

**ARBITRATION**  
**Under the Regulation respecting the guarantee plan for new residential**  
**for new residential buildings (LRQ, c. C-1.1, r.8)**  
**(Decree 841-98 of 17 june 1998)**

CANADA

Province of Québec

District of : Montréal/Québec...

Arbitration body authorized by the Régie du bâtiment du Québec (RBQ)  
Groupe d'arbitrage – Juste Décision (GAJD)

File N° Guarantee : 8130  
File N° GAJD: 20220711

Between

Tara Ashley Pagliuca & Martin Chi-Tsun So

Beneficiaries

And

Bena Construction Inc.

Contractor

And

La Garantie de Construction Résidentielle (GCR)

Administrator

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**ARBITRATION DECISION**  
**(DECISION ON DECLINATORY EXCEPTIONS)**

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**Arbitrator:**

**Mtre. Daniel S. Drapeau - GAJD**

For the beneficiaries:

Mrs. Tara Ashley Pagliuca & Mr. Martin Chi-Tsun So

For the Contractor::

Mr Chaker Hassani

For the Administrator:

Mtre. Marc Baillargeon

Hearing date(s)

Based on written representations

Location of hearing

Based on written representations

Date of decision:

10 May 2023

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## **1. PARTIES**

**BENEFICIARIES:** Tara Ashley Pagliuca & Martin Chi-Tsun So  
20 Porc-Épic Street  
Gatineau, Quebec  
J9J 2L9

**CONTRACTOR:** Bena construction inc.  
117 Front Street - Suite 200  
Gatineau, Quebec  
J9H 5S9

**ADMINISTRATOR:** La Garantie de Construction Résidentielle (GCR)  
4101 Molson Street  
3rd floor  
Montreal (Quebec)

H1Y 3L1

## 2. CHRONOLOGY

- April 13 2021: Acceptance of the Building
- October 5, 2022: Decision of the Administrator
- November 8, 2022: Reception by Groupe d'arbitrage - Juste Décision (GAJD) of the request for arbitration from the Beneficiaries
- November 8, 2022: Appointment of the arbitrator by GAJD
- December 5, 2022: Reception by the Tribunal of the Administrator's book of exhibits
- December 12, 2022: Reception by the Tribunal of the Beneficiaries' book of exhibits
- February 10, 2023: Preparatory conference
- February 23, 2023: Reception by the Tribunal of the written representations and the jurisprudence of the Administrator on the declinatory exception (non-coverage by the Guarantee Plan);
- March 2, 2023: Reception by the Tribunal of the written representations and the jurisprudence of the Beneficiaries on the declinatory exception (non-coverage by the Guarantee Plan);
- March 15, 2023: Reception by the Tribunal of the written representations of the Administrator on the date of the acceptance of the Building and the date of denunciation;
- March 31, 2023: Reception by the Tribunal of the written representations of the Beneficiaries on the declinatory exception (notification outside the delays provided in the *Regulation*)
- April 12, 2023: Reception by the Tribunal of the written representations of the Beneficiaries on the declinatory exception (notification outside the delays provided in the *Regulation*)
- April 18, 2023: Reception by the Tribunal of the written representations of the Beneficiaries on the declinatory exception (notification outside the delays provided in the *Regulation*)
- May 10, 2023 Decision

## 3. INTRODUCTION

1. The property in question is a single-family dwelling located at 20, rue du Porc-Épic, Gatineau, Quebec.
2. As a matter of economy of justice, it was decided to address, before further proceeding (if necessary), the declinatory exceptions raised by the Administrator following the Preliminary Conference, namely (a) contractual misunderstanding and (b) failure to notify within the delays set out in the *Regulation respecting the guarantee plan for new residential buildings*, RLRQ, c. B-1.1, r. 8 (the “*Regulation*”).

#### **4. MANDATE & JURISDICTION**

3. The Tribunal is seized of this matter in conformity with the *Regulation*, by appointment of Ms. Sonia de Lafontaine on November 8, 2022, who was replaced by the undersigned on December 7, 2022, the whole following a claim for coverage under the guarantee plan under the *Regulation* (the “Guarantee Plan”) and the appurtenant request for arbitration by the Beneficiaries dated November 7, 2022.
4. No objection to the jurisdiction of the Tribunal has been raised by the parties and the jurisdiction of the Tribunal has therefore been confirmed.
5. As mentioned in *Vachon et al. v. Entreprises Ricbo Inc*<sup>1</sup> - at paragraph 64, this decision does not limit the rights of the Beneficiaries against the Contractor, which they could assert before a court of law.

#### **5. THE PARTIES' REPRESENTATIONS**

6. No objection has been raised to the evidence.
7. Each party has been given the opportunity to submit written representations and case law.

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<sup>1</sup> Groupe d'arbitrage juste décision No. 165766-4420/GCR 20210501 – October 5, 2020 - Arbitrator Rosanna Eugeni

8. The Administrator has submitted written representations and case law.
9. The Beneficiaries have submitted written representations and case law.
10. The Contractor has indicated that it has nothing to add to the Administrator's representations<sup>2</sup>.
11. The Tribunal gave each party the opportunity to respond to the representations of the other parties.
12. The Beneficiaries were accompanied by Mrs. Valentina Scutaru of SOS Guarantee at the Preparatory Conference held on 10 February 2023.

## **6. POINT IN DISPUTE**

13. The sole point in dispute in this arbitration is item #13 of the Administrator's decision dated October 5, 2022, namely "*fenêtres mal positionnées*", although the Beneficiaries have indicated the following in their request for arbitration: *Item #13 is being disputed following a decision rendered by the guarantee GCR on October 5, 2022. We believe that this item should be covered under the guarantee as the builder, Bena Construction, did not respect the contractual floor plan for our kitchen. The framing of the three windows in the kitchen and dining room were shifted to follow the enlarged kitchen, but ultimately the kitchen was not enlarged. Only half of the work was completed and there was no communication as to why the plan was not respected Their error ultimately left our home with a smaller kitchen space as well as off centered windows in both the kitchen and dining room areas. (hereafter: the "Point in Dispute").*

## **7. BENEFIT OF THE DOUBT AFFORDED TO BENEFICIARIES**

14. At the Preparatory Conference held on February 10, 2023, the Beneficiaries, who were previously unsure of the value of their claim<sup>3</sup>, estimated the value thereof between \$15,000 and \$30,000. The Beneficiaries also indicated that the remedy

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<sup>2</sup> Emails dated 2023-03-10 9:32 AM and 2023-04-06 2:52 PM

<sup>3</sup> Beneficiaries' email dated of 2022-12-12 7:56 PM

sought in the context of this arbitration was neither works or repairs, but rather financial compensation in an amount of \$30,000. This claim was opposed by the Administrator on a declinatory basis given that the *Regulation* does not provide for financial compensation. In support of its position, the Administrator referred to:

14.1. sections 10 and 18 of the *Regulation*; and

14.2. the decision of Arbitrator Roland-Yves Gagné of November 18, 2011 in *Escobedo v. Habitations Beaux Lieux Inc.*<sup>4</sup> at paragraphs 126-130;

15. The Beneficiaries subsequently indicated<sup>5</sup> that they did not seek financial compensation, but rather requested that work or repairs be carried out.

16. The Tribunal affords the Beneficiaries the benefit of the doubt as to the remedy sought in the context of this arbitration. In other words: the Tribunal accepts that it was an error in good faith on the part of the Beneficiaries to seek that which is not within the Tribunal's jurisdiction, namely a financial compensation.

17. Reference to this benefit of the doubt afforded to the Beneficiaries shall be made hereinafter in section 10 below.

## **8. FIRST DECLINATORY EXCEPTION (NON-COVERAGE UNDER GUARANTEE PLAN)**

18. In his e-mail dated February 23, 2023 5:25 PM, the Administrator asked the Beneficiaries to abandon this arbitration on the basis that the Point in Dispute is not covered by the Guarantee Plan (the "**First Declinatory Exception**"), citing in support of its argument the decision of the Arbitrator Maître Roland-Yves Gagné in *Denis Roy v. 9276-7342 Québec Inc./Gestion Immobilière AB*<sup>6</sup>. Although this

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<sup>4</sup> Société pour la résolution des conflits inc. (SORECONI) – file 102012001, Decision dated 18 november 2011

<sup>5</sup> Email dated 2023-02-10 4:38 PM

<sup>6</sup> Canadian Centre for Commercial Arbitration (CCCA) – file S22-110301-NP, Decision dated 23 February 2023, at paragraphs 19 and 31.



ground was presented by the Administrator in the form of a request to abandon this arbitration, the Tribunal considers same to be a declinatory exception.

19. In their email dated February 3, 2023 6:42 PM, the Beneficiaries responded by
  - 19.1. arguing that the decision in *Denis Roy* could be distinguished from the case at hand;
  - 19.2. referring to another decision, namely that of Arbitrator Maître Roland-Yves Gagné in *Pierre Lamarre v. Société en commandite Lofts Angus*<sup>7</sup> (no paragraph quoted by the Beneficiaries, a portion of paragraph 51 was reproduced by the Beneficiaries).
20. On this First Declinatory Exception, the Tribunal<sup>8</sup> determined as follows:

*As mentioned by the Administrator, “Unless you are able to prove “within the balance of probabilities”, that the decision rendered by Mrs Delage is wrong, or that it does not respect the Regulation respecting the guarantee plan for new residential buildings, your arbitration demand will not be granted”. By the Administrator’s own admission (« Unless you are able to prove « within the balance of probabilities »), the Defendants must be provided with the opportunity to make their representations and discharge the burden of proof which the Administrator indicates is incumbent upon them.*

*With respect to the caselaw referenced by the Administrator ((Roy v. 9276-7342 Québec Inc. No. S22-110301-NP decision dated 23 February 2023, Roland-Yves Gagné, arbitrator), this is contested by the Plaintiffs, who put forward the following decision : Lamarre v. Société en commandite Lofts Angus. No. S18-101801-NP decision dated 7 February 2019, Roland-Yves Gagné, arbitrator). The Plaintiffs having supported their representations*

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<sup>7</sup> Canadian Centre for Commercial Arbitration (CCCA) – file S18-101801-NP, Decision dated February 7, 2019

<sup>8</sup> Email dated March 14, 2023 2:23 PM

*with caselaw, I must provide the Administrator and the Contractor with the opportunity to reply thereto. As such, the appreciation of the parties' position on the referenced caselaw (or any other caselaw the parties may raise) is a matter for the decision on the merits.*

*(...) In the light of the above, the Administrator's preliminary objection is rejected.*

21. In its e-mail of April 3, 2023 1:26 PM the Administrator reiterated the First Declaratory Exception, arguing that the Beneficiaries' claim flows from a contractual misunderstanding, citing the following caselaw:

21.1. The decision of Arbitrator Maître Michel A. Jeannot in the case of *S. Brisson & al. v. 9141-1074 Québec inc. (Construction Norjo)*<sup>9</sup> at paragraphs 25 and 79. The said paragraph 79 reads as follows (we have added the heading under which this paragraph appears).

*Point numéro 73 – cadre de la porte-patio de la salle à manger à remplacer (barre de sécurité)*

(...)

*[79] Il s'agit d'éléments qui sont absents de la déclaration de réception du bâtiment et pour les raisons ci-haut repris au paragraphe [25], je ne peux considérer ce poste de réclamation dans le cadre du contrat de garantie renchérissant qu'il s'agit d'une mésentente contractuelle et non pas d'une malfaçon; considérant que la mésentente contractuelle n'est pas couverte par le plan de garantie, il s'agit d'un motif subsidiaire pour ne pas considérer ce point dans le cadre du contrat de garantie.*

Insofar as the point in dispute set out in said paragraph 79 does not concern "*fenêtres mal positionnées* ", the Tribunal is not prepared to peremptorily reject the Beneficiaries' request for arbitration on the basis of this decision. We shall return below to paragraph 25 of this decision.

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<sup>9</sup> Centre Canadien d'arbitrage commercial (CCAC) – file S8-080401-NP, Decision dated 3 november 2008.

- 21.2. The decision of Arbitrator Guy Pelletier in *Éric Bordeleau v. 9082-2883 Québec inc. (Groupe Selona)*<sup>10</sup> at paragraph 53 which reads as follows (we have added the headings under which this paragraph appears):

*Point 10. Tirage de joints déficient au garage*

*Point 13. Tuyauterie brute de la salle de bain du sous-sol*

*Point 16. Escalier manquant pour la porte du garage*

*(...)*

*[53] De même, il a été établi que la situation dénoncée au point 10 ne constitue pas une non-conformité au Code national du bâtiment, mais plutôt une mésentente contractuelle non couverte par le Règlement. Il en est ainsi pour les points 13 et 16.*

Insofar as the points at issue in said paragraph 53 do not concern "*fenêtres mal positionnées*", the Tribunal is not prepared to preemptorily reject the Beneficiaries' request for arbitration on the basis of this decision.

- 21.3. The decision of Arbitrator Maître Pierre Brossoit in *Serge Lessard v. Arsenault Construction & Fils inc.*<sup>11</sup> at paragraphs 22 and 23 which read as follows (we have added the title under which these paragraphs appear):

*Item 25 – Positionnement des fenêtres*

*(...)*

*[22] L'Administrateur soumet que la fenêtre répond à l'usage auquel elle est destinée, qu'il n'y a aucune malfaçon dans son installation ou fonctionnement. Il ne s'agit pas d'une situation qui tombe sous la garantie prévue à l'article 10 du Règlement.*

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<sup>10</sup> Centre Canadien d'arbitrage commercial (CCAC) – file S11-021401-NP, Decision dated 1 June 2011,

<sup>11</sup> Groupe d'arbitrage juste décision (GAJD) – file 20200412, Decision dated 26 August 2021,

*[23] Le Tribunal partage l'avis de l'Administrateur et rejette contre l'Administrateur l'item 25 de la réclamation du Bénéficiaire.*

To the extent that paragraph 22 raised by the Administrator does not refer to the issue of "*contractual misunderstanding*", the Tribunal is not prepared to peremptorily dismiss the Beneficiaries' request for arbitration on the basis of this decision.

22. Without a debate between the parties, including testimony, it is not possible on the record as it presently stands and in the absence of unequivocal case law (which has not been brought to the Tribunal's attention), to conclude that the Point in Dispute is one of contractual misunderstanding.

23. For the foregoing reasons, the First Declinatory Exception is rejected.

**9. SECOND DECLINATORY EXCEPTION (NOTIFICATION OUTSIDE THE DELAYS PROVIDED IN THE *REGULATION*)**

24. The Administrator's decision states: « *L'administrateur est d'avis que dans un premier temps, la situation que dénoncent les bénéficiaires n'a pas été dénoncée sur le formulaire lors de la réception* <sup>12</sup>. ».

25. The Tribunal asked the parties<sup>13</sup>:

25.1. their representations on the portion of the Administrator's decision referenced above in paragraph 24; and

25.2. to indicate (a) the date of acceptance of the building; and (b) the date of denunciation (which should have been indicated as the «date of notice »), providing reference to the page number of the *Cahier des pièces* where this is evidenced.

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<sup>12</sup> Page 23 of the Administrator's decision

<sup>13</sup> Emails dated 2023-03-03, 3:39 PM, 2023-03-26 1:04 PM :

26. In response to the Tribunal's request in paragraph 25 above, the Tribunal has received the following responses:

26.1. For the Administrator (e-mail of 2023-03-15, 9:54 AM):

26.1.1. *Date de réception du bâtiment : 13 avril 2021 , page 2 de 44, Décision de conciliation du 5 octobre 2022, pièce A-11; et*

26.1.2. *Date de la dénonciation : 11 avril 2022, 3 e feuille (4 de 371), Contractor Notice Form pièce A-5.*

26.2. For the Beneficiaries (e-mail of 2023-03-31, 1 :58 PM):

*Mr. Arbitrator,*

*We apologize for the confusion as our understanding was that information relating to (a) the date of reception/acceptance and the (b) the date of denunciation was to be confirmed during the hearing, as stated in your email on March 14, 2023, and that we were to provide availabilities for the second preparatory meeting by March 17, 2023.*

*Below you will find our substantive representations as to why our arbitration request should not be peremptorily dismissed on the grounds of failure to denounce item #13 in writing at the time of acceptance or within 3 days following acceptance as stipulated in article 10(2) of the Regulation respecting the guarantee plan for new residential buildings. We would also like to reiterate that the representations below will be further substantiated during the hearing when questioning the Contractor regarding these details.*

*We are disputing the Administrator's decision, rendered on October 5, 2022, to reject our claim regarding item #13 - Fenêtres mal positionnées, pertaining to our kitchen size and window placement in both the kitchen and dining room. We believe that this item should be covered under the Regulation respecting the guarantee plan for new residential buildings as the Contractor, Bena Construction, did not respect the signed contractual floorplan of our kitchen and ultimately left our home with a smaller kitchen space as well as off-centre windows in both the kitchen and dining room areas.*

*We became aware of the fact that the Contractor did not respect the signed and agreed upon plan for our home (A-5, page 260-265; 271-276), specifically the kitchen plan (B-17, page 54-58), on January 10, 2021 and*

*we informed them of this on that date in writing (A-5, page 277-283). No action was taken, however subsequent issues arose due to the contractual floorplan not being respected, such as misplaced light fixtures in our kitchen. This was again brought to the Contractor's attention in writing on February 2, 2021 and they confirmed the following day that the light fixtures would be corrected (A-5, pages 295-299). We discussed this issue numerous times verbally with the Contractor, over the phone as well as in person during in-home visits, specifically on February 2, 5, 6, 15 and March 13, 2021.*

*On April 13, 2021, we conducted our first home inspection with the Contractor and reiterated the issue regarding our kitchen plan that was not respected and the fact that our kitchen and dining room windows were off-centre. The Contractor presented us with a document to sign and stated that it was a checklist confirming the information that we discussed during the inspection without providing further detail or explanation. We asked whether the items we had identified for correction that day needed to be added to the document and the Contractor confirmed that they would not be added as they had them recorded on a separate list (B-12). The Contractor also stated that most of the items for correction would be completed prior to our possession date, April 21, 2021, and that we could document any remaining items on the form at that time, as it would be completed then.*

*When we returned home on April 13, 2021, we realized that the form that we signed was in fact the pre-acceptance inspection checklist and called the Contractor's office who reassured us that the form would not be submitted to the Administrator. They provided us with a copy of the pre-acceptance inspection checklist on April 14, 2021, which contained our signatures, the Contractor's signature, as well as, the April 21, 2021 date indicating when the additional items for correction would be completed by (A-5, pages 300-305).*

*On April 21, 2021, we completed our final inspection with the Contractor, returned to their office to sign the necessary paperwork and finalize the pre-acceptance inspection checklist regarding work that needed to be completed in order to take possession of our home. We expressed our dissatisfaction regarding the fact that our kitchen plan had not been respected, resulting in a smaller kitchen having windows that were off centered and asked that this be added to the list of items for correction, whereby they refused. We then completed our paperwork with the Contractor and were shocked to receive an incomplete final copy of the pre-acceptance inspection checklist, which was now dated as being completed on April 13, 2021 (B-13). We explained our concerns as the*

*document had not been completed or submitted with our consent or knowledge on April 13, 2021, as there were additional items that we wanted to add to this document. We were also informed that we would have the opportunity to do so when it would be completed on the date we took possession of our home. The Contractor stated that the document had been submitted to the Administrator on April 13, 2021 to ensure that we received our guarantee certificate in time for our possession date of April 21, 2021. We questioned how it was possible that the Administrator could accept an incomplete pre-acceptance inspection checklist as the box stating whether the acceptance was with or without reservation was not completed. The Contractor then proceeded to check off the “acceptance – without reservation” box in front of us and said that it would be provided to the Administrator (A-3).*

***We contacted the Administrator on April 21, 2021, to inform them that the Contractor had submitted an incomplete pre-acceptance inspection checklist to them, which was also modified and submitted without our knowledge, and the Administrator informed us the following day that they would contact the Contractor to obtain a completed copy (B-14). On April 23, 2021, we received an email from the Administrator including a copy of our guarantee certificate, which was dated April 13, 2021 and not April 21, 2021 as requested (B-15).***

*Item #13 was denounced to the Contractor in writing numerous times, but it was initially done on January 10, 2021 (A-5, page 277-283). We understand that it should have been included on the pre-acceptance inspection checklist, but we were not provided this opportunity as our checklist was completed and submitted without our knowledge to the Administrator after the Contractor misled us about the due process of this paperwork and led us to believe that it would be completed on April 21, 2021. The Contractor had even taken note of this item on a separate list (B-12) on April 13, 2021, but failed to disclose this to the Administrator. Technically speaking, if we refer to the pre-acceptance inspection checklist (A-3) as well as our guarantee certificate (B-15), the date of acceptance is April 13, 2021, but we never confirmed our acceptance of the building nor the date of acceptance on this paperwork as it was the Contractor who entered this information.*

*Given the information presented above along with the extenuating circumstances surrounding how the pre-acceptance inspection checklist was presented to us by the Contractor during our inspection on April 13, 2021, how it was submitted to the Administrator by the Contractor numerous times while being incomplete and the Administrator not questioning it's validity or authenticity, the fact that the Administrator did*

*not contact us to validate whether we were in agreement with the documents' contents or not, the fact that the Contractor refused to add any items to this document, let alone item #13, and willingly withheld information from the Arbitrator regarding corrective work to be done in our home due to poor workmanship should be sufficient to substantiate why our arbitration request should not be peremptorily dismissed on the grounds of failure to denounce item #13 in writing at the time of acceptance or within 3 days following acceptance, as they were denounced appropriately.*

*Although we notified both the Contractor and the Administrator of the problematic situation within the time allowed, we considered that the Contractor tried to mislead us and the application of article 19.1 (2) of the Regulation respecting the guarantee plan for new residential buildings as follows :*

*« Non-compliance with a period cannot be set up against the beneficiary if the circumstances make it possible to establish that the beneficiary was made to exceed the period following representations by the contractor or the manager. »*

*Thank you,*

*Tara Ashley Pagliuca and Martin Chi-Tsun So*

27. In response to the Beneficiaries' argument reproduced above at paragraph 26.2, the Administrator<sup>14</sup> stated:

27.1. *”Even if all the facts stated in the Beneficiaries' argumentation are true, which is neither inferred nor admitted to in any way, the Beneficiaries have failed to answer the simple question as to why they did not denounce in writing, to the contractor and the manager (Administrateur) the alleged apparent defects, within the time frame stipulated in the Regulation”*

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<sup>14</sup> Email dated 2023-04-03 1:26 PM



27.2. *the Beneficiaries' claim regarding Item (point #13) should be summarily dismissed, without audition, (...) along with the fact that it was not denounced in writing to both the contractor AND the manager (GCR), as provided in the Regulation, is fatal to their claim;*

28. Thereafter, the Tribunal requested, twice,<sup>15</sup> that the Beneficiaries to provide their representations in response to those of the Administrator reproduced above in paragraph 27.1. The Beneficiaries answered as follows:

28.1. Email of 2023-04-12 8:41 PM:

*Good evening Mr. Arbitrator,*

*We have already provided our justification along with the relevant jurisprudence in our response, which can be found in the email below dated March 31, 2023. The previous response already includes the explanation relating to the Administrator's statement below, which they submitted on April 3, 2023.*

*Can you please specify what additional information you are seeking at this time?*

*Thank you,*

*Tara Ashley Pagliuca and Martin Chi-Tsun So*

28.2. Email of 2023-04-18 10:36 AM :

*Good day Mr. Arbitrator,*

*As previously mentioned, our respective representations were provided on March 31, 2023 to substantiate why our arbitration request should not be peremptorily dismissed on the grounds of failure to denounce item #13 in writing at the time of acceptance or within 3 days following acceptance as stipulated in article 10(2) of the Regulation respecting the guarantee plan for new residential buildings.*

*Subsequently, we were asked to respond the following statement made by the Administrator, [the Beneficiaries have failed to answer the simple question as to why they did not denounce in writing, to the](#)*

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<sup>15</sup> Emails dated 2023-04-11 5:15 PM and 2023-04-13 12:43 PM)

*contractor and the manager (Administrateur) the alleged apparent defects, within the time frame stipulated in the Regulation.*

*Below you will find a copy of our previous representations provided on March 31, 2023, specifically the areas whereby the writing is in blue font, to respond to the Administrator's statement above.*

*Thank you,*

*Tara Ashley Pagliuca and Martin Chi-Tsun So*

**Representations provided on March 31, 2023:**

*Below you will find our substantive representations as to why our arbitration request should not be peremptorily dismissed on the grounds of failure to denounce item #13 in writing at the time of acceptance or within 3 days following acceptance as stipulated in article 10(2) of the Regulation respecting the guarantee plan for new residential buildings. We would also like to reiterate that the representations below will be further substantiated during the hearing when questioning the Contractor regarding these details.*

*We are disputing the Administrator's decision, rendered on October 5, 2022, to reject our claim regarding item #13 - Fenêtres mal positionnées, pertaining to our kitchen size and window placement in both the kitchen and dining room. We believe that this item should be covered under the Regulation respecting the guarantee plan for new residential buildings as the Contractor, Bena Construction, did not respect the signed contractual floorplan of our kitchen and ultimately left our home with a smaller kitchen space as well as off-centre windows in both the kitchen and dining room areas.*

*We became aware of the fact that the Contractor did not respect the signed and agreed upon plan for our home (A-5, page 260-265; 271-276), specifically the kitchen plan (B-17, page 54-58), on January 10, 2021 and we informed them of this on that date in writing (A-5, page 277-283). No action was taken, however, subsequent issues arose due to the contractual floorplan not being respected, such as misplaced light fixtures in our kitchen. This was again brought to the Contractor's attention in writing on February 2, 2021 and they confirmed the following day that the light fixtures would be corrected (A-5, pages 295-299). We discussed this issue numerous times verbally with the*

*Contractor, over the phone as well as in person during in-home visits, specifically on February 2, 5, 6, 15 and March 13, 2021.*

*On April 13, 2021, we conducted our first home inspection with the Contractor and reiterated the issue regarding our kitchen plan that was not respected and the fact that our kitchen and dining room windows were off-centre. The Contractor presented us with a document to sign and stated that it was a checklist confirming the information that we discussed during the inspection without providing further detail or explanation. We asked whether the items we had identified for correction that day needed to be added to the document and the Contractor confirmed that they would not be added as they had them recorded on a separate list (B-12). The Contractor also stated that most of the items for correction would be completed prior to our possession date, April 21, 2021, and that we could document any remaining items on the form at that time, as it would be completed then.*

*When we returned home on April 13, 2021, we realized that the form that we signed was in fact the pre-acceptance inspection checklist and called the Contractor's office who reassured us that the form would not be submitted to the Administrator. They provided us with a copy of the pre-acceptance inspection checklist on April 14, 2021, which contained our signatures, the Contractor's signature, as well as, the April 21, 2021 date indicating when the additional items for correction would be completed by (A-5, pages 300-305).*

*On April 21, 2021, we completed our final inspection with the Contractor, returned to their office to sign the necessary paperwork and finalize the pre-acceptance inspection checklist regarding work that needed to be completed in order to take possession of our home. We expressed our dissatisfaction regarding the fact that our kitchen plan had not been respected, resulting in a smaller kitchen having windows that were off centered and asked that this be added to the list of items for correction, whereby they refused. We then completed our paperwork with the Contractor and were shocked to receive an incomplete final copy of the pre-acceptance inspection checklist, which was now dated as being completed on April 13, 2021 (B-13). We explained our concerns as the document had not been completed or submitted with our consent or knowledge on April 13, 2021, as there were additional items that we wanted*

*to add to this document. We were also informed that we would have the opportunity to do so when it would be completed on the date we took possession of our home. The Contractor stated that the document had been submitted to the Administrator on April 13, 2021 to ensure that we received our guarantee certificate in time for our possession date of April 21, 2021. We questioned how it was possible that the Administrator could accept an incomplete pre-acceptance inspection checklist as the box stating whether the acceptance was with or without reservation was not completed. The Contractor then proceeded to check off the “acceptance – without reservation” box in front of us and said that it would be provided to the Administrator (A-3).*

***We contacted the Administrator on April 21, 2021, to inform them that the Contractor had submitted an incomplete pre-acceptance inspection checklist to them, which was also modified and submitted without our knowledge, and the Administrator informed us the following day that they would contact the Contractor to obtain a completed copy (B-14). On April 23, 2021, we received an email from the Administrator including a copy of our guarantee certificate, which was dated April 13, 2021 and not April 21, 2021 as requested (B-15).***

*Item #13 was denounced to the Contractor in writing numerous times, but it was initially done on January 10, 2021 (A-5, page 277-283). We understand that it should have been included on the pre-acceptance inspection checklist, but we were not provided this opportunity as our checklist was completed and submitted without our knowledge to the Administrator after the Contractor misled us about the due process of this paperwork and led us to believe that it would be completed on April 21, 2021. The Contractor had even taken note of this item on a separate list (B-12) on April 13, 2021, but failed to disclose this to the Administrator. Technically speaking, if we refer to the pre-acceptance inspection checklist (A-3) as well as our guarantee certificate (B-15), the date of acceptance is April 13, 2021, but we never confirmed our acceptance of the building nor the date of acceptance on this paperwork as it was the Contractor who entered this information.*

*Given the information presented above along with the extenuating circumstances surrounding how the pre-acceptance inspection checklist was presented to us by the Contractor during our inspection on April 13, 2021, how it was submitted to the*

*Administrator by the Contractor numerous times while being incomplete and the Administrator not questioning it's validity or authenticity, the fact that the Administrator did not contact us to validate whether we were in agreement with the documents' contents or not, the fact that the Contractor refused to add any items to this document, let alone item #13, and willingly withheld information from the Arbitrator regarding corrective work to be done in our home due to poor workmanship should be sufficient to substantiate why our arbitration request should not be peremptorily dismissed on the grounds of failure to denounce item #13 in writing at the time of acceptance or within 3 days following acceptance, as they were denounced appropriately.*

*Although we notified both the Contractor and the Administrator of the problematic situation within the time allowed, we considered that the Contractor tried to mislead us and the application of article 19.1 (2) of the Regulation respecting the guarantee plan for new residential buildings as follows :*

*« Non-compliance with a period cannot be set up against the beneficiary if the circumstances make it possible to establish that the beneficiary was made to exceed the period following representations by the contractor or the manager. »*

*Thank you,*

*Tara Ashley Pagliuca and Martin Chi-Tsun So*

## **9.1. RELEVANT DATES**

29. Further to the Tribunal's request<sup>16</sup> that the parties provide (a) the date of acceptance of the building and (b) the date of the denunciation:
- 29.1. the Administrator (email of 2023-03-15, 9:54 AM) provided clear and specific dates with references to pages in the Administrator's book of exhibits as to the relevant evidence, namely:

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<sup>16</sup> Emails dated 2023-03-03, 3:39 PM and 2023-03-26 1:04 PM

29.1.1. *Date de réception du bâtiment : 13 avril 2021 , page 2 de 44, Décision de conciliation du 5 octobre 2022, pièce A-11; and*

29.1.2. *Date de la dénonciation: 11 avril 2022, 3 e feuille (4 de 371), Contractor Notice Form pièce A-5.*

29.2. The Beneficiaries have not provided clear and specific dates, but rather have provided an explanation as to why their arbitration claim should not be peremptorily dismissed. That said, the Beneficiaries have not contradicted the dates indicated above in paragraph 29.

## **9.2. APPLICABLE LEGISLATION**

30. If one gives the Beneficiaries the benefit of the doubt and therefor assumes that the Point in Dispute is an apparent defect or poor workmanship (which is not decided here), section 27(2) of the *Regulation* applies:

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

*2° repairs to apparent defects or poor workmanship as described in article 2111 of the Civil Code, notice of which is given in writing at the time of acceptance or, so long as the beneficiary has not moved in, within 3 days following acceptance. For the implementation of the guarantee for repairs to apparent defects or poor workmanship of the building, the beneficiary sends the claim in writing to the contractor and sends a copy to the manager within a reasonable time after the date of the end of the work agreed upon at the time of acceptance;*

(Emphasis added)

## **9.3. CASELAW ON THE REASONABLENESS OF A DELAY**

31. In 2015, the legislator removed certain strict time limits from article 27, and substituted therefor the notion of "reasonable time". Arbitrator Jean-Philippe

Ewart mentions, in decision in *Syndicat des copropriétaires N'Homade v. Cap-Immo Gestion inc.*<sup>17</sup> at paragraph 70 :

*Par. 70 : Le Tribunal est d'avis que le Législateur lors de ces amendements en 2015 a retiré l'exigence du délai maximal de six mois de la découverte ou survenance pour la dénonciation écrite; on se doit de saisir que le Législateur nous indique son intention de permettre un délai de plus de six mois, selon les circonstances. C'est donc une approche plus permissive et qui implique en partie une appréciation subjective.*

32. In assessing the reasonableness of a reasonable time, the following decisions (none of which were raised by either party), known to the Tribunal, may be helpful:

32.1. *Vachon et al. v. Entreprises Ricbo Inc*<sup>18</sup> at paragraph 64 (Arbitrator Rosanna Eugeni) delays of 10 and 11 months deemed unreasonable;

32.2. *SDC Cépages v. Alliance Taillon Voyer Inc*<sup>19</sup> at paragraphs 17-19, 20-23 (Arbitrator Jean Doyle): 10 month delay considered unreasonable;

32.3. *Dorcent v. Développeurs du Nord Inc.*<sup>20</sup> at paragraphs 38, 39, 55-56 (Arbitrator Me Carole St-Jean): A delay exceeding 6 months is late and must be justified to be considered reasonable;

33. We can therefore conclude that the normal delay is 6 months and that a delay exceeding 6 months is considered late (*Dorcent* decision, paragraph 38). Beyond this 6 months, a delay can be considered reasonable, but it must be justified.

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<sup>17</sup> Société pour la résolution des conflits inc. (SORECONI) – file 201802001, Decision dated 3 february 2021

<sup>18</sup> Groupe d'arbitrage juste décision No. 165766-4420/GCR 20210501 – Decision dated 5 october 2020

<sup>19</sup> Groupe d'arbitrage et de médiation sur mesure File No. 2018-06-27/GCR 101306-1037 – Decision dated 11 october 2018 -

<sup>20</sup> Centre Canadien D'arbitrage Commercial File No. S19-082601-NP/GCR non fourni – Decision dated 5 october 2020

#### 9.4. ANALYSIS

34. After having carefully read the Beneficiaries' representations, in particular those provided in their emails of March 31, 2023 1:58PM<sup>21</sup> , April 12, 2023 8:41PM<sup>22</sup> and April 18, 2023 10:36AM<sup>23</sup> ), the following question remains: **Why did the Beneficiaries not denounce the Point in Dispute in writing, to the Administrator and within the time limits stipulated in the Regulation?**
35. In their email dated 2023-03-31 1:58 PM, the Beneficiaries mention:

*The Contractor also stated that most of the items for correction would be completed prior to our possession date, April 21, 2021, (...)*

*When we returned home on April 13, 2021, we realized that the form that we signed was in fact the pre-acceptance inspection checklist and called the Contractor's office who reassured us that the form would not be submitted to the Administrator. They provided us with a copy of the pre-acceptance inspection checklist on April 14, 2021, which contained our signatures, the Contractor's signature, as well as, the April 21, 2021 date indicating when the additional items for correction would be completed by (A-5, pages 300-305)*

*On April 21, 2021, we completed our final inspection with the Contractor, returned to their office to sign the necessary paperwork and finalize the pre-acceptance inspection checklist regarding work that needed to be completed in order to take possession of our home. We expressed our dissatisfaction regarding the fact that our kitchen plan had not been respected, resulting in a smaller kitchen having windows that were off centered and asked that this be added to the list of items for correction, whereby they refused. (...)*

*We contacted the Administrator on April 21, 2021, to inform them that the Contractor had submitted an incomplete pre-*

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<sup>21</sup> Reproduced above, at para. 26.2

<sup>22</sup> Reproduced above, at para. 29

<sup>23</sup> Reproduced above, at para. 28.2



*acceptance inspection checklist to them, which was also modified and submitted without our knowledge, and the Administrator informed us the following day that they would contact the Contractor to obtain a completed copy (B-14). On April 23, 2021, we received an email from the Administrator including a copy of our guarantee certificate, which was dated April 13, 2021 and not April 21, 2021 as requested (B-15)*

(emphasis added)

36. According to the above representations made by the Beneficiaries:
  - 36.1. As confirmed by the Beneficiaries, the agreed upon date of the end of the work is April 21, 2021;
  - 36.2. As at April 21, 2021, the Beneficiaries were indeed aware of the Point in Dispute;
  - 36.3. While the Beneficiaries indicate “*We contacted the Administrator on April 21, 2021, to inform them that the Contractor had submitted an incomplete pre-acceptance inspection checklist to them*”, the Beneficiaries do not indicate having denounced the Point in Dispute in writing to the Administrator at that time; and
  - 36.4. The last date to which the Beneficiaries refer is April 23, 2021.
37. The Beneficiaries have not provided any justification for the delay of more than 11 months between either (a) the agreed upon date of the end of the work (April 21, 2021) or (b) the last date mentioned by them in their representations (April 23, 2021) and the date of the written denunciation to the Administrator, namely April 11, 2022.
38. With respect to the following arguments raised by the Beneficiaries:
  - 38.1. that article 19.2 of the Regulation provides that “*Non-compliance with a period cannot be set up against the beneficiary if the circumstances make it possible to establish that the beneficiary was made to exceed the period*

*following representations by the contractor or the manager"; and based on the various acts reproached by the Beneficiaries to the Contractor: it must be noted that none of the said reproached acts are indicated as having taken place after April 23, 2021 and therefore do not justify the delay of more than eleven months between that date and the date of the written denunciation to the Administrator, namely April 11, 2022.*

- 38.2. that the Point in Dispute "*...was denounced the the Contractor in writing numerous times, but it was initially done on January 10, 2021*": it must be noted that the denunciation to the Contractor, even if proven (which is not the case here), does not remove the Beneficiaries' obligation to denounce in writing the Point in Dispute to the Administrator, as mentioned in the decision of the Arbitrator Michel A. Jeannot in *S. Brisson & al. v. 9141-1074 Québec inc. (Construction Norjo)*<sup>24</sup> at paragraph 25:

*La loi, sa réglementation ainsi que le contrat qui lie les parties (contrat de garantie) prévoient qu'afin que l'Administrateur soit aussi responsable de malfaçons apparentes ou de l'inachèvement des travaux, cette responsabilité est limitée aux éléments dénoncés par écrit et que cette dénonciation ait lieu au même moment de la réception du bâtiment (ou dans certains cas, trois jours qui suivent si le bénéficiaire n'avait pas encore aménagé). Donc, s'il est possible qu'une réclamation ait été valablement faite à l'Entrepreneur (ce qui n'est pas admis ou même inféré), c'est à regret que je me dois de constater qu'elle fut représentée hors délai à l'Administrateur, ce qui la rend inopposable à l'Administrateur*

- 38.3. that « *We contacted the Administrator on April 21, 2021, to inform them that the Contractor had submitted an incomplete pre-acceptance inspection checklist to them, which was also modified and submitted without our knowledge, and the Administrator informed us the following*

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<sup>24</sup> Centre Canadien d'arbitrage commercial (CCAC) – file S8-080401-NP, Decision dated 3 november 2008

*day that they would contact the Contractor to obtain a completed copy* (B-14). »: this does not explain the delay of more than eleven months between the Beneficiaries's knowledge of the Point-in-Dispute (as at April 21, 2021) and the date of the written denunciation to the Administrator, namely April 11, 2022. In other words: even in the presence of the Administrator's statement aforesaid, the Beneficiaries could and should have effected the written denunciation to the Administrator, required by the *Regulation* well before 11 April 2022, aware as they had been of the Point-in-Dispute for almost a year;

38.4. that "*Given (...) the fact that the Administrator did not contact us to validate whether we were in agreement with the documents' contents or not, (...) should be sufficient to substantiate why our arbitration request should not be peremptorily dismissed (...)*" <sup>25</sup> even if the Administrator was obliged to take such steps (which has not been proven), the fact remains that the failure of the Administrator to take such steps did not prevent the Beneficiaries from denouncing in writing the Point in Dispute to the Administrator well before April 11, 2022.

39. As the Court of Appeal indicated in *La Garantie des bâtiments résidentiels neufs de l'APCHQ inc. v. Maryse Desindes et al.* <sup>26</sup> at paragraphs 11 and 15: "*Le Règlement est d'ordre public (...). Il fixe les modalités et les limites du plan de garantie ainsi que, pour ses dispositions essentielles, le contenu du contrat de garantie souscrit par les bénéficiaires de la garantie, en l'occurrence, les intimés*" and "*La réclamation d'un bénéficiaire est soumise à une procédure impérative*". As such, the Tribunal has no choice but to grant the Administrator's objection.

## 10. COSTS

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<sup>25</sup> Beneficiaries' email dated 2023-03-31 1:58 PM

<sup>26</sup> 500-09-013349-030, Decision dated 15 december 2005, Judges Rousseau-Houle, Morin and Rayle,

40. The *Regulation* provides, in its articles 123 to 125, the following regime concerning the costs of an arbitration

*123. Arbitration fees are shared equally between the manager and the contractor where the latter is the plaintiff.*

*Where the plaintiff is the beneficiary, those fees are charged to the manager, unless the beneficiary fails to obtain a favourable decision on any of the elements of his claim, in which case the arbitrator shall split the costs.*

*Only the arbitration body is empowered to draw up an account of arbitration fees for payment thereof.*

*124. The arbitrator shall, where applicable, decide on the amount of reasonable fees for a relevant expert's opinion to be reimbursed by the manager to the plaintiff where the latter wins the case in whole or in part.*

*The arbitrator must also decide, if applicable, on the amount of reasonable fees for a relevant expert's opinion that the manager and contractor must jointly reimburse to the beneficiary even when the beneficiary is not the plaintiff.*

*This section does not apply to a dispute concerning the contractor's membership.*

*125. Expenses incurred by the interested parties and by the manager for the arbitration shall be borne by each one of them.*

41. The Beneficiaries “*failed to obtain a favourable decision on any of the elements of their claim*”. As such, the Tribunal must split the costs of the arbitration.
42. The Administrator stated<sup>27</sup>: “*As for the arbitration fees, section 123 of the Regulation provides that "if the beneficiary fails to obtain a favourite (sic) decision on any of the elements of his claim, the arbitrator shall split the costs."* Considering the fact that the Beneficiaries were told on more than one occasion, that their claim (for item #13) against the Plan manager (GCR) is baseless, and considering also that they had the opportunity to consult with SOS Guarantee

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<sup>27</sup> Email dated 2023-04-03 1:26 PM

*Plan, to discuss their rights and recourses, we will let the Arbitrator decide how to split the arbitration fees."*

43. The other parties did not make any submissions on costs.
44. Each party is responsible for paying the costs of any expert it may have hired.
45. As to the remaining costs of the arbitration, the Tribunal orders them to be borne entirely by the Administrator, notwithstanding that the Administrator has been successful in the arbitration, for the following reasons:
  - 45.1. one of the Administrator's two declinatory exceptions was rejected;
  - 45.2. the fact that the Second Declinatory Exception was raised relatively late in the process and the issue of reasonable time was not addressed by the Administrator, which would have reduced the work of the Tribunal;
  - 45.3. the failure of counsel for the Administrator to respond in a timely manner to the Tribunal's request for dates of availability for the Preparatory Conference;<sup>28</sup> and
  - 45.4. the failure of counsel for the Administrator to promptly provide, in response to the Tribunal's request of March 3, 2023 3:39PM, the dates of acceptance and denunciation, which were not provided until March 14, 2023, following a reminder from the Tribunal.
46. Had it not been for the points indicated in paragraph 45 above, the costs of the Arbitration would have been divided differently. Indeed, although the Tribunal gives the benefit of the doubt to the Beneficiaries, the Tribunal is of the opinion that the points raised by the Administrator, reproduced above in paragraph 42, are not without merit.

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<sup>28</sup> Emails from the Tribunal dated 2022-12-9 6:14 PM sent to [arbitrage@garantiegr.com](mailto:arbitrage@garantiegr.com)) and 2022-12-14 1:26 PM sent to [mbaillargeon@garantiegr.com](mailto:mbaillargeon@garantiegr.com)

11. **DECISION**

**FOR THE REASONS ABOVE**, the Tribunal :

**REJECTS** Point in Dispute 13 as being irrecevable;

**CONFIRMS** that this arbitration is thus concluded

**THE WHOLE** with the costs of this Arbitration payable by the Administrator.

Signed, this 10<sup>th</sup> day of May, 2023.



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**DANIEL S. DRAPEAU**