

ARBITRATION

Under the *Regulation respecting the guarantee plan
for new residential buildings*

(c. B-1.1, r.8, Building Act, Revised Statutes of Quebec (R.S.Q.), Canada)

Arbitration body authorized by the Régie du bâtiment du Québec:
Société pour la résolution des conflits inc. (SORECONI)

Between

SYNDICAT DE COPROPRIÉTÉ 1 À 30 TERRASSE VAN GOGH

Beneficiary

And

CONSTRUCTIONS QUORUM INC.

Builder

And

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

Plan Manager

No. Ref. Guarantee Plan: 115449, 115450, 115451-1, 115452, 115453 and 115454-1

No. Ref. SORECONI: 110706001

No. Ref. Arbitrator: 13 249-18

ARBITRATION DECISION

Arbitrator:	Mtre. Jeffrey Edwards, C.Med., C.Arb.
For the Beneficiary:	Mr. Ron Newnham Mr. Bernard Fortier
For the Builder:	Mr. Peter Cosentini
For the Plan Manager:	Mtre. Luc Séguin
Date of hearing:	April 18, 2012
Hearing location:	6700 Trans Canada Highway, Pointe-Claire Quebec H9R 1C2
Date of decision:	May 4, 2012

1. FACTS AND PROCEEDINGS

[1] The Arbitration Tribunal is requested to rule upon an application for arbitration (Exhibit P-14) by the Builder regarding a decision rendered by the Plan Manager (signed by Marc-André Savage) dated May 24, 2011 (Exhibit P-13) (“Decision”).

[2] Since the Beneficiary expressed a preference that the present decision be rendered in English and the Builder and the Plan Manager consented to such request and given that the hearing took place mostly in English, the present decision has been drafted in English.

[3] The Decision ordered the Builder to carry out repairs regarding the following points as entitled in the text of the Decision:

« 1. Fissures au béton des terrasses arrière »

« 2. Infiltration d’eau au béton des terrasses arrière »

« 3. Écoulement d’eau aux ouvertures des murets de soutènement »

[4] The Plan Manager filed into the Arbitration Court Record the following Exhibits :

A-1 (en liasse) Déclarations de copropriété initiale;

A-2 (en liasse) Déclarations de copropriété subséquentes;

A-3 (en liasse) Déclarations d’immatriculation;

A-4 (en liasse) Certificats de fin des travaux;

A-5 (en liasse) Avis de fin des travaux des parties communes du bâtiment;

A-6 Lettre des Bénéficiaires à l’Entrepreneur en date du 10 août 2009;

- A-7** Lettre des Bénéficiaires à l'Administrateur en date du 13 octobre 2009;
- A-8** (en liasse) Lettre du représentant des Bénéficiaires à l'Administrateur en date du 11 mars 2010 et pièces jointes;
- A-9** (en liasse) Avis de 15 jours de l'Administrateur à l'Entrepreneur;
- A-10** (en liasse) Photographies en date du 8 juin 2010;
- A-11** Décision de l'Administrateur en date du 2 septembre 2010;
- A-12** Rapport d'expertise de Stavibel, bureau conseil en services d'ingénierie en date du 9 mars 2011;
- A-13** Décision de l'Administrateur en date du 24 mai 2011;
- A-14** Demande d'arbitrage de l'Entrepreneur en date du 6 juin 2011.

[5] The Builder also filed the report of the structural engineer Avnish Rughani, who worked on behalf of the Builder on the real estate development project in question, dated November 20, 2008, as Exhibit E-1.

[6] The properties in issue are 30 townhouses which are owned in divided co-ownership and represented by the Beneficiary in the present application. In the back of each property, there is a concrete patio which in fact is a concrete slab containing steel reinforcing bars. These reinforced slabs also come together to make the ceiling of a passageway or tunnel leading to the various underground parking spaces of the properties. The slabs rest on foundation walls of the townhouses on one side and a retaining concrete wall on the other side. During a site visit of the properties immediately before the hearing, the Arbitrator was shown the concrete slabs from above ground and below ground inside the tunnel.

[7] According to the proof and testimony, it appears that virtually each patio being part of the slab (with the exception of unit number 6) contains numerous cracks mostly of 1 millimetre in thickness across the width of the slab. The cracks go in a direction from the front to the back of the property and therefore from one side of the tunnel or passageway to the other. The cracks go through the cement slab from the top to the bottom and are visible on both sides.

[8] The Builder has tried to repair the cracks by filling them in with an epoxy type material. This has had only limited success because the cracks continue to allow water to pass through and on the undersurface. The filling material and the elements have combined to form a hanging residue referred to in the testimony at the hearing as stalactites (see photos taken and filed by the Plan Manager as Exhibit A-10). There are also water infiltrations established at various openings of the retaining walls (“murets de soutènement”) (see photos taken and filed by the Plan Manager as Exhibit A-10). These openings have been sealed by the Builder. In most cases the sealings were functional but in others documented by the inspector of the Plan Manager, they were not (see photos of Exhibit A-10).

[9] The work on the properties was generally completed in August 2007 (see Certificate of End of Work deposited by Dorel Friedman, Architect, Exhibit A-4). However, the necessary documentation to trigger the commencement of various guarantees under the *Regulation respecting the guarantee plan for new residential buildings*¹ (“Regulation”) was only deposited with the Plan Manager significantly later, namely on February 20, 2009. In a decision rendered by the Plan Manager (Marc-André Savage) and dated

¹ *Regulation Respecting the Guarantee Plan for New Residential Buildings*, R.S.Q., c. B-1.1, r. 0.2.

September 2, 2012 (Exhibit A-11), the Plan Manager set the legal date for the “Acceptance of the Building” for the common areas under Article 8 of the *Regulation*² as being 6 months from that date, namely August 20, 2009. That decision was not contested by the Builder. The Beneficiary complained of the problems regarding the present points in issue by letter dated October 13, 2009 (Exhibit A-7).

[10] In deciding upon these points, the Plan Manager therefore evaluated them as having been notified within the first year of the guarantee under the *Regulation*.

[11] As a first step after the visit and inspection, the Plan Manager retained the services of Stavibel Engineering Consulting firm (which has now been acquired by the firm SNC-Lavalin) in order to examine the cracks in issue, to verify the structural integrity of the slabs and to determine the cause and consequences of the cracking. Stavibel also examined the original plans, did site visits and investigated the issues. Stavibel prepared an expertise report dated March 9, 2011, that was filed as Exhibit A-12. The Arbitration Tribunal refers to the following extracts of the report:

(Page 2) : « Les dalles de béton extérieures sont structurales, c’est-à-dire qu’elles sont conçues de façon à supporter leur poids propre et une charge additionnelle (surcharge).

Les dalles portent entre les façades arrière des immeubles et les murs de soutènement situés à l’arrière de ceux-ci. Elles ont une portée de plus ou moins 22 pieds (6,7 m).

² Article 8 of the *Regulation*: “Acceptance of the Building” means the act whereby the beneficiary declares that he accepts the building which is ready to be used for its intended purpose and which indicates any work to be completed or corrected; (*réception du bâtiment*).

Elles sont construites en continuité, soit sans aucun joint de construction sur une longueur variant entre 80 et 120 pieds, ce qui correspond à la largeur approximative de 4 ou 6 unités.

De façon générale, les fissures qui affectent les dalles sont dans la direction perpendiculaire au mur de soutènement et à la façade arrière des bâtiments.

Ces fissures sont disposées selon un patron régulier avec un espacement variant entre 6 pieds et 10 pieds.

Elles sont souvent continues entre les murs de soutènement et les façades arrière des bâtiments, et ont une largeur inférieure à 1 mm.

À plusieurs endroits, les fissures traversent l'épaisseur entière de la dalle. Des taches d'efflorescence ont été observées à partir des allées de stationnements, sur l'intrados des dalles, soit la face inférieure de celles-ci.

La majorité des fissures observées ont été réparées avec la technique d'injection à l'époxy. À certains endroits, les fissures se sont ouvertes à nouveau.

Il n'y a pas de joints de construction aménagés dans les dalles. Nous n'avons pas vu de joints de coulée ou de contrôle. »

(Page 6) : « Tel que mentionné au préalable, les fissures observées dans les dalles de béton ainsi que dans les murs de soutènement ne témoignent

pas d'un manque de capacité structurale. Cependant, leur présence facilite la pénétration d'eau à travers de ces éléments structuraux. À long terme, la présence d'eau dans les fissures et l'augmentation de volume qu'elle subit pendant le cycle de gel peut augmenter la largeur de ces fissures, exposant ainsi le béton davantage à l'infiltration d'eau. Ces plans préférentiels de pénétration d'eau contribuent à la corrosion précoce de l'armature et à la dégradation prématurée du béton qui s'en suit. »

(Page 7) : « Nous avons été à même de constater que la fissuration dénoncée par les bénéficiaires résulte de la dilatation thermique des dalles de béton qui ont été construites en continuité sans joints de contrôle et non d'un manque de capacité structurale. Le scellement de ces fissures à l'aide d'un scellant flexible permettra de contrer les effets néfastes de l'infiltration d'eau à travers la dalle, ainsi que de permettre la dilatation thermique du béton sans la création de nouvelles fissures reliées à cet effet. »

[12] Stavibel concluded that there was presently no structural problem with the slabs. However, it was critical of the design. In particular, Stavibel took issue with the lack of control joints in the slabs which it felt would have substantially reduced the amount of cracking.

[13] Based upon these findings and conclusions, the Plan Manager concluded that there was a "malfaçon" or "poor workmanship" in accordance with the legal meaning of

these terms under of the *Civil Code of Quebec* and in particular Article 2120³. In the Plan Manager's Decision (Exhibit A-13) which is the object of the present arbitration, the Plan Manager concluded that the guarantee prescribed at article 27 (3)⁴ of the *Regulation* had been violated by the Builder and ordered the latter to undertake the necessary corrective work as specified in the report of Stavibel. The Builder requested an arbitration of the Decision (Exhibit A-14).

[14] At the hearing, the Builder was represented by its president Peter Cosentini and its project manager, Mike Manocchio. Also, Mr. Avnish Rughani, Engineer, who prepared the structural engineering plans of the project and prepared on site inspection reports regarding the pouring of the slabs, testified at the hearing on behalf of the Builder.

[15] Mr. Rughani is an Engineer who graduated from McGill and has a Master's Degree specializing in matters of structure and has worked over the past 20 years in the field of structure in commercial, industrial and residential projects. Based upon the testimony of the Builder's representatives and Mr. Rughani, the grounds of contestation of the Builder are as follows:

1. the tunnel over which the slabs constitute a tunnel is not habitable and cars do not park there. As such, the leaking water does not fall on to cars and does not damage them;

³ Article 2120 of the *Civil Code of Quebec*: The contractor, the architect and the engineer, in respect of work they directed or supervised, and, where applicable, the subcontractor, in respect of work he performed, are jointly liable to warrant the work for one year against poor workmanship existing at the time of acceptance or discovered within one year after acceptance.

⁴ Article 27 (3) of the *Regulation*: 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;

2. as the structural integrity of the slabs is acknowledged and uncontested, the problem complained of by the Beneficiary and the Plan Manager should not constitute a “malfaçon” or “poor workmanship” under the rules of the trade;

3. all concrete will have cracks when it dries and the cracks in issue are normal;

4. in order to make the slabs/patios waterproof at the time of the initial construction, there would have been substantial additional costs, ranging from \$ 5,000 to \$ 10,000 per unit. One possible method proposed was the installation of a membrane on top of the slabs.

[16] At the hearing, one of the authors of the Stavibel report, Mr. Fernando Junior Leblanc-Carrera, Engineer, testified in support of his report. Mr. Leblanc-Carrera graduated in Engineering from Concordia University in 2006 and has worked as a structural Engineer since that time. His experience has been in the commercial and industrial fields, not in the area of residential developments. He stated that although the slabs were structurally sound with the reinforced steel inserted into the concrete, he felt that the concept of “serviceability” of the slabs and the other aspects mentioned in his report were neglected. He testified that the concept of “serviceability” includes anticipating the problems of use and maintenance and in the present matter would have required that the slabs be built in a way to minimize or eliminate altogether the amount of

cracking. He testified that this is also a construction norm that should have been respected and was not sufficiently taken into account in the design, construction and finishing of the slabs.

[17] Mr. Leblanc-Carrera stated that, in his professional opinion, the slabs could have been built with a series of waterproof expansion joints that would have highly reduced the subsequent appearance of the cracks. He stated that the additional costs to include these sealed expansion joints would have been negligible. He did not consider that the cracks noticed were normal, inevitable or acceptable. In his opinion, the cracks were not “fissures de retrait” or drying cracks since they went completely through the slab. He concluded that the sealing of the cracks per the recommendations in his report was needed to halt the damage and correct the situation.

[18] The author of the Decision of the Plan Manager, Mr. Marc-André Savage, also testified at the hearing to explain and support his Decision.

[19] Mr. Savage explained that the absence or insufficiency of sealed control joints constituted a derogation from proper construction practice in the circumstances. He also justified his decision on the basis that Stavibel report’s makes clear that, over time, if the water is allowed to continue to leak through the slabs, then the water would accelerate the deterioration and corrosion of the reinforced steel in the cement and would cause additional cracks in the slabs. He also explained that another factor in his decision to conclude that the cracks were a “malfaçon” was the aesthetic disfiguration of the under part of the slabs in the tunnels as well as the leaking from the retaining wall. He stated in his testimony, that the aesthetic aspect of work can also be considered in the overall

evaluation and qualification of a “malfaçon” or “poor workmanship”. As the cracks appeared in the slabs/patios of almost every one of the units, he stated that the repetitive aspect of these cracks supported their abnormality and the necessity for corrective work.

[20] The representatives of the Beneficiary also testified. Mr. Newnham and Mr. Fortier explained that people who visited the complex including potential purchasers of units and their inspectors almost always commented and were concerned with the cracks, the residue hanging from them and the potential for future problems in that regard.

[21] In the opinion of the undersigned, the Builder’s proof does not justify a modification to the Plan Manager’s Decision. The Plan Manager’s Decision is supported by a well documented, researched and reasoned professional expertise justifying that the cracks in issue are of such a repetitive and serious nature and have a significant potential to cause future deterioration to the slabs in the future, that they do qualify as a “malfaçon” or “poor workmanship” in the circumstances, in accordance with Article 27 (3) of the *Regulation*⁴. Based upon the balance of probability of the proof made, it appears clear that further measures could and should have been undertaken to reduce the amount of cracking of the slabs and that the actual result is not satisfactory in a new property, under the standards applied under the *Regulation*. Furthermore, it is not merely that the cracks are not pleasing to the eye. Even after repairs with epoxy, their appearance constitutes a disfiguration which an owner of a new property should not be forced to accept. The undersigned does not believe that the Builder has discharged its burden of proof to show that the Plan Manager’s Decision is unfounded in fact or in law. Based upon the proof presented by the Builder, it appears to the undersigned that the construction technique employed for the slabs and their finishing was chosen and decided upon by the Builder

for economic and budgetary considerations. Based upon the final result observed, the Arbitration Tribunal must conclude that the technique employed and the finishing does not meet the minimum standard of the rules of the trade for proper construction practice. For these reasons, the undersigned will confirm the Decision of the Plan Manager (Exhibit A-13).

[22] In accordance with Article 123 (1) of the *Regulation*⁵, the arbitration fees will be shared equally by the Plan Manager and the Builder.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

REJECTS the Builder's Arbitration Application;

CONFIRMS the Decision of the Plan Manager (Exhibit A-13);

ORDERS the Builder to perform the work mentioned in the Decision (Exhibit A-13) within sixty (60) days following receipt of the present Arbitration Decision, in default of which **ORDERS** the Plan Manager to perform such work in the following sixty (60) days.

CONDEMNS the Builder, Constructions Quorum Inc. and the Plan Manager, La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc., to share in equal parts the payment of the arbitration costs, with the exception of the rental charge of the conference room for the hearing which the Plan Manager agreed to pay in full (Letter of January 25, 2012).

⁵ Article 123 (1) of the *Regulation*: Arbitration fees are shared equally between the manager and the contractor where the latter is the plaintiff.

(s) Mtre. Jeffrey Edwards

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

COPIE CONFORME

Me Jeffrey Edwards, arbitre