

**LATENT DEFECTS IN RESIDENTIAL REAL ESTATE:  
LOGICAL OR RECKLESS EXPANSION?**

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You are interested in buying a home and you find one in what appears to be a very attractive district of older (but well kept up) homes in a heavily treed neighbourhood. The particular property you are interested in has all the amenities that you and your young family (three growing children) could ever want. The price and terms are acceptable to you, and you make an offer which is quickly accepted. Before contracting to buy, you had two or three "walk-throughs" on the property and you didn't notice any existing or potential problems. However, after you move in, you discover that behind the recently installed drywall in the basement rec room and underneath the rugs on the rec room floor, there are a number of cracks/fissures. Not only is moisture slowly seeping in, but there is strong evidence (visually and odiferously) of the existence of black mould on the walls and the floors. You consult with foundation experts and are told that there are severe structural (and mould) problems with the home and that it will cost at least \$100,000 to remedy the situation. Even then, the "experts" tell you that there are no "guarantees", because an underground river runs directly beneath the property. It is quite clear that your vendor intentionally misled you with respect to these problems by hiding them, utilizing the aforementioned drywall and strategically placed rugs, such rugs having been put underneath extremely heavy furniture which the vendor had in place at the time of your inspections. Most people (lawyers and laypersons) would agree that you have a remedy against your vendor on the basis that the vendor has intentionally deceived you by hiding these defects - which were not easily ascertainable by you when you made your inspections - because these "latent" defects constitute a substantial impediment to your enjoyment of the property, at least without your incurring a very high remediation cost.

But what if the "defect", also latent in the sense that it would not be ascertainable upon a reasonable inspection of the property, is something external to the property? This very question came before the Ontario Superior Court of Justice (judgment March 11, 2011) in the Dennis v. Gray case (the "**Gray Case**"). In the Gray Case, the "defect" ascertained by the purchaser after the purchaser had committed to buy was the fact that a convicted child pornographer lived across the street. When the purchaser learned of this fact, the purchaser became concerned for

the well being of his children and didn't want to complete the purchase transaction. The hearing was not a full blown trial to decide the merits of the plaintiff's case, but rather the determination of a preliminary motion by the defendant in which the defendant sought to convince the Court to strike out the plaintiff's claim on the basis that there should be no trial because "it is (not) "plain and obvious" that such a fact does . . . in law amount to a "latent defect" of such a nature that it must be disclosed to a purchaser." However, the Court concluded that it was not so plain and obvious and thus, regardless of whether or not the plaintiff would ultimately succeed in its claim, it was appropriate for the claim to at least go forward to trial. The defendant argued that the existence of the convicted child pornographer was generally known in the neighbourhood, but the Court observed that in fact, the criminal record of the neighbour could not be ascertained from any routine inspection, at least not ascertained with certainty. The Court also observed that what has been held by the Courts to be an actionable latent defect has generally expanded somewhat over time, and thus it is not necessary to foreclose completely the possibility of considering as latent defects, elements which are external to the actual property.

It will be interesting to discover what happens with the Gray Case if it does proceed to a formal trial, perhaps followed by one or more appeals. There are certainly other elements external to certain properties which, if known to a potential purchaser at an early stage, might very well discourage the purchaser from committing himself/herself. Examples might be noises emanating from a manufacturing/processing facility, even though the facility is situated several miles away. Consider odours emanating from such a source, again, notwithstanding that the source is situated several miles away (think of the old sugar beet processing facility in Fort Garry, or a sewage treatment facility). Another possible irritant to a potential purchaser - although this would not be external to the property - is the fact that the home to be purchased is reputed to have been haunted by ghosts for many years. Surely all of these would be expansions - perhaps reasonable expansions, perhaps not - of what the law views as being an actionable latent defect.