

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

Between

KULWANT SINGH MINHAS

And

SURJIT KAUR PARMAR

Beneficiaries

And

9096-2556 QUÉBEC INC. (Nader Constructions)

Builder

And

LA GARANTIE DES BATIMENTS RÉSIDENTIELS NEUFS DE L'APCHQ INC.

Plan Manager

No. Ref. Guarantee Plan: 035616
No. Ref. GAMM: 2006-12-009
No. Ref. Arbitrator: 13 185-18

ARBITRATION DECISION

Arbitrator:	Maître Jeffrey Edwards
For the Beneficiaries:	Mr. Kulwant Singh Minhas, personally
For the Builder:	Absent
For the Plan Manager:	Maître Luc Séguin (Savoie Fournier)
Date(s) of hearing:	January 24, 2007
Hearing location:	4808, Collège Beaubois Pierrefonds, (Quebec) H8Y 2H1 Canada

Date of receipt of Administrator's
authorities:

February 7, 2007

Date of decision:

February 28, 2007

AFTER HAVING READ THE PROCEEDINGS, 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] The Beneficiaries have been occupying the property located at 4808, College Beaubois Street in the City of Pierrefonds, Quebec ("Property" or "Building") since January 1, 2004, further to an agreement with the Builder.

[2] On July 7, 2004, the Beneficiaries completed the form *Step 5 – List of pre-established elements for verification and reception of building* ("Step 5") with the Builder.

[3] At the same time, the Beneficiaries compiled a list of work to be completed or corrected and that was annexed to the form *Step 5*.

[4] The Beneficiaries bought from the Builder the Property on July 29, 2004.

[5] On July 29, 2005, the Beneficiaries drafted a *Liste des items à compléter pour finir le projet* and gave it to the Builder.

[6] On July 30, 2005, the Beneficiaries filed a claim with the Plan Manager and requested that an inspection of the Property take place.

[7] The inspection occurred on January 17, 2006, and was followed by a decision dated February 2, 2006.

[8] In its decision ("Decision"), the Plan Manager granted the Beneficiaries' claim for point 1 of the report and dismissed the claims for points 2 to 29.

[9] The Beneficiaries filed an application for arbitration on April 8, 2006.

[10] On August 10, 2006, the Arbitration Tribunal rendered a decision dismissing the Plan Manager's preliminary objection regarding the non respect of the delay to apply for arbitration prescribed at article 35 of the *Regulation respecting the guarantee plan for new residential buildings* ("Regulation").

[11] The Beneficiaries are appealing Points 2 to 29 of the Plan Manager's Decision.

[12] The hearing took place on January 24, 2007. Upon the request of the Parties, the Arbitration Tribunal visited the Property to examine the alleged defects. The attorney of the Plan Manager requested a delay until February 7, 2007 to provide authorities.

[13] The Builder, duly informed of such hearing, was however absent.

2. QUESTION IN ISSUE

[14] Is the Decision of the Plan Manager well founded in fact and in law?

3. ANALYSIS AND DECISION

General grounds of rejection raised by the Plan Manager

Validity of the notice given by the Beneficiaries (list attached to Step 5)

[15] The Plan Manager's Decision dismissed the Beneficiaries' claim on Points 2 to 9 on the basis that these were readily observable conditions which were not declared in writing at the time the building was accepted.

[16] As to Points 10 to 28, the Plan Manager dismissed the claim on the basis that these defects were not disclosed in writing within the delay of twelve (12) months prescribed by the *Regulation* for the guarantee covering non-apparent poor workmanship, and were not serious enough to be considered hidden defects or major construction defects. In addition, with regard to Points 21 to 28, the Plan Manager stated that these defects were not declared in writing within a delay of six (6) months following their discovery or occurrence.

[17] However, the Beneficiaries established on the balance of probabilities, during the hearing, that most of the said defects were in fact disclosed to the Builder on July 7, 2004, in a list annexed to the *Step 5* (hereinafter the "*Annex*").

[18] In fact, the inscription "see list attached" appears on the last page of the *Step 5* form completed by the Beneficiaries and the Builder.

[19] The Plan Manager did not establish on the balance of the probabilities that he did not receive his copy of *Step 5* or that he was diligent in trying to obtain it.

[20] In any event, a copy of the said *Annex* was sent by fax to the Plan Manager on March 22, 2006, after the Decision was rendered.

[21] Since the proof established that the prescribed form was duly completed by the Beneficiaries and the Builder, copy of which was received by the Plan Manager at the appropriate time, and considering that the *Annex* was mentioned on the said form, the Arbitration Tribunal concludes that the defects, deficiencies or non-completed work listed in the *Annex* were validly notified at the time of acceptance of the Building, on July 7, 2004.

Exclusion at Article 15 of the *Regulation*

[22] Secondly, the Plan Manager submits that the Beneficiaries' arbitration application should be dismissed on the basis of the exclusion provided by the third paragraph of Article 15 of the *Regulation*. This provision states:

15. The guarantee of a plan applies to a building that has no beneficiary at the end of the work, provided that acceptance of the building occurs within 24 months after the end of the work.

The guarantee pertaining to faulty design, construction or production of the work, or the unfavourable nature of the ground within the meaning of article 2118 of the Civil Code of Québec is nevertheless limited to the remaining term of the guarantee.

The guarantee of completion after acceptance of the building does not apply, however, if the beneficiary and the contractor agree that the building is sold in the state of completion it has attained at the date of the contract.

[23] The Plan Manager argues that the following provision of the Deed of Sale gives application to the above mentioned exclusion:

D'autre part, l'acquéreur s'oblige à ce qui suit :

1. Prendre l'immeuble vendu dans l'état où il se trouve actuellement, l'acquéreur déclarant l'avoir vu et examiné à sa satisfaction et avoir vérifié lui-même auprès des autorités compétentes que la destination qu'il entend donner à l'immeuble est conforme aux lois et règlements en vigueur.

[24] This argument was raised for the first time at the very end of the hearing, during the closing statement of the attorney of the Plan Manager. It was not mentioned in the Plan Manager's initial decision.

[25] The Arbitration Tribunal gave the Plan Manager a period of ten days to provide authorities supporting his position. However, in a letter dated February 7, 2007, the attorney of the Plan Manager informed the undersigned that its attempts to find such authorities were not successful.

[26] First, according to the proof of the Beneficiary Mr. Minhas at the hearing, at the notary's office for closing, it was clearly agreed that the Builder would complete the list of deficiencies. The clause in question in the Deed of Sale was not raised or stated as intending to release the Builder of its obligation to complete the outstanding work. That proof was not contested.

[27] Second, it appears to the Arbitration Tribunal that Article 15 of the *Regulation* concerns a specific situation, namely the case where a building has no beneficiary at the end of the work. This situation did not occur and does not apply in the present case.

[28] Third, the interpretation suggested by the Plan Manager is not supported by the facts of the present case. The Plan Manager received the Beneficiaries' claim, opened a file, made an inspection and rendered a decision without ever stating that the Beneficiaries were not covered as a result of Article 15 of the *Regulation* and the clause referred to in the Deed of Sale. The Plan Manager should have raised such argument earlier during the process and certainly not at the very end of the hearing. The Plan Manager's default to raise it at an appropriate time constitutes a *fin de non-recevoir* and it reflects badly on the Plan Manager, the administration of the Guarantee and justice to do otherwise. The Arbitration Tribunal invokes, to the extent necessary, Article 116 of the *Regulation* to apply equity since not to do so would give rise to an injustice.

[29] Fourth, the alleged provision of the Deed of Sale is a standard clause ("clause de style"), which is always included in a deed of sale. An exclusion clause is interpreted restrictively and against the party invoking it.¹ Since the effect or application of the clause is unclear and ambiguous, it cannot have the effect submitted by the Plan Manager. Once again, the Arbitration Tribunal believes that the facts of the present case do not support the interpretation of the Plan Manager.

Analysis of the alleged defects, deficiencies, uncompleted work and poor workmanship

Points 2 to 9, 19, 20 and 25

[30] The Beneficiaries' claims on points 2, 3, 4, 5, 6, 7, 8, and 9 were dismissed by the Plan Manager on the basis that these defects were readily observable conditions that were not declared in writing at the time the Property was accepted.

[31] Points 19, 20 and 25 were dismissed on the basis that they were declared in writing after the expiry of the guarantee covering non-apparent poor workmanship,

¹ Art. 1426, 1432 C.c.Q.

which is valid for twelve (12) months following acceptance of the building. The Plan Manager furthermore considered that these situations were not serious enough to be considered a hidden defect or a major construction defect.

[32] Finally, as to point 25, the Plan Manager added that the situation was not disclosed within a delay of six (6) months following its discovery or occurrence.

[33] Point 2 of the Decision relates to the absence of columns in the opening between the living room and the hall. However, it appears in the *Annex* as point 17.

[34] Point 3 of the Decision relates to the absence of French doors between the kitchen and the dining room. This is listed in the *Annex* as point 7.

[35] Point 4 of the decision relates to the finishing work under the sill of the main entrance door, which is listed in the *Annex* as point 1.

[36] Point 5 of the decision relates to the opening in the ceiling of the ground-floor washroom, which is listed in the *Annex* as point 13.

[37] Point 6 of the decision relates to the absence of a light fixture in the master bedroom ensuite washroom, which appears in the *Annex* as point 14.

[38] Point 7 of the decision relates to the absence of handles on the cupboards in the said washroom, which is mentioned in the *Annex* as point 12.

[39] Point 8 of the decision relates to the absence of light fixtures in the cornice in the front turret, which appears in the *Annex* as point 18.

[40] Point 9 of the decision relates to the finishing of the work on the walls in the furnace room, which was initially supposed to be closed off. This is mentioned in the *Annex* as point 4.

[41] Point 19 of the decision relates to the absence of caulking on the rear windows, which is mentioned in the *Annex* as point 3.

[42] Point 20 of the decision relates to the absence of a grill on the fan outlet in the back bathroom on the upper floor. This situation was disclosed in the *Annex* as point 19.

[43] Point 25 of the decision relates to the unfinished work on mouldings on the fireplace mantle, which is mentioned as point 11 in the *Annex*.

[44] At the hearing, the Plan Manager acknowledged that all these points relate to non-completion of work at the Property ("*parachèvement*"), which would normally be covered by Article 3.1 of the guarantee contract.

[45] In the light of the above comments regarding the validity of the declaration made in the *Annex*, and considering the admission of the Plan Manager, the Arbitration Tribunal will grant the Beneficiaries' claims on points 2, 3, 4, 5, 6, 7, 8, 9, 19, 20 and 25. Therefore, the Builder will be ordered to complete this work in accordance with the initial plans and the applicable rules of the trade.

Point 10: Warping of one vertical moulding on the left side of the patio door

[46] The Beneficiaries withdrew their complaint on this point during the hearing, as they could not offer any evidence of the alleged defect.

Point 11: Stability and seal of the kitchen counter

[47] It appears from the evidence that this situation was disclosed to the Builder for the first time in the Beneficiaries' letter dated July 29, 2005.

[48] Based upon the *Regulation*, even if this situation would be considered as a hidden defect, the Arbitration Tribunal is of the view that the Beneficiaries should have discovered it within six (6) months of the acceptance of the building, and that a claim should have been made within six (6) months of the said discovery.

[49] Therefore, the Arbitration Tribunal will reject this point, as it was not disclosed within the stipulated delay.

Point 12: Scratches on the kitchen sink

[50] The Plan Manager argues that it was apparent, not disclosed at *Step 5*, and therefore not covered by the warranty.

[51] The Beneficiary testified that he discovered this situation when he first moved in, in January 2004, and states that this problem is due to a defect of the said sink.

[52] The Arbitration Tribunal rejects the Beneficiaries' claim on this point, on the basis that it was apparent and should have been disclosed at *Step 5*, which it was not.

[53] Furthermore, the Arbitration Tribunal considers that the proof did not establish that the sink's deterioration was not a question of mere wear and tear.

Point 13: One part of crown moulding on kitchen cupboards coming off

[54] The Beneficiaries had fixed the problem at the time of the hearing and therefore withdrew their complaint on this point.

Points 14 and 15: Weather-stripping damaged near the strike plate and one part of moulding damaged on the main entrance door

[55] These items were listed in the *Annex* as point 1.

[56] Therefore, the Arbitration Tribunal considers that these are covered by the warranty for non-completion of the work at the Property ("*parachèvement*") and accordingly grants the Beneficiaries' claims on these points. The Builder will have to fix the weather-stripping and damaged moulding of the main entrance door.

Point 16: Noisy tub in the main washroom on the upper floor

[57] This problem was disclosed in the *Annex* at point 16.

[58] The Arbitration Tribunal had the opportunity to examine the bathtub and could effectively hear a low level sound when Mr. Minhas stepped into it.

[59] However, the situation is not sufficiently grave and serious to be considered as a defect or poor workmanship.

[60] The Arbitration Tribunal considers that this situation is within acceptable construction standards.

[61] The Beneficiaries' claim on this point is rejected.

Point 17: Adjustment and damage to the latch and crank on the window in the right front bedroom

[62] This defect is listed in the *Annex* at point 5.

[63] Therefore, the Arbitration Tribunal considers that it is covered under Section 3.2 of the warranty, and accordingly orders the Builder to fix the latch and crank of the right front bedroom window.

Point 18: Adjustment of the aluminium siding on the back wall

[64] The Beneficiaries withdrew their complaint on this point during the hearing.

Point 21: Gaps in the hardwood flooring on the main floor

[65] This defect was mentioned in the *Annex* as point 9.

[66] The Beneficiaries testified that the size of the gaps varies with the seasons, but that the said gaps never close.

[67] The Plan Manager submitted that it did not have sufficient time to determine the cause of such gaps.

[68] Therefore, the undersigned will maintain jurisdiction on this point, and give both parties the opportunity to conduct tests and submit their observations for a period of six (6) months following the present decision. The Tribunal will then render its decision.

Point 22: Alignment of upper-floor railing

[69] This point was disclosed at *Step 5*, at point 10 of the *Annex*.

[70] The Arbitration Tribunal noticed during the visit that the upper-floor railing is very slightly curved.

[71] However, the undersigned considers that this situation is within acceptable construction standards.

[72] Therefore, the Beneficiaries' claim on this point is rejected.

Point 23: Sealing bathtub joints in the main washroom

[73] The Beneficiaries testified that there were no sealing joints around the main washroom's bathtub at the time of the acceptance of the building.

[74] However, this situation was not disclosed at *Step 5*.

[75] The Plan Manager's decision on this point is therefore maintained, as this was apparent and not disclosed at the time the building was accepted.

Point 24: Broken window in the master bedroom

[76] This point appears in the *Annex* at number 5.

[77] Therefore, the Arbitration Tribunal considers that this was covered by the warranty, either under Section 3.1 or 3.2. The Builder will have to repair or change the window of the master bedroom, in accordance with the applicable rules of the trade.

Point 26: Defective recessed light fixture in the kitchen ceiling

[78] This point was mentioned in the *Annex* at point 15.

[79] Therefore, it was validly disclosed by the Beneficiaries, and their claim on this point should have been granted by the Plan Manager, either under Section 3.1 or 3.2 of the warranty. Accordingly, the Builder will have to repair or change the kitchen ceiling's defective light fixture.

Point 27: Varnish on the railing on the staircase leading to the upper floor

[80] The Arbitration Tribunal is satisfied that this point is listed in the *Annex* at point 10.

[81] The undersigned noted that one vertical rung of the railing of the staircase leading to the upper floor has not been varnished.

[82] This is therefore covered under the warranty for non-completion of the work ("*parachèvement*").

[83] Accordingly, the Builder will have to varnish the said rung.

Point 28: Paint applied over repairs on the walls and ceilings on the ground floor

[84] This point appears in the *Annex* at point 8.

[85] The Arbitration Tribunal had the opportunity to observe that on the walls and ceilings of the living room, the fireplace and the hall, paint was applied or not finished in a manner that does not follow the rules of the trade. In fact, the undersigned could see the gypsum joints through the paint.

[86] This constitutes, in the opinion of the Arbitration Tribunal, poor workmanship that was validly disclosed at the time the building was accepted. Therefore, the Builder will have to correct the situation, in a manner consistent with the rules of the trade.

Point 29: Hairline cracks and quality of gypsum joints in the upper floor bedroom

[87] This point was rejected by the Plan Manager on the basis that it concerns repairs that became necessary as a consequence of normal behaviour of materials.

[88] The Plan Manager's expert Alain Deschênes admitted during the hearing that this ground was incorrect.

[89] The Arbitration Tribunal had the opportunity to note that the wall located at the right of the entrance door of the front left bedroom, on the upper floor, is unusually curved and that the gypsum joints of the said room are generally of poor quality.

[90] It was furthermore admitted by the Plan Manager that such joints must have been of poor quality at the time of the acceptance of the building, and that this situation could not result from the subsequent work that has been done.

[91] All parties agreed that the condition of the said wall was unacceptable.

[92] This situation was disclosed at *Step 5*, as the option "Walls & ceilings (plaster joints & paint)" was checked on the said form.

[93] Therefore, the Arbitration Tribunal considers this as an apparent defect that was disclosed at the time of the acceptance of the building, and grants the Beneficiaries' claim on this point. The Builder will be ordered to repair the cracks and correct the gypsum joints in a manner consistent with the rules of the trade.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

DISMISSES the arbitration demand of the Beneficiaries for Points 10, 11, 12, 13, 16, 18, 22 and 23;

GRANTS the arbitration demand of the Beneficiaries for Points 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 17, 19, 20, 24, 25, 26, 27, 28 and 29 as described in the text of this decision;

ORDERS the Builder to execute the necessary repairs stated at Points 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 17, 19, 20, 24, 25, 26, 27, 28 and 29 of the present arbitration sentence, 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.

MAINTAIN jurisdiction for Point 21 and gives both parties the opportunity to conduct tests and submit observations and representations for a period of six (6) months following the present arbitration sentence.

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". The signature is written in a cursive style with a long horizontal stroke at the bottom.

Mtre. Jeffrey Edwards, Arbitrator