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**"ENVIRONMENTAL ISSUES AND CLAUSES
FOR COMMERCIAL LEASES - NEW CONCERNS
- TOXIC MOULD"**

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In the program, Checklists and Systems in Commercial Leasing, A Step Toward Sanity, presented in February 1998, Jay Biroo, who was then Director, Environmental Services for The Cadillac Fairview Corporation Limited, Max Maréchaux, of Miller Thomson, and Catherine G. Ross, of Davies Ward & Beck, presented a paper entitled "Environmental Exposures". The paper was prepared specifically to assist lawyers in negotiating and drafting leases having regard to environmental exposures. It includes annotated checklists, a summary of general principles of Ontario environmental law, comments on environmental site assessments, environmental compliance audits and the professionals who conduct them, information concerning PCB's, polychlorinated biphenyls asbestos, underground storage tanks, indoor air quality and information pertaining to CFC's (chlorofluorocarbons) and background information on work place hazardous material information system regulations.

There is little that the writer could add to that paper as far as environmental exposures and commercial leases were concerned in 1998.

I have, with the written permission of the authors, included a copy as Appendix A of this paper.

The concerns addressed in that paper pertain to matters such as ground water, chemicals, contaminants, and various man made substances that may harm soils ecosystems and human

health.

The New Concerns - Toxic Mould

Nowhere does the paper mention toxic mould. This is not surprising because, in 1998 the health issues associated with toxic moulds had not yet surfaced as a major concern. Moreover, toxic moulds are not produced by chemicals like PCB's, asbestos, CFC's or other biological and chemical agents. They come from water and, in particular, excessive moisture in wood, paper, cardboard, ceiling tiles, drywall, surface coatings, such as paint and wallpaper, upholstery, carpet, fabric, potting soil, and similar materials, particularly those with high cellulose, low nitrogen content. Certain types of moulds, like *stachybotris chartarum*, that result from this mildewy moisture condition are harmful to the health. Certain moulds produce by-products through their spores which contribute to "sick building syndrome". Others produce non-volatile organic compounds called mycotoxins, which, when they become air born and inhaled, can cause serious health problems. Exposure can be through inhalation or skin contact. Touching mouldy surfaces can, in some cases, result in skin irritation. More often, however, it is through inhalation of mould spores that health problems occur. The mould can enter through open doors, windows, cracks, and crevices and it can be carried in on shoes and clothing. Mites that live on paper and dust can also carry mould with them throughout interiors. Central heating, ventilating and air-conditioning systems that are poorly maintained are also a source of mould contamination¹.

¹ Resource Lines http://www.whsc.on.ca/Publications/hazard_bulletins/fall_2001/mould

The kinds of things that can result from exposure to toxic moulds include allergic and immune responses such as sinusitis, conjunctivitis, eczema, asthma, hyper-sensitivity, pneumonitis; allergic contact such as dermatitis; lung infections; eye and throat irritations; headaches, dizziness, memory and verbal problems and depression.

It was estimated that between 50 and 60 thousand active mould claims would be pressed in Texas by plaintiffs before the end of 2001, and there are an estimated 2,000 plaintiffs in mould related lawsuits already in California².

The Ministry of Labour has issued an Alert entitled "Mould in Workplace Buildings". A copy of the Alert is attached as Appendix B.

Insurance Industry Response

There is no certainty concerning whether pollution liability exclusions under commercial general liability insurance policies cover liability claims arising from damage caused by or injury resulting from toxic mould. Maurice Audet, Senior Vice President of Aon Reed Stenhouse Inc. has written a paper (unpublished) entitled "Mould Injury and Insurance". IN that paper he refers to the definition of "pollutants" in the Zurich Insurance Company package policy, (which he indicates is representative of typical commercial general liability insurance policy, wording relating to exclusions for pollutants³) and he addresses the question of whether commercial general liability policies provide coverage for liability claims related to mould. The definition is

² Canada News Wire [http://www.newswire.ca/releases/November 2001/09](http://www.newswire.ca/releases/November%2001/09)

³ Persons wishing copies of the paper should contact M. Audet at 416 868-5500 or maurice_g_audet@AON.ca

as follows

""pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapour, soot, fumes, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

The question is whether a naturally occurring mould or fungus that grows from spores in situations where there is moisture, is likely to be construed as a pollutant. Mr. Audet states that case law in the United States is equivocal on the point. In several U.S. cases, it was held that the pollution exclusion did not apply to damage caused by toxic mould but, in others, it was held not to apply. There are Canadian cases that seem to indicate that the pollution exclusion in commercial general liability policies would not be interpreted to apply, and, accordingly, protection may be available in respect of claims for personal injury and property damage arising from mould. However, the matter is not entirely clear because policy wording usually does not yet address the issue expressly and specifically.

It is anticipated however, that especially with the large number of claims from toxic mould damage and injury that are developing the U.S., policy wording will be drafted before too long to expressly exclude these claims.

With regard to property insurance, there does not appear to be much doubt that damage caused to property by mould is not covered in all risk policies. Mould causes property damage by feeding on cellulose, which is found in paper coating, drywall, wood, etc. Policies usually exclude coverage for gradual deterioration, faulty workmanship, material and design and contamination.

Some policies actually exclude damage caused by fungi, unless the loss is caused by a peril not otherwise excluded. The property policy will not respond unless there is a discrete event, as opposed to a condition of deterioration which takes place over a period of time.

Other Indoor Air Quality Problems

It should be noted, as well, that in addition to injury resulting from toxic mould, sickness and injury may arise from other airborne contaminants given off by floor coverings, solvents, and ingredients in waxes and finishes on floors which, when ground by buffers, create gases through the heat friction who fumes could be harmful. Indoor air quality, and the so called "sick building syndrome" have become major sources of concern, and claims for compensation⁴.

What Does This Mean for Leasing Lawyers

Summarized below are a number of points which, in light of the circumstances described above, need to be considered in the negotiating and drafting of commercial leases:

1. Due diligence - Particularly where older buildings or renovated buildings are concerned, air quality testing, and testing for mould may be of critical importance. A due diligence period with rights of inspection and testing, and perhaps an opportunity to review any inspection or remediation reports that may be available in connection with the building would be useful. There are several consulting firms and engineering firms that provide

⁴ Marketplace [http://www.cbc.ca/consumers/market/files/health/school air](http://www.cbc.ca/consumers/market/files/health/school%20air)

testing of this sort⁵.

2. Periodic rights of inspection and investigation - Both tenants and landlords should consider including rights of inspection periodically during the term in respect of the building or the premises for indoor air quality issues, and for mould. Where adverse conditions are determined to exist, responsibility for remediation should be appropriately allocated.

(Incidentally, a tenant may wish to expressly exclude, in the definition of operation costs, any costs of remediating, restoring or fixing indoor air quality problems or problems associated with mould.)

3. Risk Allocation Clauses - It is typical in net leases for the landlord to exclude liability in connection with water seepage, leakage, flood, etc. The rationale is that the tenant should be insuring for damage to property arising from those events. As noted above, however, the tenant would not, normally, have insurance coverage for the restoration of damage caused by mould arising from mildew, or moisture problems. A tenant may wish to reconsider the granting of an exclusion of liability to the landlord in these situations.
4. Reporting Requirements - The landlord should consider imposing a positive obligation on the tenant to report conditions relating to moisture within their premises. It is useful to alert the tenant to the health and property damage issues associated with moisture. It is

⁵ Pinchin Environmental <http://www.pinchin.net/services/hazard/mouldbldg>; Restoration Environmental Contractors-REC based in Markham and Branford

not unusual for moisture problems to exist even in major office towers that cause mildew to grow in carpets and within drywall, and the tenant should be required to report problems like this when they are detected so that the landlord can cure the problem before health and property damage issues occur.

5. Indemnity Wording - If a moisture problem develops within leased premises which the tenant is responsible to repair, the resulting spores and toxic mould may be transferred throughout the rest of the building through central heating, ventilating and air conditioning systems or may simply be tracked into other parts of the building by the employees of the tenant or its customers. In view of the courts tendency to interpret indemnity clauses strictly, and to resist applying general language of indemnity to specific situations which do not appear clearly to have been contemplated by the parties, it would be useful in the indemnity provisions of the lease to specifically refer to injury and damage caused by mould, fungus, and contaminants in the air.

6. Loss of Use of Space - Health issues associated with toxic mould or indoor air quality problems may result in the premises being unusable by a tenant. Business interruption insurance would not normally respond to the tenant's loss of use of the space where the space is unsafe due to air quality or mould problems. Business interruption only applies in connection with insurance perils. Allocation of risk in connection with losses and expenses due to air quality and mould problems should be addressed specifically in the lease document instead of being included in general exculpatory or indemnity like clauses.

7. Representations and Warranties - Express representations and warranties relating to moisture problems, toxic mould, and indoor air quality should be considered for the benefit of the tenant. In this regard, it must be kept in mind that the typical language used to describe hazardous substances, contaminants, pollutants, and similar substances is often not adequate to catch damage caused by fungus, mould or other living organisms. In addition, even where there is a specific reference to toxic mould and other microorganisms that are injurious to health, at the time when the representation is made, there may, in fact, not be any such organisms affecting the interior environment. However, the moisture and mildew conditions or seepage problems that may ultimately give rise to such claims may exist. The representations and warranties should refer, therefore, not only to the non-existence of harmful microorganisms but also to the conditions which give rise to their growth.

Conclusion

The thrust of what is set out above is that lawyers negotiating environmental concerns and drafting language related to them, need to think specifically about the nature of toxic mould and the sources of indoor air contamination. Inspection rights, releases of liability indemnity clauses, even representations and warranties, even if they deal specifically with hazardous substances, may not be adequate. Traditionally, the kinds of inspection, and language in these kinds of clauses have been focused on the presence or introduction of chemicals or man-made substances associated with machinery, building materials and products. The language does not focus on the

damage caused by such an innocuous substances as water, wood and paper nor do they focus on air quality issues especially where everyday, common substances in carpets, floor waxes and similar items are the cause. This same problem exists in reviewing insurance coverage and arranging the allocation of risk by means of insurance. It appears that the current language of insurance policies does not deal directly and expressly enough with the problem.

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