



TOXIC MOULD CLAIMS IN CANADA

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OVERVIEW

In the [Fourth Quarter 2001](#) edition of Crawford Adjusters Canada's **ProClaim** Newsletter (available online at crawfordandcompany.ca), we highlighted that insurers needed to "Prepare for Mould Losses." Since that time, we have seen a steady stream of headlines such as....

- "Is mould the killer lurking in our homes?"
- "Mould – Lurking - Choking, Toxic, Life Threatening"
- "We've got the killer mould!"
- "Mould claims require multi - pronged attack"
- "Mould Litigation - The Monster in the Closet"
- "Mould Claims - Insurance Broker Options Limited"
- "Toxic Condo rot hits new homes"
- "Having a bad mould complex? - At least 150 families sue apartment management"
- "Growing moulds a problem for Insurers in California. Potential impact on home sales"
- "Canada - Mould Growth in Buildings an Environmental and Financial Risk"
- "Insurance can help manage risk of Toxic Mould"
- "Attorneys are smelling blood - Toxic Mould"
- "Mould claim phenomenon hits Canada"
- "Mould – The four letter threat"
- "Mould claims sky rocket in the US"
- "Flurry of Mould Claims possible in Canada"
- "Toxic mould: The Fungus that is eating the US. Will it have an appetite for Canada?"

As we head towards the end of 2002, how big a problem has toxic mould become for insurers?

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IS THIS A REAL ISSUE?

In the United States, the mould problem seemed to jump into the spotlight about three years ago with the State of Texas leading the way. This US state has released some statistics that are quite startling:

1. One major insurer reported a drastic increase in the frequency of claims that involve mould issues:
1999 - 12 claims
2000 - 499 claims
2001 - 10,000 claims
2. In 2001, Texas reported a total of 50,000 new claims involving “mould.”
3. In Year 2002, four of the largest underwriters in Texas had received 39,000 new ‘mould’ related claims.
4. A statistical review reveals an increase in the per file cost to handle a water damage claim as follows:
2001 - US\$2,800
2002 - US\$8,000

The Texas experience has spread to other US States with significant activity in California and Florida. In the United States, there are reported to be 10,000 current lawsuits outstanding that involve “mould” issues.

It is certainly safe to say that “mould” claims have become a big issue in the United States. Is it coming to Canada? It is already here! Consider...

1. In Year 2000, the Province of Ontario paid out \$40 million in grants to school boards to correct “mould contamination problems” in schools.
2. In June 2000, the Courthouse in Newmarket Ontario was closed while they removed almost all of the walls and ceilings in this 165,000 square foot facility in order to remove “mould.”
3. More recently, the Alberta ‘Court of Appeal’ building in Calgary was forced to temporarily relocate their premises to Edmonton as a result of “toxic mould infestation.” Early reports suggested that two thirds of the staff were experiencing “mould-related” health problems.
4. British Columbia has seen claims and lawsuits involving construction defects that have led to “leaky condominiums.” Allegations have been made about “mould issues.” (For more information see Crawford Adjusters Canada’s September 1999 edition of [ProClaim](#))

The above are just a few examples of mould related losses in the Canada. It is a certainty that there will be a dramatic increase in insurance claims and litigation in this area. In May 2002, The Insurance Bureau of Canada announced that it was forming an “Advisory Group” to provide recommendations to their member companies on many of the issues that have arisen in recent months.

So, clearly we know that “Toxic Mould” is a real issue that we need to address!

WHAT IS MOULD?

Moulds are simple microscopic organisms that have existed for millions of years, they can be found everywhere in our environment. There are about 20,000 different types of moulds. They are not part of the animal or plant family; a mould is part of the Fungi family. There are approximately 1.5 million species of fungi. Certain types of fungi exist naturally in soils, plants, fruits, textiles and even leather products. Mould is simply the product of reproduction of fungi.

Moulds reproduce by making “spores.” This is much like a plant that reproduces by making “seeds.” Mould ‘spores’ are continuously in the air and migrate with the wind, but they can also move through air circulation systems in buildings or be tracked by human beings with dust and dirt.

Mould can settle on virtually any surface. For the most part, they are quite harmless if properly treated and removed at an early stage. But... if three conditions converge there is the potential for a big problem:

1. Moisture (ie. humidity)
2. Heat (ie. between 35 and 104⁰F)
3. Nutrients (ie. building materials)

It is important to realize that fungi will develop mould when exposed to moisture. Generally organic materials can develop mould if they remain wet for 24 to 48 hours. Therefore, it is critical in the removal or elimination of mould to respond quickly to issues of water incursion by repairing or eliminating the source of the water, thoroughly drying all wet materials and removing moisture from the air. The most significant factor in the control of mould is not the quantity of water but the time the material has been exposed to the water or moisture. If the spores happen to land on a moist (damp) spot where these conditions exist then they can multiply (build a colony). They grow by digesting the organic substance they’ve landed upon. The types of things they can eat are:

1. Drywall
2. Carpeting/under-padding
3. Panelling
4. Ceiling tiles
5. Insulation
6. Paint
7. Wallpaper
8. Draperies
9. Doors
10. Drains
11. Upholstery

A mould colony does not need light to feed its growth. It also thrives on the lack of ventilation that might be caused by the improper use of humidifiers, home spas, HVAC systems, ventilators etc. These factors all lend themselves to the colonies growing out of sight behind walls, ductwork, ceilings, sub-floors etc. Perhaps this led to the headline describing mould as the “Monster in the Closet?”

WHAT IS THE IMPACT OF TOXIC MOULD?

The answer to this question really depends upon whom you ask!

The asbestosis problem in the United States resulted in clear medical studies that linked bodily injuries and exposure to asbestos. It is not so clear-cut when it comes to linking mould problems with any injury complaints. Some types of mould, particularly those that produce mycotoxins (by-products or metabolites), can lead to health problems by breaking down the immune system. Symptoms can present as a runny nose, eye irritation, cough, congestion, and asthma-type problems or respiratory infections.

Many of these symptoms are consistent with someone who has allergies. With 45 million Americans suffering from seasonal allergies one can see how this can cloud the link that is needed to prove that the definitive cause of someone's health problems was solely mould. Obviously it would be critical in any situation where health-related issues are involved to make sure you identify the actual type of mould that is alleged to have caused the problem. As time passes, biological markers will continue to evolve and no doubt it will become easier to eliminate or confirm whether an individual's health issues are mould related.

The initial push on these claims came from three US states - Texas, Florida, and California. It's noteworthy that all three geographical areas experience long seasons of hot and humid climates. Bearing in mind the three conditions that must exist for mould to grow, it makes sense that Canada would not have the same degree of 'exposure' to the problem. However, we must keep in mind that our cold weather combined with the energy crisis(s) has lead to a strong push to making airtight buildings. This can present problems if the building has moisture exposure. So, while we may not have the same degree of the problem that exists in the southern US states, it is still with us!

CLAIMS? WHAT FORM WILL THEY TAKE?

Many of the current mould claims that have been filed are first party losses, where policyholders who have had a water damage claim in the past have recently discovered mould in their buildings. Their immediate redress has been to come back against their building insurer who directed the flow of the building repairs through "preferred"...or..."approved" contractors. Several of the remediation projects have resulted in significant payouts including one situation where the insurer actually purchased the building. Any first party claims will, of course, include claims for punitive damages and we now know the benchmark is sitting at \$1 million (Whiten v. Pilot, Supreme Court of Canada, 2001).

The other types of claims being presented are "third party" claims. These are predominantly property damage exposure claims but there is no doubt a strong effort will be made to link a bodily injury component to these claims. This has already happened on a number of claims that have been filed in British Columbia.

The shotgun approach to litigation will lead to many situations whereby subrogation efforts or deflecting blame on a contributory negligence approach will not leave anyone untouched by what's in front of us.

WHO IS BEING SUED OR IS LIKELY TO BE SUED?

1. Sellers of buildings
2. Real Estate Brokers
3. Contractors, including mechanical
4. Sub-contractors
5. Architects
6. Engineers
7. HVAC designers
8. Building owners
9. Developers
10. Property managers
11. Municipal or Provincial government building inspectors
12. Insurers
13. Renovation specialists, including restoration and remedial companies
14. Insurance adjusters
15. School Boards and other public bodies
16. Product manufacturers

ON WHAT BASIS ARE THEY LIKELY TO BE SUED?

1. Faulty design
2. Faulty construction
3. Faulty products
4. Faulty product installation
5. Faulty maintenance
6. Improper remediation work to remove 'mould'
7. Bad faith in handling a first party claim
8. Failure to warn
9. Failure to disclose
10. Improper clean-up or restoration

LAWSUITS?

There are obviously lots of examples in the US.

One good example of what can happen is Centex Rooney Construction v. Martin County, 706 so. 2d 20, Florida Ct. 1997. This courthouse was three years old when the employees started to complain of health issues. There were continuous complaints since the building opened with water leakage through windows and walls. When they investigated they found mould growth and excessive humidity. Who got sued?

1. Building contractor
2. Architect
3. Masonry subcontractor

Early investigations showed extensive mould growth in the building. This resulted in a demand for the building to be demolished and replaced at an estimated cost of US\$26 million. The end result of

protracted litigation was a settlement of US\$17 million which included interest, costs, etc. The contractor paid about US\$14.2 million of this settlement and the Architect and Masonry contractor paid US\$2.8 million. The final numbers included costs for architects and engineers and extra expense items related to temporary relocation during renovation. This example demonstrates the types of situations you can find yourself in.

The case of Melinda Ballard et al v. Firehouse Exchange/Farmers Insurance Company et al, Texas Superior Court, June 2001 has garnered significant attention. The Ballard family owned a US\$3 million mansion that contained 22 bedrooms. In 1997 they reported having “water problems” from a burst pipe in a bathroom. They reported the matter to their homeowner insurer. The Ballard’s alleged that improper remediation efforts resulted in toxic mould growing in the home. A lengthy jury trial resulted in an award of US\$6 million in direct damages, US\$12 million in punitive damages, US\$5 million for emotional distress and US\$8.9 million in legal fees. Wow!

In ‘Hartley v. Century National Insurance Company Arizona Superior Court –November 2001’ the court awarded US\$4 million punitive damages against the insurer. The insurer was found to have failed to properly deal with a US\$72,000 remediation claim. Their failure to do the ‘right thing’ allegedly exposed a 7-year old child to mould toxins and resulted in such a high award.

In Canada we had the case of MacDonald v. Dufferin-Peel Roman Catholic School Board, Ontario Superior Court, 2000. A class action lawsuit was started on behalf of 22,000 children who were allegedly exposed to toxic mould while taking classes in portable school classrooms. The trial judge decided against certifying the class action for a variety of reasons including the difficulty that he felt the plaintiffs would have in proving common causes. The lawsuit, however, included actions against the:

1. Architect
2. Contractors
3. Suppliers

The class action was dismissed but consider the legal costs involved. In addition, consider the added expert costs that might have been involved if this matter was certified and there was a full trial. Experts would have included:

1. Microbiologists
2. Environmental engineers
3. Chemists
4. Mould experts
5. Architects and engineers on remedial work needed
6. Construction experts
7. Air quality specialists
8. Ventilation experts
9. Industrial hygienists
10. Medical experts in neurology, immunology, and pulmanology

Crawford Adjusters Canada’s ISRM Division in British Columbia recently concluded a file where we acted for the Errors and Omission Insurers of an engineering firm. The case involved an action started by a school board that resulted in a Statement of Claim being issued against many parties

including our client. The toxic mould allegation against the engineering firm was resolved with a payment of \$1. This settlement was made on the basis of a very comprehensive investigation, which proved no negligence on the engineering company's part, but... the litigation against other parties is continuing.

THINGS TO CONSIDER

In this article, we are not going to address issues relating to "coverage" of toxic mould losses. The issue of coverage and the critical importance of the factual and technical investigations will be addressed in future articles, but there are a number of things that we think loss adjusters and insurers should be considering....

1. The first step is to acknowledge that we have a problem that must be addressed. The Insurance Bureau of Canada formed an Advisory Group in May 2002, this group will be looking to address many of the concerns raised in this article. This will include addressing claims, coverage and policy language concerns.
2. It is fundamental to recognize that any time water penetrates a building there is the potential for a mould problem. Experts say that a proper drying out process must get underway within 24 - 48 hours in order to mitigate against problems. Given that much of our storm activity occurs on weekends, consideration has to be given to the 24/7 intake and triaging system that is in place. The retention of experienced and educated adjusters and contractors is critical to both the remedial process and the gathering of information to protect all parties. If a contractor or adjuster is not able to get to the site quickly, what instructions are being given to policyholders to assist in the drying out process?
3. Not only must the location of the source of water and the drying out process be handled immediately but also there must be an awareness of what concealed damage exists, such as wetting.
4. Are your processes different in dealing with "clean water claims" versus "contaminated water?" To what extent should allowances been made on the scope of damage? In other words, how far do the adjuster and/or the contractor go?
5. If the 'colony' is exposed it can become airborne. Renovations to a building as well as improper mould removal/clean-up can stimulate migration into plumbing, heating, and ventilation systems. Are your contractors aware of this?
6. What are the insurer's "due diligence" protocols in the management of water damage claims? Can you really afford to 'telephone adjust' this class of claim?
7. Do you or your adjusters have a protocol that will deal with mould prevention? Does that protocol ensure a proper inspection for previous or existing damage from earlier intrusions?
8. How are you going to deal with those tricky areas where you are not sure of coverage? Use of Proofs of Loss, Critical Path Letters, Reservation of Rights letters, Non-waiver Agreements etcetera are critical to keep yourself out of trouble in creating an estoppel.
9. How will you protect any subrogation cases?

10. If you do have a claim and the insured wants to “cash out,” what should you be putting in writing to the insured? Do they know about the mould issues? Should you be warning them?
11. If you have a catastrophic loss (CAT) can you afford to ‘cash and run’ on your claims? If you do, do you have protocols to ensure you’ve released yourself properly with an informed consent? Do you need to customize new release forms?
12. Do your contractors have their CGL policies endorsed to provide mould coverage? Are the contractors you’ve “approved” certified for handling mould losses? Is your contractor properly versed in mould clean up if any exists? Keep in mind that there are many contractors that profess knowledge in this highly skilled area and very few that actually have the proper skills and training. Someone not trained can ‘push’ the mould spores through an entire building if they don’t know what they are doing.
13. If you do run into a problem, do you know how to utilize the “Appraisal Process” pursuant to the Insurance Act? This is a key method to identify the “amount of loss” without necessarily accepting coverage for the loss. It is also effective to limit legal costs.
14. Do you have a mould or microbial investigation protocol including sampling of air, surfaces, and wall cavities? Is there a management plan for conducting such investigations?
15. Have you pre-approved the properly qualified experts you will use on your mould cases such as Forensic engineers, Architects, Industrial Hygienists, Microbiologists, Toxicologists, Allergists, Immunologists, and Medical Doctor’s specializing in Environmental and Occupational Health or Pulmonary diseases?
16. Are you familiar with the various myths regarding mould claims?

Crawford Adjusters Canada’s in-house specialists as well as our comprehensive database of experts and resources can assist in many of the above areas, including the protocols referred to. For details about information and resources available from Crawford, please visit our website at www.crawfordandcompany.ca or email info@crawco.ca.

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