

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 Quebec Building Board
(Régie du bâtiment du Québec)

Groupe d'arbitrage et de médiation sur mesure (GAMM)

Between

BARBARA PRIMEAU

Beneficiary

And

LES HABITATIONS RÉJEAN ROY INC.

Builder

And

LA GARANTIE HABITATION DU QUÉBEC INC.

Plan Manager

Ref. No. Guarantee Plan: 31313-1

Ref. No. GAMM: 2006-09-016

Ref. No. Arbitrator: 13 185-22

ARBITRATION DECISION

Arbitrator:	Mtre. Jeffrey Edwards
For the Beneficiary:	Mtre. Isabelle E. Geoffroy
For the Builder:	Mr. Réjean Roy
For the Plan Manager:	Mtre. Avelino De Andrade
Date of hearing:	April 3, 2007
Delay for decision agreed to by parties:	July 2, 2007
Hearing location:	623, Missisquoi Ave. Venise-en-Québec (Quebec) J0J 2K0
Date of decision:	June 26, 2007

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

1. FACTS AND PROCEEDINGS

[1] On February 15, 2005, the Beneficiary and the Builder entered into a contract of enterprise ("contract") by which they agreed that the Builder would build a house situated at 623 Missisquoi Avenue in the City of Venise-en Québec, Province of Quebec (Exhibit A-3).

[2] The Beneficiary is an American citizen, speaks only English and requested that as much as possible of the hearing take place in English and that the present decision be rendered in English.

[3] It appears from the proof that on July 15, 2005, the Builder had substantially completed the work. However, for reasons detailed below, the date of acceptance (reception) of the house by the Beneficiary was determined by the Plan Manager as being August 31, 2005.

[4] It is to be noted that the Beneficiary has not, to date, moved in or otherwise occupied the house.

[5] On August 31, 2005, two inspectors mandated by the Beneficiary inspected the premises. They noted that the wood floors on the first and second floor were in certain places warped and separated and not in an acceptable condition. Their report was filed as Exhibit A-4.

[6] On October 26, 2005, the Beneficiary requested the intervention of the Plan Manager.

[7] The inspection of the house, pursuant to the complaint of the Beneficiary, by the inspector conciliator of the Plan Manager was done on January 18, 2006. The Builder and the Beneficiary's inspectors were also present. The state of the wood floor had further deteriorated since August 31, 2005, according to the inspector of the Beneficiary and the Builder, and on the second floor its supporting structure had even collapsed. At that time, the parties agreed to turn the heat up to 70° F (21.1° C) to see the effect it would have on the floors and to meet again in April.

[8] On April 20, 2006, the parties met again at the property. On that date, the condition of the wood floors of the property had considerably improved.

[9] On June 5, 2006, the Plan Manager rendered its decision and rejected the Beneficiary's complaint (Exhibit A-6).

[10] On June 30, 2006, the Beneficiary requested the present arbitration (Exhibit A-1).

[11] On September 21, 2006, the undersigned was mandated to act as arbitrator in this matter.

[12] A preliminary hearing by audio-conference was held on November 21, 2006. During that hearing, the attorney of the Beneficiary requested that a site visit take place and that the hearing on the merits be held at the house in question. That request was granted by the Arbitration Tribunal.

[13] The hearing was initially scheduled on March 15, 2007. However, it had to be re-scheduled since the witnesses of the Beneficiary were not available at that date.

[14] The site visit and the hearing on the merits were held at the house on April 3, 2007.

2. QUESTION IN ISSUE

[15] Are the wood floors in a defective state and if so, is the Builder responsible?

3. ANALYSIS

[16] Two areas of wood floors are in dispute. The parties agree that the wood floor on the second floor of the property is in an unacceptable condition. Its support structure has collapsed and needs to be completely replaced.

[17] For the wood floor on the first floor, the Beneficiary submits that its condition is unacceptable and needs to be either repaired or replaced. The Builder and the Plan Manager argue that the state of the floor on the first floor has considerably improved over time and is now acceptable.

The Beneficiary's Proof and Position

[18] Apart from the Beneficiary herself, two witnesses were heard on her behalf: Mr. Yvon Sauvé and Mr. Albert Arduini.

[19] Mr. Arduini inspected the house on August 31, 2005 and noticed that the floors were warping and separating. In his opinion, the condition of the floor at that time was worse than at the time of the hearing. He was present during the inspection of the

inspector-conciliator of the Plan Manager in January 2006. At that time, the floors were in his view in an unacceptable condition.

[20] He testified that the wood floor on the second floor still needs to be replaced. As for the wood floor on the first floor, he stated that the condition of the wood floor at the date of the hearing had improved, and that it was within the limits of what he considers acceptable.

[21] Mr. Sauvé was also present on August 31, 2005 and he inspected the house with Mr. Arduini. He confirmed Mr. Arduini's version that on August 31, 2005, the wood floors of the property were not in an acceptable condition. However, importantly, he also confirmed that at that time there was no difference in the state of the wood floor of the second floor and the wood floor on the first floor.

[22] He added that in his view, the fact that the basement of the house is a crawl space and therefore a humid environment contributed in part to the warping and separating of the wood floor of the first floor since the humidity was absorbed from below the wood floor.

[23] In his view, even though the condition of the wood floors at the time of the hearing had improved since his previous inspection, they were still in an unacceptable state for new wood floors in a new property.

[24] He recommended that all the wood floors be completely removed and redone.

[25] The Beneficiary requested that the Arbitration Tribunal consider these two witnesses as expert witnesses for the purpose of this arbitration. Such request was not contested by the Plan manager and by the Builder. Therefore, the Arbitration Tribunal grants the Beneficiary's demand in that regard.

[26] The Beneficiary argues that since the date of acceptance was determined by the Plan Manager as being August 31, 2005 and that her inspectors' report establishes that the wood floors, on that day, were not in a normal condition, the Builder is responsible for the entire repair work, including the replacement of the wood floors of the house, if necessary.

[27] The Beneficiary's position is that she has the right to expect new wood floors in her new property. The fact that the condition of the wood floors further deteriorated after August 31, 2005 and the reason for such deterioration is not relevant in her view.

The Plan Manager's Proof and Position

[28] The Builder's representative, Mr. Réjean Roy, was the Plan Manager's first witness. He explained that his company's contract was to build a house on the Beneficiary's land and that work was completed on July 15, 2005.

[29] He believes that the only reason why the date of acceptance of the house was determined by the Plan Manager to be on August 31, 2005 is that the Beneficiary refused, without justification, to sign and return the appropriate acceptance documents.

[30] He testified that the installation of the wood floors is not in issue. The only problem is the warping or separating of the wood floors. In his view, the fact that the property was never occupied and not properly ventilated and heated caused the humidity level to increase beyond normal standards and caused all the problems with the floors.

[31] He also stated that an amount of \$5,500.00 is still owed by the Beneficiary for the house. All parties agreed that no conclusion is requested of the Arbitration Tribunal in that regard.

[32] The inspector-conciliator of the Plan Manager, Mr. Michel Labelle, rendered the decision at issue. He also testified that his decision is based on the two inspections done on January 18, 2006 and April 20, 2006. The condition of the wood floors had considerably improved in April 2006 and that fact was recognized by all the parties.

[33] He considers that the only explanation for the condition of the floors is that there was a lack of heat in the house, which caused the humidity level to rise. The excess of humidity then caused a deterioration of the floors. He believes that the fact that the situation improved when the heat was turned on confirms his conclusion, since the only factor that changed between January 2006 and April 2006 is that the premises were heated.

[34] Mr. Labelle states that he has made over 100 wood floor inspections and that the condition of the floor on the first floor is acceptable. The floor on the second floor is unacceptable and needs to be replaced. He also testified that the Beneficiary had received a Maintenance Guide for her house and that she should have known that it needed to be properly heated and ventilated (Exhibit A-7). However, the proof indicates that this document was only received by the Beneficiary in April 2006.

[35] Donald Boudreau is a representative of a BMR Renovation Center and has been selling construction materials for 26 years. He has been consulted over 50 times for wood floor humidity issues similar to the one at hand. He believes that the condition of the floor on the first floor is acceptable but that the second floor has suffered a major trauma and that it needs to be redone.

[36] Although the Plan Manager never requested that the Arbitration Tribunal consider Mr. Boudreau as an expert witness, and since the Beneficiary raised an objection with respect to the relevance of his testimony, the Arbitration Tribunal will consider Mr. Boudreau as an ordinary witness only.

[37] Alain Chamard is another inspector for the Plan Manager. He has inspected over 100 properties with similar problems of wood flooring. He corroborates the testimony of Michel Labelle that the most probable cause of the warping and separating of the floors is the excessive level of humidity. The fact that the property was not occupied also played a role, he states.

[38] The Beneficiary also objected to the testimony of this witness on the basis that the witness had never inspected the premises before the hearing date and that his testimony was therefore not relevant. The Arbitration Tribunal believes that this testimony was helpful but will consider Mr. Chamard as an ordinary witness only.

[39] The Plan Manager argues that the floor on the first floor is, today, in a satisfactory condition and that therefore the Beneficiary suffers no prejudice. All the parties agreed that the humidity played an important role in the aggravation of the floors and that this is the only logical reason to explain the warping, separating, cracking and breaking of the floors.

[40] The Plan Manager's position is that the condition of the floors was aggravated by the Beneficiary's absence from the house and the accompanying lack of heat and ventilation.

The Builder's Proof and Position

[41] The Builder agrees with and supports the position of the Plan Manager.

4. DECISION

[42] The Arbitration Tribunal had the opportunity to inspect the entire house, more particularly, all the wood floors and the alleged defects.

[43] The Arbitration Tribunal considers that at the time of the delivery and acceptance of the house by the Beneficiary, the Beneficiary was entitled to receive new wood floors, in a new condition and free of any defect. The date of the delivery and acceptance, according to the Plan Manager's position and documents, is August 31, 2005. The Arbitration Tribunal has no jurisdiction to modify that date. The proof clearly establishes that on that date, the condition of the two wood floors was not acceptable. In fact, the floors were already warping and separating.

[44] The Plan Manager and the Builder therefore failed to prove that the wood floors were, on August 31, 2005, in a satisfactory condition. As previously mentioned, the uncontested and incontrovertible proof before the Arbitration Tribunal is that the wood floors were warping and separating on that date. However, the Arbitration Tribunal must also consider that afterwards, upon proper heating and ventilation and at the time of the site visit and hearing, the wood floor on the first floor was in an acceptable state, except all along the rear window.

[45] Therefore, for the first floor, the Builder will have to replace the wood floor only near the rear window but all along the length of entire back wall. The undersigned considers that the rest of the floor is in a satisfactory condition and that there is no need to replace the entire floor.

[46] As for the second floor, the uncontested proof and the Arbitration Tribunal agrees that its current condition is totally unacceptable. However, it is also clear that the excessive heat, absence of proper ventilation and the vacancy of the property between August 31, 2005 and January 18, 2006 aggravated and worsened the condition of the wood floor on the second floor.

[47] To that effect, the *Regulation respecting the guarantee plan for new residential buildings*¹ stipulates:

“29. The guarantee excludes: [...]

(3) repairs made necessary by a fault of the beneficiary such as **inadequate maintenance or misuse of the building**, as well as alterations, deletions or additions made by the beneficiary;” (Our emphasis)

[48] The Arbitration Tribunal therefore concludes, after having heard all the parties and their proof, that the fact that the property was not occupied and the fact that the heat and humidity were not controlled or decreased until January 2006 aggravated the deterioration of the wood floor on the second floor.

[49] However and as previously mentioned, the Arbitration Tribunal also concludes that the wood floor on the second floor was already not in a satisfactory state or condition on August 31, 2005 before the aggravated damages occurred.

[50] Under article 116 of the *Regulation*, the Arbitration Tribunal can decide and take into account equity. The article states as follows:

“116. An Arbitrator shall decide in accordance with the rules of law; **he shall also appeal to fairness where circumstances warrant.**” (Our emphasis)

¹ C. B.1.1, r.0.2, hereinafter the *Regulation*.

[51] Since both parties are in fault for the deteriorated state of the wood floor of the second floor, it is fair and equitable that the Arbitration Tribunal attributes to each party a share of the cost of repairing the wood floor on the second floor.

Furthermore, the law permits the Arbitration Tribunal to apportion liability partly to the Builder and partly to the Beneficiary. Article 1478 of the *Civil Code of Quebec* states as follows:

“1478. Where an injury has been caused by several persons, liability is shared by them in proportion to the seriousness of the fault of each. **The victim is included in the apportionment when the injury is partly the effect of his own fault.**” (Our emphasis)

[52] Based upon its analysis of the proof, the Arbitration Tribunal concludes that the Beneficiary should bear 30% of the costs of replacement of the wood floor of the second floor and the other 70% should be paid by the Builder.

[53] The Arbitration Tribunal wishes to thank the parties and their attorneys for their seriousness and their conduct during the hearing.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

PARTIALLY GRANTS the arbitration demand;

ORDERS the Builder to execute the necessary repairs as stated at paragraph 45 of this decision to the floor of the first floor of the house located at 623 Missisquoi Avenue in the City of Venise-en Québec, Province of Quebec, in accordance with the rules of the trade, within thirty (30) days of the present sentence, failing which the Plan Manager is hereby **ORDERED** to execute said repairs within the following thirty (30) days;

For the work to replace the wood floor on the second floor, **ORDERS** the Beneficiary to deposit with the Plan Manager 30% of the amount of the costs of the corrective work;

Upon receipt of the said amount by the Plan Manager and confirmation to the Builder thereof, **ORDERS** the Builder to execute the necessary work, in accordance with the rules of trade, to replace the wood floor on the second floor of the house located at 623 Missisquoi Avenue in the City of Venise-en Québec, Province of Quebec, in accordance with the rules of the trade, within thirty (30) days of the present sentence, failing which the Plan Manager is hereby **ORDERED** to execute said repairs within the following thirty (30) days;

ORDERS, IN ACCORDANCE WITH ARTICLE 123 OF THE *REGULATION*, that the costs of the present arbitration be borne by the Plan Manager.

A handwritten signature in blue ink, appearing to read "J Edwards", with a horizontal line extending from the end of the signature.

Mtre. Jeffrey Edwards, Arbitrator