

ARBITRATION

Under the *Regulation respecting the guarantee plan
for new residential buildings*
(O.C. 841-98 of June 17, 1998)

Arbitration body authorized by the Régie du bâtiment du Québec:
Canadian Commercial Arbitration Centre (CCAC)

Between

KIMMIE CHEDEL
Beneficiary

And

9048-9246 QUÉBEC INC. (Hors Série – Construction sur mesure)
Builder

And

LA GARANTIE DES BÂTIMENTS RÉSIDENTIELS NEUFS DE L'APCHQ INC.
Plan Manager

No. Ref. Guarantee Plan: 107063-1
No. Ref. CCAC: S08-010302-NP
No. Ref. Arbitrator: 12 913-16

ARBITRATION DECISION

Arbitrator:	Mtre. Jeffrey Edwards
For the Beneficiary:	Ms. Kimmie Chedel, personally
For the Builder:	Mtre. Alain Brouillard (Fédération des professionnelles, CSN)
For the Plan Manager:	Mtre. Patrick Marcoux (Savoie Fournier)
Date(s) of hearing:	June 26, 2008
Hearing location:	1080, Beaver Hall Hill, Suite 600 Montreal, (Quebec) H2Z 1S8
Date of decision:	July 23, 2008

AFTER HAVING READ THE PROCEEDINGS, HEARD THE PROOF AND ARGUMENTS OF ALL PARTIES, THE ARBITRATION TRIBUNAL RENDERS ITS DECISION AS FOLLOWS:

1. FACTS AND PROCEEDINGS

[1] The Beneficiary and the Builder entered into a contract of enterprise in November 2005 for the construction of a residential building to be situated at 2966, du Domaine du Lac Lucerne in Ste-Adèle (Exhibit A-1).

[2] The Beneficiary took possession and inspected the property on September 9, 2006. On that day, she and the Builder also signed a list of items that needed to be completed by the Builder (Exhibit A-2).

[3] It appears that shortly after the taking of possession, a major leak occurred at the property, which led to an agreement between the Beneficiary and the Builder for part of the additional costs incurred by the Beneficiary.

[4] On January 19, 2007, the Beneficiary sent a letter to the Builder explaining said costs and requesting that they be deducted from the holdback amount of \$22,254.00 (Exhibit B-1 *en liasse*). The Beneficiary also advised the Builder that she was terminating their contract. Although not all the correspondence exchanged between the parties was provided to the undersigned, the proof establishes that the Builder accepted the request of deduction in part. As we will see, the Arbitration Tribunal is also called upon to determine that amount still owed to the Builder.

[5] On January 24, 2007, the Beneficiary sent an email reiterating the content of her letter (Exhibit B-4).

[6] The Builder responded to the Beneficiary on February 5, 2007. To summarize, the Builder agreed to give to the Beneficiary a total credit of \$14,427.18, leaving an amount of \$10,835.39 to be paid by the Beneficiary (Exhibit E-1 *en liasse*).

[7] On March 10, 2007, the Builder returned to the Beneficiary her cheque in the amount of \$2,096.00 and made a final attempt to settle the dispute by offering to settle the matter for the amount of \$5,496.00 (Exhibit E-1 *en liasse*).

[8] This offer was refused by the Beneficiary on April 30, 2007 (Exhibit B-2).

[9] On July 6, 2007, the Builder served a demand letter upon the Beneficiary claiming the amount of \$10,835.39, plus a \$25.00 fee (Exhibit E-1 *en liasse*).

[10] On September 7, 2007, the Beneficiary sent a demand letter to the Builder and the Plan Manager detailing the problems with the property (Exhibit A-3 *en liasse*).

[11] On September 27, 2007, the Plan Manager sent to the Builder a 15 day notice to repair (Exhibit A-4).

[12] On October 11, 2007, the Builder instituted proceedings before the Quebec Court (Small Claims Division) against the Beneficiary for the payment of the outstanding amount he claims is due under his contract. However, the Builder reduced its initial claim of \$10,835.39 to the legal limit of \$7,000.00 in Small Claims Division (Exhibit A-8) and formally renounced to the amount of \$3,835.39.

[13] On November 6, 2007, the Plan Manager, through Mr. Jacques Fortin, Architect, inspected the complaint of the Beneficiaries. At that time, both the Builder and the Beneficiary were present. Ms. Pamela Racz, advisor for the Beneficiary, was also present.

[14] On November 12, 2007, following the inspection, the Builder sent a letter to the Plan Manager explaining that he was never asked by the Beneficiary to correct or repair and that many repairs were completed by the Beneficiary herself or a third party paid by her (Exhibit A-5).

[15] The Plan Manager rendered its decision on December 3, 2007 (Exhibit A-6). Items 1 to 5 were awarded to the Beneficiary and items 6-14 were refused.

[16] On January 3, 2008, the Beneficiary requested the arbitration of the Plan Manager's decision (Exhibit A-7). The Beneficiary formally and specifically requested that the arbitration proceedings take place in English. Although the hearing was bilingual in order to accommodate the Builder, the present decision is drafted in English in order to accommodate the request of the Beneficiary.

2. DECISION

[17] Although the Plan Manager granted the Beneficiary's request for five items, she requested to present proof and argue all the items submitted to the Plan Manager, for the main reason that she refuses to have the Builder effect the repairs already ordered and the others that may be ordered by the undersigned, for specific reasons that will be detailed later.

[18] For sake of clarity, the Arbitration Tribunal will deal with this issue under a separate heading.

Item 1: The Doors

[19] The Beneficiary says that the wood doors of the property suffered significant shrinkage due to excess heat and humidity at the time or soon after the water infiltration. She also says that originally they were badly manufactured. The proof shows that many doors are warped and in a totally unacceptable state (report and testimony of Mr. Claude Pellerin). The Beneficiary requests that all the wood doors of the property be replaced.

[20] The Plan Manager awarded this point to the Beneficiary. But there is a problem regarding the words used by the Plan Manager in its decisions for the corrective work ordered.

[21] The French version of the decision states :

“L’entrepreneur devra corriger toutes les portes intérieures, à l’exception des portes coulissantes, afin que celles-ci soient installées selon les règles de l’art. ”

[22] The English version of the decision provided to the Beneficiary reads as follows:

“The contractor will be required to repair all the doors, with the exception of the sliding doors, so that all doors are installed in compliance with existing norms and standards of practice.”

[23] Mr. Fortin testified that his intention when using the French word “corriger” included the replacement of the door, not just its repair. Also, from an administrative view for the Plan Manager of the APCHQ, its policy is that the French version of the decision prevails in case of discrepancy. Therefore, it is clear that the doors will have to be replaced when required under the normal rules of the trade. Under reserve of this clarification, the Arbitration Tribunal confirms the decision of the Plan Manager.

[24] The Beneficiary also requested that the Builder provide her with the name of the manufacturer of the doors and a copy of the release given by the subcontractor, in accordance with the contract. The Builder agreed under oath to provide such information and provided during the hearing the name of the manufacturer, namely Les Portes du Manoir, situated at Sorel. The Arbitration Tribunal also takes act of the Builder’s undertaking to provide releases from the various sub-trades and suppliers on the property.

Item 2: Crack in Ceramic Floor

[25] This item was repaired by the Beneficiary in mid-January 2008. She hired Entreprise Claude Pellerin to effect the repair. Therefore, the Arbitration Tribunal cannot intervene.

Item 5: Burnt Elements in Hot Water Tanks

[26] This point was granted by the Plan Manager. The only proof submitted by the Beneficiary is that related to her lack of confidence in the Builder. This will be dealt with later.

Item 7: Cracks in Drywall

[27] The Beneficiary submits that there are cracks in the dry wall near the fire place. The claim for repair was not accepted by the Plan Manger since Mr. Fortin believed that

the cracks were caused by the normal drying process of the construction materials. In January 2008, water started coming from the cracks. The Beneficiary's witness, Mr. Claude Pellerin, opened the area through a pot light and stated to the Arbitration Tribunal that the insulation of the ventilation pipe located inside the wall in the back of the fire place was covered with ice and that due to the temperature difference between the interior and the exterior, the ice was melting and caused the damages to the dry wall. In his report (Exhibit B-1), he states:

“[...] il y a eu de l'eau qui a coulé causé par du givre qui est produit par le tuyau d'évacuation, après avoir enlever le pot light qui est dans le plafond j'ai remarquer que l'isolant du tuyau en question étais plein de givre et lorsqu'il y a une différence des température extérieur et dégel le tuyau dégoutte sur le placoplâtre et produit de l'écoulement.” (sic)

[28] At the time of the inspection (Nov. 6, 2007) by the Plan Manager, water had not yet leaked from the cracks. It appears that there were insufficient signs of the true cause of the cracks namely intermittent water infiltration at the time of that inspection.

[29] The Arbitration Tribunal concludes that the Beneficiary's denunciation was sufficient and that the symptoms of the problem in the ceiling were latent but present during the inspection and that the cause is definitely not simply wear and tear for those cracks.

[30] The proof provided by the Beneficiary is sufficient and is not contradicted. The Builder will have to carry out the necessary work to eliminate the cause of this leak and repair the dry wall in the area at the back of the fire place, according to the rules of trade. The Arbitration Tribunal however maintains, in light of the absence of proof to the contrary, the Plan Manager's decision for the other cracks alleged by the Beneficiary.

Item 8: Telephone Line for Security Gate

[31] The Beneficiary testified that this item was already repaired by a third party at her costs. As for items 2 and 5, she is not asking the undersigned for a refund of the amounts paid. Therefore, the Arbitration Tribunal will not intervene.

3. THE BUILDER'S RIGHT TO EFFECT THE REPAIRS ITSELF

[32] The Beneficiary argues that she is justified to refuse to let the Builder make the repairs already ordered and all future repairs ordered by the Arbitration Tribunal. She says that she and her family have incurred extensive trouble and inconvenience due to the lack of competence of the Builder. Her parents (for whom the property was built) suffered extensive stress as they were forced to move out of the property for a month and a half. She complains that the Builder has broken promises and that she has lost confidence in its representatives.

[33] The Beneficiary states that to this day, the whole project has caused major stress on her relationship with her father. She says that there is tension between her, and the Builder, which resulted in the institution of proceedings by the Builder for the recovery of the balance of the price left unpaid.

[34] The Builder's representative states that there is no animosity on his behalf and that he is perfectly capable of undertaking the repairs and that he should be allowed to do so.

[35] The Plan Manager submits that the general rule to the effect that the Builder has the right to make the repairs must prevail, since there are no conclusive reasons in the present case that would justify otherwise.

[36] The general rule under the Guarantee Plan is that the Builder has the right to effect the repairs itself, presumably at a lower cost. According to the Plan Manager, there is an exception recognized in the exceptional case where the presence of the Builder was totally unbearable and after several unsuccessful efforts at repair.

[37] Although the Arbitration Tribunal sympathizes with the Beneficiary and the unfortunate stress that she and her family have suffered during the process of building the property, we see no paramount, controlling and exceptional reason that would justify the undersigned to order that a third party make the repairs.

[38] The Builder is capable of undertaking the repairs itself and has expressed his desire to do so and to fully respect the concerns of the Beneficiary and her parents during the repairs. The Arbitration Tribunal encourages the parties to work together in order to ensure that the work be completed as soon as possible, limiting the impact of those repairs on the Beneficiary's parents.

4. THE BENEFICIARY'S OBLIGATION TO PAY THE BALANCE DUE BEFORE THE PLAN MANAGER CAN EFFECT THE REPAIRS

[39] Under section 6.2 of the guarantee contract (Exhibit B-5), if the intervention of the Plan Manager is necessary to correct or finish work at the property, the Beneficiary has to pay all amounts due to the Builder for the construction of the building.

[40] The Builder submits that the amount of \$10,835.39 is left unpaid to date.

[41] Although the Beneficiary does not contest her obligation to pay the balance for the Plan Manager to intervene, she contests owing the amount of \$10,835.39. She offers to pay in trust the amount of \$2,096.00 in final and complete settlement of this matter.

[42] Both parties produced documents and email exchanges in support of their position.

[43] The Arbitration Tribunal has reviewed the documentation produced, the testimonies given and the respective representations of the parties. It must be noted that the Builder voluntarily reduced its claim to \$7,000.00 in order to qualify for the

Quebec Court (Small Claims Division) and has renounced to any further amount owing by the Beneficiary (Exhibit A-8). This constitutes an extra-judicial admission by the Builder of the amount presently owed. Consequently, the Arbitration Tribunal concludes that the amount owed by the Beneficiary is \$7,000.00. The Arbitration Tribunal will therefore make its order for corrective work to be subject to the deposit of that amount in trust with the Plan Manager.

5. ARBITRATION FEES

[44] In accordance with section 2.3.4 of the guarantee contract, the Plan Manager will pay the arbitration costs.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

PARTIALLY GRANTS the Beneficiary's application for arbitration;

ORDERS the Builder to effect the necessary corrective work, as stated in the present decision, according to the rules of trade, within forty (45) days of the present arbitration decision, failing which the Plan Manager is hereby **ORDERED** to execute said repairs within the following thirty (30) days;

ORDERS the Beneficiary to pay to the Plan Manager in trust the amount of \$7,000.00 within thirty (30) days of the present arbitration decision;

TAKES ACT of the Builder's undertaking to provide to the Beneficiary releases from the various sub-trades and suppliers on the property;

CONDEMNS the Plan Manager to pay the arbitration fees.



Mtre. Jeffrey Edwards, Arbitrator