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Building Safety – New Onerous Obligations for Owners

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On March 18, 2013, the *Règlement visant à améliorer la sécurité dans le bâtiment*, adopted pursuant to the *Building Act*, came into force. The new Regulation, which became chapter VIII of the *Safety Code* entitled “Building”, contains rules on fire safety and on maintenance of building facades and multi-level concrete parking structures. The fire safety rules will come into force progressively between now and 2018, most likely to allow owners to plan any code compliance work and associated costs.

On May 12, 2013, the *Regulation to amend the Safety Code* will come into force and will add provisions to Chapter VIII - Building - that will impose upon owners new obligations pertaining to the maintenance of water cooling towers.

This bulletin provides a summary of the new provisions of the *Safety Code* pertaining to building facades, parking structures and water cooling towers.

THE NEW REGIME FOR INSPECTION AND MAINTENANCE OF FACADES

The new safety norms apply to all facades of five stories or more above ground. The facades of a building must be maintained so as to ensure safety and avoid the development of dangerous conditions. A dangerous condition exists when the component of one of the facades of a building can, imminently, detach itself from the building or collapse and cause bodily injuries.

Every five years, the owner of a public building of five stories or more must obtain an assessment report from an engineer or an architect indicating that the facades of the building do not present any dangerous conditions and, if applicable, that recommendations intended to correct defects that may contribute to the creation of dangerous conditions have been made.

When a dangerous condition is detected, whether it be during an inspection or otherwise, the owner must respect certain obligations. He must, without delay, put in place emergency measures to ensure the safety of the occupants and of the public and he must advise the *Régie du bâtiment*; he

must also provide to the Régie, within thirty days, a description prepared by an engineer or an architect, of the corrective measures that must be implemented and a work schedule that must be approved by the *Régie*; afterwards, he must ensure that the work is performed in accordance with the documents provided to the *Régie* and he must obtain, when the work is completed, an assessment report confirming that the facades of the building are safe. At the end of this process, the owner must provide to the *Régie* a letter signed by the engineer or the architect confirming that all of the corrective measures were completed to his/her satisfaction and that there no longer exists a dangerous condition.

The government has in a way delegated to the professionals, engineers and architects, a supervisory role with respect to the application of some of the measures provided for in the Regulation. For example, the Regulation specifies that the choice of inspection methods for the report that must be provided every five years belongs to the professional who must recommend any tests, examinations or trials he deems necessary. The engineer or the architect must, in his report, identify the defects and their causes that may contribute to the development of dangerous conditions including, for example, infiltrations, rust stains, signs of efflorescence, scaling, etc. He must also describe the corrective measures to be undertaken and the work schedule, and confirm that the facades are exempt from any dangerous condition. If applicable, he must also confirm that recommendations were addressed to the owner in order to correct the defects observed that may contribute to the development of dangerous conditions.

This report must be produced every five years and the necessary inspections to issue such a report must be performed within six months preceding the production of the report. The first inspection report of the facades must be produced by the owner no later than on the day of the tenth anniversary of the construction of the building. However, if on March 18, 2013, the building is more than ten years old, the first report must be produced on the date determined by the Regulation on the basis of the age of the building. In such a case, the timetable is as follows: if the building is more than 45 years old, before March 18, 2015; between 25 and 45 years old, before March 18, 2016; between 15 and 25 years old, before March 18, 2017; and between 10 and 15 years old, before March 18, 2018.

THE NEW REGIME FOR THE INSPECTION OF PARKING STRUCTURES

The Regulation also provides for new obligations for owners of underground or aboveground parking structures with a cement slab having a rolling surface that does not rest on the ground. In the case of parking structures, the five-year report may only be prepared by an engineer and the first report must be produced between 12 and 18 months following the end of the construction of the building. However, if the parking structure is between 1 and 5 years old, the report must be produced before March 18, 2014, and if it is more than 5 years old, before March 18, 2016.

If an incident occurs that may have an impact on the soundness of the parking structure, the owner must have an engineer conduct and in-depth inspection. An owner will want to establish a protocol identifying the types of incidents that require such an in-depth assessment. A structural engineer should be able to assist the owner in establishing such a protocol.

A parking structure must also be inspected annually and the first annual inspection must take place before March 18, 2014 for all parking structures subject to the Regulation. The Regulation provides a detailed inspection checklist that must be completed by the owner during the annual inspection. The contents of the checklist suggest that the owner may rely on a visual inspection.

MAINTAINING A REGISTRY

All the reports that we have referred to, both for facades and parking structures, must be kept by the owner on site in a registry with other information required by the Regulation, including copies of plans, photographs, a description of the repair, modification and maintenance work, and a

description of repeated repairs pertaining to a recurring problem.

THE MAINTENANCE OF WATER COOLING TOWERS

The provisions of the *Regulation to amend the Safety Code* that come into force on May 12, 2013, enact the obligation of the owner to maintain the facilities and equipment of water cooling towers in accordance with a maintenance program. They also provide for the obligation to keep a register on the premises for consultation by the *Régie*, which must contain, among other things, the maintenance program(s) of the towers.

The maintenance program must be drawn up and signed by one or more members of a professional order whose activities are related to the field of water cooling towers. The Regulation does not specify in any greater detail the qualifications of these professionals. Section 402 provides a list of eight elements which must form part of the maintenance program. These include the procedures for winterizing, re-starting, decontaminating and maintaining the quality of the water in order to minimize the growth of bacteria, including bacteria of the Legionella species. The program must also contain measures for reducing corrosion, scaling and the accumulation of organic matter, as well as measures for verifying the mechanical components of the facility and equipment of water cooling towers. Finally, the program must take into account certain documents, including the manufacturers operation and maintenance manual and certain guides published by specialized organizations such as the Cooling Technology Institute (CTI), the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) and the Association of Water Technologies (AWT).

Within thirty days following the initial start-up of a water cooling tower, the owner must send to the *Régie* the address of the facility, the name and contact information of the owner, the names of the professionals that have prepared the maintenance program and a brief description of the type of facility. The owner must advise the Régie without delay of any change to the foregoing information. For water cooling towers already in operation when the Regulation comes into force, such information must be sent to the Régie by May 12, 2013.

The register that must be maintained by the owner must contain the name and contact information of the latter, the plans for the design and installation of the water cooling towers, if they are available, the manufacturer's operation and maintenance manual, the results of the water analysis for the past two years, the history and description of the maintenance, repairs, replacements and alterations made, and the names of the person responsible for and the personnel assigned to the maintenance and their telephone numbers.

SEVERE PENALTIES

The Regulation provides that a violation of any of its provisions constitutes an offence. The *Building Act* provides the penalties for such offences. The fines imposed for violations of provisions intended to promote public safety are severe.

For example, fines vary from $5,241 to $26,204 for individuals and from $15,723 to $78,612 for corporations. It is important to mention that in case of repeated offences, fines can double and even triple in certain cases.

The *Building Act* also provides that when a violation of a provision intended to protect the public lasts more than one day, each day constitutes a separate offence. For example, this means that if a notice must be provided to the *Régie* within thirty days following the finding of a dangerous condition and if said notice is transmitted 45 days after such finding, the fine could be multiplied by 15.

The importance of public safety is such that not only the offender may be fined, but also any person who by act or omission helps another person to commit an offence.

IMPORTANT CONSEQUENCES

The new provisions of the Safety Code will have important consequences in many respects.

First of all, in terms of the civil liability of the owner, they create new safety norms which, if not respected, may facilitate certain civil liability recourses if an accident where to occur. These provisions will also have an impact on professional liability since they contain new obligations for the professionals while giving them considerable latitude in terms of the measures that need to be taken to discharge their obligations. Hopefully, jurisprudence will, in the future, clarify the conduct to be followed by the professionals in the performance of their obligations.

The new safety norms will also have consequences on the relationship between landlords and tenants. Since an owner will have to perform more regular and in-depth inspections to comply with the new safety norms, and since the owner will have to perform certain maintenance and repairs recommended by the engineer or the architect, will he be able to add his expenses to the operating costs that are payable by the tenants as additional rent? Since expenses related to structural repairs are often excluded from operating costs that may be charged to the tenants of a building, the drafting of the lease will determine how this question may be answered and each case will have to be reviewed on its merits.

The buyer of a building subject to the provisions of the *Safety Code* pertaining to facades, parking structures and water cooling towers will want to have access to the registry maintained by the owner, including any inspection report prepared by an engineer, an architect or another professional. The buyer will also want a confirmation that all recommendations made by the professional have been followed and that there are no dangerous conditions. An informed buyer will most likely want to obtain from the vendor appropriate representations and warranties. It remains to be seen whether the vendor will agree to provide such representations and warranties. The outcome may vary from one case to another depending on the circumstances.

A lender financing a property will also want to ensure that the property is in compliance with the provisions of the *Safety Code* and that the borrower has not committed an offence. If a professional has recommended that certain repairs be carried out, the lender may be reticent to advance funds if there are serious defects or, if the defects are not so serious, the lender may wish to obtain a holdback designed to ensure that the recommended work is performed.

In residential buildings subject to the new provisions, we can expect that there will be debates between owners and tenants pertaining to rent increases that the owner may want to justify on the basis of increased costs for inspections and maintenance required by the coming into force of the new provisions. In condominium projects, syndicates of co-owners will want to add to their budgets the costs for inspections, maintenance and repairs required by the new norms and they will want to determine if the contributions to the contingency fund must be revised accordingly.