



# Real Estate News

Lawrence Bremner

## *Refinement of the Theory of Deferred Indefeasibility*

In *Reviczky v. Meleknia and HSBC*, Court File 07-CV-330124 PD3, the Ont. S.C. further refined the theory of deferred indefeasibility set out by the C.A. in the *Lawrence v. Maple Trust* case. The court also gave guidance as to the due diligence to be exercised by lenders providing a purchase money mortgage to a purchaser buying from a donee under a Power of Attorney.

Reviczky was the owner of the property. A fraudster entered into an Agreement of Purchase and Sale, describing himself as the donee of Reviczky's Power of Attorney and contracted to sell the dwelling to Meleknia, an innocent purchaser. Meleknia obtained a purchase money mortgage from HSBC. After the transaction was completed the fraudster disappeared with the sale proceeds. The court was asked to determine the validity of the HSBC mortgage.

In this case, Mr. Justice John Macdonald found that in the *Lawrence* case, there was no "deferred owner". The fraudster assumed Lawrence's identity and entered into an agreement to sell to another impostor who applied for a loan in order to finance the transaction. After closing, the fraudsters disappeared with the sale proceeds.

Although the C.A. held that "the theory of deferred indefeasibility of title accords with the *Land Titles Act* and must be taken into account in analyzing its provisions", Mr. Justice John Macdonald found that "The factor which determined that Maple Trust Co.'s interest was defeasible was that it has an opportunity to avoid the fraud". The court found that "My conclusion that Lawrence refined and changed the analysis is also based on what Gillese J.A. said... 'the burden of the fraud is placed on the party that had the opportunity to avoid the fraud by interpreting the *Land Titles Act* in accordance with the theory of deferred indefeasibility.' To my mind, that indicates that the opportunity to avoid the fraud is now central to the theory of deferred indefeasibility as a rationale for allocating loss amongst competing parties who claim an interest in land under the *Land Titles Act*".

According to Mr. Justice Macdonald, the ratio in the *Lawrence* case is that:

- i. Evidence that a party dealt with a fraudster establishes that the party had an opportunity to avoid the fraud; and
- ii. Having an opportunity to avoid the fraud makes the party's interest in land defeasible by of the true owner.

In the *Home Trust v. Zivic* case, which was heard prior to the

*Lawrence* case, the Ont. S.C. found that where there is a transfer from a fraudster, assuming the identity of the true fraudulent, to an innocent purchaser and two innocent chargees, the purchase and the subsequent mortgages were, in effect, registered simultaneously, so that the registrations should be treated as one transaction. The doctrine of deferred indefeasibility therefore is not applicable.

Mr. Justice Macdonald concluded that the court, in the *Home Trust* decision, dismissed the application of the defrauded purchaser and the defrauded chargees for two reasons:

- "a) the transfer and charge registrations comprised one transaction; and
- b) the chargees had the opportunity to be 'more vigilant' and should bear the burden of the fraud instead of the true owner, who had no role in the perpetration of the fraud."

The court then considered whether or not HSBC had an opportunity to avoid the fraud. The same solicitor acted for the buyer and HSBC. Both the bank and its lawyer had a copy of the Agreement of Purchase and Sale and were therefore aware that the seller was purporting to sell the property under a Power of Attorney. "The bank chose to retain the purchaser/chargor's solicitor to act on its behalf and [the court inferred] that the bank must have known that the solicitor would be in direct dealings with the person purporting to sell, whether through that person's solicitor or otherwise. Having been retained by the bank, it was the solicitor's responsibility to protect the bank's interests. However, the solicitor did nothing to scrutinize the Power of Attorney." The court's view was that such "scrutiny would have led to questions which likely would

have avoided the fraud. However, none of this was done because of a 'business as usual' approach to a transaction which required something more. It required, for example, the level of care and analysis which the bank empowered itself to perform by its standard Mortgage Loan Agreement".

The actual Power of Attorney had not been registered; however, a one-page notice of Power of Attorney was registered showing that such a Power of Attorney existed. The court noted that the bank's lawyer did not review the actual Power of Attorney or the one-page notice that was forwarded to him shortly before closing. He relied on an unsworn statement contained in the transfer, purportedly by the true owner, by the fraudulent attorney, that the Power of Attorney was effective. The solicitor had made no effort to determine the validity of the Power of Attorney. Had he reviewed it, he would likely have noticed that the Power of Attorney was a Continuing Power of Attorney which was not effective because it had only one witness. Accordingly the court ordered that the bank's charge was a not a valid charge on the true owner's property, and ordered the land registrar to delete the charge from the parcel register.

#### **Editor's Note:**

This case clearly puts the onus on Lenders and their lawyers to exercise due diligence to avoid fraud. The Ministry of Government Services is likely to make registration of the Power of Attorney mandatory; it is presently voluntary inasmuch as it can be scanned in as a Schedule to the prescribed Notice of Power of Attorney. It will be interesting to see if the Ministry will prescribe a law statement. It will be very difficult for

a lawyer to certify that the power is valid without significant due diligence or unless the power was created by the lawyer giving the certification. Hopefully the LSUC will issue practice guidelines to assist lawyers to exercise "reasonable" due diligence to determine the validity of the Power of Attorney.

Some Lenders are now refusing to permit a donee to sign a charge on behalf of the registered owner. Lawyers should check the charge instructions carefully and early, and then contact the Lender to explain why it is necessary for the chargor to sign by power of attorney to attempt to get the Lender to waive its prohibition.

#### ***Powers Of Attorney In Ontario***

Blair L. Botsford, B.A., LL.B., M.A., TEP and Geoff Rabideau, B.A., LL.B. (articling student)

Originally authorized under the *Powers of Attorney Act*, R.S.O. 1990, c. P.20, a power of attorney is a legally binding document in which one person (the principal or grantor) appoints another person or persons (the attorney or substitute decision maker) to act on their behalf in the event they are unable to make their own decisions.

The *Powers of Attorney Act* only provided a mechanism for appointing substitute decisions makers with respect to property and has been substantially repealed. It was not until the enactment of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 ("SDA"), which came into force on April 3<sup>rd</sup>, 1995, that it became possible to also name substitute decisions makers with respect to personal care decisions.

The SDA preserves certain powers of attorney created under the old legislation. They must have been executed before April 3<sup>rd</sup>, 1995 or within six months after that date. They must also: contain a provision expressly stating that it may be exercised during any subsequent legal incapacity of the grantor; have been executed in accordance with the *Powers of Attorney Act*; and otherwise be valid.

Powers of attorney for property, unless restricted as to their use, allow the attorney to do on behalf of the grantor anything the grantor could do except make a will or other form of testamentary disposition. For example, property decisions would include such financial issues as: bank deposits and withdrawals, paying bills, making or changing investments, buying, selling or refinancing a home, making payments to or on behalf of dependants, and filing income tax returns.

Personal care is defined in the SDA and includes decisions about health care, shelter, clothing, nutrition, hygiene, and safety.

In Ontario, there are currently three different types of power of attorney: two for property and one for personal care. These include: a general power of attorney for property, a continuing power of attorney for property, and a power of attorney for personal care.

A General Power of Attorney for Property is ordinarily used if a person wants to appoint someone to act on their behalf for a specific period of time or for a specific task. This type of power of attorney ends upon completion of the time or the specific task, or if the grantor becomes mentally incapable.

A Continuing Power of Attorney for Property is used where a person wishes to appoint someone to act on their behalf while they are mentally capable as well as to act on their behalf in the event of mental incapacity. These powers of attorney can be for a specified period or task or they can be all-encompassing. Both types of powers of attorney for property can be effective on the date of signing or on the happening of a specified condition other than incapacity which can only be a condition for continuing powers of attorney for property.

A Power of Attorney for Personal Care enables the grantor to appoint an Attorney for Personal Care to make personal care decisions in the event the grantor becomes incapable of making their own personal care decisions. Incapacity can be either mental or physical depending on the circumstances. For persons who have specific wishes regarding their personal care, these can be included in the power of attorney for personal care document. These wishes can also be specified in a separate advance directive, usually prepared in consultation with a doctor or other health care provider, and incorporated by reference into the power of attorney for personal care.

Power of attorney documents confer significant authority on the substitute decision maker. Caution should be exercised in selecting these persons, especially with respect to unrestricted continuing powers of attorney for property that are effective on signing.

The requirements for a valid power of attorney under the SDA are:

1. The donor must be at least 18 for

powers of attorney for property, and at least 16 for powers of attorney for personal care.

2. The donor must be capable of granting a power of attorney. Each type of power of attorney has its own guidelines for assessing capacity with powers of attorney for property having the higher standard.

For powers of attorney for **property** a person is capable if he or she:

a) knows what kind of property he or she has and its approximate value;

b) is aware of obligations owed to his or her dependants;

c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

d) knows that the attorney must account for his or her dealings with the person's property;

e) knows that he or she may, if capable, revoke the continuing power of attorney;

f) appreciates that unless the attorney manages the property prudently its value may decline; and

g) appreciates the possibility that the attorney could misuse the authority given to him or her.

For powers of attorney for **personal care** a person is capable if he or she:

a) has the ability to understand whether the proposed attorney has a

genuine concern for the person's welfare; and

b) appreciates that he or she (the donor) may need to have the proposed attorney (the donee) make decisions for him or her.

3. Both powers of attorney for **property and personal care** must be executed in the presence of two witnesses. A witness cannot be the attorney or the attorney's spouse or partner, the grantor's spouse or partner, a child of the grantor or a person whom the grantor has demonstrated a settled intention to treat as his or her child, a person whose property is under guardianship or who has a guardian of the person, and a person who is less than eighteen years old.

Powers of attorney for property and personal care can both be revoked by a person if they have the capacity to do so.

#### *Editor's Note:*

Our thanks to Ms. Botsford and Mr. Rabideau for preparing this excellent summary of the Ontario law as it relates to Powers of Attorney. Ms. Botsford practises Trust and Estate Law in Hamilton and Kitchener and can be contacted at 905-540-3288.

#### *GST Transitional Rules*

We are all aware that, effective January 1<sup>st</sup>, 2008, the Federal Goods and Services Tax rate has been reduced from 6% to 5%. Alan Silverstein, who has been a long time supporter of the Hamilton Law Association, and, indeed, lawyers and consumers throughout the province, has provided us with a Transitional Chart of Rules to determine what rate

applies to new homes and condominiums. There was not enough room to include the chart in this article; however, you may review it on the Association's website at [www.hamiltonlaw.on.ca](http://www.hamiltonlaw.on.ca) by clicking on Real Estate Committee. The Transitional Chart will be in the Resources & Practice Aids section.

### ***Calculating the G.S.T. Rebate on New Home Purchases***

The G.S.T. rebate increases to a maximum of \$6,300.00 when the net price reaches \$350,000.00 or the gross price (net price + G.S.T. less rebate) reaches \$361,200.00.

When the net price exceeds \$350,000.00, the rebate declines until the net price reaches \$450,000.00 (\$477,000.00 gross) at which point no rebate is available.

#### **Gross Price is \$361,200.00 or Less**

The formula is as follows:  $\text{Net Price} = \text{Gross Price} \div 1.032$

If the gross price is \$361,200.00, then the rebate is calculated as follows:

$$\begin{aligned}\text{Net Price} &= \$361,200.00 \div 1.032 \\ &= \$350,000.00\end{aligned}$$

$$\begin{aligned}\text{G.S.T.} &= \$350,000.00 \times .05 \\ &= \$17,500.00\end{aligned}$$

$$\begin{aligned}\text{Rebate} &= \$17,500 \times 0.36 \\ &= \$6,300\end{aligned}$$

$$\text{Proof : } \$361,200.00 + \$17,500.00 - \$6,300.00 = \$350,000.00$$

#### **Gross Price is Between \$361,200.01 and \$472,500.00**

The formulas are as follows:

$$\text{Net Price} = (\text{Gross Price} + \$28,350.00) \div 1.113$$

$$\text{G.S.T.} = \text{Net Price} \times 0.05$$

$$\text{Rebate} = (\text{Consideration in excess of } \$350,000.00) \times 0.063$$

If the Gross price is \$380,000.00, the rebate is calculated as follows:

$$\begin{aligned}\text{Net Price} &= (\$380,000.00 + \$28,350.00) \div 1.113 \\ &= (\$408,350.00) \div 1.113 \\ &= \$366,891.28\end{aligned}$$

$$\begin{aligned}\text{G.S.T.} &= \$366,891.28 \times 0.05 \\ &= \$18,344.56\end{aligned}$$

$$\begin{aligned}\text{Rebate} &= \$6,300.00 - [(\$366,891.28 - \$350,000.00) \times 0.063] \\ &= \$6,300.00 - [\$16,891.28 \times 0.063] \\ &= \$6,300.00 - \$1,064.15 \\ &= \$5,235.85\end{aligned}$$

$$\text{Proof : } \$366,891.28 + \$18,344.56 - \$5,235.85 = \$380,000.00$$

### ***Land Transfer Tax Rebate for First Time Resale Home Buyers***

The Ministry of Revenue has announced plans to provide Land Transfer Tax "LTT" rebates of up to \$2,000.00 on the purchase of resale homes by first time home buyers if the Agreement of Purchase of Sale was signed after December 13<sup>th</sup>, 2007.

To be eligible the purchaser must be at least eighteen years of age, must apply for the refund within eighteen months of the transfer, must occupy the home as his or her principal residence within nine months of closing, and must not have owned a home, or have any ownership interest in a home, anywhere in the world. The spouse of the purchaser of the home cannot have owned a home (or any ownership interest in a home) anywhere in the world while her or she was the purchaser's spouse.

The rebate will not be available until the proposed amendments have been passed by the Legislature and Royal Assent has been given. In the meantime LTT must be paid at the time of registration. A LTT refund application is available on the Ministry's website ([www.rev.gov.on.ca](http://www.rev.gov.on.ca) form 0300 (2007/12)). The completed Affidavit together with the copy of the Registered Deed/Transfer and a copy of the Statement of Adjustments should be mailed to the Ministry, which will retain the refund request for processing, if the proposed amendments become law. ■

*Lawrence Bremner practises Real Property Law at Gowling Lafleur Henderson LLP, and can be contacted at: One Main Street West  
Hamilton, Ontario, L8P 4Z5  
Tel: 905-540-3265  
Fax: 905-523-2528  
[Larry.bremner@gowlings.com](mailto:Larry.bremner@gowlings.com)*