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PRIVACY ISSUES AND THE PERILS OF MARIJUANA GROW OPERATIONS

STRATEGIES FOR IDENTIFYING HIGH RISK PROPERTIES AND INSURED

Many Canadian insurers are wrestling with claims made as a result of damages caused by residential marijuana grow operations. Over the course of the last five years insurers have responded to the dilemma by excluding vandalism caused by tenants, increasing deductibles, placing a higher onus on property owners to monitor their property and working with underwriters to amend policy wording.

However, these strategies alone do not shelter insurance companies from damage claims caused by residential grow operations. For example, financial lenders, by virtue of the standard mortgage clause and statutory conditions, may still be entitled to compensation even if a home is destroyed by a fire that has originated from an illegal grow operation. Consequently, identifying a suspect property prior to a loss is emerging as the best defence to a potential claim.

Below we address how new technological advances in thermal imaging and lobbying for clarification of privacy laws could assist insurers to identify high-risk properties, and insureds, before damages occur.

THERMAL EYE CAMERAS NO THREAT TO PRIVACY

The process of using hydroponics to cultivate Marijuana generates immense heat. Thermal eye cameras ("TEC") can detect the heat generated by hydroponics. A TEC takes a photograph of the distribution of heat on the external surface of a building, which can indicate the presence of a marijuana grow operation ("Hot House").

In 2003, the Ontario Court of Appeal declared the use of TECs as an unlawful investigative technique. However, in *R. v. Tessling* the Supreme Court of Canada unanimously held that the R.C.M.P. did not need a search warrant to scan homes with TECs.

The Court based its decision on the fact that everything shown on the TEC image identifies information already exposed to the public, regardless of the fact that it cannot be seen by the naked eye. Consequently, this case opens the door for insurers to use TEC images to justify a re-

inspection of a property or take other steps to avoid unnecessary risks.

PROVINCIAL AND FEDERAL PRIVACY LEGISLATION

Currently, both federal and provincial privacy legislation restricts the sharing of information between law enforcement agencies and insurance companies. If insurance companies and law enforcement agencies could share information it would be possible to identify potential links between insureds and “individuals” accused of cultivating marijuana, which in turn could be used to locate properties used as Hot Houses.

Unfortunately, until the federal and provincial privacy commissioners provide guidance on how such information can legally be shared, law enforcement agencies are unwilling to disclose information about suspected Hot Houses.

POTENTIAL STRATEGIES FOR THE INSURANCE INDUSTRY

Insurance companies should take every opportunity to generate public awareness of the social utility in permitting and facilitating the exchange of data between law enforcement agencies and insurers. Further, by lobbying the government, pressure can be put on the privacy commissioners to issue directives to legal authorities on how such information can legitimately be exchanged. In the interim, if an insurer suspects a house has been converted to a grow operation, it can, without a warrant, use a TEC to determine whether excessive heat is present on the outside of the building. Insurers can also use the technology to scan large areas through the use of aerial photography. The costs associated with a TEC are not excessive. A TEC can easily be rented. Also a TEC can be purchased from various dealers across Canada at a retail price of approximately \$17,000.

Given the ever-increasing exposure created by illegal grow operations insurers are well advised to consider these and other potential strategies to combat these risks.

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