Québec Employers Now Required to Take Action on Asbestos

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If your employees work in a building built in Quebec before May 1999, there are new requirements regarding the presence of asbestos

An amendment to the *Regulation respecting occupational health and safety*, adopted on May 8, 2013 (available here), now imposes on Québec employers the duty to investigate and take measures to correct the potential presence of asbestos in the building where their employees work. The amendment came into force on June 6 last.

The Context — The Employer's obligation towards Workers

The obligation of employers to limit the exposure of workers to asbestos fibres has been in existence for quite some time. The *Act respecting occupational health and safety* (the "AOHS") provides, in general terms, that an employer must take measures necessary to protect the health and ensure the safety and physical integrity of its workers.

This obligation includes several aspects. Without listing them all, it is noteworthy that the employer must ensure that it implements methods and techniques to identify, control and eliminate risks that could affect the health and the safety of workers and ensure that the emission of any contaminant does not injure the health or safety of anyone in the workplace.

Asbestos and its Health Risks for Workers

Asbestos is a recognized carcinogen. According to the World Health Organization, it is responsible for one-third of all work-related cancer deaths (https://www.who.int/mediacentre/factsheets/fs343/en/). Because of the "friable" (crumbly) nature of asbestos, breathable fibres may detach themselves from a damaged material and disperse into the air, creating a risk for the health of individuals inhaling them.

The Use of Asbestos in Québec

Asbestos is a thermic, acoustic and electrical insulation. In Québec, until the early 1980's, it was commonplace to use flocking, sprayed material containing asbestos, for thermal insulation. It goes without saying that flocking and heat insulating materials containing asbestos are therefore still found in many buildings dating from prior to that period.

Moreover, other interior finishes incorporated into buildings constructed or renovated during that same period may also contain asbestos, particularly gypsum, joint compounds, stucco and other sealants, as well as ceiling tiles, caulking and vinyl tiles.

The Obligations of Employers before the Amendments

Before the amendments, the *Regulation respecting occupational health and safety* (the "ROHS") already provided certain air quality standards for workplaces, especially standards relating to the concentration of air-borne breathable asbestos fibres.

The ROHS did not, however, specifically provide for the obligation to seek out and ensure the maintenance of materials containing asbestos. In consequence, the practices of employers and building owners with respect to the prevention of asbestos-related health risks remained uneven until now.

The Effect of the Amendments to the ROHS

An Obligation to Inspect Flocking and Heat Insulating Materials

The ROHS now obliges employers to inspect certain buildings under their authority in order to locate and, if need be, repair the heat insulating materials and flocking located in such buildings.

A first inspection must take place within two years of the coming into force of the amendment to the ROHS, that is before June 5, 2015. The buildings to be inspected are the following:

- buildings built before February 15, 1990 must be inspected, in order to locate flocking containing asbestos. Flocking is a mixture of friable materials applied by spraying, in order to cover a given surface; and
- buildings built before May 20, 1999 must be inspected, in order to locate heat insulating material containing asbestos. Heat insulating materials are materials which cover a facility or equipment to prevent loss of heat.

If the inspection reveals that a flocking or a heat insulating material is liable to emit asbestos dust, the employer must take measures to remove it, to enclose it entirely in a permanent structure resistant to fibres, or else coat it with or soak it in a binder, or cover it with materials resistant to fibres.

All flocking and heat insulating materials are now presumed to contain asbestos, unless the employer can demonstrate otherwise. To make such proof, the ROHS provides that the employer may either use verifiable documentary information, such as a technical description or a material safety data sheet, or construction plans and specifications, showing that the material was installed after February 15, 1990 or May 20, 1999, as the

case may be, or else obtain a report prepared by a laboratory participating in an interlaboratory quality control program. The laboratory results must be kept by the employer.

Every two years following the initial inspection, the employer must re-check flocking and heat insulating materials containing asbestos, unless:

- they are entirely enclosed in a permanent and fibre-resistant structure (excluding protective coating of heat insulating materials); and
- access to the heat insulating materials and flocking is only possible by destroying such structure.

An Obligation Applicable to Other Materials and Products Containing Asbestos

As discussed above, several other types of indoor finishes may contain asbestos (vinyl tiles, ceiling tiles, gypsum boards and joint compounds manufactured before January 1980, etc.).

As regards to materials other than heat insulating materials or flocking that are likely to contain asbestos, and particularly certain interior finishes, the employer is henceforth required to:

- check for the presence of asbestos in the materials and products likely to contain them, before undertaking any work liable to emit asbestos dust by a direct or indirect action on or inside any building under his authority;
- check whether materials or products liable to contain asbestos actually contain it before buying them; and
- repair or remove all indoor finishes liable to contain asbestos and which, because of their condition, may emit dust into the air.

Here again, all materials liable to contain asbestos are presumed to contain it, unless the employer shows evidence to the contrary.

An Obligation of Correction Applicable to Every Building

The ROHS draws an interesting distinction between the obligation to inspect and the obligation to apply corrective measures (i.e. the employer's obligation to remove or repair interior finishes, flocking or heat insulating material liable to emit asbestos dust). Whereas the obligation to inspect seems to be limited to buildings "under the authority" of the employer, the obligation to correct is not limited in the same way.

It therefore appears possible to us to state that the employer is henceforth obliged to take such corrective measures, even if the building is not under his authority.

An Obligation to Keep a Register

The employer must keep a register containing pertinent information concerning the inspections and the works, as long as the building remains under his authority. Such information relates to the inspections, the location of materials containing asbestos, details relating to the samples taken, the evidence of the absence of asbestos and the

dates and details of the removal works. This register must be put at the disposal of the workers.

A technical guide (in French) was published by the CSST on June 6 last regarding the new regulatory provisions (available here).

Impact for Employers who are Tenants and Recommendations

An employer who rents its workplace premises will not generally have planned to assume the financial responsibility for removing or replacing interior finishes, flocking or heat insulating material liable to emit asbestos dust, which responsibility may prove onerous. Because the ROHS henceforth requires the employer to carry out certain work, without providing that the building owner is financially liable for its performance, it is possible that the employer may have to shoulder that financial responsibility.

In the light of the foregoing, an existing and provident tenant should review its lease and, at the very least, on the occasion of its eventual renewal or extension, impose on the landlord the obligations which result or may result from the amendments to the ROHS, and have the landlord assume all the costs so entailed. In the negotiation of any new lease, the tenant should require a representation and a guarantee of the absence of heat insulating material, flocking and other materials liable to contain asbestos and should impose on the landlord the obligations that result or may result from the amendments to the ROHS, and ensure that the property-owner alone will be required to bear all related costs.

From the landlord's viewpoint, it would perhaps be desirable that he himself carry out the inspections and works required, if any, while reserving the right to charge all related costs as operating expenses. Indeed, in all probability, it will be in the landlord's interest to prevent any defective works carried out to implement the amendments to the ROHS from giving rise to additional expenses in the future and/or to health problems for the occupants of the building.

Finally, property owners are reminded that under the AOHS, they must ensure that the necessary measures are taken to protect the health and ensure the safety of workers in the parts of a building which are not under the authority of any employer. Note, however, that that obligation applies only where the building is used by several employers.

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