

# Newsletter



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## Starting point for prescription: Defects appearing gradually

*The Court of Appeal's decision in Garand c. Fiducie Elena Tchouprounova, 2018 QCCA 876, rendered on July 19, 2018, discusses the starting point for the prescription period when dealing with defects that appear gradually.*

Respondent purchased a house from Appellant in June 2007, and soon thereafter, a minor water infiltration was noted in the basement by her son. A second minor infiltration was discovered again by her son in the spring of 2009. The seller advised the buyer that once the snow would melt, he would drop by. Since the seller did not follow up in the spring, the buyer forwarded a demand letter to him alleging that an important water infiltration had occurred. The seller sought the advice of the architect and contractor who built the house in question. The latter suggested that corrective measures be taken to add the membrane to cover the back wall. This work was carried out in October 2009.

In November 2009, water was again discovered in the basement and another demand letter was forwarded to the seller. In December 2009, he agreed to sign an agreement in virtue of which he

confirmed that he would rectify the problem.

In March 2010, a more important water infiltration occurred in the same area but the buyer decided to take matters into her own hands and retained an expert from whom she received a report on April 8, 2010, confirming that there were major defects.

On April 12, 2010, a new letter of demand was sent to the seller. Given the fact that the ground was still frozen, the buyer obtained a second report on May 26, 2010, confirming the exact nature of the problem. Legal proceedings were instituted on March 20, 2013. The seller alleged that the action was prescribed.

### The reasons

The Superior Court cited from the case of *Prince c. Dalpé*, 2008 QCCS 5181, which concluded that the prescription delay only commences when the pur-



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chaser could appreciate the gravity and extent of the defect in cases where defects manifest gradually. In *Dalpe*, the Court added that the right of action crystallizes when the damages appear in an appreciable manner and when the victim is in a position to be aware of the extent of the damages. In this case, the Superior Court concluded that it was only after receipt of the expert's report that the buyer could have had knowledge of the gravity and extent of the defect affecting its property. The starting point for prescription was April 2010, after the buyer received the expertise report.

The Court of Appeal cited the following provisions of the *Civil Code of Québec* in matters dealing with the defects that appear gradually:

1739. A buyer who ascertains that the property is defective shall give notice in writing of the defect to the seller within a reasonable time after discovering it. Where the defect appears gradually, the time begins to run on the day that the buyer could suspect the seriousness and extent of the defect.

[...]

2926. Where the right of action arises from moral, bodily or material injury appearing progressively or tardily, the period runs from the day the injury appears for the first time.

The Court of Appeal analyzed the relevant caselaw and concluded as follows:

[6] [...] The jurisprudence concerned with these articles reconciles any

apparent inconsistency by insisting that the right of action runs from the moment when a prospective plaintiff is in a position to appreciate the nature and extent of the damage or defect.<sup>[3]</sup> The jurisprudence is thus sensitive to a distinction between a person's first apprehension of damage or defects and a person's appreciation of their nature and extent. In this sense there is a meaningful distinction between perception of a tip and knowledge that it is the tip of an iceberg. *This is consistent with the view that prescription runs from the time when all of the elements of an action exist and from the moment when a prospective plaintiff is aware of those elements.* For this reason the jurisprudence affirms that *prescription runs from the moment that a prospective plaintiff is aware of the nature of the damage or defect and its relative order of magnitude.*

[Emphasis added]

In the present matter, the Court of Appeal concluded that while the buyer was aware that there was a water infiltration problem and was reminded by successive infiltrations, it was only upon receipt of the expertise report, in April 2010, that she was made aware of the nature and magnitude of the problem and what would be required to correct the issue. Consequently, the prescription period commenced on that date and the buyer's right of action was not extinguished when the legal proceedings were instituted.