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
LA 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)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

File n$^{o:}$ Guarantee Plan: 07-216PM
File n$^{o:}$ SORECONI: 070821001

ESMAEILZADEH DANESH
"Beneficiary" / Appellant

v.

SOLICO INC.
"Contractor" / Defendant

and

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

ARBITRATION AWARD

Arbitrator:	Me Jean Philippe Ewart
For the Beneficiary:	Mr. Esmaeilzadeh Danesh Mr. A. Ansary
For the Contractor:	Not represented
For the Manager:	Me Patrick Marcoux (Savoie Fournier) Mr. Michel Hamel, Insp./Conciliator
Date of Hearing:	19 December 2007
Hearing location:	Palais de justice de Laval
Date of Award:	5 May 2008

IDENTIFICATION OF THE PARTIES

"**BENEFICIARY**"/ APPELLANT: ESMAEILZADEH DANESH
1614, Notre-Dame-De-Fatima
Laval (Québec)
H7G 4Y6

"**CONTRACTOR**"/DEFENDANT: SOLICO INC.
Attention: Mr. Serge Després
1, rue de Brisack
Lorraine (Québec)
J6Z 4W2

"**MANAGER**" OF THE GUARANTEE PLAN: LA GARANTIE DES BÂTIMENTS RÉSIDENTIELS NEUFS DE L'APCHQ INC.
5930 Louis - H. Lafontaine Blvd.
Anjou (Québec)
H1M 1S7

MANDATE

A request for arbitration was filed by the Beneficiary dated 21 August 2007 and the undersigned was named arbitrator by notice of change of arbitrator on 5 December 2007.

CHRONOLOGY

2003.10.07	Preliminary Contract and Guarantee Contract (A-1)
2003.11.17	Purchase Deed (A-2)
2004.08.10	Mortgage Deed (A-3)
2006.08.03	Letter from Beneficiary to Contractor, water infiltration (A-4)
2006.09.06	Letter from Beneficiary to Contractor, surface water drainage (A-5)
2007.04.26	Request to open a file (claim received by Manager on 27 April 2007) (A-6)
2007.05.17	Manager's 15 day Notice to Contractor (w/ Final Notice - unclaimed item - from Post Canada) and letter from Manager to Beneficiary (A-7)
2007.08.13	Decision by Manager (# 083124-) & copy of Advice of Receipt from Post Canada (A-8)
2007.08.21	Application for arbitration by the Beneficiary regarding the Manager's Decision above mentioned (A-9).
2007.08.24	Notification by SORECONI of Application for Arbitration
2007.08.27	Notification that arbitrator was appointed on 24 August 2007
2007.10.19	Notification of hearing
2007.12.05	Notification of change of arbitrator

EXHIBITS

By consent at the Hearing, 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 Beneficiary filed and referred to were numbered and labeled "B-".

VALUE OF LITIGATION

Further to discussions at the Hearing, the Court is satisfied that the value of the elements under litigation, including *inter alia* the replacement of shingles, repairs of the surfaces damaged by water inside the house, repairs to two vertical fissures in a concrete wall, and work that would be required to correct land drainage, is between $7,000 and $15,000.

FACTS AND PROCEEDINGS

[1] This is a request for arbitration from a decision of the Manager (#083124-1) dated 13 August 2007 (the "**Decision**") (exhibit A-8) rendered in furtherance of claims by the Beneficiary under the guarantee contract entered into on 7 October 2003 (exhibit A-1) (the "**Guarantee Contract**") 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. The Beneficiary expressed a preference to have the arbitration proceedings in English.

[2] The Contractor was not represented at the Hearing. The Court was advised by the Manager that the Contractor had filed for bankruptcy and was declared bankrupt.

[3] A visit by an inspector of the Manager was effected on 5 July 2007 and resulted in the Decision.

[4] There are three (3) points covered by the Decision:

Point 1. Water infiltration by the roof;
Point 2. Fissures (cracks) in concrete walls;
Point 3. Land drainage.

[5] The Decision stated that, for purposes of Points 1 and 2, as defects, hidden defects and major defects must be denounced in writing to the Contractor and the Manager within a reasonable delay, which delay cannot exceed six (6) months of their discovery or happening and that, in the circumstances, this delay may not be considered reasonable and consequently the Guarantee Plan may not intervene.

[6] In this particular case, the problems were denounced in writing to the Contractor on 3 August 2006 as it pertains to Points 1 and 2 of the Decision and on 6 September 2006 as it pertains to Point 3 of the Decision, while the Manager was first given notice in writing of each of these points on 27 April 2007.

[7] The Decision further stated that Point 3, which refers to land drainage, falls under an exclusion of guarantee under the Guarantee Plan, which provides that parking areas or storage rooms located outside the building containing the dwelling units, and any works located outside the building such as swimming pools, earthwork, sidewalks, driveways or surface water drainage systems are excluded from the Guarantee Plan and consequently the Guarantee Plan may not intervene.

PRELIMINARY MOTIONS

[8] There were no preliminary motions and jurisdiction of the Court was therefore confirmed.

PLEADINGS - BENEFICIARY

[9] The Beneficiary described briefly the damages identified under the Decision and filed, in connection with the land drainage situation (Point 3), a copy of a notice of infraction issued by the City of Laval, Department of Urbanism, dated 23 August 2007 (exhibit B-2) which specifies that the Beneficiary is in breach of section 31-B of By-Law L-2000 for, in summary, not having leveled its land in order to have surface waters discharged to the public road.

[10] As it pertains to the delay in denouncing the situations under review herein to the Manager within six months of the discovery or happening, the Beneficiary produces a letter dated 18 September 2007 from Me S. Cadieux, notary, addressed to Me Patrick Marcoux, counsel to the Manager (exhibit B-1), under which Me Cadieux indicates in summary on this particular point:

> that [*he*] had several conversations with the president of the Contractor, Mr. Serge Després, at which times the latter would confirm that he would deal with the problems raised by the Beneficiary and that the latter would pretend that he must wait until the Spring to correct the problems, which is what has caused the overrun of the delay of six months for denunciation. *Summary and translation by the Court.*

[11] The Beneficiary indicated to the Court that he had initially been introduced to Me Cadieux as he was the notary chosen by the Contractor to effect the necessary sale documentation and required registrations and had afterwards retained the services of Me Cadieux to advise him during the period of disagreement with the Contractor and that Me Cadieux had mentioned to him that he knew Mr. Després, and that the Beneficiary should wait as, in the past, Mr. Després had made good on similar promises.

[12] Mr. Ansary, a registered financial planner who assisted the Beneficiary in the acquisition of the subject property, confirmed at the Hearing, as witness for the Beneficiary, the indications given by the Beneficiary to the Court as regards the advice then received by the Beneficiary, having been present at a meeting with Me Cadieux and the Beneficiary on the subject.

PLEADINGS - MANAGER

[13] Counsel to the Manager submitted that the Beneficiary did not respect the delay for denunciation of the defects claimed.

[14] Counsel to the Manager also reaffirmed the position indicated in the Decision for purposes of Point 3 thereof and the exclusion under the Guarantee Plan for land drainage problems.

ISSUES

[15] Taking into consideration the facts of this case, and the applicable provisions of the *Regulation respecting the guarantee plan for new residential buildings*[1] (the "**Regulation**") and corresponding clauses of the Guarantee Plan, when applicable, the following issues must be considered:

[15.1] Is the necessity of a notice to be given in writing to the Contractor and the Manager as provided under various paragraphs of section 10 of the Regulation of a procedural nature or otherwise?

[15.2] What is the nature of the delay "…within a reasonable time not to exceed 6 months…" provided under various paragraphs of section 10 of the Regulation?

15.2.1. Delay of procedure or of prescription?
15.2.2. Peremptory delay?
15.2.3. If so, is such delay one of forfeiture, foreclosure?

[1] O.C. 841-98 of 17 June 1998, (R.S.Q. Ch. B-1.1, r.0.2.), Building Act (R.S.Q., c. B-1.1) .

[15.3] What are the consequences of exceeding this 6 months?

15.3.1. May the Court exercise any discretion in evaluating a "reasonable time concept"?

15.3.2. In the event of forfeiture, may the Court exercise any discretion in favour of the foreclosed party, including in circumstances where there may have been an impossibility in fact to act within the delay to be considered?

ANALYSIS

General Rule of Interpretation

[16] Before addressing the crux of this appeal, and taking into consideration that we shall use provisions of the Civil Code of Procedure[2] (sometimes "**C.C.P.**") to supplement our analysis of the provisions under study, it is appropriate to review briefly what are guiding principles in my view in cases where certain matters may be understood by some as procedural in nature and of a more substantive nature by others and where one must consider that the general rule of interpretation of the C.C.P. must be that of a liberal approach save specific exceptions.

[17] The Supreme Court of Canada has in several instances underlined the liberal approach that must be the general rule of interpretation, *inter alia* under the pen of Pigeon J., commenting on the 1965 reform of the Code of Civil Procedure:

> "In my opinion, it is important to intervene to ensure compliance with the intention of the Quebec legislator to repeal the old maxim that "form takes precedence over substance".[3]

and similarly, in *Duquet v. Town of Sainte-Agathe-des-Monts*[4], where he wrote at p. 1140:

> "In fact, the governing intention behind the whole new *Code* was the desire to bury the old adage that "form takes precedence over substance". This intention is stated expressly in art. 2…".

[18] In this regard, note must also be taken, amongst others, of the same position taken in other matters by the Supreme Court including under the pen of L'Heureux Dubé J., which focuses in part on the error of counsel

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[2] R.S.Q. c. C-25

[3] Hamel v. Brunelle and Labonté, [1977] 1 S.C.R. 147, pp.153-154.

[4] [1977] 2 S.C.R. 1132

in the exercise of the discretion conferred on the Court of Appeal by art. 523 *C.C.P.*, on an extension of the incidental appeal time limit beyond six months from the date of the judgment provided under art. 500 C.C.P.:

> "…a discretion broad enough to "make any order necessary to safeguard the rights of the parties". That is the general rule. Article 523 provides for only two exceptions…
>
> Given this, it follows that the general rule must be given a broad and liberal interpretation and the exception, on the other hand, must be strictly interpreted.
>
> …, this Court cannot endorse the formalistic attitude of the Court of Appeal. This would be contrary to a fundamental principle that is at the root of s. 50 of the *Supreme Court Act* and of the reform of civil procedure effected by the 1965 *Code*, and which has been sanctioned in numerous decisions, the most recent being *Cité de Pont Viau v. Gauthier Mfg. Ltd*. This principle is that a party must not be deprived of his rights on account of an error of counsel where it is possible to rectify the consequences of such error without injustice to the opposing party. In the circumstances, it appears to me that appellant should be allowed to take the necessary steps to obtain a decision on his conclusions for the annulment of the expropriation, on which the courts below did not rule." [5]

[19] We will provide an analysis of art. 523 C.C.P. below and its impact on a comparative basis with other articles of the Code of civil Procedure to the case at bar.

[20] This approach has also been noted by the Court of Appeal (Quebec), including by Gendreau J.C.A.[6] who made a review of several cases in the often referred case of *Têtu c. Bouchard* [7] and stated on a motion under then art. 481.11 C.C.P[8].;

> "La Cour suprême a plusieurs fois rappelé à notre Cour que, malgré la rigueur du texte de procédure, la sauvegarde des droits de la partie, même et peut-être surtout, si son avocat fut négligent, devait demeurer le souci premier d'un juge si le redressement recherché ne cause aucun préjudice à l'adversaire (Québec Communauté Urbaine c. Services de santé du Québec, [1992] 1 R.C.S. 426; St-Hilaire c. Bégin, [1981] 2 R.C.S. 79; Bowen c. Ville de Montréal, [1979] 1 R.C.S. 511; Cité de Pont Viau c. Gauthier Mfg. Ltd, [1978] 2 R.C.S. 516)." [9]

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[5] Québec (Communauté urbaine) *v.* Services de santé du Québec, [1992] 1 S.C.R. 426

[6] (in a minority opinion ~ minority for reasons that do not affect this statement)

[7] Têtu c. Bouchard, 1998 CanLII 12993 (QC C.A.) ; [1998] R.J.Q..

[8] Repealed in 2002 under this article, pertaining to filing within 180 days of an inscription.

[9] Reference is also made by Gendreau J. to other judgments, including Construction Paquette c. Entreprises Vego, [1997] 2 R.C.S. 299 of the Supreme Court of Canada.

[21] In summary of this introductionary commentary, 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.

Applicable regulatory provisions

[22] It is appropriate to review the various possible applicable provisions for this case found under section 10 of the Regulation providing coverage for buildings not held in co-ownership (and contained under clause no.4, heading Guarantee, of the Guarantee Contract)[10]:

> 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.
>
> *The underlines are ours.*

[23] It should be noted that the text applying a requirement of a written notice within a delay of six months is of identical effect for non-apparent poor workmanship, latent defects, faulty design, construction or production of the work or the unfavorable nature of the ground and consequently it is not

[10] Identical provisions (with adjustment for common portions in par. 5 thereof) may be found for buildings held in divided co-ownership under section 27 of the Regulation, and the concepts reviewed herein find corresponding application.

necessary at this juncture to classify the problems or defects claimed to determine if denunciation has been made in accordance with the delay provided for by the Regulation.

Comparative Analysis provisions

[24] The legislator has enacted various provisions under the Code of Civil Procedure which contain similar language and concepts to those under study in the Regulation. It is of importance in my view to analyse same and draw from the doctrine and jurisprudence that have reviewed same.

[25] A first set of provisions provide for applications for leave to appeal and the discretion of the Court of Appeal to grant special leave in certain circumstances:

> 494. An application for leave to appeal …must be presented by motion…
>
> The motion must be served on the adverse party and filed with the office of the court within 30 days of the date of judgment …
> ….
>
> Such time limits are peremptory and their expiry extinguishes the right of appeal."[11]
> …..

and

> "523. The Court of Appeal may, notwithstanding the expiry of the time allowed by article 494, but provided that more than six months have not elapsed since the judgment, grant special leave to appeal to a party who shows that in fact it was impossible for him to act sooner. …"[12]
>
> *The underlines are ours.*

[26] These provisions are of special interest as the arbitration provided in the Regulation is of the nature of an appeal from the decision of the Manager, and as they address several of the concepts of the case at bar, being (i) the notice in writing to the contractor and the Manager which is reflected by the service under art. 494 on the other party and the filing with the office of the court, (ii) that these provisions are peremptory and of forfeiture, and (iii) the concept of a maximum delay of no more than six months *i.e.* "more than six months have not elapsed" under art. 523.

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[11] Code of Civil Procedure, 1965 (1st sess.), c. 80, a. 494; 1969, c. 80, s. 9; 1982, c. 32, s. 35; 1983, c. 28, s. 19; 1989, c. 41, s. 1; 1992, c. 57, s. 285; 1993, c. 30, s. 6; 1995, c. 2, s. 3; 1995, c. 39, s. 3; 1999, c. 40, s. 56; 2002, c. 7, s. 91

[12] Code of Civil Procedure, 1965 (1st sess.), c. 80, a. 523; 1985, c. 29, s. 11; 1999, c. 40, s. 56; 1999, c.46, s. 12; 2002, c. 7, s. 97

[27] A second provision of interest is art. 484 C.C.P. which provides that motions in revocation in cases where a party was condemned by default to appear or to plead, if he was prevented from filing his defence in certain circumstances, or in cases where a party has no other useful recourse against a judgment, may be presented to the court and reads in part as follows:

> "484. The motion in revocation, served on all the parties in the record … must be filed within 15 days counting, according to the circumstances, from the day …
> …
> [Third paragraph]. The time limit of 15 days is peremptory; nevertheless the court may, on motion and provided that not more than six months have elapsed since judgment, relieve from the consequences of his default the party who shows that, in fact, it was impossible for him to act sooner."[13]
>
> *The underlines are ours.*

Nature of notice to contractor and Manager

[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 [14] of the Civil Code of Québec ("**C.c.Q**.")[15] 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[16] and the Courts[17] have considered the notice under art. 1739 to

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[13] Code of Civil Procedure, 1965 (1st sess.), c. 80, a. 484; 1999, c. 40, s. 56.

[14] See also the reference to art. 1739 under section 10 paragraph 4 of the Regulation.

[15] Civil Code of Québec (L.Q., 1991, c. 64)

[16] Clueless and Moore, Droit des obligations, Éditions Thémis, no. 2800 (and note 38 *in fine*) - 2803

[17] See *Voyer c Bouchard* (C.S. 1999-08.27) [1999] R.D.I. 611; and also *Fleurimont c. APCHQ inc.* (C.S. 2001.12.19) in this latter case, the facts precede the adoption of the Regulation and the then APCHQ certificate of guarantee required conciliation, but the principles on notice remain applicable *in extensio*.

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

[31] The courts have in several occasions[18] 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[19] and I am of the view that this applies to the notices to the Manager under Regulation 10.

[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 the arbitration provided in the Regulation is of the nature of an appeal from the 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* [20] (which follows immediately after the citation extract from such case cited under our par. 18 herein):

> "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.

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[18] Idem, *Voyer c Bouchard*; see also *L'Espérance c Bernstein*, (C.Q. 2000.12.12); *Dubé c Bourassa* (C.Q. 2004.06.28).
[19] *Dionne c. Guay* (C.Q. 2004.03.04) B.E. 2004 BE-414.
[20] Idem, note 5.

Nature of six month delay under various paragraphs of section 10

[35] Under cross examination by counsel to the Manager, the Beneficiary admitted that his denunciation to the Manager was in excess of six (6) months following the discovery or occurrence of the elements claimed by the Beneficiary, as the case may be, and the documentary proof of receipt by the Manager as at 27 April 2007 (exhibits A-4, A-5 and A-6) has not been challenged, representing delays between discovery or occurrence and denunciation, of more than eight (8) months for Points 1 and 2 of the Decision and more than seven (7) months for Point 3 of the Decision.

[36] It is essential at this time, prior to any analysis of other matters which may be raised herein, to determine the appropriate application of this six (6) month rule submitted as the maximum delay for notice to be given in writing to the Contractor and the Manager for coverage under the Guarantee Plan (in as much as the other conditions of application are also met).

[37] Counsel to the Manager has submitted jurisprudence from three arbitration awards to the attention of the Court in support of his position[21].

[38] The Court has also noted the recent decision rendered by our learned colleague Me Michel Jeanniot in *Jobin et Plourde et Carrefour St-Lambert Lemoyne Inc. et La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc.*[22]

[39] The gist of the cited decisions by my learned colleagues MMrs. Fournier, Dupuis, Labelle and Jeanniot is to the effect that, in each case based on the circumstances before them, the written notice of the denunciation had to be given to the contractor and the manager within the six (6) months from the discovery or occurrence of the defects. I must concur with the conclusions reached on the delay, subject to further considerations by the Court which may differ from those of my colleagues and which I fell obliged to address taking into consideration some of the facts of the case at bar.

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[21] Syndicat de copropriété du 4570-4572 de Bréboeuf Inc. c. Construction Précellence Inc. et La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc. , Soreconi No. 050512002, Alcide Fournier, Arbitre, 5 Septembre 2005.
Paul Blanchette Construction et Letiecq et La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc., Le Groupe d'arbitrage et de médiation sur mesure (GAMM), Dossier APCHQ 025391, Claude Dupuis, ing., Arbitre, 14 octobre 2005.
Chackal et Bardakji et La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc., Henri P. Labelle, arch., Arbitre, 5 mai 2006

[22] Soreconi No. 061215001, 8 mars 2007.

Delay of procedure or of prescription?

[40] The nature of the six month delay must be distinguished from the delay to send an application for arbitration within 30 days following receipt of the manager's decision which the beneficiary may wish to dispute, as decided by the Superior Court (Québec) which determined that this 30 days delay (then of 15 days) under section 107 of the Regulation was a delay of procedural nature and could be subject to extension [23]

[41] In furtherance to my decision herein, I wish to emphasize the position taken by the Court of Appeal (Quebec) and the Supreme Court of Canada on similar provisions and the consequent conclusion that this Court has derived that the six (6) month delay provided under the applicable provisions of section 10 of the Regulation.

[42] In several decisions[24], the Quebec Court of Appeal has rejected, on the basis that more than six months had elapsed from the appropriate date, motions for revocation of judgment under the principles found under article 484 C.P.C. (see our par. 27 above), which reads in part "...the court may, on motion and provided that not more than six months have elapsed since judgment relieve from the consequences…".

[43] More particularly, the Quebec Court of Appeal writes on the subject of the six month delay provided under the third paragraph of article 484 C.p.c. under the pen of Delisle, J.C.A.[25]:

> "Malheureusement, ce n'est que […], en dehors donc de ce dernier délai [*note : délai de six mois prévu à l'article 484*] que l'avocat de l'appelant a demandé au tribunal que son client soit relevé des conséquences du retard à agir.
> Comme il s'était écoulé plus de six mois, le juge de première instance a accueilli le moyen d'irrecevabilité invoqué par l'intimée.
> Il a eu raison.
> Contrairement au délai de 15 jours de l'article 484 qui, a certaines conditions, n'est pas fatal, le délai de six mois du même article et celui de l'article 523 C.p.c. sont des délais de prescription."
>
> "Unfortunately, it is only […] outside this last delay [*note : six months delay set forth in article 484*] that counsel for the appellant requested from the tribunal that his client be absolved of the consequences of his delay in taking action.

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[23] Takhmizdjian and Bardakjian v. Soreconi and Betaplex inc. and APCHQ, No. 540-05-007000-023 (9 July 2003).
[24] See *Laurendeau c. Université Laval,* Quebec Court of Appeal No. 200-09-003399-000 (200-05-000225-933), 28 February 2002; see also *Balafrej c. R.*, 2005 QCCA 18.
[25] *J.P. c. L.B.*, Quebec Court of Appeal No. 500-09-012743-027 (500-12-249425-996), 14 March 2003, pp.3 and 4.

> As more than six months have elapsed, the first instance judge granted the motion for dismissal submitted by the respondent.
> He was right.
> Contrary to the 15 day delay of article 484 which, under certain conditions, is not fatal, the six month delay of the same article as well as the one of article 523 C.P.C. are delays of prescription. "
>
> *Translation and underline by the Court.*

[44] The Quebec Court of Appeal classifies the six month delay as a delay in the nature of prescription. Delisle J.C.A. cites Justice Pratte of the Supreme Court of Canada in the case *Cité de Pont Viau c. Gauthier MFG Ltd.*[26] which addresses the application of article 523 C.p.c. which contains a similar provision as article 484 C.p.c. and similar to the concept under review in section 10 of the Regulation, and reads:

> "523. The Court of Appeal may, notwithstanding the expiry of the time allowed by article 494, but provided that more than six month have not elapsed since the judgment, grant special leave to appeal to a party who shows that in fact, it was impossible for him to act sooner. […]" [27]
>
> *The underline is ours.*

[45] Justice Pratte writes[28] that the delay of six months under 523 C.p.c., which deals with the delay for leave to appeal, crystallize the *res judicata*, the fact that the judgment is final, i.e. no longer subject to appeal:

> "Article 523 *C.C.P.* specifically empowers the Court under special circumstances to grant special leave to appeal within six months of the judgment. It is therefore only after this six-month period has elapsed that a Superior Court judgment acquires the same force of *res judicata* that it had under the old *Code a*fter thirty days".

[46] 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.

Delay of forfeiture – "déchéance ~ préfix"

[47] Is this a delay under which the Beneficiary may benefit from suspension or interruption of prescription?

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[26] Supra, 1978 [2] S.C.R. 516; 1978 CanII 4 (Supreme Court of Canada).
[27] Article 494 C.p.c. provides that a motion for leave to appeal must be served and filed, save certain exceptions, within 30 days of the date of judgment.
[28] Id. 527 and 528

[48] 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. Furthermore, there are distinctions that has led the authors and the courts to identify certain elements that are specific to delays of forfeiture, with the remainder non-contradictory provisions of prescription to remain applicable to prescription. We must now review these elements.

[49] Article 2878 C.c.Q. under Book Eight, Prescription, under Rules governing Prescription, General Provisions states:

> "The court may not, of its own motion, supply the plea of prescription. However, it shall, of its own motion, declare the remedy forfeited where so provided by law. Such forfeiture is never presumed; it is effected only where it is expressly stated in the text." *The underline is ours.*

[50] The Court of Appeal has indicated[29] that the delay of forfeiture must be expressed in a clear, precise and unambiguous way. This jurisprudence confirms the position taken by authors, more specifically Jean Louis Baudouin, in *Les Obligations* [30] :

> "Le second alinéa de cette disposition [2878] précise que la déchéance ne se présume pas et doit résulter d'un texte exprès. Il n'y a donc désormais comme seuls délais préfix véritables que ceux à propos desquels le législateur s'est exprimé de façon précise, claire et non ambiguë".
>
> "The second paragraph of this provision [2878] provides that forfeiture may not presumed and must result from a specific text. Consequently, there are now only real prefix delays those for which the legislator has expressed himself in a precise, clear and unambiguous fashion."
>
> *Translation by the Court*

[51] The Court of Appeal has also determined that it is not necessary to have the words forfeiture or foreclosure specifically mentioned in a text [31] but that:

> "…, une mention formelle du terme "déchéance " ne me parait pas obligatoire. Il faut cependant que l'intention du législateur est d'en faire un tel délai. " [32]

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[29] *Entreprises Canabec inc. c. Laframboise*, J.E. 97-1087 (C.A.). where the Court determined that in the case of 524C.C.P. there was no forfeiture; see also: *General Motors of Canada Ltd c. Demers*, [1991] R.D.J. 551 (C.A.)

[30] Baudouin, Jean-Louis ; Jobin, Pierre-Gabriel. – Les obligations. – collaboration de Nathalie Vézina. – 6e éd. – Cowansville (Québec) : Éditions Y. Blais, ©2005, p. 1092, no. 1087.

[31] Such as articles 1103 C.c.Q. (co-ownership) or 1635 C.c.Q. (Paulian action) where the text is specific.

[32] Alexandre c Dufour, [2005] R.D.I. 1 (C.A.), par. 34, the Court evaluating the right of exclusion from indivision by an co-owner within 60 days of learning that a third party has acquired the share of an undivided co-owner as provided under art. 1022 C.c.Q..

> "…, a formal indication of the word forfeiture does not seem mandatory. It is nevertheless necessary that the intent of the legislator was to create such a delay." *Translation by the Court*

[52] The Court of Appeal, more specifically Jean Louis Beaudoin, as J.C.A., interestingly in furtherance of his views as an author that the text must be clear, precise and unambiguous reflected under our par. 49 herein, also confirms same in the unanimous decision *Massouris et Honda Canada Finance Inc. (Re) (Syndic de)*, 2002 CanLII 39140 (QC C.A.), determining that the delay of publication under article 1852 C.c.Q:

> 1852. […].
> [Second paragraph] Publication is required, however, in the case of rights under a lease with a term of more than one year in respect of a road vehicle or other movable property …; effect of such rights against third persons operates from the date of the lease provided they are published within 15 days. [33]

is a delay of forfeiture.

[53] The same confirmation may be found on other provisions reviewed by the Court of Appeal[34], such as article 2050 C.c.Q. which states in the case of an action in damages against a carrier:

> 2050. Prescription of any action in damages against a carrier runs from the delivery of the property or from the date on which it should have been delivered.
>
> The action is not admissible unless a notice of the claim is priorly given to the carrier in writing within 60 days after the delivery of the property, whether or not the loss is apparent, or if the property is not delivered, within nine months after the date on which it was sent. No notice is required if the action is brought within that time.
>
> *The underline is ours*

[54] 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[35] and consequently extinguish the right of the Beneficiary to require the coverage of the Guarantee Plan.

[55] 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 Beneficiary to require the coverage of the Guarantee Plan, is

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[33] 1991, c. 64, a. 1852; 1998, c. 5, s. 8.

[34] Équipement Industriel Robert Inc. c. 9061-2110 Québec Inc**.,** 2004 CanLII 10729 (QC C.A.)

[35] Supra, Baudouin, Jobin – Les obligations – p. 1092, no. 1086.

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. "[36]
>
> "… 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*

Impossibility to act – May the six month delay be extended by the Court?

[56] Can this six month delay be extended by the Court in certain circumstances? We must answer in the negative.

[57] The Court sympathizes with the Beneficiary's situation, even more so when taking into consideration that:

the Beneficiary may have received imprecise legal advice from his legal advisor,

was misled by the Contractor as to having the repairs effected in a timely manner, Contractor which filed for bankruptcy during the course of this affair, and

the fact that the Beneficiary has advised the Court that he had various telephone contacts with the staff of the Manager during this period and that same did not mention the six month delay at any time, on the contrary.

Our underlines.

[58] Some of the decisions of my learned colleagues[37] have highlighted the possibility in certain circumstances to evaluate the impact of an impossibility in fact to act by the Beneficiary, including the error of a counsel or other legal advisor, in order to evaluate the possibility of extending the delay under review or, the possibility of determining a concept of reasonable time. With all consideration for the contrary opinion,

[36] Idem, pp. 1092 -3, no. 1086.

[37] *Infra,* notes 38, 39.

I am of the view that neither of these concepts, the impossibility in fact to act nor the reasonable delay element, may find application under section 10 of the Regulation.

[59] A reasonable delay in excess of the six month period is not an applicable concept, purely and simply by the definition of a delay of forfeiture.

[60] We have seen the general principle supported *inter alia* by the Supreme Court of Canada that a party should not be deprived of his rights on account of an error of his counsel (where it is possible to rectify the consequences of such error without injustice to the opposing party) [38] but the same main decision on the subject *Cité de Pont Viau v. Gauthier Mfg. Ltd*, also clearly identifies that the requirement of the six month delay is a prior condition to the application of 523 C.C.P. and is not subject to any discretion by the court:

> "…the discretionary power of the Court of Appeal is subject to the existence of two prior conditions: application for leave to appeal must be made within six months of the judgment…
> […]
> …the Court of Appeal must determine whether the applicant meets the two prior conditions mentioned above [*our note: i.e. inter alia, appeal within six months*]. In deciding this question the Court is not exercising its discretionary power; rather, it is acting in its traditional role of interpreting the law and applying it to the proven facts." [39] U*nderlines & Italics are ours*

[61] In addition, in the case at bar, we must distinguish from these decisions that pertained to provisions where the impossibility to act was specifically mentioned by the legislator in the body of the provision, such as the provisions we have reviewed herein:

> Art. 523 C.C.P. :"…grant special leave to appeal to a party who shows that in act it was impossible for him to act sooner",

or

> Art. 484 C.C.P.:"… relieve from the consequences of his default the party who shows that, in fact, it was impossible for him to act sooner."

or, recently by the Court of Appeal [40] under article 110.1 C.C.P.[41] which reads:

> "[Third paragraph] …failure to act within the time limit upon proof that it was in fact impossible for the party to act within the time limit."

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[38] Such as *Supra* Cité de Pont Viau v. Gauthier Mfg. Ltd., and Québec (Communauté urbaine) *v.* Services de santé du Québec.
[39] *Supra* Cité de Pont Viau v. Gauthier Mfg. Ltd, pp. 521 and 522.
[40] Québec (Sous-ministre du Revenu) c. Stever, 2007 QCCA 257
[41] 2002, c. 7, s. 14; 2004, c. 14, s. 1

[62] It is clear, as the Court of Appeal has recently confirmed, under the pen of Thibault J.C.A.,

> "Enfin, le législateur n'a pas cru bon d'adopter certaines mesures d'atténuation du principe telle, par exemple, la prolongation du délai en cas d'impossibilité d'agir, comme il l'a fait pour d'autres institutions." [42]
>
> "Finally, the legislator has not consider appropriate to enact certain measures of reducing the severity of the principle, such as a extension of the delay in the case of an impossibility to act, as provided under other legislative provisions."
>
> *Translation by the Court*

that the absence of the concept of impossibility to act under section 10 of the Regulation prevents the Court to temper the failure to act by any consideration of either failure the Beneficiary or of an error of counsel, and under the parameters of section 10 of the Regulation, any action or omission by the Contractor.

[63] Finally, a short note on the exclusion of the land drainage problem from the Guarantee Plan by the Manager. If the delay had not been elapsed as provided above, this Court would nevertheless concur with the conclusion of the Decision, as there was no element of an error of design of the building (height of the foundations for example), as it pertains to the application of Section 12, paragraph 9 of the Regulation which provides:

> "12. The guarantee excludes:
> […]
> (9) parking areas or storage rooms located outside the building containing the dwelling units, and <u>any works located outside the building such</u> as swimming pools, <u>earthwork</u>, sidewalks, driveways or <u>surface water drainage systems</u>;" *The underline is ours*

CONCLUSIONS

[64] In conclusion, this Court is of the view that:

- The notice in writing to be given to the Contractor and 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, as the Manager is concerned, is a substantive condition precedent to the respective rights of the Beneficiary to require the coverage of the Guarantee Plan and to require arbitration in connection thereto.

[42] *Supra*, Alexandre c Dufour, par. 43.

- 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 the failure by the Beneficiary to give notice to the Manager in writing within such delay of six months extinguish the respective rights of the Beneficiary to require the coverage of the Guarantee Plan and to require arbitration in connection thereto.

- The foreclosure of the rights of the Beneficiary by the expiry of the six month delays under section 10, as the Manager is concerned, to have the Beneficiary require the coverage of the Guarantee Plan and to require arbitration respectively, are not subject to the provisions of suspension or interruption applicable in certain circumstances to delays of prescription.

- The Court does not have discretion to extend the six month delays under section 10, including neither under 'an impossibility to act' concept nor any 'reasonable delay thereafter' element, both of which do not find application under section 10 of the Regulation.

[65] Consequently, the denunciations to the Manager by the Beneficiary of the problems which are the subject of his application for arbitration were made outside the six month delay provided under the applicable provisions of section 10 of the Regulation and this delay is a delay of forfeiture, which this Court does not have the discretion of extending and which causes foreclosure of the Beneficiary's rights.

[66] I wish to underline that the decision of this Court 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 Beneficiary to bring any action before the civil courts having jurisdiction, subject to the applicable rules of law.

[67] In accordance with section 123 of the Regulation, and as the Beneficiary has failed to obtain a favorable decision on any of the elements of his claim, the Court must determine the division of the fees to be charged between the Manager and the Beneficiary.

[68] Consequently, the cost and fees of this arbitration, as well under law as under equity, in accordance with sections 116 and 123 of the Regulation, shall be apportioned as to $50 to the Beneficiary and the remainder to the Manager.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

[69] DISMISSES the arbitration demand of the Beneficiary;

[70] ORDERS, in accordance with section 123 of the *Regulation,* that the costs of the present arbitration be borne as for $50.00 by the Beneficiary and for the remainder by the Plan Manager.

DATE: 5 May 2008

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M^{e} Jean Philippe Ewart
Arbitrator