

**ARBITRATION PURSUANT TO THE
REGULATION RESPECTING THE
GUARANTEE PLAN FOR NEW RESIDENTIAL BUILDINGS
(c. B-1.1, r. 8)
CANADIAN COMMERCIAL ARBITRATION CENTRE
(Arbitration Body Accredited by the Régie du Bâtiment du Québec)**

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL
File Nr. S19-120201-NP

**Xuerong Cao
Zhong Xin Yu**

Beneficiaries

vs.

Les Tours Utopia Inc./Domaine Bobois

Contractor

AND :

**La Garantie de Construction
Résidentielle (GCR)**

Manager

ARBITRATION DECISION

Arbitrator:	Roland-Yves Gagné
For the Beneficiaries:	M ^e Michel Jasmin Zhong Xin Yu Jie Yu
For the Contractor:	Absent
For the Manager:	M ^e Éric Provençal Anne Delage
Date of the hearing:	6 November 2020
Date of the decision:	9 November 2020

Description of the parties

BENEFICIARIES:

Ms. Xuerong Cao
Mr. Zhong Xin Yu
550 rue Jean-D'estrées – Condo 201
Montréal, Qc. H3C 6W1
c/o M^e Michel Jasmin
285 Rte 344
Saint-Placide, Qc. J0V 2B0

CONTRACTOR :

Les Tours Utopia Inc./Domaine Bobois
a/s Monsieur André Lacombe
218-8457 Boul. Newman
Lasalle, Qc. H8N 0A2

MANAGER :

Garantie Construction Résidentielle GCR
a/s M^e Éric Provençal
4101 3e étage, rue Molson
Montréal, Qc. H1Y 3L1



Exhibits

At the hearing, the Manager filed the following exhibits:

- A-1: Attestation d'acompte daté du 28 novembre 2015;
- A-2 : Contrat de garantie signé par les Bénéficiaires et l'Entrepreneur le 28 novembre 2015;
- A-3 : Contrat préliminaire signé par les Bénéficiaires et l'Entrepreneur le 28 novembre 2015;
- A-4; Confirmation d'annulation du contrat préliminaire No I-1911 signée le 16 février 2017;
- A-5 : Courriel des Bénéficiaires à l'Administrateur et au Centre d'arbitrage daté du 22 décembre 2019 auquel sont joints copies de chèques;
- A-6 : Courriel de dénonciation du Bénéficiaire à l'Entrepreneur et à l'Administrateur daté du 3 juillet 2019, incluant:
 - Formulaire de réclamation daté du 18 juillet 2019;
- A-7 : Formulaire de réclamation daté du 18 juillet 2019;
- A-8 : En liasse, la décision de l'Administrateur datée du 6 novembre 2019, ainsi que les accusés réception de Postes Canada des Bénéficiaires datés du 9 novembre 2019 et de l'Entrepreneur daté du 7 novembre 2019;
- A-9 : Courriel de l'organisme d'arbitrage daté du 20 décembre 2019 duquel est joint la notification de l'organisme d'arbitrage, la demande d'arbitrage des Bénéficiaires ainsi que la décision de l'Administrateur déjà soumise en A-8;
- A-10 : Curriculum Vitae de Anne Delage.

The Beneficiaries filed the following exhibits:

- B-1 Check by Jie Yu dated 2 December 2015 – \$14,867.68 – deposited on 3 December 2015;
- B-2 Check dated 29 December 2015 - \$19,867.68 – processed by the deposit Bank on 31 December 2015;
- B-3: Check dated 22 September 2016 - \$5,000.00 – deposited on 23 September 2016;
- B-4: Letter by the Contractor dated 16 February 2017;
- B-5: Email sent by Anne Delage dated 28 November 2019 (in reply to Jie Yu's email dated 27 November 2019).



INTRODUCTION

- [1] The Tribunal is seized of this case following the nomination of the undersigned on 20 December 2019, after a notice of arbitration filed by the Beneficiaries under the *Regulation respecting the guarantee plan for new residential buildings* (hereinafter referred to as the *Regulation*) was received by the Canadian Commercial Arbitration Center on 4 December 2019.
- [2] Even if it was duly notified, the Contractor was absent.
- [3] Both the Beneficiary and his son, testified at the hearing of the following.
- [4] On 28 November 2015 (Exhibit A-1), the Beneficiaries signed a document called Partial Payment Certificate, on the Manager's form, in which both the Contractor and Beneficiaries recognized partial payment (acompte) of \$39,735.36.
- [5] This amount comes from the preliminary contract, also dated 28 November 2015 (Exhibit A-3), which establishes some Terms of Payment as follows (extracts):
- [5.1] Initial payment on the date the Preliminary Contract is signed: \$14,867.68;
 - [5.2] Additional partial payment payable on Dec.28, 2015: \$19,867.68;
 - [5.3] [...] Other Terms Reservation Deposit Received Oct. 20, 2015: \$5000.00.
- [6] Evidence shows that the payment was done later with three checks, paid by the Beneficiaries' son but with the Beneficiaries' funds, in the circumstances explained at the hearing:
- [6.1] B-1 Check by Jie Yu dated 2 December 2015 – \$14,867.68 – deposited on 3 December 2015;
 - [6.2] B-2 Check dated 29 December 2015 - \$19,867.68 – processed by the deposit Bank on 31 December 2015;
 - [6.3] B-3: Check dated 22 September 2016 - \$5,000.00 – deposited on 23 September 2016.
- [7] The Beneficiaries visited the promised unit in December 2016, and complained about the vibrations of the floor.
- [8] In January 2017, the Contractor said he could not fix it.
- [9] On 16 February 2017, the Beneficiaries went to its sale's office and the Contractor and the Beneficiaries cancelled that preliminary sales contract for the unit at 1911, the Contractor promising verbally there will be other projects to be built and that the Beneficiaries will be able to buy another unit in these new projects:
- This is to confirm that both parties' vendor and buyer have agreed to cancel preliminary sales contract Bobois I-1911 for following unit:
- 1911 Bois-Des-Caryers, Lasalle, Quebec.



The vendor Les Tours Utopia Inc. agrees to full refund of deposit received and no recourse shall be taken by either party past this date.

The vendor agrees to pay an additional penalty of 10% on initial down payment.

Initial down payment = 39,735.36\$

Penalty = 4768\$

- [10] As a matter of fact, from that date until early 2019, the Beneficiaries made many attempts to meet with the same Contractor's representative, who at the beginning said do not worry, he had many other projects, then it became more and more difficult to reach him, then his line was cut, then the other projects were sold to other people, then other representatives said do not worry, and, finally, in early 2019, they were told by the President of the Contractor, André Lacombe, that the only way to be reimbursed of their partial payments was to make a claim with the Manager.
- [11] As appears from Exhibit A-6, the Beneficiaries sent an email on 3 July 2019 to the Manager and the Contractor, claiming that "they did not refund the initial deposit 39,735.36 + 4,768 = 44 503.36 please see the photocopy of the agreement".
- [12] As appears from Exhibit A-7, the claim form to the Manager is dated 18 July 2019.
- [13] The inspector of the Manager, Madam Anne Delage, who was seized of the claim and signed the decision on 6 November 2019, testified at the hearing that she tried collect all evidence in order to render a decision but she could not collect any new evidence, including evidence that the Beneficiaries had paid the amount of money they were claiming reimbursement, as:
- [13.1] she called the Beneficiaries, they did not reply and there was no answering machine;
- [13.2] she sent an email at the end of October, 2019, to have the evidence that the money claimed had be disbursed, but nobody replied to her email.
- [14] The Manager's decision dated 6 November, 2019, Point 1, Demande de Remboursement d'acompte, starts as follows:
- Le 28 novembre 2015, les bénéficiaires ont signé un contrat préliminaire et un contrat de garantie pour l'achat du 1911, rue du Bois-des-Caryers à Montréal, unité qui leur sera livrée au plus tard le 30 mai 2016 et pour laquelle ils ont remis un acompte au montant de 39 735,36\$ lors de la signature dudit contrat préliminaire.
- À cette date, l'entrepreneur leur a remis une attestation d'acompte établie à ce montant.
- Les bénéficiaires n'ont fourni aucune preuve du paiement** de ce montant. [...]
- [15] Upon receipt of the decision, the Beneficiaries' son contacted the Inspector, as appears from his email dated 19 November (Exhibit B-5) and sent her evidence of the money paid (the three checks).
- [16] By email dated 29 November (Exhibit B-5), the Inspector wrote:



After checking with my supervisor, I inform you that I will not be able to change my decision.

I strongly suggest that you apply for arbitration. You will find the procedure in the decision. I highlighted it in yellow.

(in yellow) You must apply for arbitration by December 5, 2019, 30 days after the decision is received. (end of yellow)

You will be able to do this in English, as well as the hearing will be heard in English.

If you need help, please contact me.

[17] As already stated by the Tribunal at the hearing, the facts that:

[17.1] the Inspector could not change her decision:

[17.1.1] the Tribunal notes that, indeed, it is established that a Manager cannot change its decision under the Regulations, the Superior Court wrote in *Dubois c. Fondations André Lemaire inc. (Habitations André Lemaire)*¹ :

[100] Or, la Loi sur le bâtiment^{[14]²} ne confère pas à l'inspecteur-conciliateur de pouvoir de révision ou de révocation de ses propres actes. Le principe de l'autorité de la chose jugée s'applique, par conséquent, en l'espèce.

[17.2] the Beneficiaries could go to arbitration:

[17.2.1] the Tribunal notes that, indeed, an arbitration is a *procès de novo*, in which the Beneficiaries can file new evidence that was not submitted to the Manager before it made its decision, as reminded by the Superior Court in *9264-3212 Québec Inc. c. Moseka*³ :

[20] [...] L'arbitre peut entendre des témoins, recevoir des expertises et procéder à l'inspection des biens ou à la visite des lieux

[...] [24] Le Tribunal rappelle que l'arbitre ne siège pas en appel ou en révision de la décision du Conciliateur. **Il ne procède pas non plus à décider en se basant uniquement sur le dossier transmis.** [...]

[18] At the hearing, the Inspector said that, if she had been in possession of the proof of partial payments (the three checks) before she had rendered her decision, she

¹ 2011 QCCS 2339 (Suzanne Mireault, J.C.S.).

² Précitée, note 7 (note 7 : L.R.Q., c. B-1.1).

³ *9264-3212 Québec Inc. c. Moseka* 2018 QCCS 5286 (Hon. Juge Johanne Brodeur). Voir aussi, au même effet : *Immobilier Versant Ouest Inc. c. SDC de la Bâtisse Savage et Raymond Chabot Administrateur Provisoire Inc. ès qualités d'administrateur provisoire du plan de garantie La Garantie Abritat*, CCAC S19-012101-NP, 19 juillet 2019, Michel A. Jeannot, arbitre (paragraphe [89] et [90]); *3093-2313 Québec c. Létourneau et Bouchard et la Garantie des maisons neuves de l'APCHQ* CCAC S15-022401-NP, Décision rectifiée du 12 novembre 2015, Roland-Yves Gagné, arbitre, paragraphe [335]; *Syndicat des copropriétaires 6613-6635 boul. des Laurentides Laval c. 9141-0001 Québec Inc. et Garantie des Bâtiments Résidentiels Neufs de l'APCHQ*, (CCAC S14-070901-NP, 1^{er} juin 2015, Yves Fournier, arbitre), paragraphe [68] à [76].



would have rendered a decision favourable to the Beneficiaries, except for the penalty.

Partial Payment and Penalty

[19] Article 9 of the *Regulation* states that the Manager guarantees only the partial payments where the contractor fails to perform his legal or contractual obligations before the acceptance of the building:

9. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations before the acceptance of the building, shall cover,
 (1) in the case of a contract of sale,
 (a) either the **partial payments by the beneficiary**.

[20] The evidence demonstrates that the Contractor failed to perform his obligations by, at the very least, failing to deliver the promised unit without having another one available and to reimburse the partial payments, in contravention with the preliminary contract and with the agreement signed on 16 February 2017.

[21] Considering the evidence, considering the *Regulation*, the Beneficiaries are entitled to get the reimbursement of their partial payments.

[22] In addition to their partial payments, the Beneficiaries claim the penalty granted by the Contractor, 4 768\$.

[23] There is no provision to that effect in the *Regulation*.

[24] Article 7 of the *Regulation* states:

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.

[25] The Court of Appeals of Québec stated at least four times⁴, that the *Regulation* was of "ordre public".

[26] The role of this Arbitration Tribunal is to apply the *Regulation* as the lawmaker issued it.

[27] Moreover, the Contractor cannot bind the Manager for "penalties" unilaterally determined that are not in the *Regulation*, which the Court of Appeals of Québec has declared to be of public order.

[28] The Superior Court wrote in the case of *Garantie Habitation du Québec inc. c. Masson*⁵ :

[38] Ici, la Sentence permet à un entrepreneur de lier à l'avance Qualité Habitation [the Manager] pour des obligations exorbitantes de celles prévues au

⁴ *Giguère c. Construction Duréco inc.* 2019 QCCA 2179 ; *Consortium M.R. Canada Ltée c. Office municipal d'habitation de Montréal* 2013 QCCA 1211 ; *Garantie des bâtiments résidentiels neufs de l'APCHQ inc. c. MYL* 2011 QCCA 56 ; *La Garantie des Bâtiments Résidentiels Neufs de l'APCHQ Inc. c. Maryse Desindes et Yvan Larochelle, et René Blanchet mise en cause* AZ-50285725, J.E. 2005-132 (C.A.).

⁵ 2016 QCCS 5593 (Marie-Anne Paquette, j.c.s.).



Plan de garantie. Suivant ce raisonnement, il suffirait à tout bénéficiaire de convenir privément de n'importe quel arrangement avec son entrepreneur, même si cela dépasse les couvertures de garantie limitées prévues au *Règlement*, pour ensuite se faire rembourser ces sommes par Qualité Habitation en cas de défaut de l'entrepreneur.

[39] Une telle approche et interprétation vide de sa substance tout le cadre et les limites qu'impose le *Règlement* en ce qui a trait aux couvertures de garantie, notamment les remboursements admissibles et les seuils maximaux.

[40] Certes, la clause supplémentaire de pénalité pour relogement et entreposage convenue entre Mme Gouin et Réa n'est pas illégale. Cependant, elle ne lie que Réa.

[41] Rappelons que le Plan de garantie prévu au *Règlement* est d'ordre public^[17]. Il fixe les modalités et limites du Plan de garantie, de même que les dispositions essentielles du contrat de garantie auquel souscrivent les bénéficiaires. Ce Plan de garantie est donc réglementé et les obligations qui en découlent ne sont ni illimitées, ni inconditionnelles^[18].

[42] Qualité Habitation n'intervient donc à titre de caution que pour les obligations couvertes par le Plan de garantie et dans la mesure où les parties respectent les règles relatives à sa mise en œuvre^[19]. Les limites des obligations de la caution ne peuvent varier au gré des ententes entre les entrepreneurs et les bénéficiaires, sans égard aux termes du *Règlement*.

[43] Un entrepreneur et un bénéficiaire ne peuvent convenir d'étendre ou de restreindre les limites des obligations de Qualité Habitation, comme prévues au Plan de garantie et au *Règlement*.

[44] L'article 139 du *Règlement* est d'ailleurs clair en ce sens :

139. Toute clause d'un contrat de garantie qui est inconciliable avec le présent règlement est nulle.

[29] For these reasons, the Tribunal will award the reimbursement of the partial payments only, and not the penalty.

Additional Indemnity

[30] The Beneficiaries ask:

[30.1] for the additional indemnity,

[30.2] from the date of the Agreement signed on February 16, 2017, on the basis that, so they allege, "it is in the law".

[31] Article 1619 of the Civil Code reads as follows:

1619. An indemnity may be added to the amount of damages awarded for any reason, which is fixed by applying to the amount of the damages, from either of the dates used in computing the interest on them, a percentage equal to the excess of the rate of interest fixed for claims of the State under section 28 of the Tax Administration Act (chapter A-6.002) over the rate of interest agreed by the parties or, in the absence of agreement, over the legal rate.

[32] The Manager objects, stating it is not provided for in the *Regulation*.



- [33] Considering the Manager's position at the hearing that is favourable to the Beneficiaries, the Tribunal will not generate extra costs by discussing if he can, or cannot, grant the additional indemnity for reimbursement of partial payments based on Article 9 of the *Regulation*, but will briefly comment on one of the reasons why he considers not to award the additional indemnity.
- [34] Beaudouin wrote « parfois aucune indemnité additionnelle n'est accordée. C'est une forme de pouvoir d'équité.⁶ »
- [35] While they signed an agreement cancelling their purchase with the Contractor on February 16th, 2017, and were given false promises from the Contractor until early 2019 when they were told to file a claim with the Manager, it is only on July 18, 2019, just before the construction holidays (and closing of the Manager's office) that they filed a "claim form" with the Manager.
- [36] While the Tribunal understands that the Beneficiaries are and have been in good faith and that there is a language barrier, they filed a claim for the reimbursement of funds without filing the evidence of payment of these funds.
- [37] The Manager made the attempts and efforts, in good faith, to have this evidence, but was not successful.
- [38] The Manager rendered its decision and, when informed by the Beneficiaries' son of the proof of payments, informed him that he had to file an arbitration application, which he did on 4 December 2019.
- [39] The undersigned was nominated and sent a notice of preliminary hearing for Monday 17 February 2020.
- [40] As appears from the procès-verbal dated 17 February 2020, the Beneficiaries were in Asia at that time, and after on, due to well-known sanitary reasons, they could not come back from Asia to Canada, in fact, they could not come back for a while.
- [41] The contents of the numerous follow-up emails sent by the undersigned Tribunal to the Beneficiaries' son since 17 February 2020 are quoted here at length as if they were part of this decision.
- [42] Without expressing any opinion on if a legal indemnity could have been awarded in normal circumstances for the reimbursement of partial payments under Article 9 of the *Regulation*, the Tribunal is of the opinion that, in the circumstances and delays detailed above, the Manager cannot be responsible for the payment of an additional indemnity over the legal interests payable after a grace period of 30 calendar days from the date of this decision.

⁶ Jean-Louis Baudoin, *Les Obligations*, 6e édition, Éditions Yvon Blais, 2005, p. 878 paragraph 874.



FEES

[43] Article 123 of the *Regulation* states:

123. Arbitration fees [...]. 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, [...]

[44] As the Beneficiaries obtained a favourable decision on at least one element of their claim, the Arbitration fees will be charged to the Manager.

CONCLUSION

[45] **FOR THESE REASONS, THE ARBITRATION TRIBUNAL:**

[45.1] **GRANTS** partly the Arbitration Application;

[45.2] **CONDEMNNS** the Manager, as the guarantor of the Contractor, to pay to the Beneficiaries the amount of \$39,735.36 within thirty days after the date of this decision the whole with legal interests after a grace period of 30 calendar days from the date of this decision;

[45.3] **LE TOUT**, avec les frais de l'arbitrage, à la charge de Garantie de Construction Résidentielle (GCR) (l'Administrateur) conformément au *Règlement sur le plan de garantie des bâtiments résidentiels neufs*, avec les intérêts au taux légal majoré de l'indemnité additionnelle prévue à l'article 1619 du Code civil du Québec à compter de la date de la facture émise par CCAC, après un délai de grâce de 30 jours ;

[45.4] **RÉSERVE** à Garantie de Construction Résidentielle (GCR) ses droits à être indemnisé par l'Entrepreneur, pour les coûts de la condamnation au remboursement des acomptes et pour les frais de l'arbitrage (par.19 de l'annexe II du *Règlement*) en ses lieux et place, et ce, conformément à la Convention d'adhésion prévue à l'article 78 du *Règlement*.

Montréal, 9 November 2020



**ROLAND-YVES GAGNÉ,
ARBITRATOR**

Procureurs :

M^e Michel Jasmin
Bénéficiaires

M^e Éric Provençal
Administrateur

