

# GILL V. BUCHOLTZ: THE BRITISH COLUMBIA COURT OF APPEAL AND MORTGAGE FRAUD

## INTRODUCTION

Two recent decisions of the British Columbia Court of Appeal have left lenders feeling unsettled about lending money to finance real property transactions. The facts in the cases of *Gill v. Bucholtz* and *Re Oehlerking* are very similar. In both cases, a fraudster impersonated an owner of a home and signed a fraudulent transfer of that home to an accomplice, who then arranged for a mortgage, which was registered against title in the Land Title Office. Funds were then advanced from the lender to the fraudster. In both cases, the issue that the court had to determine was who would bear the loss of the fraud, and the burden of the mortgage – the defrauded home owner, or the defrauded lender.

## THE DECISIONS

The Court determined that the home owner was entitled to the return of title to the property, and the loss of the fraud would be born by the lender. The Court concluded that a mortgage is not protected to the same degree as an owner's interest in property. The Court held that the lender did not acquire an "indefeasible" interest in the property upon registration of their mortgage because the mortgage was granted by a person who had no interest in the property to give. As the mortgage was void the lender had not acquired any interest in the land and therefore had to bear the cost of its own loss.

Recognizing the difficulty inherent in this decision, the Court of Appeal briefly reviewed the current state of the Torrens system of land registration in B.C., and acknowledged that it is not perfect. Under the current system, lenders have a burden in lending money on the security of a mortgage to look behind the name of the owner registered on title in order to better protect themselves against fraud. The Court concluded by stating that the legislature of B.C. "appears to have adopted the policy that the cost of frauds perpetrated against mortgagees and other chargeholders should be borne not by the public (as the funders of the Assurance Fund) but by lenders and other chargeholders themselves. Whether this policy choice is a good one or not is not for us to decide."



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## IMPLICATIONS

The question that naturally arises is whether any amount of due diligence by a lender would be sufficient to protect against this type of fraud and financial loss.

Basic steps such as cross-referencing names, addresses, telephone numbers and postal codes between those provided and those found in publicly available databases may identify inconsistencies. Phone calls and internet searches may be enlightening. Lenders should also consider conducting on-site appraisals, rigorously checking income confirmation letters and interviewing the owner to confirm the sale price. A lender should also ask itself questions such as:

- Does the transaction make sense?
- Has there been a recent flip reflected on title?
- Is there cash flowing out?
- Is a power of attorney being used?
- Where, when and how did the transaction documents get signed?
- Is the borrower's picture identification authentic and does it match the title and local phone directory information?
- Is the deal deadline too urgent?
- Does the vendor or borrower seem unconcerned about fees or commissions?
- Does it all just seem a little bit strange or "off"?

The development of a comprehensive fraud prevention "checklist", combined with appropriate knowledge on how to detect warning signals, can assist lenders in their due diligence efforts.

An effective partnership between a lender and their legal counsel can also go a long way to reducing a lender's exposure to fraud. A lawyer's review of title to the property and other due diligence investigations can be extremely useful. In addition, certain mandatory "Know Your Client" protocols that the Law Society of B.C. requires lawyers to undertake may also help to uncover fraud.

Although title insurance is no substitute for a thorough fraud prevention process and appropriate due diligence investigations, it may provide some additional comfort to lenders. Many title insurers cover loss caused by mortgage fraud in their policies and such coverage should be considered by lenders where appropriate.

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