Cooling Towers and Asbestos: New Obligations for Owners, Tenants, Managers and Employers

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Over the last year and half, the legislator has addressed the building safety issues in order to ensure the safety of the occupants and visitors of these buildings, as well as the persons who may be exposed to hazards because of equipment attached to such buildings.

On March 18, 2013, the *Regulation to improve building safety*, which became Chapter VIII entitled "Buildings" of the *Safety Code* adopted under the *Building Act* came into force.

The "Buildings" chapter of the *Safety Code* (**"SC"**) provides for rules governing the maintenance of building façades and concrete multistorey garages, in addition to containing various fire safety rules which are slated to progressively come into force between March 18, 2013 and March 18, 2018.

Additional fire safety provisions are in force since March 18, 2014 for sleeping rooms covered by the SC (namely, some hotels, motels, multiple-unit residential buildings, condominiums complexes, retirement homes and healthcare facilities). The provisions in force since March 18, 2014 particularly govern smoke alarms, carbon monoxide alarms and emergency lighting.

The remainder of the provisions of the SC respecting fire safety will come into force on March 18, 2016 and March 18, 2018. These new provisions may involve significant modifications and costs for the owners of relevant buildings. The progressive coming into force of the provisions aims to allow the owners in question to prepare accordingly.

WATER COOLING TOWERS

On May 12, 2013, the *Regulation to amend the Safety Code* containing provisions pertaining to water cooling towers came into force. These provisions have also been integrated in the SC.

These provisions impose new obligations to owners of cooling towers, particularly the implementation of a preventative maintenance program developed by a professional, the maintenance of a register containing information pertaining to the towers and providing information

to the Régie du bâtiment du Québec (**"RBQ"**). The coming into force of these provisions was further to the outbreak of Legionella during summer 2012. At the time, no regulatory framework was governing the maintenance of water cooling towers and no register was in existence to locate operating cooling towers.

The provisions which came into force in May 2012 were succinct. They consisted in six sections and contained no details as to the standards and methods to be complied with respecting the maintenance of water towers.

On May 28, 2014, an "update" of the *Regulation to amend the Safety Code* was published in the Gazette officielle du Québec. The new provisions will come into force on **July 12, 2014**. They specifically deal with the methods to be followed in maintaining cooling towers. They are, in a way, phase 2 of the provisions pertaining to water cooling towers maintenance. They contain additional specific measures concerning the procedure for maintaining water quality and the frequency of sampling. The most demanding provisions for tower owners relate to the obligation to have samples analyzed monthly by a laboratory which is accredited by the Centre d'expertise en analyse environnementale du Québec to determine their *Legionella pneumophila concentration*. The draft regulation announced that the new provisions would involve costs for enterprises which own the towers. The cost of an analysis by an accredited laboratory is approximately $250, for an annual cost of approximately $3,000.

Most of the measures covered by the new provisions were already included in the guide for the maintenance of water cooling towers published in May 2013, which was posted on the RBQ's website. Since they are now included in the *Regulation to amend the Safety Code* published on May 28, 2014, they are henceforth compulsory.

Moreover, the new provisions specify that the owners of the towers are responsible for obtaining all the results of the analysis performed by the accredited laboratory. The owners of the towers must also make sure that the accredited laboratory sends to the RBQ all the results of the analysis performed within 30 days from the date the relevant sample was taken.

The new provisions also impose on owners the obligation to obtain the results of the accredited laboratory forthwith or the business day following the result of the analysis where a result indicates a *Legionella pneumophila* concentration equal to or greater than 10,000 CFU/L and where it is impossible to quantify the *Legionella pneumophila* concentration.

Lastly, the provisions provide for immediate measures to be taken by owners when the *Legionella pneumophila* concentration is 1,000,000 CFU/L or more, particularly the obligation to ensure that the RBQ and the public health director of the region where the water cooling tower facility is located receive the result from the accredited laboratory without delay.

The *Building Act* includes penalties and penal provisions for failure to comply with the measures applicable to cooling towers. It must be noted that the RBQ conducted over 1,900 inspections of water cooling towers since 2012 and that with the register it now has, it precisely knows where the cooling towers are. It is therefore essential to comply with the new measures to avoid sanctions.

Beyond the measures that may be imposed by the RBQ (including a remedial notice and obtaining an order enjoining compliance with the Act and fixing a time limit for doing so), the RBQ may also order the shutdown of the cooling towers. Owners who refuse to comply with the Act and orders are liable to penalties ranging from $3,000 to $15,000. In the case of renewed breaches, the amount of the penalties may be multiplied by 10.

ASBESTOS

On June 6, 2013, the *Regulation to amend the Regulation respecting occupational health and safety and the Safety Code for the construction industry* came into force. Most of the provisions of this Regulation are now integrated in Division IX.I of the *Regulation respecting occupational health and safety* entitled “Provisions on the safe management of asbestos”.

This Regulation requires that all buildings built before February 15, 1990 be inspected to locate asbestos flocking and all buildings built before February 20, 1999 be inspected to locate heat insulating material containing asbestos. **The first inspections to be made under the Regulations must be carried out no later than June 6, 2015**. Thereafter, employers must verify every other year the asbestos flocking and insulating material containing asbestos, except if they are entirely enclosed in a permanent structure resistant to fibres and access to flocking and heat insulating material is only possible by a destructive operation of the structure.

It is important to note that it is the employer’s responsibility to locate flocking and heat insulating material in respect of any building under the employer’s authority. The employer may obviously be the owner of the building but ownership is not necessary. The employer can be, for instance, the tenant or manager of the building, as long as the building is under his authority.

The Regulation imposes other obligations on employers, including that of setting up and maintaining a register which must contain information concerning flocking and heat insulating materials. The result of the inspections conducted by the employer must also be entered in the register. The employer is required to make this register available to employees and their representatives who work in his establishment.

The method for analysing samples and the frequency of inspections are also covered. The Regulation also provides for various measures to be taken in the event flocking and heat insulating materials are located. Under this Regulation, it is presumed that all flocking and heat insulating materials contain asbestos and only an analysis may demonstrate the contrary.

The Regulation also requires any employer undertaking work that may generate dust by a direct or indirect action on or inside a building to check for the presence of asbestos in the materials and products likely to contain some. It must be noted that where asbestos is detected in materials and products, the employer must repair or remove them taking into account the degradation and dispersal factors.

Once again, if these provisions necessarily apply to an owner carrying out work on his building, the Regulation may also apply to a tenant, manager or contractor having the authority to carry out work on a building, who will then be required to assume the resulting expenses.

CONCLUSION

The new provisions pertaining to water cooling towers and asbestos will have a financial impact for owners of towers and, in the case of asbestos, for many employers, whether they are owners, tenants, managers or contractors. One can well imagine that the new Regulation concerning asbestos will have an impact on the negotiation and drafting of construction contracts, property management agreements and commercial leases since the parties will want to allocate the risks and specify the responsibilities of each party as to compliance with the Regulation.