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December 13, 2003

Power failure can pull plug on real estate deals

With the arrival of mandatory electronic title registration in Toronto this week, it is no longer possible to register deeds and mortgages in paper format with handwritten signatures. As of Dec. 9, users of the land registration system are required to submit documents for registration electronically using the Teraview software platform.

Real estate closings are now totally dependent on computers and a reliable supply of electricity. Emergencies like the power outage in Eastern Canada and the United States on Aug. 14 and 15 put the registration system and its users to the ultimate test.

In the paper system, it was possible to register documents without electricity as long as everyone showed up in person at the Land Registry Office and handed over the money and signed documents. But not anymore.

Now, the question "Where were you when the lights went out?" is not just the snappy title of a 1968 comedy starring Doris Day. That film was based on the massive but relatively short east coast blackout of Nov. 9, 1965.

Every real estate lawyer, and every one of their clients who had a purchase or sale closing during the blackout this summer, will no doubt remember exactly where they were when the lights went out on Aug. 14.

Late last month, Kate Murray spoke to more than 500 real estate lawyers gathered for a seminar at the Law Society's Osgoode Hall and around the province by video hook up. Murray is the director of titles for the Ministry of Consumer and Business Services. She is responsible for the operation of all of the provincial registry offices and their relationship with Teranet Inc., which runs the electronic registration system for the government.

Her job involves making the decision to shut down all or part of the province's land registries if there is a power outage or a health and safety risk, such as the 1998 ice storm.

She reported that Teranet's contract with the government requires the electronic registration system to be operational 99.5 per cent of the time.

In 2002, the system was available 99.79 per cent of the time, and this year to date, it has been up and running 99.98 per cent of the time.

Murray reported that some land registry offices closed early on Aug. 14, and were either closed or open only part of the following day, a Friday.

The electronic system was closed down for part of Aug. 15, 18 and 19 for energy conservation purposes. It was in full operation on Aug. 20.

When the power went out on Aug. 14, I still had some transactions in process for that day and the next.

Even though my computer was working for a time on battery backup, and my phones were fully operational the same way, it was impossible to reach other law firms whose systems were totally down. With the banks closed, certifying closing cheques was not going to happen.

What happens to a real estate transaction if the land registry office or the electronic system is closed due to an emergency or other unforeseen circumstances?

That was the question that faced Justice John Ground in the Ontario Court of Justice in 1993. Elderbank Estates Inc. and Mei Chu Ng entered into a real estate transaction that was scheduled to close Nov. 12, 1990. Nobody realized that that day was a Monday, and a holiday in lieu of Remembrance Day the previous day.

The transaction fell apart and the parties wound up in court. Ng had refused to close and Elderbank sued for "specific performance" of the contract.

The issue in question was what are the obligations of the parties to a real estate transaction if the closing cannot take place and be registered on the scheduled date through no fault of the parties?

Without providing any specific references, Justice Ground cited "case law" as establishing that the obligation of the parties was either to close "in escrow" (by holding documents and money in trust) and register first thing the next morning, or to negotiate a short extension. When a transaction cannot close because of unforeseen circumstances, Justice Ground ruled that neither party has the right to terminate the transaction.

My experience during the blackout last summer restored my faith in human nature and the ability of lawyers, their clients and real estate agents to cooperate in the face of adversity. Purchasers and vendors either postponed their deals or exchanged keys without money or documents and I have not heard of any transaction which was aborted because of the power outage.

I just hope we won't have another power failure for a long time. The August blackout provided enough excitement to last me many years.