

Radon - Managing Risks and Liabilities

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**“Law Firm of the Year” for Environmental Law in
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Willms & Shier Environmental Lawyers

- Established over 40 years ago
- 17 lawyers
 - six are certified by the Law Society of Ontario as Environmental Law Specialists
 - lawyers called to the Bar across Canada

Overview

- Statutory Liabilities
- Common Law Liabilities
- Managing Risks and Liabilities

Health Canada Guideline on Radon

“Remedial measures should be undertaken in a dwelling whenever the average annual radon concentration exceeds 200 Bq/m³ in the normal occupancy area.” (CMHC/Health Canada, 2007)

- 200 Bq/m³ = no remedial action
- 200 Bq/m³ - 600 Bq/m³ = remedial action within two years
- > 600 Bq/m³ = remedial action within a year

BUILDING CODE LEGISLATION



Building Code Legislation – Federal

National Building Code

- Contains measures to prevent soil gas from entering homes
 - air and soil gas barrier systems, rough-ins for radon mitigation systems, airtight sump pumps
- **Incorporates Health Canada’s 200 Bq/m³ guideline**
- References best practice guidelines, such as the EPA/625/R-92/016, “**Radon Prevention in the Design and Construction of Schools and Other Large Buildings**”

Building Code Legislation – Federal

National Standards of Canada

- **CAN/CGSB-149.12-2017 – Radon Mitigation for Existing Low-Rise Residential Buildings**
 - incorporates Health Canada’s 200 Bq/m³ guideline
 - final guideline published November 2017
- **CAN/CGSB-149.11 – Radon control options for new construction in low rise residential buildings**
 - options for construction: Level 1, Level 2 and Level 3
 - second 30-day public review period from December 14, 2017

Building Code Legislation – Ontario

O Reg 332/12: Building Code

- Buildings in designated areas must be designed and constructed to ensure that indoor annual average concentrations of radon 222 do not exceed 200 Bq/m³
- Where appropriate, heating, ventilating and air-conditioning systems shall be designed, constructed and installed to conform to EPA/625/R-**92/016**, “**Radon Prevention in the Design and Construction of Schools and Other Large Buildings**”

Building Code Legislation – Ontario

O Reg 332/12: Building Code

- Where radon gases are known to be a problem, construction shall comply with the requirements for soil gas control in MMAH Supplementary Standard SB-9, “Requirements for Soil Gas Control”
- MMAH Supplementary Standard SB-9 includes various soil gas control measures including
 - sealing masonry walls and underground structure roofs
 - installing soil gas barriers in floors
 - providing for subfloor depressurization
 - sealing floor perimeters and penetrations

Building Code Legislation – Ontario

Municipal By-laws

- Guelph – Radon Gas Mitigation Program requires builders to install one of three radon mitigation options in all new residential buildings
- Thunder Bay – Requires radon testing for new residential buildings and mitigation measures depending on the testing results

CONSUMER PROTECTION LEGISLATION



Consumer Protection Legislation – Ontario

Ontario New Home Warranties Plan Act, RSO 1990, c. O-31

- Applies to all sales of new homes in Ontario
- ONHWPA requires that vendors provide warranties that apply regardless of any waiver to the contrary and in addition to any other warranties a homeowner may have
- One-year warranty includes construction in accordance with the Building Code
- Two-year warranty include no violation of the Building Code affecting health and safety
- Seven-year warranty covers major structural defects for all homes enrolled under ONHWPA after December 1, 1990

Consumer Protection Legislation – Ontario

Ontario New Home Warranties Plan Act, RSO 1990, c. O-31 – Tarion’s Coverage Position

- 1 Year Warranty
 - unfit for habitation (if radon levels are > 200 Bq/m³)
 - Ontario Building Code violations (if home is not in compliance with designated area provision or soil gas control provisions and radon levels are > 200 Bq/m³)
- 2 Year Warranty
 - Ontario Building Code violations affecting health and safety (if home is not in compliance with designated area provision or soil gas control provisions and radon levels are > 200 Bq/m³)
- 7 Year Warranty
 - major Structural Damage (if home is not in compliance with designated area provision or soil gas control provisions and radon levels are > 200 Bq/m³)

Consumer Protection Legislation – Ontario

Ontario New Home Warranties Plan Act, RSO 1990, c. O-31

- In *Grudzinski v Ontario New Homes Warranty Program*, the Ontario Court of Justice considered what constitutes a **“defect in the work or materials that materially and adversely affects the use of such building for the purpose it was intended.”**
- Cracks in the basement caused the basement to be unusable.
- The Court held:

I disagree...that the homeowner...must show the home, i.e. the entire home, is "... virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse ..."...

The argument that the homeowners continue to occupy two thirds of the home and thus their use...is not materially and adversely affected is unrealistic.

Consumer Protection Legislation – Outside Ontario

Radon Awareness and Testing Act, SA 2017 c. R-2.5

- Requires the responsible Minister to develop educational materials explaining the health risks associated with exposure to radon for the public and for residential real estate purchasers
- Requires child-care program license applicants to provide the results of a radon test
- If testing results exceed the acceptable radon level (prescribed by regulation) the applicant is required to provide a plan to reduce radon levels

OCCUPATIONAL HEALTH AND SAFETY LEGISLATION



OHS Legislation – Ontario

Occupational Health and Safety Act, RSO 1990, c. O-1

- Constructors and employers have statutory duties and obligations to their workers, including contractors and subcontractors
- General duties to protect the health and safety of workers
- Must take every precaution reasonable in the **circumstances for its workers'** protection
- Must **provide information to its workers to protect workers'** health or safety, including identifying hazards.
- Additional duties for biological, chemical or physical agents (radiation is a physical agent)

OHS Legislation – Ontario

Occupational Health and Safety Act, RSO 1990, c. O-1

- The Ministry of Labour can prosecute constructors, employers and corporate directors and officers for violating the OHS A
- The Ministry may issue Orders that require constructors, employers and/or corporate officers and directors requiring corrective actions

OHS Legislation – Ontario

Health Protection and Promotion Act, RSO 1990, c. H-7

- Medical officers of health have the authority to issue Orders where there is a health hazard and where an Order is necessary to decrease the effect of or eliminate the health hazard
- **“Health hazard” is defined as**
 - a condition of a premises
 - a substance, thing, plant or animal other than man, or
 - a solid, liquid, gas or combination of any of them,that has or that is likely to have an adverse effect on the health of any person

ENVIRONMENTAL LEGISLATION



Environmental Law – Ontario

Environmental Protection Act, RSO 1990, c. E-19

- Prohibits the discharge of a contaminant into the natural environment
- “Contaminant” is defined to mean any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an adverse effect. “discharge” is defined as: when used as a verb, includes add, deposit, leak or emit and, when used as a noun, includes addition, deposit, emission or leak
- Case law has held that the interior of a residential home can be considered part of the “natural environment” where the contaminant affects both the indoors and outdoors of a residential property

Environmental Law – Ontario

Environmental Protection Act, RSO 1990, c. E-19

- **“Adverse effect” is defined to mean**
 - impairment of the quality of the natural environment
 - injury or damage to property or to plant or animal life
 - harm or material discomfort to any person
 - an adverse effect on the health of any person
 - impairment of the safety of any person
 - rendering any property or plant or animal life unfit for human use
 - loss of enjoyment of normal use of property
 - interference with the normal conduct of business

(Environmental Protection Act, s. 1(1))

Environmental Law – Ontario

Environmental Protection Act, RSO 1990, c. E-19

- MOECC may make Orders to require
 - preventive action
 - stop work
 - change equipment, processes
 - study, monitor and report
 - clean up and restore the environment
 - pay costs

Environmental Law – Ontario

Environmental Protection Act, RSO 1990, c. E-19

- Who Can be Ordered?
 - property owners
 - corporate directors, officers, owners
 - controllers – persons in charge, management or control of a contaminant or property (individuals)

Environmental Law – Ontario

Environmental Protection Act, RSO 1990, c. E-19

- MOECC may prosecute parties that contravene environmental laws, regulations, permits, approvals or orders
- Who Can be Prosecuted?
 - individuals, partnerships, corporations
 - corporate directors and officers have a duty to take all reasonable care to prevent environmental contraventions (EPA, s. 194; OWRA, s. 116)
 - regulators have been known to prosecute directors and officers and/or their companies to extract a conviction against the company

Environmental Law – Ontario

Draft Technical Guidance: Soil Vapour Intrusion Assessment

- Provides guidance on how to evaluate the significance of vapour intrusion with respect to potential chronic health risks due to long-term exposure
- Focuses on the migration of volatile and semi-volatile chemicals

COMMON LAW



Common Law – Buying/Selling Homes

Caveat Emptor – Let the Buyer (Usually) Beware

- Generally, the risk of any deficiencies in a purchased property falls to purchaser
- The courts recognize four exceptions to the rule of caveat emptor where the vendor
 - fraudulently misrepresents or conceals
 - knows of a latent defect rendering the house unfit for habitation
 - is reckless as to the truth or falsity of the statements relating to the fitness of the house for habitation, and
 - has breached his or her duty to disclose a latent defect that renders the premises dangerous

Common Law – Buying/Selling Homes

Duty of Real Estate Agent

- A real estate agent must exercise the standard of care that would be expected of a reasonable and prudent agent in the same circumstances
- In *Krawchuck v Scherbak et al.*, the vendors failed to disclose plumbing and settling issues in the Property Seller Information Sheet. The real estate agent (who acted for both **vendor and purchaser**) **had knowledge of the home's issues** but failed to disclose these facts to the purchasers prior to the sale
- The Court in *Krawchuck* held that the real estate agent had a duty to verify material facts about the property provided by the vendor

Common Law – Testing & Remediating Homes

Contractor and Consultant Liability

- Contractors and consultants must be careful to perform radon testing and mitigation work diligently
- Common errors include
 - performing work below the applicable standard of care
 - missing deadlines
 - damaging clients' property and/or exacerbating existing contamination
 - extending reliance

Common Law – US Case Law

- Casale v Segal & Morel at Lopatcong, LLC
 - class action certified against homebuilders and radon mitigation system installers
- State ex rel. Richmond Am. Homes of W. Va., Inc. v Sanders
 - 40 adults and children living in 11 homes claimed against a new home builder for failing to install, or improperly installing, or fraudulently installing inoperable, radon mitigation systems

Managing Environmental Liabilities

- Property Owners and Employers
 - perform testing to determine whether indoor radon concentrations are above the Health Canada guideline of 200 Bq/m³
 - if indoor radon concentrations exceed the Health Canada guideline, have work completed on the property to reduce radon concentrations to a safe level

Managing Environmental Liabilities

- Real Estate Transactions
 - full and timely disclosure
 - access and inspection
 - be mindful of representations/warranties

Managing Environmental Liabilities

- Insurance for Radon Professionals
 - know the products
 - e.g. CGL, E&O, CPL, Professional Liability
 - watch for exclusions
 - e.g. contaminant/pollution, radioactive, naturally occurring material
 - consider coverages
 - quantum, bodily injury, property damage

Contact Information

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