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The worth of an emailed signature lost in legislation

Why is it possible to buy and sell real estate by faxing agreements, but not by email? That's the question asked by Hamilton real estate lawyer Larry Bremner of Gowling Lafleur Henderson LLP.

In the latest edition of his newsletter, entitled Larry's Law, Bremner points out that although the Ontario legislature intended to enact a law saying that electronic signatures could not be used on agreements for purchase and sale of land, it botched the wording.

As a result of the error, it may well be possible to buy and sell real estate in Ontario using the text of email messages.

The ability to use electronic means to buy and sell real estate dates to a decision of the Ontario Court of Appeal in 1989.

In 1974, long before facsimile transmission had been contemplated, William and Vera Rolling gave Willann Investments Ltd. a right of first refusal to buy a parcel of land by matching any third-party offer within 72 hours of being notified.

An offer was received by the Rollings 15 years later, in 1989. Willann was notified by fax but failed to reply within 72 hours. It offered to buy the property, but after the 72 hours had run out.

The Rollings sold the property to the new buyer and Willann took them to court. It argued that fax delivery of the notice was insufficient, since it was not contemplated by the 1974 contract.

Ultimately, the Ontario Court of Appeal ruled that delivery by fax transmission satisfied the terms of the contract. Writing for the court, Justice Sydney Robins wrote, "Where technological advances have been made which facilitate communications and expedite the transmission of documents we see no reason why they should not be utilized. Indeed, they should be encouraged and approved."

Even though standard form offers now permit delivery and acceptance by fax, that same reasoning by Justice Robins could well apply to email offers in 2007 except for the confusing and contradictory wording of Ontario's Electronic Commerce Act, 2000 (ECA).

Essentially, the ECA provides that for certain purposes, electronic signatures have the same effect as those signed with a pen subject to several key exceptions.

One part of Section 31 (1) of the ECA says that the legislation (which allows electronic signatures) does not apply to "documents, including agreements of purchase and sale, that create or transfer interests in land and require registration to be effective against third parties."

The law sets out two requirements to be met so that an agreement to buy or sell land cannot be made with electronic signatures.

Firstly, the document must create or transfer an interest in land. (An agreement of purchase and sale does create an interest in land.)

Secondly, the document must require registration to be effective against third parties. This is where the legislature made a mistake. An agreement of purchase and sale does not have to be registered to be effective against third parties.

As a result, says Bremner, the exception stating that agreements of purchase and sale cannot be signed electronically does not apply since the second test is never met.

Unfortunately, according to Bremner, this "badly drafted and contradictory" wording of the ECA frustrated the intention of the legislature. Presumably, the law was intended to state simply that agreements to buy and sell land cannot be signed electronically but that's not what it says.

Eventually, a court may have to figure out what the Electronic Commerce law means, or the Ontario legislature will have to clarify whether or not land can be bought or sold with electronic signatures.

In the meantime, it remains unclear whether an exchange of emails can be effective to buy or sell property in Ontario.

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