

# LAW BRIEF

February 6, 2012

TORONTO

Serving North America's  
Legal Communities

For Subscriptions or Ad  
Information call 1-800-503-4563  
[www.nationallawlist.com](http://www.nationallawlist.com)

## GRAHAM v. VANDERSLOOT, ON CA, 2012 January 31

### PROCEDURE -- ADJOURNMENT

Appeals from decisions that refused an adjournment and dismissed an action. HELD: Appeals allowed. Adjudgment decisions are highly discretionary and appellate courts are rightly reluctant to interfere with them. Laskin J.A. succinctly summarized the operative legal principles in *Khimji v. Dhanani* (2004), 69 O.R. (3d) 790 (C.A.). Although he was in dissent, the majority accepted his articulation of the statement of principles. At paras. 14 and 18 he said: 14. A trial judge enjoys wide latitude in deciding whether to grant or refuse the adjournment of a scheduled civil trial. The decision is discretionary and the scope for appellate intervention is correspondingly limited. In exercising this discretion, however, the trial judge should balance the interests of the plaintiff, the interests of the defendant and the interests of the administration of justice in the orderly processing of civil trials on their merits. In any particular case several considerations may bear on these interests. A trial judge who fails to take account of relevant considerations may exercise his or her discretion unreasonably and if, as a result, the decision is contrary to the interests of justice, an appellate court is justified in intervening. In my opinion, that is the case here. [Emphasis added.] 18. I begin with the overriding goal of our modern Rules of Civil Procedure: to ensure as far as possible that cases are resolved on their merits. This goal is expressly set out in Rule 2.01(1)(a), which gives a judge power to grant any relief necessary "to secure the just determination of the real matters in dispute". Courts should not be too quick to deprive litigants of a decision on the merits. The trial judge does not appear to have sufficiently taken into account that his order deprived the parties, especially the appellant, of a determination of "the real matters in dispute." See also *Ariston Realty Corp v. Elearim Inc.* [2007] O.J. No. 1497 (S.C.J.), at paras. 33, 36 and 38. Here, there are some factors favouring an adjournment refusal, to be sure. However, there are two factors that the motion judge did not take into account which bring this case into the category of cases where, in spite of the foregoing, the overall interests of justice call for a decision of the real matter in dispute on the merits. First, liability was admitted. Secondly "apart from the general implications of delay (not really a

factor in this case)" there is nothing in the record to indicate that an adjournment would result in prejudice to the respondents that could not be compensated for in costs. It is significant that liability was admitted in this case. The only issue to be determined was the quantum of damages sustained by the appellant. There is nothing to suggest that the respondents would suffer from any non-compensable prejudice if the trial had been adjourned from September 2010 to the following Spring. Finally, while the motion judge was justified in observing that the medical assessments should have been arranged prior to May 2010, she gave undue weight to the appellant's lawyer's failure to do so when all of the foregoing factors are taken into consideration. As Hamblly J. noted when granting leave to appeal to the Divisional Court in this matter, "the often applied principle that the sins of the lawyer should not be visited upon the client applies in this case." This principle was enunciated by this Court in *Hallon Community Credit Union Ltd. v. ICL Computers Canada Ltd.* (1985), 8 O.A.C. 369, at para. 11: Undoubtedly counsel is the agent of the client for many purposes ... but it is a principle of very long standing that the client is not to be placed irrevocably in jeopardy by reason of the neglect or inattention of his solicitor, if relief to the client can be given on terms that protect his innocent adversary as to costs thrown away and as to the security of the legal position he has gained. There may be cases where the plaintiff has so changed his position that this is impossible. There is nothing to indicate that a further adjournment of six months would have in any way affected "the security of the legal position [the respondents had] gained" or changed their position in any way that could not be compensated for in costs. Recognizing that his client is seeking an indulgence, Mr. Scott does not seek costs of the proceedings before either Milanetti J. or Hamblly J. Nor did he strenuously press for costs here. In all the circumstances, this is not a case for costs in this Court.

## DOLLAN v. THE OWNERS STRATA PLAN BCS 1589, BC CA, 2012 January 30

### REAL PROPERTY -- CONDOMINIUMS -- CONSTRUCTION CHANGE -- UNFAIRNESS

Appeal from a decision that held that a decision to change a window was unfair to the Appellants. HELD: (Smith, JA, dissenting) Appeal dismissed. Per Garson: As defined by the Supreme Court of Canada in *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at para. 52: [52] The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K. C. Davis wrote in *Discretionary Justice* (1969), at p. 4: A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction. The characterization of an action as significantly unfair is not a matter of discretion but is an inquiry requiring consideration of the facts before the court and what legally constitutes unfair action. This appeal requires appellate review of a question of law, that is the interpretation of s. 164, and of a question of mixed fact and law, the application of the law to the facts in this case. The standard of review for questions of law is correctness: *Housen v. Nikolaisen*,

2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8. For a true mixed question of law and fact, the standard of review is the less stringent standard of palpable and overriding error: *Housen* at paras. 36 – 37; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631 at para. 45; and *Paladin Security Systems Ltd. v. JBLK Enterprises Inc.*, 2010 BCCA 532 at para. 10. This appeal raises two issues about the proper interpretation of s. 164. First, the appropriate degree of deference owed to a decision of a strata council, or in this case, the Strata Corporation, and second, the meaning of the phrase "significantly unfair". In *934859 Alberta Ltd. v. Condominium Corp. No. 0312180*, 2007 ABQB 640, 434 A.R. 41, a judge considered whether deference should be granted to a condominium board. The section under consideration, s. 67 of the Condominium Property Act, R.S.A. 2000, c. C-22, permitted an interested party to apply to court for a remedy where a board of a condominium corporation engaged in improper conduct. At para. 54, *Chrumka J.* held that a court should defer to elected condominium strata boards "as a matter of general application" in the absence of improper conduct. He cited a number of authorities from various provinces for the proposition that: a Court should not lightly interfere in the decision of the democratically elected board of directors, acting within its jurisdiction and substitute its opinion about the propriety of the board of directors opinion unless the board's decision is clearly oppressive, unreasonable and contrary to legislation ... The appellant contends that the focus of the analysis is on the conduct of the Strata Corporation. In *Peace v. Strata Plan VIS 2165*, 2009 BCSC 1791, 3 B.C.L.R. (5th) 188 at para. 55, *Sewell J.* focused on the process undertaken by the Strata Corporation and not the result: [55] I have already referred to the wording of section 164 of the SPA. I repeat that the focus of that section is on the conduct of the Strata Corporation and not on the consequences of the conduct. There is no doubt that in making a decision the Strata Corporation must give consideration of the consequences of that decision. However, in my view, if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others. This must be particularly so when the consequence complained of is one which is mandated by the SPA itself. Section 164 is remedial. It addresses that, despite using a fair process and holding a democratic vote, the outcome of majoritarian decision-making processes may yield results that are significantly unfair to the interests of minority owners. Section 164 provides a remedy to an owner who has been treated significantly unfairly by co-owners or the strata council that represents them. The view that significantly unfair decisions reached through a fair process are insulated from judicial intervention would rob the section of any meaningful purpose. As noted by the respondents, the language in s. 164 bears some resemblance to s. 227 of the Business Corporations Act, S.B.C. 2002, c. 57, which concerns oppression remedies. The jurisprudence considering the oppression remedy has informed the interpretation of s. 164. In the case of *Blue-Red Holdings Ltd v. Strata Plan VR 857* (1994), 42 R.P.R. (2d) 49 (B.C.S.C.), the court reviewed all of the definitions that had been given to these terms. Specifically, oppressive conduct has been interpreted to mean conduct that is burdensome, harsh,

wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial" conduct has been interpreted to mean conduct that is unjust and inequitable. A number of subsequent decisions from the B.C. Supreme Court have cited *Sinclair Prowse J.'s* definition of "significantly unfair" with approval. Most recently, *Masuhara J.* in *Gentis v. The Owners, Strata Plan VR 368*, 2003 BCSC 120, referred to *Sinclair Prowse J.'s* decision as authority for the definition of significantly unfair. The judge, however, added the following comment: Judges have consistently applied the language used by the Supreme Court in *Reid* (see: *Gentis* at para. 27; *Chan v. Owners, Strata Plan VR-151*, 2010 BCSC 1725 at para. 18; and *934859 Alberta Inc. v. Condominium Corporation No. 0312180*, 2007 ABQB 640 at para. 87). In the appellate decision in *Reid*, *Ryan J.A.* noted that the term "unfair" may not connote conduct as severe as is envisaged by the term "oppressive and unfairly prejudicial", but she held it was unnecessary for her to decide the point. Similarly, here, neither party suggested that the phrase should be given a meaning that is different than the meaning ascribed to it by *Sinclair Prowse J.* in *Reid*. The difference between the positions of the parties is in the scope of the inquiry. In the case of a strata unit owner seeking redress under s. 164, test should be adapted, suggested by *Greyell J.* slightly to the context of s. 164 and articulate it in this manner: 1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner? 2. Does the evidence establish that the reasonable expectation of the petitioner was violated by action that was significantly unfair? If the chambers judge had asked the two-part test set out above, she would have had to conclude that, looked at objectively, *Dollan* and *Woodford* had a reasonable expectation that the spandrel windows would be vision glass. That is what they agreed to purchase. The second question – whether the evidence establishes that the reasonable expectations of the owners were violated by action that was significantly unfair – was implicitly answered in the positive by the judge. The Strata Corporation in carrying out its statutory mandate must fairly balance the competing tensions between those who want their view and those who want their privacy. The original purchasers of the 01 units and the 02 units both knew or ought to have known from looking at the strata plans that the distance between their windows was close and that the windows were to be vision glass windows. The Strata Corporation does not dispute that the spandrel window was designed during the course of construction to accommodate window coverings. There is nothing to suggest that the windows in the 02 units could not be covered with window coverings or blinds or that the windows do not already have existing coverings or blinds. On the facts of this case, the result of the Strata Corporation decision was to place the burden of the desired privacy on the wrong party. Courts should be most reluctant to interfere in the affairs of a strata corporation where the process adopted to arrive at a decision is one that is fair and democratic. But where an owner invokes s. 164 to remedy alleged unfairness, a court is mandated to consider if the action rises to the threshold of "significant unfairness", in which case the court is required to intervene. There was no palpable and overriding error in the judge's conclusion that the refusal to permit the 01 units to remove the spandrel

was unfairly burdensome to them.

**MARTIN-VANDENHENDE v. MYSLIK,  
ON CA, 2012 January 30**

**NEGLIGENCE – MOTOR VEHICLES –  
EVIDENCE – CONFLICTING EVIDENCE –  
CONTRIBUTORY NEGLIGENCE**

Appeal from a decision that found the Defendant liable for a motor vehicle accident. HELD: Appeal allowed, new trial ordered. The trial judge initially went astray when he failed "to resolve the divergent testimony" between the parties on the crucial factual issues surrounding which turning signal Ms. Martin-Vandenhende activated, and when and how she manoeuvred her vehicle just prior to the collision. This error, in turn, led to other flaws in his reasoning. A trial judge has an obligation to make factual findings on conflicting evidence with respect to material facts that were essential to a proper determination of the issues before him or her. As Denning L.J. observed, in *Jones v. National Coal Board*, [1957] 2 Q.B. 55, at p. 64, it is the judge's role "at the end to make up his mind where the truth lies." This Court expressed a similar sentiment a year earlier when it said that a trial judge "must make the findings of fact that enable the Court to say whether or not there is liability involved": see *Waring v. Jarvis*, [1956] O.J. No. 246 (C.A.), at paras. 4-5. See also *Aujla v. Hayes* (1997), 100 O.A.C. 129 (C.A.), at para. 31. The fact-finding exercise in itself brings a certain discipline and rigour to a trial judge's analysis of the evidence and guards against imprecise thinking and the risk of a case being decided on the basis of facts that were not actually found. The failure to make the findings of fact reveals that although the trial judge professed to take the Myslik position at its highest, he does not appear to have done so. Had the trial judge resolved the conflicting credibility issues with respect to the turning signals and the manner in which Ms. Martin-Vandenhende manoeuvred her vehicle, he may well have rejected Mr. Myslik's testimony and found that he was confused by inconsistent signals and that the Camry was not really off the road. On the other hand, he might have accepted Mr. Myslik's testimony and rejected that of Ms. Martin-Vandenhende - a viewpoint that could well have led him to consider the liability of Peter Myslik in a different light (something to which I will return). The trial judge addressed the common law respecting the onus on a following driver, as expressed by this Court in *Beaumont v. Ruddy*, [1932] O.R. 441 (C.A.), at p. 442: Generally speaking, when one car runs into another from behind, the fault is in the driving of the rear car, and the driver of the rear car must satisfy the Court that the collision did not occur as a result of his negligence. [Emphasis added.] He also relied upon the "following too closely" provisions of s. 158(1) of the Highway Traffic Act R.S.O. 1990, c. H.8: The driver of a motor vehicle or street car shall not follow another vehicle or street car more closely than is reasonable and prudent having due regard for the speed of the vehicle and the traffic on and the conditions of the highway. In the end,

however, the trial judge treated the case as a rear-end collision case in which an inexperienced driver, perhaps confused by inconsistent signals from the lead vehicle, was proceeding too quickly without having his vehicle under proper control in the circumstances and who, as a result, failed in "his obligation to have his vehicle on such control that on these road conditions he can stop without colliding with her vehicle no matter what she chooses to do, within her own lane" (emphasis added). This approach was neither justified in law or on the facts, taking the Myslik position at its highest. The approach is unjustified on the facts because, as outlined above, it is not compatible with the Myslik evidence taken at its highest, which is the basis upon which the trial judge purported to impose liability. In addition, the trial judge's approach was wrong in law. The common law principle enunciated in *Beaumont v. Ruddy* does not prescribe that a following driver is always at fault if he or she runs into another from behind. It simply states that generally speaking this will be the case, and shifts the onus to the following driver to show otherwise. There is no principle of law that automatically fixes a following driver who runs into another vehicle from the rear with liability "no matter what [the lead driver] chooses to do, within [his or] her own lane." Subject to the law's general bias in favour of fault on the part of the following driver and the "following too closely" jurisprudence, liability "as in any negligence case" depends upon whether the following driver was acting reasonably in the circumstances and, conversely, whether the lead driver was as well. The upshot of the foregoing analysis is twofold, for purposes of the appeal. Section 3 of the Negligence Act, R.S.O. 1990, c. N.1 requires the judge to apportion damages if fault or negligence is found on the part of the plaintiff that contributed to the damages. The trial judge did not directly address the issue of contributory negligence, but he did refer to three authorities cited to him by the appellants, which he said "all [found] fault in the operator of the lead vehicle when abruptly changing lanes, or directions of travel, without signalling or ensuring the way was clear." The three authorities were *Adshade v. Jackson* (1987), 82 N.S.R. (2d) 8 (C.A.); *Wierenga v. Hemmons*, 1993 Carswell BC 1845 (S.C.); and *Schleiermacher v. Neider* (1996) Carswell BC 2761 (S.C.). A new trial is required to resolve the issue of contributory negligence. Although more reluctant to do so, I would a new trial on the issue of Peter Myslik's liability is also ordered.

**RE: ATWAL,  
BC CA, 2012 January 31  
BANKRUPTCY – EXEMPTIONS**

Appeal from a decision that refused to grant the \$5,000 personal exemption for his motor vehicle pursuant to ss. 37 and 67(1)(b) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA], ss. 71(1)(c), 71.2(2)(b), 71.2(3) of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 [Act] and s. 2(b) of B.C.R. Regulation 28-98 (Court Order Enforcement Exemption Regulation)

[Regulation]. Appeal allowed. As the decision under appeal involved the interpretation of a statute, a matter of law, the standard of review is that of correctness. The exemption sought by the appellant is said to arise as a result of the combined effect of a legislative scheme that results from the combination of statutory provisions identified by the Chambers Judge. While s. 71 of the Act deals with goods and chattels, s. 71.1 of the Act deals with the debtor's principal residence. In *Royal Bank of Canada v. Nguyen*, 2004 BCSC 895, 33 B.C.L.R. (4th) 131, Mr. Justice Masuhara considered s. 71.2 of the Act in an appeal from the decision of a Master of the Supreme Court denying an exemption of \$12,000 from the sale of the principal residence by debtors, each of whose equity in their home exceeded \$12,000. The sale had preceded the efforts of the Royal Bank to foreclose on the home, and thus there was no sale by a sheriff. At paras. 59-61, Masuhara J. concluded that a residential property, sold voluntarily, should be considered property sold "under this Act" as per s. 71.2(2), as to hold otherwise would be "neither in line with the statutory purpose, nor [be] practical." He viewed the process of the sale as "incidental rather than critical" to the true purpose of the Act, which is to provide the exemption on a sale of their principal residence to debtors. He found that the fact that the debtor conducted the sale themselves and the proceeds were not "distributed by a sheriff or other officer" did not bar the debtor from the entitlement to the exemption. Mr. Justice Burnyeat reached a similar conclusion in *Bankruptcy of Kathleen Helen Walker*, 2010 BCSC 1368, 71 C.B.R. (5th) 84, and permitted Ms. Walker to claim an exemption relating to her principal residence notwithstanding that her equity in the residence exceeded the exempt amount. In this case, Burnyeat J.'s decision is at odds with the earlier decision of Mr. Justice Colver in *Tunney*, (Trustee of) *Re*, 2000 BCSC 1144, 18 C.B.R. (4th) 311. The reasoning of Burnyeat J. in this case is also at odds with his reasoning in the *Thow* case. In that case, the trustee in bankruptcy argued that the debtor's vehicle, which had a value in excess of \$5,000, was not property exempt from execution or seizure because it was not seized and sold under provincial or any execution proceedings. Burnyeat J. rejected that submission. With respect, the reasoning of Masuhara J. in *Nguyen* is correct, and that, to the extent that he applied that reasoning in *Thow*, Burnyeat J. was also correct. Unlike *Nguyen*, this case involves a bankruptcy as a result of which all of the appellant's assets, subject to the applicable exemptions, vested in his bankruptcy trustee at the moment of the bankruptcy. There is no principled basis upon which to distinguish a bankruptcy from an impending foreclosure for the purposes of the application of the statutory exemptions to the benefit of a debtor. It follows, then, that the reasoning of Burnyeat J. in this case is incorrect, and that the exemption for a vehicle found in s. 71(1)(c) of the Act, when considered in the statutory scheme that includes ss. 37 and 67(1)(b) of

the BIA, is available to a bankrupt regardless of whether there is a sale of the vehicle.

**DEEFERRARO LIMITED v. PELLIZZARI,  
ON CA, 2012 January 31  
PROCEDURE – PLEADINGS –  
AMENDMENT – LIMITATIONS**

Appeal from a decision that dismissed an application to amend pleadings. HELD: Appeal allowed. The motion judge erred in concluding that the proposed amendments added new causes of action. The original pleading, while far from elegant and orderly, contains all the facts necessary to support the amendments. The amendments simply claim additional forms of relief, or clarify the relief sought, based on the same facts as originally pleaded. The distinction between pleading a new cause of action and pleading new or alternative remedies based on the same facts is set out in one of the seminal cases, *Canadian Industries Ltd. v. Canadian National Railway Co.*, [1940] O.J. No. 266 (C.A.), affd. [1941] S.C.R. 591. The plaintiff sued for damages following the destruction of a cargo of sodium cyanide due to a derailment on the defendant's railway line. He pleaded that the defendant was a common carrier and that the goods had been damaged. The trial judge allowed an amendment, at trial, to plead negligence. *Middleton J.A.*, writing for the court, held at para. 18 that the amendment was properly allowed - it was not the institution of a new cause of action, but simply an alternative claim with respect to the same cause of action: "The amendment relates to the remedy sought upon facts already pleaded." Here, the original statement of claim contained broad allegations against Pellizzari. The statement of claim also claimed a constructive trust over certain profits allegedly acquired by Pellizzari, deprivation of the appellants and enrichment of the respondents (para. 64), an accounting (para. 1(b)), disgorgement (paras. 1(b), 104) and punitive damages (paras. 1(c), 105). Apart from tidying up the claim for relief, and extending the relief sought, the proposed amendments do not add any material facts to those already pleaded. In some cases, the claims sought to be added are already found in the existing pleading. In the other cases, the claims are simply alternative forms of relief based on the facts already pleaded. This is not a case in which new and unrelated causes of action are being asserted based on new facts. The claims flow directly from the facts previously pleaded. I therefore conclude that the claims were not statute-barred and the amendments should have been permitted, in the absence of evidence of non-compensable prejudice. During oral argument, counsel for the respondents properly acknowledged that, apart from the expiry of the applicable limitation period (which is relevant only if the proposed amendments effect the addition of new causes of action), there is no evidence in this case of non-compensable prejudice of the type envisaged by Rule 26.01 that would preclude the amendments. That is correct. Any prejudice caused by the delay of the trial as a result of the amendments could be addressed in costs.

**Edjline Appraisal Services Inc.**

Toronto Property Appraisal Service  
(Also Serving Richmond Hill and Markham)  
Appraisal for Buyers or Sellers,  
Litigation, Relocation, Asset Management  
[www.edjline.com](http://www.edjline.com) (416) 630-2668

*Lisa Minnini* PHOTOGRAPHY  
Commercial Photography  
416-258-8843  
lisaphoto@rogers.com  
[www.lisaphoto.ca](http://www.lisaphoto.ca)

**WHOLESALE DIAMOND**

Replacement Experts  
Diamond Shippers

1-800-798-7176

**Residential Appraisals for:**

- Market Value
- Mortgage Lending
- Tax Assessment
- Bankruptcy
- Estate Planning

**Frontier**  
REAL ESTATE APPRAISAL  
[www.frontierappraiser.com](http://www.frontierappraiser.com) 416-926-8833