

# KEEPING CURRENT

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## *Seller allowed to re-schedule Tarion closing date following “unavoidable delay”*

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New homes in Ontario may include a warranty from the builder for certain construction deficiencies and other matters. Historically, the Tarion Warranty Corporation was the administrative authority responsible for the warranty program and licensing home builders in Ontario. As of February 1, 2021, the role was transitioned to [The Home Construction Regulatory Authority](#).

In cases where a new home warranty is provided, the Agreement of Purchase and Sale (APS) will generally include a detailed addendum of the matters relating to the warranty and include a series of critical dates for the completion of construction and sale of the property to a buyer. These terms form part of the APS and are subject to the same principles of contractual interpretation to determine whether there has been any breach thereof. As the closing date may be subject to change, buyers should be ready with financing in place once a new date is set.

In *5000933 Ontario Inc. v. Mahmood*, [2022 ONSC 4726 \(CanLII\)](#), affirmed by the Court of Appeal, [2023 ONCA](#)

[58 \(CanLII\)](#), a buyer had entered into an APS with the respondent to buy a new home to be built in a residential subdivision for the price of \$849,900.00. The APS included a Tarion Addendum and statement of critical dates, including interim and final closing dates. The Tarion Addendum provided that the critical dates could change if there was an “Unavoidable Delay,” which was defined to include a pandemic, plus any period of delay directly caused thereby which was beyond the reasonable control of the seller.

On August 11, 2021, the seller notified the buyer that the ongoing COVID-19 pandemic had resulted in a delay in the availability of kitchen cabinetry, which it characterized as an Unavoidable Delay. Nine days later, on August 20, 2021, the seller notified the buyer that the Unavoidable Delay had ended and that a new Firm Closing Date as defined in the Tarion Addendum was now set for September 3, 2021.

The buyer requested an extension of the

closing date to September 10, 2021, which was confirmed via email correspondence between the parties and their lawyers.

On September 8, 2021, the buyer's lawyer wrote to the seller's lawyer to ask for a further extension of the closing date to September 17, 2021. However, the seller did not agree to this request.

On September 10, 2021, the seller's lawyer confirmed to the buyer that the closing date was to be that day, that the seller was "ready, willing and able" to complete the transaction, and that its closing documents had been delivered. The seller advised that if closing funds were not received by 5:00 PM, they would be treating the APS as no longer binding upon it, retaining the deposit, and taking immediate steps to resell the Property.

The buyer did not tender payment of the balance of the purchase price on September 10, 2021, and the transaction failed to close. There was no dispute that the buyer did not have the funding needed to close on September 10, 2021.

The seller brought an application for seeking a declaration that the APS was repudiated by the buyer and that it was entitled to resell the lands, along with other related relief.

In response to the application, the buyer argued that the seller was not entitled to rely on the Unavoidable Delay provisions in the Tarion Addendum or, alternatively, its reliance was not in accordance with that section because the correspondence failed to specify the dates when the purported delay commenced or concluded. The buyer argued that a calculation of the Unavoidable Delay period was impossible and so these notices were ineffective.

The application judge was satisfied, however, that the COVID-19 pandemic and the resulting delay in the delivery of the kitchen cabinetry fell within the definition of Unavoidable Delay and that the seller had taken reasonable steps to calculate the applicable dates and provide notice thereof.

The application judge referred to an earlier decision of the Ontario Court of Appeal in *Ingarra v. 301099 Ontario Limited (Previn Court Homes)*, [2020 ONCA 103](#), which addressed whether an agreement between the lawyers, made orally and through the exchange of faxes and emails, to extend the agreed upon firm closing date superseded the provisions set out in the Tarion Addendum. The Court of Appeal held that the parties were free to set a new closing date outside of the framework of the Tarion Addendum.

In this case, there was no evidence that the buyer or his lawyer had raised any concerns about how the eight-day Unavoidable Delay Period was calculated by the seller. Instead of seeking to exercise any rights to void the closing date of September 3, 2021, the buyer asked that it be further changed to September 10, 2021, to which the seller agreed. Once the new closing date of September 10, 2021, was agreed-upon, the seller was under no obligation to provide a further extension.

The buyer was found to have breached the APS by failing to complete the transaction.

On appeal, the buyer argued that the application

judge erred in concluding that the seller satisfied the requirements of the APS to extend the closing date beyond August 27, 2021, for “Unavoidable Delay” and that the seller’s failure to deliver the occupancy permit on or before September 10, 2021, barred it from terminating the APS. The buyer further argued that the seller acted in bad faith by refusing to extend the closing date beyond September 10, 2021.

The Court of Appeal rejected the buyer’s arguments and affirmed the application judge’s decision regarding compliance with the “Unavoidable Delay” requirements in the Tarion Addendum.

The buyer also argued that the Tarion Addendum required the seller to have delivered an occupancy permit for the new dwelling as of the date when it purported to grant the extension of the closing date to September 10, 2021.

However, while the seller was in possession of the occupancy permit on September 10, 2021, there was no obligation in the APS to deliver it to the buyer until on or before “Closing,” which Tarion Addendum defined to mean “the completion of the sale of the home including transfer of title to the home to the Purchaser”. The application judge held that there was no “Closing” within the meaning of the APS and thus no breach by the seller. The Court of Appeal agreed and the appeal was dismissed with costs.

The decision shows how a closing date may be subject to change due to unavoidable delays during the construction process and, while there may be some opportunity to negotiate a new closing date, once the new date is set a buyer must be ready to complete the transaction. The Tarion warranty terms in an APS are notoriously difficult to read, as noted by the Court of Appeal in [Ingarra](#), paragraph 24, so due care should be taken to ensure that all critical deadlines are complied with.

## Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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