PRODEMNITY

# THE straight line

TEN MINUTES WELL SPENT | ISSUE 3 | DECEMBER 2016

## Welcome to *The Straight Line*

This is the third issue of *The Straight Line*, a newsletter that will appear occasionally throughout the year. Articles will cover a broad range of topics that will engage anyone with an interest in the profession, including Ontario architects insured by Pro-Demnity, other OAA members—whether in practice or engaged in other businesses—and others.

We encourage readers to suggest topics for future issues of *The Straight Line*. Please send any suggestions to: **editor@pd-straightline.com**

## IN THIS ISSUE:



*Harbour Centre, Vancouver*
*Photo: Kelam, 7 August 2011, Wikimedia Commons*

For many decades up until the late 1970s asbestos was a common component in many commercial or household goods, as well as in products and systems selected or specified by architects for use in buildings.

However, by the late 1970s, asbestos had been confirmed as a health hazard, the use of asbestos-containing products in buildings had been largely discontinued or banned in Canada, and non-asbestos-containing products were being substituted as replacements.

Harbour Centre was the building that featured in the landmark *Privest v. Foundation Company of Canad*a decision that is the subject of this issue.

*— The Editor*

# How *Privest v. Foundation Company of Canada* helped save architects and others from asbestos property claims in Canada.

**The identification of asbestos as a health hazard and the restrictions on its use has given rise to extensive property litigation in North America. This litigation relates to its previous use in existing buildings, where, in order to eliminate the health hazard to occupants and workers, owners were faced with extensive removal or abatement measures.**

The risk of claims against architects who may have specified asbestos-containing products in already existing buildings was potentially catastrophic—for the profession and for its insurers. In response, many insurers excluded asbestos-related claims from coverage, leaving architects and engineers personally exposed to significant damages if these claims were successful.

Against this backdrop, the OAA Indemnity Plan (now Pro-Demnity Insurance Company) successfully defended an Ontario architect in an action in British Columbia. Leave to appeal the decision was ultimately denied by the Supreme Court of Canada. One asbestos expert described the outcome of *Privest* on liability for past use of asbestos as "not only killing the beast, but double-nailing the coffin."

The following article by one of the participants describes the story as it unfolded.

## I. Introduction

During the late 1980s and early 1990s, a new type of lawsuit began appearing in Canadian courts: claims for asbestos property damage. The claimants, typically building owners, claimed the presence of asbestos in their buildings caused them damage and they sought compensation for asbestos removal costs and lost income. The case considered below, *Privest*, was the first such case in Canada to reach trial. The court dismissed the claim. The dismissal was upheld by the British Columbia Court of Appeal and ultimately by the Supreme Court of Canada. According to one of the plaintiff's knowledgeable damage experts, *Privest* "stopped these cases in their tracks."

## II. The Case

Privest Property owned a building in which asbestos-containing sprayed fireproofing material was installed. They alleged that the asbestos product was installed without their knowledge and consent.

The building, originally known as the Spencer Building, was constructed in the 1930s. In the early 1970s, it underwent a major restoration and retrofit, as part of the construction of a new complex known as the Harbour Centre, which featured, among other things, a tower with a revolving restaurant. Privest alleged that the asbestos was contained in fireproofing material installed between 1972 and 1975, during the course of the renovation.

Privest alleged that the asbestos-containing fireproofing was inherently dangerous and caused physical damage to their property. A number of parties were sued. These included: the contractor (The Foundation Company of Canada Limited); the sub-contractor that installed the product (Donalco Services Ltd.); the manufacturer of the product (W.R. Grace & Co. of Canada Ltd.) and its parent company W.R. Grace & Co. – Conn.; as well as the local architects who provided design services, including working drawings and specifications for the construction (Eng & Wright Partners Architects); along with design architect Webb, Zerafa, Menkes, Housden (WZMH), who had been retained to prepare a "conceptual design of the entire project." Also named was the Workers' Compensation Board of British Columbia. The suit against WZMH engaged the Pro-Demnity policy, and Bernie McGarva of Aird & Berlis was appointed as counsel to defend their interests.

## III. The Background

Construction of the Harbour Centre was completed around 1976. In the spring of 1987, portions of the interior of the building were being renovated to meet the requirements of a new tenant, the Federal Department of Fisheries and Oceans (DFO), whose standard form lease stipulated that the premises must be asbestos-free. In the course of renovation for the new tenant, inquiries were made as to whether the building contained any asbestos. A review confirmed that it did: asbestos-containing fireproofing Monokote MK-3 had been sprayed on the steel structure. MK-3 contained approximately 12 or 13 per cent asbestos fibres.

The owner then undertook an expensive asbestos abatement process, which cost approximately $10 million, and sued for both the cost of the abatement and punitive damages. The claim was made against the architectural firms involved, in both contract and tort, and included claims for failure to warn.

The case represented the first asbestos property damage claim to reach trial in a Canadian court. The trial occupied some 182 days, spread out over two-and-a-half years, from early 1992 to late 1994. The many claims, cross claims and third party claims in the action, gave rise to a multitude of complex issues, with many hundreds of documents entered as exhibits. A total of 160 days were taken up by the presentation of evidence alone, after which, counsel provided more than 6,000 new pages of written argument followed by 22 days of oral argument.

In the years leading up to the trial, courts in the United States had been inundated with asbestos litigation. First came the wave of personal injury actions, then came the second and perhaps even larger wave of property damage claims. In the United States, potential property damage awards and insurance claims extended well into the billions of dollars.

But this was the first asbestos property damage claim to reach trial in a Canadian court—and the first such claim to reach trial in which a contractor, manufacturer, applicator and architect had all been named. Clearly the outcome of the case would set an important precedent for other claims waiting in the wings or already on court dockets throughout Canada.

The specification for fireproofing on the project called for Monokote. The fireproofing chosen and applied was Monokote MK-3 which contained asbestos. In late 1975, W.R. Grace removed Monokote MK-3 from the market, replacing it with Monokote MK-5, an asbestos-free fireproofing product.

The project was completed in 1976 and operated as a multi-purpose complex including a shopping centre, department store and office tower with the revolving restaurant.

The plaintiff alleged that the architects were retained because of their knowledge and expertise in the field of buildings, and that they ought to have been aware of the health hazards posed by the asbestos-containing fireproofing, since these hazards were widely acknowledged in the architectural profession and the construction industry. The architects, they claimed, had acted negligently and in breach of their contract by failing to take sufficient care in the drafting the specifications for the renovation, and by failing to exercise the required degree of skill by not warning the plaintiff about the presence of the hazardous product. They also alleged that the architects breached an implied warranty of fitness of the specified product and that, as design experts, they should have known that the product should not have been used, although its use was legally permitted in Canada.

## IV. Issues and Testimony

The duty of a design professional to warn a client about asbestos-containing sprayed fireproofing became a central issue in the case. Indeed, the plaintiff called a well-known senior Ontario architect to testify that by the early 1970s, a reasonably prudent architect should not have specified asbestos-containing sprayed fireproofing. They should have known, the expert testified that an alternative product using non-asbestos-containing fireproofing was

available and was preferable. Unfortunately, the strength of his opinion was undermined when, in cross examination, it was revealed that the expert's own architectural firm had specified Monokote simpliciter (MK-3) in a hospital project in Ontario in the early 1970s.

When it came time for WZMH to call evidence, they called three witnesses. The late Boris Zerafa, the partner in charge of the project, testified that his firm's role was simply to act as the design architect and it did not involve itself in details such as the choice of sprayed fireproofing product. "End of story," he concluded. The project architect involved, Zerafa's partner and senior design expert Stanford Downey, reinforced Mr. Zerafa's testimony under rigorous cross-examination.

Finally, the expert, J.E. (Ted) Sievenpiper was called. He gave evidence that, in his opinion, it was appropriate to have specified Monokote, without further qualification, in 1974. He testified that there was no reason not to specify the material. Regarding asbestos in fireproofing, he added, "the light had not yet come on" in the Canadian architectural community.

There was further evidence supporting Mr. Sievenpiper's testimony. A senior veteran of the sprayed fireproofing business testified on behalf of the manufacturer that when the building was renovated, he had submitted a bid for the installation of the sprayed fireproofing:

*Q: " What fireproofing did you bid on?"*

*A: " We ended up submitting our tender for Monokote MK-3 in the retail base and Monokote MK-4 for the tower fireproofing."*

*Q: "Why did you bid this job on the basis of two of Grace's fireproofing products, rather than simply one?" [Note the Monokote 4 was asbestos-free.]*

*A: "There were two separate specifications —one for the tower, one for the retail base. Monokote 3 was known simply as Monokote. It was the predominant Monokote used at that particular time. If you were spraying a job with Monokote you used Monokote MK-3, unless somebody requested otherwise."*

## V. The Ruling

Justice Drost's Reasons contain perhaps the most detailed and comprehensive review of asbestos and asbestos-related diseases, and the expert testimony underlying those issues, that existed at the time of his Judgment. More than 200 pages of his Decision are dedicated to these issues and related regulatory matters. For anyone interested in a learned discussion of the science of asbestos and asbestos disease, Justice Drost's Reasons offer a clear and highly readable explanation.

Based on the evidence of common usage and the evidence of Mr. Sievenpiper, Justice Drost found: "Subject to consideration of the allegations, I am satisfied that the specification of cementitiously applied Monokote was acceptable at that time."

The court referenced the following exchange from the transcripts:

*Mr. McGarva: "Now, changing topics, Mr. Sievenpiper, in your opinion, was it appropriate for an architect practicing in Canada in 1974 and 1975 to specify Monokote without any requirement that it be asbestos-free?"*

*Mr. Sievenpiper: "Yes. Monokote was cementitious material. It was encapsulated and it was a reputable manufacturer and it had a track record and at that period of time there didn't seem to be any […] compelling reason why you would not specify it."*

The court went on to find that, at the time of its installation in the building, MK-3 had been on the market for many years. "When first introduced, it was hailed as a 'break-through' and considered by many to be of significant improvement over other dry sprayed fireproofing products." This was acknowledged by the plaintiff's expert architectural witness who, under cross-examination by counsel for Grace, testified as follows:

*Q: "Would it be fair to say that, at the time, in the early 70s, when you considered […] cementitious products versus sprayed fibre products, that […] you had a rough guide that cementitious products tended to have a more adhesive bond than the fluffier product?"*

*A: "Oh, very much so, but to the degree, as I say, you wouldn't know."*

The plaintiff, of course, based its claim for damages and the cost of asbestos removal on the allegation that they embarked upon the removal of the asbestos-containing fireproofing because of their concern for the health of tenants and visitors to the building. Justice Drost relied upon a report from the Asbestos Co-coordinator for the Department of Public Works, who assigned an asbestos exposure number to the building of 6, on a scale of 0 to 171. The report contained the following remarks:

*A score of less than 12 indicates that the material can be considered stable and unlikely to present a health hazard. Asbestos abatement measures are normally only required after a score of 10 is exceeded.*

The court also received evidence that asbestos in the ambient air outside and nearby the building was as high as, or higher than, the air inside the building. The court found that:

*On the evidence, I am satisfied that the decision to remove the asbestos-containing fireproofing material from the third and fourth floors was taken solely for the purpose of retaining the DFO as a tenant. Moreover, the evidence shows that the owners had no intention at that time of removing the material from any other part of the building, and none of the tenants, save Sears, were advised of the presence of an asbestos-containing material.*

Turning to remedial issues, the Judge found that:

*The medical evidence presented in this case does not […] support the conclusion that "any release of asbestos fibres into the atmosphere creates a potential health hazard." As discussed above, I have concluded that there is a point, depending on the type and size of fibres, below which there is no potential hazard.*

With respect to the specific diseases associated with exposure to asbestos, the Judge reached the following conclusions:

*Asbestosis: Based on that evidence, it can safely be said that the state of medical knowledge at all relevant times was that there is no risk of contracting asbestosis as a result of the low levels of exposure to asbestos encountered in public buildings.*

*Lung Cancer: [T]he evidence then available established clearly that at the low levels of exposure encountered by the general public, there was no risk of lung cancer [….] I also find that, while there is current disagreement among the experts as to whether asbestosis is a prerequisite to lung cancer, there is nevertheless firm agreement today that low levels of exposure, such as those encountered in public buildings, do not increase the risk of lung cancer.*

*Mesothelioma: I find that at the relevant time, there was no evidence of a risk of contracting mesothelioma at low levels of exposure to asbestos, particularly where the exposure has been to chrysotile fibres." [found within MK-3 Monokote]*

Finally the Judge found that, as far as the Spencer Building was concerned,

*[F]ar from establishing a "real and substantial danger" to persons, the evidence satisfies me that the MK-3 that was installed between 1972 and 1975 was not and is not an inherently dangerous product. I have no hesitation in concluding that the asbestos fibres contained in the MK-3 did not contaminate the Building, nor did they expose its occupants and workers to an increased risk of contracting any of the asbestos-related diseases. Nor did any asbestos fibres that were released into the atmosphere of the Building by that product cause damage to property. From these conclusions, it follows that there has been no negligence, no breach of duty or care or duty to warn, and no misrepresentation.*

The plaintiff's claim against all parties was dismissed with costs.

## Our Contributor

**Bernie McGarva** has been a partner of the firm of Aird & Berlis LLP since 1992. He practices in the area of commercial and construction litigation. He is certified by the Law Society of Upper Canada as a Certified Specialist in Construction Law and is recognized in *The Best Lawyers in Canada* in the field of Construction Law.

He has appeared before tribunals and all levels of the court, including the Supreme Court of Canada. He has served as a mediator in over 500 disputes focusing on construction, commercial contracts, insurance, and professional errors and omissions.

Bernie can be contacted at:

Aird & Berlis LLP
Brookfield Place, 181 Bay Street, Suite 1800, Box 754, Toronto, ON M5J 2T9
Telephone: (416) 865-7765 • bmcgarva@airdberlis.com

## VI. Conclusion

The *Privest* case changed the landscape for property-based asbestos litigation in Canada. The outcome protects architects from liability for use of asbestos in buildings designed and constructed before it was identified as a health hazard. However, the decision does not protect architects from asbestos-related claims for projects undertaken after the health hazards became known and restrictions were placed on its use.

In contrast to the 1970s, the dangers of asbestos are well known. Both the duty of care of an architect to its clients and to the public, and the standard of care applicable to an architect's services respecting the use of asbestos-containing products will have changed with the passage of time.

In the intervening years, a recognized area of specialized expertise related to asbestos identification, remediation, abatement and removal has developed in Canada and elsewhere. Architects can direct a client or building owner to these experts for necessary assistance.

Many insurers include coverage restrictions related to asbestos and other toxic or hazardous substances, and many architects are concerned about how to address these products and services as they relate to their identification and removal or abatement.

OAA *Practice Tip 30* dated July, 2014 addresses some of these concerns. Pro-Demnity has issued a Bulletin *Retaining Surveyors, Geotechnical and Hazardous Materials Specialists* dated July 2014 that addresses Pro-Demnity policy provisions that may apply.

THE straight line

**is a newsletter for architects and others interested in the profession. It is published by Pro-Demnity Insurance Company to provide a forum for discussion of a broad range of issues affecting architects and their professional liability insurance.**

**Publisher:** Pro-Demnity Insurance Company
**Editor:** Gordon S. Grice
**Design:** Finesilver Design + Communications
**Address:** The Straight Line
c/o Pro-Demnity Insurance Company
111 Moatfield Drive, Toronto ON
M3B 3L6
**Contact:** editor@pd-straightline.com

**Pro-Demnity Insurance Company** is a wholly owned subsidiary of the Ontario Association of Architects. Together with its predecessor the OAA Indemnity Plan, it has provided professional liability insurance to Ontario architects since 1987.

Questions related to the professional liability insurance program for Ontario architects may be directed to Pro-Demnity Insurance Company. Contact information for the various aspects of the program can be found on the Pro-Demnity website:

**www.prodemnity.com**