

March 30, 2007

Your Phone Lines Could Catch Fire!

Telephone and other telecommunications companies installed huge amounts of very flammable cable in commercial buildings prior to the late 1990's. Adding to the problem, when these companies installed extra cable to serve customers, they did so without removing the old cables. Ceiling spaces and risers have consequently become crowded with highly flammable cabling. To make matters worse, the sprinkler systems are often ineffective in controlling the spread of fire because much of the cabling is located in the air plenum spaces above the sprinkler systems.

The National Building Code, Fire and Electrical Codes, as well as the corresponding codes of certain provinces and municipalities were amended to stop the installation of flammable cabling, but this didn't solve the problem of the many miles of existing flammable cable. Section 2.4.1.1(5) of the National Fire Code addresses this issue by requiring the removal of abandoned combustible cable. The City of Vancouver adopted the provision and is already enforcing it. It was expected that Ontario would also adopt the provision effective on January 1, 2007. The enactment and enforcement of the requirement was postponed, but the postponement is expected to be short.

The new provision is likely to be modeled on the National Fire code provision and will require that all abandoned optical cables, fibre cables, electrical wire and cables, with combustible insulation, jackets or sheaths, as well as all non-metallic raceways (i.e. communication cables and conduits) be removed from every plenum in a building unless:

- (1) they are permanently enclosed by the structure or finish of the building;

- (2) they are not capable of being removed without disturbing the building structure or finish; or
- (3) their removal will risk affecting the performance of cables in use.

When the new requirement is put in force, it will likely not be "grandfathered". It will not matter that the cables were in conformity to the applicable Code requirements at the time of installation. The removal requirement will apply immediately to the affected cables and the costs will be significant.

Additional Liability Exposures

Building owners may also have exposure to liability in connection with the presence of flammable cable in their buildings, not only because of the Fire Code removal requirements but also due to common law obligations, occupier's liability legislation, and lease clauses.

Common Law Liability

Regardless of any provision of the *Occupiers Liability Act* (Ontario), it is reasonable to expect that if a building owner does not take appropriate steps to identify any dangerous situations associated with its cabling, and thereafter fails to remedy any dangerous situation, it might be liable in negligence.

Occupiers Liability

Section 3(1) of the *Occupiers Liability Act* (Ontario) (the "Act") requires a building owner to "take such care as in all the circumstances of the



case is reasonable to see that the persons entering on the premises are reasonably safe while on the premises". As far as flammable cable is concerned, the fact that it complied with code at some point is simply not a defence. The *Act* imposes a positive duty on building owners to ensure the safety of their premises. The fact that removal might disturb the finish of a building or the performance of other cables in use may not be sufficient justification to leave it in place if it is dangerous. For example, flammable cable near an electrical apparatus that is prone to cause fires, or that is situated so as to cause a rapid spread of fire, should be removed to ensure compliance with the *Act*.

Liability Under Lease Clauses

Building owners may also have exposure to liability under certain lease provisions. Leases sometimes contain an obligation on the landlord's part to operate the building according to first class standards, or in a prudent manner. Leases may also contain indemnities in favour of the tenant in respect of occurrences that cause damage or injury to the tenant or its property. Likewise, leases often state that upon delivery of possession to the tenant, the premises will comply with all laws. If the landlord leaves flammable cable in place, these provisions could result in liability to the landlord.

Suggestions

Here are some steps you can take if you own a building that contains flammable cable:

(1) Develop a program to ensure that flammable cable is identified and removed, and that abandoned cable is removed on a timely basis.

- (2) Review lease forms to ensure that the boundaries (vertical and horizontal) of the leased premises and the common elements are described properly. In many office leases, plenum space is considered as part of the common elements; accordingly, the tenant's obligation to maintain, repair and ensure that the premises comply with code requirements might not extend to items installed in those areas.
- (3) Modify the definition of "leasehold improvements" (for which tenants are responsible) in standard lease forms to include any cable that the tenant installs outside of the leased premises.
- (4) Require tenants to ensure that all cable installed by them within the building, whether in the premises or elsewhere, is appropriately labeled.
- (5) As part of initial Tenant's Work, require the Tenant to remove any cable that is abandoned (as defined within the applicable code) or dangerously situated and lying within its premises, regardless of who installed it. (Likewise on expiry or earlier termination.) This responsibility should include production of a report by a qualified engineer certifying proper removal.
- (6) Impose requirements upon communications suppliers to have them identify and remove abandoned cable, and dangerously situated cable before being allowed to install any new cable.
- (7) Modify your standard form leases and construction schedules to stipulate that the installation of flammable cable is expressly prohibited.



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