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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.

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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.

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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 "too 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.

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