

# KEEPING CURRENT

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## Mortgage provided by corporate borrower with apparent authority is not a “fraudulent instrument” (*Froom v. LaFontaine*)

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The Ontario [Land Titles Act](#) (“[LTA](#)”) provides that a registered mortgage that is determined to be a fraudulent instrument is void and may be deleted from title. This provision is commonly used in circumstances where an imposter has posed as a mortgagor in order to secure funds from a lender without the knowledge of the true owner. Where the borrower is a corporation, however, the issue of whether the corporation was fraudulently represented may be less clear.

In *Froom v. Lafontaine*, [2023 ONCA 519](#), the Court of Appeal affirmed that a mortgage is not a “fraudulent instrument” under the [LTA](#) even if it was obtained on the basis of fraudulently misappropriated corporate authority.

The case involved a property in Toronto that was purchased in the name of a corporation (“128 Ontario”) in 2003. The individual owner of 128 Ontario (AF) was the sole registered director and officer and held all the issued shares.

AF lived in the property until 2008, when he was convicted and incarcerated in the United States in connection with

various healthcare fraud offences. AF did not return to Canada thereafter.

In 2011, AF’s former spouse (SL)—from whom he was not divorced—arranged for a change notice to be registered showing that she was the sole officer and director of 128 Ontario. SL also took steps to take over the corporation’s bank accounts. A document showing that SL acquired 100 shares of 128 Ontario was allegedly forged.

In 2013, 128 Ontario commenced an application at SL’s behest for possession of the property, which was occupied by AF’s girlfriend and their daughter. In response, AF commenced a proceeding to obtain a divorce from SL and a declaration that he owned 128 Ontario, along with other relief relating to the dissolution of the marriage.

In August 2014, 128 Ontario obtained a mortgage from a private lender. The mortgage was initially for \$100,000, but was later increased to \$300,000. SL signed the mortgage documents on behalf of 128 Ontario and personally guaranteed the mortgage. In the sworn

declaration for the mortgage, SL represented that she was unaware of any other claim or interest in respect of the property, without disclosing the ongoing family law proceedings. The mortgage was renewed and amended several times thereafter.

Default in payment of the mortgage occurred in March 2019, and the lender commenced enforcement proceedings against 128 Ontario and SL.

In 2021, the lender brought a motion for summary judgment against 128 Ontario and SL to enforce the mortgage and guarantee. SL supported the lender's motion.

In response, AF and 128 Ontario took the position that the lenders' mortgage was void as it was a "fraudulent instrument" under the [LTA](#) since SL either met the definition of "fraudulent person" or she falsely held herself out in the mortgage instrument to be the registered owner of the property. AF argued that the lender was in the best position to prevent fraud and had failed to exercise due diligence since it did not take steps to investigate the use or occupancy of the property and did not appear to have obtained an appraisal.

The lender's motion for summary judgment was [granted](#) and it obtained judgment under the mortgage and a writ of possession for the property.

On appeal, 128 Ontario argued amongst other things that the motion judge erred in finding that the charge was not a "fraudulent instrument" under the [LTA](#).

[Section 1](#) of the [LTA](#) defines a "fraudulent instrument" as an instrument,

- (a) under which a fraudulent person purports to receive or transfer an

estate or interest in land,

- (b) that is given under the purported authority of a power of attorney that is forged,

- (c) that is a transfer of a charge where the charge is given by a fraudulent person, or

- (d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument.

A "fraudulent person" is defined in [section 1](#) of the [LTA](#) to mean a person who executes or purports to execute an instrument if,

- (a) the person forged the instrument,

- (b) the person is a fictitious person, or

- (c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument.

128 Ontario took the position that SL was a "fraudulent person" because she fraudulently held herself out to the lender to be an officer and director of 128 Ontario whereas AF was the sole officer and director. 128 Ontario argued because SL fraudulently took control of 128 Ontario, she did not have authority to act for it, and the actions she took in its name had the effect of transforming 128 Ontario or herself into a "fraudulent person".

In this regard, the case was essentially about whether the court should invalidate an instrument on the basis that a party fraudulently misappropriated corporate authority.

The Court of Appeal accepted that the definition of "fraudulent person" in [section 1](#) of the [LTA](#) was broad enough to include a corporation. However,

128 Ontario did not meet the statutory requirements in the circumstances of the transaction.

Firstly, 128 Ontario did not “forge” the mortgage instrument. The Court of Appeal agreed with an earlier decision of the Ontario Divisional Court, *1168760 Ontario Inc. v. 6706037 Canada Inc.*, [2019 ONSC 4702 \(CanLII\)](#), which determined that forgery was an issue of “authenticity, not truth” and held that the mortgage instrument was not forgery.

In the circumstances, SL had apparent authority to act on behalf of 128 Ontario and there was no question as to the authenticity of the documents she executed, including her signature on the acknowledgment and direction authorizing the registration of the mortgage. There was no evidence that the lender ought to have known that SL lacked authority to enter into the transaction or that the corporate documents she executed should have alerted the lender to the alleged fraud.

The Court of Appeal noted that this was different from cases where an imposter signed the documents (e.g. *Lawrence v. Maple Trust Company*, [2007 ONCA 74 \(CanLII\)](#)). SL was not an imposter.

Secondly, 128 Ontario, acting through SL, was not a “fictitious person,” which the Court of Appeal affirmed as meaning “a fabricated or otherwise non-existent person”. 128 Ontario was a valid and subsisting corporation. It was not posing as a non-existing entity when the mortgage was registered. In the court’s view, 128 Ontario’s position would undermine the indoor management rule by placing an onus on those conducting business with a corporation to look behind the apparent authority of a person held out by the corporation to conduct such business.

Lastly, 128 Ontario did not hold itself out to be the owner of the property while knowing it was not. There was no dispute that 128 Ontario was the registered owner of the mortgage property. SL never claimed that she owned the condominium. Her claim was that she was a director of the corporate owner. 128 Ontario therefore did not falsely hold itself out—it held itself out as something that it actually was. The Court of Appeal affirmed that the concept of “holding out” does not capture an individual who has apparent authority to act for the registered corporate owner.

The appeal was therefore [dismissed](#). The matrimonial proceedings between SL and AF will presumably continue.

The case shows that the issue of whether a corporate borrower or other person has the proper authority to enter into a mortgage is distinct from the issue of whether they were a fraudulent person. There was no evidence showing that the lender was aware of any issues regarding the authority of 128 Ontario or SL to enter into the mortgage. 128 Ontario could not avail itself of the provisions of the [LTA](#) to avoid liability under the mortgage.

### Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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