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DEFECTS RELATING TO REAL ESTATE:

Marijuana Growing Operations

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Abstract

A marijuana growing operation ("MGO") causes health and safety hazards which negatively affect property values and are costly to remediate. Such defects may be undetectable upon inspection and not surface until months after a transaction has closed. Lenders must be aware of the possibility of MGO related defects that lower the value of its security. Marijuana growing may be permitted by the government for medical reasons and lenders must be aware that such activities may also negatively affect property values. Lenders are advised to include a covenant in the loan agreement forbidding any marijuana growth on the mortgaged property.

Full Article

There are numerous health and safety hazards posed by MGOs. Marijuana plants require humidity and high temperatures, both of which can lead to a property becoming contaminated with mould and fungus. If chemicals are used to treat the plants, the chemicals may seep into the foundation of the property and pollute the indoor air. Illegal electrical wiring is frequently used to power indoor growing lights and this creates a fire and electrical hazard.

The cost of remediating these hazards can be significant. According to the Insurance Bureau of Canada, the average claim to repair the damage caused by an MGO is \$41,000. In *House v. House*, a house fire was caused by an MGO which cost \$87,000 to repair. In *Hanlon v. ING Insurance Company of Canada* the cost to a landlord to repair mould and odour issues caused by a tenant's MGO was approximately \$26,000. In another situation, property in Toronto was noted to have \$150,000 worth of structural damage caused by an MGO according to a Toronto Police report.

It is a well-established rule of real estate law that a buyer of real estate takes the property as he/she finds it. In other words, the seller is not liable for disclosing patent defects, i.e. defects that are easily discoverable upon inspection of the property. However, many of the effects of an MGO can be difficult to detect and not appear until months after a home buyer moves in to the property. If the seller has knowledge of any hidden (latent) defects which render the property to be uninhabitable or dangerous, these must be disclosed to the buyer. There is still always the risk that latent defects exist and the seller is simply not aware of them.



Marijuana Growing Operations

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The licensed production of marijuana is permitted by the Marihuana Medical Access Regulations (“Regulations”), which were created pursuant to the Controlled Drugs and Substances Act. The holder of a personal-use production licence is authorized to produce and keep marijuana, in accordance with the licence, for the medical purpose of the holder. To obtain a personal-use production licence one must be of at least 18 years of age and submit an application to the Minister of Health. Those who are not the owner of the dwelling in which they wish to produce marijuana (i.e. tenants), must obtain the approval of the property owner. The amount of marijuana allowed to be grown is strictly limited by the Regulations down to the number of plants that may be grown and grams of dried marijuana that may be harvested. Legal grow operations may also cause hazards and negatively affect property values. Although consent of the property owner is required to commence a legal grow operation on a property, consent of the mortgagee is not required. It follows that lenders should require a covenant in the loan agreement forbidding any marijuana growth on the mortgaged property.

Lenders must also be aware of the government’s powers of restraint and forfeiture with respect to MGOs. Under the Controlled Drugs and Substances Act, the Criminal Code and the Civil Remedies Act, the Attorney General (“AG”) may apply for a restraint order preventing any dealing in any way with “offence related property”, property used in the commission of offences, or property used “as an instrument of unlawful activity”. Upon conviction the AG may apply for forfeiture of the property to the government.

The AG’s restraint order typically includes an exception for financial institutions as that term is defined by the Bank Act. This definition includes a bank or an authorized foreign bank and a body corporate to which the Trust and Loan Companies Act applies. Those that fall under the financial institution exception may take possession, repair and sell the property subject to the restraint order pursuant to the mortgage agreement. The mortgagee must provide a full accounting to the AG of any proceeds arising from the sale of the property and must forward any net proceeds to the government.

The determination of what constitutes an MGO is not defined by statute. Whether or not a court will find the existence of an MGO is a fact specific determination. The court will look at the property for any indicia of an MGO. The existence of an MGO is typically confirmed by the opinion of an expert witness such as a police officer with training in detecting MGOs or an electrician or repair person with experience repairing damage caused by MGOs.

The following is a list of indicia of MGOs as seen in the case law:

- Hydro/power diversions (unlawful diverting of power lines to bypass hydro meters);
- Excess humidity;
- Mould, mildew, fungi or spores;
- Water stains on walls or ceiling;
- Damage to interior caused by excessive moisture;
- Equipment related to indoor gardening/planting;
- Watering systems;

- Indoor lighting systems;
- Ventilation systems (to remove excess moisture and marijuana plant related odours);
- Mylar/Tarps on floors and walls (for heat/moisture retention);
- Pots, soil, fertilizer, etc.;
- Marijuana trafficking related paraphernalia;
- Small plastic baggies;
- Digital scales; and
- Marijuana plants and leaves.