ARBITRATION TRIBUNAL

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

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

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

UNDER THE AEGIS OF

CENTRE CANADIEN D'ARBRITAGE COMMERCIAL (CCAC) / CANADIAN COMMERCIAL ARBITRATION CENTRE (CCAC)

CANADA
PROVINCE OF QUÉBEC

FILE N^{o}: S14-080101-NP
FILE N^{o}: 189003-1

DATE : 5 OCTOBER 2015

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

JOHNSON SUI YIN KWOK AND MEI CHUN TANG

«BENEFICIAIRES»/ PLAINTIFFS

and

9181-5712 QUÉBEC INC.

«CONTRACTOR»/ DEFENDANT

and

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

«**"MANAGER" of the Guarantee Plan**»

ARBITRATION AWARD

Arbitrator:	M^tre^ Tibor Holländer
For the Beneficiaries:	Mr. Johnson Sui Yin Kwok
For the Contractor:	(absent)[1]
For the Manager:	M^tre^ Nancy Nantel
Date of Hearing:	September 8, 2015
Date of the Arbitration Award:	October 5, 2015
Place for the hearing:	1010 de la Gauchetière West, Suite 950, Montréal, Québec

IDENTIFICATION OF THE PARTIES

«**BENEFICIAIRES**» / PLAINTIFFS:	Mr. Johnson Sui Yin Kwok and Ms. Mei Chun Tang […] Lasalle, Québec […]
«**CONTRACTOR**» / DEFENDANT:	9181-5712 Québec Inc. P.O. Box 3037 – Lapiere Montréal, Québec H8N 3H2
«**MANAGER**» OF THE GUARANTEE PLAN:	La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc. (GMN) 5930, boulevard Louis-H-La Fontaine Montréal, Québec H1M 1S7

[1] The Notice of pre-trial conference sent to the Contractor was returned with the following notation «*déménage ou inconnu//moved//unknown*».

CHRONOLOGY

2010.04.03	Preliminary Contract between 9181-5712 Quebec Inc. and Johnson Sui Yin Kwok (Exhibit A-1).
2011.01.20	Déclaration de copropriété (Exhibit A-1).
2011.06.21	Formulaire d'inspection préréception et certificat d'enregistrement/certificate of registration of a building/ du bâtiment (Exhibit A-3).
2011.06.21	Acceptance of the private portion by the Beneficiaries (Exhibit A-3).
2011.06.23	Deed of sale (Exhibit A-4).
2013.09.11	Beneficiaries' letter of disclosure addressed to the Contractor (Exhibit A-5).
2013.09.12	Reception by the Manager of the letter of disclosure addressed to the Contractor (Exhibit A-5).
2013.11.07	Claim Form (Exhibit A-6).
2013.11.18	15-Day notice given by the Manager to the Contractor (Exhibit A-7).
2014.05.01	Inspection of the property by the Manager (Exhibit A-8).
2014.07.14	"DÉCISION DE LA GARANTIE DES BÂTIMENTS RÉSIDENTIELS NEUFS DE L'APCHQ INC. (GMN)" (Exhibit A-8).
2014.08.07	Beneficiaries' request for arbitration (Exhibit A-9).
2014.08.14	Nomination of Arbitrator (Exhibit A-10).
2014.10.24	Receipt of the Manager's Book of Exhibits.
2014.11.24	Notice of Pre-trial conference.
2015.07.15	Pre-trial hearing held with the parties (the Beneficiary Mr. Kwok and M^tre^ Nantel).
2015.09.08	Hearing.

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.

MANDATE

[2] On August 7, 2014, the Beneficiaries submitted a dispute to arbitration[2] and the undersigned was designated as the arbitrator to hear the matter.

[3] The undersigned was seized with the dispute arising from the Manager's "DÉCISION DE LA GARANTIE DES BÂTIMENTS RÉSIDENTIELS NEUFS DE L'APCHQ INC. (GMN)" rendered by Ms. Anne Delage on July 14, 2014, (hereafter the «**Decision**»)[3] pursuant to the *Regulation respecting the guarantee plan for new residential buildings* (R.S.Q., c. B-1.1, r.8) (hereafter the «***Regulation***») dismissing the Beneficiaries' claim relating to point 1.

[4] Point 1 of the Beneficiaries' claim is identified as follows:

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[2] Exhibit A-9.
[3] Exhibit A-8.

POINT 1 OF THE DECISION	INFILTRATION D'EAU AU SOUS-SOL

[5] Ms. Delage did not decide on the merit of the Beneficiaries' claim. Ms. Delage dismissed the claim on the basis that the Beneficiaries failed to give written notice of the construction defect to the Contractor and the Manager within a reasonable delay that could not have exceed six (6) months following the discovery of the construction defect.

EXHIBITS

[6] The Exhibits have been initially labeled and numbered "**A-**" in accordance with the numbering of the Book of Exhibits filed by the Manager. The exhibits filed by the Beneficiaries at the hearing were numbered and labeled "**B-**".

[7] The following Exhibits were filed by the Manager and form an integral part of the Manager's Book of Exhibits:

Number	Description
A-1	Preliminary Contract between 9181-5712 Quebec Inc. and Mr. Johnson Sui Yin Kwok.
A-2	Déclaration de copropriété.
A-3	"*Formulaire d'inspection préréception et certificat d'enregistrement/certificate of registration of a building/ du bâtiment*" dated June 21, 2011, received by the Manager on November 14, 2013.
A-3	Certificat d'enregistrement/certificate of registration of a building/ du bâtiment.
A-4	Deed of sale.
A-5	Beneficiaries' letter of disclosure addressed to the Contractor.
A-6	Claim Form.
A-7	15-Day notice given by the Manager to the Contractor.
A-8	"Décision de La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc. (GMN)".
A-9	Beneficiaries' request for arbitration.
A-10	Nomination of Arbitrator.
A-11	File copy of a letter dated September 23, 2013 from the Manager addressed to the Beneficiary Mr. Johnson Sui Y Kwok.
A-12	"*Formulaire d'inspection préréception et certificat d'enregistrement/certificate of registration of a building du bâtiment*" dated June 21, 2011 received by the Manager on March 19, 2012.

[8] The following Exhibits were filed by the Beneficiaries at the hearing:

Number	Description
B-1	Preliminary Contract between 9181-5712 Quebec Inc. and Mr. Johnson Sui Yin Kwok.
B-2	Deed of sale.

Number	Description
B-3	Certificat d'enregistrement/certificate of registration of a building/ du bâtiment.
B-4	"Formulaire d'inspection préréception et certificat d'enregistrement/certificate of registration of a building/ du bâtiment" dated June 21, 2011.
B-5	"Décision de La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc. (GMN)".
B-6	Letter dated July 11, 2011 emanating from Mr. Johnson Sui Yin Kwok to 9181-5712 Quebec Inc. disclosing a series of deficiencies required to be rectified including the infiltration of water into the basement.
B-7	Letter dated July 18, 2012 emanating from Mr. Johnson Sui Yin Kwok to 9181-5712 Quebec Inc. disclosing the infiltration of water into the basement.
B-8	Copy of a Building specifications/Semi detached Cottages 20x36/Construction Loulex Inc.
B-9	Email dated September 27, 2012 from Mr. Johnson Sui Yin Kwok to 9181-5712 Quebec Inc. and reply dated October 1, 2012 from SAV Construction disclosing a series of deficiencies.
B-10	Email dated September 30, 2012 from Mr. Johnson Sui Yin Kwok to 9181-5712 Quebec Inc. and reply dated October 2, 2012 from SAV Construction disclosing a deficiency.
B-11	Email dated September 4, 2013 from Mr. Johnson Sui Yin Kwok to 9181-5712 Quebec Inc. /SAV Construction disclosing the water infiltration into the basement that occurred on August 30, 2013.
B-12	A photograph of the stair landing leading to the front entrance of the building.
B-13	A photograph of the stair landing leading to the front entrance of the building.
B-14	An "Exemplary Diagram"
B-15	A CD containing photographs B-13, B-14 and video of the infiltration of water into the basement.
B-16	Memo to clients Bois des Caryers.
B-17-A	Floor plan depicting the stair case, the entrance and the ground floor of the building.
B-17-B	Floor plan depicting the basement of the building.
B-18	Photocopies of four (4) business cards.

PRELIMINARY MOTIONS

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

[10] By letter dated October 21, 2014, the Manager's attorneys indicated that they intended to raise a preliminary objection regarding the Beneficiaries' claim seeing that the Beneficiaries were tardy in giving notice to the Contractor and the Manager of the existence of the construction defect following the infiltration of water into the basement.

[11] Following the telephone conference held with the parties, the Tribunal decided to hear the Manager's preliminary objection while the Beneficiaries would have the opportunity to explain the circumstances relating to the discovery of the construction defect and its written denunciation to the Contractor and the Manager.

FACTS

[12] Mr. Johnson Sui Yin Kwok was the only witness to testify at the hearing.

[13] On April 3, 2010, the Beneficiaries signed the Preliminary Contract[4] for the construction of a townhouse to be held in divided co-ownership.

[14] Mr. Kwok declared that the construction and purchase of the townhouse was conditional upon the Contractor guaranteeing the construction pursuant to the guarantee plan offered by the Manager.

[15] The Preliminary Contract was the only agreement signed by the Beneficiaries and the Contractor, which agreement did not incorporate standard guarantee clauses found in similar type agreements.

[16] The Preliminary Contract bears the logo of the "APCHD-ASSOCIATION PROVINCIALE DES CONSTRUCTEURS D'HABITATIONS DU QUÉBEC INC.". The only reference to the guarantee plan was found in article 35 of the Preliminary Contract containing the following language:

> "***SUFFICIENT SECURITY***
>
> *Under the terms of Article 2111 of the Civil Code of Quebec and for the purposes hereof,* ***and under the condition that the vendor is duly accredited with "La Garantie des maisons neuves de l'APCHQ"****, the promissory purchaser acknowledges and accepts that the said guarantee shall constitute sufficient security to guarantee the performance of the vendor's obligations concerning:*
>
> *a) Any reserve established for the repair or correction of apparent defects at the time of the acceptance of the work by the promissory purchaser that are covered under the said guarantee;*
>
> *b) Completion of seasonal and non-seasonal work on the property, when such work is covered by the said guarantee.*

[4] Exhibit A-3 and Exhibit B-1.

> *Consequently the promissory purchaser undertakes not to withhold any amount of the sale price of the property.*"

[17] Mr. Kwok stated that he received from the Contractor the "CERTIFICATE D'ENREGISTREMENT DU BÂTIMENT/CERTIFICATE OF REGISTRATION OF A BUILDING"[5] ("**Certificate**") as evidence that the townhouse was guaranteed by the Manager.

[18] The Certificate confirmed that the Contractor:

[18.1] Held a general contractor's license authorizing it to carry out construction work on a new residential building;

[18.2] It was accredited with "*La Garantie des bâtiments résidentiels neuves de l'APCHQ Inc.*";

[18.3] The townhouse was registered with "*La Garantie des bâtiments résidentiels neuves de l'APCHQ In.c*".

[19] The Certificate appears to be a standard document bearing the logo of the "GARANTIE MAISONS NEUVES APCHQ" and incorporates the data and information referred to in paragraph 18 above.

[20] In the body of the Certificate, one can discern the reference to an "***Important notice***" worded as follows:

> "***The present Certificate of registration does not automatically confer the advantage of "La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc." with regard to the aforementioned building.***
>
> ***To verify if the building is protected, consult the Guarantee Contract.***"

[21] The Beneficiaries and the Contractor did not sign a separate guarantee contract.

[22] The Beneficiaries and the Contractor signed a "FORMULAIRE D'INSPECTION PRÉRÉCEPTION" that is worded as follows:

> "***LISTE D'ÉLÉMENTS À VÉRIFIER***
>
> ***Approuvée par la Régie du bâtiment du Québec***

[5] Exhibit A-3 and Exhibit B-3.

> *Quel que soit le type de bâtiment visé par la garantie, une inspection avant la réception est requise par le Règlement sur le plan de garantie des bâtiments résidentiels neufs.*
>
> *L'inspection préréception se fait à partir de la présente liste d'éléments à vérifier, fournie par l'administrateur et dont le contenu est approuvé par la Régie du bâtiment du Québec.*
>
> *A l'aide de cette liste, le bénéficiaire et l'entrepreneur doivent faire le tour complet du bâtiment…afin de constater l'état des travaux. Il faut porter une attention particulière aux travaux supplémentaires qui ont été demandées. Il faut noter tous les éléments à parachever ou à corriger, …*
>
> *Si l'entrepreneur et le bénéficiaire sont en désacord avec les travaux à parachever ou à corriger, ils doivent le mentionner sur la présente liste élaborée pour l'inspection.*
>
> *De plus, le bénéficiaire peut ajouter des éléments à la liste de travaux à corriger ou à parachever dans les 3 jours qui suivent la réception, à la condition qu'il n'ait pas emménagé dans le bâtiment ou dans sa partie privative de la copropriété.*
>
> *Par ailleurs, la déclaration réception du bâtiment est l'acte par lequel le bénéficiaire déclare accepter le bâtiment qui est en état de servir à l'usage auquel on le destine, sous réserve des travaux à corriger ou à parachever qui auront été énumères sur la présente liste.*"[6]
>
> [Emphasis added]

[23] According to Mr. Kwok, the townhouse was inspected on June 1, 2011, at which time he ascertained the presence of various defects, which according to him, the Contractor undertook to remedy. The inspection of June 1, 2011 does not appear to have been documented, as was the case with the inspection of June 21, 2011.

[24] Mr. Kwok explained that during the inspection of the townhouse, he ascertained the presence of water on the floor of the basement. He brought this fact to the attention of the Contractor, who reassured him that the Beneficiaries had nothing to be worried about, since it was only a matter of having to clean the basement prior to the acceptance of the townhouse.

[25] The second inspection took place on June 21, 2011 at which time the Contractor corrected many of the initial defects ascertained during the first

[6] Exhibit A-12.

inspection. According to Mr. Kwok, the basement was dry and there was no evidence of infiltration of water into the basement.

[26] There were three (3) "FORMULAIRE D'INSPECTION PRÉRÉCEPTION" filed with the Tribunal, only two (2) of which were identical.

[27] Mr. Kwok filed a "FORMULAIRE D'INSPECTION PRÉRÉCEPTION"[7] ("**FORMULAIRE-B**"), pursuant to which June 21, 2011 was designated as the date of acceptance of the townhouse. FORMULAIRE-B contains a series of defects that the Contractor was required to repair and refers to "*infiltration d'eau au sous-sol*."

[28] The Manager filed as Exhibit A-3 and Exhibit A-12, two "FORMULAIRE D'INSPECTION PRÉRÉCEPTION" ("**FORMULAIRE-A-1**" and "**FORMULAIRE-A-2**"), confirming that the townhouse was accepted by the Beneficiaries on June 21, 2011.

[29] The nature and number of defects contained in FORMULAIRE-A-1 and FORMULAIRE-A-2 differ from the defects listed in the FORMULAIRE-B filed by the Beneficiaries before the Tribunal.

[30] FORMULAIRE-A-1[8] was submitted by the Beneficiaries to the Manager at the time that the claim was filed and was received by the Manager on November 14, 2013. FORMULAIRE-A-2[9] was submitted by the Contractor and was received by the Manager on March 19, 2012.

[31] While FORMULAIRE-A-1 and FORMULAIRE-A-2 contain the identical information identifying the defects that the Contractor undertook to correct, FORMULAIRE-B incorporated a significant number of defects not included in FORMULAIRE-A-1 and FORMULAIRE-A-2.

[32] Mr. Kwok admitted that he inscribed the reference to "*infiltration d'eau au sous-sol*" on his file copy after the parties signed the "FORMULAIRE D'INSPECTION PRÉRÉCEPTION". Mr. Kwok did not explain the additional defects listed on the last page of the FORMULAIRE-B that were not included in his copy, FORMULAIRE-A-1[10] or in the Contractor's copy, FORMULAIRE-A-2[11].

[33] The Tribunal shall deal with the inscription referring to the "*infiltration d'eau au sous-sol*" when reviewing the evidence adduced by the Beneficiaries.

i. Infiltration of water - June-July 2011

[7] Exhibit B-4.
[8] Exhibit A-3.
[9] Exhibit A-12.
[10] Exhibit A-3.
[11] Exhibit A-12.

[34] It would appear that the Beneficiaries moved into the townhouse during the "*1st week of July 2011*"[12], at which time they ascertained a number of deficiencies one of which was identified as "*Basement storage room has water leakage as water were found on the ground of the storage room*".[13]

[35] While the Beneficiaries gave written notice of the infiltration of water to the Contractor, they did not give written notice to the Manager of the infiltration of water referred to in their letter dated July 11, 2011[14].

[36] Mr. Kwok explained in his testimony that after the Contractor's representatives inspected the building; they determined that the water infiltrated along the side of the exterior wall of the front of the building and the stair landing. The Contractor caulked the joint along the side of the building where the stair landing met the front wall of the townhouse.

[37] The corrective work performed by the Contractor is visible in Exhibit B-13[15] which is reproduced below:

ii. Infiltration of water during June 2012

[38] On June 28, 2012, after heavy rainfall, the problem re-occurred with water infiltrating once again into the basement.

[12] Exhibit B-6, letter dated July 11, 2011 addressed by the Beneficiaries to the Contractor.
[13] Ibid.
[14] Ibid.
[15] The photograph Exhibit B-13 was not taken in 2011. It merely depicts the work performed by the Contractor after the infiltration of water was denounced in July 2011 pursuant to the letter, Exhibit B-6.

[39] On July 18, 2012[16], the Beneficiaries gave written notice to the Contractor of the infiltration of water into the basement, calling upon the Contractor to repair the construction defect. The Beneficiaries did not denounce in writing to the Manager the infiltration of water that occurred on June 28, 2012.

[40] The Beneficiaries' disclosure was worded as follows:

> "*WATER LEAKAGE IN THE STORAGE ROOM – still unsolved even though you made sealant to the concrete joints on top of the stair entrance outside the house. Water still came in from other area. It happened in heavy rainfall. Please fix this problem as it happened since I moved into this house.*"[17]

[41] According to Mr. Kwok, the Contractor sent someone to inspect the claim, however, subsequently, the Contractor did not return to perform any corrective work to remedy the construction defect.

[42] By September 2012, seeing that the Contractor did not perform any additional work to remedy the construction defect, Mr. Kwok called the Manager. He spoke to someone who allegedly informed him that he would first have to make a claim with the Contractor and if the Contractor failed to correct the defect, a claim would have had to be made with the Manager who would then open a file and look into the Beneficiaries' claim.

[43] According to Mr. Kwok, by September 2012, there were no further incidents involving water infiltrating into the basement. Consequently, the Beneficiaries did not send a written notice to the Manager disclosing the infiltration of water that occurred on June 28, 2012.

iii. Infiltration of water during August 2013

[44] One year later, on August 30, 2013, following a thunderstorm, the Beneficiaries' basement was once again infiltrated by water[18].

[45] On September 4, 2013, Mr. Kwok sent an email to "SAVCONSTRUCTION" stating that "…*the past week-end 30 Aug 2013. A thunder storm with wind and rain hit my area. My basement below the main entrance stair. Water leaking into my cool room area*…"[19].

[46] By letter dated September 11, 2013, Mr. Kwok gave written notice to the Contractor and the Manager that water infiltrated into the basement:

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[16] Exhibit B-7.
[17] Exhibit B-7.
[18] Exhibit B-11.
[19] Ibid.

> "*Please note that a water leakage problem in my house due to heavy rainfall on August 30, 2013. Water came into my basement under the main entrance staircase areas. Notification was sent to your Sav Bois des Caryers at the email address given. No reply to my email, no technician came to visit*…"[20]

[47] Ms. Anne Delage ("*inspecteur-concilateur*") visited the building on May 1, 2014[21], and rendered her decision on July 14, 2014[22].

THE DECISION RENDERED BY THE MANAGER

[48] The facts upon which the Ms. Delage relied to render her decision are recited at length below:

> "*Dans le cadre du Règlement sur le plan de garantie des bâtiments résidentiels neufs, les bénéficiaires ont déposé une demande de réclamation auprès de l'administrateur. L'avis adresse à l'entrepreneur et à l'administrateur porte sur l'élément suivant:*
>
> *Avis reçu par l'administrateur le 12 septembre 2013*
>
> - *Infiltration d'eau au sous-sol*
>
> *Puisque la découverte de l'élément mentionné à la demande de réclamation des bénéficiaires a eu lieu dans la première année de la garantie, l'administrateur doit se référer à l'article 3.2 du contrat de garantie, lequel porte sur les malfaçons.*
>
> *En vertu de cet article, exception faite des travaux de parachèvement et des malfaçons dénoncés par écrit lors de la réception, pour être couvert par la garantie, le point dénoncé dans la demande de réclamation des bénéficiaires doit répondre aux critères de la malfaçon, à savoir:*
>
> *a) L'entrepreneur a-t-il fait défaut de se conformer aux règles de l'art ou à une norme en vigueur applicable au bâtiment?*
>
> *b) Les malfaçons étaient-elles cachées au moment de la réception du bâtiment?*
>
> *De plus, le point doit avoir été dénoncé par écrit à l'entrepreneur et a l'administrateur à l'intérieur d'un délai raisonnable, lequel ne peut excéder six (6) mois de la découverte et ne doit pas faire partie des exclusions mentionnées à la section 4 du contrat de garantie.*

[20] Exhibit A-5.
[21] Exhibit A-8.
[22] Ibid.

FAITS, ANALYSE ET DECISION

1. INFILTRATION D'EAU AU SOUS-SOL

Les faits

Au cours de l'année 2011, soit en première année de garantie, les bénéficiaires ont constaté une infiltration d'eau au haut de la porte située entre la salle de lavage et la chambre froide.

À l'époque, ils ont contacté l'entrepreneur, lequel a exécuté des travaux correctifs.

Il appert que le 30 août 2013, de l'eau s'est à nouveau infiltrée, au même endroit.

ANALYSE ET DECISION (point 1) :

Les bénéficiaires ont déclaré avoir découvert la situation décrite au point 1 au cours de l'année 2011.

Quant à l'administrateur, il fut informe par écrit de l'existence de cette situation pour la première fois, le 12 septembre 2013.

En ce qui a trait au délai de dénonciation, le contrat de garantie stipule que les malfaçons, les vices cachés ou les vices majeures, selon le cas, doivent être dénoncés par écrit à l'entrepreneur et à l'administrateur dans un délai raisonnable, lequel ne peut excéder six (6) mois de leur découverte ou survenance ou, en cas de vices ou de pertes graduels, de leur première manifestation.

Dans le cas présent, il appert que le délai de dénonciation excède le délai raisonnable qui a été établi par le législateur et par conséquent, l'administrateur ne peut donner suite à la demande de réclamation des bénéficiaires à l'égard de ce point.

CONCLUSION

POUR TOUS CES MOTIFS, L'ADMINISTRATEUR:

NE PEUT CONSIDERER la demande de réclamation des bénéficiaires pour le point 1."[23]

[Emphasis added]

[23] Exhibit A-8.

PLEADINGS BY THE BENEFICIAIRES

[49] The Beneficiaries pretend that they denounced the claim within the delays prescribed by the *Regulation*.

PLEADINGS BY THE MANAGER

[50] The Manager's position is set out in the Decision hereinabove cited at length.

[51] In addition the Manager's attorneys advanced the following arguments:

[51.1] The *Regulation* is public order;

[51.2] The guarantees are limited by the provisions of the *Regulation*;

[51.3] The Beneficiaries have the burden of proof to establish their claim;

[51.4] The claim filed by the Beneficiaries must be made in accordance with the provisions of the *Regulation* which procedures are imperative;

[51.5] The principle of equity cannot be used to save a claim made outside the delays prescribed by the *Regulation*.

ISSUES IN DISPUTE

[52] There is only one issue in dispute before the Tribunal. The issue relates to the denunciation by the Beneficiaries of the construction defect evidenced by the infiltration of water in accordance with the provisions prescribed by the *Regulation*.

ANALYSIS

[53] In order to facilitate a better understanding of the Arbitration Award, it is pertinent to reproduce below, the articles that would apply in the present case:

> "***Regulation respecting the guarantee plan for new residential buildings, R.S.Q., c B-1.1, r 8****:*
>
> ***CHAPTER I***
>
> ***INTERPRETATION AND APPLICATION***
>
> ***SECTION I***
>
> ***INTERPRÉTATION***

"beneficiary" means a person, a partnership, an association, a non-profit organization or a cooperative that enters into a contract with a contractor for the sale or construction of a new residential building and, in the case of the common portions of a building held in divided co-ownership, the syndicate of co-owners; (bénéficiaire)

"building" means the building itself, including the installations and equipment necessary for its use, specifically, the artesian well, connections with municipal or government services, the septic tank and its absorption field and the subsoil drain; (bâtiment)

"contractor" means a person holding a general contractor's licence authorizing him to carry out or have carried out, in whole or in part, for a beneficiary, construction work on a new residential building governed by this Regulation; (entrepreneur)

"manager" means a legal person authorized by the Board to manage a guarantee plan, or a provisional manager designated by the Board under section 83 of the Building Act (R.S.Q., c. B-1.1). (administrateur)

DIVISION II

APPLICATION

2. *This Regulation applies to guarantee plans guaranteeing the performance of the contractor's legal and contractual obligations provided for in Chapter II and resulting from a contract entered into with a beneficiary for the sale or construction of*

(2) *the following new buildings intended mainly for residential purposes and held in divided co-ownership by the beneficiary of the guarantee:*

(a) *a detached, semi-detached or row-type single-family dwelling;*

CHAPTRE II

MINIMUM GUARANTEE

DIVISION I

GUARANTEE AND REQUIRED MEMBERSHIP

6. *Any person wishing to become a contractor for the new residential buildings referred to in section 2 shall, in accordance with Division I of Chapter IV, join a plan guaranteeing the performance of the legal*

and contractual obligations provided for in section 7 and resulting from a contract entered into with a beneficiary.

DIVISION II

CONTENT OF THE GUARANTEE

7. *The guarantee plan shall guarantee the performance of the contractor's legal and contractual obligations to the extent and in the manner prescribed by this Division.*

§2. Guarantee for Buildings Held in Divided Co-ownership

I. Coverage of the Guarantee

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*

(1) *completion of the work, notice of which is given in writing*

(a) *by the beneficiary, at the time of acceptance of the private portion or, so long as the beneficiary has not moved in, within 3 days following acceptance; and*

(b) *by the building professional, at the time of acceptance of the common portions;*

(2) *repairs to apparent defects or poor workmanship as described in article 2111 of the Civil Code, notice of which is given in writing at the time of acceptance or, so long as the beneficiary has not moved in, within 3 days following acceptance;*

(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, 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 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 the meaning of article 1739 of the Civil Code; and*

(5) *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 appear within 5 years following the end of the work on the common portions or, where there are no common portions forming part of the building, the private portion, 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.*

34. *Any claim based on the guarantee referred to in section 27 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 contractor in writing of the construction defect found and send a copy of that notice to the manager in order to suspend the prescription;*

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

C.C.Q., R.S.Q., c C-191

BOOK SEVEN

EVIDENCE

TITLE ONE

GENERAL RULES OF EVIDENCE

CHAPTER I

GENERAL PROVISIONS

2803. *A person seeking to assert a right shall prove the facts on which his claim is based.*

A person who claims that a right is null, has been modified or is extinguished shall prove the facts on which he bases his claim.

2804. *Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.*

2805. *Good faith is always presumed, unless the law expressly requires that it be proved.*

> ***TITLE TWO***
>
> *MEANS OF PROOF*
>
> ***2811.*** *A fact or juridical act may be proved by a writing, by testimony, by presumption, by admission or by the production of real evidence, according to the rules set forth in this Book and in the manner provided in the Code of Civil Procedure (chapter C-25) or in any other Act.*"
>
> [Emphasis added]

A. BURDEN OF PROOF

[54] It is a well-established principle of law that the burden of proof rests with the party making a claim before the Tribunal. Article 2803 of the Civil Code of Quebec reads as follows:

> "*2803. A person wishing to assert a right shall prove the facts on which his claim is based.*"

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

> "*2804. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.*"

[56] Article 2811 of the Civil Code of Quebec sets out the manner in which a party discharges the burden of proof, which article reads as follows:

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

[57] Accordingly, it was up to the Beneficiaries to adduce the evidence susceptible of being made in accordance with the rules of evidence of the Province of Quebec.

[58] The Beneficiaries have the burden to prove on the balance of probabilities the circumstances relating to the denunciation of the infiltration of water caused by a construction defect.

[59] The rules referred to, are means of weighing the evidence presented by the parties before the Tribunal.[24]

[60] The Tribunal is therefore required to consider the merit of the Beneficiaries' claim in light of the obligations imposed upon the Beneficiaries to establish on the balance of probabilities the existence of those material facts relevant in determining whether they gave written notice to the Contractor and the Manager of the construction defect within the delay prescribed by the *Regulation*.

[61] In the present instance, the Beneficiaries failed to discharge the burden of proof establishing the facts pertaining to the denunciation of the infiltration of water forming part of point 1 of the Decision, for the reasons to be set out in greater length hereinafter.

B. THE FACTS

[62] The Tribunal shall examine, analyse, and consider the evidence presented by the parties in light of the facts established before the Tribunal and the legislative provisions applicable to the present instance.

[63] According to Mr. Kwok, the first inspection of the townhouse took place on June 1, 2011, at which time he ascertained the presence of water on the floor of the basement. The first inspection is not documented and evidently, the Beneficiaries did not file a similar "FORMULAIRE D'INSPECTION PRÉRÉCEPTION" as the ones filed as Exhibits A-3 and A-12.

[64] The second inspection took place on June 21, 2011 at which time the "FORMULAIRE D'INSPECTION PRÉRÉCEPTION" Exhibits A-3 and A-12 were signed by the Beneficiaries and the Contractor. Exhibit A-3 represented the Beneficiaries' copy while Exhibit A-12 represented the Contractor's copy.

[65] Mr. Kwok testified that the basement floor was dry and there was no evidence of infiltration of water. The Tribunal is called upon to conclude that the infiltration of water referred to in the letter of July 11, 2011[25], would have occurred between June 21, 2011 and the first week of July 2011[26].

[66] The "FORMULAIRE D'INSPECTION PRÉRÉCEPTION" filed as Exhibits A-3 and A-12 do not refer to an existing construction defect associated with the infiltration of water into the basement.

[24] *Caisse populaire de Maniwaki v. Giroux*, [1993] 1 S.C.R. 282
[25] Exhibit B-6.
[26] Ibid.

[67] Why did Mr. Kwok inscribe on his copy of the FORMULAIRE-B[27] the reference to "*infiltration d'eau au sous-sol*." when the basement floor was dry?

[68] It is evident that he inserted the said reference for the purposes of the hearing that took place before the Tribunal.

[69] FORMULAIRE-B does not have any probative value to establish the presence of a construction defect that would have caused the infiltration of water into the basement at the time that the townhouse was inspected or thereafter.

[70] Subsequent to the Beneficiaries accepting the townhouse, there were three incidents involving the infiltration of water into the basement, which occurred during June 21 and the first week of July 2011, June 2012 and August 2013.

[71] The Beneficiaries gave written notice to the Contractor of the construction defect relating to the infiltration of water that occurred during the months of June-July 2011[28] and June 2012[29] but did not give written notice of the construction defect to the Manager.

[72] It was only during the month of September 2013 that the Beneficiaries first gave written notice to the Contractor and the Manager of the construction defect associated with the infiltration of water into the basement of the townhouse.

[73] The written notice given by the Beneficiaries to the Manager of the construction defect occurred twenty-six (26) months after the Beneficiaries first learned of the existence of a construction defect associated with the infiltration of water that took place sometime during the period of June 21, 2011 to the first week of July 2011.

C. THE *REGULATION*

i. PRELIMINARY OBSERVATIONS RELATING TO THE APPLICATION OF THE *REGULATION*

[74] In *Garantie des bâtiments résidentiels neufs de l'APCHQ inc. c. MYL Développement inc.*, 2011 QCCA 56 (CanLII), Mr. Justice André Rochon of the Court of Appeal dealt with the notion of the guarantee plan and held that:

> "*[10] En l'espèce, ce plan de garantie est au bénéfice des personnes qui ont conclu un contrat avec un entrepreneur pour la construction d'un bâtiment résidentiel neuf.* "

[75] In *La Garantie des Bâtiments Résidentiels Neufs de l'APCHQ Inc. c. Desindes*, 2004 CanLII 47872 (QC CA), the Court of Appeal of Quebec

[27] Exhibit B-4.
[28] Exhibit B-6.
[29] Exhibit B-7.

recognized that the provisions prescribed by the *Regulation* are public order[30] and cannot be derogated from:

> "*[11] Le Règlement est d'ordre public[4]. Il pose les conditions applicables aux personnes morales qui aspirent à administrer un plan de garantie[5]. Il fixe les modalités et les limites du plan de garantie ainsi que, pour ses dispositions essentielles, le contenu du contrat de garantie souscrit par les bénéficiaires de la garantie, en l'occurrence, les intimés.*
>
> *[12] L'appelante est autorisée par la Régie du bâtiment du Québec (la Régie) à agir comme administrateur d'un plan de garantie approuvé[6]. Elle s'oblige, dès lors, à cautionner les obligations légales et contractuelles des entrepreneurs généraux qui adhèrent à son plan de garantie.*
>
> *[13] Toutefois, cette obligation de caution n'est ni illimitée ni inconditionnelle[7]. Elle variera selon les circonstances factuelles, notamment selon que le défaut de l'entrepreneur général survient avant ou après la « réception du bâtiment », soit : «l'acte par lequel le bénéficiaire déclare accepter le bâtiment qui est en état de servir à l'usage auquel on le destine…[8].*
>
> *[…]*
>
> *[15] La réclamation d'un bénéficiaire est soumise à une procédure impérative.*"
>
> [Emphasis added]

[76] In *Garantie des bâtiments résidentiels neufs de l'APCHQ inc.* c. *Dupuis*, 2007 QCCS 4701, Justice Michèle Monast, J.S.C. dealt with the notion of equity and its application to the *Regulation* and held that:

> "*[75] Il est acquis au débat que l'arbitre doit trancher le litige suivant les règles de droit et qu'il doit tenir compte de la preuve déposée devant lui. Il doit interpréter les dispositions du Règlement et les appliquer au cas qui lui est soumis. Il peut cependant faire appel aux règles de l'équité lorsque les circonstances le justifient. Cela signifie qu'il peut suppléer au silence du règlement ou l'interpréter de manière plus favorable à une partie.*
>
> *[76] L'équité est un concept qui fait référence aux notions d'égalité, de justice et d'impartialité qui sont les fondements de la justice naturelle. Dans certains cas, l'application littérale des règles*

[30] *Roll et Groupe Maltais (97) inc.*, M[tre] Michel A. Jeanniot, Arbitrator, SORECONI, 060224001 A and 060224001 B, 2006-06-06.

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 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]

[77] In *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 arbitrator, M^tre^ Jean Philippe Ewart dealt with the manner in which the *Regulation* is meant to be interpreted:

> *"[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.*"

[78] In the present instance, the Contractor was a person holding a general contractor's licence issued by the *Régie du Bâtiment du Québec* (Contractor N° 5604-3813-01[31]) authorizing it (Accreditation N°. 208815[32]) for the benefit of a beneficiary (the Beneficiaries in the present instance[33]), the construction of a new residential building governed by the *Regulation*.

[79] Notwithstanding that the Beneficiaries and the Contractor did not sign a guarantee agreement setting out the terms of the guarantee plan, the parties' clear intentions was that the construction of the townhouse would be guaranteed by the guarantee plan made available by the Manager.

[80] There is no dispute that the Beneficiaries' townhouse was covered by the guarantee plan made available by the Manager and consequently, the provisions of the *Regulation* apply in their entirety.

[81] While the Beneficiaries benefit from the guarantee plan, to do so, they are obliged to follow and respect the provisions prescribed by the *Regulation*. Failure to do so entails the loss of the benefit provided by the guarantee plan.

[82] The Tribunal in rendering the Arbitration Award does so within the framework of the facts established before it and the principles enunciated by the decisions referred to hereinabove and hereinafter.

ii. THE APPLICATION OF SECTION 27 OF THE *REGULATION*

[83] Article 27 of the *Regulation* applies to a building 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:

> "*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, and notice of*

[31] Exhibit A-3 and Exhibit B-3.
[32] Ibid.
[33] Ibid.

> *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 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 the meaning of article 1739 of the Civil Code; and*
>
> *(5) 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 appear within 5 years following the end of the work on the common portions or, where there are no common portions forming part of the building, the private portion, 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]

[84] In addition, a beneficiary making a claim under section 27 of the *Regulation* is required to follow the provisions set out in section 34(1) of the *Regulation* that reads as follows:

> "*34. Any claim based on the guarantee referred to in section 27 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 contractor in writing of the construction defect found and send a copy of that notice to the manager in order to suspend the prescription;*"
>
> [Emphasis added]

[85] It is to be noted that the Legislator used the same language throughout section 27 subparagraphs (3), (4) and (5) when prescribing the obligation imposed upon beneficiaries to give written notice of the construction defect.

[86] The Legislator did not distinguish between the nature of the construction defects such as "*poor workmanship*" [section 27(3)], "*latent defects*" [section 27(4)] or "*faulty design, construction or production of the work, or the unfavourable nature of the ground*" [section 27(5)] and the obligation imposed upon a beneficiary to give written notice to the contractor and the manager, disclosing the existence of a construction defect.

[87] The Legislator imposed an imperative[34] obligation on a beneficiary to give written notice of a construction defect to the contractor and the manager, which written notice had to be given "*within a reasonable time not to exceed 6 months following the discovery*" of the construction defect.[35]

iii. DID THE BENEFICIARIES GIVE WRITTEN NOTICE OF THE CONSTRUCTION DEFECT WITHIN THE DELAY PRESCRIBED BY THE *REGULATION*?

[88] The coverage provided to beneficiaries by the guarantee plan insofar as the Manager is concerned arises only after a contractor has failed to perform its legal and contractual obligations following the acceptance of the building.

[89] In the present case, the giving of the written notice to the Contractor and the Manager denouncing the construction defect relating to point 1, constitutes the crux of the present arbitration.

[90] The provisions of the *Regulation* are clear on the subject matter relating to disclosing construction defects. In order for the Beneficiaries to suspend the prescription of a claim made under section 27, they were required pursuant to section 34(1) to give written notice to the Contractor and the Manager.

[91] The Legislator referred specifically in Section 34 to section 27 in obliging the Beneficiaries who submitted a "*claim based on the guarantee referred to in section 27*" to give written "*notice to the contractor … of the construction defect found and send a copy of that notice to the manager in order to suspend the prescription*".

[92] Section 27 deals with construction defects that are discovered during the guarantee period of one (1), three (3) or five (5) years following the acceptance of the townhouse. The construction defects forming part of a claim made pursuant to sections 27(3), 27(4) and 27(5) cannot have been apparent at the time that the building was accepted by the beneficiaries.

[93] Section 27(3), guarantees the repair of "*non-apparent poor workmanship existing at the time of the acceptance*" of the townhouse and discovered within "*1 year after acceptance*" provided that notice was given to the Contractor and the Manager "*within a reasonable time not to exceed 6 months following the discovery of the poor workmanship*".

[94] Section 27(4), guarantees the repair of "*latent defects*" discovered within "*3 years following acceptance*" provided that notice was given to the contractor and the manager "*within a reasonable time not to exceed 6 months following the discovery of the latent defects*". The guarantee plan secures the repair of

[34] *Domaine et Construction Robert Garceau inc.*, M^tre^ Michel A. Jeanniot, Arbitrator, CCAC, S13-091201-NP, 2014-07-18.
[35] *Hamelin et Groupe Sylvain Farand inc.*, M^tre^ Jean Robert LeBlanc, Arbitrator, CCAC, S13-121002-NP, 198489-1 and ARB-3706, 2014-04-26.

latent defects discovered within the three years following the acceptance of the building.

[95] Section 27(5), guarantees the repair of defects arising from "*faulty design, construction or production of the work, or the unfavourable nature of the ground*" which "*appear within 5 years following the end of the work on the common portions or, where there are no common portions forming part of the building, the private portion*" provided that written notice was given to the contractor and the manager "*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*".

[96] According to Mr. Kwok, the Beneficiaries moved into the townhouse during the first week of July 2011[36]; July 1, 2011 fell on a Friday with the week ending on Sunday, July 10, 2011.

[97] As at July 11, 2011, the Beneficiaries were aware of the existence of a construction defect that had to be disclosed in writing.

[98] The letter dated July 11, 2011[37], constituted a written notice disclosing a construction defect given to the Contractor discovered within one (1) year following the acceptance of the townhouse, which would have been covered by section 27(3) of the *Regulation*.

[99] However, the written notice dated July 11, 2011[38] was only given to the Contractor and not to the Manager, for reasons that were not explained by Mr. Kwok.

[100] Section 27(3) and Section 34(1) of the *Regulation* do not require the Beneficiaries to have given written notice simultaneously to the Contractor and the Manager.

[101] Mr. Knowk could have given written notice of the construction defect to the Manager any time after July 11, 2011, provided that he did so within a reasonable delay that did not exceed six months following the discovery of the construction defect which in this case would have been no later than January 11, 2012.

[102] Mr. Kwok chose not to give written notice to the Manager and consequently, the Manager was not informed of the construction defect that caused the infiltration of water during the period of June 21, 2011 and the first week of July 2011.

[36] Exhibit B-6.
[37] Ibid.
[38] Ibid.

[103] The written notice of July 11, 2011, does not constitute a valid notice that triggers the coverage under the guarantee plan for which the Manager is responsible in the event that the Contractor failed to respect its contractual and legal obligations.

[104] The same can be said of the letter of July 18, 2012[39]. It may have been a written notice given by the Beneficiaries to the Contractor disclosing a construction defect.

[105] However, the Beneficiaries were disclosing a construction defect, which they were aware of since July 11, 2011. In addition, the written notice was deficient in itself since it was not given to both the Contractor and the Manager.

[106] The written notice of September 11, 2013[40], constituted a claim disclosing the same construction defect given this time to the Contractor and the Manager.

[107] Nevertheless, the Beneficiaries were aware of the construction defect since July 2011, and consequently, the written notice given twenty-six (26) months after its discovery fell outside the maximum delay of six (6) months following the discovery of the construction defect.

iv. IS THE DELAY TO GIVE NOTICE ONE OF PROCEDURE CAPABLE OF BEING REMEDIED OR IS IT ONE OF SUBSTANTIAL LAW THAT IS PRESCRIPTIVE IN NATURE RESULTING IN THE BENEFICIARIES BEING FORECLOSED FROM EXERCISING THEIR RIGHTS?

[108] In the *Christou* case, M^tre^ Ewart reviewed this question extensively in his appreciation of the application of section 10 of the *Regulation*, which provisions are similar in nature to the provisions found in section 27 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[13] of the Civil Code of Québec ("C.c.Q.")[14] is a first element of response:*
>
> > *"1739. A buyer who ascertains that the property is defective <u>may give notice in writing</u> of the defect to the seller only within a reasonable time after discovering it. The time begins to run, where the defect appears gradually, <u>on the day that the buyer could have suspected the seriousness and extent of the defect</u>."*
>
> *30. The authors have viewed this notice as an extra judicial demand subject to art. 1595 C.c.Q.:*

[39] Exhibit B-7.
[40] Exhibit A-5.

> *"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[15] and the Courts[16] have considered the notice under art. 1739 to be specifically required to be in writing, and to be imperative and essential in nature.

31. The courts have in several occasions[17] 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[18] and I am of the view that this applies to the Manager under section 10 of the Regulation.

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[19]:

> *"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]

[109] The Tribunal subscribes to the opinion expressed by M^tre^ Ewart in the *Christou* case. The Legislator used the word “*shall*” in section 34(1) thereby creating an imperative obligation which the Beneficiaries have to respect “*… in order to suspend the prescription*”.

[110] Section 27(3) read together with section 34(1) imposes two imperative obligations that must be respected by the Beneficiaries in order to benefit from the coverage provided by the guarantee plan, namely:

[110.1] The obligation to denounce the construction defect in writing to the Contractor and the Manager; and

[110.2] To do so within a reasonable delay that could not exceed 6 months from the discovery of the construction defect, failing which prescription will not be interrupted.

V. WHAT IS THE NATURE OF THE DELAY PRESCRIBED BY VARIOUS SUBPARAGRAPHS OF SECTION 27 OF THE *REGULATION*?

[111] The nature of the delay provided in section 27 of the *Regulation* was reviewed extensively by M^tre^ Ewart in the *Christou* case. The arbitrator raised the question whether the delay of six (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, he 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.*”
>
> …

> *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[36] and consequently extinguish the right of the Beneficiaries to require the coverage of the Guarantee Plan*."
>
> [Emphasis added]

vi. IF THE NOTICE OF DENUNCIATION WAS GIVEN BEYOND THE DELAY PRESCRIBED BY SECTION 27(3) 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?

[112] M^tre^ Ewart in the *Christou* case considered the consequences faced by beneficiaries when their rights are 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. "[37]*
> >
> > *"… 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"*

[113] In the present instance, the Beneficiaries' failure to give written notice to the Contractor and Manager within a delay that did not exceed six (6) months from the discovery of the construction defect that caused the infiltration of water is fatal to their claim relating to point 1.

[114] Lastly, the Beneficiaries took twenty-six (26) months to give written notice to the Contractor and the Manager, the construction defect that caused the infiltration of water.

[115] Arbitrators have denied coverage under the guarantee plan, in cases where the beneficiaries gave written notice to the contractor and the manager: (1) nine (9) months[41]; (2) twenty-five (25) months[42]; (3) two (2) and four (4) years[43] after the discovery of the construction defects.

[116] Arbitrators have also denied coverage under the guarantee plan in cases where beneficiaries gave written notice to the contractor within the delays and to the manager beyond the delays prescribed by the *Regulation*[44].

[117] The Beneficiaries' failure in July 2011 to give written notice to the Contractor and the Manager of the construction defect that caused the infiltration of water into the basement, results in the prescription of the Beneficiaries' claim and forfeiture of any rights that could have been asserted under the guarantee plan.

vii. DOES THE TRIBUNAL HAVE DISCRETION TO OVERLOOK THE GIVING OF A WRITTEN NOTICE OUTSIDE THE LEGAL DELAYS PRESCRIBED BY SECTION 27(3) OF THE *REGULATION* WHEN IT IS FAIR OR EQUITABLE TO DO SO, NOT TO DEPRIVE THE BENEFICIARIES FROM EXERCISING THEIR RIGHTS?

[118] It was established before the Tribunal that the Beneficiaries discovered the infiltration of water in their basement sometime during the first week of July 2011. On July 11, 2011, the Beneficiaries gave written notice of the construction defect to the Contractor. They had until January 11, 2012 to give written notice of the construction defect to the Manager.

[119] The Beneficiaries did not provide any explanation for their failure to give written notice to the Manager of the construction defect that caused the infiltration of water sometime between June 21, 2011 and the first week of July 2011.

[120] The Tribunal is sympathetic with the Beneficiaries' situation and the possibility that they may not have fully appreciated or understood their obligation to give written notice to the Contractor and the Manager disclosing the construction defect within the delay prescribed by section 27(3) of the *Regulation*.

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[41] *Danesh v. Solico Inc. and La garantie des bâtiments résidentiels neufs de l'APCHQ Inc., SORECONI 070821001, 2008-05-05*
[42] *Parent c. Construction Yvon Loiselle Inc. et La garantie des bâtiments résidentiels neufs de l'APCHQ Inc., 2012-07-23*
[43] *Syndicat de copropriété Les Condos du Cerf (2147) c. Habitations de la Bourgade, 2006 CanLII 60490 (QC OAGBRN), 2006-10-20*
[44] *Danesh v. Solico Inc. and La garantie des bâtiments résidentiels neufs de l'APCHQ Inc., SORECONI 070821001, 2008-05-05; Parent c. Construction Yvon Loiselle Inc. et La garantie des bâtiments résidentiels neufs de l'APCHQ Inc., 2012-07-23*

[121] Even if Mr. Kwok would have stated that, he did not know that he had to give written notice to both the Contractor and the Manager, the Beneficiaries are presumed to know their obligations and as such, lack of knowledge is insufficient to prevent the forfeiture of the Beneficiaries' rights under the guarantee plan.

[122] The Tribunal in its deliberation is required to decide the issues that are presented before it, in accordance with the rules of law. Section 116 of the *Regulation* allows the Tribunal to apply the principle of fairness or equity when circumstances warrant it.

[123] The Tribunal refers to the *La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc.* case where Justice Monast of the Superior Court addressed the manner in which an arbitrator may apply equity within the framework of the *Regulation*. The lengthy citation is found at paragraph 76 hereinabove.

[124] What were the Legislator's intentions in legislating section 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* that may result in the denial of a party's rights such as is in the present instance.

[125] It is an established fact that the Beneficiaries gave written notice to the Contractor and Manager twenty-six (26) months following the discovery of the construction defect that resulted in the infiltration of water into their basement.

[126] The delays prescribed by section 27(3) of the *Regulation* form part of the rules of law referred to in section 116 that a Tribunal must respect. How can the Tribunal in the present instance apply the rule of law, pursuant to which the Beneficiaries are foreclosed from coverage under the guarantee plan, and, at the same time apply its discretion, and be equitable or fair to the Beneficiaries, by allowing their claim?

[127] Clearly, the strict application of section 27(3) of the *Regulation* on one hand is inconsistent with allowing the Beneficiaries' 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.

[128] On the contrary, section 116 allows a tribunal to exercise its equitable discretion provided that the circumstances warrant it. However, the Tribunal cannot interpret section116 under the circumstances of the present case, to allow it to use principles of equity or fairness and ignore the strict application of section 27 (3) and section 34(1) and thereby de facto extend the delays to give written notice from six (6) to twenty-six (26) months.

[129] The Beneficiaries did not preserve and exercised their rights under the guarantee plan within the legal delay. The consequences suffered by the

Beneficiaries for their failure to respect the imperative provisions set out in section 27(3) and section 34(1) of the *Regulation* brought about the extinction of their rights.

[130] The Tribunal can only exercise its discretion when rights exist. However, rights that are extinguished by the operation of law, no longer exist and consequently, such rights cannot therefore be revived through the exercise of the Tribunal's equitable discretion.[45]

[131] The arbitrator, M^tre^ Rolland-Yves Gagné expressed 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.*" [46]
>
> [Emphasis added]

[132] The arbitrator M^tre^ Johanne Despatis expressed likewise the same view:

> "*[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."* [47]
>
> [Emphasis added]

[133] In the present case, the provisions of the *Regulation* obliged the Beneficiaries to have given the written notice to the Contractor and the Manager within a delay that could not exceed six (6) months following the discovery of the construction defect that caused the infiltration of water.

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[45] *Thilagaruban and 9129-7069 Québec inc.*, M^tre^ Tibor Holländer, Arbitrator, SORECONI, GP 1546496-1 and 122905001, 2012-10-22; *Gattas et Groupe Construction royale inc.*, M^tre^ Tibor Holländer, Arbitrator, SORECONI, 187084-1 and 130606001, 2014-04-22.

[46] *Escobedo et al c. Habitations Beaux Lieux inc. et Garantie des bâtiments résidentiels Neufs de l'APCHQ Inc., SORECONI 122012001, 2011-11-11*.

[47] *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*.

[134] The Beneficiaries' failure to do so cannot be saved by the application of principles of equity or fairness that would therefore result in the Tribunal allowing their claim.

[135] Faced with a delay of forfeiture that requires strict adherence, the Tribunal cannot exercise its discretion in equity or fairness to allow the Beneficiaries to obtain coverage under the guarantee plan, when they failed to respect the strict conditions of denunciation set out in section 27(3) of the *Regulation*. In September 2013, the Beneficiaries no longer had any rights of coverage under the guarantee plan, since their rights were extinguished by prescription.

[136] To allow the Beneficiaries' claim, would in itself constitute an abuse of the principles of equity or fairness. The Beneficiaries would continue to indirectly conserve their rights, notwithstanding that they no longer had any rights at the time that they gave written notice to the Contractor and the Manager, their rights having been extinguished by January 2012.

viii. DO THE SUBSEQUENT INFILTRATIONS OF WATER IN 2012 AND 2013 CONSTITUTE INDEPENDENT CLAIMS?

[137] For the purposes of the Beneficiaries' obligations to give written notice to the Contractor and Manager of the construction defect, can the Tribunal treat the infiltrations of water of June 2012 and August 2013, independently from that which occurred during June-July 2011?

[138] The Manager's obligation to correct a construction defect only arises once the Contractor fails to perform its "*legal or contractual obligations*"[48].

[139] In the present instance, in order for the infiltration of water of June 2012 and August 2013 to be considered as separate and distinct claims, the construction defect that was the source for the infiltration of water had to be different as well.

[140] The knowledge of the construction defect constitutes the determinant factor in appreciating the obligations imposed upon the Beneficiaries to ensure that the claim made with the Manager fell within the coverage provided by the guarantee plan.

[141] A construction defect may cause multiple consequences. It is for this very reason that the Beneficiaries were obliged to give written notice of the

[48] *Section 2. This Regulation applies to guarantee plans guaranteeing the performance of the contractor's legal and contractual obligations…*; *Section 7. The guarantee plan shall guarantee the performance of the contractor's legal and contractual obligations to the extent and in the manner prescribed by this Division.*; *Section 9. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations…*; *Section 10. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations…*; *Section 26. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations…*; *Section 27. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations…* of the *Regulation*.

construction defect to the Contractor and the Manager once they ascertained it in July 2011.

[142] 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 subsequently discovered. She expressed the following view:

> "*[45] La jurisprudence est constante à 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]

[143] The Tribunal subscribes to the view expressed by the arbitrator Karine Poulin in the *Parent* case. Had the Beneficiaries given written notice to the Manager of the infiltration of water that occurred during June-July 2011, that denunciation would have conserved the Beneficiaries' rights of coverage under the guarantee plan concerning the subsequent infiltration of water that was occasioned by the same construction defect.

[144] In the present instance the subsequent infiltration of water that occurred during the month of June 2012 and August 2013, do not constitute separate claims.

[145] Mr. Kwok testified that the water dripped into the basement through the doorframe giving access to the cold room located underneath the stairs. The video[49] filed by the Beneficiaries established this fact.

[146] The Beneficiaries gave written notice to the Contractor of the infiltration of water, which occurred in June 2012. The Contractor investigated the complaint but did not perform any remedial work.

[49] Exhibit B-15.

[147] The Beneficiaries expressed sufficient concern and communicated with the Manager's offices, but did not subsequently act upon their complaint to the Contractor.

[148] Consequently, not only did the claim relate to the construction defect of which the Beneficiaries were aware since July 2011, but they also failed to disclose the continued construction defect to the Manager.

[149] Concerning the written notice given to the Contractor and the Manager in September 2013, while the notice was given within weeks following the infiltration of water, the Beneficiaries were aware of the construction defect since the infiltration of water that occurred in June-July 2011.

[150] While the infiltration of water occurred at two different periods, the claims are not distinct and different since they arose from the same construction defect.

[151] Under the circumstances of the present case, the infiltration of water during the months of June 2012 and August 2013, form part of the continuing infiltration of water that was due to a construction defect, which the Beneficiaries were aware of since July 2011.

CONCLUSIONS

[152] In view of the foregoing, the Tribunal is of the view that the Beneficiaries breached their obligation to give written notice to the Contractor and the Manager of the construction defect within a delay that could not exceed six (6) months following the discovery of the defect.

[153] The Tribunal finds that the delay prescribed by section 27(3) of the *Regulation* is a delay of forfeiture, which resulted in the extinction of the Beneficiaries rights of coverage under the guarantee plan.

[154] Accordingly, the Tribunal does not have the discretion to extend the delays prescribed by section 27(3) of the *Regulation* with the result that the Beneficiaries are foreclosed from exercising their rights regarding the claim formulated in point 1 of the Decision.

[155] The Tribunal is of the view that the written notice given to the Manager by the Beneficiaries in September 2013 was too late and the Beneficiaries no longer had coverage under the guarantee plan in regard to this particular construction defect.

[156] The Tribunal underlines 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 that may find application to the facts of this case. This Arbitration Award is therefore

without prejudice to the rights of the Beneficiaries to bring any action before the civil courts having jurisdiction, subject to the applicable rules of law.

[157] In accordance with article 123 of the *Regulation*, and as the Beneficiaries have failed to obtain a favorable decision, the Tribunal must determine the division of the costs and fees to be charged between the Manager and the Beneficiaries.

[158] Consequently, the fees of this arbitration, in law and equity, and in accordance with articles 116 and 123 of the *Regulation*, shall be apportioned $50.00 to the Beneficiaries and the remainder to the Manager.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

[159] **DISMISSES** the arbitration demand and claim formulated thereunder by the Beneficiaries.

[160] **MAINTAINS** the Decision rendered on July 14, 2014 by Ms. Anne Delage.

[161] **ORDERS** in accordance with article 123 of the *Regulation respecting the guarantee plan for new residential buildings* that the fees of the present arbitration be borne $50.00 by the Beneficiaries with the remainder by the Manager.

[Original signed]

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M^tre^ Tibor Holländer
Arbitrator