Mould Claims: Implications for the Construction Industry in Canada

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1. Introduction.

Since the late 1990's there has been much ado about mould. Construction Industry commentators, particularly those involved in the legal and insurance areas, have published a significant number of articles and essays, for the most part warning of the dire implications of these types of claims for the industry. Despite the lack of science establishing a clear link between mould exposure and significant health effects in normal, healthy human beings, the warnings are probably appropriate given the novelty of these claims and the experience in the United States. In that country, a significant number of claims have been made1 and, in some instances, significant awards have made in favour of Plaintiffs.

How significant are these claims for construction industry stakeholders in Canada? What is being done to address mould problems by the industry, governments, and the Courts? In the Courts, who is being sued or who may be sued and what kind of exposure and challenges are the parties likely to face?

2. The Problem.

How significant is the mould problem in terms of claims and the dollars associated with them? So far there have been relatively few claims in Canada. However, the press has given a high profile

[1] As a for instance of what has been occurring in the United States, the Texas Department of Insurance has published data provided by insurers in that state showing staggering increases in the number of claims and their dollar value. In the first quarter of 2000, approximately 1050 such claims were made with estimated losses at $14.4 Million. In the fourth quarter of 2001, approximately 14,700 claims were made with estimated losses of $187 Million. Total estimated losses for the years 2000 and 2001 were just over $1 billion. Source: Texas Department of Insurance Special Call for Homeowners mold experience issued 7/30/2001 and 12/31/2001. Prepared by the Texas Department of Insurance, P/C Actuarial Division.

to a number of mould contamination complaints, including: In January 2001, the Chief Justice of Alberta closed the Calgary courthouse, alleging that mould contamination was making its occupants, including the judges, sick. It has been reported that the judges often worked on mould "contaminated" files at home and that some have considered mould inspection of their homes. Further, it has been reported that when the court needs to access files stored in the closed building, the files are removed by workers wearing protective clothing and respirators and the file contents are hepa vacuumed prior to use[2].

a. In June 2000 in Newmarket Ontario the courthouse was closed for a year and an approximately $20 million mould remediation project was undertaken. Despite the year long clean up project and the millions spent on clean-up, reports of mould contamination in the building persist[3]. In January, 2002, a class action was launched seeking a reported $50 million in damages from various defendants. Over 3 years has passed and the action has still not been certified (hearing scheduled for June 2005).

b. In British Columbia, between 2000 and the present, various school boards have undertaken mould remediation projects concurrent with the repair of leaky building envelopes. Numerous lawsuits have been launched naming architects, contractors, and trades.

c. In Ontario, the provincial government has provided approximately $40 million to various school boards to assist with mould remediation of schools.

Despite the press hysteria associated with these "toxic mould" occurrences, the litigation flood gates have not broken open. Among other obstacles, Plaintiffs seeking to establish their claims face the following:

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[2] *R. vs. Mould--Alberta's legal records are being eaten*, by Candis McLean, Report, Canada's Independent News Magazine, March 4, 2002 (http://report.ca/archive/report/20020304/p38i020304f.html)

[3] *Courthouse confounds occupants,* Toronto Star -October 31, 2002

a. Proving causation of mould related injury is difficult to establish given the lack of scientific data linking mould exposure to specific illness and given the wide array of chemicals (possible alternate causes) that people are exposed to on a daily basis;

b. Serious injury from mould exposure is very rare and, most mould associated illnesses typically clear up quickly once mould exposure is terminated.

c. Mould is naturally occurring and is ever present in the atmosphere. It affects different plaintiffs differently and behaves differently from building to building. Therefore, the common elements between plaintiffs' needed to justify mass tort or class action claims are more difficult to establish.

Regardless of the amount of litigation that may ultimately be driven by mould in Canada, what is now clear is that there is a widespread perception that mould may be a significant health hazard. While this perception remains building occupants will, justifiably, complain and building owners and operators will continue to spend money removing mould and remediating their buildings. Accordingly, the construction industry owes it to its customers and the users of its products to be alert and responsive to mould issues.

2. What is Being Done to Address Mould Problems

Construction Contractors

There is recognition in the construction industry that where found in or on construction materials, mould must be removed. There is also recognition that when organic building materials (drywall, paper, wood) become wetted and ventilation is insufficient, they may require removal to avoid the growth and proliferation of mould.

In late 2002, the Canadian Construction Association formed a toxic mould task force to develop standards, means of assessment, remediation protocols and other guidelines for construction

contractors.[4] The CCA has now provided a dedicated page on its website with respect to mould issues: (http://www.cca-acc.com/mould/index.html). More importantly, the task force has published CCA- 82, "Mould Guidelines for the Canadian Construction Industry". The document is available as a free download from the website and provides a comprehensive guide to the risks, construction practices, building operations and maintenance, and assessment and remediation guidelines.

The CCA document adopts a cautious conservative approach which is probably prudent given the current uncertainties. Contractors and others who fail to follow this suggested approach will increase their exposure to legal claims because, to some extent, these guidelines may be taken to establish the acceptable standard for dealing with remediation and avoiding risks in the first place. The document is helpful and certainly those involved in mould remediation should become familiar with it to understand the factors of risk, increased cost and time involved in removing mould.

Owners

Building owners are remediating their buildings where significant mould growth is found. In many of these cases in the Pacific Northwest there is also a water ingress problem. If significant portions of a building are damaged by the water and require replacement, then solving that problem often solves much of the mould problem. While in such cases additional money may be spent specifically on mould remediation, the additional amount is typically small compared to the overall cost of remediation. This has generally been the experience in the so-called "leaky condo" claims in British Columbia. Accordingly, allegations involving mould have not generally caused a significant change in the way those claims have been dealt with.

Owners of buildings face more difficult decisions with respect to mould remediation where water/moisture problems are insufficient to justify tearing off the building exterior and replacing entire wall assemblies. In such cases, the question becomes whether the presence of mould, by itself, dictates extensive removal and replacement of wall assemblies or expensive containment and remediation procedures. Not surprisingly, public authorities have taken a conservative

[4] CCA News, Issue # 41, November 2002 (http://www.cca-acc.com/news/newsletter/monthly/2002/november02.pdf)

stance. School Boards in British Columbia and Ontario and public employers throughout Canada have taken the approach that wherever significant amounts of mould exist, remediation must be undertaken and the mould colonies removed. What remains to be seen is how difficult it is going to be to recover these remediation costs where buildings otherwise require relatively minor repairs to stop the moisture problems.

Governments

There is no regulatory regime in Canada purporting to set standards for or impose liability on those involved in the construction industry for the creation of structures that are conducive to mould growth. Within existing legislation it may be possible, to a limited extent, to find a response to toxic mould. Many provinces have enacted residential tenancy legislation[5] and public[6] and workplace health statutes[7] that might obligate landlords, governments, employers, and private parties to investigate or remediate mould complaints. For instance, in British Columbia, it is arguable that Occupational Health and Safety Regulations create obligations for employers with respect to mould issues[8]. Subsections 4.79(1) and (2) of the Regulations provide:

1) The employer must ensure that the indoor air quality is investigated when

    a) complaints are reported...

2) An air quality investigation must include...

    a) sampling for airborne contaminants suspected to be present

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[5] In B.C. *The Residential Tenancy Act*, RSBC 1996, c. 406, ss. 10-12

[6] In B.C. *The Health Act*, RSBC 1996, c. 179, ss 57-59 enables health boards to investigate and order the termination of health hazards;

[7] In B.C., *the Occupational Health and Safety Regulation*, Part 4. In Ontario, *the Occupational Health and Safety Act.*,c.0.1, s.25;

[8] Occupational Health and Safety Regulation, Part 4 General Conditions. Subsections 4.70 to 4.80 deal specifically with Indoor Air Quality issues;

In association with this legislation the Workers Compensation Board has developed a policy of conducting mould investigation and remediation in accordance with the so called New York protocol9[9].

In British Columbia, the provincial government recently established a Building Envelope Program to assist its various school districts with diagnosing building envelope problems and pursuing recovery against those responsible for designing and building problem/leaky schools. There are a number of claims being advanced by Vancouver area school districts that include allegations that toxigenic mould species have proliferated due to faulty building envelope design and construction. None of these claims has been adjudicated to date. However, a number of schools have undergone repair and mould remediation pursuant to the New York protocol.[10]

While governments in Canada have not set clear standards, the construction industry cannot ignore the fact that governments have taken a very low tolerance c. 0.1, s. 25; approach to mould exposure. Contractors doing restoration or original construction work for government will be expected to be familiar with this approach and to avoid creating opportunities for mould growth in carrying out their work.

3. Who is being sued?

Who is being sued in mould claims? Employers, landlords, building owners, contractors, architects, mechanical engineers, trades, product suppliers, developers, vendors, real estate agents, property inspectors, and insurers are all being sued in Canada. These claims are brought by workers/employees, building owners, tenants, and purchasers, and insured parties.

These claims are typically advanced under theories of liability with which those involved in the construction industry are familiar, including:

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[9] New York City Department of Health, Bureau of Environmental and Occupational Disease Epidemiology *Guidelines on Assessment and Remediation of Fungi in Indoor Environments*

[10] New York City Department of Health, Bureau of Environmental and Occupational Disease Epidemiology Guidelines on *Assessment and Remediation of Fungi in Indoor Environments*; See also U.S. Environmental Protection Agency

a. Tort claims founded on plain negligence, negligent or fraudulent misrepresentation, breach of duty to warn or disclose;

b. Contract claims associated with design, construction, purchase and sale, or lease agreements; and

c. Insurance coverage claims pursuant to policies/contracts of insurance.

About the only conclusion that can be drawn from the list of parties involved and the nature of the claims being brought is that the uncertainty surrounding mould claims will not stop them from being advanced and, further, that same uncertainty promotes a shotgun blast approach to identifying the parties responsible. This is all the more reason to be cautious when it comes to assessing the risk and costs that may be associated with mould claims.

Contractors Exposure to Mould Claims

Contractors whose work is associated with water system (plumbing, sprinkler systems, etc.) failures, leaky building envelopes, HVAC system failures or inadequacies, the supply of wet building materials, and restoration of water damaged buildings are all exposed to mould claims. Just as owners are being pro-active with the repair and remediation of their buildings, contractors must be pro-active during construction to ensure that the conditions for mould growth are discouraged. If organic material gets wet during construction and is likely to be sealed into a closed space, then, unless there is sufficient certainty that the material will dry out, it is likely that the material should not be used. Contractors should consider periodic inspection during construction of areas that have the potential for accumulation of moisture. In particular, restoration contractors cleaning up after a fire or flood would be well advised to become familiar with mould issues and mould remediation practices and, whenever in doubt, to retain the services of an expert.

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guide: *Mold Remediation in Schools and Commercial Buildings* available at the EPA website: www.epa.gov/iaq/molds.

Contractors should also educate their employees with respect to mould issues. They will need to do this both to avoid potential liability to building users and to their own employees whose health may be affected by mould.

Insurers Exposure to Mould Claims

Insurers were the parties with the greatest exposure to mould claims. Coverage for these claims might be sought under homeowner policies, first party commercial property policies (landlords and owners), CGL and wrap up policies (contractors and trades) and E&O policies (design professionals). Most Insurers, having looked with alarm at the situation in the United States, have by now moved to exclude coverage for mould claims. However, anyone facing a mould problem should still review all coverages in effect just to be sure.

4. Proving Mould Claims

Property Damage Claims Founded in Contract

There is a consensus amongst experts that mould can cause property damage. Mould is a reasonably foreseeable occurrence in the event that faulty design or construction creates the opportunity for excessive moisture/humidity levels proximate to organic structures. Accordingly, mould claims for property damage have reasonable prospects of success where they are founded in contract and the conditions giving rise to the mould are caused by breaches of express or implied terms or representations of the contract.

Plaintiff's suing in contract are typically able to recover the cost of rectifying the damage or, sometimes, the diminution in value of their property. In the former case, the cost of rectifying water ingress damage often substantially overlaps the costs of rectifying the mould problem. In fact, the authors experience in leaky building litigation has been that the incremental cost of addressing mould in these repairs is negligible. That seems to be, in part, because the air-tight vapour barrier adjacent to the interior wall finish on most buildings does a reasonably good job of preventing mould in wall cavities from migrating to the interior of buildings.

Where mould spores are not trapped inside a wall cavity they are much more likely to be liberated and remediation and protection costs attributable specifically to mould may become substantial. Apparent examples of this are the Calgary and Newmarket courthouse buildings. Assuming that mould growth in such cases can be attributed to faulty design or construction (rather than, say, an accidental flood or maintenance), building owners claiming remediation costs may face a defence argument that the extent of the remediation or protective measures are excessive. This is a viable argument given the lack of consensus on the health threat associated with mould. However, and as is discussed below, there is judicial authority which tends to suggest that this argument will only go so far.

Property Damage Claims Founded in Tort

Plaintiff's suing in tort for property damage to their buildings due to a latent construction related defect may face the problem of recovery of pure economic loss. They must satisfy the Winnipeg Condominium test[11]. That is, they must establish that the defect represents a real and substantial danger to the health or safety of a building's occupants.

The body of scientific literature on the dangers of mould is growing but provides limited guidance. At one end of the spectrum there are studies that suggest that exposure to toxic mould species can cause such serious illness as acute pulmonary hemorrhage and even death[12]. However, in a more recent address to the United States House of Representatives, the CDC confirmed that such a link has not been proven to exist and that the health affects of mould remain largely unknown.[13]

The published guidelines issued by various governments and government bodies setting low mould thresholds and conservative clean-up policies are supportive of the plaintiff's position that

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[11] *Winnipeg Condominium Corporation* No. 36 v. Bird Construction Co. [1995] 1 S.C.R. 85 at para's 35 to 38.

[12] In 1998, the American Academy of Pediatrics committee on Environmental Health suggested further investigation of a possible link between the toxigenic mold species, Stachybotrys Atra, and acute pulmonary hemorrhage in infants which can lead to death: *Toxic Effects of Indoor Molds*, Pediatrics, Vol. 101, No. 4, April 1998. See also the list of publications regarding health effects on the Health Canada Website at:

[13] *State of the Science on Molds and Human Health*, Statement to the Subcommittee on Oversight and Investigations and Housing and Community Opportunities, Stephen C. Redd M.D., July 18, 2002

mould poses a significant health risk. In the authors' view, this kind of material may influence, to a limited degree, standards of care but it will not establish judicial notice that all mould is dangerous and plaintiffs will have to prove this on a case by case basis with specific evidence. An example of this potential difficulty was encountered by plaintiffs in the British Columbia Privest Properties case[14]. There, it was alleged that an asbestos containing spray fireproofing was sufficiently hazardous to health that the defendants should be found liable for the cost of removal and replacement of the material. Despite the widespread knowledge that asbestos is a health hazard, the court refused to accept the evidence that zero tolerance for airborne asbestos was the correct approach.

The plaintiff's had lead evidence of the substantial body of literature dealing with the dangers of asbestos but that did not prove that sufficient volumes of asbestos in that particular installation were becoming airborne and creating a health hazard.

There are cases involving contamination by certain mould species where a lack of evidence specifically connecting ingestion of mould to physical harm lead to dismissals[15]. On the other hand, there are cases where toxigenic mould species have been held to pose a significant risk or to have actually caused injury. In British Columbia, despite dismissing the plaintiff's case, the Supreme Court accepted that the presence of mould in her condominium and the plaintiff's illness and respiratory ailments while in the condominium made it "not unreasonable to assume the mould caused the problem".[16] In Ontario, the courts have accepted that the presence of mould rendered a basement uninhabitable[17] and, in another case, that moulds were hazardous to the health of building occupants and was a factor necessitating removal and replacement of basement foundation walls.[18] In a number of landlord and tenant cases in Quebec, the toxic

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[14] Privest *Properties et al v. The Foundation Company of Canada Limited et al* (1995), 11 B.C.L.R. (3d) (S.C.), aff'd on appeal.

[15] See *M. Hasegawa v. & Co. v. Pepsi Bottling Group (Canada) Co.* [2002] BCJ No. 1125 (SC), aff'd on appeal (mould present in bottled water), *Andersson v. Loblaw Companies Ltd.* [1998] O.J. No. 1108 (S.C.J.) (mouldy margarine), Seilver v. Mutual Insurance Co. of British Columbia 2003 BCSC 1423 SC

[16] *Wright v. Strata Plan No. 205* [1996] BCJ No. 381 (SC)

[17] *Fraser v. Knox* [1998] O.J. No. 4379 (OCJ-GD).

[18] *Alie v. Bertrand & Frere Construction Co. et al* [2000] O.J. No. 1360 (S.C.J) at para. 58, upheld on appeal [2001] O.J. No. 2014 (O.C.A.). See also Mariani v. Lemstra (2004) 246 D.L.R. (4th 489 ONT CA).

mould species "stachybotrys" has been held to be a heath threat[19] and, in one such case, plaintiffs were awarded personal injury damages, although substantially less than the amount claimed.[20] In view of these decisions, it appears likely that the presence of a toxigenic mould species may well assist a plaintiff in establishing the "real and substantial danger" required for recovery of economic loss, although specific evidence of the danger will need to be called.

Personal Injury and Class Action Claims

Personal injury claims arising out of mould contamination are rare in Canada. In many leaky building cases, strata corporations are authorized by statute to bring claims for property damage on behalf of all the owners in a given development. This is a significant convenience that keeps the claims much more manageable than if one were to have to name all the individual owners as plaintiffs. Unfortunately, personal injury claims have to be brought by individual owners unless one is able to certify a class action.

Mould claims, particularly mould claims for personal injury damages, are likely to require an array of experts including medical practitioners, both generalists and specialists, biologists, mycologists, environmental engineers, mechanical engineers (HVAC) and remediation experts. The lack of expert consensus in the medical community as to the health effects of mould make it a given that opposing parties will be able to obtain contradictory opinions. This, along with the added complexity to the litigation and consequent cost, and the possibility that personal injury

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[19] *Theriault c. Debeau* [2000] J.Q. no 5685 (SC); Morvan (f.a.s. Portes et fenetres Express enr.) c. Tessier [2002] J.Q. no 4052 (S.C.). In *Morvan*, a renovation contractor claimed for certain extras for his water damage restoration work done in Madam Tessier's basement. She counterclaimed claiming that the work was done improperly leaving mould causing moisture behind so that her basement was unusable. Morvan's contract called for him to rid the basement of mould and mildew. He did not perform any anti-fungal treatment and claimed that all wet assemblies had been removed. That was not true and experts testified that Morvan had left behind conditions conducive to mould growth. The court accepted that this necessitated the demolition and rebuilding of much of the basement and rendered Morvan's original work useless. The court also found that Morvan's shoddy work was, in part, the cause of conditions in the basement that were dangerous to health. The court accepted the homeowners evidence that mould in the basement had made her family ill, despite other potential causes (dog, smoking, unrelated allergies). However, no personal injury damages were awarded (it does not appear that any were sought).

[20] *Alain c. 2809630 Canada Inc.* [2002] J.Q. no 5534 (C.S.). The court accepted expert testimony that the tenants exposure to the stachybotrys mould species had caused fatigue, vomiting, gastrointestinal problems, headaches, and other problems, all of which cleared up when they vacated. Both plaintiffs claimed $75,000 in non-pecuniary personal injury damages but they were awarded only $5000 each.

damages may be relatively modest, are all factors that have to be weighed in the decision to bring these claims.[21]

In one Quebec case the Plaintiff tenants claimed for $75,000 each for personal injury arising from approximately 6 months of exposure to toxigenic mould. Both tenants suffered a variety of flu-like symptoms, among others. They spent over a week in trial and tendered the evidence of an environmental consultant, an industrial engineer, a molecular micro-biologist, evidence from an independent laboratory, and evidence from their medical doctors in support of claims for non-pecuniary loss. The Court ultimately awarded them $5,000.00 each[22]. It is hard to imagine that the award justified the expense of pursuing the personal injury claim.

The economies of scale that may be achieved through class actions might make personal injury claims more attractive. However, class action claims for mould have failed in two recent cases because of the perceived difficulty of establishing which Plaintiffs have actually suffered injury and the subjectivity of each plaintiff's exposure[23]. In the Ontario case involving the Newmarket Courthouse the class certification hearing is pending. It will be interesting to see whether that action is certified or not. If it is not, the weight of authority in Canada will certainly be against Plaintiffs hoping to proceed with personal injury claims by way of class action.

5. Conclusion

Mould litigation may not be the next asbestos but it cannot be ignored. Building owners are incurring considerable costs dealing with mould and where blame can be laid on construction practices claims will follow. The construction industry has to play its part in minimizing the problem in the first instance as well as correcting and cleaning up mould infestations. Standards that have been set, require a conservative approach to mould exposure thresholds and

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[21] In one British Columbia "leaky condo" case, the Plaintiff's abandoned toxic mould claims asserted by individual owners, presumably due to the added complexity and cost of pursuing these claims. *The Owners, Strata Plan VR 2000 v. Shaw et al*, [1999] B.C.J. No. 28 (S.C.)

[22] *Alain c. 2809630 Canada Inc.* [2002] J.Q. no 5534 (C.S.).

[23] *Taub v. Manufacturers Life Insurance Co.* [1998] OJ No. 2694 (S.C.J.); *MacDonald (Guardian ad litem of) v. Dufferin Peel Catholic District School Board* [2000] O.J. No. 5014 (S.C.J.)

remediation measures. It is prudent and good business for the industry to observe this conservative approach until more is known about the potential dangers of mould.