ARBITRATION TRIBUNAL
Constituted by virtue of *Regulation respecting the guarantee plan for new residential buildings*
(O.C. 841-98 of 17 June 1998)

Under the aegis of
SOCIÉTÉ POUR LA RÉSOLUTION DES CONFLITS INC. (SORECONI)
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)

C A N A D A

PROVINCE OF QUEBEC

File n°: GP 1546496-1
File n°: SORECONI 122905001

THIRUMAL THILAGARUBAN

-AND-

PUSHPAMALA THILAGARUBAN

"Beneficiaries" / Plaintiffs

v.

9129-7069 Québec Inc.

"**Contractor**" / Defendant

-and-

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

"**Manager**"

ARBITRATION AWARD

Arbitrator: Me Tibor Holländer

For the Beneficiaries: Me An-Lac Nguyen, Counsel for

	Mrs. Pushpamala Thilagaruban (absent) and Mr. Thirumal Thilagaruban
For the Contractor:	9129-7069 Québec Inc. (absent)
For the Manager:	Me Élie Sawaya, Counsel for La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc. Ms. Anne Delage, Administrator
Date of Hearing:	10 October 2012
Hearing Location:	Laval Court House
Date of Award:	22 October 2012

IDENTIFICATION OF THE PARTIES

"**BENEFICIARIES**"/PLAINTIFFS:	Mrs. Pushpamala Thilagaruban (absent) Mr. Thirumal Thilagaruban 10111 Gouin Blvd. West Roxboro, Québec H8Y 1S1
"**CONTRACTOR**" /DEFENDANT:	9129-7069 Québec Inc. 17407, chemin Sainte-Marie Kirkland, Québec H9J 2L3
"**MANAGER**" OF THE GUARANTEE PLAN:	La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc. 5930, boul. Louis-H. Lafontaine Anjou, Québec H1M 1S7

PRELIMINARY OBSERVATIONS

[1] For the purposes of the present Arbitration Award, the Tribunal shall only set out, refer to and/or highlight those facts, documents and exhibits that are pertinent to the arbitration award that is being rendered.

[2] Prior to the commencement of the hearing, Counsel for the Manager informed the Tribunal that the Letter of Demand (Exhibit A-5) bearing the Administrator's stamp date of 18 January 2012 was in fact received by the Manager on 4 October 2012. Accordingly, for the purposes of the computation of the delays governed by article 10 of the "*Regulation respecting the guarantee plan for new residential buildings*"[1] (the "**Regulation**") such delays are considered for the purposes of denunciation to be 4 October 2011 instead of 18 January 2012.

[3] In addition, the Tribunal was informed by the Manager, that the Manager is withdrawing the decision rendered in regard to Point 4 that forms part of the request for arbitration. The Manager undertook to have the deficiencies relating to Point 4 re-inspected for the purposes of rendering a subsequent decision. The Tribunal retains jurisdiction to the extent that one of the parties may seek to refer to arbitration the Manager's decision to be rendered subsequent to the present award.

[4] The Beneficiaries/Plaintiffs ("**Plaintiffs**") informed the Tribunal at the pre-trial hearing and subsequently on the hearing day, that they have abandoned their request for arbitration relating to Points 3, 9 and 10 of the Decision.

[5] The parties have agreed that the value in dispute amounts to a total of $10,000.00.

MANDATE

[6] Plaintiffs filed a request for arbitration dated 28 May 2012 and the undersigned was named arbitrator on 4 June 2012.

CHRONOLOGY

2008.10.28 Declaration of Co-Ownership (Exhibit A-4).

2008.10.31 Preliminary contract and guarantee contract (Condominium) (the "**Contract**"**)** executed by Parveen Razan ("**First Beneficiary**") and 9129-7069 Québec Inc. (the "**Contractor**") (Exhibit A-1).

2008.10.31 Plan de Garantie Des Bâtiments Résidentiels Neufs «*Formulaire D'inspection Préréception*» executed by the First Beneficiary and the Contractor (Exhibit A-2).

2008.10.31 Acceptance of the Building by the First Beneficiary (Exhibit A-8).

2009.05.07 Property Inspection Report prepared by «*Inspection de batiment Safeguard Building Inspection Service*» at the request of the Beneficiaries Pushpamala Thilagaruban and Thirumal Thilagaruban ("**Second Beneficiaries**") (Exhibit A-12).

[1] *c. B-1.1, r.8*

2009.06.17 Deed of sale executed by the First Beneficiary and the Second Beneficiaries (Exhibit A-3).
2011.10.01 Letter of Demand from the Second Beneficiaries to the Contractor and Manager, bearing the Manager's receipt stamp of 18 January 2012 (Exhibit A-5).
2011.11.02 Letter from the Manager acknowledging receipt of the Second Beneficiaries' Letter of Demand (dated 1 October 2011) on 4 October 2011 (Exhibit A-13).
2011.11.25 «*Demande de Réclamation/Claim Form completed by the beneficiaries*» signed by the First Beneficiary (Exhibit A-6).
2012.01.25 Letter from the Manager addressed to the Second Beneficiaries and Contractor (Exhibit A-7).
2012.03.15 Inspection of the Building by the Manager.
2012.04.23 Decision by the Manager. (Exhibit A-8 in French and Exhibit A-9 in English). For the purposes of the present Arbitration Award the Decision shall be referred to as Exhibit A-9.
2012.05.28 Hand written letter by the Second Beneficiaries requesting arbitration to be submitted before SORECONI (Exhibit A-10).
2012.06.04 Nomination of Arbitrator (Exhibit A-10).
2012.06.19 Receipt of the Manager's Book of Exhibits.
2012.06.20 Notice of Pre-trial conference.
2012.07.05 Pre-trial hearing held with the parties.

EXHIBITS

[7] The Exhibits have been initially labeled and numbered "A-" in accordance with the numbering of the Book of Exhibits filed by the Manager and any other additional exhibits which the Plaintiffs filed at the Hearing were numbered and labeled "B-".

[8] The following additional Exhibits were filed by the Manager at the Hearing:

A-11 Twenty-one (21) photographs taken by Ms. Anne Delage depicting the matters that the Plaintiffs complained in their letter of demand dated October 1, 2011 (Exhibit A-5).
A-12 Property Inspection Report prepared by «*Inspection de batiment Safeguard Building Inspection Service*» dated 7 May 2009.
A-13 Letter dated 2 November 2011, from the Manager to the Second Beneficiaries/Plaintiffs acknowledging the receipt of the Second Beneficiaries Letter of Demand (Exhibit A-5) as at 4 October 2011.

[9] The Tribunal received a copy of the letter dated 2 November 2011, though it was inadvertently not produced at the hearing. The Tribunal accepts the production of the letter and identifies it as Exhibit A-13, seeing that Counsel

for the Manager admitted that the Manager did in fact receive Exhibit A-5 on 4 October 2011 and not on 18 January 2012.

[10] The following Exhibits were filed by the Plaintiffs at the Hearing:

B-1 Twenty (20) photographs taken by Plaintiffs on October 1, 2012 depicting the matters that the Plaintiffs complained in their Letter of Demand dated October 1, 2011 (Exhibit A-5).

PRELIMINARY MOTIONS

[11] The parties did not challenge the competence or jurisdiction of the Tribunal and the jurisdiction of the Tribunal is therefore confirmed.

FACTS

[12] The Contractor built a semi-detached cottage bearing civic address number 10111 Gouin Blvd. West, Roxboro, Quebec (the "**Property**").[2]

[13] The Contract was initially executed by and between the Contractor and the First Beneficiary[3] who accepted the Property on 31 October 2008.[4]

[14] On 17 June 2009, the First Beneficiary sold the Property to the Plaintiffs.[5]

[15] In May 2009, a month prior to purchasing the Property, the Plaintiffs had the Property inspected and obtained a "*Property Inspection Report*"[6]. The inspector who prepared the report in question noted that the purpose of the report was to inform Plaintiffs of "***visible major defects***". [7]

[16] The "*Property Inspection Report*"[8] identifies most of the deficiencies (with the exception of Points 1 and 2) subsequently denounced by the Plaintiffs in the Letter of Demand dated 1 October 2011[9] which forms the object of the Decision that was rendered on 23 April 2012.[10]

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[2] Exhibit A-1
[3] Exhibit A-1
[4] Exhibit A-2
[5] Exhibit A-3
[6] Exhibit A-12
[7] Exhibit A-12, at page 16 "*The sole purpose of this inspection and report is to inform the client of* ***visible major defects*** *in the above-mentioned property*."
[8] Exhibit A-12
[9] Exhibit A-5
[10] Exhibit A-9

[17] By Letter of Demand dated 1 October 2011[11] that was received by the Manager on 4 October 2011[12], the Plaintiffs gave written notice to the Contractor and the Manager claiming various deficiencies that are more fully identified in the Decision as Points 1 to 10 (since Plaintiffs have abandoned Points 3, 9 and 10, they are not reproduced herein below) namely:[13]

1. Water infiltration in the basement and finishing work on the floor drain at the bottom of the outer staircase incomplete (Point 1);
2. Mould on walls and beneath basement staircase (Point 2);
3. Significant or sizable gaps between strips in hardwood flooring on ground floor and second floor (Point 5);
4. No parging Point 6);
5. Exterior concrete stairs not properly finished, missing balustrade/railing (Point 7); and
6. Rear and right side basement windows not properly installed (Point 8).

[18] On 15 March 2012, the Manager, Ms. Anne Delage, visited the Property. Her observations are duly noted in the Decision[14] and are consistent with her testimony.

[19] The Decision dismissing Plaintiffs' claims was rendered on 23 April 2012.[15]

[20] This is a request for arbitration from a decision of the Manager entitled "*Décision de l'administrateur*" dated 23 April 2012 (the "**Decision**")[16] rendered in furtherance of claims filed by the Plaintiffs under the Contract[17] providing for coverage in accordance with the terms and conditions under a Guarantee Plan for new residential buildings (the "**Guarantee Plan**") administered by the Manager for their Property.[18] The Plaintiffs expressed a preference to have the arbitration proceedings in English.

[21] There are ten (10) points ("**Point**(**s**)") covered by the Decision, though only Points numbered 1, 2, 5, 6, 7 and 8 are in issue before the Tribunal, namely:

1. Water infiltration in the basement and finishing work on the floor drain at the bottom of the outer staircase incomplete;

[11] Exhibit A-5
[12] Exhibit A-13 and admission made by Counsel for the Manager
[13] Exhibit A-9
[14] Exhibit A-9
[15] Exhibit A-9
[16] Exhibit A-9
[17] Exhibit A-1
[18] Exhibit A-1

2. Mould on walls and beneath basement staircase;
5. Significant or sizable gaps between strips in hardwood flooring on ground floor and second floor;
6. No parging (Point 6);
7. Exterior concrete stairs not properly finished, missing balustrade/railing; and
8. Rear and right side basement windows not properly installed.

[22] The Decision states in regard to Points 1 and 2 that the "*administrator's inspection revealed considerable damage caused by successive water infiltrations. The basement flooring is warped and lifted from its base. It also mouldy, as is the bottom of the basement walls*." However, seeing that the Plaintiffs "*declared that they first discovered the problem described in Item 1 in May 2010 and the one described in Item 2 in August 2011… [and Item 2] is directly related to the problem described in Item 1.*" and that the Manager was first informed of these problems on 4 October 2011, eighteen (18) months after the discovery of the water infiltration, "*it is clear that the legally established "reasonable time limit" was greatly exceeded, and, as a result, the administrator cannot take action on the beneficiaries' claims in these matters."*[19]

[23] The Decision states in regard to Point 5 that though the "*administrator's inspection revealed that the width of these gaps varied from 2 to 5 millimetres… it [was her] considered opinion that these gaps cannot be caused solely by seasonal variations in indoor temperature and humidity.*", and that the Manager was "*unable to rule on the contractor's responsibility in the matter described in Item 5.*"[20]

[24] The Decision states in regard to Points 6, 7 and 8 that the "*the problems mentioned in Items 6 to [8] were readily observable for a reasonably diligent buyer… [and as such] the administrator cannot take action on the beneficiaries' claims in these matters.*"[21]

PLEADINGS - PLAINTIFFS

[25] The Plaintiffs' position with regard to Points 1 and 2 can be summarized as follows. Regarding Point 1, Plaintiffs' Counsel admits that the Letter of Demand[22] denouncing the water infiltration was given outside the reasonable delays prescribed by article 10(4) of the Regulation. However, Counsel urges the Tribunal to exercise its equitable discretion and allow the claim, given that Plaintiffs acted in good faith and were unaware of the delays associated with

[19] Exhibit A-9
[20] Exhibit A-9
[21] Exhibit A-9
[22] Exhibit A-5

having to denounce the problem in question. As for Point 2, Plaintiffs' Counsel argues that Plaintiff noticed the presence of mould during the month of August 2011 and as such, the Letter of Demand[23] that was received by the Manager on 4 October 2011, was in fact given within the delays prescribed by the Regulation.

[26] Regarding Points 5, 6, 7 and 8, these are latent defects that fall within the responsibility of the Contractor to correct.

PLEADINGS - MANAGER

[27] Regarding Points 1 and 2, the Manager ascertained the problems relating to the water infiltration in the basement of the Property. However, seeing that the Plaintiffs were aware of the problem as far back as May 2010 and only informed the Manager on 4 October 2011, the Plaintiffs did not respect the delays relating to the denunciation of latent defects within the meaning of article 10 (4) of the Regulation.[24]

[28] The Manager further argues that the problem created by the water infiltration, *i.e. the mould*, was a direct consequence of the water infiltration and as such the Letter of Demand received by the Manager on 4 October 2011 was outside the reasonable delay prescribed by article 10(4) of the Regulation. The Manager advanced the argument that since the presence of the mould is a consequence of the water infiltration, it is but an "*accessory*" damage caused by the water infiltration and the denunciation therefore was tardy, in that the Plaintiffs were aware of the water infiltration and the damages caused thereof since May 2010.

[29] With regard to Points 5, 6, 7 and 8, the Manager argues that the deficiencies in question were evident at the time that the Property was accepted by the First Beneficiary as well as when the Property was purchased by Plaintiffs and that even if they were subsequently discovered, they are not of a serious and grave nature as to render the Property unusable or dangerous.

ISSUES

[30] Taking into consideration the facts of this case and the applicable provisions of the Regulation and corresponding clauses of the Guarantee Plan, when applicable, the following issues must be considered:

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[23] Exhibit A-5

[24] *c. B-1.1, r.8*; a.10(4) reads as follows: "*10. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations after acceptance of the building, shall cover: (4) repairs to latent defects within the meaning of article 1726 or 2103 of the Civil Code which are discovered within 3 years following acceptance of the building, and notice of which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months following the discovery of the latent defects within the meaning of article 1739 of the Civil Code;*"

[30.1] what are the applicable delays to denounce latent defects after the acceptance of the Property?

[30.2] did the Plaintiffs denounce the problems relating to Points 1 and 2 (Exhibit A-5) within the delays prescribed by the Regulation?

[30.3] is the delay to give notice in writing to the Contractor and Manager within the delays stipulated in the various paragraphs of article 10 of the Regulation considered to be one of procedure capable of being remedied or is it one of substantial law that is prescriptive in nature resulting in Plaintiffs being foreclosed from exercising their rights in the event of their failure to respect the delays relating to the denunciation of the latent defects?

[30.4] what is the nature of the delay prescribed by article 10 of the Regulation?

[30.5] if the notice of denunciation (Exhibit A5) was given beyond the delays prescribed by article 10(4) of the Regulation, is the failure to do so fatal and if so, what are the consequences of a written notice not being given within the delay of 6 months?

[30.6] does the Tribunal have discretion to overlook the giving of a written notice beyond the legal delays prescribed by article 10 of the Regulation when it is equitable or fair to do so, not to deprive Plaintiffs from exercising their rights?

[30.7] does the mould problem created by the water infiltration constitute an independent claim or is it of a nature that is "*accessory*" to the damage caused by the water infiltration in which case, is late notice fatal to Plaintiffs' claim?

[30.8] were the deficiencies relating to Points 5, 6, 7 and 8 latent defects or deficiencies that existed at the time that the Property was accepted by the First Beneficiary and subsequently by Plaintiffs and were "*observable*" to a reasonably diligent buyer?

ANALYSIS

[31] The Tribunal will review and analyze the evidence in relation to the individual issues raised by the Plaintiffs with respect to Points 1, 2, 5, 6, 7 and 8 of the Decision.

a. <u>Point 1 and 2: Water infiltration in the basement, finishing work on floor drain at the bottom of the outside staircase and mould on walls and beneath the basement stair case</u>

[32] Plaintiffs' Counsel admitted the dates noted by Ms. Delage (Manager) in the Decision pertaining to when the water infiltration occurred and when the Plaintiffs' first noticed the presence of mould on the basement walls.

[33] Accordingly, it is an admitted that Mr. Thilagaruban during the month of May 2010 ascertained water infiltration in the basement of the Property. However, Mr. Thilagaruban's testimony pertaining to the circumstances surrounding the installation and finishing by the Contractor of the floor drain on the ground floor of the exterior staircase was confusing and unclear.

[34] Mr. Thilagaruban testified that following the May 2010 flooding, he communicated with the Contractor about the problem, though it is important to note that no written notice to the Contractor or the Manager was apparently given by the Plaintiffs.

[35] According to Mr. Thilagaruban the Contractor installed a drain outside the lower landing of the concrete stairs leading to the basement. However the installation of the drain did not resolve the water infiltration problem.

[36] Subsequently, when Plaintiffs' Counsel asked Mr. Thilagaruban to identify when the Contractor installed the outer drain and how this came about, Mr. Thilagaruban was unable to state when and how the drain was installed. Essentially, he suggested to the Tribunal that the Contractor showed up and proceeded to install the drain, though at one point he stated that the Contractor did not install the drain during the month of October 2010.

[37] Ms. Delage testified and confirmed that she inspected the Property on 15 March 2012 and she obtained from Mr. Thilagaruban all of the information pertaining to all the dates and facts noted in the Decision.

[38] According to Ms. Delage's notes and testimony, Mr. Thilagaruban informed her that during the month of October 2010 the Contractor installed a "*water catchment system on the lower landing of the outside concrete staircase*", however, the installation of the drain did not resolve the problem, since during her visit in March 2012, she ascertained the presence of water in the basement of the Property.

[39] The drain referred to by Mr. Thilagaruban and Ms. Delage is shown in the photographs produced by the Plaintiffs as Exhibit B-1 and by the Manager as Exhibit A-11. Both Exhibits A-11[25] and B-1[26] depict a wood frame sank into the outside cement ground floor out of which protrudes a pipe.

[25] At page 8

[40] Mr. Thilagaruban's testimony is unclear and contradictory; he first testified that the Contractor came during 2010 unknown to him to install the water drain and did not complete the work in question; subsequently, Mr. Thilagaruban stated that he did not know when the Contractor installed the drain.

[41] However, the presence of the drain pipe without a wood frame sank into a gravel covered surface area is noted by the inspector who prepared in May 2009 the "*Property Inspection Report*" ("**Report**") obtained by Mr. Thilagaruban prior to purchasing the Property. The inspector took a photograph and identified the water pipe under the heading "***visible major defects***".[27]

[42] The Report (Exhibit A-12, dated May 7, 2009) was commissioned by Plaintiffs and confirms the installation of a water drain, though it does not establish who installed the water frame and when the water pipe was subsequently framed and the cement floor applied to the outer ground surface area of the Property.

[43] The photograph depicting the wood framed drain forming part of Exhibit A-11 was taken by Ms. Delage in March 2012 and merely establishes that work was performed but allegedly it was not completed. Exhibit A-11 does not establish the identity of the party that performed the work and when it was performed.

[44] Mr. Thilagaruban did not produce photographs taken after the Property was purchased in June 2009 up to the denunciation of the various deficiencies in October 2011.

[45] The photograph depicting the wood framed drain forming part of Exhibit B-1 was taken in October 2012 and merely establishes that work was performed but allegedly it was not completed. Exhibit B-1 does not establish the identity of the party that performed the work and when it was performed.

[46] Though Mr. Thilagaruban's evidence is confusing to say the least, the Tribunal is not of the view that Mr. Thilagaruban is acting in bad faith or is being dishonest. The fact is that Plaintiffs' complained that the Contractor failed to complete the work relating to the outside drain. Tribunal does not take into consideration this evidence, since it is not relevant to the determination of whether Plaintiffs' denounced to the Contractor and the Manager the problem associated with the water infiltration and mould within the legal delays prescribed by article 10(4) of the Regulation.

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[26] At page 1 photo number 14
[27] Exhibit A-12, at page 16, a photo identified as number "*6. Rear floor drain installation.*"

[47] Mr. Thilagaruban did not testify and did not offer evidence pertaining to when he first ascertained the presence of mould in the basement of the Property.

[48] The facts set out in the Decision and before the Tribunal relating to Points 1 and 2 have been established to be the following:

[48.1] in the month of May 2010, in the second (2nd) year of the guarantee, there was a major water infiltration in the Plaintiffs' basement that caused considerable damage to the floor and to the foot of the basement walls;

[48.2] Ms. Delage's inspection revealed in March 2012 that considerable damage was caused by successive water infiltrations including the presence of water in the basemen during the inspection;[28]

[48.3] the basement floor was warped and lifted from the base;

[48.4] the basement lower walls were mouldy as evidenced by the Manager's Exhibit A-11[29] and Plaintiffs' Exhibit B-1[30];

[48.5] Mr. Thilagaruban informed Ms. Delage that in August 2011, in the third (3rd) year of the guarantee, Plaintiffs ascertained the presence of mould on the bottom of the walls and beneath the basement staircase;

[48.6] Mr. Thilagaruban first gave notice to the Contractor and Manager of the problems relating to water infiltration and mould in October 2011[31] eighteen (18) months after discovering the problem that caused the mould to manifests itself on some of the walls of the basement.

b. <u>Point 5, Point 6, Point 7 and Point 8</u>

i. ***<u>Point 5: Gaps between strips in hardwood flooring on ground floor and second floor</u>***

[49] The facts set out in the Decision and before the Tribunal relating to Point 5 have been established to be the following:

[49.1] Mr. Thilagaruban testified to the existence of sizable gaps between strips in the hardwood floor located on the ground floor and the

[28] Testimony of Ms. Anne Delage
[29] page 5 [two (2) photographs]; page 7 [one (1) photograph]
[30] page 4 [photographs numbers 42, 43 and 44]
[31] Exhibit A-5 dated 1 October 2011 received by the Manager on 4 October 2011 [admitted by the Manager and Exhibit A-13]

second floor of the Property, though he was unable to explain the extent to which such gaps existed on the ground and second floor of the Property;

[49.2] Mr. Thilagaruban stated that gaps are found in the middle of the floor in the living room. In cross-examination he admitted that he does not have any problem walking on the floors in question;

[49.3] Ms. Delage noted following the inspection of the Property that the width of the gaps varied from 2 to 5 millimetres and testified that according to industry norms, a gap of over 2 millimeter was considered to be excessive;

[49.4] the gaps in the floor are evidenced by the Manager's Exhibit A-11;[32]

[49.5] the Report (Exhibit A-12) establishes that in 2009 when Plaintiffs purchased the Property, the inspector engaged by Plaintiffs identified the gaps in the floor (at Page 16 of Exhibit A-12). Plaintiffs' inspector noted the following: "*The sole purpose of this inspection and report is to inform the client of* ***visible major defects*** *in the above-mentioned property.*" A photograph was included as item number 8 with the notation "*floor hardwood floor cracks*".

ii. ***Point 6: No parging on foundation***

[50] The facts set out in the Decision and before the Tribunal relating to Point 6 have been established to be the following:

[50.1] parging involves the application of a coat of plaster or cement mortar to masonry or concrete walls;

[50.2] Mr. Thilagaruban's testimony on this issue was not extensive other than to state that the foundation lacked parging;

[50.3] Ms. Delage inspected the Property and stated that the absence of parging was evident at the time that the Property was accepted by the First Beneficiary as well as when it was purchased by Plaintiffs and was therefore readily "*observable*" to a reasonably diligent buyer;

[50.4] according to Ms. Delage, parging is merely aesthetic and the lack of such an application does not threaten the integrity of the building.

[32] pages 1 to 4 [seven (7) photographs]

iii. ***Point 7: Exterior concrete stairs missing balustrade/railing***

[51] The facts set out in the Decision and before the Tribunal relating to Point 7 have been established to be the following:

[51.1] The Report (Exhibit A-12) commissioned by Plaintiffs establishes that in May 2009, the inspector included a photograph of the rear stairs and identified it at page 16 of the report as: "*4. Rear stairs installation. Child security.*"

[51.2] the photograph that was inserted at page 16 of the Report (Exhibit A-12) depicts the external rear stairs descending to the basement. The photograph establishes the presence of wood stairs without a railing;

[51.3] Ms. Delage inspected the Property in March 2012 and the photographs produced as Exhibit A-11 depict at pages 7 and 11, the presence of cement stairs without railing;

[51.4] Plaintiffs produced Exhibit B-1; photograph number 23 at page 2 and photograph number 32 at page 3, establishing the presence of cement stairs without railing;

[51.5] Mr. Thilagaruban did not testify regarding the claim pertaining to Point 7. Plaintiffs did not adduce any evidence before the Tribunal to establish the time frame relating to the work that was carried out to replace the stairs providing access from the outside to the basement and whether the work in question was carried out by the Contractor.

iv. ***Point 8: Rear and right side basement windows not properly installed***

[52] The facts set out in the Decision and before the Tribunal relating to Point 8 have been established to be the following:

[52.1] Mr. Thilagaruban testified that when he bought the Property, the inspector did not reveal the problems with the windows that are depicted in the photographs produced as Exhibits A-11 and B-1;

[52.2] Mr. Thilagaruban did not testify to when he ascertained the deficiencies relating to Point 8;

[52.3] Exhibit B-1, (page 5 photographs 51, 52, 53 and 54) establishes gaps between the window frames and the building structure, wide enough that one could place several fingers in the gaps;

[52.4] Exhibit A-11 (two photographs found at page 9) confirms the same fact;

[52.5] Ms. Delage testified that the various deficiencies depicted in the photographs produced as Exhibit A-11, did not result in water infiltration at the time of the inspection of the Property in March 2012.

APPLICABLE PROVISIONS

[53] In paragraph 30 of the present Arbitration Award, the Tribunal has identified the issues that require answers which will determine the reception of Plaintiffs' claims. The Tribunal therefore will review and discuss each individual issue.

[54] It is to be noted that in the case at bar, the giving of a written notice within the delays required by the Regulation and the Contract, denouncing to the Contractor and the Manager the deficiencies relating to Points 1 and 2 forms the crux of the present arbitration.

[55] Before addressing the individual issues, it is appropriate for the Tribunal to briefly review the guiding principles governing the Tribunal in its deliberation, especially in light of the specific request made by the Plaintiffs that the Tribunal use its equitable discretion to overturn the Decision rendered by the Administrator Ms. Delage and order the Contractor to perform the work involving the correction of the deficiencies relating to Points 1, 2, 5, 6, 7 and 8.

[56] In the case at bar, the Tribunal is called upon to interpret the provisions of the Regulation in a liberal manner while at the same time respecting and complying with the intention of the Legislator. That means that the Tribunal must determine whether the provisions of article10 of the Regulation are substantive and therefore the delays relating to the written denunciation must be strictly adhered to or merely procedural in nature, in which case the failure to respect the delays do not foreclose Plaintiffs from exercising their right to force the Contractor to redress and correct the problems associated with the infiltration of water into their basement.

[57] The Tribunal is inspired by the words of one of its colleagues, Me Jean Philippe Ewart, who was of the view that:

> *"[20] … the Court should approach the interpretation of situations where a litigant is losing his rights with a view to reject unjust formalism and, unless otherwise compelled to do so, to safeguard the rights of the parties."*[33]

[33] *Christou et al v. Groupe Immobilier Clé d'Or Inc. et La Garantie Habitations du Québec Inc., CCAC S08-061101-NP, 2009-02-02*

The Regulation[34]

[58] Article 10 of the Regulation applies to a building that is not held in co-ownership. The coverage is provided to beneficiaries in the event that a contractor has failed to perform its obligations after the acceptance of the building and the provisions are worded as follows:

> "*10. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations after acceptance of the building, shall cover:*
>
> *[…]*
>
> *(3) repairs to non-apparent poor workmanship existing at the time of acceptance or discovered within 1 year after acceptance as provided for in articles 2113 and 2120 of the Civil Code of Québec, and notice of which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months following the discovery of the poor workmanship;*
>
> *(4) repairs to latent defects within the meaning of article 1726 or 2103 of the Civil Code of Québec which are discovered within 3 years following acceptance of the building, and notice of which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months following the discovery of the latent defects within the meaning of article 1739 of the Civil Code of Québec; and*
>
> *(5) repairs to faulty design, construction or production of the work, or the unfavorable nature of the ground within the meaning of article 2118 of the Civil Code of Québec, which appears within 5 years following the end of the work, and notice of which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months after the discovery or occurrence of the defect or, in the case of gradual defects or vices, after their first manifestation.*"
>
> [Emphasis added]

[59] In addition, a beneficiary that files a claim under article10 of the Regulation is required to follow the provisions set out in article 18 of the Regulation that read as follows:

> "*18. Any claim based on the guarantee referred to in section 10 is subject to the following procedure:*
>
> *(1) within the guarantee period of 1, 3 or 5 years, as the case may be, the beneficiary shall give notice to the*

[34] *c. B-1.1, r.8*

> *contractor in writing of the construction defect found and send a copy of that notice to the manager in order to suspend the prescription;*"[35]
>
> [Emphasis added]

[60] It is to be noted that the Legislator used the same language throughout article10 subparagraphs 10(3), 10(4) and 10(5): (1) it imposed an obligation on the beneficiary to give written notice to the contractor and manager of the guarantee plan; (2) the written notice must be given "*within a reasonable time not to exceed 6 months following the discovery*" of the deficiency.

[61] As such, when it comes to the formulation of a claim made by a beneficiary against a contractor, the Legislator did not make a distinction between the nature of the deficiencies such as "*poor workmanship*" (article 10(3)), "*latent defects*" (article 10 (4)) or "*gradual defects or vices or faulty design, construction or production of the work, or the unfavorable nature of the ground*" (article 10(5)) and the conditions attached to the denunciation of the deficiencies that would trigger the coverage provided by the guarantee plan.

i. ***what are the applicable delays to denounce latent defects after the acceptance of the Property?***

[62] In the case at bar, Plaintiffs were required pursuant to the provisions of article 10(4) of the Regulation to give written notice to the Contractor and Manager denouncing the water infiltration in the basement of the Property in order to trigger the coverage of the Guarantee Plan in the event that the Contractor failed to correct the latent defects.

[63] By letter dated 1 October 2011, the Plaintiffs gave written notice to the Contractor and Manager which notice was received by the Manager on 4 October 2011.

[64] Plaintiffs were required pursuant to article 10(4) of the Regulation to have given written notice[36] "*within a reasonable time not to exceed 6 months following the discovery*" of the water infiltration in the basement of their Property. Accordingly, Plaintiffs ought to have denounced in writing the water infiltration by no later than October 2010, which evidently they failed to do.

[35] *O.C. 841-98,* a. 18
[36] Exhibit A-5

ii. ***did the Plaintiffs denounce the problems relating to Points 1 and 2 (Exhibit A-5) within the delays prescribed by the Regulation?***

[65] The water infiltration occurred in May 2010 and the written notice[37] was received by the Manager on 4 October 2011, some eighteen (18) months following the discovery of the water infiltration.

[66] Plaintiffs have admitted that they did not denounce the water infiltration into the basement of their Property within the delays prescribed by article 10(4) of the Regulation following the discovery of the water infiltration.

iii. ***is the delay to give notice in writing to the Contractor and Manager within the delays stipulated in the various paragraphs of article 10 of the Regulation considered to be one of procedure capable of being remedied or is it one of substantial law that is prescriptive in nature resulting in Plaintiffs being foreclosed from exercising their rights in the event of their failure to respect the delays relating to the denunciation of the latent defects?***

[67] This question was reviewed extensively by the undersigned's colleague Me Jean Philippe Ewart[38], who looked at the application of article 10(4) of the Regulation in light of the provisions set out in article 1739 C.C.Q. referenced in article 10(4) and held as follows:

> "*[28] What is the nature of the notice in writing? Is it of a procedural nature only or is it an element of a more substantive nature?*
>
> *[29] The interpretation given to article 1739 of the Civil Code of Québec ("**C.c.Q**.") is a first element of response:*
>
> > *"1739. A buyer who ascertains that the property is defective may give notice in writing of the defect to the seller only within a reasonable time after discovering it. The time begins to run, where the defect appears gradually, on the day that the buyer could have suspected the seriousness and extent of the defect."*
>
> *[30] The authors have viewed this notice as a extra judicial demand subject to art. 1595 C.c.Q.:*
>
> > *"The extrajudicial demand by which a creditor puts his debtor in default shall be made in writing."*
>
> *and while contrary to certain jurisprudence in other circumstances, authors **and the Courts have considered the notice under art.***

[37] Exhibit A-5
[38] *Christou et al v. Groupe Immobilier Clé d'Or Inc. et La Garantie Habitations du Québec Inc., CCAC S08-061101-NP, 2009-02-02*

1739 to be specifically required to be in writing, and to be imperative and essential in nature*.*

[31] The courts have in several occasions identified that the notice under 1739 C.c.Q. has a specific character of a denunciation and even made distinctions between the extra judicial demand and the denunciation on the basis of their respective objectives

[32] The Supreme Court has also addressed this issue under a service mechanism in the case of an appeal procedure, which I believe is specifically relevant as I have mentioned earlier, the arbitration provided in the Regulation is, in my view, of the nature of an appeal from a decision of the Manager.

[33] The undersigned notes that this is under the same case law that supports the general rule of liberal interpretation referred hereinabove, and more particularly by L'Heureux Dubé J. (and before her by Pratte J.) as reflected in the following extract from Québec (Communauté urbaine) v. Services de santé du Québec:

> *"This having been said, it is clear that, barring undue formalism, the peremptory provisions of the Code of Civil Procedure must be observed, as procedure judiciously applied provides an additional guarantee that the rights of litigants will be respected. This is especially true in the context of an appeal because, as the majority of the Court of Appeal pointed out, the right of appeal is a statutory creation, the very existence of which is subject to precise rules. This is what Pratte J. held in Cité de Pont Viau v. Gauthier Mfg. Ltd., [1978] 2 S.C.R. 516, upholding the Court of Appeal on this point, when he wrote at p. 519:*
>
> > *An appeal is brought only if, within the time limit provided for in art. 494 C.C.P., the inscription is filed with the office of the court of first instance and served upon the opposing party or his counsel. In the case at bar, though the inscription was filed with the office of the Superior Court, it was never served upon respondent or its counsel. One of the two steps essential to the bringing of the appeal was therefore missing; this is not a mere formality that the Court of Appeal could allow to be corrected (art. 502 C.C.P.)."*
> >
> > *The underlines are ours*.

[34] The ***notice in writing*** *to be given to the Manager in accordance with section 10 of the Regulation is in effect a denunciation, it* ***must be in writing****,* **it is essential and imperative***, and* ***a substantive condition precedent*** *to the right of the Beneficiary to arbitration.*"

[Emphasis added]

[68] The Tribunal is of the same view and opinion expressed by Me Jean Philippe Ewart in the case of *Christou et al v. Groupe Immobilier Clé d'Or Inc. et La Garantie Habitations du Québec Inc., CCAC S08-061101-NP, 2009-02-02*. The Legislator used the word "*shall*" in article 18(1) of the Regulation thereby prescribing the imperative obligations placed upon a beneficiary to denounce in writing to the contractor "***the construction defect"*** and ***"send a copy of that notice to the manager in order to suspend the prescription"***.

[69] Article 10(4) read together with article 18(1) of the Regulation imposes two (2) imperative obligations that must be respected by a beneficiary availing himself of the right for coverage under the Guarantee Plan, namely, the obligation to denounce the latent defect in writing to the contractor and manager and to do so within a reasonable delay that will not exceed 6 months from the discovery of the latent defect, failing which prescription will not be interrupted.

iv. ***what is the nature of the delay prescribed by various subparagraphs of article 10 of the Regulation?***

[70] The nature of the delay provided in article 10 of the Regulation was reviewed extensively by Me Jean Philippe Ewart[39], who raised the question whether the delay of 6 month was one of procedure or of prescription that resulted in the forfeiture of rights that otherwise could be claimed to be covered by the guarantee plan. After a lengthy discussion, my learned colleague concluded as follows:

> "*[47] It may be said that the wording and intent of section 10 of the Regulation "…time not to exceed 6 months after the discovery …or occurrence … or first manifestation… " may at least be considered as stringent as the delay wording of articles 484 and 523 C.p.c.*"

[71] Me Jean Philippe Ewart[40], further concluded that the delay prescribed by article 10(4) is one of forfeiture and held that:

> "*[55] The Court is of the view that the* ***six month delays under section 10*** *of the Regulation are each in the* ***nature of a delay of forfeiture****,* ***delays of forfeiture are of public order*** *and* ***extinguish the right*** *of the creditor of the obligation and consequently extinguish the right of the Beneficiaries to require the coverage of the Guarantee Plan.*"
>
> [Emphasis added]

[39] *Christou et al v. Groupe Immobilier Clé d'Or Inc. et La Garantie Habitations du Québec Inc., CCAC S08-061101-NP, 2009-02-02*
[40] *Ibid*

v. ***if the notice of denunciation (Exhibit A-5) was given beyond the delays prescribed by article 10(4) of the Regulation, is the failure to do so, fatal and if so, what are the consequences of a written notice not being given within the delay of 6 months?***

[72] Me Jean Philippe Ewart[41], considered the consequences of rights being forfeited and held that:

> *"[56] **One of the consequence of forfeiture, the foreclosure of the right to exercise a particular right**, in our case as the Manager is concerned the right of the Beneficiaries to require the coverage of the Guarantee Plan, is not subject to the provisions of suspension or interruption applicable in certain circumstances to delays of prescription:*
>
> > *"… alors qu'un délai de prescription peut être suspendu et interrompu (articles 2289 et s.), …, la solution contraire prévaut pour le délai de déchéance, qui éteint le droit de créance dès que la période est expirée sans que le créancier est exercé son recours et quoi qu'il arrive. Le titulaire du droit, de ce fait, ne peut même plus invoquer celui-ci par voie d'exception. "*
> >
> > *"… while a prescription delay may be suspended or interrupted (art. 2289 and following), …., a contrary solution applies to the delay of forfeiture, which extinguishes the creditor's right as soon as the period for the creditor to exercise his right is lapsed, and whatever happens afterwards. The holder of this right may then not even invoke the latter by any means of exception. "*
> >
> > *Underline and Translation by the Court"*
> > [Emphasis added]

[73] In the case at bar, Plaintiffs' failure to give written notice to the Contractor and Manager within a delay that did not exceed 6 months from the discovery of the water infiltration is fatal to Plaintiffs' claim relating to Point 1.

[74] The fact that it took Plaintiffs eighteen (18) months to denounce in writing the water infiltration has no additional bearing on the forfeiture by Plaintiffs to exercise their right to seek coverage under the Guarantee Plan, in that a written notice given to a contractor and manager beyond the delays prescribed by article 10(4) of the Regulation results in Plaintiffs immediately forfeiting their rights under the Guarantee Plan.

[75] The Arbitration Tribunal has held in a case where a beneficiary gave written notice to the contractor and manager 2 and 4 years after the discovery of the latent defects to be unreasonable, thereby depriving the beneficiary from

[41] *Ibid*

successfully making a claim against the contractor and manager under the guarantee plan.[42]

[76] It is equally imperative for the beneficiary to denounce in writing the deficiencies to both the contractor and manager.[43] While the beneficiary is not required to denounce the deficiencies simultaneously to the contractor and the manager, the beneficiary is nevertheless required to denounce in writing to both the contractor and the manager within the delays prescribed by article 10 of the Regulation.

[77] Thus in cases where beneficiaries gave written notice to the contractor within the delays and to the manager beyond the delays of article 10 of the Regulation; 9 months[44] and 25 months[45] after the discovery of the latent defects, in such instances the Arbitration Tribunal denied the beneficiaries the right of coverage under the guarantee plan.

vi. ***does the Tribunal have discretion to overlook the giving of a written notice outside the legal delays prescribed by article 10(4) of the Regulation when it is fair or equitable to do so, not to deprive Plaintiffs from exercising their rights?***

[78] It was established before the Tribunal that the Manager's inspection revealed considerable damage caused by successive water infiltrations that the Contractor would have had to remedy. The evidence was unclear as to when in May of 2010 Plaintiffs discovered the water infiltration in their basement. Nevertheless, Plaintiffs would have had until October 2010 to denounce in writing to the Contractor and Manager the water infiltration.

[79] Plaintiffs' Counsel argued that Plaintiffs' failure to denounce the water infiltration to the Contractor and the Manager within 6 months following the discovery of the water infiltration was caused by their lack of knowledge.

[80] Plaintiffs' Counsel did not argue that it was impossible for Plaintiffs to have denounced in writing to the Contractor and Manager the water infiltration within the 6 months following such discovery. However, even if such an argument would have been submitted, the Tribunal cannot extend the delays

[42] *Syndicat de copropriété Les Condos du Cerf (2147) c. Habitations de la Bourgade, 2006 CanLII 60490 (QC OAGBRN), 2006-10-20*
[43] *Castonguay et al et La Garantie des bâtiments résidentiels neufs de l'APCHQ et Construction Serge Rheault Inc., 2011-12-009 et 152907-1 (11-243ES), 2011-10-06, par. 31, page 8*
[44] *Danesh v. Solico Inc. and La garantie des bâtiments résidentiels neufs de l'APCHQ Inc., SORECONI # 070821001, 2008-05-05*
[45] *Parent c. Construction Yvon Loiselle Inc. et La garantie des bâtiments résidentiels neufs de l'APCHQ Inc., 2012-07-23*

beyond the 6 months prescribed by the Legislator in Article 10(4) of the Regulation.[46]

[81] The Tribunal is sympathetic with Plaintiffs' situation and the fact that they may not have fully appreciated or understood their obligation to denounce the water infiltration within the time frame prescribed by the Regulation.

[82] Nevertheless, the Tribunal cannot ignore the evidence adduced before it. There is no question that the Plaintiffs benefited as subsequent owners of the Property from the coverage provided by the Guarantee Plan. Article 3 of the Contract (Exhibit A-1) stipulates that the "*guarantee inures to the benefit of any subsequent owner for the unexpired portion of its term.*" Plaintiffs were the subsequent owners of the Property and were therefore covered by the Guarantee Plan, provided that they respected the terms and conditions of the Guarantee Plan and Regulation.

[83] Furthermore, the Contract, Exhibit A-1, reproduced the language of article 10 of the Regulation. Therefore, the Plaintiffs knew or ought to have known that it was imperative for them to denounce in writing the water infiltration to the Contractor and Manager within a time frame that did not exceed 6 months following the discovery of the water infiltration.

[84] The Tribunal in its deliberation is required to first decide the issues that are presented before it in accordance with the rules of law. Article 116 of the Regulation also allows the Tribunal to apply the principle of fairness or equity when circumstances warrant it.[47]

[85] Before the Tribunal addresses the manner in which equity can be applied in accordance with article 116 of the Regulation, the notion of equity itself must be understood. In the case of *La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc. c. Dupuis*, 2007 QCCS 4701 (CanLII), the Honourable Justice Michèle Monast of the Superior Court deal with the notion of equity and its application within the framework 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.*

[46] *Danesh v. Solico Inc. and La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc., SORECONI # 070821001, 2008-05-05*

[47] *c. B-1.1, r. 8, "a.116. An arbitrator shall decide in accordance with the rules of law; he shall also appeal to fairness where circumstances warrant.*"

[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]

[86] What were the Legislator's intentions in legislating article 116 of the Regulation? Clearly, a Tribunal must decide in accordance with the rules of law. Those rules of law include the application of provisions (contained in the Regulation and the Contract[48]) that may result in the denial of a party's rights such as is the case at bar.

[87] It is an established fact that Plaintiffs' written notice to the Contractor and Manager was given 18 months following the discovery of the water infiltration. The written notice of 1 October 2011[49] exceeded by 12 months, the 6 months' notice that was required to have been given following the discovery of the water infiltration.

[88] The delays prescribed by article 10(4) of the Regulation and reproduced in the Contract (Exhibit A-1) form part of the rules of law referred to in article 116 that a Tribunal must first adhere to. How can the Tribunal in the present instance apply the rule of law, pursuant to which Plaintiffs are foreclosed from coverage under the Guarantee Plan and at the same time apply its discretion and be equitable or fair to Plaintiffs, by allowing their claim?

[48] Exhibit A-1
[49] Exhibit A-5

[89] Clearly the strict application of article 10(4) of the Regulation on one hand is inconsistent with allowing Plaintiffs' claim under the guise of equity or fairness on the other hand. This is not to say that a tribunal can never apply equity or fairness in deciding claims presented for adjudication. On the contrary, article 116 allows a tribunal to exercise its equitable discretion provided that the circumstances warrant it. However, the Tribunal cannot interpret article 116 under the circumstances of the case at bar, to allow it to use principles of equity or fairness and ignore the strict application of article 10(4) and thereby *de facto* extend the delays to give written notice from 6 to 18 months.

[90] The Tribunal does not have the discretion to extend the delays set out in article 10(4) of the Regulation, as article 18 of the Regulation extinguishes by the operation of prescription Plaintiffs' rights that were not preserved and exercised within the delays. The Tribunal can only exercise its discretion when rights exist. However, rights that are extinguished by the operation of law[50], no longer exist and consequently, such rights cannot therefore be revived through the exercise of the Tribunal's equitable discretion.

[91] My learned colleague, Me Rolland-Yves Gagné was of the same view when he held that:

> "*[111] Le Tribunal d'arbitrage ne peut pas faire appel à l'équité pour faire réapparaître un droit qui n'existe plus, soit une absence de couverture du Plan de garantie déjà constatée dans la décision de l'Administrateur du 7 novembre 2008, pour laquelle il n'y a pas eu de demande d'arbitrage, il ne s'agit pas ici de suppléer au silence du Règlement ou l'interpréter de manière plus favorable à une partie, malgré toute la sympathie qu'il pourrait avoir envers les Bénéficiaires.*"[51]
>
> [Emphasis added]

[92] The application of the notion of equity by an arbitration tribunal was dealt with by my colleague Me Michel A. Jeanniot as well, in the following manner:

> "*[37] Notre collègue Masson puise aux article[s] …116 du Règlement, (ce dernier article qui prévoit entre autres: 'qu'un arbitre statue conformément aux règles de droit, et fait aussi appel à l'équité lorsque les circonstances le justifient'), son droit à recourir à 'l'équité' afin de faire échec aux exclusions prévues à l'alinéa 9 de l'article 29 du Règlement. Je suggère que cette 'équité' doit prendre source au contrat de garantie et doit faire l'objet d'une utilisation logique,*

[50] *Civil Code of Québec, LRQ, c C-1991*, "*a. 2921. Extinctive prescription is a means of extinguishing a right which has not been used or of pleading the non-admissibility of an action*."
[51] *Escobedo et al c. Habitations Beaux Lieux inc. et Garantie des bâtiments résidentiels Neufs de l'APCHQ Inc., SORECONI 122012001, 2011-11-11*

> *raisonnable et judicieuse, et ne peut être utile à habiliter un décideur à contredire un texte qui me semble limpide.*"[52]
>
> [Emphasis added]

[93] As previously stated, Plaintiffs' Counsel argued that Plaintiffs did not know that they were required to give written notice within a time frame that could not exceed 6 months following the discovery of the water infiltration.

[94] This certainly is not the first time that such an argument was advanced before a tribunal or court. Me Johanne Despatis had the following to say regarding such an argument:

> "*[27] Au moment de présenter leur plaidoirie, les bénéficiaires ont fait valoir, d'une part, ne pas avoir été familiers avec le délai qu'on leur oppose et, d'autre part, avoir fait confiance à l'entrepreneur.*
>
> *[28] Il est vrai que l'audience m'a permis de constater que le point 3 concerne un problème qui, s'il avait été dénoncé à temps, aurait pu être corrigé en conformité du Plan. Force est toutefois de constater, après analyse du Plan, qui est clair et impératif au sujet de ces questions, et à la lumière de toute la jurisprudence pertinente à la sanction de ce délai de six mois, qu'il s'agit d'un délai impératif qu'il n'est tout simplement pas possible d'ignorer ni de contourner en invoquant l'équité.*"[53]
>
> [Emphasis added]

[95] In the case at bar, the rule of law requiring Plaintiffs' to have given their written notice within a delay that did not exceed 6 months following the discovery of the water infiltration and their failure to do so, cannot be superseded by the application of principles of equity or fairness that would therefore result in the Tribunal allowing Plaintiffs claim.

[96] Faced with a delay of forfeiture that requires strict adherence, the Tribunal cannot exercise its discretion in equity or fairness to allow Plaintiffs to seek coverage under the Guarantee Plan, when they failed to respect the strict conditions of denunciation set out in article 10(4) of the Regulation and the Contract. In October 2011, Plaintiffs no longer had any rights of coverage under the Guarantee Plan, since such rights were extinguished by prescription.[54]

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[52] *Syndicat Des Copropriétaires Les Villas Du Golf, Phase II, et al, et Les Maisons Zibeline, et La Garantie Qualité Habitation CCAC- S09-180801-NP & S09-100902-NP, 2010-03-15*
[53] *Castonguay et al et La Garantie des bâtiments résidentiels neufs de l'APCHQ et Construction Serge Rheault Inc., 2011-12-009 et 152907-1 (11-243ES), 2011-10-06*
[54] *a. 18 of the Regulation and a. 2921 C.C.Q.*

[97] To allow Plaintiffs' claim would in itself constitute an abuse of the principles of equity or fairness, in that Plaintiffs, notwithstanding their failure to respect their obligations and interrupt prescription by giving written notice within the delays of article 10(4) of the Regulation, would continue to indirectly conserve their rights, notwithstanding that they no longer had any rights at the time that they gave written notice, their rights having been extinguished by October 2011.

vii. ***does the mould problem created by the water infiltration constitutes an independent claim or is it of a nature that is "accessory" to the damage caused by the water infiltration in which case, is late notice fatal to the claim?***

[98] Plaintiffs admitted that the water infiltration occurred during the month of May 2010. It is inconceivable that Plaintiffs did not realize that water infiltration into the basement would damage the walls and cause mould to grow if they did not take steps to correct the problem.

[99] Can the Tribunal treat the mould problem independently from the water infiltration for the purposes of its denunciation to the Contractor and Manager?

[100] There is no doubt that had Plaintiffs' denounced the water infiltration within the delays prescribed by article 10(4) of the Regulation and the Contract, this problem would have been remedied by the corrective measures that would have had to be undertaken by the Contractor, failing which Plaintiffs would have benefited from the coverage provided by the Guarantee Plan.

[101] In view of the circumstances, the Tribunal is of the view that the Plaintiffs ought to have envisaged that a mould problem would develop if the walls were not replaced; therefore, Plaintiffs ought to have denounced the water infiltration within the 6 month delay, that would have triggered the replacement of the walls, which under the circumstances would have constituted the denunciation of a latent defect within the meaning of article 10(4) of the Regulation and the Contract.

[102] In the case of *Parent c. Construction Yvon Loiselle Inc. et La garantie des bâtiments résidentiels neufs de l'APCHQ Inc., 2012-07-23,* Arbitrator Karine Poulin was called upon to decide whether a general denunciation of a problem was sufficient as opposed to having a beneficiary denounce each and every problem that was discovered. She expressed the following view:

> "*[45] La jurisprudence est constante a l'effet que c'est la connaissance de l'existence d'un problème qui déclenche l'obligation de dénonciation. Prétendre que la Bénéficiaire devait connaître la nature du vice, i.e. procéder à toutes les analyses et expertises requises pour confirmer la nature du vice affectant sa propriété avant*

> *de le dénoncer a l'Entrepreneur avec copie à l'Administrateur serait lui imposer un trop lourd fardeau.*
>
> *…*
>
> *[47] Par conséquent, j'estime que ce que devait dénoncer la Bénéficiaire a l'Entrepreneur avec copie a l'Administrateur c'est l'existence d'un problème, quel qu'il soit.*"
>
> [Emphasis added]

[103] The Tribunal agrees with the decision rendered by Arbitrator Karine Poulin and as such, Plaintiffs did not have to wait for the mould problem to develop prior to denouncing the damages that they had already suffered following the infiltration of water during the month of May 2010. Had they denounced the water infiltration within the prescribed delays, the Contractor could not have argued that Plaintiffs were under the obligation to subsequently denounce the mould problem upon its discovery. The denunciation of the water infiltration within the delays would have conserved Plaintiffs' rights of coverage under the Guarantee Plan in relation to the mould problem.

[104] Counsel for the Manager argued that the mould problem was merely an "*accessory*" and a direct consequence of the damages caused by the water infiltration that triggered the obligation to denounce the matter to the Contractor and Manager. As such, the delays to denounce commenced from the discovery of the water infiltration in May 2010 and not when Plaintiffs discovered the mould in August 2011.

[105] Two cases were cited in support of the argument that an "*accessory damage*" follows the outcome of the "*principal cause*" of damages suffered by beneficiaries under a guarantee plan.

[106] In the case of *Giroux et al c. La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc., et Les Habitations M.G./9067-0142 Québec Inc., CCAC S05-1202-NP, 2006-03-20,* Arbitrator René Blanchet dealing with such an argument held as follows:

> *"Le perron avant, fait de béton, est surplombé d'une toiture. Une malfaçon ayant fait l'objet d'un autre point, qui fut corrigé et réglé depuis, fut la cause d'une infiltration d'eau à la toiture. Cette eau s'est ensuite infiltré au travers du soffite pour tomber sur le balcon en deux endroits, y laissant deux taches jaunâtres.*
>
> *Les bénéficiaires demandent l'effacement de ces deux taches."*
>
> "*En outre, ce point est accessoire à la malfaçon qui en est la cause et, doit donc être déclaré réglé puisque l'accessoire doit suivre le principal.*"
>
> [Emphasis added]

[107] In the case of *Syndicat de copropriété du 2201 au 2221 Harriet-Quimby, c. Groupe Maltais (97) Inc. et La garantie des bâtiments résidentiels neufs de L'APCHQ, SORECONI # 060224001 A et B 2006-06-06,* Me Michel A. Jeanniot expressed a similar opinion:

> *"[52] À défaut d'éléments à l'effet contraire, il appert que ce son provient d'une dilatation des tuyaux dû à leur utilisation.*
>
> *[53] La dilatation est une chose normale, l'accessoire devant suivre le principal, tout bruit relatif à la dilatation est, sauf exception, normal."*
>
> [Emphasis added]

[108] Ms. Delage testified that she observed the presence of water during the inspection conducted in March 2012. There is no reason to believe that without any corrective measures, the water infiltration would not occur in the future. There was no evidence adduced by Plaintiffs to suggest that they are willing to take steps or took steps to correct the deficiencies in the foundation that allow water to infiltrate into the basement of the Property.

[109] Accordingly, the Tribunal cannot order the Contractor to repair the moulded walls, while the latent defect that is the cause for the water infiltration remains uncorrected. The result will be that the Contractor and/or the Manager will have to constantly repair the walls upon the reappearance of the mould.

viii. ***were the deficiencies relating to Points 5, 6, 7 and 8 latent defects that existed at the time that the Property was accepted by the First Beneficiary and subsequently by Plaintiffs and were observable to a reasonably diligent buyer?***

[110] The evidence pertaining to the deficiencies claimed by Plaintiffs relating to Points 5, 6, 7 and 8 is clear. The Report (Exhibit A-12) establishes that the Plaintiffs were made aware of the various deficiencies as of May 2009. Their own inspector characterized the deficiencies as being "*visible major defects*".

[111] First, the Tribunal agrees with the Manager's finding that the deficiencies set out in Points 5, 6, 7 and 8 were readily "*observable*" by the First Beneficiary who accepted the Property in the same condition in so far as the "*apparent visible defects*" existed and were subsequently accepted by Plaintiffs as well.

[112] Second, Plaintiffs themselves obtained an independent Report (Exhibit A-12) in May 2009[55] that characterized the "*apparent visible defects*" as being "*visible major defects*". Without having to decide whether the "*visible major defects*" did or did not constitute latent defects or whether they were of such gravity that placed the building's integrity into question, the fact is that Plaintiffs failed to denounce the "*visible major defects*" within a delay that did

[55] Exhibit A-12

not exceed 6 months following their discovery that took place in May 2009 upon Plaintiffs being placed in possession of the Report.

[113] My colleague Me Roland-Yves Gagné held that "*la couverture du Plan de garantie pour vices cachés, sous l'article 10 alinéa (4) du Règlement, ne couvre pas les vices qui sont à la connaissance du sous-acquéreur au moment de l'achat par ce sous-acquéreur*."[56]

[114] The Tribunal subscribes to the opinion of Me Roland-Yves Gagné. Since the deficiencies relating to Points 5, 6, 7 and 8 were readily "*observable*", and Plaintiffs knew of their existence, such deficiencies are not therefore latent defects covered by the Guarantee Plan.

CONCLUSIONS

[115] In view of the foregoing, the Tribunal is of the view that the denunciation made by the Plaintiffs to the Contractor and Manager during the month of October 2011 of the problems which are the subject of their demand for arbitration relating to Points 1 and 2 were respectively made beyond the 6 month delay prescribed by article 10 (4) of the Regulation and this delay is a delay of forfeiture. Accordingly, this Tribunal does not have the discretion to extend the delays prescribed by article 10(4) of the Regulation with the result that Plaintiffs are foreclosed from exercising their rights for Points 1 and 2 under the Guarantee Plan.

[116] Having regard to Points 5, 6, 7 and 8, the Tribunal is of the view that these deficiencies were readily "*observable for a diligent buyer*" and therefore, such deficiencies are not covered by the Guarantee Plan.

[117] The Tribunal wishes to underline the fact that the Arbitration Award that is being rendered is solely in application of the Regulation and does not purport in any manner to provide a decision under any other applicable legislation which may find application to the facts of this case. This decision is therefore without prejudice to the rights of the Plaintiffs to bring any action before the civil courts having jurisdiction, subject to the applicable rules of law.

[118] In accordance with article 123 of the Regulation, and as the Plaintiffs have failed to obtain a favorable decision on any of the elements of their claim, the Tribunal must determine the division of the fees to be charged between the Manager and the Plaintiffs.

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[56] *Tiksrail et un autre, c. Bâti-concept plus inc., et La Garantie des bâtiments résidentiels neufs de l'APCHQ INC*., CCAC S11-042101-NP, 2011-09-13

[119] Consequently, the cost and fees of this arbitration, as well under law as under equity, in accordance with articles 116 and 123 of the Regulation, shall be apportioned as to $50.00 to the Plaintiffs[57] and the remainder to the Manager.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

[120] **DISMISSES** the arbitration demand and claims formulated thereunder by the Beneficiaries/Plaintiffs;

[121] **ORDERS** in accordance with article 123 of the *Regulation* that the costs of the present arbitration be borne as for $50.00 by the Beneficiaries/Plaintiffs and for the remainder by the Manager.

DATE: 22 October 2012

(signed) Tibor Holländer
Me Tibor Holländer
Arbitrator

[57] "*c. B-1.1, r.8*; *a. 123. … 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.*" Accordingly the Tribunal is exercising its discretion in condemning Plaintiff to pay the costs of arbitration in the amount of $50.00.