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TIME IS OF THE ESSENCE:

Perils of Missing a Deadline (Even by One Day)

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In the Ontario Superior Court of Justice decision *2336574 Ontario Inc. v. 1559586 Ontario Inc.*, 2016 ONSC 2467, the Court interpreted the meaning of performing a contract in "good faith". The common law duty to perform a contract in good faith was introduced recently by the Supreme Court of Canada's decision *Bhasin v. Hrynew*, 2014 SCC 713 which stated that there is a duty for parties to act honestly in the performance of contractual obligations. *2336574 Ontario Inc. v. 1559586 Ontario Inc.* interprets this duty in the specific context of a commercial real estate transaction.

In *2336574 Ontario Inc. v. 1559586 Ontario Inc.*, the purchaser missed the final closing date by one day, despite its principals being experienced real estate investors. The vendor refused to close on the basis that since the final closing date was missed by one day the transaction was dead and all deposit monies were now forfeited to the vendor as liquidated damages. The Court agreed with the vendor and decided that missing the closing date by one day constituted a default and the deposits should be released to the vendor as per the Agreement of Purchase and Sale. The Court was particularly unimpressed that the purchaser had the financial means to close the transaction on the closing day but chose not to, and found the purchaser's untimely behavior to not be in good faith, meaning that in this particular context the conduct of the purchaser would be regarded as commercially unacceptable by reasonable and honest people.

That this commercial real estate purchaser was deemed to be in default by missing the closing date by one day is not different from what occurs in residential real estate purchases. The standard OREA Agreement of Purchase and Sale for residential real estate transactions states in Paragraph 20 that time is of the essence, unless the time for doing or completing any matter is extended or abridged by an agreement in writing signed by the Seller and Buyer or by their respective lawyers. As such, all deadlines in the Agreement of Purchase and Sale must be met, failing which a vendor may be entitled to retain the deposit paid by the purchaser even if the vendor suffered no damages due to the purchaser's default. As a practical matter, it is routine in residential real estate transactions for lawyers to agree in writing to postponing the closing date by one day since an extension is frequently needed to



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accommodate late financing. In these cases, the purchaser will typically pay extension fees for the one-day extension but will not be held to be in default and such will not lose their deposit.

As shown by the decision in *2336574 Ontario Inc. v. 1559586 Ontario Inc.*, in both residential and commercial transactions, time is of the essence, meaning that if the closing date is missed by one day, then the purchaser could be held to be in default of the agreement of purchase and sale and may lose their deposit. As stated by the Judge in *2336574 Ontario Inc. v. 1559586 Ontario Inc.*, good faith in a real estate transaction means sticking to the contract, not bending the contract, even just a little bit, to what one side wants. Courts will enforce adhering to strict deadlines in real estate contracts with rigor because delaying real estate transactions wreaks havoc; in many transactions, the seller needs the money to fund a same-day purchase, and if one side is casually asking for an extension of the closing date, many parties are detrimentally affected.