



Clarity Clauses, Agreements and Documents

By Brian Madigan

Legible Agreements

REBBA 2002 was enacted 31 March 2006 and brought into force a number of new provisions for the real estate industry. One new and important change was the requirement that all agreements be legible. Oddly enough, previously, this had not been a requirement. You would have thought that it was rather obvious, but apparently not.

At one time, real estate agents took great care to ensure that agreements were carefully prepared and legible. It was customary to prepare six (6) copies of every agreement, one for each of the parties, one for their agents and one for their lawyers.

So, what happened? Actually, technology! The invention of the fax machine.

With the fax machine came negotiation by fax communication. Instead of six originals, it came down to one document. Now, with back and forth negotiations, each fax is going to be poorer and poorer in quality and legibility. Often, by the time the final deal is struck, no one can read it. Of course, on the clear cut deals where both parties are anxious to close, maybe it doesn't matter that much. However, just think about a long closing where one party wants out, and the agreement is illegible.

In Court, it is not possible to introduce evidence of prior negotiations (that is the standard rule), only the final agreement, and that is the one that no one can read.

Hence, RECO (The Real Estate Council of Ontario) came to the rescue with one of the many changes to REBBA 2002. There is now an affirmative obligation upon agents to produce a legible agreement.

In response the issue, OREA (Ontario Real Estate Association) has changed a number of its forms. The font is larger; this will work out well with fax machines and you should be able to have a clear and legible agreement.

The problem, however, is that agents may just fax the document back and forth a few more times before they decide that it's illegible and they have to start over with a fresh offer.

The Custom

A custom had developed among certain real estate agents to prepare and exchange a nicely typed and readable version of the agreement that was negotiated in the wee hours of the morning.

This caused great concern among lawyers. They didn't want anything signed again that may be in conflict with the original. So, the practice evolved somewhat. Some documents were signed and others were not. In fact, most lawyers cautioned against it.

If it is your intention to have such a document, then what should it say? Basically, there are four separate issues that need to be addressed.

First, is this intended to replace the previously negotiated agreement? If so, then it should be called an "agreement". But, this is the specific risk that the lawyers cautioned about. Perhaps, it should simply be intended for ease of reference. If that is the case, then you must call the document something else. Never refer to it as an agreement. If you want to call it something, refer to it as a "document", and the form it should take is as an "Acknowledgement".

Second, make absolutely certain that it does not amend or alter the terms of the agreement. That's not its purpose. The lawyers will be pleased with that approach.

Third, is the document intended to have some value? If it is, then perhaps it might be able to be used as evidence in Court. If this is the case, then the document should say so. Certainly, that would be helpful. Naturally, the agreement governs, but the second document actually passes the evidentiary test, if that is specified. So, if you want it to be a guideline, then this second document should clearly indicate that it may be used in Court as evidence.

Fourth, if it is not to be signed by both parties, then it should not be exchanged or delivered. The agent would be better advised, to simply to prepare such a companion document for their own client.

The actual document might look something like this:

Acknowledgement

The Undersigned parties, namely the Buyer an Seller hereby acknowledge and agree the Document attached as a schedule is a true and accurate representation of the terms of the Agreement of Purchase and Sale dated 8 February 2007.

The Parties further acknowledge that the Document:

- Has been prepared for the purposes of ease of reference to improve the legibility and clarity of the Agreement
- Does not alter or amend the terms of the Agreement
- May be introduced as evidence in Court under the Canada Evidence Act

Dated at Mississauga, Ontario this day of February, 2007.

witness

Buyer 1

witness

Buyer 2

witness

Seller 1

witness

Seller 2

As a word of caution, all documents appearing here are intended for review, consideration and discussion. They are not intended to be used in a specific transaction. Readers are requested to seek legal advice if they propose to use a document in practice.

The author specifically disclaims all such responsibility, and readers use any such documents at their own risk.

The Law

A number of individuals wanted to know the source of the law relating to legible agreements.

It is contained in Regulation 585 (O. Reg. 580/05) *The Code of Ethics* under the Real Estate and Business Brokers Act. Here is the provision set out verbatim:

Written and legible agreements

- 27. (1)** A registrant who represents a client in respect of a trade in real estate shall use the registrant's best efforts to ensure that,
- (a) any agreement that deals with the conveyance of an interest in real estate is in writing; and
 - (b) any written agreement that deals with the conveyance of an interest in real estate is **legible**. O. Reg. 580/05, s. 27 (1).
- (2)** Subsection (1) applies, with necessary modifications, if a brokerage and a customer have an agreement that provides for the brokerage to provide services to the customer in respect of any agreement that deals with the conveyance of an interest in real estate. O. Reg. 580/05, s. 27 (2).

By way of comment, all agreements concerning the sale of land **must** be in writing. That requirement is contained in the Statute of Frauds. And, by necessary implication all agreements had to be legible. What's the point in having an illegible document? It's meaningless!

So, what is the difference in the law? Previously, an agent would be liable in damages by way of breach of contract and in tort to a client. Now, even if nothing goes wrong, RECO upon audit and inspection of a brokerage can charge agents with a offence under the legislation.

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