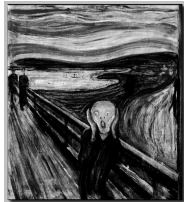


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MY GOD! I'VE GOT MOULD!



TRACY C. WARNE, Q.C.

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PURCHASE AND SALE AGREEMENT WARRANTY

“Seller represents and warrants to Buyer that during the time Seller has owned the property, Seller has not caused any building on the property to be insulated with insulation containing ureaformaldehyde, and that to the best of Seller's knowledge no building on the property contains or has ever contained insulation that contains ureaformaldehyde. This warranty shall survive and not merge on the completion of this transaction, and if the building is part of a multiple unit building, this warranty shall only apply to that part of the building which is the subject of this transaction.”

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NO MOULD WARRANTY

The standard house inspector's contract:

“The inspection does not include spores, fungus, mould or mildew, including that which may be present behind walls or under floors.”

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WHAT IS MOULD?

A non-scientific term referring to a few members of the fungi family.

Not all mould is dangerous – Penicillin.

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PATENT DEFECT AND LATENT DEFECT

Latent, meaning hidden or concealed.

Patent, meaning plain and obvious.

Patent Defect

Caveat Emptor

Buyer Beware

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RESIDENTIAL TENANCIES ACT (“RTA”)

Applies to residential units in residential complexes.

Can't contract out.

Section 3(4)


Provisions of the RTA override all other laws, except the Human Rights Code

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RESIDENTIAL TENANCIES ACT ("RTA")

Section 20(1)
A landlord is responsible for providing and maintaining a residential complex, including rental units in it, in a state of good repair and fit for human habitation.

Section 20(2)
Subsection (1) applies even if the tenant was aware of the state of non-repair.

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SECTION 20(1)

The most important section for a landlord.

2 cases – Landlord & Tenant Board:


1. The landlord must immediately clean up mould.

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Latent Defect:

The three possible scenarios:

- 1. Discovered after the agreement is signed and during normal, conditional on inspection period**
 - (a) Walk away from deal.
 - (b) Negotiate a significant price reduction – you pay clean up costs.


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- 2. Discovered after conditional period and before closing**

Stone v. Stewart 2009, CarswellOnt 21887

"A latent defect is one that would not be readily apparent to an ordinary purchaser during a routine inspection."

"A seller of a residence may be liable to a buyer for an undisclosed latent defect (including a patent defect concealed) about which the seller knows and which substantially or significantly and adversely impacts the habitability of the residence."

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3. Discovered after you closed the deal

Your case might not be as strong.

Certainly in poorer negotiating position.


The length of time between closing and discovery is vital.

Longer the period, the tougher your case because you will have to prove the mould was there before closing and is not something that you or your tenant caused after closing.


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Example 1

- House purchased from nice young couple who had done self-renovation.
- Included rental unit in basement.
- Water proofing consisted of concrete parging between sidewalk and building wall.
- No trench to the footings.
- No weeping tile.
- No water proof on the below grade wall.
- Building inspection did not warn of mould.
- After closing, tenant fled, sticking owner with unpaid rent.
- Result: Tens of thousands of dollars in remediation costs.
- Lawsuit stripped couple's equity but buyer still suffered a loss.
- Buyer had to declare mould infestation and sale price reduced.




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Example 2

- Commercial building, occupied by the owner and by tenants.
- Broken pipe flooded basement area.
- Insurance company hired remediator.
- Bad remediation.
- Employees and tenants suffering.
- Workers' Health and Safety inspectors ordered building cleared.
- Tenant Protection Act, Sections 154 and 155 - An inspector can order clean-up.
- Frank Haverkate and dog discovered mould.
- Remediation costs and business interruption - \$100,000
- Sued insurance company and remediator.
- Less than 100% of loss and legal fees.



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I AM A SELLER

You can be sued if the property contains a latent defect.


Law not completely clear.

Prudent seller should disclose presence of mould or remediation.

Get inspection by Frank Haverkate and clean bill of health.



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CONCLUSION

Be careful.

If in doubt, inspection by true professionals.

You do have legal rights and can recover.