

Sick Building Syndrome

Mould is a growing cause of legal action

Studies have shown that North Americans spend over 90 per cent of their time indoors. As a result, our building environment has become the subject of concern and, in many cases, litigation. A number of different types of claims have arisen in the sick building syndrome context. Many of these claims have been in the United States, but more and more are making their way through Canadian courts.

In the United States, the flagship case was decided in June 2001. A Texas jury found in favour of the plaintiff homeowners against an insurance company. The homeowners were awarded \$32 million in damages, including \$6 million for actual damages, \$12 million in punitive damages, \$5 million for emotional distress and \$8.9 million in legal fees. The court did not permit medical evidence as to the alleged health effects on the residents. The action related to the Ballard home, a 12,000-s.f. mansion that had a plumbing leak in a bathroom in 1998. Apparently, more than 10,000 square feet of stachybotrys mould is growing in the Ballard residence and the house is now being used by scientists to test mould-inhibiting technology. The jury found that, when inhaled, the mould caused nosebleeds, cold symptoms, headaches and pulmonary infections.

In Canada, we have seen employees sue employers over sickness and disability resulting from buildings that are subject to sick building syndrome. In one case in New Brunswick, the employee sued his employer, the federal government, together with the design consultants, contractor and the building operator of the complex in which he worked (*McCarthy v. Canada (Minister of Natural Resources)*, 1999). The Canadian government tried to have the claim dismissed based on compensation available to the employee through other means, but the application was dismissed.

In another recent case, a Manitoba district hospital was prevented from suing its design consultant, contractor and a number of subcontractors for damages relating to mould growth in a new personal care facility for seniors because the claim was brought outside the time frame permitted by the Limitations of Actions Act of Manitoba (*Swan River Valley Hospital v. MMP Architects*, 2002). The allegations against

the design consultant included that they had improperly designed the facility such that moisture could penetrate the building envelope and mould was able to proliferate.

In Ontario, plaintiffs launched a class action against a Catholic school board, which joined its architects and contractors in the action, in relation to alleged illnesses suffered by children who had to be placed in portables operated by the school board (*MacDonald v. Dufferin-Peel Catholic District School Board*, 2000). The claim was based on the presence of mould in the portable classrooms and the failure of the school board to remove it. Also, the claim included allegations that the portables were not properly designed

to provide adequate ventilation and that they were constructed negligently and in a manner that allowed amplification of the mould. The court found that there was not enough evidence to show a widespread illness caused by amplified mould and pointed to the fact that many students who had been in portable classrooms did not miss any more time off school than students in permanent classrooms. As a result, the Ontario Superior Court refused to certify the action as a class action. However, if the applicant had been successful, it is likely that the school board and third parties would have considered expanding the action to include other possible defendants including engineering consultants.

In a case concerning the Newmarket Courthouse, the design consultants have been named as defendants. The Ontario government closed the courthouse in June of 2000 due to health concerns. A class action has been commenced on behalf of the workers seeking \$50 million in damages. In addition to the Ontario Government, the construction company, the mechanical engineers, the architects and the maintenance company for the facility have been included as defendants. The allegations include improper design and construction of the facility. This action is still before the court.

The extent of the problem in Canada is not only seen in court cases, but also in statistics. In 2001, for example, the Ontario government announced that it would spend \$90 million a year to repair mouldy provincial buildings. In that same year, 58 Ontario government buildings had

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already been identified as having mould problems. Given the extent of the problem, there are now reports that design consultants may not be able to obtain insurance coverage for mould and sick building syndrome.

In the construction industry, the following parties are typically the defendants in sick building syndrome related actions:

- architects
- engineers
- contractors
- subcontractors
- manufacturers and suppliers
- property managers
- building operators.

Owners may also be defendants in these actions, such as in the class action case noted above against the Catholic School Board in Ontario. However, when the actions are relat-

ed to building defects, typically the owners or occupants are the plaintiffs. In addition, where a contractor sues the owner for delay as a result of encountering a mould problem during construction, the owner will likely involve the design consultants if the circumstances indicate that deficiencies in the drawings or specifications contributed to the problem.

Litigation associated with sick building syndrome and mould is in its infancy in Canada and, based on the American experience, the building industry and design consultants should brace themselves. In this regard, construction contracts and professional client-consultant agreements should be reviewed to determine if they deal adequately with claims arising out of sick building syndrome circumstances. **CCE**

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Resources

- Fungal Contamination in Public Buildings: A Guide to Recognition and Management (Health Canada, June 1995) http://www.hc-sc.gc.ca/ehp/ehd/catalogue/bch_pubs/fungal.pdf
- Guidelines for Investigation, Assessment & Remediation of Mould in Workplaces (Manitoba Department of Labour, March 2001) www.gov.mb.ca/labour/safety/publication/guidelines/mould/mouldguidel.pdf
- Guidelines on Assessment and Remediation of Fungi in Indoor Environments (New York City Department of Health, April 2000) www.ci.nyc.ny.us/html/doh/html/epi/moldrpt1.html