg

September 10
York Region Real Estate Board, General Meeting
TitlePLUS exhibiting

September 14
The Canadian Women's Foundation Breakfast
TitlePLUS sponsoring
Metro Toronto Convention Centre, Toronto

September 19-22
CUMA Conference
TitlePLUS exhibiting
Niagara Fallsview Casino Resort

September 20
OBA – Everything that is New (and Old) Dangerous and Different in Domestic Relations
Using Technology To Be Better Faster and Cheaper
Dan Pinnington, practicePRO
OBA, Toronto

September 22
LSUC New Lawyer Experience
Client Communication and Time Management Done Right
Dan Pinnington, practicePRO
LSUC, Toronto

September 23
Hughes Amys LLP
60 Tech Tips in 60 Minutes
Dan Pinnington, practicePRO
Toronto

September 29
Realtors Assoc. of Hamilton-Burlington
Realtors Without Boarders Trade Show
TitlePLUS exhibiting

October 6
Hamilton Law Association
18th Annual Joint Insurance Seminar
Dan Pinnington, practicePRO
Sheraton Hotel, Hamilton

October 27-30
TLOMA Conference
TitlePLUS sponsoring
White Oaks Conference Resort & Spa, Niagara-on-the-Lake

October 28-29
Thunder Bay Law Association
TitlePLUS Exhibiting
60 Tips in 60 Minutes
Dan Pinnington, practicePRO
Ramada Prince Arthur Hotel, Thunder Bay

November 10
York Region Real Estate Board, General Meeting
TitlePLUS exhibiting

November 11-12
LSUC/OBA Technology for Lawyers 2004 Conference and Vendor Expo
LawPRO sponsoring
TitlePLUS exhibiting
OBA Conference Centre, Toronto

November 18-20
LPAC National Workshop 2004
practicePRO sponsoring and exhibiting
OBA Conference Centre, Toronto

For more information on practicePRO events, contact Susan Carter at 416-596-4623 or 1 800 410-1013, or by e-mail at susan.carter@lawpro.ca.

For more information on TitlePLUS events, contact Marcia Brokenshire at 416-598-5882 or e-mail marcia.brokenshire@lawpro.ca.

ABOUT PRACTICEPRO TECHNOLOGY BREAKFASTS

These presentations focus on legal technology; some sessions feature product comparisons; others are practical discussions and demonstrations of specific products by actual users; others review practical technology skills at a basic level.

Written summaries and online versions of past breakfasts, including handouts if available, are available for download at www.practicepro.ca/techbreakfasts.

Online versions of some breakfasts are also available for only $29.95 at the BAR-eX Communications Web site at www.bar-ex.com. These online versions provide screen captures and audio of the actual presentation.

Our most recent technology breakfast took place on June 4:
Quicklaw – Not Just for Caselaw Anymore!
This session focused on how to get the most out of your Quicklaw service, including using current awareness sources, drill down indexes, textbooks and point-in-time statutes.

LawPRO • One Dundas St. W. • Suite 2200, P.O. Box 75 • Toronto, Ontario M5G 1Z3

LAWYERS' PROFESSIONAL INDEMNITY COMPANY (LawPRO®)

President & CEO: Michelle Strom

LawPRO news is published by the Lawyers' Professional Indemnity Company (LawPRO) to update practitioners about LawPRO's activities and insurance programs, and to provide practical advice on ways lawyers can minimize their exposure to potential claims.

Editor: Dagmar Kanzler
dagmar.kanzler@lawpro.ca

Design & Production: Freeman Communications

Tel: (416) 598-5800 or 1-800-410-1013
Fax: (416) 599-8341 or 1-800-286-7639
www.lawpro.ca