

Practice Resource

The law of property in BC might not give your clients the result they expect

Lin v. CIBC Mortgages Inc.

February 2016

The decision in [Lin v. CIBC Mortgages Inc.](#), 2015 BCCA 518 (December 18, 2015) challenges standard practices for real estate conveyancing in British Columbia and brings into question the circumstances, if any, in which a lender, or the lender's counsel, should be prepared to advance funds to a borrower's lawyer or notary on their undertaking to pay out and register a discharge of prior encumbrances.

In this case, Hsui-Wen Lin and Min-Sheng Tang sought to refinance their house with a new mortgage from CIBC Mortgages Inc. in the amount of \$520,000. These funds were to be used to pay off their existing mortgage and certain small unsecured debts, with the balance going to the borrowers. CIBC advanced the funds to its own notary, who in turn forwarded them to the borrowers' notary to be used according to the mortgage agreement. The borrowers' notary undertook to pay off the existing mortgage in exchange for which CIBC would receive a valid first charge against the borrowers' home, free from prior encumbrances. The borrowers received approximately \$78,000 from their notary, who confirmed that she had paid out the funds required to discharge the existing mortgage.

The borrowers' notary subsequently disappeared, and it came to light that no funds were paid to the existing first mortgage holder.

At trial, the borrowers were held to have received no benefit from the funds advanced to their notary, that no consideration was received for the CIBC mortgage, that it was not a valid encumbrance and that the CIBC mortgage should be struck from the borrowers' title.

The Court of Appeal dismissed CIBC's appeal and held that the validity of the bank's mortgage is governed by principles of property law, rather than that of agency. The court held that the mortgage was never advanced to the point where the borrowers had the right to call for the funds for their own benefit and therefore the funds remained the property of CIBC. While the borrowers received a portion of the funds, the entire amount of the mortgage had been advanced in escrow and the condition for their release had not been met.

It remains to be seen how this decision will be applied or interpreted. Instances of theft by lawyers and notaries are rare, and compensation programs exist for both. For lawyers, trust protection coverage will pay up to \$300,000 of stolen funds. However, if a lawyer's client still suffers a shortfall, that lawyer may be at risk of a claim in light of this decision.

Lawyers may wish to consider the following suggestions to help protect themselves and their lender clients:

1. Consider warning clients of the potential risk associated with transfer of funds to opposing counsel or notaries.
2. Review all lenders' standard form Instructions to Solicitor, Requisition of Funds and Standard Opinions. Consider whether you can certify or opine on whether your lender client has any security for an advance where there are outstanding conditions. Think

about whether you wish to give such opinions, especially if you personally cannot control the performance of the conditions.

3. Consider obtaining consents for disclosure of personal information from opposing parties. If a lender's lawyer assumes responsibility for direct payouts of pre-existing charges, then the lender's lawyer will need consent to obtain mortgage payout information.
4. Consider whether to recommend closing of certain transactions with title insurance or through some other mechanism, such as escrow, that will protect your client.
5. If you are engaged in any practice, real estate or otherwise, that exposes you to claims exceeding the compulsory policy's \$1 million limit, consider buying [excess insurance](#).

If you have any questions or comments about this notice, please contact [Dave Bilinsky](#), Practice Advisor.