

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Case No.: 2008-06
Decision No.: OHSTC-08-022

**CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY**

Marc Duguay
appellant

and

Canadian Broadcasting Corporation
(CBC)
respondent

August 29, 2008

This case was decided by Appeals Officer Richard Lafrance.

For the appellant

Marc Duguay
Glenn Gray, National President, Canadian Media Guild

For the respondent

Harry Phillips, Senior Manager, Health and Safety, CBC/Radio Canada
Marc Germain, Senior Manager, Transmitter Stations, Ontario

Canada

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I. Nature of Appeal

- [1] This is an appeal made by Mr. Marc Duguay under subsection 129(7) of the *Canada Labour Code*, Part II, (the *Code*), regarding a decision of absence of danger rendered by Health and Safety Officer (HSO) Fancy Smith on February 20, 2008. A hearing was held in Kapuskasing, Ontario, on June 17, 2008.
- [2] The question to be decided in this matter is whether the employee, Mr. Duguay, was at the time of the refusal exposed to a danger as it is defined in the *Code*.

II. Background

- [3] The following is based on the health and safety officer's report and testimony as well as that of Mr. Duguay.
- [4] Mr. Duguay is employed as a Senior Remote Area Transmitter Technologist by the Canadian Broadcasting Corporation (CBC). His normal work base is the Transmitter Station located on St. Jean Road in Moonbeam, Ontario, also known as the Kapuskasing Transmitter Station (Kapuskasing Tx).
- [5] On January 23, 2008, Mr. Duguay refused to work stating in an e-mail to his manager that "based on documented evidence of a less than thorough cleanup job, I feel that the Kapuskasing Tx base is unsafe, and poses a clear and present danger to my health."
- [6] This situation originated in October 2006, when Mr. Duguay reported in the CBC computerized work place inspection data bank, the presence of mould in the Kapuskasing Tx base. He again submitted a health and safety inspection report to management in November 2006. There was no reply from management to this report. Mr. Germain commented, during the hearing, that although this may have been reported in the data bank, Mr. Duguay should have contacted him directly about this matter. He was not aware of the reports going in the safety inspection data bank.
- [7] Finally, in May of 2007, an inspection of the work place was done by management representatives. The employer recognised the problem and had the work place inspected in July 2007 by MouldCLEAN, a specialized mould removing company. In order to prevent exposure, the supervisor of Mr. Duguay had him work from an alternate work site until the results of the tests were known and if necessary until the necessary work was completed.

- [8] Mr. Duguay noted that MouldCLEAN was finally called in to clean the ventilation system in August of 2007 and when the work was completed, they confirmed that the building was free of mould. Mr. Duguay then returned to work at that worksite.
- [9] Mr. Duguay was off on sick leave from September 6 to December 7, 2007. No reason for the sick leave was presented at the hearing and no link was established with the present case.
- [10] Mr. Duguay confirmed that in October 2007, at the request of CBC, he was examined at the Riverfront Medical Services in Toronto to determine whether he was allergic to moulds. The doctor in a written report presented at the hearing, confirmed that an allergic reaction test indicated that Mr. Duguay was not allergic to various types of moulds.
- [11] Furthermore, the doctor was of the opinion that the mould counts obtained in the MouldCLEAN air samples were insufficient to cause allergic reactions.
- [12] Additionally, he believed that since the building had now been cleaned, there was no reason for Mr. Duguay not to return to work. However, he did have concerns about the presence of bats in the work place. The possibility of a bat roost in the attic could indicate potential breeding grounds for the mould histoplasma. However, this should not be of concern to Mr. Duguay as he was not required to work in the attic. It should however be of concern for other employees who may have to access the attic.
- [13] In October of 2007, MouldCLEAN further reported that the problem at the Kapuskasing Station had been resolved and that millions of dead flies were found under desks and other office furniture and at the intake screen of the ventilation system. The flies were "shovelled" out by MouldCLEAN.
- [14] MouldCLEAN reported that after having sanitized the building, the airborne contaminants level immediately corrected itself and that inside air quality was superior to outside air quality. The report, however, contained no information with regard to the identity of the contaminants.
- [15] Following the medical diagnosis, Mr. Duguay was asked by the employer in December 2007 to return to work.
- [16] Mr. Duguay testified that upon his return to work, in December 2007, he advised his manager that dead bats and large amounts of dead flies had been found in the ventilation unit by GT Plumbing, a plumbing and heating contractor doing maintenance work on the ventilation system. The

contractor found that various components of the ventilation system had not been properly cleaned by MouldCLEAN in August. Pictures taken at the time, and presented at the hearing, indicate the presence of mould and other "dust" pollen inside the intake components of the ventilation system. In addition, bat and mouse droppings and copious amounts of dead flies were also found in the attic. The company vacuumed and cleaned the attic as well as the affected ventilation components. They recommended that the unit be further cleaned for sanitary reasons to remove stuck on bug residues that could, in their opinion, cause diseases.

- [17] On January 17, 2008 MouldCLEAN reported to CBC that they had inspected the station on January 15 and that no mould contamination had been found at the time of the inspection.
- [18] On January 23, 2008, Mr. Duguay exercised his right to refuse to work on the basis that "based on evidence of a less than thorough cleanup job by MouldCLEAN, I feel that the Kapuskasing Tx Base is unsafe and poses a clear and present danger to my health. I hereby refuse to enter this building. I will continue to service other sites I've been assigned and perform tasks from home, as directed by management."
- [19] The CBC has a safety procedure in place for the investigation of "right to refuse" incidents. This policy incorporated in the HSO's report, appears to adhere to the steps of the process established by the *Code* and provides for the involvement of the refusing employee, the employee's manager and the health and safety committee with the investigation of the work refusal. However, according to Mr. Duguay, no such investigation ever occurred. No one visited his work place other than when the Human Resources and Social Development Canada (HRSDC) health and safety officer conducted her investigation.
- [20] According to the employer representative a meeting was held with the health and safety committee. However, there seems to have been disagreements between the committee members and the employee representative refused to sign the minutes of the meeting. Since the minutes were not signed by both parties, they were not submitted in the HSO's report or for the hearing.
- [21] HRSDC Labour was contacted on February 12, 2008, and HSO Smith started her investigation on the same date.
- [22] In the employee's written and signed refusal to work registration document received by HSO Smith, Mr. Duguay stated that he was refusing to work because of "evidence of toxic mould exposure found in the fresh air intake & supply system, looks like MouldCLEAN did not clean fresh air intake and ductwork only partially cleaned. Mould removal not done properly and

no remediation to cause of problem done by MouldCLEAN.”

- [23] HSO Smith noted in her report that this was a long standing situation dating back to 2006 with a report of the presence of mould in the said work place.
- [24] HSO Smith indicated that she made sure that the employer had followed the proper procedure with regard to work refusal investigation. She believed that there was some form of investigation conducted by the employer and the health and safety committee. However, she also noted that she was not there to judge the investigation, but just to make sure that one had occurred.
- [25] The HSO inspected the work place in question. She took into consideration the reports submitted by MouldCLEAN as well as the laboratory reports provided by the same company. When HSO Smith conducted her inspection of the work place she noted that she thoroughly examined all accessible areas in the work place and the ventilation system.
- [26] She consulted with her technical advisor as well as with an Industrial Hygienist from the HRSDC Labour Program. The Industrial Hygienist believed that according to the laboratory report submitted, there did not seem to be a mould problem in the work place. However, she indicated that she was not familiar with the equipment and sampling techniques used by MouldCLEAN to collect the microbial samples and/or to take the laser particulate readings. Consequently, she cautioned the HSO that she had to be careful with the interpretation of the results since Health Canada recommendations for microbial infections are based on different sampling techniques and protocols. With regard to the laser particulate readings, once more she did not have guidelines to do a comparative examination of the results.
- [27] The HSO consulted as well with the manager of MouldCLEAN with regard to the tests that were conducted as well as the remediation measures taken by that company.
- [28] HSO Smith learned the following from MouldCLEAN:
- The indoor air quality tests were conducted under the same conditions that the employee would be exposed to.
 - The entire duct system was inspected and cleaned inside out. Water and soap were used to clean the ductwork as well as a small quantity of Foster, a disinfectant.

- MouldCLEAN also inspected the attic, but found no mould. On this, the employer commented at the hearing that MouldCLEAN had been hired to investigate and address only the mould issue and nothing else.

[29] Upon further questioning she also learned the following:

- In the initial testing, a small amount of mould was found on ductwork that could easily be wiped away.
- According to their tests, the mould count was very low.
- They were not able to comment on the toxic effect of moulds.
- With regard to test samples indicating TNC (too numerous to count) it was explained that this refers to the sample area and does not necessarily reflect the situation in the whole building. It must be taken in context with the onsite inspection.
- Even though the fungal count was slightly over the accepted Health Canada guidelines, if the outdoor fungal ecology is representative of the indoor fungal ecology, it shows that there is no amplification occurring indoor.
- About the guidelines that they use for laser particulate readings, no guidelines or standards were specified. However, she was told that although laser particulate can be useful in determining if there are particulates in the air in the mould spore size range, it is only used as an indicator. What really counts is the actual onsite inspection.
- When asked about the reliability of the final test result with regard to acceptable levels, MouldCLEAN replied that there was never any significant amount of mould present, only small amounts on some duct work was found. In their opinion, the building was extremely well ventilated with the air being HPA filtered.

[30] Mr. Duguay indicated during his testimony that a few years ago in order to save electricity, the manager of the time had ordered him to run the emergency ventilation system only. This system is much smaller than the main system and consequently provides less air changes in the work place. Up to the day of the hearing, that was the only ventilation system in operation. As indicated in the HSO's report, the same condition prevailed at the time of her investigation.

[31] Taking into consideration the results of the air test from MouldCLEAN as

well as the Health Canada, Indoor Air Quality Technical Guide¹; as provided for in the COHS² Regulations as well as the expert opinion of the Labour Program's Industrial Hygienist, HSO Smith extrapolated that the submitted results obtained by MouldCLEAN met the requirements of the prescribed Health Canada guidelines. Consequently, she decided that there existed no danger and that Mr. Duguay had to return to work.

- [32] More than a month later, when the employer hired a company to clean and replace the insulation in the attic that had been contaminated by bat and mouse droppings, the construction company found that the roof was leaking, and that moisture had accumulated inside the north and south walls and once the plaster board had been removed they found mould and a "green fuzzy thing" growing on the inside of the roof boards.
- [33] A work order was placed to have plaster board and insulation removed from the south wall and the contaminated area cleaned. At the time of the hearing, the work was in progress to have a new roof built and to eventually have the south wall repaired before next winter.
- [34] However, according to Mr. Duguay, nothing is being done to correct the situation in the north wall which the contractor also identified as being damaged by water.

III. Appellant's case

- [35] Mr. Duguay stated that he finally exercised his right to refuse out of frustration that nothing was being done to address his health problems. He believed that his health problems were caused by the mould that was found in the building and in the ventilation system as well as bat and mouse droppings in the attic. He testified that he had never refused to work in his 28 years of service with the CBC. He will continue to work at any other locations. However, he believes that conditions at the Kapuskasing Tx make him sick. He indicated that his health problems included depression, tiredness, stress, irritability, nose bleed.
- [36] Mr. Duguay further testified that he was frustrated with the lack of cooperation from management as well as from the health and safety committee with regard to his situation in the said work place.
- [37] Mr. Duguay testified that during their inspection MouldCLEAN, identified humidity damage on the walls, but the employer did nothing to correct the

¹ Health Canada: Indoor Air Quality in Office Buildings: A Technical Guide. 93-EHD-166 (revised 1995) Cat. H46-2/93-16 Erev - ISBN 0-662-23646-X (Guide)

² Canada Occupational Health and Safety Regulations, Part II, Permanent Structures, Sub. 2.24(2) (COHS)

situation until lately, and this only partially. The intake side of the ventilation system as well as the north wall still have to be cleaned.

- [38] Mr. Glenn Gray, National President, Canadian Media Guild, summed up that the undisputed pictures presented during the hearing by Mr. Duguay show that there is still mould present in the ventilation system as well as on or inside the walls. It is clear that there is a mould problem in that building and the only thing that Mr. Duguay asks is that the ventilation and the building be cleaned once and for all and fixed so that the problem does not reoccur.
- [39] Mr. Gray indicated that a short visit of the work place by the Appeals Officer would convince him that there is still a problem with that work place and that it is dangerous to Mr. Duguay's health to work there.

IV. Respondent's case

- [40] Mr. Harry Phillips represented the employer and argued that the CBC had done everything reasonable to have the mould issue rectified. He further stated that it was the position of the employer that at no time had the employee, Mr. Duguay been in a situation of danger.
- [41] Mr. Phillips agreed that at some time during the periods mentioned in the chronology of events presented by Mr. Duguay there were minor issues with regard to the presence of mould in the building in question.
- [42] He maintained that the employer's position was substantiated by the thorough investigation of the HSO as well as by the HRSDC technical services Industrial Hygienist. He stated that the HRSDC Industrial Hygienist herself, indicated in an e-mail to the HSO that based on the report provided by MouldCLEAN she believed that there were no mould problems in the work place.
- [43] Furthermore, he argued that less than a week before the work refusal by Mr. Duguay, MouldCLEAN had inspected the premises and reported that no mould contamination was discovered at the time of the inspection.
- [44] Mr. Phillips agreed that a subsequent inspection of the attic revealed evidence of vermin; however, he believes that this was not the subject of the refusal and that in any case, it did not pose a danger to Mr. Duguay, as his duties did not require him to enter the attic. Nevertheless, he submits that this area was also cleaned and sealed to prevent future infestations.
- [45] Mr. Phillips objected to the visit of the work place by the Appeals Officer stating that all we could see would be an open wall that has been

scrubbed clean of mould. The wall will be refinished once a new roof has been built, as it would be unreasonable the refinish the wall without having the leaking roof replaced.

- [46] Nonetheless, Mr. Phillips argued that there was no danger in the work place and that the health and safety officer's decision of absence of danger should stand.

Relevant statutory provisions, *Canada Labour Code Part II*: See Annex 1

Analysis

- [47] The question to decide is if under the circumstances at the time of the refusal, whether Mr. Duguay was exposed or not to a "danger" as defined in the *Code*.
- [48] To decide this, I must take into consideration the circumstances that existed at the time of the refusal, the reasons referred to by the HSO in rendering her decision as well as the relevant statutory provisions.
- [49] This said, however, as stated by the honourable Justice Rothstein, in *Martin*³, an appeal before an appeals officer is *de novo*. Consequently, this allows me to receive and take into consideration anew, all and any evidence that the parties may have, whether or not it was considered or available to the health and safety officer at the time of her investigation.
- [50] With regard to the circumstances, I must first establish the reason why Mr. Duguay refused to work in the Kapuskasing transmission tower. It has long been established that the right to refuse should not be used to bring to a resolution long-standing occupational health and safety problems as stated in the *Don Boucher and James Stupor and Correctional Service Canada*⁴ decision.
- [51] However, I believe that, as it was established in *Simon v. Canada Post Corp*⁵, the existence of tension or disagreement between employer and employees on specific issues does not prevent an employee from refusing to work and enjoying the protection of the *Code* if that employee personally and sincerely believes that he has reasonable cause to believe that a danger exists.

³ *Douglas Martin and Public Service Alliance of Canada v. Attorney General of Canada*, 2005 FCA 156, May 6, 2005, Rothstein J.A.

⁴ *Don Boucher and James Stupor Correctional Service Canada*, (Appeals Officer) Decision No. 02-022, October 21, 2002

⁵ *Simon et al. v. Canada Post Corp.* (1993) 91 di 1, (CLRB Decision no. 988)

- [52] In the case at hand, it was clearly recognized that there was a problem relating to the presence of mould in the work place. In October 2006, Mr. Duguay reported the situation in the employer's computerized data bank as required. The work place was finally inspected by management more than six months later and cleanup was initiated a few months later. I note with this that even if there exists a sophisticated computerized reporting mechanism in place, there is an evident lack of communication strategy in the procedure put in place by the employer.
- [53] After the cleanup by MouldCLEAN, mould was still found in December 2007 in the intake side and other parts of the ventilation system. Even though no cleanup occurred after these findings, in a letter dated January 17, MouldCLEAN stated that no mould contamination was found at the time of their inspection of the work place performed on January 15. Pictures taken a few months later by a renovation contractor demonstrated the presence of mould inside the walls of the building.
- [54] Obviously, there is a problem with moulds in this work place. Although remedial efforts occurred, these efforts were not sufficient to immediately and completely clean the place and make sure to find the cause of the problem and fix it so that the problem does not reoccur.
- [55] The question however is: can the presence of mould in a work place be considered a "danger" to employees, as it is understood in the *Code*?
- [56] Danger is defined in the *Code* as follows:
- "danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.
- [57] In the aforementioned document, "*Indoor Air Quality in Office Buildings: A Technical Guide*" the issue of moulds is addressed at paragraph 5.2.8 dealing with Microbials. The provision in question points out that:
- Moulds are a variety of microbials (micro-organism) that can be found in the indoor environment. Contamination most often occurs when a fault in the building, heating, ventilating and air conditioning (HVAC), or other system allows for the proliferation of micro-organism.
 - In indoor air, microbial contamination can be a serious problem. High humidity, reduced ventilation, [...] and HVAC systems that have water or condensation (humidifier, cooling coils, etc) allow for the

growth and distribution of various microbials.

- This is a matter of concern because of the various associated human health and comfort implications.
- Chronic exposure to most fungi can induce allergic or asthmatic reactions in humans, and a very few species can cause disease directly. Some moulds are “toxigenic” producing mycotoxins that often accumulate in the spores. The inhalation of spores containing certain mycotoxins has been shown to induce many of the symptoms normally associated with SBS⁶.
- Other products of fungi include certain VOCs⁷. Such compounds (characterized by mouldy smell) occur only when there is active and considerable fungal growth. There is some evidence to suggest that these can contribute to SBS.

[58] I give considerable weight to this document in my decision because, the employer, in accordance with the *COHS Regulations Permanent Structures*, subsection 2.27(3), must take it into consideration when investigating situations in which the health and safety of an employee may be endangered by the air quality.

[59] At page 10 of the *Guide*, it is stated that analysis of air samples may fail to reveal significant concentrations of any one contaminant, so the problem is often attributed to the combined effect of many pollutants at low concentrations, complicated by other environmental factors.

[60] On pages 49 of the *Guide*, the interpretation of results is discussed and the issue about the need to identify the species of fungi present in the workplace is said to be critical to the analysis. Numerical guidelines, although useful, cannot be used as a primary determinant of whether there is a problem.

[61] At page 50 of the *Guide*, it is noted that bird or bat droppings near air intakes, in ducts or building should be assumed to contain certain form of pathogenic fungi that can have serious health effect. As well it is indicated that some of the species cannot be measured by air sampling techniques.

⁶ Indoor Air Quality in Office Buildings: A Technical Guide: page 5: Definitions: SBS means Sick Building Syndrome: A set of symptoms related to chemical, particulate or biological exposure that cannot be related to a specific cause but are alleviated when the occupant leaves the building. Individuals report symptoms such as headaches, nausea, fatigue, and drowsiness to eye, nose and throat irritation.

⁷ Indoor Air Quality in Office Buildings: A Technical Guide: page 6: Acronyms: VOC: Volatile Organic Compound.

[62] In this case it was demonstrated that there was moisture problem in the building, the roof was leaking, and as well; there was condensation in the ductwork caused by an air conditioning unit situated inside the ductwork. Consequently, this humidity caused growth and accumulation of mould on and in the ventilation system as well inside the outside walls of the building.

[63] Based on the Health Canada Guide on Indoor Air quality, 'it is evident that contact with airborne microbial biological agents, such as mould, and potentially with bat and mouse droppings, not taking into consideration, at this time, the issue of millions of dead flies, since no adverse medical evidence was contained in the *Guide* about this issue: can cause serious health issues.

[64] As well other issues such as ventilation rate, air motion, humidity etc, all play a role in Sick Building Syndrome.

[65] Mr. Duguay has testified that he was sick when he worked in the said building. Although he was tested for allergies to moulds and that the results indicated that he was not allergic to a vast number of moulds; he was not tested for anything else. There was no medical report of any kind as to the nature of his illness, not that he has to prove that a danger exists to have a reasonable cause to refuse to work. As stated in the Canadian Industrial Relations Board's decision *Davis (Re) v. Alberta Wheat Pool*,⁸

"There is no burden of proof upon an employee to prove a "danger". If the employee has reasonable cause to believe a danger is present, the safety officer must then decide the matter, using his or her own expertise, or acquiring it where necessary."

[66] Nonetheless, Mr. Duguay stated that the building made him sick, and I give great credibility to this. I note that he did not refuse to accomplish his tasks elsewhere, in fact, when he signified his work refusal to his manager, he indicated that that he would continue to accomplish his duties at all the other eight or so sites he services. Perhaps it was the mould, as suggested in the work refusal form that he gave to the HSO. Perhaps it is something else, he is no expert, and the only thing he knows is that he is sick whenever he works at the Kapuskasing transmission tower.

[67] During her investigation, the health and safety officer did not even consider that there may have been other issues at play other than the mould issue in this case. Based on the facts presented, I believe that although mould was the most evident issue to look at, it is not difficult to realize that there may be other issues at play in this situation. One only

⁸ *Davis (Re) v. Alberta Wheat Pool*, [2000] CIRB No. 72, May 25, 2000.

has to look at the definition of "Sick Building Syndrome" in the *Guide*, to determine that there might be more to it than only mould:

Sick Building syndrome: A set of symptoms related to chemical, particulate or biological exposure that cannot be related to a specific cause but are alleviated when the occupant leaves the building. Individuals report symptoms such as headaches, nausea, fatigue, and drowsiness to eye, nose and throat irritation.

- [68] Nonetheless, as stated in *Martin v. Canada*⁹ a work refusal cannot be based on speculation or hypothetical viewpoint. An inspection conducted by the employer revealed the presence of moulds in the building. This was further confirmed by MouldCLEAN. The report from the refrigeration company as well as the photographic evidence presented at the hearing also confirm the presence of some mould and dust or pollen or other unknown substance in the intake of the ventilation system. Based on the above, I conclude that Mr. Duguay had reasonable cause to believe that a danger existed for him.
- [69] Can it be said, however that exposure to moulds or fungi, a microbial agent of some sort, and/or indirect contact with bat and mouse droppings and dead flies can be considered an existing hazard or condition that could reasonably be expected to cause an illness to a person exposed to it before the hazard or condition can be corrected, whether or not the illness occurs immediately after the exposure to the hazard or condition? I believe so.
- [70] As stated in the *Guide*, this is a matter of concern because of the various associated human health and comfort implications. Chronic exposure to most fungi can induce allergic or asthmatic reactions in humans, and a very few species can cause disease directly. Some moulds are "toxigenic" producing mycotoxins that often accumulate in the spores. The inhalation of spores containing certain mycotoxins has been shown to induce many of the symptoms normally associated with SBS. I believe that if someone is exposed to certain types and quantities of mould or other pollutants in the work place, as described in the *Guide*, it is reasonable to believe that the health of the person exposed to it can potentially be affected.
- [71] Normally, in such situation the employer investigates the refusal, in the presence of the employee and at least one employee member of the health and safety committee, or if no one from the committee is available by a person from the work place selected by the refusing employee.
- [72] Unfortunately, this did not occur. The employer decided to rehire MouldCLEAN to take indoor air quality test. Consequently, it is obvious that the employer knew that this was an air quality issue emanating from

⁹ *Martin v. Canada (Attorney General)* (2005) F.T.R., 294 (F.C.)

the presence of mould and other materials in the intake side of the ventilation system.

[73] The *Code* provides for a regulation with regard to Permanent Structures¹⁰ which has a specific division regarding HVAC Systems¹¹.

[74] This Division has a section devoted to "Investigations" that states in subsection 2.27(1):

Every employer shall develop, or appoint a qualified person to develop, a procedure for investigating situations in which the health and safety of an employee in the work place is or may be endangered by the air quality.

[75] To a certain extent, the employer did this by hiring MouldCLEAN to investigate the matter. However, MouldCLEAN was not told that they had to follow the steps in the regulation. Because of this I find that the investigation was incomplete.

[76] By not following the procedure, the *Guide* for Indoor Air Quality was not taken into consideration. By not doing so, many elements were not considered in evaluating the ambient quality of the air in the work place.

[77] In addition, with regard to the inspection carried out by MouldCLEAN, they told the HSO that they had conducted the tests with the ventilation system in operation and that the place was very well ventilated. However, Mr. Duguay testified, and this was corroborated in the HSOs report that the main ventilation system had been turned off for a number of years and that only the much smaller, emergency ventilation system was functioning.

[78] As well, MouldCLEAN were hired to clean the whole ventilation system. A few months later, as reported by the refrigeration contractor, mould was found in many parts of the ventilations system. This leaves a doubt in my mind about the reliability of the reports submitted by MouldCLEAN.

[79] HSO Smith, considered the said *Guide* in her investigation. However, she accepted the results of MouldCLEAN by extrapolating, on her own, that the results met the lines. This was done despite the warning by the Labour Program Industrial Hygienist, to be very careful in trying to interpret the results. She, as a professional hygienist, was reluctant to do this because she did not know about the procedure followed by MouldCLEAN.

¹⁰ *Canada Occupational Health and Safety (COHS) Regulations*; Part II, Permanent Structures.
¹¹ COHS Part II, Permanent Structure: Section 2.1: Interpretation: "HVAC system" means a heating, ventilating or air conditioning system that is installed in a building, and includes all of its equipment and components.

[80] Upon questioning at the hearing, HSO Smith indicated that she did not see the need to direct the employer, or to even take her own air and surfaces samples to correctly identify the potential problems in the work place in accordance with the prescribed *Guide*.

[81] Had the *Guide* been thoroughly followed by the employer or even the HSO, someone would have noted that on page 48 of the *Guide* it is stipulated :

- Air sampling is not an infallible means of reliably determining microbial contamination, and caution must be used to interpreting the results.
- Identification of the fungal species is critical for a complete determination of whether an abnormal or hazardous condition exists.
- This process requires a mycologist with expertise in IAQ¹².
- Excessive numbers of fungal propaguls or modest numbers of certain disease-causing or toxigenic fungi can result in health or comfort problems.
- When fungi are growing in or on building surfaces or systems, removal is necessary.

[82] I find that the employer tried, unfortunately, without following the proper procedure, to deal with the issue that was most apparent, that is mould on and in the ventilation system. Remedial action was, as demonstrated, incomplete, in that more mould was found in the ventilation system and later on within the walls.

[83] A viewing of the work place was arranged during the hearing and I observed that the employer had a renovation project ongoing in the work place. The plaster board and mouldy insulation had been removed from the south wall but not from the north wall. I was told that replacement of the leaky roof was imminent and once this was completed, the renovations to the walls would be completed.

[84] In paragraph 35 of *Verville v. Canada (Correctional Services)*¹³, Justice Gauthier stated that the definition of danger does not require that it could reasonably be expected that every time the condition or activity occurs, it will cause injury. It indicates that it must be capable of causing injury at

¹² IAQ: Indoor Air Quality

¹³ *Verville v. Canada (Correctional Services)*, [2004] F.C.J. No. 940.

any time, but not necessarily every time. Justice Gauthier stated on that matter:

[35] Also, I do not believe that the definition requires that it could reasonably be expected that every time the condition or activity occurs, it will cause injury. The French version « susceptible de causer » indicates that it must be capable of causing injury at any time but not necessarily every time.

[85] In the *Health Canada Guideline on Indoor Air quality* it is stated that “exposure to moulds is a matter of concern because of the various associated human health and comfort implications. Chronic exposure to most fungi can induce allergic or asthmatic reactions in humans, and a very few species can cause disease directly. Some moulds are “toxigenic” producing mycotoxins that often accumulate in the spores.” Consequently, I find that being exposed to moulds is a hazard which can reasonably be expected to cause an illness to a person. Although not every time, but some of the time. Consequently, being exposed to moulds in a work place is a “hazard” that needs to be dealt with.

[86] Keeping in mind, Appeals Officer Douglas Malanka’s decision in the *Cole and Air Canada*¹⁴ case, I completely agree with him when he writes that a danger exists where the employer has failed, to the extent reasonably practicable, to:

- a) Eliminate a hazard, condition or activity;
- b) Control a hazard, condition or activity within safe limits; or
- c) Ensure employees are personally protected from the hazard, conditions or activity;

and one determines that:

- d) There are circumstances in which the remaining hazard, condition or activity could reasonably be expected to cause injury or illness to any person exposed thereto before the hazard, condition or activity can be corrected or altered, and that circumstances will occur in the future as a reasonable possibility as opposed to a mere or a high probability.

[87] I believe that the employer tried to eliminate the mould, or control it within safe limits; however, the facts indicate that every time the mould was thought to have been eliminated, more mould was found.

[88] In addition to the criteria set by Justice Gauthier, in *Union of Canadian Correctional Officers (CSN) and Attorney General of Canada*¹⁵, Justice

¹⁴ *Cole and Air Canada*, Appeals Officer Douglas Malanka, Decision No. 06-004, February 28, 2006.

¹⁵ *Union of Canadian Correctional Officers of Canada – Syndicat des agents Correctionnels du Canada – (CSN) (UCCO-SACC-CSN) and Attorney General of Canada*, [2008] FC 542, April 28, 2008.

O'Keefe stated:

"It is not sufficient for the appeal officer in assessing whether or not the first part of his "danger" test is met, to simply look at the measures taken by CSC, to reduce the danger. The test requires that the appeals officer not only look at the action of CSC, but also the success of those actions in eliminating, or controlling the hazard, condition, or activity."

[My underline]

- [89] The photos taken in December 2007 and presented by Mr. Duguay at the hearing showed the presence of some unidentified matter, mould or pollen in parts of the intake of the ventilation system.
- [90] Taking this into consideration, I believe that by not conducting an investigation in accordance with subsection 2.27 of the *Occupational Health and Safety Regulations* as specified above, the employer, as well as the health and safety officer could not properly identify the hazard involved with this situation and consequently could not take proper corrective measures to completely eliminate the hazard from the Kapuskasing telecommunication tower.
- [91] Consequently, for all the reasons stated above, I believe that Mr. Duguay was exposed at the time of the refusal as well as at the time of the HSOs investigation, and is still presently exposed to the hazard of unknown substances, including moulds of unknown types situated in and on the ventilation system as well as other places in the building including within the walls of the Kapuskasing Transmission tower buildings.
- [92] Consequently, for all the reasons stated above, I conclude that Mr. Duguay is exposed to a danger as understood under the *Canada Labour Code*, Part II.
- [93] Therefore, by the powers vested in me by subsection 146.1 of the *Code*, I am rescinding the decision of absence of danger rendered by health and safety officer Fancy Smith.
- [94] Furthermore, as authorized under subsection 146.1(b) of the *Code*, I am directing the employer, Canadian Broadcasting Corporation, represented by Mr. Germain, Manager, as specified in subsection 145(2) of the *Code*:
- To immediately take measures to correct the hazard or condition that constitutes the danger.
 - The employer is further directed not to use the place in respect of which the direction is issued until the direction is complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

- [95] In addition, in accordance with subsection 146.1(4) of the *Code*, I am directing, Mr. Duguay, and any other person not to enter the said premises until the direction to the employer is complied with. However, nothing in this direction prevents the doing of anything necessary for the proper compliance with the direction. [My underline]
- [96] As well in accordance with subsection 145.(5) of the *Code* the employer is to post a copy of this decision at the Kapuskasing Telecommunication tower, and give a copy of the decision to the policy committee as well as to the local health and safety committee.
- [97] Finally, the employer is to report in writing to health and safety officer Fancy Smith or another health and safety officer, by September 18, 2008, the results of the investigation and what corrective measures will be taken if any are required along with the completion date of the said measures. This report is to be copied to Mr. Duguay as well as to the policy committee and the local health and safety committee.

Richard Lafrance
Appeals Officer

ANNEX 1

Relevant statutory provisions, *Canada Labour Code Part II*

➤ Right to refuse, subsection. 128.(1)

Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that

(b) a condition exists in the place that constitutes a danger to the employee.

➤ Definition of Danger, subsection 122.(1), in this Part,

“danger” means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

➤ Subsection 146.1(1)

If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may

a) vary, rescind or confirm the decision or direction; and

b) issue any direction that the appeals officer considers appropriate under subsection 145.(2) or (2.1).

➤ Subsection 145.1(2)

For the purposes of sections 146 to 146.5, an appeals officer has all the powers, duties and immunity of a health and safety officer.

➤ Part II, *Permanent Structures*¹⁶, section, 2.24 to 2.27 See Annex 1

¹⁶ *Canada Occupational Health and Safety Regulations*

Operation, Inspection, Testing, Cleaning and Maintenance

2.24 (1) Every employer shall appoint a qualified person to set out, in writing, instructions for the operation, inspection, testing, cleaning and maintenance of an HVAC system and the calibration of probes or sensors on which the system relies.

(2) The instructions shall

(a) take into account CSA Guideline Z204-94, entitled *Guideline for Managing Air Quality in Office Buildings*, dated June 1994;

(b) where they exist on the day that this section comes into force, be readily available;

(c) where they do not exist on the day that this section comes into force, be developed and made readily available as soon as possible and, in any event, no later than five years after that day;

(d) for buildings the construction of which is completed on or after the day of the coming into force of this section, be readily available as soon as possible and, in any event, no later than five years after the day of the coming into force of this section;

(e) specify the manner of operation of the HVAC system;

(f) specify the nature and frequency of inspections, testing, cleaning and maintenance; and

(g) be reviewed by a qualified person and amended

(i) when modifications to the HVAC system are carried out in accordance with section 2.22,

(ii) when the standard referred to in section 2.21 is amended,

(iii) when the an investigation carried out in accordance with section 2.27 has identified that a health or safety hazard exists, or

(iv) at least every five years.

(3) Despite paragraph (2)(c), if an investigation referred to in section 2.27 identifies that a health or safety hazard exists, the instructions shall be developed and made readily available without delay.

(4) The employer shall appoint a qualified person or persons to implement the instructions and make a report, in writing, of each inspection, testing, cleaning and maintenance operation.

(5) The report shall be kept readily available by the employer for a period of at least five years and shall

(a) specify the date and type of work performed, and the identity of the person who performed it;

(b) identify the components of the HVAC system or portion of an HVAC system involved; and

(c) record test results, any deficiencies observed and the actions taken to correct them.

SOR/2000-374, s. 2; SOR/2002-208, s. 39.

2.25 An employer shall ensure that the qualified person or persons referred to in subsection 2.24(4) are instructed and trained in the specific procedures to be followed in the operation, inspection, testing, cleaning and maintenance of the HVAC system and the calibration of probes or sensors on which the system relies.

SOR/2000-374, s. 2.

2.26 An employer shall post, in a place readily accessible to every employee, the telephone number of a contact person to whom health or safety concerns regarding the indoor air quality in the work place can be directed.

SOR/2000-374, s. 2; SOR/2002-208, s. 42.

Investigations

2.27 (1) Every employer shall develop, or appoint a qualified person to develop, a procedure for investigating situations in which the health or safety of an employee in the work place is or may be endangered by the air quality.

(2) The procedure shall include the following steps:

- (a) a review of the nature and number of health or safety complaints;
- (b) a visual inspection of the work place;
- (c) the inspection of the HVAC system for cleanliness, operation and performance;
- (d) a review of the maintenance schedule for the HVAC system;
- (e) the assessment of building use as compared to the use for which it was designed;
- (f) the assessment of actual level of occupancy as compared to the level for which the building was designed;
- (g) the determination of potential sources of contaminants;
- (h) the determination of levels of carbon dioxide, carbon monoxide, temperature, humidity and air motion, where necessary;
- (i) the specification, where necessary, of tests to be conducted to determine levels of formaldehyde, particulates, airborne fungi and volatile organic compounds; and
- (j) the identification of the standards or guidelines to be used in evaluating test results.

(3) In developing the procedure, the employer or the qualified person appointed by the employer shall take into account the Department of Health publication 93-EHD-166, entitled *Indoor Air Quality in Office Buildings: A Technical Guide*.

(4) Where the health or safety of an employee in a work place is or may be endangered by the air quality, the employer shall, without delay, appoint a qualified person to carry out an investigation in accordance with the procedure developed pursuant to subsection (1).

(5) The investigation shall be carried out in consultation with the work place committee or the health and safety representative.

(6) To the extent reasonably practicable, the employer shall, in consultation with the work place committee or the health and safety representative, remove or control any health or safety hazard that is identified in the course of the investigation.

(7) Every employer shall keep the records of every indoor air quality complaint and investigation for at least five years.

➤ Dangerous situation – direction to employer: Section 145

145. (2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,

(a) the officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to

(i) correct the hazard or condition or alter the activity that constitutes the danger, or

(ii) protect any person from the danger; and

(b) the officer may, if the officer considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in writing to the employer directing that the place, machine, thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the officer's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

Dangerous situations — direction to employee

(2.1) If a health and safety officer considers that the use or operation of a machine or thing by an employee, a condition in a place or the performance of an activity by an employee constitutes a danger to the employee or to another employee, the officer shall, in addition to the directions issued under paragraph (2)(a), issue a direction in writing to the employee to discontinue the use, operation or activity or cease to work in that place until the employer has complied with the directions issued under that paragraph.

Posting notice of danger

(3) If a health and safety officer issues a direction under paragraph (2)(a), the officer shall affix or cause to be affixed to or near the place, machine or thing in respect of which the direction is issued, or in the area in which the activity in respect of which the direction is issued is performed, a notice in the form and containing the information that the Minister may specify, and no person shall remove the notice unless authorized to do so by a health and safety officer.

Cessation of use

(4) If a health and safety officer issues a direction under paragraph (2)(b) in respect of a place, machine, thing or activity, the employer shall cause the use or operation of the place, machine or thing or the performance of the activity to be discontinued, and no person shall use or operate the place, machine or thing or perform the activity until the measures directed by the officer have been taken.

Copies of directions and reports

(5) If a health and safety officer issues a direction under subsection (1) or (2) or makes a report in writing to an employer on any matter under this Part, the employer shall without delay

(a) cause a copy or copies of the direction or report to be posted in the manner that the officer may specify; and

(b) give a copy of the direction or report to the policy committee and a copy to the work place committee or the health and safety representative.

Copy to person who made complaint

(6) If a health and safety officer issues a direction under subsection (1), (2) or (2.1) or makes a report referred to in subsection (5) in respect of an investigation made by the officer pursuant to a complaint, the

officer shall immediately give a copy of the direction or report to each person, if any, whose complaint led to the investigation.

Copy to employer

(7) If a health and safety officer issues a direction to an employee under subsection (1) or (2.1), the officer shall immediately give a copy of the direction to the employee's employer.

Response to direction or report

(8) If a health and safety officer issues a direction under subsection (1), (2) or (2.1) or makes a report referred to in subsection (5), the officer may require the employer or the employee to whom the direction is issued or to whom the report relates to respond in writing to the direction or report, within the time that the officer may specify. The employer or employee shall provide a copy of the response to the policy committee and a copy to the work place committee or the health and safety representative.