

ARBITRATION

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

CANADA
Province of Québec

Arbitration organization authorized by the *Régie du bâtiment*:
La Société pour la résolution des conflits (SORECONI)

N° dossier Garantie : 10821
N° dossier SORECONI : 240301001

Between

DWAYNE SAMSON
Beneficiary

And

Eco-Quartier de la Gare (Brossard) Phase 1 S.E.C.
Contractor

And

Garantie Construction Résidentielle (« GCR »)
Manager

ARBITRATION AWARD

Arbitrator :	Pamela McGovern
Beneficiary :	Dwayne Sampson
Contractor :	absent
Manager :	absent
Hearing date :	November 7, 2024
Place of hearing :	Videoconference, Montréal
Date of arbitration decision :	December 16, 2024

240301001

Mandate

The Arbitrator received the mandate from La Société pour la résolution des conflits (SORECONI) on February 7 2024.

Relevant excerpts of the Record

23-11-2023	Manager's decision.
22-12-2023	Manager's email to Beneficiary with a copy of the decision.
15-01-2024	Receipt by the registry of Soreconi of the Beneficiary's request for arbitration.
07-02-2024	Transmission to the parties of the notification of arbitration and appointment of Me Pamela McGovern as the arbitrator.
28-02-2024	Contractor's attorney's email requesting a copy of the book of exhibits.
18-03-2024	Manager's email advising that there is a delay in the production of the book of exhibits.
26-03-2024	Manager's email forwarding the book of exhibits and confirming that that the Manager will not participate in the arbitration proceedings.
10-04-2024	Arbitrator's email to the parties regarding the management conference and proposing dates.
01-05-2024	Arbitrator's email to the parties following up regarding the management conference.
02-09-2024	Arbitrator's email to the parties following up regarding the management conference and requesting whether the parties wish to continue to proceed.
05-09-2024	Beneficiary's email confirming that he wishes to continue with the arbitration proceedings.
05-09-2024	Arbitrator's email to the parties proposing dates for the management conference.
11-09-2024	Contractor's email confirming that they are not available on any of the proposed dates.
24-09-2024	Arbitrator's email to the parties proposing new dates for the management conference.
01-10-2024	Arbitrator's email to the parties requesting a response.
01-10-2024	Beneficiary's email confirming availability for October 21 2024.
21-10-2024	Contractor's attorney email confirming that the Contractor will not participate in the arbitration process.
21-10-2024	Arbitrator's email to Beneficiary with a copy of the book of exhibits and a copy of the applicable regulation.

240301001

27-10-2024	Beneficiary's email to Arbitrator with additional information regarding claim including a picture of the floor under the hot water tank.
28-10-2024	Arbitrator's email to Beneficiary requesting availability for hearing.
29-10-2024	Beneficiary's email proposing dates for hearing.
07-11-2024	Hearing by video conference.

ADMISSIONS

[1] The admissions regarding the claim are:

[1.1] The property is a private portion of a multi-dwelling building.

[1.2] The initial contract of sale was dated July 8, 2019.

[1.3] The guarantee contract was dated July 3, 2019.

[1.4] The Deed of sale for the purchase of the property by the Beneficiary, was signed on February 10, 2023.

[1.5] The Beneficiary gave written notice to the Contractor of the claim, with a copy to the Manager, on August 25, 2023.

[1.6] The Beneficiary sent a claim to the Manager, received on September 15, 2023.

[2] The claim was sent between the third (3rd) and fifth (5th) year of the warranty under the Regulation respecting the guarantee plan for new residential buildings (hereinafter the "Regulation").

ISSUES AND BACKGROUND

[3] The Tribunal is presented with a request for arbitration initiated by the Beneficiary under the Regulation concerning a decision of the Manager dated November 23, 2023 regarding a property (hereinafter "Property") located at 7200 rue de Chambéry, appartement 3, Brossard, Québec J4Z 0N7. It should be noted that according to the record, the Beneficiary would have received a copy of the decision on December 22, 2023. The request for arbitration was received by Soreconi on January 15, 2024 the undersigned was appointed as Arbitrator on February 7, 2024.

[4] In an email dated March 23, 2024, the Manager advised the Arbitrator that it did not intend on participating in the arbitration proceedings.

240301001

[5] In an email dated October 21, 2024, the Contractor advised the Arbitrator that it did not intend on participating in the arbitration proceedings.

[6] The hearing was held virtually on November 7, 2024.

[7] The Beneficiary has requested that the Arbitrator review the decision of the Manager dated November 22, 2024 given that the Manager refused the following the claims under the guarantee plan:

- [7.1] Point 1: defective floor installation;
- [7.2] Point 2: defective shower door in the bathroom;
- [7.3] Point 3: noisy kitchen range hood;
- [7.4] Point 4: rusty and discolored kitchen sink;
- [7.5] Point 5: unsealed joint on kitchen counter;
- [7.6] Point 6: cabinets falling apart;
- [7.7] Point 7: poorly installed hot water tank.

[8] In brief, the Manager refused the Beneficiaries' claims for the following reasons:

- [8.1] Point 1: the guarantee for poor workmanship has expired and the condition of the floor is attributable to misuse of the building which is excluded under the guarantee plan;
- [8.2] Point 2: the guarantee for poor workmanship has expired and the condition of the shower door is attributable to misuse of the building which is excluded under the guarantee plan;
- [8.3] Point 3: the claim was presented 3 years after the acceptance of the work but is not covered as it is not a latent defect as the situation does not render the building unfit for the use for which it was intended;
- [8.4] Point 4: the claim arises from the misuse of the building and is excluded under the guarantee plan.
- [8.5] Point 5: the claim was not sent within the required time period under the guarantee plan;
- [8.6] Point 6: the claim was not sent within a reasonable time after the end of the work.
- [8.7] Point 7: the claim was not covered as it is not a latent defect as the situation does not render the building unfit for the use for which it was intended;

THE EVIDENCE

[9] The Beneficiary testified that point 7, regarding the poorly installed hot water tank, was related to the use of two different types of flooring materials under the tank which is located in the closet of the master bedroom. This would have resulted in an unstable

240301001

surface. The Beneficiary produced a picture taken in the fall of 2023 indicating the different flooring materials and testified that the poorly installed hot water tank is related to the improper installation of the floor.

[10] The Beneficiary produced an invoice from a flooring installer in support of the claim regarding point 1:

te requise/Required Date	Référence/Reference No.	Conditions/Terms					
	4657	PAYABLE SUR LIVRAISON					
E	DESCRIPTION	COMMANDÉ	EXPÉDIÉ	PRIX UNIT.	ESC	PRIX DE VENTE	TOTAL
E	DESCRIPTION	ORDERED	SHIPPED	UNIT PRICE	DISC	SELLING PRICE	TOTAL
	LUXURY LAMINÉ AC4 12MM WATERPROOF TF 6607-F PC (20.56PC/BTE) Note : 34 BOXES	699,04		2,99 \$		2,99 \$	2 090,13 \$
ITGUARD	MEMBRANE SILENTGUARD (200PL/RLX) GILL	CH 4,00		80,00 \$		80,00 \$	320,00 \$

Note : OLD PRODUCT IS LAMINATE OF AN AC3 GRADE , WHICH IS A RESIDENTIAL FINISH THAT IS NOT WATERPROOF. THIS TYPE OF PRODUCT IS NOT VERY SUITABLE IN THE LONG TERM. ITS A CHEAP MATERIAL THAT SCRATCHES EASIER AND IS MORE SUSCEPTIBLE TO WATER DAMAGE

Note : THE NEW PRODUCT IS LAMINATE OF AN AC4 GRADE, WHICH IS A LIGHT COMMERCIAL FINISH FLOORING, MADE WITH HDF, AND IS ALSO WATERPROOF FOR UP TO 100 HOURS. IT HAS HARDER RESITANCE WHEN IT COMES TO SCRATCHES AND EVERYDAY USE

[11] This document is dated October 23, 2023 and was included in the book of exhibits as A-6.

[12] With regard to point 2, the Beneficiary testified that the problem with the shower door was related to the quality of the material which was not of high quality.

[13] With regard to point 3 regarding the noisy kitchen range hood, the Beneficiary mentioned that the noise could be related to the improper installation of some wires.

[14] With regard to point 4 concerning the rusty and discolored sink, the Beneficiary testified that he did not have evidence to support the claim under the guarantee plan.

[15] With regard to point 5 concerning the unsealed joint on the kitchen counter, the Beneficiary stated that he made the claim as soon as it was noticed.

[16] With regard to point 6 concerning the cabinets in the kitchen, the Beneficiary stated that he was concerned about the installation and noted that the quality of the materials was not optimal.

[17] The Beneficiary testified that he contacted the Manager of the guarantee plan and was encouraged to submit the claim which explains why he doesn't understand why all of the claims were dismissed. He also testified that he had incurred costs to determine the cause of the problems. The Tribunal gave the Beneficiary a delay to produce documents in support of these costs. No documents were produced.

ANALYSIS AND REASONS

[18] Prior to rendering a decision on the Beneficiaries' claim, the Tribunal would like to review the underlying basis of this arbitration which is held under the Regulation.

[19] Although the Tribunal may interpret provisions of other laws in the application of its mandate, it is under the Regulation that it must determine the rights and obligations of each party. Its decision must be based on the law and on the sufficiency of the evidence submitted by the parties. Moreover, our courts have established the public order nature of the Regulation.

[20] In this regard, the Tribunal refers to the comments of the Honourable Mrs. Justice Pierrette Rayle of the Quebec Court of appeal¹:

Le Règlement est d'ordre public. Il pose les conditions applicables aux personnes morales qui aspirent à administrer un plan de garantie. Il fixe les modalités et les limites du plan de garantie ainsi que, pour ses dispositions essentielles, le contenu du contrat de garantie qui souscrit par les bénéficiaires de la garantie.

Translation:

The Regulation is of public order. It sets out the conditions applicable to legal entities wishing to administer a guarantee plan. It sets out the terms and limits of the guarantee plan and, for its essential provisions, the content of the guarantee contract signed by the beneficiaries of the guarantee.

[21] The parties are bound by a guarantee contract, the terms of which are dictated by the Building Act (chapter B-1.1 sections 185 and 192) and the Regulation. The relevant provisions of the Regulation are:

7. The guarantee plan shall guarantee the performance of the contractor's legal and contractual obligations to the extent and in the manner prescribed by this Division.

...

27. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations after acceptance of the building, shall cover:

...

¹ La Garantie des bâtiments résidentiels neufs de l'APCHQ inc. c. Descindes et al., December 15 2004, 500-09-013349-030 (C.A.)

240301001

(4) repairs to latent defects within the meaning of article 1726 or 2103 of the Civil Code which are discovered within 3 years following acceptance of the building, and notice of which is given to the contractor and to the manager in writing within a reasonable time following the discovery of the latent defects within the meaning of article 1739 of the Civil Code;

(5) repairs 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, which appear within 5 years following the end of the work on the common portions or, where there are no common portions forming part of the building, the private portion, and notice of which is given to the contractor and to the manager in writing within a reasonable time after the discovery or occurrence of the defect or, in the case of gradual defects or vices, after their first significant manifestation;

...

29. The guarantee excludes

(2) repairs made necessary by normal behaviour of materials, such as cracks or shrinkage;

(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;

(4) deterioration brought about by normal wear and tear;

...

[22] Therefore, the guarantee will apply if the Contractor is in default of respecting its legal and contractual obligations. The claim must fall within the coverage provided for under the guarantee plan and, the Beneficiary must respect the notice period as provided for under the Regulation.

[23] It should also be noted that to succeed in the claims, the parties must meet the burden of proof as set out in the Quebec civil code.

[24] The Tribunal refers to articles 2803 and 2804 of the C.C.Q. which set out the burden of proof which must be adduced by the Beneficiary regarding the existence of a defect in the construction or execution of the work and, of proving the actual or potential loss:

2803. A person seeking to assert a right shall prove the facts on which his claim is based.

A person who claims that a right is null, has been modified or is extinguished shall prove the facts on which he bases his claim

2804. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.

240301001

[25] It is therefore in the context of this regulated relationship, the content of which is dictated by a regulation of public order, that this Tribunal is called upon to analyze the dispute of the parties to the arbitration.

[26] In this case, the Tribunal must therefore determine whether the claims are covered under the guarantee plan and whether the Beneficiary has met the burden of proof.

Review of the evidence

[27] The Beneficiary described point 1 as follows:

“The installation of the floor material inside the condo is poor quality and it has lifted in various areas which presents risk for accident or injury. Additionally, the poor quality of floor material has little tolerance to scratching and it is not waterproof; accidental spilling of water could result in extensive damage even if removed within a reasonable amount of time.”

[28] In its decision, the Manager noted the following:

The manager is of the opinion that the laminate flooring installed is of standard quality and is sufficient for such a floor. It is clear that we are not dealing with hardwood or engineered flooring, and this aspect is apparent and known to the present beneficiary, the second owner.

The manager is also of the opinion that it was the beneficiary’s responsibility to have the condominium inspected prior to its purchase.

It is important to note that the original owner never gave notice of such a deficiency to the contractor or the manager.

In addition, it is impossible to know how the first owner cleaned the floor during the first two years.

It seems that water was used, since the edges of some planks of the laminate flooring are slightly raised and made vulnerable by previous maintenance.

[29] In support of his claim for point 1, the Beneficiary filed a document (A-6) regarding the quality of the material but did not adduce any evidence contradicting the conclusions of the Manager.

[30] With regard to point 2, the Beneficiary described the problem as follows in his claim:

“The bathroom shower door frequently becomes unhinged when I open the door. The upper hinge is plastic and does not seem to reliably hold the weight of the floor.”

[31] The Manager concluded as follows with regard to point 2:

The manager is of the opinion that it was the beneficiary’s responsibility to have the condominium inspected prior to the purchase.

240301001

It is also important to note that the original owner never gave notice of such a deficiency to the contractor or the manager.

In addition, it is impossible to know how the first owner used these premises and the shower enclosure, how the shower was cleaned, etc.

The manager is therefore of the opinion that the guarantee covering poor workmanship has now expired and, in the absence of poor workmanship, the manager cannot attribute blame to the contractor for any poor workmanship or defect related to this point.

...

With regard to point 2, the visit to the premises allowed the manager to note that this is a situation arising from the misuse of the building.

[32] The Beneficiary's testimony regarding point 2 concerned the fact that the hinge was made of plastic.

[33] The claim concerning point 3 reads as follows:

"...the kitchen hood vent system is very noisy when the weather is windy. I recently consulted with a contractor who removed the vent to inspect it and the contractor mentioned that the installation of the hoodvent is incorrect as the electrical wire does not have a strain relief. I was advised that this poses an electrical hazard and needs to be corrected by a qualified professional."

[34] The Manager concluded as follows regarding point 3:

The situation that the beneficiary has reported does not render the building unfit for the use for which it was intended.

In these circumstances, in the absence of any latent defect, the manager must dismiss the beneficiary's claim with regard to point 3.

[35] The Beneficiary testified that he was of the view that point 3 constituted a hidden defect and questioned whether the work was performed by a qualified electrician. However, no evidence was adduced regarding the work nor the strain relief alleged by the Beneficiary.

[36] With regard the rusty and discolored sink claimed as point 4, the Beneficiary acknowledged that he did not have any evidence and therefore withdrew the claim.

[37] With regard to point 5 concerning the unsealed joint on the kitchen counter, the Beneficiary stated that he made the claim as soon as he noticed the problem.

[38] The Manager noted that point 5 was indeed poor workmanship but that the claim had to be presented within 3 days from the acceptance of the work which took place in 2020.

240301001

[39] With regard to point 6 concerning the kitchen cabinets, the Beneficiary testified that the problem was with the base of the cabinets which would not have been properly installed. He also stated that the work would have been stapled and not glued.

[40] The Manager concluded that the work on the cabinets was poor workmanship but did not constitute a latent defect.

[41] With regard to point 7 concerning the hot water tank, the claim is described as follows:

“The hot water tank is a quarter inch off the floor and is leaning on the wall. It is unclear if the structure of the floor is compromised. There does not seem to be any sign of water leakage or infiltration. It is unclear for me if this is dangerous and presents an electrical failure or risk of fire. If the structure of the floor is compromised, it is unclear if the water tank will completely tilt over and cause irreparable damage.”

[42] The Manager concluded that the Beneficiary, the second owner of the property, reported a situation that does not render the building unfit for the use for which it was intended. The Manager further noted:

“During the visit, nothing appeared to be deficient in connection with the installation of the water heater; there were no signs of floor movement and no cracks in the finishes were observed.

The manager is also of the opinion that it was the beneficiary's responsibility to have the condominium inspected prior to its purchase.

It is also important to note that the original owner never gave notice to the contractor or the manager of a deficiency in connection with this point.

In addition, it is impossible to know how the first owner made use of the premises and the closet, how the equipment there was maintained, etc.

The manager is therefore of the opinion that the guarantee covering poor workmanship has now expired, since this is the fourth year of the guarantee, and, in the absence of any poor workmanship or defect, the manager cannot attribute blame to the contractor for any poor workmanship or defect related to this point.”

DECISION

Point 1: defective floor installation

[43] The Tribunal must decide whether the claim is covered under the guarantee plan.

[44] The evidence presented by the Beneficiary does not meet the standard to bring the claim within the coverage provided for under the guarantee plan. Furthermore, as noted by the Manager, the Beneficiary is not the first owner under the plan, the first Beneficiaries did not present a claim and, the floor had been used prior to his purchase of the property.

240301001

[45] While the Manager stated that the guarantee for poor workmanship had expired, it was also noted that there was no indication of poor workmanship attributable to the Contractor;

[46] In the circumstances, the Tribunal concludes that the claim regarding point 1 is dismissed.

Point 2: defective shower door

[47] The Beneficiary raised concerns regarding the fact that the hinge on the door was made of plastic. No evidence was presented regarding poor workmanship. Furthermore, the Beneficiary is not the first under the plan and, the first Beneficiaries did not present a claim under the guarantee plan.

[48] The Manager dismissed the claim as the problem resulted from misuse of the building and as a result, excluded under the guarantee plan. The Beneficiary's claim is dismissed.

Point 3: noisy kitchen range hood

[49] The Beneficiary did not meet the burden of proof as he referred to comments made by someone who was not heard by the Tribunal. Furthermore, the Manager dismissed the claim after noting that the Beneficiary was not the first under the guarantee plan and that the issue had not been raised by the first Beneficiaries.

[50] The claim regarding the noisy kitchen range hood does not fall within the coverage of the guarantee plan.

Point 4: rusty and discolored kitchen sink

[51] The Beneficiary withdrew the claim during the hearing.

Point 5: unsealed joint on kitchen counter

[52] Notice was given of this claim more than 3 years after the end of the work. The first Beneficiaries did not make a claim or send a notice to the Contractor or the Manager. Consequently, the notice was not sent within a reasonable time as provided for under the guarantee plan.

Point 6: cabinets falling apart

240301001

[53] The Beneficiary was not the first under the guarantee plan. The original owner did not make a claim or send a notice to the Contractor or the Manager. No evidence was adduced regarding the use or maintenance of the cabinets since the installation in 2019.

[54] The guarantee for poor workmanship has expired and, the claim is dismissed.

Point 7: poorly installed hot water tank

[55] The Beneficiary was not the first under the guarantee plan. The first Beneficiaries did not make a claim or give a notice to the Contractor or the manager. No evidence was adduced regarding the use or maintenance of the hot water tank since its installation in 2019.

[56] The claim is dismissed as it does not fall within the definition of "latent defect" within the meaning of the guarantee plan.

ARBITRATION COSTS

[57] The Beneficiary testified that he had been encouraged by the Manager to present the claim and the Contractor initially indicated that it would be present but subsequently withdrew from the proceedings, the Arbitrator will apply article 116 of the Regulation. Pursuant to article 123 of the Regulation, the Arbitrator orders the Beneficiary to pay the sum of \$25.00 and the balance to be paid by the Manager.

CONCLUSION

[58] For all the reasons set out above, the Tribunal accepts and upholds the Manager's decision and rejects the Beneficiary's claims, all without prejudice to and subject to the right of the Beneficiary to bring their claims before the civil courts, as well as his right to seek the remedies and compensation claimed, subject to the rules of civil law and civil prescription.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

[59] **DISMISSES** the Beneficiary's request for arbitration;

[60] **MAINTAINS** the Manager's decision

[61] **THE WHOLE**, with the costs of arbitration to be divided between the Beneficiary for the sum of \$25.00 and the balance to the Manager, Garantie Construction Résidentielle and in accordance with the Regulation respecting the guarantee plan for new residential buildings, with interest at the legal rate plus the additional indemnity provided for in article

240301001

1619 of the Civil Code of Québec from the date of the invoice issued by the arbitration organization, after a 30-day grace period.

[62] **RESERVES** to the Manager its rights to be indemnified by the Contractor, for all work, action and amounts paid, including costs payable for arbitration (par. 19 of Schedule II of the Settlement Agreement).

December 16, 2024

Me Pamela McGovern