

MOULD: A GROWING PROBLEM

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BACKGROUND

The construction industry has faced an increasing level of concern about mould in indoor environments. From an issue that was treated as a problem only in a hospital settings a few years ago, mould is now recognized as a significant concern in commercial, institutional and residential construction.

The media has embraced mould as a new plague and appears to gleefully report each infestation that becomes problematic for occupants.

Some years ago, toxic mould was linked to a number of hospital deaths in eastern Canada. In April of 2001, a form of toxic mould known as aspergillus was detected within the ventilation systems of Montreal Royal Victoria Hospital. Patients and hospital workers working in acute surgical areas were exposed and infected with the mould. Sometime after that, the New Market Court House north of Toronto, Ontario was evacuated and closed. The media reported all aspects of the evacuation, subsequent remediation and now the resulting litigation. In Alberta, the legal profession is well aware familiar of the woes of the Court of Appeal and the historic Court of Appeal Building in Calgary. Judges and court workers alike had long complained about an unhealthy indoor environment at the Court of Appeal Building. In the face of significant health affects and air quality testing, the Court of Appeal Building was evacuated (in a less dramatic manner than the New Market Court House), the Court relocated and the building remains closed. Toxic mould within the Calgary Foot Hills Hospital is currently the subject of health concern and legal action¹.

¹ “Toxic mould cleanup plan promised for Foothills”, Calgary Herald, 25 September 2003, online: <http://www.canada.com/search/story.aspx?id=09152846-9700-42ff-84f7-c0a120ee7b49>

In Edmonton, many people will recall the media hype over the burning of a mould infested residence in Stony Plain. Too heavily infested to remediate, the homeowners, the local health authority, the homeowners' insurer and mortgagee agreed that the best solution for the mould problem in that residence was to burn it to the ground.

Of note to the construction industry and the legal profession was the attempt to certify a class action against the Peel-Dufferin Catholic School Board in southern Ontario. A \$2 Billion action was proposed against the School Board, contractors, designers and maintenance companies arising out of complaints by teachers, school workers and students about mouldy conditions in portable schools, older school buildings and other School Board facilities. Their attempt to certify the class action failed, not because of the absence of causes of action, but because the proposed law suit attempted to join too many defendants and too many different problems. In the United States, mould cases have been litigated in a number of states. Florida, California and Texas have all seen significant awards relating to remediation and relocation of occupants during the remediation process. In California and Delaware, the health effects to occupants in mould-infested buildings have resulted in damages in the million-dollar plus range. The most celebrated of the American decisions, the Melinda Ballard case, involved a fight over the timeliness and standards of remediation, *Allison v. Fire Insurance Exchange* (1 June 2001), District Court of Travis County, 345th Judicial District No. 99-05252, [Dietz J.] This elevated into a \$32 Million jury award comprised largely of punitive damages and legal costs. On appeal, the Court of Appeals of Texas significantly reduced the punitive damages and legal costs, but the remediation cost award of some \$4 Million was affirmed, 98 S.W.3d 227 (Tex.App. [3rd Dist.] 2002).

The media has gleefully report Ed McMann's mould problems and law suit, as well as environmental activist, Erin Brokovich's litigation over her mould infested home.

The American experience has had insurers leave the market place, in the most extreme situations, and eliminate coverage for mould in routine cases. Texas insurers alone report mould payouts exceeding \$2 Billion in the last few years.

CANADIAN LEGAL CASES

There have been a number of court decisions in Canada over the last several years relating to mould. As a relatively new subject matter for law suits, there have been few decisions to assist in assessing the risks and responsibilities associated with mould in indoor environments. There are sufficient cases, however, to see a trend of increasing responsibility and liability.

As a none exhaustive list, starting with the most recent cases, the following are of note:

1. *Clay v. Bovaird*, [2003] A.J. No. 518 (Q.B.) [McIntyre J.]. A residential tenancy agreement had been frustrated as a result of the presence of mould.
2. *Seiler v. Mutual Insurance Co. of British Columbia*, [2003] B.C.J. No. 2151 (S.C.) [Edwards J.]. This case involved an action in negligence and breach of contract for failure to take steps to ensure against moisture induced mould growth which allegedly became "toxic" and caused health problems. During the course of trial, at the close of the plaintiff's case, the defendants applied to have the action dismissed on the ground that there is no evidence to support the plaintiff's case. The Court granted the application and held, "the causal relationship between mould and disease is not a matter of common knowledge, expert

evidence is required to establish both the presence of mould at toxic levels in the house and a link between mould and the symptoms experienced by the plaintiffs' family members.”

3. *Mariani v. Lemstra*, [2003] O.J. No. 750 (Gen. Div.) [Dunn J.]. Relying on a representation that a house was “well-built”, the Plaintiff purchaser sued the Defendant vendor/contractor. Latent defects in the construction of the house rendered the home structurally unsound and allowed for the incursion of water which lead to the growth of mould. The Court held that the “the proliferation of mould itself has conclusively rendered this house dangerous to inhabit”. The Court awarded the Plaintiff damages for demolishing and rebuilding a new home.
4. *R. v. Goebel*, [2003] A.J. No. 591 (Q.B.) [Slatter J.]. In this case, Justice Slatter dealt with an appeal from convictions on 18 counts of breaching public health legislation and from the sentence imposed. The accused had been charged in relation to an apartment building which he owned. The charges included failure to comply with orders, unclean and unsafe conditions, and breaches of the housing regulation. The accused had been convicted on 15 counts and was fined a total of \$45,240.00, or 150 days in custody in default. The accused had actually paid 6 days in custody before paying the fines. While the appeal was allowed in part, a significant number of the convictions were maintained. The fines were reduced and the number of days in default was likewise reduced.
5. *Morvan v. Tessier*, [2002] J.Q. no 4052 (S.C.) [Tremblay J.], the plaintiff had been sued by a renovation contractor for extras during his water damage restoration work in the defendant’s basement. The defendant counterclaimed that the work had been improperly done leaving moisture which caused mold and rendered her basement unusable. Experts testified that the contractor had left behind conditions conducive to mold growth and the court accepted that this necessitated the demolition and rebuilding of much of the basement and rendered the contractor’s original work useless. The court found that the contractor’s shoddy work was in part the cause of conditions of the basement that were

dangerous to health. The court accepted the homeowners evidence that the mold in the basement had made her family ill, although no personal injury damages were awarded as they do not appear to have been sought in that case.

6. *Alain v. 2809630 Canada Inc.*, [2002] J.Q. no 5534 (S.C.) [Poulin J.] (2002, Quebec Superior Court), the court accepted expert testimony that the tenants exposure to “stachybotrys” had caused fatigue, vomiting, gastrointestinal problems, headaches and other problems, all of which cleared up when they vacated. The two plaintiffs were awarded \$5,000 each for personal injury damages.
7. *Alie v. Bertrand & Frere Construction Co.*, (2000) 11 C.L.R. (3d) 19 (Ontario SCJ), additional reasons (2000) 11 C.L.R. (3d) 149, affirmed (2001) 11 C.L.R. (3d) 12 (Ont. CA), where the trial judge (affirmed on appeal) concluded that mouldy conditions in basements which had leaky walls resulting from defective cement in the concrete resulted in the homes being uninhabitable, requiring significant remediation and renovation, and justifying awards for relocation and inconvenience. The awards were part of a massive lawsuit against the concrete supplier and cement manufacturer. Leave to the Supreme Court of Canada was denied (January 2002).
8. *MacDonald v. Dufferin-Peel Catholic District School Board* (2000), 20 C.P.C. (5th) 345 (Ont. S.C.J.) [Jenkins J.]. The plaintiff was the proposed representative of a class of children who students at Dufferin-Peel Catholic School Board. The plaintiffs alleged that a number of the defendant’s portable schools, Port-a-Paks and relocatable classroom modules became contaminated with mould which made the students ill. The Chambers Judge dismissed the application because “given the number of individual issues involved in the actions a class proceeding is not the preferable procedure.” The Dufferin-Peel School District covered 100 sq. km. in which there were variations in temperature, moisture, elevation and weather. The School Board had 80,000 in 120 schools, 22,000 were housed in 700 portables, 200 Port-a-Paks and 100 relocatable classroom modules. The portable

classrooms were constructed of different materials and had different considerations.

9. *Thériault v. Debeau* [2000] J.Q. no 5685 (S.C.) [Gervais J.]. The presence of the toxic mould species “stachybotrys” was held to be a health threat.
10. *Taub v. Manufacturer’s Life Insurance Company* (1998), 40 O.R. (3d) 379 (Gen. Div.) . In that case, the judge dismissed an application for certification of a class proceeding by a plaintiff who alleged that there was mould in her apartment building. The judge refused to certify the action as a class proceeding because there was no evidence before him to conclude that the harm complained of by the plaintiff was the subject of concern on the part of anyone else. The Court also held, “It is by no means self-evident that the presence of mould in one bathroom in one apartment indicates that there will be a similar problem in other areas of the building” . .
11. *Fraser v. Knox*, [1998] O.J. No. 4379 (Gen. Div.) [Aitken J.] It was held that the presence of mould rendered a basement uninhabitable.
12. *Wright v. Strata Plan No. 205* [1996] B.C.J. No. 381 (S.C.) [Drake J.] is a case where the court accepted that the presence of mould in the plaintiff’s condominium and her illness and respiratory ailments while in the condominium made it “not unreasonable to not unreasonable to suppose that this condition had its origin in the bacteria and fungi among which she was living”, the case was actually dismissed because the judge found that the condominium corporation had not failed to take reasonable steps when it learned of the mold problem.
13. Anecdotally, there is litigation in Toronto over the New Market Court House and its celebrated problems. There is litigation on behalf of a number of school boards in British Columbia relating to alleged mould in schools. There is an action in Edmonton by a condominium corporation against the developer, contractor, structural engineer, mechanical engineer, mechanical subcontractor

and others relating to mould growth in crawl spaces and the resulting need for structural repairs.

ARE THE PROBLEMS WITH MOULD REAL OR PERCEIVED?

Despite the emerging case law and the growing number of claims, there are still a significant number of organizations and groups putting forward the belief that mould is not as big a problem as it is being made out to be, and in some circumstances that mould is not a problem at all. Insurers are quick to point that mould is naturally present in the environment. Of hundreds of thousands of species, only a few varieties are known to be toxic. There are no “threshold limits” for mould exposure and there is certainly no unanimity within the medical community as to the health affects of mould. The “minimalists” point to walks in the woods and blue cheese as evidence that most moulds are not harmful to humans. Others point to the apparent absence of concerns over mould outside of North America and suggest that the problem with mould is really a problem of plaintiffs looking for a windfall, and lawyers looking for the next case and big fee.

So what is the reality? Will mould be the next asbestos with respect to the frequency and magnitude of claims and the devastating results on entire industries?

What is known is that mould is often the unwanted by-product or result of water leaks, excessive humidity and other problems with the building environment. Water leaks and excessive moisture does cause property damage - premature deterioration of materials, structural problems and damage to porous materials. The writer is not aware of any body of authority, whether legal or scientific, suggesting that water leaks and excessive moisture are not

problematic and do not need to be cleaned up appropriately. Steps must be taken to stop the source of water, lower humidity, dry wet materials out and remove and replace damaged materials. Disruption of occupants is inevitable as with any repair or renovation situation.

What is not known is the degree to which mould growth may be harmful to human health, and the extent of exposure to mould growth required to cause health affects.

It is not within the scope of this paper to discuss or debate the medical issues other than to note that there appears to be consensus that exposure to mould may cause allergic responses in approximately 10% of the population. The severity of allergic reactions varies from person to person. Mould has also been linked to respiratory difficulties and infections in persons with weakened immune systems such as:

- infants;
- the elderly;
- asthmatics;
- steroid users;
- immune deficient persons;
- AIDS sufferers; and
- persons recovering from operations;

It can be seen that health effects have been identified in a significant portion of the population.

It is the area of health affects that is the most controversially one with respect to mould. The medical and scientific community have been unable to identify “safe” or “unsafe” levels for mould exposure, other than with respect to some of the highly toxic varieties where there is essentially zero tolerance.

Health authorities and the scientific community appear to be in agreement that mould growth in indoor environments is undesirable and that mould growth should be stopped, and indoor environments that have been affected by mould growth need to be properly cleaned.

POSITION OF REGULATORY AUTHORITIES

The recognition of mould as a problem in indoor environments is not simply a creation of the courts. For sometime, a number of regulatory authorities have considered mould to be a problem and have published guidelines as to the identification of mould problems and the remediation of mould problems when identified. Appended to this paper are publications and guidelines from the following:

1. New York City Guidelines on Assessment and Remediation of Fungi in Indoor Environments²;
2. Canada Mortgage and Housing Corporation publications;
3. Centre for Disease Control Mould Brochure;
4. Health Canada, Fungal Contamination in Public Buildings: a guide to recognition and management ³;
5. CCDR - Health Canada Guideline⁴;
6. Manitoba Guidelines for the Investigation, Assessment & Remediation of Mould in Workplaces⁵.

² Available online: <http://nyc.gov/html/doh/html/epi/moldrpt1.html>

³ Available online: http://www.hc-sc.gc.ca/hecs-sesc/air_quality/pdf/fungal.pdf

⁴ Available online: <http://www.hc-sc.gc.ca/pphb-dgspsp/publicat/ccdr-rmtc/01pdf/27s2e.pdf>

In the field of regulatory control, as noted in the *Goebel* and other cases noted above, public health authorities have determined mould to be unacceptable in indoor environments and have proven to be diligent and vigorous in ordering remediation, condemning properties and prosecuting offenders.

OCCUPATIONAL HEALTH AND SAFETY ISSUES

As at the date of the writing of this paper, the author is unaware of specific regulations under occupational health and safety legislation in Canada dealing with exposure to mould. However, under the general duty provisions of such legislation, namely that the employer's obligation is to take all reasonable precautions for the health and safety of its workers, employers must be sensitive to their obligations to their workers. Because of the uncertain nature of the health affects associated with mould exposure, the absence of "threshold limits", and the fact that certain individuals appear more susceptible to health affects than others, employers are at risk, without being able to turn to specific guidelines to establish that they have been duly diligent.

Employers' responses vary from instructing workers to spray affected areas with bleach solutions or biocides and then wipe them off, to approaching a suspected mould infestation with space suits, breathing apparatus and creating negative pressure around such areas.

5 Available online: <http://www.gov.mb.ca/labour/safety/publication/guidelines/mould/mouldguidel.pdf>

Employers should be aware of the right (if not duty) of employees to refuse to work in unsafe conditions, such that greater mould knowledge may lead to greater fears and the need for employers to have appropriate education, training and response plans.

INDUSTRY RESPONSE

The construction industry in Canada has elected to be proactive on the subject of mould rather than wait for ten provincial, three territorial and one federal government authority to provide legislative guidance. The Canadian Construction Association established, in the spring of 2002, a Mould Task Force to investigate mould issues in the construction industry and report to the Board of Directors of the Canadian Construction Association.

The result of the work of the Task Force has been to create a brochure on mould in the construction industry, which is available through the Canadian Construction Association. Additionally, the Canadian Construction Association through the Task Force is finalizing production and publication of “Mould Guidelines for the Canadian Construction Industry”. This publication is expected to be available in early 2004, and will deal with:

- construction practices to prevent/control moisture intrusion;
- building operation and maintenance to minimize mould growth;
- mould assessment;
- mould remediation guidelines;
- hazard communication; and
- selecting a proper remediation contractor and consultant.

The Associated General Contractors of America has already published its report on mould in the construction industry. This publication is entitled *Managing the Risk of Mold in the Construction of Buildings* and a copy is appended to this paper⁶.

INSURANCE INDUSTRY RESPONSE

The insurance industry response to mould problems has been to flee the field. The insurance industry in the United States reports some \$2 Billion losses in Texas alone, resulting in some home insurance providers to refuse to write policies in Texas. The Insurance Bureau of Canada has recommended to its members (basically, all insurers in Canada) that mould coverage be eliminated generally, including the elimination of mould growth as “resultant damage”.

A typical homeowners policy might contain the following exclusion:

“We do not insure:

- wear and tear, deterioration, defect or mechanical breakdown, resting or corroding, extremes of temperature, wet or dry rot, mould”

“We do not insure loss or damage:

- caused by continuous or repeated seepage, or leakage of water or steam from within a plumbing, heating, sprinkler or air conditioning system, or domestic appliance

⁶ available online at: http://www.agc.org/content/public/PDF/Safety/may03_mold.pdf

- caused by seepage or leakage of water below the surface of the ground including through sidewalks, driveways, foundations, walls, basement or other floors or through doors, windows or any other openings...
- caused by accidental discharge or overflow of water or steam...
- caused by freezing of a plumbing, heating, sprinkler or air conditioning system or domestic appliance unless it happens within a building heated during the usual heating season and you have not been away from your premises for more than four consecutive days...
- caused by or resulting from contamination or pollution, or the release, discharge or dispersal of contaminants or pollutants”

From an insurance perspective, it is unlikely that homeowners will have much if any coverage for mould growth in their homes.

According to architects and engineers, professional liability insurers are refusing to provide coverage to construction professionals who purport to give advice as to mould identification and remediation. This has led the consulting industry to decline to provide advice, or to provide advice without the comfort of insurance to back-up the correctness of the advice.

Older course of construction/builder's risk policies may provide some assistance for clean-up and remediation in the event mould growth results from an insured risk such as a flood or a building envelope failure. More recent policies may exclude all consequences of mould growth.

Similarly, older commercial general liability policies may provide defence costs and some indemnification for mould growth as resulting damage from other insured claims. More recent policies are more likely to exclude all aspects of mould growth, leaving consultants, contractors, material suppliers and owners looking to their own resources rather than insurers for assistance with respect to remediation costs.

Some limited mould coverage may be available, but at significant cost.

But who can blame the insurers? With huge losses from asbestos, urea formaldehyde insulation and leaky condominiums, insurers are fearful of the unknown and are unwilling to assume liability for what at present appears to be uncertain and unquantifiable.

SUMMARY

The end result is that no one knows the extent to which mould will continue to be a problem for the industry. It is possible that some definitive study may conclude that exposure to mould poses no health risks. Perhaps the medical and scientific communities may be able to develop guidelines and threshold limits for safe and unsafe levels of mould exposure. Perhaps personal injury claims relating to mould exposure will be unsuccessful or successful only to the recovery of small amounts of damages. The absence of insurance may discourage claims and prevent mould claims from being as numerous and significant as asbestos claims.

Perhaps mould will be to some extent be exonerated, as was the case with asbestos in the *Privest Properties Ltd. v. Foundation Co. of Canada*, [1995] 10 W.W.R. 385 (BC

Supreme Court), affirmed on appeal [1997] 5 W.W.R. 265, which dealt with the health risks or dangers of encased asbestos in office buildings.

On the other hand, perhaps mould and other biological hazards will bloom and devastate building owners, designers, contractors, subcontractors, and material suppliers.

The construction industry elected, in the face uncertainty to establish guidelines and attempt to set benchmarks as to what diligent contractors should do.

WHAT SHOULD LAWYERS KNOW ABOUT MOULD IN THE CONSTRUCTION INDUSTRY

- Mould growth in indoor environments is undesirable;
- Mould growth is evidence of water damage and needs remediating;
- Health affects do exist, but are variable and uncertain;
- Public health authorities have regulated the presence of mould in occupied buildings;
- Other regulatory authorities have enacted rules and guidelines with respect to mould growth remediation;
- Occupational health and safety obligations exist with respect to mould;
- There is limited insurance available for defence and indemnification relating to mould growth problems; and
- Owners, designers, contractors, subcontractors, and material suppliers need :
 - education and training;
 - policies;
 - risk management and insurance programs; and

- assistance with contract drafting relating to mould risks and remediation costs.

Edmonton, Alberta
October, 2003

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