

GREENMAIL

NEWSLETTER

*A Report On Developments
in Environmental
Regulation*

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INSIDE

**PAGE 2
HEALTH CONCERNS**

PAGE 3

- **MOLD IN THE WORKPLACE**
- **DEFENSIVE STRATEGIES –
DUE DILIGENCE**
- **CONCLUSION**

PAGE 4

**MINISTER REQUESTS REVIEW
OF VOLUNTARY STEWARD
RULES**

**TOXIC MOLD LITIGATION AND
UPDATE ON VOLUNTARY STEWARDS**

INTRODUCTION

We're taking a small step away from our focus on the *Waste Diversion Act* and the Blue Box Program Plan this issue to bring our clients news on another environmental front – toxic mold litigation. Although most of the lawsuits are taking place south of the border, Canadian property owners, developers, real estate agents, and employers would be wise to pay attention.

Lest our clients think we are abandoning the topic of the Blue Box Program Plan, we offer an update on the most recent developments concerning voluntary stewards. The Minister of the Environment, Leona Dombrowsky (the "Minister"), recently requested that Stewardship Ontario suspend the acceptance of further categories of voluntary stewards, pending a review of the voluntary steward policy. Stewardship Ontario held two consultation sessions in June to discuss changes to the policy, and presented revisions to the Waste Diversion Ontario Board on July 9, 2004. The revised policy should address the concerns that stakeholders have been voicing over the past several months and is discussed on page 4.

TOXIC MOLD: DON'T LET IT CREEP UP ON YOU

Imagine being told that your home was so badly infested with mold that it would be cheaper to bulldoze it and start over rather than fix the problem.

That's the news a couple in Charlottetown, PEI received in March after a home inspection revealed a mold problem so severe, they had to move out and leave most of their belongings behind. Worse yet, their homeowners' insurance does not cover mold. The couple still owes \$80,000 on their mortgage, but their house is uninhabitable.¹

Will anyone be held responsible?

While relatively rare in Canada, mold suits are one of the fastest-growing sectors of liability law in the US. US settlements and damage awards are notoriously high, and toxic mold cases are no exception to that rule. For instance, at the end of November, an owner of a luxury apartment complex in Florida agreed to settle a class action lawsuit that alleged his building was infested with mold. The settlement amount was estimated to be in the neighbourhood of \$25 million US.²

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¹ "Family forced to abandon sick home: Inspector finds mold problem so serious, it might be better to bulldoze house, start over" *The Guardian* (25 May 2004), online: <<http://www.fpinfomart.ca>>.

² "Miami apartment owner to settle mold lawsuit for millions" *The Miami Herald* (26 November 2003), online: <<http://www.miami.com/mld/miamiherald/business/7356260.htm?template=contentModules/printstory.jsp>>.

That same week, a 57-year old graphic designer in Boston named Katrine Stevens made mold history. She won a jury award worth \$549,326 US by proving that she had suffered severe health effects after living for only six weeks in a condo infested with mold.³

Not all mold suits are successful, however. In late February 2004, the first wrongful death mold lawsuit in the US resulted in a judgement for the defendant. A 60-year-old plaintiff and her 2-year-old grandson suffered severe health problems allegedly as a result of exposure to mold found in their mobile home. The plaintiff sought more than \$7.5 million US in damages. Although the plaintiff died in 2001 due to a fungal infection in her lungs, her legal team was unable to demonstrate that the mold in the mobile home actually caused the plaintiff's health problems.⁴

These cases are not without controversy. Some people blame opportunistic lawyers for the increase in mold litigation, not the mold. Lawyers and plaintiffs counter that their claims of adverse health effects and property damage are not simply figments of the imagination, they're very real.

The litigation trend is not as pronounced in Canada. One reason may be that Canadian damage awards are considerably lower than in the US. But also, most of the Canadian cases concern the relatively benign claim of property damage, not deleterious health effects.⁵ However, this does not mean that Canadians should be complacent about mold. Mold can be a costly and worrisome problem, even if a lawsuit is never filed.

Health Concerns

Since there are many different types of mold, its presence in a building does not necessarily mean that toxins are present. However, some molds, such as *Stachybotrys atra* (*chartarum*) and *Aspergillus versicolor*, can produce dangerous toxins. Mold can grow on any organic surface, as long as there are ready supplies of moisture and oxygen. Some common places where mold can be found include carpets and backing, ceiling tiles, cellulose insulation, concrete or cinder block surfaces, fiberglass insulation, hard surface/porous flooring (i.e. Linoleum, ceramic tile, vinyl), non-porous/hard surfaces (i.e. plastics, metals), upholstered furniture, drywall and gypsum board, window drapes, and wood surfaces.

Mold affects everybody differently and should never be ignored. Generally, the most common complaints are a runny nose, cough, congestion and aggravation of asthma. Employees who have been exposed to mold-contaminated offices have exhibited symptoms such as fatigue, respiratory ailments and eye irritation. But a variety of other health effects have also been reported such as internal bleeding, cancer, lung disease, immune system suppression, and chronic fatigue. Mold has even been blamed for problems with both the male and female reproductive systems.

Because the symptoms are so varied, and because some people are not affected by mold at all, both Canadian and US plaintiffs have found causation to be difficult to prove.⁶ The Stevens case mentioned above is therefore notable for the fact that the jury believed her claim that the exposure to mold left her permanently disabled.

³ T. Grillo, "Mass. jury award a milestone in battle over mold" *Boston Globe* (25 November 2003), online: <http://www.boston.com/news/local/massachusetts/articles/2003/11/25_mass_jury_award_a_milestone_in_battle_over_mold>.

⁴ "Klinedinst Attorneys Win Verdict in Precedent-Setting Mold Wrongful Death Case" *eMediaWire* (25 February 2004), online: <<http://www.emediawire.com/releases/2004/2/emw106910.htm>>.

⁵ For a summary review of Canadian case law, see T. Heintzman, C. Hubbard and A. Einav, "The Infectiousness of Mould: Toxic Mould Claims in Canada?", online: <http://www.environmentalhazards.com/mold-fungus/toxic_mould_claims_canada.htm>.

⁶ See, for example, *Derosa v. Horning* (2001), 46 R.P.R. (3d) 111 (B.C.S.C.) and *Taub v. Manufacturers Life Insurance* (1998), 40 O.R. (3d) 379 (Ont. Ct. Gen. Div.).

Mold in the Workplace

Mold does not only appear in homes, it can also infest commercial buildings. Beyond serious property damage, mold in the workplace is an occupational health and safety issue. Action must be taken to clean up the mold as soon as a problem is discovered. When planning a remediation, the most important consideration must be the health and well-being of employees. Depending on the extent of the problem, employees may have to be relocated. This decision depends on the size and type of area that is affected by the mold, the potential health risks during remediation, and the degree of disruption caused by the remediation.

Therefore, in the case of an office building, a business owner may have to find an alternative location from which to operate the business, if possible, or consider shutting down the business entirely until the remediation is complete. Both options can be costly.

The second cost that must be considered is the remediation itself. Again, depending on the extent of the problem, outside contractors may have to be hired to do the clean-up.⁷

Defensive Strategies – Due Diligence

Corporate purchasers or potential lessees should be alert to the presence of mold when visiting properties. Add mold to your due diligence list, as you would any environmental concern. Although mold is primarily a health and safety issue, it has the potential to become a serious environmental problem.

It is much easier to deal with mold **before** moving into new premises than afterwards. In the case of a lease, for instance, the lease document should contain a representation and warranty that there is no mold on the premises, and should any be found, the landlord will be responsible for the costs of remediation. Potential purchasers who notice a mold problem should negotiate an abatement to the purchase price to offset the costs of remediation.

Because mold is a health and safety issue, all mold must be cleaned up before employees begin working at the premises. Again, it is easier and less costly to perform the clean up before the employees arrive, rather than relocating them or shutting down the business during the remediation.

Lastly, check your insurance policies – some companies view mold as an “inevitable risk” and therefore not insurable. However, it may be possible to obtain mold coverage in separate environmental insurance policies, although the premiums can be high.

Conclusion

The story of the homeless family in Charlottetown combined with news of recent US lawsuits should send a message to Canadian property owners and employers that mold can be a costly problem with serious adverse health effects. Potential purchasers and lessees should make sure their buildings are mold-free before moving their employees on site. Any identified mold problems should be dealt with contractually in order to offset the costs of remediation, as well as to guarantee the fitness of the building for its occupants. Should a mold problem be discovered after the building is occupied, immediate steps must be taken to protect the building’s occupants, as well as to eliminate the mold and prevent it from returning.

This section was written with the assistance of Tina Chun, Summer Law Student.

⁷ For more information, see the United States Environmental Protection Agency report, “Mold Remediation in Schools and Commercial Buildings” March 2001, EPA 402-K-01-001, online: <<http://www.epa.gov/iaq/molds/images/moldremediation.pdf>>.

MINISTER REQUESTS REVIEW OF VOLUNTARY STEWARD RULES

In our last Greenmail Newsletter, we reported on Stewardship Ontario's release of revised procedures for becoming a "voluntary steward" under the Blue Box Program Plan (the "Plan"). A voluntary steward is a company that is not an obligated steward under the Plan, but elects to register with Stewardship Ontario in order to assume responsibilities for another steward's fees. To qualify for registration, a voluntary steward must have a "commercial connection" to the Blue Box waste for which it is assuming responsibility.

Since the voluntary steward program was implemented in April, stakeholders continuously expressed their concern over the treatment of voluntary stewards under the Plan. As a result, the Minister placed the voluntary steward program under review. On May 31, 2004, the Minister wrote a letter to Waste Diversion Ontario ("WDO") requesting that Stewardship Ontario suspend the acceptance of any further categories of voluntary stewards until a revised policy framework is in place. This suspension began with the implementation of the 2004 schedule of the stewards' fees, covering the period between July 2004 and December 2004.

The Minister's overall objective is to ensure that the voluntary steward policy is consistent with the Plan's commitments, and that it does not have an unfair or distorting effect on the Ontario marketplace. In her letter, the Minister emphasized that a number of stakeholders have complained of being pressured to "volunteer" to become a voluntary steward, a result that is clearly outside the intention of the Plan. As such, voluntary stewards are now limited to two categories only: out-of-province brand owners and franchisors. The procedure, however, remains unchanged: voluntary stewards must enter into a contract with Stewardship Ontario and if they elect for one customer, they must elect for all.

As part of the revision process, the Minister requested that the WDO, in cooperation with Stewardship Ontario, hold meetings with stakeholders. These meetings were aimed at developing policies and rules allowing for out-of-province brand owners and franchisors to become voluntary stewards. As per the Minister's request, the WDO held meetings at their offices on June 7 and June 14, 2004.

Although the WDO was asked to submit a revised voluntary steward policy to the Minister for her review by June 30, Stewardship Ontario did not present its revised policy to the WDO Board until July 9. The Board must approve it before it can go to the Minister.

Whatever the result of this consultation and review process, it is expected that the amended rules will apply to the 2005 schedule of steward fees. Stay tuned.

This section was written by Nicole Lee, Student-at-Law.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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