

Agreement of Purchase and Sale not binding due to addition of unsigned Schedule (Ali v. Patel)

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20 June 2024

In *Ali v. Patel*, 2024 ONSC 3505 (CanLII), the Ontario Superior Court of Justice determined that a binding agreement of purchase and sale had not been formed between a seller and buyer because the seller had added a schedule which had not been signed by the buyer.

On 5 June 2023, the buyer made an unconditional offer to purchase the seller's property, which was irrevocable until 11:59 pm on the following day. The offer to purchase contained an Offer Summary Document, an Offer of Purchase and Sale, and a Schedule A.

On the evening of 6 June 2023, the seller's agent sent the signed offer back by email. The price, deposit, closing date, and Schedule A remained unchanged. However, the seller added a notation on the first page of the agreement indicating that it now included a "Schedule B". The cover email stated: "Can you have your clients initial schedule b and on the first page that there is a schedule B. Accepted offer and deposit info attached"[sic]. There was no new irrevocable date proposed.

The form of the Schedule B document included provisions dealing with issues such as defined "banking days" and how the parties would conclude the transaction in the event that banks and registry offices were closed on the anticipated closing date, the timing and form of deposit, and where the keys would be left. The MLS listing for the property included a stipulation that all offers were required to include Schedule B.

Schedule B was not attached to the agent's initial email enclosing the signed offer. A few minutes later, however, the agent re-sent the documents, this time attaching Schedule B, under cover of an email stating "Sorry. Use this." The buyer did not respond or deliver the \$50,000 deposit required by the agreement.

The next morning, on 7 June 2023, the buyer advised that they would be unable to proceed with the transaction for unforeseen family reasons. The buyer sent the seller a mutual release later that day. The seller did not sign the release. Rather, the seller's agent sent an email advising that her clients would hold the buyer liable for any loss or damages.

The seller re-listed the property. One week later the seller sold the property for \$25,000 less than the previous buyer had agreed to pay.

Litigation ensued and the seller ultimately brought a motion for summary judgment concerning the buyer's liability for the \$50,000 deposit. The seller argued that there was a binding agreement, and that they were entitled to the \$50,000 deposit that should have been paid by the buyer.

The motion turned on the issue of whether the addition of the Schedule B in the final version of the agreement, and the demand from the seller that the buyer acknowledge the Schedule by signatures and initials, was a counteroffer that needed to be accepted by the buyer to form a binding agreement.

The court referred to the principle that—by definition—a "counteroffer" is a non-acceptance of a previous offer: *Tang v. Rong*, 2021 ONSC 8058, at paragraphs 43-46. In order for a binding agreement to be formed, there must be a meeting of the minds. The court may look beyond the formal written document, to the words and conduct of the parties, if all the essential terms have been agreed upon: *Luo et al. v. Chen et al.*, 2019 ONSC 680, at paragraphs 31-32.

First, the seller argued that there was a binding agreement in place because Schedule B did not include essential elements of the contract.

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The motion judge noted that the circumstances were unusual because Schedule B did not address what would typically be considered necessary and essential clauses to find that there had been a meeting of the minds and the conclusion of a binding agreement. However, the treatment of Schedule B by the seller as a necessary inclusion in any final agreement indicated that it was essential in their view. Their return of the agreement including Schedule B was therefore a “counteroffer” which the buyer was free to accept—or not.

Second, the seller argued that they had accepted the buyer’s offer without attaching Schedule B, so that a binding agreement was struck, and their later communication which included Schedule B came after a contract already existed. This argument was rejected since the failure to include Schedule B in the agent’s first email was obviously inadvertent, as is evident in the wording of the follow up email stating “Sorry. Use this”.

The motion judge commented that the argument might be more persuasive if the facts were that the seller had fully accepted the offer and then later changed their mind to decide that they wanted to include a new Schedule, or additional provisions to the deal. The argument then would be that, in fact, there was no counteroffer and a binding offer was in place, and any events thereafter could not impact the already existing contract. However, that it is not what occurred.

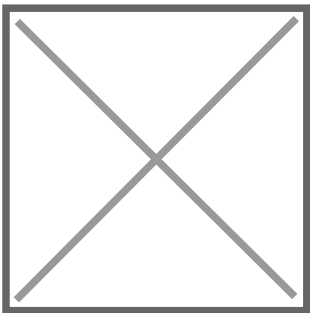
Rather, the signed counteroffer was inadvertently sent without Schedule B. The email referenced Schedule B and asked that the buyer initial the first page of the offer document and sign Schedule B. In the motion judge’s view, giving effect to the seller’s argument would have ignored the fundamental contractual law principle that a contract requires a meeting of the minds to be formed. Here, there was no meeting of the minds as the buyer did not sign or accept any agreement that included a Schedule B.

In the result, the court [found](#) on a balance of probabilities, that the returned agreement was a counteroffer, and that the seller viewed Schedule B as a necessary component of a concluded agreement. As the counteroffer was never accepted or signed by the buyer, no binding agreement was reached. The buyer was therefore not liable to pay the deposit.

The decision demonstrates that a party should be cognizant that changing or adding any terms to an offer to contract may constitute a counteroffer that requires acceptance. Schedules or other additional terms should be included in the original form of the offer that is intended to be accepted without further negotiation. A PDF version is available for download [here](#).

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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