CASE NOTES AND COMMENTS

Suspicion and Straw Buyer Mortgage Fraud — *Toronto Dominion Bank v. Whitford*

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1. INTRODUCTION

> Credit, not distrust, is the basis of commercial dealings; mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communication is no more based on the supposition of fraud than it is on the supposition of forgery.[1]

This passage about the common law on fraud, articulated by Lord Bowen in 1883, and later applied by the Supreme Court of Canada,[2] is not free from controversy. A 2020 lower court decision has come perilously close to requiring a supposition of fraud, at least for banks lending on mortgages. We encourage the reader, here at the outset, to remember the principled position that there is a need for certainty in commerce.[3] There should be few instances where a person is relieved of compliance with the terms of a contract they signed.[4]

The decision alluded to is *Toronto Dominion Bank v. Whitford*, a case involving straw buyer mortgage fraud before the Court of Queen's Bench of Alberta.[5] It challenges the prevailing view in Canadian law that the relationship between a bank and customer is purely commercial,[6] and the corollary that a

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1 *Sanders Brothers v. Maclean* (1883), 11 Q.B.D. 327 (Eng. Q.B.) at 343 *per* Bowen L.J.

2 *M.A. Hanna Co. v. Provincial Bank of Canada*, 1934 CarswellNB 30, [1935] 1 D.L.R. 545, [1935] S.C.R. 144 (S.C.C.) at 169 [S.C.R.] *per* Cannon J. (concurring).

3 *Marvco Color Research Ltd. v. Harris*, 1982 CarswellOnt 142, 1982 CarswellOnt 744, 20 B.L.R. 143, 141 D.L.R. (3d) 577, 26 R.P.R. 48, 45 N.R. 302, [1982] 2 S.C.R. 774, [1982] S.C.J. No. 98 (S.C.C.) at 786 [S.C.R.] *per* Estey J.

4 Paul Mitchell, "Illiteracy, Sophistication and Contract Law" (2005) 31:1 Queen's L.J. 311 at 326.

5 *Toronto Dominion Bank v. Whitford*, 2020 ABQB 802, 2020 CarswellAlta 2589, 24 Alta. L.R. (7th) 227, 71 C.C.L.T. (4th) 211, 24 R.P.R. (6th) 184, [2021] 8 W.W.R. 291 (Alta. Q.B.) *per* Dario J. [*Whitford*].

bank does not have a positive duty to prevent mortgage fraud by its customers or third parties.[7] The Court in *Whitford* re-examined the law on straw buyers,[8] proceeding on the assumption that a bank is best-positioned to discover mortgage fraud.[9] In the end, the Court recognized a duty owed by a bank to a borrower when a mortgage is Canada Mortgage and Housing Corporation (CMHC) insured. This duty requires a bank to inquire about suspicious or questionable behaviour,[10] and the Court indicated that the scope of the duty to the borrower might be expanded to impose additional obligations in the future.[11]

Given the prevalence of CMHC insured mortgages — we estimate that as many as one in six residential bank-issued mortgages in Canada is CMHC insured[12] — the ramifications of *Whitford* should be carefully considered.

2. FACTS

Whitford involved a pattern typical of straw buyer mortgage fraud, with Mr. Whitford as the straw buyer.[13] Two fraudsters, a then-acquaintance and a

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6 See e.g. *First Calgary Financial Savings & Credit Union Ltd. v. Meadows*, 1989 CarswellAlta 45, 94 A.R. 286, 66 Alta. L.R. (2d) 7 (Alta. Q.B.) at para. 24 [*Meadows*]; affirmed 1990 ABCA 302, 1990 CarswellAlta 156, 109 A.R. 220, 76 Alta. L.R. (2d) 176, 73 D.L.R. (4th) 705 (Alta. C.A.).

7 See e.g. *Isaacs v. Royal Bank*, 2010 ONSC 3527, 2010 CarswellOnt 4182, [2010] O.J. No. 2620 (Ont. S.C.J.) at para. 39; affirmed 2011 ONCA 88, 2011 CarswellOnt 514 (Ont. C.A.) [*Isaacs*]; and *Farm Credit Canada v. Pacific Rockyview Enterprises Inc.*, 2020 ABQB 357, 2020 CarswellAlta 1051 (Alta. Q.B.) at para. 89; affirmed *Farm Credit Canada v. Chan*, 2021 ABCA 168, 2021 CarswellAlta 1167, 28 Alta. L.R. (7th) 255 (Alta. C.A.): "Negligent lending is not a cause of action in Canada," aff'd. by 2021 ABCA 168, 2021 CarswellAlta 1167. Similar views prevail in jurisprudence from the United Kingdom and the United States; see e.g. *Golden Belt 1 Sukuk Co. B.S.C.(c) v. BNP Paribas*, [2017] EWHC 3182 (Comm.), [2018] 3 All E.R. 113 at para. 166: "there is in general no duty to prevent the fraud of a third party"; and *Sullivan v. MERS, Inc.*, 30 N.Y.S.3d 112, 139 A.D.3d 419 (1st Dept., 2016) at 114 [N.Y.S.]: "claims for negligent underwriting are unavailing, as mortgage lenders owe no duty to property owners to prevent their properties from being the subject of fraudulent real estate transactions."

8 *Whitford*, *supra* note 5 at para. 6.

9 *Ibid.* at para. 174.

10 *Ibid.* at paras. 150, 158-159, 178.

11 *Ibid.* at paras. 158-159.

12 For an explanation of CMHC mortgage insurance see section 4(b) of this article. Canada Mortgage and Housing Corporation, "Residential Mortgage Industry Report" (Ottawa: CMHC, 10 September 2020) at 11 [Residential Mortgage Industry Report]; and Geoff Zochodne, "Private-sector mortgage insurers say they're gaining market share in wake of CMHC tightening rules" *Financial Post* (18 January 2021), online < www.financialpost.com > . Taken together, these sources suggest that, in 2019, 40% of all bank-issued mortgages were insured (down from 54% in 2016), and, as of 2020, approximately 46% of those are CMHC insured. The proportion of CMHC insured mortgages may differ from time to time and depending on the type of lender.

13 *Whitford*, *supra* note 5 at paras. 4-5. A straw buyer is an individual who becomes involved

realtor, persuaded Mr. Whitford to take part in buying a home.[14] It took time and some convincing before he agreed.[15] The acquaintance told Mr. Whitford that it would be beneficial to be involved in buying the property. Specifically, he told Mr. Whitford that: he would pay Mr. Whitford $5,000 (which he did); Mr. Whitford's credit rating would increase from having a mortgage; Mr. Whitford would only have the mortgage for one year; the acquaintance would cover the costs associated with the property; and after one year the property would be purchased back from him. Mr. Whitford did not ask many, if any, questions about how the deal would operate.[16]

The realtor opened a deposit account and applied for a mortgage in Mr. Whitford's name through the realtor's sister-in-law, who was an employee of the Toronto Dominion Bank (TD).[17] The realtor provided TD falsified notices of assessment that inflated Mr. Whitford's income thereby significantly increasing the likelihood of the mortgage being approved. TD allowed the realtor to take the mortgage application and related mortgage documents to Mr. Whitford for signature, without the TD employee having met him. The Court found that Mr. Whitford was unaware of the realtor's falsifications.[18]

In November 2007, TD advanced funds for the purchase of the property and registered a high-ratio mortgage, insured by CMHC, on title. Mr. Whitford was unaware that the purchase price of the property for which he now had a mortgage was artificially inflated above its market value (thus, maximizing the fraudsters' profits). The mortgage defaulted in January 2009. In 2011, the Court ordered the sale of the property, and it sold for about 60% of the 2007 purchase price, leaving a sizeable deficiency for TD to recover from Mr. Whitford.[19]

3. THE COURT'S DECISION

TD sued Mr. Whitford for breach of contract rather than fraud.[20] In 2015, a Master denied TD's application for summary judgment,[21] and the case eventually proceeded to trial. On December 30, 2020, the Court issued reasons

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in a real estate transaction and has a mortgage taken out in their name. The role of a straw buyer is discussed in detail in section 4(a) of this article. We also commend to the reader the following as primers on straw buyer mortgage fraud: Jeffrey L. Oliver, "Straw Buyer Mortgage Fraud and the BIA: Real Estate Boom to Bankruptcy Bust?" (2012) Ann. Rev. Insol. L. 273 [Real Estate Boom]; and an American article, Courtney J. Linn, "The Way We Live Now: The case for mandating fraud reporting by persons involved in real estate closings and settlements" (2009) 16:1 J. Fin. Crim. 7 at 11ff.

14 *Whitford*, *supra* note 5 at para. 1.

15 *Ibid*. at paras. 10, 25.

16 *Ibid*. at para. 10.

17 *Ibid*. at para. 31.

18 *Ibid*. at paras. 13-16, 21, 25.

19 *Ibid*. at paras. 2, 14, 34, 57.

20 *Ibid*. at para. 56.

for judgment which are the subject of this article. The Court found that TD succeeded in establishing its claim against Mr. Whitford for breach of contract,[22] but relieved Mr. Whitford of liability (in whole or in part) on two bases.

First, the Court applied the doctrine of *ex turpi causa non oritur actio* (commonly shortened to *ex turpi causa*), meaning "no right of action arises from a base cause."[23] The doctrine prevents a party from profiting from its own wrongdoing[24] and requires the court to consider a plaintiff's conduct and culpability relative to the defendant. If a plaintiff is intentionally fraudulent or wilfully blind then *ex turpi causa* is triggered.[25] In *Whitford*, the Court concluded that TD's employee was "far more blameworthy" than Mr. Whitford in the fraud.[26] It held that TD's employee was wilfully blind to the fraud while Mr. Whitford was merely negligent in his involvement.[27] The Court went on to conclude that TD was vicariously liable for the acts of its employee.[28] Therefore, the loss remained where it lay, and TD was precluded from recovering on the mortgage against Mr. Whitford;[29] however, the Court ordered Mr. Whitford to repay the $5,000 profit that he received for participating in the scam and to pay costs to TD of $15,000.

Second, the Court held in the alternative that, if it were in error on the *ex turpi causa* defence (which relieved Mr. Whitford of mortgage liability), then the Court would find TD negligent. The Court decided that it was time to recognize a novel duty of care owed by a bank to a borrower where a mortgage is CMHC insured, which appears to require a bank to inquire about suspicious or questionable behaviour.[30] The Court found that TD failed to meet that standard and would have, as alternative relief, set off damages for such negligence against the mortgage debt.[31] In this regard, the Court apportioned liability to TD and Mr. Whitford at 65% and 35%, respectively.[32] Inasmuch as we disagree with

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21 *Toronto Dominion Bank v. Whitford* (24 September 2015), Calgary 0901-06163 (Alta. Master).

22 *Whitford*, *supra* note 5 at para. 57.

23 See e.g. *Hall v. Hebert*, 1993 CarswellBC 92, 1993 CarswellBC 1260, EYB 1993-67102, 78 B.C.L.R. (2d) 113, 15 C.C.L.T. (2d) 93, 101 D.L.R. (4th) 129, 45 M.V.R. (2d) 1, [1993] 4 W.W.R. 113, 26 B.C.A.C. 161, 152 N.R. 321, [1993] 2 S.C.R. 159, 44 W.A.C. 161, [1993] S.C.J. No. 51 (S.C.C.) at 209 [S.C.R.] *per* Cory J. (concurring) [*Hall*].

24 *Ibid.* at 172ff *per* McLachlin J. (as she then was).

25 Subject to some exceptions. See *Tran v. Kerr*, 2014 ABCA 350, 2014 CarswellAlta 1960, 584 A.R. 306, 6 Alta. L.R. (6th) 213, [2015] 1 W.W.R. 70, 623 W.A.C. 306, [2014] A.J. No. 1189 (Alta. C.A.) at paras. 32-33; and *Whitford*, *supra* note 5 at para. 83.

26 *Whitford, supra* note 5 at para. 112.

27 *Ibid.* at paras. 107-109.

28 *Ibid.* at paras 113-24.

29 *Ibid.* at para. 252.

30 *Ibid.* at para. 150, 158-159, 178.

31 *Whitford*, *ibid.* at para. 172ff.

32 *Ibid.* at paras. 212, 253.

many aspects of the reasons for judgment, including the Court's conclusions on *ex turpi causa*, this article focuses on the novel duty of care.

4. ANALYSIS

The novel duty which the Court found that a bank owes a borrower obtaining a CMHC insured mortgage calls for specific attention. In our view, this duty of care is unwarranted and unsupported at law. In the analysis that follows, we provide background commentary as it relates to the culpability of the straw buyer and the bank employee for context. These comments aim to focus discussion on the novel duty of care. We then provide an overview of mortgage insurance — as it is central to the Court's decision — before assessing the novel duty of care itself.

(a) The Straw Buyer's Culpability

Due to the purposefully confusing and chaotic nature of straw buyer mortgage fraud schemes, the level of involvement of a straw buyer can vary. Straw buyers range from the truly innocent (i.e. victims of identity theft), to the naïve, to the knowing participant in the fraud (who might help fraudsters buy and sell a property several times in order to inflate the value).[33] At the end of the day, the fraudsters abscond with the profits from the sale and the straw buyer is left with the mortgage liability.

The Court described Mr. Whitford as careless, naïve, foolhardy, overly trusting and not innocent of wrongdoing,[34] but concluded that he was only negligent, not wilfully blind.[35] Although the Court acknowledged that a person's naïveté does not prevent a finding of wilful blindness, that comment was in the context of TD's employee rather than regarding Mr. Whitford.[36] With respect, the Court's conclusion that Mr. Whitford was less than wilfully blind is irreconcilable with its findings of fact. Wilful blindness occurs when someone "has become aware of the need for some inquiry [but] declines to make the inquiry because he does not wish to know the truth."[37]

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[33] See Real Estate Boom, *supra* note 13, citing *Rabi v. Rosu*, 2006 CarswellOnt 6685, 83 O.R. (3d) 37, 277 D.L.R. (4th) 544, 48 R.P.R. (4th) 1, [2006] O.J. No. 4348 (Ont. S.C.J.), which involved a different type of mortgage fraud; and Jay Somerset, "Sold From Under Us", *Maclean's* (16 January 2006) at 39-40 [Sold From Under Us].

[34] *Whitford*, *supra* note 5 at paras. 47, 201.

[35] *Ibid.* at paras. 109-111. The Court acknowledged that one reading of the facts *might* support a finding that Mr. Whitford was wilfully blind, but did not make such a finding.

[36] *Ibid.* at para. 105.

[37] *R. v. Williams*, 2003 SCC 41, 2003 CarswellNfld 203, 2003 CarswellNfld 204, REJB 2003-47357, 231 Nfld. & P.E.I.R. 1, 176 C.C.C. (3d) 449, 13 C.R. (6th) 240, 230 D.L.R. (4th) 39, 686 A.P.R. 1, 208 N.R. 235, [2003] 2 S.C.R. 134, [2003] S.C.J. No. 41 (S.C.C.) at para. 27, as quoted in *Whitford*, *ibid.* at para. 102.

It is inconceivable to suggest that Mr. Whitford might have been unaware of the need to make inquiries. He earned $5,000 for his involvement.[38] He also signed mortgage documents without reading them or asking questions, and without legal advice.[39] He gave the realtor information about his bank accounts with another bank, expecting the realtor to pass that information along to TD to obtain a mortgage.[40] Mr. Whitford also admitted that it took some convincing before he agreed to participate.[41] In similar circumstances, a Master explained:

> For several hours of their time, and no risk, they [the straw buyers] received $4000.00. Surely, they must have wondered why they were receiving this sum for so little effort on their part. ***If they were not suspicious that what they were doing was wrong, they should have been.*** Participants in a scheme of this kind cannot then ask the court that it refuse to enforce the contract that they signed on the basis of its illegality . . . [emphasis added].[42]

Similarly, Constable Terry Schmidt of the RCMP's Commercial Crime Section in Alberta explained the role of a straw buyer as follows: "***The buyer usually knows something is illegal*** but is led to believe it's just a legal loophole. So he signs mortgage papers, collects a small cheque, and walks away believing his part in the deal is over . . ." [emphasis added].[43]

Based on the facts as reported, it was not open to the Court to find that Mr. Whitford was merely negligent. Mr. Whitford must have been suspicious before obtaining the mortgage but did not wish to know the truth. The Court's suggestion that Mr. Whitford's suspicions were only aroused at a point later on, when he actually began to make inquiries, is not plausible.[44] Mr. Whitford chose to make inquiries once his relationship with his acquaintance began to deteriorate.[45] There were several reasons for Mr. Whitford not to make inquiries so long as the relationship was cordial, including that the acquaintance was a source of employment income for Mr. Whitford,[46] and that the acquaintance was a professional athlete of whom Mr. Whitford was fearful.[47]

While the Court was evidently concerned that Mr. Whitford was inexperienced and unsophisticated,[48] that ought not to have relieved him of

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[38] *Whitford, supra* note 5 at para. 4.

[39] *Ibid.* at paras. 10-11.

[40] *Ibid.* at para. 11. We can find no support anywhere in the Court's reasons to substantiate the conclusion at para. 11 that Mr. Whitford did not understand what mortgage was other than Mr. Whitford's own assertion described at para. 243.

[41] *Ibid.* at para. 251.

[42] *MCAP Service Corp. v. Molina-Tan*, 2009 ABQB 472, 2009 CarswellAlta 2333, 503 A.R. 1 (Alta. Q.B.) at para. 53 [*Molina-Tan*].

[43] Sold From Under Us, *supra* note 33.

[44] *Whitford*, *supra* note 5 at para. 34.

[45] *Ibid.* at para. 34.

[46] *Ibid.* at paras. 10, 110.

[47] *Ibid.* at para. 5.

liability or the responsibility to protect or inform himself. The Court's warning that straw buyer mortgage fraud "will continue because the courts have allowed them in the name of commercial efficacy" ignores the agency that a straw buyer possesses.[49] Straw buyer mortgage fraud cannot exist without the straw buyer. Inasmuch as it may be tempting to assume that a bank is best-placed to guard against fraud,[50] to require a bank to be on guard for fraud (when the borrower is not or is wilfully blind) is perilously close to employing a one-sided supposition of fraud.

(b) TD's Culpability

Without a doubt, the conduct of TD employee exhibited several deficiencies from the expected standard of conduct. She received the request for a mortgage and a new bank account for Mr. Whitford, through a realtor (her sister-in-law). In this regard, TD's employee received from the realtor notices of assessment for Mr. Whitford and other financial information, which had been materially altered. These documents were used to complete the mortgage application, which TD's employee let the realtor sign with Mr. Whitford (rather than meet directly with Mr. Whitford herself). TD's employee further interacted with CMHC to process the mortgage application, as it was a high ratio mortgage. She deviated from TD policies and procedures respecting mortgage applications and opening personal deposit accounts.

In considering the defence of *ex turpi causa*, the Court assessed whether TD's employee was fraudulent or wilfully blind, or only negligent or innocent to the scam. In finding she was at least willfully blind (if not intentionally fraudulent), the Court highlighted her noncompliance with TD's practices and procedures and her reliance on the realtor. The Court concluded that given the "professional responsibilities resting on a banker and the extent to which [TD's employee] turned a blind eye to numerous red flags," her conduct was far more blameworthy than that of Mr. Whitford. In that respect, we disagree. TD's employee did not intentionally close her eyes to the facts or participate in a scam: the evidence does not support such a finding. She was negligent, no doubt, and that fault was properly attributed to TD; however, when compared to the circumstances facing Mr. Whitford, who had knowledge of the $5,000 payment, the fact that he was not purchasing the home, and the presentation of documents through a third party, it cannot be said that TD was more culpable.

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[48] *Ibid*. at para. 173.

[49] *Ibid*. at para. 170.

[50] *Ibid*. at para. 173, quoting *Royal Bank of Canada v. Azizuddin*, 2015 ABQB 102, 2015 CarswellAlta 327, 28 Alta. L.R. (6th) 201 (Alta. Q.B.) at para. 66 *per* Macleod J.; additional reasons 2015 ABQB 683, 2015 CarswellAlta 2028, 25 Alta. L.R. (6th) 156 (Alta. Q.B.).

(c) Understanding CMHC and mortgage insurance

Although the presence or absence of insurance is not normally an appropriate consideration when determining liability in tort,[51] it is difficult to escape the fact that mortgage insurance is a crucial fixture of the statutory scheme and warrants discussion.[52] In this regard, the Court in *Whitford* erred by taking an incomplete and inaccurate view of the applicable scheme. In concluding that it was necessary for the Court to impose liability on TD as a way to deter "lax practices which facilitate the commission of fraud,"[53] the Court ran roughshod over the careful balancing of commercial relationships set out under a complex and longstanding set of statutes and regulations.

By way of background, CMHC was established in 1946 as a Crown corporation, then-named the Central Mortgage and Housing Corporation,[54] with the aim of providing favourable mortgage rates to home buyers after World War II.[55] It bears noting that, at the time, Canadian banks were not allowed to lend money for mortgages; most mortgage debt was held by trust, loan and insurance companies.[56] It was not until 1954 that banks were permitted to engage in mortgage lending and, even then, they were only allowed to lend on one type of mortgage: an insured mortgage (then new in Canada).[57] Parliament required

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[51] *Dobson (Litigation Guardian of) v. Dobson*, 1999 CarswellNB 249, 1999 CarswellNB 248, (*sub nom.* Dobson v. Dobson) 214 N.B.R. (2d) 201, 45 C.C.L.T. (2d) 217, 33 C.P.C. (4th) 217, 174 D.L.R. (4th) 1, 44 M.V.R. (3d) 1, 547 A.P.R. 201, 242 N.R. 201, [1999] 2 S.C.R. 753, [1999] S.C.J. No. 41 (S.C.C.) at para. 74 *per* Cory J., quoting *Romford Ice & Cold Storage Co. v. Lister* (1956), [1957] A.C. 555, [1957] 1 All E.R. 125, [1956] 2 Lloyd's Rep. 505 (U.K. H.L.) at 133 [All E.R.]; see also *Tolko Industries Ltd. v. Railink Ltd.*, 2003 ABQB 349, 2003 CarswellAlta 559, 333 A.R. 270, 14 Alta. L.R. (4th) 388, 32 C.P.C. (5th) 268, [2003] A.J. No. 529 (Alta. Q.B.) at para. 11 *per* Slatter J. (as he then was); affirmed 2003 ABCA 332, 2003 CarswellAlta 1607, 346 A.R. 78, 21 Alta. L.R. (4th) 260, 38 C.P.C. (5th) 66, 320 W.A.C. 78 (Alta. C.A.).

[52] See the discussion of the relevance of insurance on common law duties of care in the United Kingdom in John Murphy, "Contemporary Tort Theory and Tort Law's Evolution" (2019) 32:2 Can. J.L. & Juris. 413 at 417-4118.

[53] *Whitford*, *supra* note 5 at para. 172.

[54] *Central Housing and Mortgage Corporation Act*, S.C. 1945, c. 15, s. 3, renamed as the Canada Mortgage and Housing Corporation in 1979 under *An Act to amend the National Housing Act and the Central Mortgage and Housing Corporation Act and to make other related amendments*, S.C. 1978-79, c. 16, s. 12.

[55] See memorandum from Patricia Begin, PRB99-1E, "Housing and Parliamentary Action" (Ottawa, Library of Parliament, Parliamentary Research Branch: January 1999); see also Catherine Jill Wade, *Wartime Housing Limited, 1941 — 1947; Canadian Housing Policy at the Crossroads* (M.A. Thesis, University of British Columbia Department of History, 1984), online: < www.library.ubc.ca > .

[56] Jane Londerville, "Mortgage Insurance in Canada: Basically sound but room for improvement" (November 2010), *MacDonald-Laurier Institute* at 8, online: < www.macdonaldlaurier.ca > .

[57] *National Housing Act*, S.C. 1953-54, c. 23, s. 3 [NHA (1954)]; and *Bank Act*, S.C. 1953-54, c. 48, s. 75(2)(d); see also J.V. Poapst, "The National Housing Act, 1954" (1956) 22:2

CMHC to establish a mortgage insurance reserve fund to receive insurance premiums and to pay out mortgage insurance claims.[58] It was understood from the outset that mortgage insurance was for the benefit of the bank, not the borrower.[59]

Now nearly 70 years later, although the mortgage landscape has changed,[60] the goal of ensuring greater accessibility to home financing remains the same.[61] It is still true that, under the NHA, mortgage insurance is for the benefit of the bank,[62] even if the cost is often passed along to the borrower.[63] The Court in *Whitford* took issue with that fact.[64]

In so doing, the Court failed to recognize that providing a bank the benefit of mortgage insurance was a deliberate choice made by Parliament in 1954 — a choice which has been reaffirmed with re-enactments of, and revisions to, the legislation since.[65] Parliament does not speak in vain and must not be ignored.[66]

Can. J. Econ. & Pol. Sci. 234 at 238-241; and Brian H.J. MacDonald, *The Canadian Chartered Banks and the Federal Government: An Analysis of the 1954 and 1967 Bank Act Revisions* (M.A. Thesis, University of British Columbia Department Political Science, 1974) at 30 <www.library.ubc.ca> [*The Canadian Chartered Banks and the Federal Government*].

58 NHA (1954), *supra* note 57, s. 10.

59 See e.g. *House of Commons Debates*, 22nd Parl., 1st Sess. No. 1 (16 December 1953) at 1008.

60 For example, in 1967, Canadian banks were permitted to enter into the conventional mortgage market; *Bank Act*, S.C. 1966-67, c. 87, s. 75(3); see also technical report from Charles Freedman, 0713-793181, "The Canadian Banking System" (Ottawa, Bank of Canada: March 1998) at 22. Likewise, in 1992, banks were permitted to diversity their services and acquire trust companies; *Bank Act*, S.C. 1991, c. 46, s. 29 [*Bank Act*]; see also M.H. Ogilvie, "What's Really New in the New *Bank Act*?" (1993) 25:2 Ottawa L. Rev. 385 at 390; and David John Gordon Pringle, *The 1998 Canadian Bank Merger Decision and the 2008 Financial Crisis: Factual and Counterfactual Investigations*, (D.Phil. Thesis, Carleton University Department of Public Policy, 2018) at 97, online: <www.curve.carleton.ca>.

61 *National Housing Act*, R.S.C. 1985, c N-11, s. 3 [NHA], as acknowledged in *Whitford*, *supra* note 5 at para. 150.

62 NHA, *supra* note 61, s. 8(2).

63 See generally Ministry of Finance, "Regulatory Impact Analysis Statement" (18 December 2020) in *Canada Gazette Part II*, vol. 155, no. 1 at 481ff [Regulatory Impact Analysis Statement] regarding the *Regulations Amending the Eligible Mortgage Loan Regulations*, SOR/2020-296.

64 *Whitford*, *supra* note 5 at para. 164.

65 NHA (1954), *supra* note 57, ss. 6-9; *An Act to amend the National Housing Act, 1954*, S.C. 1968-69, c. 45, ss. 3, 4; NHA (as enacted), *supra* note 61, s. 7ff; and *An Act to amend the National Housing Act and the Canada Mortgage and Housing Corporation Act and to make a consequential amendment to another Act*, S.C. 1999, c. 27, s. 8(2): "For lenders, the purpose of insuring housing loans is to indemnify lenders in the event of default by borrowers."

66 *Québec (Procureur général) c. Carrières Ste-Thérèse ltée*, 1985 CarswellQue 109, 1985 CarswellQue 85, (*sub nom.* P.G. Quebec c. Carrières Ste-Thérèse Ltée) 13 Admin. L.R.

Without hyperbole, mortgage insurance protection has been afforded to banks for as long as banks have been allowed to lend on mortgages in Canada. Providing a guarantee via mortgage insurance was a necessary condition for the federal government to allow banks to enter the arena of mortgage lending at all.[67] As the Master in *Toronto-Dominion Bank v. 294341 Alberta Ltd.* correctly explained:

> It should be self-evident from the N.H.A. that ***Parliament wanted to entice private lenders to lend money for construction of residences***, to a greater extent than they would otherwise be doing so. The carrot to achieve that end was for the Crown to insure any loans made. ***If the Crown, through the Corporation [CMHC], was prepared to insure the loans private lenders would have a no lose situation.*** They would not be at risk if the homeowner defaulted [emphasis added].[68]

The fact that a bank benefits from mortgage insurance is also relevant elsewhere in the statutory scheme. Mortgage insurance is important to a bank in meeting its obligation under the *Bank Act* to maintain adequate capital.[69] In that regard, regulators view mortgage insurance as mitigating the bank's risk and allow it to be taken into account when calculating the bank's capital requirements.[70]

(d) Negligence and the Novel Duty of Care

The *Anns* test,[71] as modified by the Supreme Court of Canada in *Cooper v. Hobart*,[72] creates the framework for determining whether a duty of care is owed

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144, (*sub nom.* Attorney General of Québec v. Carrières Ste-Thérèse Ltée) 20 C.C.C. (3d) 408, 20 D.L.R. (4th) 602, (*sub nom.* A.G. (Que.) v. Carrières Ste-Thérèse Ltée) 59 N.R. 391, [1985] 1 S.C.R. 831, [1985] S.C.J. No. 37 (S.C.C.) at 838 [S.C.R.].

67 *The Canadian Chartered Banks and the Federal Government*, *supra* note 57 at 29. This was in response to thinking at the time, likely informed by the Great Depression, that a bank ought to be self-liquidating in the short term.

68 *Toronto-Dominion Bank v. 294341 Alberta Ltd.*, [1984] A.J. No. 528 at para. 33.

69 *Bank Act*, *supra* note 60, s. 485(1).

70 Office of the Superintendent of Financial Institutions, *Capital Adequacy Requirements Guidelines, Ch. 3 — Credit Risk Standardized Approach* (November 2017) at § 3.1.9, online: <www.osfi-bsif.gc.ca>.; and Office of the Superintendent of Financial Institutions, *Capital Adequacy Requirements Guidelines, Ch. 5 — Credit Risk Mitigation* (November 2017) at § 5.1.2(iii), online: <www.osfi-bsif.gc.ca>; see also Allan Crawford, Césaire Meh & Jie Zhou, "The Residential Mortgage Market in Canada: A Primer" in Bank of Canada, *Financial System Review: December 2013* (Ottawa: Bank of Canada, 2013) at 55: "a lender holding government-backed insured mortgages benefits from the zero risk weight of these mortgages for bank capital purposes."

71 *Anns v. Merton London Borough Council*, [1977] UKHL 4, [1978] A.C. 728, (*sub nom.* Anns v. London Borough of Merton) [1977] 2 All E.R. 492, [1977] 2 All E.R. 118, 121 S.J. 377, [1977] 2 W.L.R. 1024 (U.K. H.L.) [*Anns*].

72 *Cooper v. Hobart*, 2001 CSC 79, 2001 SCC 79, 2001 CarswellBC 2502, 2001 CarswellBC 2503, REJB 2001-26862, 96 B.C.L.R. (3d) 36, 8 C.C.L.T. (3d) 26, 206 D.L.R. (4th) 193, [2002] 1 W.W.R. 221, (*sub nom.* Cooper v. Registrar of Mortgage Brokers (B.C.)) 160

in a particular circumstance. Under the first stage of *Anns*, a court considers the relationship between the parties to determine whether the relationship is sufficiently close and direct, such that it would be fair and just to impose a *prima facie* duty of care.[73] A *prima facie* duty is established by relying on an analogous relationship in which the law already recognizes a duty, or by independently showing proximity and reasonable foreseeability. Even then, under the second stage of *Anns*, a court considers whether there are residual policy considerations that negate the duty.

(i) Stage one: Prima facie duty

When considering analogous relationships, caution is required. In *Livent*, Justices Gascon and Brown warned judges, ''be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship at issue is, in fact, truly the same as or analogous to that which was previously recognized.''[74] Similarly, in *McDonald and Dickson v. TD Bank*, the Ontario Superior Court of Justice observed, ''the mere fact that proximity has been recognized as existing in a relationship for *one* purpose is insufficient to conclude that proximity exists between the same parties for *all* purposes.''[75]

The relationship between TD and Mr. Whitford — that of a lender advancing a CMHC insured mortgage to a customer — is not analogous to the aspects of a banker-client relationship which gave rise to limited duties in the cases cited by the Court in *Whitford*. Those cases involved bankers mishandling a transaction on a deposit account (often a cheque) despite having knowledge of a problem (e.g. financial distress, lack of authority or that a cheque was N.S.F.).[76] Yet, in effect, the Court bundled those cases together and pronounced that there was already an amorphous and nondescript duty on the part of a bank to act

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B.C.A.C. 268, [2001] B.C.T.C. 215, 277 N.R. 113, [2001] 3 S.C.R. 537, 261 W.A.C. 268, [2001] S.C.J. No. 76 (S.C.C.) [*Cooper*]; see also *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 CSC 63, 2017 SCC 63, 2017 CarswellOnt 20138, 2017 CarswellOnt 20139, 71 B.L.R. (5th) 175, 55 C.B.R. (6th) 1, 43 C.C.L.T. (4th) 1, 416 D.L.R. (4th) 32, [2017] 2 S.C.R. 855 (S.C.C.) [*Livent*].

[73] *Cooper, supra* note 72 at paras. 32, 34. *Livent, supra* note 72. at para. 25.

[74] *Livent, supra* note 72 at para. 28.

[75] *McDonald and Dickson v. TD Bank*, 2021 ONSC 3872, 2021 CarswellOnt 8316, 17 B.L.R. (6th) 83, 90 C.B.R. (6th) 238 (Ont. S.C.J. [Commercial List]) at para. 150, emphasis in original.

[76] See e.g. *Groves-Raffin Construction Ltd. v. Canadian Imperial Bank of Commerce*, 1974 CarswellBC 281, (*sub nom.* Groves-Raffin Construction Ltd. v. Bank of Nova Scotia) 51 D.L.R. (3d) 380, [1975] 2 W.W.R. 97 (B.C. S.C.) at 414 [D.L.R.]; varied 1975 CarswellBC 221, (*sub nom.* Groves-Raffin Construction Ltd. v. Bank of Nova Scotia) 64 D.L.R. (3d) 78, [1976] 2 W.W.R. 673, [1975] B.C.J. No. 1173 (B.C. C.A.); and *Ubacol Investments Ltd. v. Royal Bank*, 1995 CarswellAlta 207, 171 A.R. 122, 30 Alta. L.R. (3d) 327, [1995] A.J. No. 518 (Alta. Q.B.) at para. 19; see also *Singularis Holdings Ltd. (in liquidation) v. Daiwa Capital Markets Europe Ltd.*, [2019] U.K.S.C. 50, [2020] 1 All E.R. 383 at para. 1 *per* Hale L.J.

toward its clients with reasonable skill and care;[77] thus, it found an analogous duty upon which to base a novel duty including a duty "to ensure that what is suspicious or questionable is queried."[78] That was an error. Even if a duty of care exists in some aspects of a banker-client relationship, with respect, a duty of suspicion is hogwash.

The Court went on to consider proximity and reasonable foreseeability in the alternative, in case its findings on the analogous duty were incorrect, and because the Court wanted to create a broader duty to safeguard other straw borrowers in the future.[79] Where an analogous duty is not applicable, all relevant factors in the relationship between the parties must be considered, including "expectations, representations, reliance, and the property or other interests involved."[80] In cases of pure economic loss, two factors are primary: the defendant's undertaking and the plaintiff's reliance, because a defendant cannot be liable for a risk against which he did not undertake to protect.[81]

In *Whitford*, the Court relied heavily on the "special circumstances of the CMHC scheme" including TD's role in "processing the CMHC application and distributing the loan"[82] in order to find proximity between TD and Mr. Whitford. The Court opined that "the presence of CMHC in this transaction alters the relationship of the parties as compared to typical lender-borrower relationships." [83] We disagree. With respect, the Court failed to consider the full context of the statutory scheme.

The statutory scheme only creates a close relationship between the bank and CMHC (not the bank and a borrower).[84] For example, in order for a bank to be able to underwrite or administer an insured mortgage for CMHC, the bank must have the capability and resources to do so,[85] and must satisfy itself that the loan is reasonably likely to be repaid.[86] Even so, any failure on the bank's part in underwriting or administering an insured mortgage is only an issue as between the bank and CMHC. Closeness between the bank and CMHC does not somehow morph into something else and must not be confused for creating proximity between the bank and borrower.[87]

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77 *Whitford*, *supra* note 5, at paras. 133-139.

78 *Ibid*. at para. 139.

79 *Ibid*. at para. 140.

80 *Livent, supra* note 72 at para. 29.

81 *Ibid*. at paras. 30-31.

82 *Whitford, supra* note 5 at para. 140.

83 *Ibid*. at paras. 150-151.

84 NHA, *supra* note 61, ss. 5(1) and 6(1).

85 *Housing Loan (Insurance, Guarantee and Protection) Regulations*, SOR/2012-232, ss. 3(2) and 3(3) and esp. 3(2)(a) and 3(3)(a).

86 *Insurable Housing Loan Regulations*, SOR/2012-282, ss. 5(1)(j) and 5(4) [*Insurable Housing Loan Regulations*].

No doubt, in Alberta the presence of the CMHC insurance is what gives the lender the right to pursue the borrower personally, rather than solely relying upon recovery as against the property itself.[88] An insured high ratio mortgage exposes the borrower to personal liability; however, it does not change what is fundamentally a lender-borrower relationship. It does not change that the lender's only undertaking was to provide a mortgage and submit an application to CMHC for insurance. It does not change that the borrower cannot have reasonably relied upon the lender to investigate suspicious circumstances and question the documents presented in the application for a CMHC insured mortgage. In short, the statutory scheme does not create proximity.

Instead, it seems that the Court allowed the foreseeability of the harm to improperly overwhelm its analysis of *prima facie* duty and supplant proximity. The Court opined that high ratio mortgages are "fertile ground" for fraud and that the "possibility of harm through incidence of fraud is more than just foreseeable."[89] One must remember that the federal government sets the criteria and processes for obtaining CMHC insurance, plus CMHC has some freedom to impose requirements on lenders.[90] If the government or CMHC had concerns about mortgage insurance losses, from fraud or otherwise, then it would be within their power to put stricter measures in place; it was not for a court to intervene. The Court was incorrect to conclude that a *prima facie* duty exists just because there was, in its view, foreseeable loss. That is only part of the equation, and the *Anns* test requires more than "mere foreseeability of injury."[91]

We also note that the Court's choice to tie the *prima facie* duty inextricably to CMHC is perplexing and overlooks the existence of other mortgage insurers.[92] CMHC is in direct competition with two private mortgage insurers: Sagen MI Canada Inc.[93] and Canada Guaranty Mortgage Insurance Company.[94] Their mortgage insurance obligations are similarly backed by the federal government in the event that the insurer becomes insolvent.[95] Many Canadians do not qualify

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87 The Court in *Whitford* made such an error; see especially *Whitford*, *supra* note 5 at paras. 151-153, 157, 170.

88 *Law of Property Act*, R.S.A. 2000, c L-67, ss. 40, 41, 43(4).

89 *Whitford*, *supra* note 5, at para. 149.

90 See especially *Insurable Housing Loan Regulations*, *supra* note 86.

91 *Livent, supra* note 72, at para. 23.

92 *Whitford*, *supra* note 5 at para. 150.

93 Formerly Genworth MI Canada Inc. and now a wholly owned subsidiary of Brookfield Business Partners L.P. and its affiliates and partners; see Sagen MI Canada Inc., News Release, "Sagen MI Canada Inc. and Brookfield Business Partners L.P. Announce Closing of Arrangement Transaction" (1 April 2021), online: < www.investor.sagen.ca > .

94 The Ontario Teacher's Pension Plan is one of the main shareholders; see Ontario Teachers' Pension Plan, News Release, "Canadian Investor Group completes acquisition of AIG's Canadian Mortgage Insurance Company" (19 April 2012), online: < www.otpp.com > .

for conventional mortgages,[96] and require insurance from CMHC or a private insurer. Respectfully, in our view, neither circumstance warrants recognizing a *prima facie* duty, nor is markedly different from any of the lender-borrower relationships in which courts have consistently refused to recognize a duty of care.[97]

(ii) Stage two: Residual policy considerations

Where a *prima facie* duty of care is recognized under the first stage of *Anns*, the question at the second stage is whether there are any residual policy considerations, outside the relationship between the parties, that might negate the duty of care.[98] As stated in *Livent*, "[t]he policy inquiry assesses whether, *despite* the proximate relationship between the parties, and *despite* the reasonably foreseeable quality of the plaintiff's injury, the defendant should nonetheless be insulated from liability."[99]

As we explored in some detail in section 4(c) of this article, mortgage insurance has a long history in Canada. Whether from CMHC or a private mortgage insurer, it is a mandatory component of the statutory scheme,[100] and an indispensable tool that allows for greater home ownership.[101] Parliament has

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[95] However, the federal government is entitled to deduct 10% of the original principal amount from any payment upon insolvency in instances of private insurance; see *Protection of Residential Mortgage or Hypothecary Insurance Act*, S.C. 2011, c. 15, s. 20, ss. 16(2) and 22 [PRMHIA]. PRMHIA replaced individual agreements between the federal government and private mortgage insurers; see PRMHIA, s. 43.

[96] See Residential Mortgage Industry Report, *supra* note 12 at 11. The lending criteria for mortgages insured by CMHC or private mortgage insurers are identical; see *Insurable Housing Loan Regulations*, *supra* note 86, s. 5; and *Eligible Mortgage Loan Regulations*, SOR/2012-281, s. 5.

[97] See *Meadows*, *supra* note 6; *Isaacs*, *supra* note 7; *Molina-Tan*, *supra* note 42; *Bertolo v. Bank of Montreal*, 1986 CarswellOnt 801, 57 O.R. (2d) 577, 33 D.L.R. (4th) 610, 18 O.A.C. 262, [1986] O.J. No. 1377 (Ont. C.A.) at 617 [D.L.R.]; *Bank of Montreal v. Duguid*, 2000 CarswellOnt 1306, 47 O.R. (3d) 737, 5 B.L.R. (3d) 1, 185 D.L.R. (4th) 458, 132 O.A.C. 106, 99 O.T.C. 320, [2000] O.J. No. 1356 (Ont. C.A.); leave to appeal allowed 2000 CarswellOnt 4638, 2000 CarswellOnt 4639, 51 O.R. (3d) xvii (note), 266 N.R. 199 (note), 142 O.A.C. 398 (note), [2000] S.C.C.A. No. 298 (S.C.C.); and *Pierce v. Canada Trustco Mortgage Co.*, 2005 CarswellOnt 1876, 5 B.L.R. (4th) 178, 254 D.L.R. (4th) 79, (*sub nom.* Canada Trustco Mortgage Co. v. Pierce) 197 O.A.C. 369, [2005] O.J. No. 1886 (Ont. C.A.) at para. 27; leave to appeal refused 2005 CarswellOnt 5202, 2005 CarswellOnt 5203, (*sub nom.* Canada Trustco Mortgage Co. v. Pierce) 347 N.R. 400 (note), 212 O.A.C. 398 (note), [2005] S.C.C.A. No. 336 (S.C.C.); leave to appeal refused 2005 CarswellOnt 5204, 2005 CarswellOnt 5205, (*sub nom.* Canada Trustco Mortgage Co. v. Pierce) 347 N.R. 400 (note), 212 O.A.C. 399, [2005] S.C.C.A. No. 337 (S.C.C.).

[98] *Livent, supra* note 72, at para. 37.

[99] *Ibid.* at para. 41, emphasis in original.

[100] *Bank Act*, *supra* note 61, s. 418(2). Mortgage insurance is mandatory for every high ratio mortgage — i.e. a mortgage in which the borrower does not have a large enough deposit and needs to borrow more than 80% of the value of the property. Notably, low ratio mortgage insurance is also available, and operates in the same manner; however, low

intentionally extended, and re-affirmed, that mortgage insurance protection should be afforded to banks for as long as banks have been allowed to lend on mortgages in Canada. A *prima facie* duty of the type contemplated in *Whitford* would run contrary to the statutory scheme, and specifically against a bank's statutory right to be indemnified by mortgage insurance. Such conflict precludes the imposition of a duty.[102]

The main policy consideration contemplated by the Court in *Whitford* was the "societal/public cost to mortgage fraud."[103] The Court opined that without some consequences for lenders, "the public is exposed to the deficiency resulting in part from the lender's negligence."[104] Such statements belie fundamental misunderstandings about the very nature of CMHC and mortgage insurance which, if corrected, ought to militate against imposing a duty rather than in favour. The Court incorrectly equated CMHC with the "public" (either in whole or in part).[105] CMHC is a Crown corporation and an agent of the Crown,[106] but it is not the public. Properly understood, CMHC operates as a for-profit business,[107] within the framework of the NHA and the *Canada Mortgage and Housing Corporation Act*.[108] In 2019, CMHC's mortgage insurance and mortgage funding activities generated $2.6 billion in revenue, and CMHC returned more than $2 billion from those activities to the federal government by way of dividends.[109] While the federal government backs 100% of CMHC's mortgage insurance obligations in the event that CMHC cannot meet them,[110] in

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ratio mortgage insurance is optional and is more often paid for by the lender; see Regulatory Impact Analysis Statement, *supra* note 64 at 4162.

[101] *Bank of Montreal v. Hoehn*, 2010 ABQB 405, 2010 CarswellAlta 1084, 496 A.R. 355, 28 Alta. L.R. (5th) 259, 95 R.P.R. (4th) 87, [2010] 11 W.W.R. 110 (Alta. Q.B.) at para. 11.

[102] See *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2013 BCCA 34, 2013 CarswellBC 197, 40 B.C.L.R. (5th) 213, 99 C.C.L.T. (3d) 121, 358 D.L.R. (4th) 581, [2013] 4 W.W.R. 532, 334 B.C.A.C. 24, 572 W.A.C. 24 (B.C. C.A.) at para. 55; leave to appeal refused 2013 CarswellBC 2463, 2013 CarswellBC 2464, 357 B.C.A.C. 320 (note), 464 N.R. 398 (note), 611 W.A.C. 320 (note), [2013] S.C.C.A. No. 134 (S.C.C.); see also *Becker v. Crowe Estate*, 2015 ONSC 4207, 2015 CarswellOnt 10107, 51 C.L.R. (4th) 161 (Ont. S.C.J.) at para. 39.

[103] *Whitford*, *supra* note 5, at para. 173.

[104] *Ibid*. at para. 170.

[105] See *ibid*. at paras. 121, 123, 125, 150, 153, 156, 162, 164, 172, 194. The Court also conflated CMHC with the public under the first stage of *Anns*, opining that a bank would likely be less inclined to protect itself when lending because of the presence of CMHC insurance; *Ibid*. at para 162.

[106] *Canada Mortgage and Housing Corporation Act*, R.S.C. 1985, c. C-7, s. 5(1) [CMHCA].

[107] The governing legislation acknowledges the for-profit nature of CMHC's business and includes express references to profit; see CMHCA, *supra* note 106 at ss. 29(2), 29(3) and the NHA, *supra* note 61, ss. 21(2), 21(4).

[108] CMHCA, *supra* note 106.

[109] Canada Mortgage and Housing Corporation, "A Commitment to Affordability: Annual Report 2019" (Ottawa: CMHC, 5 May 2020) at 11 [Annual Report 2019].

practice CMHC has been able to provide mortgage insurance and remain commercially viable without government support.[111]

The Court's suggestions that "the public will be obligated to cover the shortfall" and that "the public — and not TD — is in fact the innocent victim" if CMHC pays are wholly speculative.[112] CMHC is currently profitable and serves a function prescribed by statute when it provides and pays out on mortgage insurance. This factor, properly weighed, militates against finding a duty. Mortgage insurance does not unduly expose or place liability on the public, nor does it require the public to bear any cost or shortfall, despite the Court's assertions.[113] Accordingly, in our view, even if a *prima facie* duty was established at the first stage of *Anns*, it is negated by policy considerations at the second stage. It was not appropriate for the Court to intervene.

5. CONCLUSION

Straw buyer mortgage fraud represents a troubling problem in insured mortgages and, accordingly, we appreciate the Court's efforts to tackle the problem in a novel way in *Whitford*. For the reasons explored in this article, we remain of the view that the *Whitford* decision as it relates to the finding of a novel duty of care rests on shaky ground. The Court could have simply concluded the case in favour of Mr. Whitford on the basis of *ex turpi causa*. The *obiter* finding of a novel duty of care is not helpful to the jurisprudence relating to mortgage fraud and potentially creates undue difficulties in these cases. We commend counsel to contemplate the issues we have raised, and to approach the problem of straw buyer mortgage fraud in a more holistic and commercially appropriate manner,[114] recognizing the legislative history, as well as the roles of straw buyer, bank, and mortgage insurer.

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[110] CMHCA, *supra* note 106, s. 23; see also Department of Finance Canada, "Technical Backgrounder: Mortgage Insurance Rules and Income Tax Proposals" (14 October 2016) *Government of Canada*, online: < www.canada.ca > .

[111] Annual Report 2019, *supra* note 109 at 19.

[112] *Whitford*, *supra* note 5 at para. 123.

[113] *Ibid.* at paras. 170-172.

[114] Counsel might also consider whether to plead fraud as a cause of action (TD did not) despite the potential adverse cost consequences if fraud is not proven; see e.g. *Hamilton v. Open Window Bakery Ltd.*, 2004 CSC 9, 2004 SCC 9, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, REJB 2004-54076, 70 O.R. (3d) 255, 70 O.R. (3d) 255 (note), 40 B.L.R. (3d) 1, 235 D.L.R. (4th) 193, 2004 C.L.L.C. 210-025, 316 N.R. 265, 184 O.A.C. 209, [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72 (S.C.C.) at para. 26. Likewise, one might consider whether to add other parties as defendants, when such parties are known, even if there is a seemingly straightforward debt claim against the straw buyer alone.