ARBITRATION BY VIRTUE OF THE REGULATION RESPECTING THE GUARANTEE PLAN FOR NEW RESIDENTIAL BUILDINGS
(Decree 841-98 dated June 17, 1998)
(Building Act, R.S.Q., c. B-1.1)

SOCIÉTÉ POUR LA RÉSOLUTION DE CONFLITS INC. (SORECONI)
A body duly authorized to conduct arbitrations by the Régie du Bâtiment

AMONG: **Suzanne Pouliot**

(hereinafter the "Beneficiary")

AND: **Habitations Raymond Allard Inc.**

(hereinafter the "Contractor")

AND: **La Garantie Habitation du Québec inc.**

(hereinafter the "Manager")

SORECONI File Number: 153004001

ARBITRATION AWARD

Arbitrator:	M^{e} Albert Zoltowski
For the Beneficiary:	M^{e} David Durand
For the Contractor:	Ms. Sophie Campeau
For the Manager:	M^{e} François-Olivier Godin
Award rendered on:	May 27, 2016

Complete identification of the parties

Arbitrator:	*Me Albert Zoltowski* *1010 de la Gauchetière Street West* *Suite 950* *Montreal, Quebec H3B 2N2*
Beneficiary:	*Ms. Suzanne Pouliot* *559 Forest Street, Apt. 5* *Pincourt, Quebec J7V 0H7*
Contractor:	*Habitations Raymond Allard Inc.* *6 St-Michel Street* *Vaudreuil-Dorion, Quebec J7V 1E7* *Attention : Mr. Raymond Allard*
Manager:	*La Garantie Habitation du Québec inc.* *9200 Metropolitan Blvd. East* *Montreal (Anjou), Quebec H1K 4L2* *Attention: M^e François-Olivier Godin*

CHRONOLOGY OF EVENTS :

March 31, 2015: Decision rendered by the Manager's conciliator, Mr. Michel Labelle, T.P.;

April 30, 2015: Written request for arbitration filed by the Beneficiary with SORECONI;

June 2, 2015: Letter from SORECONI to the parties notifying them of the appointment of the Arbitrator;

August 24, 2015: Receipt of Manager's exhibit binder by the Arbitrator;

August 26, 2015: Notice of a pre-hearing conference from the Arbitrator to the parties;

September 4, 2015: Pre-hearing conference;

September 15, 2015: Notice of appearance from Me David Durand;

January 29, 2016: Hearing.

ARBITRATION AWARD

Introduction:

1. This decision is drafted in English in order to accommodate the Beneficiary. Though bilingual, her correspondence in this file is in English, she testified in this language at the hearing and indicated that her understanding of English is much better than that of French.

2. This case concerns two (2) claims filed by the Beneficiary with the Manager. Both claims refer to a defective laminate floating flooring in the Beneficiary's condo, namely apartment 5 located at 559 Forest Street in Pincourt, Province of Quebec.

3. The Beneficiary addressed her written notice concerning both claims to the Manager on November 17, 2014.

4. The Manager's Conciliator, Mr. Michel Labelle, after visiting the apartment, rendered a decision on March 31, 2015.

5. The Beneficiary's first claim is described by Mr. Labelle in his decision as follows:

> *"1. Revêtement de plancher laminé flottant: espacements aux embouts" (Laminate floating flooring: spacings at endings* (as translated by the Arbitrator)

6. Under this first claim, Mr. Labelle identified some ten (10) spots with unusual gaps between the endings of adjoining planks when placed ending to ending. He also recorded the absence of any expansion joints in the flooring between the hallway and other rooms.

7. He rejected this claim on two (2) grounds: first, on the ground that the written notice addressed to the Manager was dated some fifteen (15) months after the discovery of the problem and therefore, exceeded the maximum six (6) month delay provided under the *Regulation Respecting the Guarantee Plan for New Residential Buildings*[1] (hereinafter called the "*Regulation*"). The second ground was that the problem did not qualify as a latent defect.

8. In his decision, Mr. Labelle described the second claim as follows:

> *"2. Espace salon de coiffure: plancher" (Hairstyling studio space: flooring)* (as translated by the Arbitrator)

9. During his visit, Mr. Labelle noticed that some planks at the entrance from the hallway to the studio were moving (lifting/bowing) when a person stepped on them. As a possible cause, he identified a depression (or a hollow) in the cement slab under the flooring. He rejected this second claim on the same grounds as the first one: a

fifteen (15) month delay between the date of the discovery and the date of the written notice to the Manager, which exceeded the maximum delay of six (6) months under the *Regulation* and the fact that this second alleged defect did not meet the criteria of a latent defect.

10. The Beneficiary, unsatisfied with this decision, submitted it to arbitration.

EVIDENCE

11. The evidence presented to the Arbitrator (hereinafter the "Tribunal" or the "Arbitration Tribunal") shows the following:

12. The Beneficiary became aware of problems affecting the floating flooring in her apartment in August 2013, namely some four (4) months after the date of her acceptance of her apartment (April 2, 2013).

13. At that time, she contacted the Contractor's representative, Ms. Sophie Campeau, who recommended to her that she should speak to Stéphane at Plancher IdéeCore. She did so.

14. Stéphane assured her that it was normal for new flooring to swell and shift in the humid summer months and recommended that she should contact the Contractor before the expiry of the one-year garantee from the date of acceptance of her apartment.

15. On March 17, 2014, the Beneficiary contacted Ms. Campeau and sent her a written list of problems affecting her apartment, including the two problems with the flooring. She got no response.

16. At the hearing, the Beneficiary testified that in March 2014, at the time of the notice sent to Ms. Campeau, there were many gaps between the endings of the planks up and down the hallway in her apartment and two (2) or three (3) planks at the entrance from the hallway to her hair styling studio moved when a person would step on them.

17. Since Ms. Campeau did not reply to the note of March 2014 from the Beneficiary, she sent an email to Ms. Campeau in April 2014.

18. The Contractor attempted to do some repairs to eliminate the first problem (namely, the presence of the gaps) on two (2) occasions: in May 2014 and October 2014. The repairs in October 2014 consisted of the repairman from Plancher IdéeCore kicking the planks together with rubber-soled boots and applying some glue.

19. No repairs were attempted to correct the instability in the planks at the entrance to the studio. The repairman from IdéeCore suggested two (2) possible repair methods of this instability in the planks: a replacement of the whole flooring in the studio or the installation of a transitional joint at the entrance.

20. The Contractor, in order to repair the unstable flooring at the entrance to the studio, was willing to consider only the installation of a transitional joint, though was

unwilling to provide the Beneficiary with a guarantee that this corrective measure will solve the problem. For this reason, the Beneficiary refused this corrective method.

21. At the hearing, the 2 witnesses who testified on behalf of the Contractor, namely Mr.Peter Byrne, who was qualified as an expert witness, as well as Mr. Stéphane Sévigny of Plancher IdéeCore who was one of the installers of the flooring in the Beneficiary's apartment, as well as the Conciliator, Mr. Labelle, agreed that both problems affecting the Beneficiary`s flooring can be characterized as defects.

22. They all agreed that the absence of transitional joints in the flooring between the rooms constituted a defect in the installation of the flooring.

23. The Contractor's expert witness, Mr. Byrne, specifically referred to the manufacturer's installation guide (Exhibit E-1, page 21) which states that *"Expansion joints (at least 2 cm. in width) must be fitted between adjoining rooms and also in rooms measuring more than 10 meters in the direction of the panel length and more than 8 meters in the direction of the panel width."*.

24. According to Mr. Byrne's report, the distance (in length) between the furthest point in the living room to that in room number 1 is 13.4 meters. The width between the living room and the dining room is 8.2 meters. If one adds the width of the adjacent room (office), the total width is 10.5 meters.

25. In regard to the cause of the second problem, namely the unstable planks at the entrance to the studio, the installer of the flooring, Mr. Sévigny, as well as the Conciliator, strongly suspected that the real cause of this problem was a depression in the cement slab under the moving planks.

26. At the hearing, the Conciliator, Mr. Labelle, admitted that both problems could be considered as "unapparent poor workmanship".

27. Some conflicting evidence was presented to the Tribunal concerning the spacing around the perimeter of the floor and the surrounding walls made of drywall.

28. The purpose of this spacing is to allow the floating floor to contract and expand in accordance with the prevailing humidity level in the apartment.

29. According to the manufacturer's installation guide annexed to Mr. Byrne's report *"a space of 10-15 millimetres should always be left between the panels and walls or any other fixed elements (such as heating pipes or doorframes)"* (Exhibit E-1, page 21).

30. The installer of the flooring, Mr. Sévigny, testified that he left ¼ to 3/8 of an inch of open space between the flooring and the baseboard at the time of the installation. This statement is difficult to reconcile with the 2 photographs that appear in Mr. Byrne's report (Exhibit E-1, page 18). On these photographs, a section of the baseboard has been removed and the plank endings visibly penetrate under the bottom section of the drywall. This penetration of the flooring under the drywall was also confirmed by Mr. Tousignant at the hearing.

31. In his report, Mr. Byrne also states that the plank endings do indeed penetrate under the drywall but *"ne s'accotent pas à l'ossature du mûr de bois"* (Exhibit E-1, page 2).

32. Mr. Tousignant also testified that the attempted repair by the repairman from IdéeCore in October 2014 that consisted of kicking the planks together with rubber-soled boots, destroyed the clipping mechanisms that hold the plank endings together.

33. At the hearing, Mr. Tousignant filed a written evaluation of the repair work that would solve the 2 problems consisting of the removal of the whole flooring and its replacement by a new similar floating flooring (Exhibit B-2). According to this evaluation, the total cost would be $5,005.00, excluding GST and QST or $5,754.50 with GST and QST.

34. He also testified, however, that a possible repair of the flooring could be made by replacing individual planks, provided that the exact kind and colour of the replacement planks could match those of the existing flooring.

35. Both of the Contractor's witnesses, namely Mr. Sévigny and Mr. Byrne, testified that the existing flooring could be repaired by the installation of transition joints.

QUESTION

36. Since the Conciliator, Mr. Labelle, admitted during his testimony that both problems affecting the flooring can be qualified as apparent poor workmanship, for purposes of this case, the truly relevant question to be determined is whether either or both of these problems could also be qualified as latent defects.

37. Its relevance is based on the provisions of the *Regulation* which state that, for purposes of coverage by the guarantee plan, the date of the discovery of apparent poor workmanship is not necessarily the same as the discovery of a latent defect that appears gradually.

ARGUMENTS OF THE PARTIES:

38. The position of the Beneficiary is that both problems affecting her flooring constitute latent defects.

39. She points to the high cost of replacing the flooring ($5,005.00 according to Mr. Tousignant's evaluation), which is a substantial sum to her.

40. Moreover, she argues the number of gaps in the flooring reduces its normal use and usefulness.

41. She also submits that the clicking mechanisms that hold the planks together cannot perform their usual function because of the lack of spacing between the floor and the drywall around the perimeter of the apartment.

42. According to the Manager, the defects in the flooring can be repaired at a relatively low cost and do not require the replacement of all the floating flooring . These repairs are not only relatively inexpensive but they would cause little inconvenience to the Beneficiary.

43. Therefore, goes the Manager's argument, the evidence shows that these defects do not have the degree of seriousness that is required for a problem to be characterized as a latent defect.

44. The Contractor does not submit any arguments.

ANALYSIS AND AWARD

45. The relevant provision in the *Regulation* that provides a guarantee of the repair of latent defects, is found in paragraph 27(4) which states the following:

> *"27. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations after acceptance of the private portion or the common portions, shall cover*:
>
> > *(4) repairs to latent defects within the meaning of Article 1726 or 2103 of the Civil Code of Quebec which are discovered within 3 years following acceptance, 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 in the meaning of article 1739 of the Civil Code of Quebec;"*

46. A reading of paragraph 27(4) shows that it refers to a description of a latent defect that is found in article 1726 of the *Civil Code of Quebec*. For our purpose, the relevant portion of this article reads as follows:

> *"Art. 1726. The seller is bound to warrant the buyer that the property and its accessories are, at the time of the sale, free of latent defects which render it unfit for the use for which it was intended or which so diminish its usefulness that the buyer would not have bought it or paid so high a price if he had been aware of them."*

47. In a well-known legal textbook entitled *"La responsabilité civile"*[2], its authors, Jean-Louis Baudouin and Patrice Deslauriers summarize the three (3) main elements that a plaintiff, who alleges the existence of a latent defect in the property that he or she has purchased, must prove:

> *"Comme la jurisprudence et la doctrine avaient établi depuis longtemps, l'acheteur doit, pour invoquer la garantie, démontrer que le vice est grave, caché et antérieur à la vente."*[3]

48. In the case before this Arbitration Tribunal, of these three (3) elements only that of "gravité" or seriousness is in issue.

49. According to the above-noted authors, minor defects do not meet the requirement of seriousness:

> *"Un vice mineur ne peut suffire à entraîner la responsabilité du vendeur. Le vice doit être de nature à rendre le bien impropre à l'usage auquel on le destine, ou à diminuer tellement son utilité que l'acheteur ne l'aurait pas acheté, ou n'aurait pas donné un si haut prix s'il l'avait connu."*[4]

50. Moreover, as pointed out by Baudouin and Deslauriers, the "gravité" or seriousness of a latent defect essentially refers to the reduction of use or in the usefulness of the property so affected by the defect.[5]

51. What guiding criteria do courts consider in deciding whether a defect is a serious one or not? Once again, the two authors, Jean-Louis Beaudouin and Patrice Deslauriers summarize these criteria as follow:

> *"Différents critères guident les tribunaux dans l'appréciation de la gravité du vice, notamment le coût ou l'importance des travaux de réparation, les inconvénients subis par l'acheteur ou la diminution de la valeur du bien."*[6]

52. The Tribunal notes that these criteria, namely the cost of the repairs and the inconvenience suffered by a buyer of the property (such as the Beneficiary) are also quoted by Honorable Doris Thibault, J.C.Q. in the *Laprise-Martel* judgment submitted by the Beneficiary.[7]

53. Judge Thibault, in the *Laprise-Martel* judgment, states the following on this subject:

> *"La gravité du vice s'évalue en fonction du déficit d'usage, c'est-à-dire, des limites d'utilisation qu'il impose aux demandeurs. Toute défectuosité, aussi grave soit-elle, ne peut être qualifiée de vice caché au sens de la garantie de qualité prévue au Code civil du Québec."*[8]

54. The Beneficiary pleads that a repair consisting of replacing the whole flooring in her apartment would cost $5,005.00 (before GST and QST), according to Mr. Tousignant's evaluation (Exhibit B-2). She also pleads that such an amount represents a substantial sum to her.

55. Although the Tribunal sympathizes with the Beneficiary's position concerning the cost of this type of repair, the evidence presented not only by Mr. Tousignant, who testified on behalf of the Beneficiary, but also by the witnesses for the Manager and the Contractor testified that the replacing of the whole flooring is not the only possible and adequate method of repair.

56. They all testified that a repair consisting of replacing only a certain portion of the flooring would constitute a sufficient repair of both defects.

57. Mr. Tousignant, during his cross-examination, admitted that such a repair could consist of replacing a limited number of planks, provided they could match the existing ones in kind and color.

58. The Contractor's and the Manager's witnesses testified that such repairs would consist in installing transitional joints.

59. Though there is no consensus among all the witnesses as to the exact nature of these repairs, the evidence clearly shows that replacing only certain portions of the flooring would constitute a sufficient and appropriate repair to solve both problems affecting the flooring. According to the Tribunal, this type of repair would cost less than the $5005, as estimated by Mr. Tousignant, to replace all the flooring.

60. Without any additional evidence before the Tribunal that the gaps and the moving planks at the entrance to the studio, substantially diminish the use or usefulness of the flooring to the Beneficiary, the Tribunal is not in a position to conclude that these defects meet the criterion of seriousness required of latent defects.

61. The last argument of the Beneficiary is that the attempts at repairing the planks by the representative of IdéeCore, in October 2014, destroyed some of the locking mechanisms of certain planks.

62. According to the evidence, these unfortunate and ineffective methods of repairing the flooring took place in October 2014, namely some 18 months after the acceptance of the apartment on April 3, 2013. Among the elements required to prove a latent defect is the following: the defect must exist on the date of the purchase or of the acceptance of the apartment by the Beneficiary. Based on the evidence, the defect in the locking mechanisms could have come into existence only after October 2014 and therefore after the date of the acceptance of the apartment by the Beneficiary. For this reason, the defective locking mechanisms cannot be considered latent defects.

Six (6) month delay between Discovery and Notice to the Manager:

63. In view of the Tribunal's conclusion that the 2 problems cannot be characterized as latent defects but only as poor workmanship that was unapparent at the time of the acceptance by the Beneficiary of her apartment, their coverage under the guarantee plan is governed by paragraph 27(3) of the *Regulation* which states the following:

> *"27.The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations after acceptance of the private portion or the common portions, shall cover:*
>
> *(3) repairs to non-apparent poor workmanship existing at the time of acceptance and discovered within 1 year*

> *after acceptance as provided for in articles 2113 and 2120 of the Civil Code of Quebec, 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;"*

64. The evidence that was made available to the Manager's Conciliator and also presented to the Tribunal is that the Beneficiary was made aware of the problems affecting her flooring already in August 2013.

65. This awareness on the part of the Beneficiary marks the date of her discovery of these problems for the purpose of paragraph 27(3) even though in August 2013, she might not have suspected "the seriousness and extent" of these problems. In the case of gradual latent defects, the date of discovery is when a Beneficiary can suspect the seriousness and extent of the defect.

66. Since the extent of the period between the date of that discovery (August 2013) and the date of the written notice from the Beneficiary to the Manager is of some 15 months, it vastly exceeds the maximum 6 month delay under paragraph 27(3) of the *Regulation.*

67. As stated by many arbitration awards in the past, this 6 month delay under the *Regulation* "*est de rigueur et de déchéance et ne peut être continue ou prorogé par le Tribunal nonobstant toute cause, incluant tels des indications de discussion avec l'Entrepreneur ou des tiers relativement à un problème, s'il n'y a pas dénonciation à l'Administrateur tel que requis. »*[9]

ADDITIONAL CONCLUSIONS:

68. The evidence before the Tribunal shows that the Beneficiary was diligent in disclosing to the Contractor the problems of unapparent poor workmanship affecting her flooring.

69. Although her claims regarding these two problems are not covered by the guarantee plan under the *Regulation* for the reasons stated above, she might wish to consider taking a recourse against the Contractor (though not the Manager) under the provisions of the *Civil Code of Quebec,* before a Civil Court.

70. Article 120 of the *Regulation* provides:

> *"An arbitration award, once it is made, is binding on the interested parties and on the manager.*
>
> *An arbitration award is final and not subject to appeal."*

71. Furthermore, Article 116 of the *Regulation* states that an arbitrator shall decide in accordance with the rules of law; he shall also appeal to fairness where circumstances warrant.

72. Although the Beneficiary failed to obtain a favorable decision from the Tribunal on any of the elements of her claim, it is equitable, in view of the circumstances of this case that the arbitration fees charged to the Beneficiary be in the amount of $100 and that the balance should be borne by the Manager.

FOR ALL THESE REASONS, THE ARBITRATION TRIBUNAL:

DISMISSES the Beneficiary's request for arbitration based on the Manager's decision dated March 31, 2015;

DECLARES that the arbitration costs should be paid as follows:

- ONE HUNDRED DOLLARS ($100.00) by the Beneficiary;
- and the balance by the Manager.

Montreal, this 27th day of May, 2016.

Me ALBERT ZOLTOWSKI
Arbitrator/SORECONI

[1] 1998 G.O.Q. 2, 2510.
[2] *La responsabilité civile*, 7e édition, Jean-Louis Baudouin and Patrice Deslauriers, Volume 2, Éditions Yvon Blais 2007.
[3] See endnote 2, page 335, 2 -379.
[4] See endnote 2, page 335, 2 -380.
[5] See endnote 2, page 334, 2 -378.
[6] See endnote 2, page 337, 2 -380.
[7] Louis, Philippe Laprise – Martel et al. c. François Bouchard et Suzanne Vallée, Cour du Québec, 2015 QCCQ 7716, paragraph 22.
[8] Louis, Philippe Laprise – Martel et al. c. François Bouchard et Suzanne Vallée, Cour du Québec, 2015 QCCQ 7716, paragraph 23.
[9] Anastasios Tsonis c. Quorum Habitations inc et la Garantie des Bâtiments résidentiels neufs de l'APCHQ inc., Me Jean-Philippe Ewart, arbitre, 3 août 2015, par.23, Société pour la résolution des conflits inc SORECONI no 130701001.