



**Mayors and Councilpersons  
Municipalities of Ontario**

June 2016

Re: Your potential liability of not enforcing Ontario Building Code regarding Radon Gas

We are the Canadian Association of Radon Scientists and Technologists (CARST). We work closely with Health Canada and our Members, and indeed Governments across Canada, to bring awareness to the Canadian public of the dangers of exposure to Radon Gas. Radon is the second leading cause of lung cancer. We feel it is important for us to bring to your attention the possibility of liability based on your Officials interpretation of the Ontario Building Code when issuing your permits, as it relates to “soil gas” in general and Radon Gas specifically.

**We attach hereto for your information a “Legal Opinion” on this issue. We would urge you to take the following actions to limit your liability:**

1. Have your legal team review the attached legal opinion of Fasken Martineau DuMoulin LLP (FMD) and bring a report to Council.
2. Ask your Chief Building Officials to report to Council on this matter.
3. Ensure that current standard practices do not expose your municipality to liability
4. Review changes to current standard permit practices to ensure your residents are protected and that your Municipal Corporation is not negligent.

This is a fast emerging subject of interest amongst Canadians and for good reason. Radon is a naturally occurring radioactive gas that comes from the breakdown of uranium in soil and rock under our buildings. Radon is present at low levels outdoors but can become a problem when too much accumulates inside our buildings. The health risk associated with elevated radon levels inside buildings is lung cancer. According to Health Canada, approximately 3,200 Canadians die each year from radon induced lung cancer with approximately 850 of those deaths occurring in Ontario.

The Canadian Association of Radon Scientists and Technologists (CARST) was established in 2011, to provide a bridge between policy makers, radon professionals, private industry and homeowners to support the effective and responsible management of radon levels in Canadian

homes, schools and workplaces. The successful management of radon in buildings consists of numerous components such as testing and effective follow-up mitigation steps. Another aspect in successfully managing radon occurs at the time of construction of a building. The Ontario Building Code (OBC) includes measures to be taken into account at the time of construction to ensure the safety of the occupants after they occupy the building.

CARST members have worked with builders and building officials alike throughout Ontario in determining the best way to protect occupants from the radiation associated with radon. Through this work, we have become aware of inconsistencies regarding the application and interpretation of the OBC in various municipalities across the province. Based on our findings, we feel that it is prudent for your municipality to undertake a complete review of the requirements of the OBC with respect to buildings practices that are currently being conducted in your community.

If upon review of the attached you require additional information and/or support, please feel free to contact us directly at [info@carst.ca](mailto:info@carst.ca). We are aware of radon mitigation programs being implemented in Guelph, Central Elgin, Elliott Lake, and Thunder Bay to lower radon levels in new buildings constructed in their municipalities. These municipalities may be willing to share the knowledge and experiences acquired in ensuring occupants are not exposed to elevated radon concentrations in new buildings.

For the CARST Board of Directors,

Alan Whitehead,

President CARST

[info@carst.ca](mailto:info@carst.ca) [www.carst.ca](http://www.carst.ca)

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File No.: 306627.00001

Canadian Association of Radon Scientists  
and Technologists  
450 - 1040 West Georgia Street  
Vancouver, BC V6E 4H1

Dear Sirs/Mesdames:

**Re: Potential Liability of Municipalities Arising from Failure to Apply Building Code**

You have brought to our attention that some Ontario Municipalities may be issuing building permits in contravention of the *Ontario Building Code Act, 1992*, SO 1992, c 23 (collectively the “**Building Code**”). You have requested our opinion regarding the potential liability of such municipalities and their officials for risk to health and damages caused by their failure to properly interpret, apply and enforce the Building Code.

We have reviewed applicable legislation and case law. Based on our review, the facts and law regarding the potential liability of such municipalities may be summarized as follows:

- The Building Code requires municipalities to ensure that “all wall, roof and floor assemblies in contact with the ground” are constructed to “resist the leakage of soil gas from the ground into the building” (Section 9.13.4.2(1)).
- The Building Code requires soil gas barriers or other protective radon measures to be installed to achieve the Building Code’s requirements (Sections 9.13.4.2, 9.13.4 and 6.2.1.1).
- If a municipality or its officials approve building plans or issue permits for buildings that do not comply with the requirements of Section 9.13.4.2(1), then it may be liable for the breach of its statutory duty to enforce the Building Code (Section 3(1) Act).
- The Building Code contains certain exemptions from the requirements in Section 9.13.4.2(1) to install soil gas barriers or other protective measures (Section 9.13.4.2(2)).

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\*Fasken Martineau DuMoulin LLP includes law corporations.

- The exemptions include (a) garages and unenclosed spaces; (b) areas where it can be “demonstrated that soil gas does not constitute a hazard” and (c) buildings containing single dwelling units where subfloor depressurization controls have been used to the required standard.
- We understand that some municipalities have been misinterpreting exemption (b) [demonstrated that soil gas is not a hazard] by essentially applying the exemption as the default position, unless the municipality is provided with evidence of a radon gas hazard. With respect, that is a clear misreading of the Building Code.
- The Building Code requires a soil gas barrier or the other required measures unless the exemption is demonstrated. Given the practical difficulty of proving the exemption (the primary difficulty being that the potential hazard cannot be effectively determined until the building is constructed) in most cases a soil gas barrier must be required.
- If a municipality approves plans or issues permits for buildings that do not comply with the requirements of Section 9.13.4.2(1) without requiring evidence to “demonstrate that soil gas does not constitute a hazard”, the municipality will have breached its statutory duty to enforce the Code and may be liable to fines of up to \$50,000.
- Municipalities and municipal officials could also be liable to third parties for breach of statutory duty or in negligence including liability to owners, purchasers, users or occupiers of affected buildings and any other individual who suffers harm or damages as the result of a municipality’s failure to properly interpret, apply and enforce the Building Code (*Ingles v. Tutkaluk* [2000] 1 SCR 298).

In summary, municipalities and municipal officials bear a risk of liability for misapplying or not applying the Building Code. The most obvious way to limit the risk is for municipalities to comply with the Building Code’s requirement that all wall, roof and floor assemblies in contact with the ground are constructed to resist the ingress of soil gas through the installation of a soil gas barrier, unless a permit applicant can “demonstrate that soil gas does not constitute a hazard.”

Yours truly,

**FASKEN MARTINEAU DuMOULIN LLP**



Paul C. Wilson