

**ARBITRATION IN VIRTUE OF THE REGULATION RESPECTING THE GUARANTEE
PLAN FOR NEW RESIDENTIAL BUILDINGS
(O.C. 841-98 of June 17, 1998)**

Arbitration body authorized by the *Régie du bâtiment du Québec* :
CANADIAN COMMERCIAL ARBITRATION CENTRE

CZESLAWA JAKUBOWICZ

(hereinafter « the Beneficiary »)

v.

**HABITATIONS DESAULNIERS
CHAMBERLAND INC.**

(hereinafter « the Contractor »)

and

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

(hereinafter « the Manager »)

File No. CCAC: S11-031501-NP
File No. Manager: 176839-2

ARBITRATION DECISION

Arbitrator:	Me Philippe Patry
For the Beneficiary:	Mrs. Czesława Jakubowicz
For the Contractor:	Mr. Mario Desaulniers Mr. Mario Chamberland
For the Manager:	Me Luc Séguin, counsel Mr. Manuel Lago, Inspector-Conciliator
Date of decision:	September 23, 2011

Identification of the Parties

Arbitrator: Me Philippe Patry
5530, Côte-St-Luc Road
Suite 24
Montréal (Québec) H3X 2C8

Beneficiary: *Mrs. Czeslawa Jakubowicz*
24 Lajoie Street
Châteauguay (Québec) J6K 0B6

Contractor: *Habitations Desaulniers Chamberland Inc.*
Mr. Mario Desaulniers
Mr. Mario Chamberland
6506 Chauvin Avenue
Montréal (Québec) H1M 1K4

Manager: *La Garantie des Bâtiments Résidentiels Neufs
de l'APCHQ*
5930, Louis-H. Lafontaine
Anjou (Québec) H1M 1S7
and its counsel:
Me Luc Séguin
Mr. Manuel Lago,
Inspector-Conciliator

Decision

Mandate :

The Arbitrator received its mandate from the CCAC on March 28, 2011.

History of File :

August 29, 2009:	Preliminary Contract and Guarantee Contract;
August 3, 2010:	Pre-Acceptance Inspection;
August 3, 2010:	Acceptance of building;
August 5, 2010:	Contract of sale;
September 7, 2010:	Letter of claim by the Beneficiary to the Contractor;
September 7, 2010:	Receipt of the Beneficiary's claim by the Manager;
October 6, 2010:	Notice of 15 days by the Manager to the Contractor;
January 14, 2011:	Inspection by the Manager;
February 1, 2011:	Decision by the Manager;
March 14, 2011:	Notification of the Request for Arbitration;
May 10, 2011:	Receipt of exhibits from the Manager;
July 5, 2011:	Preliminary hearing by telephone conference;
August 31, 2011:	Site visit and hearing.

Introduction:

[1] The Beneficiary interjected appeal of the following points of the Manager's decision dated February 1, 2011:

1. Garage Access Door
6. Kitchen Cupboard Door
7. Windows in Basement
8. Wall behind Basement Door
9. Main Entrance Door and Frame

[2] During the preliminary hearing held on July 5, 2011, the Beneficiary mentioned that she was satisfied with the Contractor's work concerning points 1, 6 and 7. It was therefore agreed by all parties that the hearing would deal solely with points 8 and 9.

[3] On August 31, 2011, the tribunal heard the testimonies of Mrs. Czeslawa Jakubowicz in English and in Polish and Mr. Edward Kozyra for the Beneficiary, of Mr. Manuel Lago for the Manager, and of Mr. Mario Desaulniers for the Contractor. Mr. Kozyra also acted as an interpreter for Mrs. Jakubowicz translating at times from English to French and at other times from Polish to French throughout the whole hearing.

Analysis and Decision:

[4] The panel will address points 8 and 9 separately given that the rationale behind the Manager's decision is different for each point.

8. Wall behind Basement Door

[5] In its decision, the Manager opined that this item was readily observable by a reasonably diligent buyer at the time of the acceptance of the building in reference to Subsection 10(2) of the *Regulation respecting the guarantee plan for new residential buildings*¹ (the *Plan*).

[6] Yet at the hearing, the Beneficiary pointed out that the Contractor wrote a note with the words "cloison MUR escalier Gyproc descente de cave" about the item at page 4 of the Pre-Acceptance Inspection form² signed by the Beneficiary and the Contractor on August 3, 2010, the same day of the acceptance of the building.

¹ O.C. 841-98.

² Exhibit M-2.

[7] Questioned by counsel Me Luc Séguin, Mr. Lago mentioned that the note on the item was not clear. He further added that his decision would have been the same if the item had been denounced the day of the acceptance of the building. He affirmed that the issue is purely one of esthetics as the item presents no technical apparent defect or poor workmanship as described in article 2111 of the *Civil Code of Québec*.

[8] Concerning the wording of the note on the item, the Tribunal gives the benefit of the doubt to the Beneficiary even though the words are not clear and do not specifically relate to the alleged apparent defect or poor workmanship.

[9] Given that no disposition in the *National Building Code of Canada* prevents the usage of duct diffusers, given that the Tribunal observed that the dryer outlet is hidden in a box at the bottom of the wall behind the door leading to the basement and does not prevent the door from opening or closing smoothly, given that although Mr. Lago in his capacity of Inspector-Conciliator recognized that the dryer outlet could easily have been put through the basement ceiling in another location, the evidence demonstrates on a balance of probabilities that the item presents no technical apparent defect or poor workmanship and remains an issue of pure esthetics raised by the Beneficiary. Therefore, the Tribunal dismisses the appeal concerning this item.

9. Main Entrance Door and Frame

[10] In its decision, the Manager indicated that he saw no evidence of faulty workmanship or of improper adjustment of the door in its frame in reference to Subsection 10(3) of the *Plan*.

[11] In her testimony, the Beneficiary stated that the door was in perfect condition at the time of the inspection of the building. She further mentioned that the problem occurred around Mid-October 2010 when the Contractor damaged the frame as he was installing a new entrance door. While she is satisfied with the Contractor's work concerning the new entrance door, she insisted in her submissions on having the broken frame of the door repaired.

[12] On the other hand, Mr. Lago declared that the door opens and shuts properly while acknowledging afterwards that the holes behind the strike plate were very deep. He added that there had been no infiltration of water. In cross-examination, he responded that the frame was not split, nor broken, nor damaged.

[13] Given that the Tribunal observed that the entrance door opens and closes easily, given that there has been no evidence of infiltration of water and/or air that could have been caused by the alleged damaged frame, given that the frame shows no clear signs of splits, breaks or damages, the evidence reveals on a balance of probabilities that there is no evidence of non-apparent poor workmanship discovered within one year

after the acceptance of the building. Hence, the Tribunal dismisses the appeal on item no 9.

Arbitration fees:

[14] Given that the Beneficiary failed to obtain a favorable decision on any elements of her claim, the Manager and the Beneficiary shall split the costs of the current arbitration as stated in Section 21 of the *Plan*.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

TAKES ACT of the withdrawal by the Beneficiary of points 1, 6 and 7 in her arbitration request dated March 14, 2011;

MAINTAINS the Manager's decision on points 8 and 9 of its decision rendered on February 1, 2011;

DISMISSES the appeal of the Beneficiary;

CONDEMNS the Beneficiary to pay the amount of \$100.00 as costs of the present arbitration and the Manager to pay the remaining balance of these costs.

Montréal, September 23, 2011

ME PHILIPPE PATRY
Arbitrator / CCAC