

ARBITRATION TRIBUNAL

**CONSTITUTED BY VIRTUE OF THE REGULATION RESPECTING THE
GUARANTEE PLAN FOR NEW RESIDENTIAL BUILDINGS**

(O.C. 841-98 OF 17 JUNE 1998)

**ARBITRATION BODY AUTHORIZED BY THE RÉGIE DU BÂTIMENT DU QUÉBEC
RESPONSIBLE FOR THE ADMINISTRATION OF THE BUILDING ACT (R.S.Q., C.
B-1.1)**

UNDER THE AEGIS OF

SOCIÉTÉ POUR LA RÉOLUTION DES CONFLITS INC. (SORECONI)

CANADA
PROVINCE OF QUÉBEC

FILE N°: 220904001
FILE N°: 167753-7135
GUARANTEE PLAN:

DATE: NOVEMBER 18, 2022

IN THE PRESENCE OF: M^{TR}E TIBOR HOLLÄNDER

HESHMATULLAH HAJIZADEH AND YALDA KHATIZ

«BENEFICIARIES»

-and-

VIVESCO INC.

«CONTRACTOR»

-and-

GARANTIE CONSTRUCTION RÉSIDENTIELLE (GCR)

«MANAGER OF THE GUARANTEE PLAN»

<p>ARBITRATION AWARD</p>

CHRONOLOGY

[1.] The exhibits involving the files hereinafter referenced were assembled by the Manager and submitted to the parties.

FILE N° 210710003		FILE N° 220904001	
CAHIER DE PIÈCES DE L'ADMINISTRATEUR		CAHIER DE PIÈCES DE L'ADMINISTRATEUR	
Exhibit	Identity of the Documents	Exhibit	Identity of the Documents
<u>Document(s) contractuel(s)</u>		<u>Document(s) contractuel(s)</u>	
A-1	En liasse, attestations d'acompte signés par les Bénéficiaires et l'Entrepreneur le 13 décembre 2019 ainsi qu'en janvier 2020;	A-1	Contrat préliminaire signé par les Bénéficiaires et l'Entrepreneur le 16 décembre 2019;
A-2	Contrat de garantie signé par les Bénéficiaires et l'Entrepreneur le 13 décembre 2019;	A-2	Contrat de garantie signé par les Bénéficiaires et l'Entrepreneur le 13 décembre 2019;
A-3	Contrat préliminaire signé par les Bénéficiaires et l'Entrepreneur le 14 décembre 2019;	A-3	Formulaire d'inspection pré-réception signé par les Bénéficiaires et l'Entrepreneur le 17 février 2020;
<u>Dénunciation(s) et réclamation(s)</u>		<u>Dénunciation(s) et réclamation(s)</u>	
A-4	Courriel de dénonciation envoyé par les Bénéficiaires à l'Entrepreneur daté du 14 janvier 2021 auquel est joint : ➤ Le formulaire de dénonciation envoyé le 14 janvier 2021;	A-4	Courriel de dénonciation des Bénéficiaires transmis à l'Entrepreneur le 21 septembre 2021, incluant : ➤ Photos;
A-5	Formulaire de réclamation envoyé par les Bénéficiaires ;	A-5	En liasse, le courriel de l'avis de 15 jours transmis par l'Administrateur à l'Entrepreneur et aux Bénéficiaires le 11 novembre 2021, avec les preuves de remises par courriel, incluant : ➤ Courriel de dénonciation daté du 21 septembre 2021 (voir A-4); ➤ Formulaire de mesures à prendre par l'Entrepreneur (non inclus dans le cahier de pièces);
A-6	Courriel de l'avis de 15 jours daté du 25 février 2021 auquel sont joints : ➤ Le formulaire de dénonciation déjà soumis en A-4; ➤ Le formulaire des mesures à prendre par l'entrepreneur, vierge (non inclu à la présente);	A-6	A-6 Courriel de l'Entrepreneur daté du 12 novembre 2021 : rép. Avis 15 jours, incluant : ➤ Formulaire de mesures à prendre par l'Entrepreneur daté du 12 novembre 2021
		A-7	Courriel des Bénéficiaires daté du 7 décembre 2021 : rép. Avis jours;
<u>Correspondances</u>			
A-7	Échange de courriels entre les Bénéficiaires et l'Entrepreneur entre le 13 et le 19 janvier 2021;		
A-8	Échange de courriels entre les Bénéficiaires et l'Entrepreneur daté du 25 janvier 2021;		
<u>Autres documents pertinents</u>		<u>Autre(s) document(s) pertinent(s) et / ou expertise(s)</u>	

A-9	Plans d'implantation;	A-8	Relevé du Registraire des entreprises du Québec concernant l'Entrepreneur;
A-10	Formulaire d'inspection préreception signé par les Bénéficiaires et l'Entrepreneur le 17 février 2020;		
A-11	Rapport d'inspection daté du 17 février 2020;		
Décision(s) et demande d'arbitrage		Décision(s) et demande d'arbitrage	
A-12	En liasse, la décision de l'Administrateur datée du 14 mai 2021, la décision supplémentaire de l'Administrateur datée du 26 septembre 2021 ainsi que les accusés réception de Postes Canada des Bénéficiaires datés du 22 mai et du 7 octobre 2021;	A-9	En liasse, la décision de l'Administrateur datée du 27 janvier 2022, ainsi que les preuves de remises par courriel aux Bénéficiaires et à l'Entrepreneur le 27 janvier 2022;
A-13	Courriel de la notification de l'organisme d'arbitrage daté du 3 novembre 2021 auquel sont joints : ➤ La demande d'arbitrage des Bénéficiaires datée du 7 octobre 2021 ; ➤ La lettre de notification ainsi que la nomination de l'arbitre datée du 3 novembre 2021; ➤ La décision de l'Administrateur déjà soumise en A-12 ;	A-10	Courriel de la notification de l'organisme d'arbitrage daté du 14 mai 2022, incluant : ➤ Demande d'arbitrage des Bénéficiaires datée du 9 avril 2022; ➤ Décision de l'Administrateur datée du 27 janvier 2022 (voir A-9); ➤ Lettre de nomination de l'arbitre datée du 14 mai 2022;
A-14	Curriculum Vitae de Benoit Pelletier.	A-11 Annex 2	Curriculum Vitae de Benoit Pelletier. Registered mail receipt dated February 10, 2022

THE PARTIES

[2.] The parties are identified below:

MR. HESHMATULLAH HAJIZADEH
MS. YALDA KHATIZ
 1819 Balmoral
 Saint-Hubert, Québec,
 J4T 1B5
BENEFICIARIES

M^{TRE} PIERRE-MARC BOYER
 Garantie Construction Résidentielle
 (GCR)
 4101, Molson, suite 300
 Montréal, Québec,
 H1Y 3L1
ATTORNEY FOR THE MANAGER

MR. JONATHAN BELISLE
 Vivesco Inc.
 1006 Gardenville
 Longueuil, Québec
 J4J 3B6
CONTRACTOR

THE ARBITRATION FILES

- [3.] The Beneficiaries requested arbitration concerning two (2) decisions rendered by the Manager on September 28, 2021 ("**2021 Decision**") and January 27, 2022 ("**2022 Decision**").
- [4.] The request for arbitration regarding the 2021 Decision concerns file number 210710003 ("**File N° 1**"); the request for arbitration involving the 2022 Decision concerns file number 220904001 ("**File N° 2**").

NOVEMBER 1, 2022

- [5.] On November 1, 2022, the Tribunal heard the: (1) Manager's preliminary objection seeking the dismissal of the Beneficiaries' request for arbitration involving the 2022 Decision; and (2) the Beneficiaries' request to be relieved from their failure to submit the 2022 Decision to arbitration, within the delays prescribed by section 35 of the *Regulation respecting the guarantee plan for new residential buildings*, chapter B-1.1, r. 8 ("**Regulation**").
- [6.] The following persons were present before the Tribunal:
- [6.1] Mr. Heshmatullah Hajizadeh, one of the Beneficiaries;
- [6.2] Mr. Jonathan Belisle, the Contractor's representative; and
- [6.3] Me Pierre-Marc Boyer represented the Manager, Garantie Construction Résidentielle (GCR).

PRELIMINARY OBSERVATIONS

- [7.] The Tribunal shall first set out the facts, documents and exhibits that are relevant to the award that shall be rendered.
- [8.] The Tribunal makes a preliminary remark concerning the Beneficiaries. Mr. Heshmatullah Hajizadeh, one of the Beneficiaries previously indicated that he does not speak or understand French and that while he speaks and communicates in English, English is not his mother tongue. Consequently, whenever the Tribunal refers to an extract referencing Mr. Hajizadeh's representations, it does so by being mindful that Mr. Hajizadeh is doing his best to communicate in a language that is not his mother tongue.

THE FACTS

- [9.] The Beneficiaries and the Contractor signed a preliminary contract for the purchase of a single-family home forming part of a project known as Le Balmoral¹, which project was covered by the guarantee plan issued by *Garantie Construction Résidentielle*².
- [10.] The Beneficiaries complied with the Regulation and filed with the Contractor, a number of claims concerning alleged defects covered by the guarantee plan, resulting in various decisions being rendered by the Manager (Mr. Benoit Pelletier), some of which form part of the Beneficiaries' requests for arbitration involving the 2021 Decision³ and the 2022 Decision⁴.

1. THE 2021 DECISION

- [11.] The 2021 Decision was sent to the Beneficiaries by registered mail, and was received by them on October 7, 2021⁵.
- [12.] On the same day, Mr. Hajizadeh submitted the 2021 Decision for arbitration⁶.
- [13.] On March 18, 2022, the parties were before the Tribunal to schedule a hearing involving the 2021 Decision, at which time, Mr. Hajizadeh raised the point in dispute involving the 2022 Decision and confirmed that he had received the decision rendered in French, however, according to him, he had not received the English version. The Minutes of the Virtual Management Conference is annexed as "**Annex 1**".

2. THE 2022 DECISION

- [14.] The Manager's objection, concerns the 2022 Decision⁷. The book of exhibits communicated to the parties, contains the 2022 Decision, Exhibit A-9 together with copies of emails establishing that the decision was communicated to the Beneficiaries on January 27, 2022.
- [15.] However, Exhibit A-9, did not include a receipt establishing that the 2022 Decision was sent to the Beneficiaries by registered mail as required by the Regulation⁸.

¹ Exhibit A-1, File N° 2

² Exhibit A-2, File N° 2

³ File N° 1

⁴ File N° 2

⁵ Exhibit A-12, File N° 1

⁶ Exhibit A-13, File N° 1

⁷ Exhibit A-9, File N° 2

⁸ File N° 2

- [16.] The absence of the receipt was brought to the parties' attentions. Mr. Hajizadeh did not recall having received the 2022 Decision by registered mail.
- [17.] Me Boyer requested a delay to communicate and file the proof establishing that the 2022 Decision was sent to the Beneficiaries by registered mail, which request was granted.
- [18.] On the same day, November 1, 2022, Me Boyer communicated to the parties, the receipt from Canada Post establishing that the 2022 Decision was sent by registered mail and was received by the Beneficiaries on February 7, 2022, annexed as "**Annex 2**".
- [19.] The receipt from Canada Post, contains the "*Reference Number 1 - 167753-7135*", which corresponds with the file reference number of the 2022 Decision⁹.
- [20.] The Canada Post receipt establishes that on February 7, 2022, the Beneficiaries received the 2022 Decision. The Beneficiaries did not subsequent to the communication of the Canada Post receipt, make any representations casting any doubt as to the validity of the receipt.
- [21.] On April 9, 2022, sixty-one (61) days following the receipt by registered mail of the 2022 Decision, the Beneficiaries submitted the decision for arbitration¹⁰.

THE ISSUES

- [22.] The Beneficiaries filed their request for arbitration sixty-one (61) days following the receipt by registered mail of the 2022 Decision rendered by the Manager, dismissing their claim.
- [23.] The Manager objects to the hearing of the Beneficiaries' request for arbitration, on the ground that the request was made outside the delay set by section 35 of the Regulation and seeks the dismissal of the Beneficiaries' request for arbitration.
- [24.] The Beneficiaries were authorized to file an application seeking to be relieved from the default to comply with the delay of section 35 of the Regulation which they did on August 28, 2022¹¹.
- [25.] The Manager's objection involving the 2022 Decision, raises the following issues that the Tribunal is required to address and decide:

- [25.1] Is the delay to file the request for arbitration under section 35 of the Regulation strict and must be complied without exception?

⁹ Exhibit A-9, File No 2

¹⁰ Exhibit A-10, File No 2

¹¹ Annex 3

[25.2] Was it impossible for the Beneficiaries to submit for arbitration the 2022 Decision, within the delay prescribed by section 35 of the Regulation to?

[25.3] Do the circumstances of the case, warrant the application of section 116 of the Regulation and relieve the Beneficiaries from their default to comply with section 35 of the Regulation?

THE BENEFICIARIES' EXPLANATIONS TO BE RELIEVED FROM FAILING TO SUBMIT THE REQUEST FOR ARBITRATION WITHIN THIRTY (30) DAYS

[26.] On August 28, 2022, the Beneficiaries submitted to the Tribunal the grounds explaining their inability to file the request for arbitration within the delay of thirty (30) days required by section 35 of the Regulation, reproduced below:

1. *"unfortunately have have been so busy for the last few tho months, my mother passed away, and the the same time I had to take care of my kids, as well, therefore I do not have any time for to spend on researching and find case scenarios that justify the delay on opening objection on the GCR administrator's decision."*
2. *"unfortunately, have been so busy for the last few months" "Reason N° 1";*
3. *"my mother passed away" "Reason N° 2";"*
4. *"the same time I had to take care of my kids - I have two kids with special needs that require 24/7 supervision, all my time and energy are consumed with our kids" "Reason N° 3";"*
5. *"At the same time I have my own work as well, and since there is always delays, negligence and lack of proper communication from GCR, which is not honoring my requests for requested information, which in return, made a biased decision in favor of the contrator, Vivesco, either due to financial incentives or due to ethnic dependency, therefore delay contesting is justifiable, if GCR not accepting this, then we can go back and we can consider all the delays that GCR and Vivesco has made, which caused emotional damage to me and my family" "Reason N° 4";"*
6. *"Vivesco has failed several times to respect the deadline and GCR was supposed to take action and rectify the points by a 3rd party contractor, and instead GCR did not take any action and keep giving time for the contractor, with no result. All the communications are documented and we have access to them which can be used in a court of law. as proof and evidence" "Reason N° 5";"*

7. *“I do not have any time for to spend on researching and find case scenarios that justify the delay on opening objection on the GCR administrator's decision” “Reason N° 6”;*

[27.] The Beneficiaries' email of August 28, 2022, is annexed as “**Annex 3**”.

THE REGULATION

35. Le bénéficiaire ou l'entrepreneur, insatisfait d'une décision de l'administrateur, doit, pour que la garantie s'applique, soumettre le différend à l'arbitrage dans les 30 jours de la réception par poste recommandée de la décision de l'administrateur à moins que le bénéficiaire et l'entrepreneur ne s'entendent pour soumettre, dans ce même délai, le différend à un médiateur choisi sur une liste dressée par le ministre du Travail afin de tenter d'en arriver à une entente. Dans ce cas, le délai pour soumettre le différend à l'arbitrage est de 30 jours à compter de la réception par poste recommandée de l'avis du médiateur constatant l'échec total ou partiel de la médiation.

107. La demande d'arbitrage doit être adressée à un organisme d'arbitrage autorisé par la Régie dans les

30 jours de la réception par poste recommandée de la décision de l'administrateur ou, le cas échéant, de l'avis du médiateur constatant l'échec total ou partiel de la médiation. L'organisme voit à la désignation de l'arbitre à partir d'une liste des personnes préalablement dressée par lui et transmise à la Régie.

116. Un arbitre statue conformément aux règles de droit; il fait aussi appel à l'équité lorsque les circonstances le justifient.

35. A beneficiary or contractor who is dissatisfied with a decision of the manager shall, in order for the guarantee to apply, submit the dispute to arbitration within 30 days following receipt by registered mail of the manager's decision, unless the beneficiary and contractor agree to submit the dispute, within the same period, to a mediator chosen from a list established by the Minister of Labour in order to try and reach an agreement.

In that case, the deadline to submit the dispute to arbitration is 30 days following receipt by registered mail of the mediator's advice concluding to the partial or total failure of the mediation.

107. An application for arbitration shall be sent to an arbitration body authorized by the Board within 30 days following receipt by registered mail of the manager's decision or, where applicable, the advice of the mediator concluding to partial or total failure of the mediation. The body shall appoint an arbitrator from a list of persons drawn up by it beforehand and sent to the Board.

116. An arbitrator shall decide in accordance with the rules of law; he shall also appeal to fairness where circumstances warrant.

[Emphasis added]

BURDEN OF PROOF

[28.] It is a well-established principle of law that the burden of proof rests with the Beneficiaries being the parties making a claim before the Tribunal. Section 2803 of the Civil Code of Quebec reads as follows:

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

- [29.] In addition, the appreciation of the evidence by the Tribunal is guided by the principles set out in Section 2804 of the Civil Code of Quebec, that reads as follows:

“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.”

- [30.] Section 2811 of the Civil Code of Quebec sets out the manner in which a party discharges the burden of proof, which section reads as follows:

“2811. Proof of a fact or juridical act may be made by a writing, by testimony, by presumption, by admission or by the production of material things, according to the rules set forth in this Book and in the manner provided in the Code of Civil Procedure (chapter C-25) or in any other Act.”

- [31.] Accordingly, it was up to the Beneficiaries to adduce the evidence susceptible of being made in accordance with the rules of evidence of the Province of Quebec, establishing the grounds justifying being relieved from their default to comply with section 35 of the Regulation.
- [32.] The Beneficiaries have the burden to prove on the balance of probabilities that it was impossible for them to have submitted the request for arbitration within thirty (30) days following the receipt of the 2022 Decision.
- [33.] The rules referred to, are means of weighing the evidence presented by the Beneficiaries before the Tribunal.¹²
- [34.] The Tribunal is therefore required to consider the merit of the Beneficiaries' application in light of the obligation imposed upon them to establish on the balance of probabilities the existence of the material facts explaining why they were unable to submit the request for arbitration within thirty (30) days, following the receipt by registered mail of the 2022 Decision.
- [35.] In the present instance, the Beneficiaries failed to discharge the burden of proof and convince the Tribunal, that it was impossible for them to have submitted the request for arbitration within thirty (30) days following the receipt by registered mail of the 2022 Decision, for the reasons more fully detailed and explained hereafter.

¹² *Caisse populaire de Maniwaki v. Giroux*, [1993] 1 S.C.R. 282

ANALYSIS

1. PROCEDURE

[36.] Section 107 of the Regulation refers to “*an application*” being “*sent to an arbitration body*”. The Regulation does not define the word “*application*” and consequently, an application may be made by way of an email, letter or any other written document sent to an arbitration body.

[37.] In both instances involving the 2021 and 2022 Decisions, the Beneficiaries filed their request for arbitration by email. The means used by the Beneficiaries to submit the 2022 Decision for arbitration is not in issue.

2. DELAY

[38.] Section 35 of the Regulation required the Beneficiaries to submit their request for arbitration of the 2022 Decision, within thirty (30) days following the receipt of the decision by registered mail.

[39.] The Canada Post receipt establishes that the 2022 Decision was received by the Beneficiaries on February 7, 2022¹³. The Beneficiaries were therefore required to submit the request for arbitration by no later than March 9, 2022.

[40.] The Beneficiaries made their request for arbitration on April 9, 2022, sixty-one (61) days following the receipt of the 2022 Decision.

i. IS THE DELAY OF THIRTY (30) DAYS STRICT AND MUST BE COMPLIED WITHOUT EXCEPTION?

[41.] As previously mentioned, the Manager objects and seeks dismissal of the Beneficiaries’ request for arbitration on the ground that the Beneficiaries did not comply with section 35 of the Regulation, in that their request for arbitration was filed sixty-one (61) days following the receipt by registered mail of the 2022 Decision.

[42.] The Tribunal is therefore required to decide whether, the Beneficiaries’ failure to comply with section 35 of the Regulation, must be interpreted strictly, in which case it is fatal to their request for arbitration.

[43.] The Manager submitted *Richard & Mezzapelle and Les Habitations Classique V Inc. and La Garantie Abritat Inc.*, Jean Doyle, arbitrator, 2015-10-08; *Roussin & Godin and Administrateur de la Garantie GCR*, Jean Doyle, arbitrator, 2020-10-09; and *Cloutier & Rouleau and Gravel & Gravel entrepreneurs gén. Inc. and Garantie Construction Résidentielle (GCR)*, 2021-08-04, Claude Prud’homme arbitrator, in support of its position that the Beneficiaries’ request for arbitration be dismissed.

¹³ Annex 2

- [44.] The Beneficiaries and the Contractor did not submit any cases in support of their respective positions. The Beneficiaries relied strictly on the grounds set out in their email of August 28, 2022¹⁴, while the Contractor relied on the arguments advanced by the Manager.
- [45.] The cases submitted by the Manager evidences the strict application of the delay of thirty (30) days. However, in the *Roussin*¹⁵ and *Cloutier*¹⁶ decisions, the arbitrators also considered whether the circumstances warranted the application of section 116 of the Regulation, to relieve the defaulting parties from having failed to comply with section 35 of the Regulation. They held that the circumstances in each of the two (2) cases did not warrant an extension of the delay.
- [46.] The courts and arbitration tribunals have repeatedly decided, that the delay of thirty (30) days is not strict and an arbitrator may extend the delay, if the circumstances so warrant.¹⁷
- [47.] Section 116 of the Regulation requires the Tribunal to follow the rules of law in deciding the dismissal of the request for arbitration being made outside the delay of thirty (30) days. The legislator nevertheless, allows the Tribunal to apply the principles of “*fairness where circumstances warrant*”.
- [48.] Before the Tribunal addresses how “*fairness*” can be applied to the circumstances of the present instance, the concept of “*fairness*” or “*equity*” must be explained and understood.

¹⁴ Annex 3

¹⁵ Paragraph 36, page 13

¹⁶ Paragraph 70, page 15

¹⁷ *Takhmizdjian c. Soreconi*, 2003 CanLII 18819 (QC CS), l'Honorable Ginette Piché; *Hébert et 9122-9385 Québec inc. (Habitations Signature inc.)*, M. Claude Dupuis, arbitre, 036373, 2004-09-17; *Construction Marcel Blanchard (1993) inc. et Callimaci*, M. Claude Dupuis, arbitre, 2005-08-005 et 082003, 2006-10-17; *Construction Paveton inc. et Malboeuf*, M. Marcel Chartier, arbitre, 071024001 et 117166-2 (GMN), 2007-12-28; *Syndicat de la copropriété Jardins de Limoges - 3550407 et Habitation Classique inc.*, M. Claude Dupuis, arbitre, 083041-1 et 2007-09-017, 2008-04-03; *9050-8219 Québec inc. (1er Choix Immobilier) et Développements Le Monarque inc.*, M^e Jeffrey Edwards, arbitre, A-20252, U-502141, U-502142, S08-140301-NP, 12 913-18, S08-140302-NP et 12 913-19, 2008-08-22; *De Luca et Maisons usinées Confort Design inc.*, M^e Michel A. Jeanniot, arbitre, 080430001 et 115698-1, 2009-03-10; *Fortin et Construction Gilles Rancourt et Fils inc.*, M. Claude Dupuis, arbitre, 147624-1 et 2011-04-002, 2011-08-01; *Fiducie RMLT et Construction Xaloma inc.*, M^e Michel A. Jeanniot, arbitre, 070605001, 080528001, 081105001 et 1022030001, 2011-11-14; *Syndicat des copropriétaires 2863 à 2867 Pierre-Bernard et Espaces Harmoniks inc.*, M^e Roland-Yves Gagné, arbitre, S12-011601-NP, 2012-06-22; *Girard et Groupe Pro-Fab inc. (Résidences PF)*, M^e Reynald Poulin, arbitre, 112109001, 2012-06-28.

[49.] In *La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc. v. Dupuis*, 2007 QCCS 4701 (CanLII), the Honourable Justice Michèle Monast of the Superior Court of Quebec, dealt with the concept of equity and its application in the context of the Regulation:

"[75] Il est acquis au débat que l'arbitre doit trancher le litige suivant les règles de droit et qu'il doit tenir compte de la preuve déposée devant lui. Il doit interpréter les dispositions du Règlement et les appliquer au cas qui lui est soumis. Il peut cependant faire appel aux règles de l'équité lorsque les circonstances le justifient. Cela signifie qu'il peut suppléer au silence du règlement ou l'interpréter de manière plus favorable à une partie.

[76] L'équité est un concept qui fait référence aux notions d'égalité, de justice et d'impartialité qui sont les fondements de la justice naturelle. Dans certains cas, l'application littérale des règles de droit peut entraîner une injustice. Le recours à l'équité permet, dans certains cas, de remédier à cette situation.

[77] Les propos tenus par la professeure Raymonde Crête dans un article récent permettent de mieux saisir la nature et les limites du pouvoir de l'arbitre en matière d'équité:

«PRELIMINARY REMARKS ON THE CONCEPT OF EQUITY

7. For a better understanding of the scope of the equitable remedies that are provided by the legislation, it is important to shed some light on the foundational concept of equity.⁷ According to its first accepted understanding, equity refers to the notions of equality, fairness, and impartiality, which are associated with the standards of natural justice.⁸ In this broad sense, the concept of "equity" encompasses all the institutions and rules of law designed to attain the objective of justice.

8. In certain circumstances, the application of the rules of substantive law can, due to their general nature, result in injustice. They are sometimes incapable of capturing the complex reality of life in society.⁹ For the purposes of preventing injustice, "equity", in a more restricted sense, leads judicial authorities to override or supplement the strict rules of law by taking into account the particular circumstances of each case.¹⁰ One author refers to these overriding and supplementary functions of "equity" in the following terms: "an opposition to the rigidity of the law, of the 'strict law'".¹¹

9. In the English tradition, the term "equity" refers to the rules and doctrines that were applied to temper the rigidity, which characterized the common law in the thirteenth and fourteenth centuries.¹² The equitable jurisdiction was originally administered by the Lord Chancellor and later by the Court of Chancery to correct or supplement the common law.¹³ The Courts of Equity recognized new rights and remedies by referring to the broad concepts of conscience, good faith, justice, and fairness.¹⁴ Gradually these equitable rules and doctrines evolved, in the Seventeenth Century, into a formal system of law that existed parallel to the common law.¹⁵ Since the enactment of the Judicature Acts 1873-75 in England, both systems of common law and Equity

are administered by the same courts, although legal scholars and judicial authorities still view them as distinct.¹⁶

10. In jurisdictions with a tradition of Civil Law, like those with a tradition of Common Law, equity also constitutes a fundamental concept that originally manifested itself in the rules and doctrines of the Roman Praetorian Law. However, unlike its historical development in English law, equity has always remained an integral part of the Civil Law systems.¹⁷ In Private Law, the concept finds its expression in its overriding function, notably where judges, aware of their inability to overtly override the explicit norms, temper the power of those norms with a skilful interpretation of the law and of the facts in such a way as to adopt what is clearly the fairest decision.¹⁸ To reach this end, the arbiter may call on a general principle to reduce the extent of a specific clause or may bring particular attention to certain facts and play down others.¹⁹

11. Equity also manifests itself in substantive law, by the integration of a number of "notions of variable content".²⁰ These include specific rules founded on the interests of justice, which allow the courts to derogate and to add to the legislative and contractual norms. Notably, the Civil Code of Quebec imposes certain requirements of 'good faith', which transcend the respect of strict rights.²¹ They prohibit the abusive or unreasonable exercise of rights and recognize the auxiliary role of 'equity' in the determination of contractual obligations. They also introduce the rule of contractual justice, which aims at re-establishing an equilibrium between the obligations of the parties. These rules and principles effectively legitimize overriding and auxiliary judicial interventions aimed at finding the fairest solution in the circumstances. As mentioned by Philippe Jestaz, the auxiliary function of equity is possible, "when the legislator refuses to give a precise command and leaves in the hands of the judges the task of preceding individual treatment (within certain legal limits)."

[Emphasis added]

[50.] The application of the concept of fairness in the context of the objection raised by the Manager was examined by Me Michel A. Jeannot, arbitrator, in the case of *Fiducie RMLT et Construction Xaloma inc.* (SORECONI), 070605001, 080528001, 081105001 and 1022030001, 2011-11-14 as follows:

"[37] Je suggère avec grand respect pour toute opinion à l'effet contraire que le droit de l'arbitre prévu au Règlement et qui l'habilite à recourir à l'équité doit, à tout le moins, prendre source de la doctrine et jurisprudence en semblable matière.

[38] Le pouvoir discrétionnaire en équité doit faire l'objet d'une utilisation logique, raisonnable et judicieuse et ne peut être utile à habiliter un décideur à cautionner l'inobservance d'une condition connue et pleinement appréciée, à tout le moins le 14 mars 2007."

[51.] In *De Luca et Maisons usinées Confort Design inc.*, (SORECONI), 080430001 et 115698-1, 2009-03-10, the arbitrator, M^e Jeannot held that “*il appartient à l'Arbitre de décider s'il y a dépassement raisonnable, excusable et pardonnable.*”

[52.] In order to deal with the Manager's objection, the Tribunal is required to assess the circumstances of the case taking into account the grounds invoked by the Beneficiaries explaining why it was impossible for them to have submitted the request for arbitration within the delay required by Section 35 of the Regulation.

ii. IMPOSSIBILITY TO ACT

[53.] Some arbitrators have held that they may relieve a party from the consequences of the delays not being respected, provided that the party has demonstrated that, in fact, the party was unable to act.¹⁸

[54.] In *Fortin et Construction Gilles Rancourt et Fils inc.*, 147624-1 et 2011-04-002, 2011-08-01, Mr. Dupuis, arbitrator held:

«°[30] Dans ces circonstances, ce délai peut être prorogé par l'arbitre, à condition toutefois que les bénéficiaires démontrent qu'ils étaient dans l'impossibilité d'agir à l'intérieur du délai prescrit ou qu'ils n'ont pas été négligents, et à condition qu'une prorogation ne soit pas préjudiciable à la partie poursuivie.°»

[Emphasis added]

[55.] The notion of impossibility to act was reviewed by the Supreme Court of Canada in *St-Hilaire et al. v. Bégin*, [1981] 2 SCR 79, in the context of a party not having filed an inscription in appeal within the delays of the Code of Civil Procedure of the Province of Quebec. The Supreme Court expressed the view that the impossibility of action should be considered in relative rather than absolute terms:

“It appears from the foregoing that, before exercising its discretion, the Court of Appeal must be satisfied (apart from the provision relating to the six-month deadline, which is not at issue here) “that in fact it was impossible for [the party] to act sooner”. In this regard, the Court of Appeal should not require from the party proof that it was impossible to act as the result of an insuperable obstacle beyond its control; it will suffice for the party to show a de facto, relative impossibility. The Court further observed, in the words of Pratte J.:

18 *Postras et 9139-3454 Québec inc.*, M^e Jean Morissette, arbitre, 2011-11-002, 2011-05-11; *Fortin et Construction Gilles Rancourt et Fils inc.*, M. Claude Dupuis, arbitre, 147624-1 et 2011-04-002, 2011-08-01; *Morency et 9142-6353 Québec inc.*, M^e Jean Morissette, arbitre, 2011-10-011 et 11-589MC, 2012-04-24.

In the case at bar foreclosure was due solely to the error of appellant's counsel. The party itself acted with diligence and I do not see what more it could have done in order to "act sooner".

It is argued, however, that the impossibility referred to in art. 523 C.C.P. is not that of the party but rather that of the party's counsel. I do not agree with this submission. The last part of art. 523 C.C.P. was enacted in favour of the party itself in order to temper the strictness of the automatic forfeiture of the right of appeal when the holder of this right—the party itself — was unable to act in time. The impossibility to act must therefore be assessed from the point of view of the person who will have to bear the consequences of the foreclosure if he is not relieved from it."¹⁹

[Emphasis added]

- [56.] The question before the Tribunal is whether the concept of impossibility of action applies to section 35 of the Regulation, when the legislator did not use the words "*impossibility to act*" in section 35 of the Regulation.
- [57.] Contrary and with respect to opinions expressed by other arbitrators, the Tribunal is of the view that even though the words "*impossibility to act*" are not found in section 35 of the Regulation, it can nevertheless consider such notion, provided the defaulting parties establish, that the failure to respect the delays was not caused by the parties' own negligence.

CONCLUSION

- [58.] The facts of each case are different. It is up to the Tribunal to assess the facts and explanations submitted by the Beneficiaries and determine whether the Beneficiaries have discharged their burden of proof establishing the circumstances involving their failure to seek arbitration within thirty (30) days following the receipt of the 2022 Decision.
- [59.] The Tribunal is mindful that the impossibility to act must therefore be assessed from the point of view of the Beneficiaries who will have to bear the consequences of being foreclosed from presenting their request for arbitration, if they are not relieved from their default to have submitted the request for arbitration within thirty (30) days following receipt of the 2022 Decision.
- [60.] The documentary evidence involving the two (2) files, establishes that the Beneficiaries respected their contractual obligations by submitting various claims with the Contractor, within the delays governing the claims in question.

¹⁹ *St-Hilaire et al. v. Bégin*, 1981 [1981] 2 SCR 79, page 86

- [61.] The claim forming the object of the 2022 Decision was denounced during the month of September 2021²⁰ during the same month when the 2021 Decision was rendered by the Manager.
- [62.] The Beneficiaries received the 2021 Decision by registered mail on October 7, 2021, and on the same day, they submitted their request for arbitration.
- [63.] The claim concerning the 2022 Decision was processed by the Manager during the months that followed and concluded with the Manager rendering the 2022 Decision on January 27, 2022, which was received by the Beneficiaries by email²¹ and by registered mail on February 7, 2022²².
- [64.] The Beneficiaries' impossibility to act is assessed by considering the facts and circumstances that occurred between February 7, 2022 and April 9, 2022 and not thereafter. What took place during this time frame that made it impossible for the Beneficiaries to submit their request for arbitration?
- [65.] On March 18, 2022, the parties were before the Tribunal to schedule a hearing involving the 2021 Decision, at which time, Mr. Hajizadeh raised the point in dispute involving the 2022 Decision and confirmed that he had received the decision prepared in French, however, according to him, he had not received the English version²³.
- [66.] Having taken cognisance of what is alleged in Reasons N° 1 to Reasons N° 6, the Tribunal notes that none of the allegations are corroborated by any evidence submitted by the Beneficiaries.
- [67.] The Tribunal shall therefore review and analyze each of the six (6) specific reasons submitted by the Beneficiaries on August 28, 2022²⁴.

REASON N° 1

- [68.] Even if Mr. Hajizadeh is far from being proficient in English, the grounds invoked in Reason N° 1, being "*so busy for the last few months*" are clear-cut. According to Mr. Hajizadeh, he was too busy, however he failed to correlate being "*so busy*" with the specific time frame of February 7, 2022 to April 9, 2022. It was incumbent upon Mr. Hajizadeh to establish how being "*so busy*" made it impossible for the Beneficiaries to request arbitration of the 2022 Decision within the delay, which they failed to present and establish.

²⁰ Exhibit A-4, File N° 2

²¹ Exhibit A-9, January 27, 2022, File N° 2

²² Annex 2

²³ Annex 1

²⁴ Annex 3

- [69.] By stating that he was too busy, Mr. Hajizadeh, confirmed that the Beneficiaries failed to act diligently in submitting their request for arbitration within thirty (30) days following the receipt of the 2022 Decision.
- [70.] Being too busy can never constitute a reasonable explanation for not having submitted the request for arbitration the 2022 Decision by no later than March 9, 2022, since it was possible for the Beneficiaries to have acted sooner.
- [71.] The Tribunal finds that Reason N° 1 does not constitute an act which made it impossible for the Beneficiaries to comply with section 35 of the Regulation.

REASON N° 2

- [72.] The Tribunal acknowledges the passing of Mr. Hajizadeh's mother, which is in itself difficult, however, Mr. Hajizadeh failed to connect the death of his late mother with the time frame covering the period of February 7, 2022 to April 9, 2022.
- [73.] It was incumbent upon Mr. Hajizadeh to establish the manner in which the death of his late mother made it impossible for the Beneficiaries to request arbitration of the 2022 Decision, which they failed to present and establish.
- [74.] The Tribunal finds that Reason N° 2 does not constitute an act which made it impossible for the Beneficiaries to comply with section 35 of the Regulation.

REASON N° 3

- [75.] The Tribunal acknowledges Mr. Hajizadeh's devotion to supervise his "*special needs children*". However, one cannot overlook the fact that insofar as the claims involving the 2021 and 2022 Decisions are concerned, they were submitted by the Beneficiaries in a timely manner, respecting the delays set out in the Regulation.
- [76.] Furthermore, the request for arbitration of the 2021 Decision was submitted within the delays.
- [77.] What has changed between the 2021 Decision and the 2022 Decision that made it impossible for the Beneficiaries to submit the request for arbitration with the delays? The nature of care involving his children which was not detailed or described by Mr. Hajizadeh, existed before and continues to exist thereafter.
- [78.] Mr. Hajizadeh has failed to connect the supervision of his children with the time frame in question or the manner in which such supervision made it impossible for the Beneficiaries to submit the request for arbitration within the delays.
- [79.] The Tribunal finds that Reason N° 3 does not constitute an act which made it impossible for the Beneficiaries to comply with section 35 of the Regulation.

REASON N° 4

[80.] In Reason N° 4, Mr. Hajizadeh invokes several grounds summarized hereafter.

[81.] According to him, he has his own affairs to look after on top of everything else. That in itself is not exceptional, since all litigants have to juggle between their own particular work-related activities and the prosecution of the claim lodged before a Tribunal.

[82.] The fact that Mr. Hajizadeh has to look after his own affairs does not in itself establish that it was impossible for the Beneficiaries to have complied with section 35 of the Regulation.

[83.] Mr. Hajizadeh further asserts the following:

“...since there is always delays, negligence and lack of proper communication from GCR, which is not honoring my requests for requested information, which in return, made a biased decision in favor of the contractor, Vivesco, either due to financial incentives or due to ethnic dependency, therefore delay contesting is justifiable, if GCR not accepting this, then we can go back and we can consider all the delays that GCR and Vivesco has made, which caused emotional damage to me and my family”;

[84.] The claim that there have always been delays involving his file, does not constitute a reasonable explanation as to how and in what exact manner, the alleged delays attributed to the Contractor and the Manager, made it impossible for the Beneficiaries to comply with section 35 of the Regulation. And in any event, there is no correlation between the alleged delays attributed to the Contractor and the Manager, to the 2022 Decision.

[85.] Mr. Hajizadeh suggests that the Manager somehow was negligent and that there was “*lack of proper communication*” from the Manager who supposedly was not “*honoring [his] requests for [...] information*”. Notwithstanding that the assertion is not substantiated by any evidence, in addition on its own, it does not constitute facts establishing that it was impossible for the Beneficiaries to have submitted the decision for arbitration within the delays.

[86.] Lastly, Mr. Hajizadeh claims, that the Manager “*made a biased decision in favor of the contractor, Vivesco, either due to financial incentives or due to ethnic dependency*”.

[87.] Firstly, these are unsubstantiated allegations. Secondly, there is no correlation between the individual allegations forming part of Reason N° 4 and how the said allegations, prevented the Beneficiaries from complying with section 35 of the Regulation.

[88.] The Tribunal finds that the various allegations involving Reason N° 4 do not constitute acts which made it impossible for the Beneficiaries to comply with section 35 of the Regulation.

REASON N° 5

- [89.] Mr. Hajizadeh in Reason N° 5 claims once again, that there have always been delays involving his file, previously asserted in Reason N° 4.
- [90.] The Tribunal dispossess the allegations contained in Reason N° 5 in the same manner and for the same reasons involving Reason N° 4.
- [91.] The Tribunal finds that Reason N° 5 does not constitute an act which made it impossible for the Beneficiaries to comply with section 35 of the Regulation.

REASON N° 6

- [92.] The Tribunal dispossess the allegations contained in Reason N° 6 in the same manner and for the same reasons involving Reason N° 1.
- [93.] The Tribunal finds that Reason N° 6 does not constitute an act which made it impossible for the Beneficiaries to comply with section 35 of the Regulation.

REASON N° 1 TO REASON N° 6

- [94.] The explanations provided by the Beneficiaries in Reasons N° 1 to N° 6 inclusively, do not establish in any manner that they were prevented by the Contractor or by the Manager from complying with section 35 of the Regulation.
- [95.] None of the allegations contained in Reason N° 1 to Reason N° 6, establishes that it was impossible for the Beneficiaries to submit a request for arbitration within the delays prescribed by section 35 of the Regulation.
- [96.] The specific and distinct reasons submitted by the Beneficiaries establishes that they were negligent in not complying with the delay prescribed by section 35 of the Regulation.
- [97.] Section 116 does not assist the Beneficiaries, since they cannot overcome their own negligence. The circumstances set out in Reason N° 1 to Reason N° 6 do not warrant the application of section 116 of the Regulation. The Tribunal cannot therefore rely upon or apply its equitable discretion to grant the Beneficiaries' application to be relieved from the default to comply with section 35.
- [98.] The Beneficiaries' application is dismissed.
- [99.] The Manager's objection is granted and the request for arbitration filed on April 9, 2022, is dismissed.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

- [100.] **DISMISSES** the Beneficiaries' application to be relieved from the default to have filed their request for arbitration of the January 27, 2022 Decision within thirty (30) following the receipt by registered mail of the January 27, 2022 Decision.
- [101.] **GRANTS** the Manager's objection and dismisses the request for arbitration submitted by the Beneficiaries on April 9, 2022.
- [102.] **ORDERS** in accordance with section 123 of the Regulation, that the costs be borne by the Manager.

Montreal, November 18, 2022



M^{TRE} TIBOR HOLLÄNDER
ARBITRATOR

ARBITRATION TRIBUNAL

**CONSTITUTED BY VIRTUE OF THE REGULATION RESPECTING THE
GUARANTEE PLAN FOR NEW RESIDENTIAL BUILDINGS**

(O.C. 841-98 OF 17 JUNE 1998)

**ARBITRATION BODY AUTHORIZED BY THE RÉGIE DU BÂTIMENT DU QUÉBEC
RESPONSIBLE FOR THE ADMINISTRATION OF THE BUILDING ACT (R.S.Q., C.
B-1.1)**

UNDER THE AEGIS OF

SOCIÉTÉ POUR LA RÉOLUTION DES CONFLITS INC. (SORECONI)

CANADA
PROVINCE OF QUÉBEC

FILE N°: 220904001
FILE N°: 167753-7135
GUARANTEE PLAN:

DATE: NOVEMBER 18, 2022

IN THE PRESENCE OF: M^{TR}E TIBOR HOLLÄNDER

HESHMATULLAH HAJIZADEH AND YALDA KHATIZ

«BENEFICIARIES»

-and-

VIVESCO INC.

«CONTRACTOR»

-and-

GARANTIE CONSTRUCTION RÉSIDENTIELLE (GCR)

«MANAGER OF THE GUARANTEE PLAN»

<p>ANNEX 1</p>

ARBITRATION TRIBUNAL

**CONSTITUTED BY VIRTUE OF THE REGULATION RESPECTING THE
GUARANTEE PLAN FOR NEW RESIDENTIAL BUILDINGS**

(O.C. 841-98 OF 17 JUNE 1998)

**ARBITRATION BODY AUTHORIZED BY THE RÉGIE DU BÂTIMENT DU QUÉBEC
RESPONSIBLE FOR THE ADMINISTRATION OF THE BUILDING ACT (R.S.Q., C.
B-1.1)**

UNDER THE AEGIS OF

SOCIÉTÉ POUR LA RÉOLUTION DES CONFLITS INC. (SORECONI)

CANADA
PROVINCE OF QUÉBEC

FILE N°: 210710003
FILE N°: 167753-5571
GUARANTEE PLAN:

DATE: MARCH 23, 2022

IN THE PRESENCE OF: M^{TRE} TIBOR HOLLÄNDER

HESHMATULLAH HAJIZADEH AND YALDA KHATIZ

«BENEFICIARIES»

-and-

VIVESCO INC.

«CONTRACTOR»

-and-

GARANTIE CONSTRUCTION RÉSIDENTIELLE (GCR)

«MANAGER OF THE GUARANTEE PLAN»

MINUTES OF THE VIRTUAL MANAGEMENT CONFERENCE HELD ON MARCH 18, 2022 AT 3:00 PM

- [1.] Although the parties to the present proceeding in accordance with the rules of procedure are masters of their own files, it is the Tribunal's responsibility to ensure the proper conduct of the proceeding and to intervene to ensure its sound management.
- [2.] A virtual pre-trial hearing/management conference was held on Friday, March 18, 2022, at 3:00 P.M., for the purpose, among others, of circumscribing the issues in arbitration, identifying the possible list of witnesses, the purpose and duration of their testimony, the estimated time to break down their evidence and pleadings on the merits and, consequently, to set the case for trial.
- [3.] The following parties were present:
- | | |
|--|--|
| MR. HESHMATULLAH HAJIZADEH
1819 Balmoral
Saint-Hubert, Québec,
J4T 1B5
ONE OF THE BENEFICIARIES
Ms. Yalda Khatiz was absent | MR. JONATHAN BELISLE
Vivesco Inc.
1006 Gardenville
Longueuil, Québec
J4J 3B6
CONTRACTOR |
|--|--|
- MTRE PIERRE-MARC BOYER**
 Garantie Construction Résidentielle
 (GCR)
 4101, Molson, suite 300
 Montréal, Québec,
 H1Y 3L1
ATTORNEY FOR THE MANAGER
- [4.] Pursuant to the Tribunal's letter of March 7, 2022, the parties received the Agenda of the preliminary hearing which was followed and forms the object of the present Minutes.
- [5.] The Tribunal makes a preliminary observation concerning the parties. Mr. Heshmatullah Hajizadeh, one of the Beneficiaries indicated that he does not speak or understand French and that while he speaks and communicates in English, English is not his mother tongue. Consequently, whenever the Tribunal refers to an extract referencing Mr. Hajizadeh's representations, it does so by being mindful that Mr. Hajizadeh is doing his best to communicate in a language that is not his mother tongue.

1. JURISDICTION OF THE ARBITRATION TRIBUNAL

[6.] The parties confirmed the jurisdiction of the Arbitration Tribunal to hear the Beneficiaries request for arbitration dated October 7, 2021.

[7.] The request for arbitration filed by the Beneficiaries on October 7, 2021, was worded as follows: *"We are not agreed with the decision of the manager of the GCR"*.

[8.] In an email of October 18, 2021, while the Beneficiaries identified the points in dispute as being:

- 2. Swelling of kitchen cabinet doors;
- 3. Hardware of door to half bathroom and front door;
- 4. Deficiencies in wall and ceiling drywall joints
- 12. Gap between staircase and structure of floor decking of back balcony
- 13. Adjustment of half bathroom door

I would like to mention that there is a point that the Administrator did just neglect it while he was in our property. The swelling doors of the cabinets in the main bathroom. I have sent several email and pictures to remind GCR but I got no response.

they did not identify the decision which dealt with the points raised by them in their request for arbitration.

2. DETAILS OF THE ISSUES BEFORE THE ARBITRATOR

[9.] The Book of Exhibits communicated by the Manager, comprises Exhibits A-1 to A-14.

[10.] Exhibit A-12 consists of two (2) decisions rendered by Mr. Benoit Pelletier, the Manager; a Decision dated May 14, 2021 and a Supplementary Decision dated September 28, 2021 ("**Supplementary Decision**").

[11.] The Tribunal requested the Beneficiary to identify the decision concerning the points forming part of his request for arbitration.

[12.] The Beneficiary confirmed that his request for arbitration concerning points:

- 2. Swelling of kitchen cabinet doors;
- 3. Hardware of door to half bathroom and front door;
- 4. Deficiencies in wall and ceiling drywall joints
- 12. Gap between staircase and structure of floor decking of back balcony
- 13. Adjustment of half bathroom door

arising from the Supplementary Decision.

- [13.] Regarding the “*swelling doors of the cabinets in the main bathroom*”, the Beneficiary confirmed that the Manager did not deal with this matter in the Supplementary Decision.
- [14.] Mr. Belisle informed the Tribunal that the matter involving the “*swelling doors of the cabinets in the main bathroom*” was dealt with by the Manager pursuant to a decision rendered on January 27, 2022 and that the English version of the said decision was transmitted to the Beneficiaries and the Contractor on January 28, 2022.
- [15.] The Beneficiary acknowledged having received the January 27, 2022 decision rendered in French, but not the English version.
- [16.] The Beneficiary did not request arbitration from the Decision of January 27, 2022, since he was waiting to receive the English version.
- [17.] Me Boyer indicated that pursuant to article 35 of the Regulation, the Beneficiary who was dissatisfied with the manager’s decision was required to submit the dispute to arbitration within thirty (30) days following receipt by registered mail of the manager’s decision.
- [18.] The Tribunal does not decide the dispute arising from the January 27, 2022 decision, since that decision is not before the Tribunal.
- [19.] It is up to the Beneficiaries to exercise their rights prescribed by the *Regulation respecting the guarantee plan for new residential buildings* (“**Regulation**”)¹. Once the Beneficiaries decide to exercise their rights concerning the January 27, 2022, decision, the parties at such time will have the opportunity to address this issue in accordance with the Regulation.

3. PRELIMINARY OBJECTIONS

- [20.] Regarding point 4, Me Boyer confirmed that the Manager agreed to do the work and consequently, it was his view that point 4 ought not to be heard by the Tribunal.
- [21.] The Tribunal indicated to Me Boyer, that at this stage, it is not rendering any decision concerning his verbal representations. It is up to the Manager to present an application requesting that point 4 be excluded from the dispute in arbitration.
- [22.] Other than point 4, the parties confirmed that there were no other preliminary objections that required adjudication by the Arbitration Tribunal.

¹ chapter B-1.1, r. 8

4. LIST OF ORDINARY WITNESSES OR EXPERT WITNESSES

i. The Beneficiary

- [23.] The Beneficiary identified himself as being the only ordinary witness who would testify before the tribunal.
- [24.] Regarding the use of an expert, the Beneficiary requested a delay of forty (45) days to decide whether he will avail himself of his right to use an expert supporting the dispute involving points 2, 3, 4, 12 and 13 of the Supplemental Decision.
- [25.] The Tribunal reminded the Beneficiary that in the event that he engages an expert, he is required to provide the expert, the material documents concerning the disputes involving points 2, 3, 4, 12 and 13 of the Supplemental Decision.

ii. The Contractor

- [26.] Mr. Belisle identified himself as being the only ordinary witness who would testify before the Tribunal.
- [27.] Mr. Belisle confirmed that the Contractor will not have an expert testify before the Tribunal.
- [28.] The Contractor, depending on whether the Beneficiary decides to use an expert, reserves its right to file a counter-expertise.

iii. The Manager

- [29.] Me Boyer confirmed that Mr. Benoit Pelletier (the manager) would be the only witness who would testify before the Tribunal.
- [30.] The Manager depending on whether the Beneficiary decides to use an expert, reserves its right to file a counter-expertise.

iv. Order

- [31.] The Tribunal after having heard the representations of Mr. Belisle and Me Boyer, grants the Beneficiary a delay of thirty (30) days to decide whether to use or not to use an expert concerning the disputes involving points 2, 3, 4, 12 and 13 of the Supplemental Decision.
- [32.] The Beneficiaries are Ordered to communicate in writing, the confirmation that they have decided either to use or not to use an expert, within the aforementioned delay.

5. THE COMMUNICATION OF ADDITIONAL EXPERT REPORTS, IF NEED BE

[33.] This matter is suspended until such time as the Beneficiaries indicate whether they will or will not use an expert.

6. IDENTIFICATION OF DOCUMENTS TO BE FILED AS EXHIBITS THAT HAVE NOT BEEN REMITTED TO THE ARBITRATOR AND/OR TO THE OTHER PARTIES THAT WILL BE FILED AND PRODUCED IN EVIDENCE**i. The Manager**

[34.] The Manager communicated to the Beneficiaries and the Contractor the Book of Exhibits, comprising Exhibits A-1 to A-14 inclusively.

[35.] Me Boyer confirmed that there are no additional documents intended to be used as exhibits.

ii. The Beneficiaries

[36.] The Beneficiary indicated that he wanted a delay to review all the documents in his possession prior to confirming that there are no additional documents intended to be used as exhibits.

[37.] The Beneficiary requested a delay of fourteen (14) business days to review the documents and advise the Tribunal and the parties whether additional documents would be used as exhibits.

iii. The Contractor

[38.] Mr. Belisle confirmed that there are no additional documents intended to be used as exhibits.

iv. Order

[39.] The Tribunal after having heard the representations of Mr. Belisle and Me Boyer, grants the Beneficiary a delay of fourteen (14) business days to identify additional documents that would be used as exhibits.

[40.] The Beneficiaries are Ordered to communicate in readable PDF format all additional documents intended to be used as exhibits, within the aforementioned delay.

7. SELECTION OF A DATE AND LOCATION FOR THE HEARING

[41.] The parties stated their preference to be heard in person.

[42.] The hearing will take place at 950 - 1010, de La Gauchetière Ouest/West, Montréal, Québec.

[43.] The selection of a date for the hearing is suspended pending the decisions that the Beneficiaries have to make concerning the use of an expert and the identification of any additional documents to be used as exhibits, if need be.

8. ARBITRATOR'S COMMENTS PERTAINING TO THE ARBITRATION PROCEDURE

[44.] The Tribunal reminds the parties that:

- (1) Each party (other than the Manager who is represented by a lawyer) has the right to be represented by a lawyer of his choice;
- (2) The Beneficiaries, have the right to use an interpreter, should they choose to do so;
- (3) All communications with the Tribunal, be it in writing or through any media, must involve all the parties;
- (4) All communications and to the extent possible, including the transmission of exhibits and additional procedures must be through electronic means, and that the email addresses to be used by the parties will be:
 1. For Mr. Heshmatullah Hajizadeh: hesh.hajizadeh@gmail.com
 2. For Ms. Yalda Khatiz: yaldakhatiz@hotmail.com
 3. For Mr. Jonathan Belisle: jonathan.belisle@vivesco.ca
 4. For Me Pierre-Marc Boyer: pierre-marcboyer@garantieqcr.com
 5. For Me Tibor Holländer: thollander@jeannot.ca
- (5) All documents must be in readable PDF format;
- (6) The parties have the obligation to adduce the evidence before the Tribunal, upon which they intend to rely;
- (7) The rules of evidence governing hearsay evidence, requires the party who intends to use a writing emanating from a third party, to ensure that the author of the writing is present to authenticate its origin and integrity, and is available to be questioned as to its probative value.
- (8) The parties are required to exchange all authorities they intend use, with copies to the Tribunal, no later than seven (7) days prior to the date of hearing;
- (9) All other matters governing the rules of evidence will be discussed at the next hearing that shall be scheduled once the Beneficiaries have

communicated their intentions concerning the use of an expert and the use of additional documents;

(10) The delays granted by the Tribunal commence as of **March 18, 2022**;

9. MISCELLANEOUS

- [45.] The Beneficiary raised an issue concerning the responsibility to pay for the cost of arbitration.
- [46.] Me Boyer indicated that he would communicate with the Beneficiary to explain this matter.
- [47.] Lastly, the Beneficiary expressed his desire to communicate with Mr. Belisle to discuss the dispute in arbitration who apparently is not taking his calls.
- [48.] The Tribunal indicated that while the parties should always communicate with each other, and they have an obligation to cooperate, it cannot order a party to speak with any other party.

10. CONCLUSION

[49.] In view of the foregoing, the Tribunal:

ADJOURNS the preliminary management conference.

SUSPENDS the preliminary management conference pending the expiration of the thirty (30) days delay Ordered by the Tribunal.

Montreal, March 23, 2022



M^{TRE} TIBOR HOLLÄNDER
ARBITRATOR

ARBITRATION TRIBUNAL

**CONSTITUTED BY VIRTUE OF THE REGULATION RESPECTING THE
GUARANTEE PLAN FOR NEW RESIDENTIAL BUILDINGS**

(O.C. 841-98 OF 17 JUNE 1998)

**ARBITRATION BODY AUTHORIZED BY THE RÉGIE DU BÂTIMENT DU QUÉBEC
RESPONSIBLE FOR THE ADMINISTRATION OF THE BUILDING ACT (R.S.Q., C.
B-1.1)**

UNDER THE AEGIS OF

SOCIÉTÉ POUR LA RÉOLUTION DES CONFLITS INC. (SORECONI)

CANADA
PROVINCE OF QUÉBEC

FILE N°: 220904001
FILE N°: 167753-7135
GUARANTEE PLAN:

DATE: NOVEMBER 18, 2022

IN THE PRESENCE OF: M^{RE} TIBOR HOLLÄNDER

HESHMATULLAH HAJIZADEH AND YALDA KHATIZ

«BENEFICIARIES»

-and-

VIVESCO INC.

«CONTRACTOR»

-and-

GARANTIE CONSTRUCTION RÉSIDENTIELLE (GCR)

«MANAGER OF THE GUARANTEE PLAN»

<p>ANNEX 2</p>



Date: 2022/02/10

Dear Sir or Madam

Please find below the scanned delivery date and signature of the recipient of the item identified below:

Item Number 4005176345802357

Product Name Xpresspost

Reference Number 1 167753-7135-DÉC-JANV2022-BEN-0

Reference Number 2 Not Applicable

Delivery Date (yyyy/mm/dd) 2022-02-07

Signatory Name Heshmatullah Hajizadeh

Signature

A scanned image of a signature in black ink, written over a light blue background that features the Canada Post logo. The signature is a stylized, cursive script that starts with a large loop and ends with a horizontal stroke.

Yours sincerely,

Customer Relationship Network

1-888-550-6333.

(From outside Canada 1 416 979-3033)

This copy confirms to the delivery date and signature of the individual who accepted and signed for the item in question. This information has been extracted from the Canadapost data warehouse

ARBITRATION TRIBUNAL

**CONSTITUTED BY VIRTUE OF THE REGULATION RESPECTING THE
GUARANTEE PLAN FOR NEW RESIDENTIAL BUILDINGS**

(O.C. 841-98 OF 17 JUNE 1998)

**ARBITRATION BODY AUTHORIZED BY THE RÉGIE DU BÂTIMENT DU QUÉBEC
RESPONSIBLE FOR THE ADMINISTRATION OF THE BUILDING ACT (R.S.Q., C.
B-1.1)**

UNDER THE AEGIS OF

SOCIÉTÉ POUR LA RÉOLUTION DES CONFLITS INC. (SORECONI)

CANADA
PROVINCE OF QUÉBEC

FILE N°: 220904001
FILE N°: 167753-7135
GUARANTEE PLAN:

DATE: NOVEMBER 18, 2022

IN THE PRESENCE OF: M^{TR}E TIBOR HOLLÄNDER

HESHMATULLAH HAJIZADEH AND YALDA KHATIZ

«BENEFICIARIES»

-and-

VIVESCO INC.

«CONTRACTOR»

-and-

GARANTIE CONSTRUCTION RÉSIDENTIELLE (GCR)

«MANAGER OF THE GUARANTEE PLAN»

<p>ANNEX 3</p>

From: [Heshmat](#)
To: [Tibor Holländer](#)
Cc: [Jonathan Belisle](#); [Pierre-Marc Boyer](#)
Subject: delay in objection for administrator's decision.
Date: August 28, 2022 11:48:33 PM

Hello Mr. Hollander.

unfortunately have have been so busy for the last few tho months, my mother passed away, and the the same time I had to take care of my kids, as well, therefore I do not have any time for to spend on researching and find case scenarios that justify the delay on opening objection on the GCR administrator's decision.

I have two kids with special needs that require 24/7 supervision, all my time and energy are consumed with our kids.

At the same time I have my own work as well, and since there is always delays, negligence and lack of proper communication from GCR, which is not honouring my requests for requested information, which in return, made a biased decision in favour of the contratore, Vivesco, either due to financial incentives or due to ethnice dependency, therefore delay contesting is justifiable, if GCR not accepting this, then we can go back and we can consider all the delays that GCR and Vivesco has made, which caused imptional damage to me and my family.

Vivesco has failed several times to respect the deadline and GCR was supposed to take action and rectify the points by a 3rd party contractor, and instead GCR did not take any action and keep giving time for the contractor, with no result. All the communications are documented and we have access to them which can be used in a court of law. as proof and evidence.

We can discuss further, the facts that we have, that proves GCR failed to make a good judgment either due to lack of knowledge or not considering the facts or for some other reason made the decision in favor of the contractor.

Thanks
H Hajizadeh