

TOXIC MOULD LEGAL OVERVIEW

INTRODUCTION

One of the current “hot topics” in the construction industry is the issue of toxic mould. Concerns over mould in building environments is not new, but recent events, such as lawsuits and increasing publicity over mould concerns, has resulted in much greater interest being taken in the subject. Lawyers and consultants are now regularly holding seminars and spreading information on the subject, so that issues and concerns are constantly confronting the construction industry.

Toxic moulds have been implicated in health concerns, such as Legionnaire’s disease, aspergillus, infections, allergies and asthma. While current thinking suggests that only a few of the moulds present in the environment are toxic, and only persons with suppressed immune systems (the young, the elderly, and those already ill), mould concerns affect everyone from parents to caregivers to employers to building owners.

Are the concerns well-founded, or are they the result of fear-mongering and questionable science? There are certainly those that believe that mould concerns are greatly exaggerated, and are more the result of greedy lawyers looking for the next case and greedy plaintiffs looking for compensation for imaginary or exaggerated injuries or illnesses, than from real concerns from the medical community.

Only time will tell. At present, there is the appearance that fears over mould will make the topic the next asbestos situation. Everyone knows the results of the litigation over asbestos concerns: the asbestos industry was destroyed, virtually every entity having a significant involvement in mining, processing, selling or installing asbestos and products containing asbestos went out of business, or into bankruptcy protection. Ironically, the major Canadian case which went to trial over the health risks surrounding encased asbestos in buildings (Privest Properties vs. Foundation Company of Canada)

resulted in a finding by the trial court that the health risks had been exaggerated, and the claim was dismissed.

In any event, there appears to be little doubt that **some** moulds and micro-toxins related to mould are toxic, and can have serious health effects on some people. And whether or not the problem is a small one, or a major one, contractors and others involved in the construction industry as manufacturers and suppliers are at risk regarding litigation.

LEGAL CASES

I do not propose to deal in any significant way with any of the litigation (past or present) relating to mould concerns. There are two types of cases: personal injury cases, where a plaintiff claims to have been injured by exposure to toxic mould; and property damage cases, where a property owner seeks the cost of repairs to its building to remove mould and prevent further mould growth. These two types of case are not mutually exclusive – a plaintiff can allege both personal injury to himself, his family or his tenants or employees, and also claim the cost of repair or remediation.

In the United States, there have been a number of cases involving toxic mould, some of which having resulted in favourable results for the claimants. Insurance companies have been found liable for failing to take proper post-incident action to prevent the growth and spread of mould in buildings that have been flooded, or have experienced leaks. Contractors have been found liable for failing to prevent mould growth, and for failing to take proper steps to remove all mould which has resulted from poor construction practices, or inadequate remedial work following floods, disasters, or leaks. Public awareness of possible concerns (and claims) is enhanced when celebrities (like Ed McMahon of “Tonite Show” fame) advance lawsuits over mouldy conditions in their homes. There is little doubt that plaintiffs, and plaintiffs’ lawyers in the USA are looking for cases to try. Every successful case encourages a host of new ones. Large punitive damage awards in the USA (which bear little or no resemblance to the harm actually suffered by a plaintiff) are fairly common in the USA, and represent a significant

risk to defendants. Class actions, which allow a host of small claims to be combined into one lawsuit, represent a serious risk to defendants because of the risk of huge compensatory and punitive damages in favour of a large number of persons.

In Canada, to date, and so far as I am aware, no personal injury case has gone to trial involving allegations of harm because of toxic mould. Health fears, however, have fuelled the “leaky condo” cases in BC and the “sick building syndrome” cases there and elsewhere in Canada. The leaky condo cases in BC have resulted in the failure of the BC New Home Warranty Program, the bankruptcy of a number of contractors, subcontractors and consultants, and a huge growth industry in the legal profession. Other provinces may be following suit (no pun intended). In Ontario, a huge class action was attempted on behalf of students, teachers and other employees in the Peel-Dufferin School District. While the Ontario courts ultimately refused to certify the class, and the action has not proceeded, the class action failed not because of the absence of concerns over mould, or the absence of real injury suffered by the proposed class members, but because there were too many differences between class members and too many potential defendants for the proposed class action to be appropriate. As at the date of writing, a class action has been certified and is proceeding on behalf of judges, court workers and prisoners in the Newmarket Court House against Ellis-Don and others, because of alleged mould effects.

NON-LITIGATION SITUATIONS

Each province will undoubtedly have its own stories about mould. Apart from litigation in BC and Ontario, Alberta has had several highly publicized situations involving mould. Near Edmonton, in August 2002, a home was removed from its foundations and burned with a large media audience because of mould infestation. The owners, and their insurers, apparently agreed that the only remedy for the home was total destruction. In Calgary, the Court of Appeal building, an Alberta Heritage building, was evacuated when extensive testing showed that mould (and other things like mouse droppings) had created a heavily compromised atmosphere. A large percentage of judges and court workers had fallen ill. Court sittings have been cancelled in Calgary for the last year, and will only

recommence when new facilities are complete later this fall. Files, gowns and personal possessions of judges and court workers remain quarantined. Other files, which were removed to the Calgary Queen's Bench courthouse, have resulted in impairment to that courthouse, presumably because of the spreading of mould spores throughout the building HVAC system. Obviously, in Alberta, there is an increased interest and awareness concerning mould in the courts!

Hospitals are increasingly concerned about mould issues, hence the publication by Health Canada (CCRA) of papers dealing with construction-related nosocomial (secondary) infections in hospital patients ("Decreasing the Risk of Aspergillus, Legionella and Other Infections") and increasing reliance on the so-called "New York Protocols" in the knowledgeable health care industry.

Additionally, class actions are increasing common in Canada. Most provinces have, or will soon have, rules or legislation permitting class actions. The Supreme Court of Canada has ruled that class actions should be permitted, and that courts have an inherent jurisdiction to fashion appropriate rules allowing and regulating class actions, so even provinces (like Alberta) with no legislation at present are seeing class or representative actions being developed.

From this background, it can be seen that the writer's view is that whether or not there are real scientific bases for significant concerns, mould now presents a number of practical risks which should be managed.

AREAS OF RISK

1. WORKER SAFETY

From an Occupational Health & Safety and a Worker's Compensation perspective (apart from being a responsible employer), what steps should be taken to:

- i. educate workers?

- ii. revise safety programs?
- iii. provide training for revised operating procedures?
- iii. implement safe working procedures in the event mould is suspected or discovered?

2. PAST PROJECTS

What's done is done – or so the saying goes. But apart from issues as to breach of contract (warranties as to fitness, absence of defects, etc.) and tort liability (creation of dangerous or hazardous situations, negligent construction, etc.) there is the “duty to warn”. Issues here include:

- i. To what extent do contractors and suppliers have a duty to warn their old clients about the risks of mould being present in their buildings and systems?
- ii. What inspection and testing should be conducted?
- iii. How might this impact on the liability of contractors and suppliers for past work?
- iv. What should be done, if anything, to document the “state of the art” and standard of care being practiced in the construction industry, to assist in the defence of claims and lawsuits which are likely to be made?

3. NEW PROJECTS AND WORK

A. NEW BUILDINGS

- i. What practices should be followed with respect to the handling of materials (protection from getting wet and mouldy)?
- ii. What precautions should be taken to prevent mould growth in buildings under construction?
- iii. How should procedures which introduce water into the building (curved drywall, for example) be handled?

iv. What steps should be taken in the event unexpected moisture is introduced into the project (bad weather, leaks, etc.)?

v. What practices should be followed regarding building systems and equipment to prevent the growth of mould in the future?

vi. What instructions and warnings should be given to owners and building managers regarding the prevention of mould growth, inspections and remediation in the event of leaks?

vii. What education and training of workers should be undertaken regarding mould issues, including personal safety?

B. RENOVATIONS

In addition to the above questions:

i. What steps should be taken to “benchmark” the existing facility?

ii. What inspection and testing should be undertaken?

iii. What steps should be taken to protect workers until the condition of the building can be established?

iv. What steps should be taken in the event mould or mouldy conditions are encountered?

v. How should mouldy materials be disposed of?

vi. To what extent, if any, can mouldy materials be re-used or recycled?

4. RISK MANAGEMENT ISSUES

A. CONTRACT CLAUSES AND PROVISIONS

To what extent should standard contract wording be changed to deal with responsibility for handling of materials, protection of property, construction practices and safety?

How can contractors and suppliers protect themselves through the use of contract terms?

B INSURANCE

To what extent can the insurance industry be counted on to deal with mould problems?

- i. completed projects – existing commercial general liability (CGL) insurance provisions;
- ii. new work – exclusions under CGL and course of construction insurance;
- iii. specific environmental risk policies – coverages and exclusions.

How can contractors and suppliers protect themselves through insurance provisions?

C. ADOPTION OF INDUSTRY STANDARDS

To what extent might industry standards assist with management of legal liability risks, and to what extent might industry standards pose liability risks to contractors?

D. CONSULTANTS

To what extent and how should consultants be used to manage the risks?

CONCLUSION

It is clear that there are a number of mould-related issues of concern to the construction industry. It is the writer's view that the industry needs to be proactive to manage these concerns and risks, and not simply react to the results of legislation and court actions

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