ARBITRATION

Under the *Regulation Respecting the Guarantee Plan for New Residential Buildings*
(O.C. 841-98 June 17, 1998, c. B-1.1, r.0.2, Building Act, Revised Statutes of Quebec(R.S.Q.), c. B-1.1, Canada)

Arbitration body authorized by the Régie du bâtiment du Québec:
Groupe d'arbitrage et de médiation sur mesure (GAMM)

Between
ANTONIETTA DI MANNO
Beneficiary
And
PENTIAN CONSTRUCTION
Builder
And
LA GARANTIE DES MAISONS NEUVES DE L'APCHQ INC.
Plan Manager

No. Ref. Guarantee Plan: 12-225ES
No. Ref. GAMM: 2011-19-005
No. Ref. Arbitrator: 13 185-92

ARBITRATION DECISION

Arbitrator:	Mtre. Jeffrey Edwards, C.Med., C.Arb.
For the Beneficiary:	Ms. Antonietta Di Manno
For the Builder:	Mtre. Giuseppe (Joe) Morrone
For the Plan Manager:	Mtre. Élie Sawaya Savoie Fournier
Date of hearing:	February 6, 2013
Hearing location:	Domicile of the Beneficiary
Date of decision:	February 27, 2013

AFTER HAVING TAKEN COGNIZANCE OF THE PROCEEDINGS AND EXHIBITS, HEARD THE WITNESSES, VISITED THE PREMISES, HEARD THE ARGUMENT OF THE PARTIES, THE ARBITRATION TRIBUNAL DECIDES AS FOLLOWS:

1. FACTS AND PROCEEDINGS

[1] The Beneficiary has made an application for arbitration to the Arbitration Tribunal with respect to the decision of the Plan Manager (Marie-Pier Germain, architect) dated March 7, 2011 ("Decision"). The arbitration application is dated April 1, 2011 and requests the revision of ten (10) points, namely Points 4, 5, 6, 8, 11, 12, 14, 16, 17 and 19 of the Decision.

[2] The hearing took place on February 6, 2013 at the domicile of the Beneficiary. The Arbitrator and the representatives and witnesses of each party had the opportunity to examine, review and, where appropriate, visually examine the physical appearance of the points in issue.

2. EXHIBITS

[3] The Exhibits produced by the Plan Manager are as follows:

A-1 Contrat en date du 23 novembre 2004;

A-2 Contrat de garantie en date du 24 mars 2004;

A-3 Acte de vente en date du 14 juin 2005;

A-4 Déclaration de réception en date du 7 juin 2005;

A-5 Correspondance de l'avocat de la Bénéficiaire adressée à l'Entrepreneur en date du 1er juin 2010;

A-6 Demande de réclamation en date du 13 juillet 2010;

A-7 Correspondance de l'Entrepreneur à l'Administrateur;

A-8 Letter of demand (4), dated February 2, 2011, received by Plan Manager on February 4, 2011;

A-9 Demande d'arbitrage en date du 1er avril 2011;

A-10 Documents concernant les moustiquaires.

[4] The Beneficiary added another Exhibit, B-1 being a photo of the metal bar connecting the outside railing to the back wall. After the hearing, and in accordance with the comments of the Arbitration Tribunal, the Beneficiary communicated as Exhibit B-2 an invoice of J & G Corbeil Aluminium number 20110008 dated July 12, 2011.

3. FACTS

[5] The Beneficiary purchased the property ("Property") on June 14, 2005 (Exhibit A-3). She testified at that hearing that she had generally a good relationship with the Builder throughout the construction period. After the taking of possession, she requested that the Builder effect various repairs. She made telephone calls to a "Maggie" and "Charlie" who were the Builder's representatives. The Beneficiary testified that she was regularly told by these representatives that the various problems would be corrected and that there was no reason to worry and make the process or request more conflictual or formal. The Beneficiary testified that sometimes workers or sub-contractors would turn up to do some work and some problems were corrected. However, other problems and verbal complaints were not followed up upon by the Builder. These "fell by the wayside", in her words. She would continue to call the Builder's representatives about them, she would continue to receive reassurances that they would be handled but again these

problems and verbal complaints were not followed-up by the Builder. She testifies that this process of verbal complaints and requests, verbal reassurances and intermittent lack of concrete follow-up and resolution by the Builder went on for several years.

[6] The Beneficiary testified that she then fell sick and underwent a difficult period of medical tests leading to the discovery that she had cancer. The Beneficiary is the sole homeowner so when she fell sick there was no partner to assist her. In May 2010, as the Builder was still not reacting in a practical way despite ongoing reassurances, and despite her medical condition and fatigue, the Beneficiary sought legal counsel. On June 1, 2010, a written legal letter was sent by the attorneys to the Builder and the Plan Manager. That was the first written correspondence sent by the Beneficiary.

[7] Therefore, the written notice of complaint at the basis of the present proceedings was made in the fourth year of the five (5) years warranty plan applicable to the Property.

[8] The Plan Manager in its Decision (A-8) took the position that it would only analyze the validity of the various points of complaint on the basis of the remaining protection under the warranty plan at that stage namely, the five (5) years protection found against important defects within the meaning of Article 2118[1] of *Civil Code of Quebec*, pursuant to Article 10 (5)[2] of the *Regulation respecting the guarantee plan for new residential buildings*[3] ("*Regulation"*).

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[1] Article 2118 of the *Civil Code of Quebec*: Unless they can be relieved from liability, the contractor, the architect and the engineer who, as the case may be, directed or supervised the work, and the subcontractor with respect to work performed by him, are solidarily liable for the loss of the work occurring within five years after the work was completed, whether the loss results from faulty design, construction or production of the work, or the unfavourable nature of the ground.

[2] Article 10 (5) of the *Regulation*: The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations after acceptance of the building, shall cover repairs to faulty design, construction or production of the work, or the unfavourable nature of the ground within the meaning of article 2118 of the Civil Code, 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

[9] The other ground of refusal of the Plan Manager was that the Beneficiary did not notify the Plan Manager in writing of the problem within six (6) months of knowledge of the problem. We will now proceed to go through each point to determine if they have been correctly decided by the Plan Manager in the Decision and whether, in the circumstances, there should be any modification in accordance with the powers given to the Arbitrator under the Law and in particular under the *Regulation*.

4. EXAMINATION OF POINTS

POINT 4 : "TOITURE COMPORTE PLUSIEURS BARDEAUX QUI SE SONT DÉTACHÉS"

[10] The Beneficiary complains that some of the roof shingles of the Property have come off. The Plan Manager rejected this point on the basis that the Beneficiary has known about the problem from two years before the inspection of January 20, 2011 and did not send a notice sooner. In her testimony at the hearing, the Beneficiary explained that she only discovered the problems a few months before her letter of notification of June 1, 2010 (Exhibit P-5). That testimonial evidence was not seriously contested at the hearing. So the time limit for notification seems to have been respected. The next question is whether this is a defect which is sufficiently grave that it falls under Article 2118 of the *Civil Code of Quebec.* Unfortunately, there was no proof or expert evidence regarding the seriousness or scope of the problem. It is unknown whether there is any leaking. However, the Beneficiary testified that she is unaware of any leaking. In the circumstances, the Arbitration Tribunal concludes that the Beneficiary has not discharged her burden of proof to show that the problem falls within the meaning of Article 2118 of

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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.

[3] *Regulation Respecting the Guarantee Plan for New Residential Buildings*, R.S.Q., c. B-1.1, r. 0.2.

the *Civil Code of Quebec.* The Arbitration Tribunal will therefore not intervene on this point.

POINT 5 :"FISSURE IMPORTANTE SUR LA DALLE DU SOUS-SOL ENTRE LA SALLE DE SÉJOUR ET LA CHAMBRE FROIDE"

[11] There is a wide crack in the concrete slab in the basement. This crack has been getting wider. It was first noticed in the first year after taking possession of the Property. It was then the thickness of a dime. It has been progressively getting wider. Now it is the thickness of a two dollars coin or wider and is of approximately four feet in length. The Plan Manager rejected the Point on the issue of notice. This ground may or may not be well founded as it has progressively been discovered and the Beneficiary was always told by the Builder that it was not a problem. We also have to examine the question whether the defect is of such a nature that it falls within the meaning of Article 2118 of the *Civil Code of Quebec.* The crack is visibly impressive. However at the hearing the Builder's representative Tony Amato stated that it was merely a "fissure de retrait" (a drying crack). The architect Marie-Pier Germain of the Plan Manager also was of that view. Both indicated that it was a cosmetic problem only. There was no credible evidence adduced to show that it had serious consequences. Based on the evidence, I have no choice but to maintain the Decision of the Plan Manager on this Point. However, I am surprised that a self respecting Builder of a new home has not intervened to at least fill in the crack and make it less of an eye-sore.

POINT 6 :"PORTE D'ENTRÉE PIÉTONNE DU GARAGE QUI SE COINCE ET NE SE FERME PAS CORRECTEMENT, OCCASIONNANT DES INFILTRATIONS D'AIR"

[12] The undersigned examined the door that seemed to close and lock normally. There did not appear to be an anomaly. The Decision will not be modified on this Point.

POINT 8 :"PLANCHER ET MUR DU REZ-DE-CHAUSSÉE NE SONT PAS DE NIVEAU"

[13] The undersigned examined this Point and the work appears to satisfy the applicable norms. There appears to be no reason to intervene.

POINT 11 :"FENÊTRES DU REZ-DE CHAUSSÉE ET DE L'ÉTAGE PRÉSENTENT DE LA CONDENSATION À LA TABLETTE DES FENÊTRES"

[14] The undersigned examined the problem described by the Beneficiary. The Builder states that the condensation is the result of the omission to remove the mosquito screens in the winter. The Beneficiary states that the problem occurs even in the summer. The Plan Manager has provided as Exhibit A-10 an extract of the document entitled *"Le tour du propriétaire*" (Exhibit A-10) given by the APCHQ which makes the recommendation to remove the mosquito screens in the Winter. The problem complained of is not established in the opinion of the Arbitrator. In any event, there is no evidence that any defect would be sufficiently serious to fall within the meaning prescribed by Article 2118 of the *Civil Code of Quebec.*

POINT 12 :"MURS DE LA CHAMBRE PRINCIPALE ARQUÉS"

[15] The Arbitrator examined the physical evidence. There did not appear to be any anomaly that would be a violation of the applicable construction rules. There appears to be no reason to intervene in the Decision.

POINT 14 :"ESCALIER MENANT À L'ÉTAGE NE RESPECTE PAS LES NORMES EN VIGUEUR"

[16] The Beneficiary complains that the space between ceiling and steps of the staircase going to the second floor does not respect the rules of the trade. The present distance is 6'8''. The Plan Manager states the *National Building Code* of 1995 at Article 9.8.4.4 states that it must be at least 6'4" (1,95m) for stairs in a dwelling. There was no evidence adduced to contest that affirmation. There is no evidence to justify a change to this Point.

POINT 16 :"BARREAUX DE LA RAMPE DE L'ESCALIER EXTÉRIEUR SONT TROP PETITS ET LA MAIN COURANTE SE DÉTACHE DU MUR"

POINT 17 :"ESCALIER EXTÉRIEUR NON AU NIVEAU"

[17] These two points were examined together. It appears clear from the testimony and the photos provided that the bars, railings and the outside metallic stairwell are inadequately built and not solid. The bar that is supposed to solidify it and attach it to the building is too short and protrudes from the back wall (Photo B-1 and Photo 2 of Exhibit A-5). The frame work was unstable and the staircase was crooked (Photos 3, 4, 6 and 7 of Exhibit A-5). There was an approximate two foot gap between the last stair and the ground. The inspector of the Plan Manager seems to indicate in her decision that the structure was in violation of applicable rules and by all accounts it appears that it was highly unstable and dangerous. She states that the Builder tried to stabilize the structure by adding support parts underneath but without success. In his testimony, the representative of the Builder stated that the cause of instability was landscaping work done by an independent contractor after his work. The Beneficiary in her testimony is categorical that the problems of instability, bending, safety and detachment from the Building are entirely independent and without connection to the later landscaping work. Even the representative of the Builder acknowledges that the structure as seen in

the photos is highly unacceptable and he states that he would not have accepted it. In this regard, the Arbitrator does not find the explanation of the Builder to be satisfactory or convincing. The Builder appears to be trying to avoid its own responsibilities for building an adequate, stable and safe structure. The Arbitrator prefers the testimony of the Beneficiary and to some degree the inspector of the Plan Manager that the unstable and unsafe nature of the structure was the result of improper and faulty construction of the Builder and/or its subcontractor.

[18] In the opinion of the Arbitrator, the defects in the structure and the staircase constituted serious and dangerous defects within the meaning of Article 2118 of the *Civil Code of Quebec*. The state of the staircase and structure, when left unrepaired, constituted an immediate partial loss or “perte” within the meaning of that article.

[19] Since the Beneficiary made her complaint within the five (5) years protection (and additional 6 months notice for progressively appearing or worsening defects) period, she is entitled to protection and coverage under Article 10 (5) of the *Regulation*.

[20] The reason invoked by the Plan Manager to reject the claim under this Point was that it should have been apparent at the time of purchase and that the written notice was beyond the six (6) months deadline. With all due respect, in light of the facts and evidence, these reasons do not appear valid. It is clear that the situation evolved and worsened over time for the staircase. It seems unduly harsh to state the purchaser of a new house must notice that the brand new staircase is not sufficiently structurally sound and designed. Furthermore, it is clear that the situation worsened over time. Accordingly, the deterioration and loss were gradual and discovery of the true unsafe state was only gradual. Based upon the testimony of the Beneficiary, it is clear that the true state of the

exterior staircase was only discovered by the Beneficiary at a time contemporary to the letter of June 1, 2010 (Exhibit A-5). Therefore, the notice requirement was respected.

[21] Since the defect of the unstable staircase qualifies under Article 2118 of the *Civil Code of Quebec* and was notified in a timely manner, the Beneficiary should be entitled to an order from the Arbitration Tribunal to the effect that the proper work be carried out. However, it was discovered at the hearing that for safety and security reasons and to preserve the state of the balcony from a collapse and further deterioration, the Beneficiary had urgent work done to the stairwell during the Summer of 2011 after the visit of the Plan Manager inspector, after the application for arbitration. The Beneficiary presents an invoice of J & G Corbeil Aluminium for the costs of repair in the amount of $3,269.65 (taxes included) (Exhibit B-2). The *Regulation* gives the Arbitrator certain powers to authorize compensation to a party who has paid for work as measures to conserve the Building. In particular, Articles 18 (5) and 111 of the *Regulation* state in part as follows:

> 18 (5): ... If the claim has not been settled, the manager shall decide the claim and order, as applicable, the contractor to reimburse to the beneficiary the cost of necessary and urgent conservatory repairs, or to complete or correct the work within the period the manager indicates and agreed upon with the beneficiary;
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> 111: Before or during the arbitration proceedings, an interested party or the manager may request necessary measures to ensure the preservation of the building.

Furthermore, the Builder agreed under the *Regulation* (Article 78,2) and Schedule II, paragraph 18 to:

> "where applicable, to take all necessary measures to ensure the preservation of the building or to reimburse the beneficiary where the latter was forced to take such measures urgently".

Furthermore, Article 116 of the *Regulation* allows the Arbitrator to base his decision on equity or fairness where circumstances warrant:

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

Therefore to the extent necessary, the undersigned Arbitrator considers that the circumstances of the present case justify him to base his entire decision on Points 16 and 17 on Article 116 of the *Regulation* on fairness. Considering all the circumstances, including the state of the staircase, the unsafe and unstable nature of it, the urgent need to repair it, the risk to the occupant, the Beneficiary and others who might be on the premises and use it, the undersigned Arbitrator is going to order to the Builder to pay to the Beneficiary one half, namely the amount of $1,634.82 of the cost to repair, reinforce and partially replace the stairwell for safety reasons.

The Arbitration Tribunal is aware that the Beneficiary seeks to have the entire amount paid by the Builder and an order to carry out further work to the balcony. The Arbitrator is trying to arbitrate a fair and equitable solution in the circumstances. It would have been preferable for the Beneficiary to have asked the Arbitration Tribunal for permission before carrying out the urgent work. The Beneficiary did not do so and the Arbitration Tribunal is also taking that fact into account by only granting one half of the repair costs. In the circumstances, there will not be an order against the Builder to carry out further work regarding these points.

POINT 19 :"OUVERTURES DANS LE PLANCHER DE BOIS FRANC"

[22] The Arbitration Tribunal noted the gaps between some hardwood floor lattes. This is obviously not in the nature of a defect within the meaning of Article 2118 of the *Civil Code of Quebec* and therefore there is no reason to analyze this Point further. The Arbitrator will not intervene in the Decision of the Plan Manager on this Point.

5. ARBITRATION COSTS

[23] In light of the fact that the Beneficiary was successful on one of the elements of her claim, the Plan Manager will be responsible for all the costs of the present arbitration.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

MAINTAINS, in part, the Beneficiary's application for arbitration.

CONDEMNS the Builder 3395383 Canada Inc. (Pentian Construction) to pay to the Beneficiary the amount of $1,634.82 with regard to the Beneficiary's claim under Points 16 and 17 within twenty (20) days of receipt of the present Arbitration Decision.

In default of the Builder 3395383 Canada Inc. (Pentian Construction) to pay said amount in the stipulated deadline, **CONDEMN** the Plan Manager La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc. to pay said amount within the following twenty (20) days.

DISMISS the Beneficiary's application for arbitration with regard to Points 4, 5, 6, 8, 11, 12, 14 and 19.

CONDEMNS the Plan Manager La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc. to pay all the arbitration costs relating to the present arbitration application.

(s) Mtre. Jeffrey Edwards

Mtre. Jeffrey Edwards, Arbitrator, C.Med., C.Arb.

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Mtre. Jeffrey Edwards, Arbitrator, C.Med., C.Arb.