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## CLOSING DELAY

One of the more nerve-racking experiences in the purchase of a new home is the wait for a closing date that seems to be an ever-elusive target. Continual delays cause major problems. For example, a purchaser who is selling a home to fund the purchase has to attempt to postpone the sale; if unsuccessful, the purchaser has to arrange alternate accommodations. All of this is costly. The Ontario New Home Warranty Plan Act and its regulations have provisions which allow, at some point in the delay process, a purchaser to receive some compensation. The effect of the Act was the subject of Markey v. Tarion Warranty Corp. [2005] OLATD No. 94 (Tribunal), [2006] O.J. No. 2929 (Div'l Ct.), a 2006 decision of the Ontario Divisional Court.

### The Act

Sections 13(1) and 14(3) of the Act state that the vendor of a new home gives to the new owner (i.e. the purchaser) various warranties as set out in the Act and its Regulations and gives the purchaser a cause of action for the breach of those warranties. Section 17 of the Regulations creates a warranty that, in the event of a specified delay in closing, the vendor must compensate the purchaser for living expenses, not to exceed \$100 per day and \$5,000 in total.

Section 17 is not

weighted in favour of a purchaser. The vendor may still extend the closing beyond the original closing date, without cost consequences, by giving at least 65 days notice. There is no limit to the length of the extension. Further, a vendor may, with impunity, extend a closing date, whether original or extended, by 15 days upon giving at least 35 days notice. The vendor may also extend the closing date, without compensation to the purchaser, if the delay is caused by a strike or an act of God.

Since the Act gives the warranty to the purchaser and the Act is remedial legislation to protect purchasers of new homes, vendors cannot contract out of the Act. However, there are other ways to get around the Act – if done correctly.

### Tribunal

The purchaser has a choice: sue in the courts or bring a claim to Tarion Warranty Corp. If Tarion agrees that the vendor breached the warranty, Tarion can order the vendor to pay the amount owing; if the vendor fails to do so, Tarion will pay the aggrieved purchaser itself and then look to the vendor for reimbursement. If Tarion refuses to pay a claim, the purchaser may appeal that decision to the Ontario Licence Appeal Tribunal. An appeal before the Tribunal is akin to a trial, with evidence presented and oral argument made. Given that the amount of the claim for delay cannot

exceed \$5,000, it is unlikely that a purchaser would pursue a remedy in the courts.

### Facts

In the actual case (we didn't forget about it), the vendor had amended the original closing date of November 30, 2002 on 6 occasions. By way of the last notice, the closing date was set for July 22, 2003. The purchaser called the sales agent and informed her that the new closing date was not acceptable because he would be on a business trip at that time. Accordingly, the agent prepared, and the parties signed, an amendment to the agreement of purchase and sale by which the extended closing date of July 22, 2003 was changed to August 5, 2003.

After the closing, indeed long after the closing, but before the expiry of the warranty period, the purchaser made a claim for delay compensation. Tarion and the vendor refused to give him the compensation and, accordingly, he appealed to the Tribunal.

### Hearing Decision

The parties agreed that, under the formulae set out in the Act, the quantum of the purchaser's claim was \$4,920. However, the vendor and Tarion took the position that the purchaser had waived his claim for delay compensation when he signed the agreement by which the closing date was amended from July 22 to August 5. At that point, the vendor had not unilaterally im-

posed the new closing date; rather, the parties had agreed upon it.

The purchaser readily agreed that he knew, as of an extension that took place in April 2003, that he had a claim for compensation under the Act. However, no one, including the vendor, had informed him that, by signing the amendment to the agreement, he was waiving his right to compensation.

The Tribunal held, *"To find that the act of signing an amendment for the extension of an occupancy date would automatically create a waiver of a claim for delay would allow a builder to ignore the requirements for the giving of notice under the regulation, provided the builder obtained a signed amendment with respect to the last extension, regardless of whether or not the issue of delay had ever been raised with the purchaser. This approach would be contrary to the intent of the Act, which is for the protection of consumers."*

The Tribunal allowed the purchaser's claim, but, curiously, it ignored the pre-hearing arrangement of the parties, by which they had agreed on \$4,920 as compensation; instead, the Tribunal awarded only \$3,710.00.

## Appeal

Tarion appealed the decision to the Divisional Court. The purchaser cross-appealed regarding quantum. The Court upheld the Tribunal's decision and its rationale for deciding against Tarion and the vendor. The court stated *"Where, as here, the right to compensation for de-*

*lay has been established by the circumstances, it should be incumbent on the builder to obtain an acknowledgement in writing from the purchaser when signing an amendment for the extension date that it is understood the purchaser is waiving his or her entitlement to compensation under section 17 of regulation 892."*

The Court also allowed the purchaser's appeal and allowed him the agreed-upon amount of \$4,920.00. Finally, the Court allowed the purchaser \$8,234.31 plus GST for costs. Although, a student-at-law represented the purchaser before the Tribunal, we assume that lawyers represented all parties in the Divisional Court. It was a lot of work and money for a \$4,920 claim.

## Rationale

We bring this decision to your attention to alert you that:

1. There is a simple solution by which your purchaser clients can be compensated for a delay in closing.
2. You, as purchasers' lawyer, should ensure that you advise your clients of their rights the next time that a vendor/builder wants the clients to sign away these rights. It seems that it would be a good idea to advise them of this provision when you first meet with them, before there is a delay. If nothing else, it will alert your clients that a closing date for a new home is not written in stone and that they should make contingency plans at the outset. Further, it will make you look good. Remember, the job of the real estate lawyer is to add value.

### Speigel Nichols Fox LLP

44 Peel Centre Dr., Suite 400  
Brampton, Ontario L6T 4B5  
Tel: 905-791-6262  
Fax: 905-791-6446  
www.ontlaw.com

Jonathan Speigel\*+  
Brian Nichols  
Irving Fox  
Ian Latimer\*  
Robert McIntyre  
Susanne Balpataky\*  
Carrie Kennedy\*  
Paul Roth

\* members of commercial litigation group  
+ certified by Law Society as a specialist  
both in civil litigation & construction law  
+ roster mediator – Ontario Mandatory  
Mediation program – Toronto

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