

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Busato v. Gore Mutual Insurance Company*,
2025 BCCA 79

Date: 20250314
Docket: CA47935

Between:

Anthony Edward Busato

Appellant
(Plaintiff)

And

Gore Mutual Insurance Company

Respondent
(Defendant)

Before: The Honourable Madam Justice Fisher
The Honourable Justice Griffin
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated
November 15, 2021 (*Busato v. Gore Mutual Insurance Company*,
2021 BCSC 2214, New Westminster Docket S201179).

Counsel for the Appellant:

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Counsel for the Respondent:

P. Dawson

Place and Date of Hearing:

Vancouver, British Columbia
November 7, 2024

Place and Date of Judgment:

Vancouver, British Columbia
March 14, 2025

Written Reasons by:

The Honourable Justice Winteringham

Concurred in by:

The Honourable Madam Justice Fisher
The Honourable Justice Griffin

Summary:

This appeal arises from the dismissal of the appellant’s action for damages against the respondent insurer with respect to the appellant’s homeowner’s insurance policy, following a fire that destroyed his home. During its investigation, the insurer discovered approximately 25 marijuana plants in the house, grown pursuant to a lawfully issued Health Canada license. The insurer denied coverage for the loss, relying on an exclusion relating to marijuana cultivation on the property, regardless of whether it was licensed. On appeal, the appellant argued that the summary trial judge erred: (1) by concluding the exclusion clause was unambiguous; and alternatively, (2) failing to grant relief from forfeiture under s. 32 of the Insurance Act. Held: Appeal allowed. The exclusion was ambiguous and should be interpreted narrowly and in favour of the appellant.

Reasons for Judgment of the Honourable Justice Winteringham:

Introduction

[1] On April 23, 2017, the appellant’s home was destroyed by fire. There was no dispute that the total loss was caused by an accidental fire that started in the kitchen. In 2014, the appellant had purchased an insurance policy from Gore Mutual Insurance Company (“Gore”), and he renewed the insurance policy each year. The appellant made a claim with Gore for indemnity under the policy. During its investigation of the fire, Gore learned the appellant was growing approximately 25 marijuana plants, pursuant to a valid license issued by Health Canada that permitted him to cultivate and possess up to 73 marijuana plants and use medicinal marijuana.

[2] On May 16, 2017, Gore denied coverage for the loss. Gore relied on an exclusion in the policy relating to marijuana cultivation on the property. The appellant then sued on the policy. The case proceeded by way of summary trial. In reasons for judgment pronounced November 15, 2021, the judge dismissed the appellant’s action against the insurer: *Busato v. Gore Mutual Insurance Company*, 2021 BCSC 2214.

[3] In finding that the exclusion was unambiguous, the judge, in large part, relied on *Pietrangelo et al v. Gore Mutual Life Ins. Co. et al*, 2010 ONSC 568 [*Pietrangelo*]; affirmed on appeal, *Pietrangelo v. Gore Mutual Insurance Company*, 2011 ONCA 162. *Pietrangelo* involved the same insurer, virtually the same policy, and the same

exclusion. However, the circumstances in *Pietrangelo* were exceedingly different. In *Pietrangelo*, a tenant caused an explosion (and total loss of a house) while making cannabis resin. The tenant did not hold a license for marijuana cultivation or production and his conduct was the subject of criminal charges. In the case at bar, the judge concluded that it did not matter that the appellant's 25 plants were grown pursuant to a license or that the cultivation had nothing to do with the cause of the fire.

[4] Finally, the judge found that, though a "harsh result", the appellant was not entitled to relief from forfeiture under s. 32 of the *Insurance Act*, R.S.B.C. 2012, c. 1 [Act].

[5] For the reasons I will explain, I would allow the appeal.

Background

[6] From 2006 through 2013, the appellant had five surgeries (including a shoulder replacement and surgeries to his lower back, spine, and neck) that caused him chronic and debilitating pain. On June 29, 2013, Health Canada issued to the appellant:

- a) an "authorization to possess" dried marijuana for medical purposes to a maximum of 450 grams; and,
- b) a "personal use production license" permitting him to grow marijuana indoors, for personal-medical use, to a maximum of 73 plants.

[7] The possession and cultivation license had an expiry date of June 29, 2014. On March 31, 2014, Health Canada extended the authorization to possess and cultivation license "until the court orders otherwise".

[8] The appellant owned a single-family home located in Peachland, B.C. On June 20, 2014, the appellant purchased a homeowners' insurance policy from Gore that covered, among other risks, the risk of fire. The policy was renewed annually and was valid at the time of the fire.

[9] On April 23, 2017, the appellant's home was damaged by an accidental kitchen fire. The fire caused the total loss of his home and its contents. The appellant sought indemnity for the loss under the insurance policy. Gore investigated the claim and determined the total loss was caused by the accidental kitchen fire. Nevertheless, Gore denied coverage for the loss on the basis that it did not insure property used for cultivating, harvesting, or processing marijuana, pursuant to an exclusion in the insurance policy.

[10] There was no dispute that the fire was caused by an insured risk (accidental kitchen fire) and not the appellant's marijuana cultivation.

[11] The exclusion clause was stated as follows:

We do not insure direct or indirect loss or damage, in whole or in part: [. . .]

32 to dwellings or detached private structures or unscheduled personal property contained in them, used in whole or in part for the cultivation, harvesting, processing, manufacture, distribution or sale of marijuana or any product derived from or containing marijuana or any other substance falling within Schedule (Section 2) of the *Controlled Drugs and Substances Act Narcotic Control Regulations*;

regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage.

[12] On May 16, 2017, Gore denied coverage for the loss. In its letter denying coverage, Gore wrote:

...we have determined that your claim is not covered under your policy. Our determination is based on the following information:

- a. You sustained a significant fire loss to your premises on April 23, 2017.
- b. During the course of the fire suppression, it was discovered that you had been growing marijuana in your home.
- c. Regardless of whether you had a license to grow some or all of the marijuana, it was discovered that you were or had recently been growing approximately 25 marijuana plants at the time of the fire.
- d. Your policy provides,

[*Exclusion clause quoted*]

In light of the above information and the exclusionary language in your policy with respect to a marijuana grow operation, Gore Mutual cannot pay your claim.

[13] After the fire and its denial of coverage, Gore did not void the policy. It continued to accept the appellant's premium payments and the policy remained in full force and effect.

[14] Until 2018, and at the time of the fire, marijuana was listed as a controlled substance in Schedule II of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [CDSA] and in the single Schedule of the *Narcotic Control Regulations*, C.R.C., c. 1041 [Regulations]. The exclusion refers to substances listed in the "*Controlled Drugs and Substances Act Narcotic Control Regulations*". There is not now, nor at the time of the fire, a statute or regulation with this title.

Reasons for Judgment

[15] Both parties brought summary trial applications for judgment in their favour. At the outset, the judge noted that the policy was valid at the time of the fire and that the cultivation did not cause or contribute to the fire or the loss: at para. 2.

[16] The appellant argued that Gore could not rely on the exclusion because:

- a) the cultivation was "legal";
- b) the cultivation did not cause the loss;
- c) the exclusion is a "cause-based fire exclusion" and therefore invalid pursuant to s. 33 of the *Act*; and,
- d) the exclusion is unjust and unreasonable pursuant to s. 32 of the *Act* at para. 3.

[17] Gore defended the claim on the basis that the exclusion covered a class of property it did not agree to insure; that is, property used for the cultivation, harvesting, or processing of marijuana. Further, Gore denied that the exclusion offends the *Act*, noting it excludes marijuana-related properties from coverage against all risks, and not just fire: at para. 4.

[18] The judge first considered whether the exclusion was ambiguous. Following the analysis in *Pietrangelo* of the same exclusion clause, the judge found the exclusion created three distinct subcategories of excluded coverage: (1) dwellings or detached private structures or unscheduled personal property contained in them used for the cultivation, harvesting, processing, manufacture, distribution, or sale of marijuana; (2) any product derived from or containing marijuana; and, (3) any other substance falling within Schedule (Section 2) of the *Controlled Drugs and Substances Act Narcotic Control Regulations*: at para. 17.

[19] The judge found the first subcategory—property used for the cultivation, processing, or sale of marijuana—to be “clear and unambiguous”: at para. 23. The second subcategory relating to marijuana-derived products was inapplicable in the circumstances. Considering the third subcategory, the judge set out the following paragraph of the trial decision in *Pietrangelo*. As can be seen, the judge in *Pietrangelo* found the third subcategory included a “faulty and confusing reference”:

[96] Had Gore Mutual sought to rely upon the Marijuana Exclusion to deny coverage for loss or damage to property used, say, to process or manufacture methamphetamine, it might well have been thwarted by its own[sic] faulty and confusing reference near the end of the Exclusion to “Schedule (Section 2) of the Controlled Drugs and Substances Act Narcotic Control Regulations.” But that is not the situation here. In this case, there can be no doubt that Mr. Arquette’s activity falls squarely within the earlier plainly worded, wholly unambiguous portion of the Marijuana Exclusion which bars coverage for loss or damage caused to property used for the processing or manufacture of any product derived from or containing marijuana. There is no ambiguity lurking in the language; nothing to even hint at more than one reasonable interpretation.

[20] The judge adopted the conclusion in *Pietrangelo* that “[a]ny ambiguity arising from the less clearly worded third subcategory in the Exclusion does not and cannot reasonably be seen to derogate from the clear meaning of the first or second subcategories”: at para. 23, citing *Pietrangelo* at para. 95.

[21] Having found the exclusion to be unambiguous, the judge determined that she did not need to resort to the principles of contractual interpretation summarized in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33 at para. 24 [*Progressive Homes*].

[22] Next, the judge questioned whether the exclusion applied to legal marijuana-related activity and concluded it did. She noted that the third subcategory of the exclusion referred to controlled substances, which at the time of the fire included marijuana. She rejected the appellant’s submission that the third subcategory should be used to interpret the first subcategory. She noted that the exclusion was broadly worded, and on a plain reading, excluded all marijuana-related uses of the property, whether legal or illegal. She rejected the appellant’s argument that Gore’s interpretation of the policy would require reading the words “licensed or not” into the first subcategory. Relying again on *Pietrangelo*, she held that she could not make a finding about any difference in risk associated with insuring a criminal marijuana grow operation versus licensed cultivation of marijuana for medicinal purposes, and stated the following:

[30] I do not share that view. The Exclusion is broadly worded. Based on the evidence of Gore in *Pietrangelo*, it was intentionally drafted as widely as possible: *Pietrangelo* at para. 73. On a plain reading, it excludes all marijuana-related uses of the Property, whether legal or illegal. I do not agree that qualifying “marijuana” by adding the words “licensed or not” to the Exclusion would clarify or alter its meaning.

[Emphasis added.]

[23] The judge noted that the appellant was conflating the legality of his marijuana cultivation with its insurability and rejected his interpretation of the exclusion: at para. 32. The judge was not persuaded that the exclusion applied only to illicit marijuana-related activities and concluded that such an interpretation is unduly narrow and inconsistent with the plain wording of the exclusion: at para 36.

[24] Next, the judge considered whether the exclusion was invalid by virtue of s. 33 of the *Act*. Section 33(1) of the *Act* provides that an insurer must not implement an exclusion relating to the cause of the fire or peril other than an

exclusion prescribed by regulation or established by s. 34(2) or (3). Fire loss caused by the legal cultivation of marijuana is not an exclusion prescribed by regulation or established by s. 34(2) or (3) of the *Act*.

[25] The appellant argued that the exclusion was invalid under s. 33 because the exclusion required the marijuana-related activity at the property to cause the loss. The judge noted that the introductory clause of the policy states, “but we do not insure direct or indirect loss or damage, in whole or in part”, followed by a list of exclusions, including the marijuana exclusion at issue. She found that the words “direct or indirect” modify “loss or damage”, and do not relate to the cause of the peril itself: at para. 42. She considered the concluding words of Section 1 of the policy, which immediately follow the exclusion at issue and states that “... ‘regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage’ ...”. She held that this wording did not transform the exclusion at issue into one that imports a causal requirement, as the concluding words apply to all of the exclusionary provisions in paras. 13–32 of Section 1 of the policy, only some of which are cause-based. She noted that Section 1 of the policy includes several other class-based exclusions which do not differentiate between fire and other potential perils, and do not depend on the cause of any damage to such property. She held that if the appellant’s arguments were accepted, insurers would be required to insure entire classes of property they had never agreed to insure, such as business premises and illegal goods: at para. 46. She was not persuaded that the exclusion required the insured’s marijuana-related activities to have caused the loss, and concluded that the exclusion was not invalid under s. 33 of the *Act*: at para. 50.

[26] Finally, the judge considered s. 32 of the *Act* and asked whether the exclusion was unjust or unreasonable. Section 32 provides that a term or condition that is or may be material to the risk—including a provision in respect of the use, condition, location, or maintenance of the insured property—is not binding if it is held to be unjust or unreasonable by the court. The appellant argued that if the exclusion

applied to legally licensed marijuana cultivations, without a causal requirement, it was unjust and/or unreasonable and therefore not binding under s. 32.

[27] The judge rejected the appellant's argument that the exclusion was unjust or unreasonable. She noted that there is a distinction in the case law between cases where s. 32 is considered in the context of non-disclosure of a change material to the risk that voided the policy, versus where the insurer denies coverage based on an exclusion. She found the distinction was not relevant to an assessment of whether a term or condition is unjust or unreasonable. She rejected the appellant's assertion that the enforcement of the exclusion, absent a causal connection, was inherently unjust or unreasonable, stating that the Supreme Court of Canada was clear in *Marche v. Halifax Insurance Co.*, 2005 SCC 6 that a policy breach need not be causally connected to the loss. She held that on the facts of this case, the lack of causal nexus did not make the exclusion unjust or unreasonable: at para. 64.

[28] Next, the judge rejected the appellant's argument that the exclusion was unfair because it discriminated against people who are licensed to grow marijuana for medicinal purposes. She found that the exclusion was universal in its application and did not discriminate; it excluded coverage for all marijuana-related uses of the property. She noted that she could not conclude on the evidence that the appellant could never have obtained coverage for legal marijuana-related activities at the property, only that this policy did not provide such coverage: at para. 67.

[29] The judge noted that the key question in assessing the applicability of s. 32 is whether the exclusion has a rational, defensible basis for its existence, and that neither party provided direct evidence on this point. She found that there was no evidentiary basis to support the appellant's assertion that the risks of a legal marijuana grow operation are materially different from those of an illegal one. She held that she was unable to find that the presence of a legal marijuana grow operation at the property had no bearing on Gore's underwriting risk. She noted that the appellant gave no evidence about his expectations regarding coverage under the policy or his understanding about whether he had insurance coverage

for the legal cultivation of marijuana at the property. Finally, she found no evidence to suggest that the underwriting rationale in *Pietrangelo* did not apply here: at paras. 68–70.

[30] The judge noted that, while the exclusion resulted in a harsh outcome for the appellant, unfairness alone did not make the result unjust or unreasonable. After rejecting each of the appellant’s arguments, the judge dismissed the appellant’s action: at paras. 71–72.

On Appeal

[31] On appeal, the parties essentially reiterated the positions they had taken in the Court below. The appellant alleges the judge erred in finding that the exclusion clause:

- a) is not prohibited by s. 33(4) of the *Act*;
- b) captures legal, licensed, medicinal cultivation and use of marijuana;
- c) does not require a direct or indirect causal connection; and
- d) is not unjust or unreasonable pursuant to s. 32 of the *Act*.

[32] Gore supports the judge’s determination of each issue, stating that the exclusion clearly and unambiguously excludes from coverage property used for marijuana-related activities. Gore submits that since 2003, its homeowner’s insurance policies have excluded from coverage any property used for the cultivation, harvesting, processing, manufacture, distribution, and sale of marijuana, or of substances scheduled in—what they refer to as—“the federal *Controlled Drugs and Substances Act Narcotic Control Regulations*”. Gore asserts that the judge, following the trial and appellate decisions in *Pietrangelo*, accepted that Gore had a “valid and legitimate business concern” about the risks inherent to marijuana production in residential homes, and that the exclusion was justified by a “reasonable economic rationale”. Gore says the legal status of the marijuana-related activities is irrelevant, as is the absence of any causal relationship between those activities and the fire. Lastly, Gore submits the exclusion does not discriminate

between fire losses by cause, and thus does not offend s. 33(4) of the *Act*, and is not unjust or unreasonable under s. 32 of the *Act*.

[33] In my view, this appeal should be determined by addressing the following two questions:

- a) Does the exclusion apply to marijuana cultivation pursuant to a licensed medical purpose?
- b) Is the application of the exclusion unjust or unreasonable pursuant to s. 32 of the *Act*?

Standard of Review

[34] The standard of review for the interpretation of a standard form insurance contract is correctness, unless the interpretation turns on a specific factual matrix: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 24; *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2019 BCCA 110 at para. 26.

[35] In this case, the parties agree that the grounds of appeal raise issues of mixed fact and law, subject to review on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26, 28 and 36.

Analysis

[36] For the reasons that follow, I find the exclusion clause is ambiguous and should be interpreted narrowly and in favour of the appellant. Further, if it were necessary to do so, I would find the application of the exclusion clause creates an unjust and unreasonable result and therefore would not be binding on the appellant under s. 32 of the *Act*.

1. Does the exclusion apply to licensed marijuana-related activity?

[37] A key issue in the summary trial was whether the exclusion applied to legal marijuana-related activities. On this point, the parties relied heavily on *Pietrangelo*, each for a different purpose.

[38] Based on the parties' submissions, the judge adopted the reasoning and findings of fact in the Ontario trial decision in *Pietrangelo*, where it was held that the insurer had a "valid and legitimate business concern" over the risks and harms arising from the use of properties to grow marijuana: *Pietrangelo* at para. 101.

[39] Some background regarding *Pietrangelo* will assist. The insureds were renting one of their residential properties to a tenant, described by the trial judge as "... a person of questionable character and of even more dubious entrepreneurial ability": *Pietrangelo* at para. 1. The tenant had been smoking marijuana and thereafter decided to use some of his stash to make cannabis resin, "[h]aving learned the production technique on the Internet ...": *Pietrangelo* at para. 2. The internet recipe called for the tenant to use several canisters of butane gas and tubing to heat the marijuana and turn it into a liquid. The tenant's production ultimately caused an explosion, and "... in the ensuing fire [the tenant] and his friend ... were badly burned, and the house destroyed": *Pietrangelo* at para. 4.

[40] The insureds were unaware of the tenant's activities and asserted that "... in every way they were innocent, diligent landlords, and that they could not have prevented [the tenant] from embarking upon his course of criminal conduct on that fateful day": *Pietrangelo* at para. 6. The tenant pleaded guilty to two criminal offences: intentionally or recklessly causing damage by fire or explosion to a dwelling house and unlawfully producing cannabis resin.

[41] In *Pietrangelo*, Gore relied on the same exclusion clause that is at issue in the case at bar. Justice Ducharme described the exclusion in the following way:

[95] On a plain and simple reading, the Marijuana Exclusion can be seen to consist of three separate and distinct elements: the first relating to marijuana; the second relating to any product containing or derived from marijuana; and the third relating to any other scheduled substance. These distinct elements are not conjunctive; each is set off by the disjunctive “or”. Thus, the excluded property includes: (a) property used for the processing, manufacture, or sale of marijuana, *or* (b) any product derived from or containing marijuana, *or* (c) “any other substance falling within Schedule (Section 2) of the Controlled Drugs and Substances Act Narcotic Control Regulations.” Mr. Arquette’s activity is caught by the second of these disjunctive elements. Any ambiguity arising from the unclear, inaccurate wording in the third element does not and cannot reasonably be seen to derogate from the clear meaning of the first or second element. Because the elements are disjunctive, the meaning of one is not modified or altered by another.

[42] In finding no ambiguity in the exclusion, Justice Ducharme referred to the evidence of Gore and its underwriting concerns:

[92] Mr. Bardon testified that his company’s rationale for introducing the Marijuana Exclusion was that it wished to be part of an industry-wide initiative to protect against the proliferation of marijuana grow operations, a phenomenon that began in British Columbia but then quickly spread to Ontario. The insurance industry, he said, was determined not to expose itself to damage claims related to buildings and contents that were converted to such uses. However, he also testified, as I remarked earlier, that although marijuana grow operations were “topical,” the industry generally, and Gore Mutual particularly, wanted to cast the language of the Marijuana Exclusion as widely as possible so as to capture any other designated substances and prohibited activities under the *Controlled Drugs and Substances Act*.

[Emphasis added.]

[43] Justice Ducharme also considered the reasonable expectations and true intentions of the parties:

[100] We are reminded here that insurance is meant to strike an appropriate balance between the insurer’s need to maintain sufficient financial viability and the reasonable expectations of its customers. By introducing the Marijuana Exclusion in 2003, Gore Mutual placed its customers on notice that it wished to re-address that balance. The Marijuana Exclusion meant that the insurer

now viewed such unlawful activities as the kind engaged in by Mr. Arquette as something quite other than fortuitous or random. Losses of this kind were not the losses that Gore Mutual was prepared to bear, for the sound economic reason that, were it to do so, its own profitability would be undermined, and its customers would never be able to afford the spiralling costs of the premiums.

[Emphasis added.]

[44] On this point, Justice Ducharme accepted Gore’s evidence that it had “... created the [exclusion] out of a valid and legitimate business concern that it not be exposed to claims for loss or damage to properties used for illicit, socially harmful acts, including but not restricted to the structural and other harm done to homes when they are turned into marijuana grow operations”: *Pietrangelo* at para. 101.

[45] I have considered the analysis in *Pietrangelo* and the discussion about the breadth of the marijuana exclusion. However, in my view, the case at bar is different from *Pietrangelo* in two material respects. First, the focus in that case was on the nature of the product as defined in the exclusion clause and Justice Ducharme relied on the second “subcategory” (any product derived from or containing marijuana) in his analysis; the focus in the case at hand was not on the nature of the product, and the judge explicitly found “[t]he second subcategory is inapplicable here”: at para. 19. Second, the Ontario Court was very clearly dealing with criminal activity. Indeed, the tenant pleaded guilty to the very conduct that caused the fire and testified about his conduct at trial. Justice Ducharme’s discussion about the underwriting rationale as a basis for his interpretation of the exclusion should be kept in mind. At times, he specifically referred to Gore’s intention that the exclusion addressed “prohibited activities”, “unlawful activities”, and “illicit, socially harmful acts”: *Pietrangelo* at paras. 92, 100–101.

[46] While interpreting the exclusion clause, Justice Ducharme returned to Mr. Bardon’s testimony about the breadth of the exclusion, finding that Gore drafted the exclusion “... as widely as possible so as to capture any other designated substances and prohibited activities under the *Controlled Drugs and Substances Act*”: *Pietrangelo* at para. 92 (emphasis added).

[47] In the case at bar, the judge accepted the evidence provided by Gore in *Pietrangelo* about its use of broad language, to find "... [the exclusion] was intentionally drafted as widely as possible ...", relying on the following passage:

[73] Mr. Bardon testified, as I noted earlier, that part of his job at Gore Mutual is to write the policy wordings, manuals, and all other information that goes out to the customers. He said that he wrote the Marijuana Exclusion as well as the IMPORTANT NOTICE letter. The grammatical structure of the Marijuana Exclusion that he settled on is consistent with and reinforces his further testimony that he wished to make the language of the Exclusion as wide as possible.

[48] The evidence tendered in *Pietrangelo* deals with illegal substances; Gore explicitly stated its purpose for using broad language was to capture illegal substances and prohibited activities. However, Gore relies on the evidence of the underwriter that he wished to make the language "as wide as possible" to demonstrate that the exclusion intended to capture licensed activity as well, including marijuana grown for medicinal activities.

[49] In my view, Gore invites the Court to apply *Pietrangelo* to circumstances which never arose in that case. In the case at bar, the judge found the exclusion applied to licensed cultivation of marijuana, a finding she "[b]ased on the evidence of Gore in *Pietrangelo* ...": at para. 30. However, it is unclear what that "evidence" was, beyond the testimony of Gore's policy writer. Nothing more was said about what that evidence consisted of and *Pietrangelo* did not discuss any distinction between legal and illegal grow operations. It was an error for the judge to rely on *evidence* led in *Pietrangelo*, especially where that evidence has limited application to the facts of this case.

[50] Further, the circumstances in *Pietrangelo* fell under the "second subcategory", as the tenant had tried to follow an internet recipe to use gas to convert marijuana to an oil, thus creating a "... product derived from or containing marijuana ...": *Pietrangelo* at para. 95. Here, Gore did not rely on the second subcategory and the judge found it was inapplicable in these circumstances. Instead, Gore relied on the first and third subcategories, notwithstanding Justice Ducharme's comment that, had Gore attempted to rely on the third subcategory to deny coverage, "... it might well

have been thwarted by its own faulty and confusing [wording] ...”: *Pietrangelo* at para. 96.

Interpretation principles

[51] The *Pietrangelo* analysis is thus limited and does not necessarily answer the interpretation point the appellant raises. I bear that in mind as I turn to interpret the exclusion at issue here. I also bear in mind the general principles for interpreting insurance policies, set out in *Progressive Homes*, where Justice Rothstein wrote:

[22] The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole (*Scalera*, at para. 71).

[23] Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (*Consolidated-Bathurst*, at pp. 900-902). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (*Gibbens*, at para. 26; *Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901), so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (*Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (*Gibbens*, at para. 27). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.

[24] When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* — against the insurer (*Gibbens*, at para. 25; *Scalera*, at para. 70; *Consolidated-Bathurst*, at pp. 899-901). One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly (*Jesuit Fathers*, at para. 28).

Is the exclusion ambiguous?

[52] In my view, the wording “Schedule (Section 2) of the *Controlled Drugs and Substances Act Narcotic Control Regulations*” creates ambiguity in the exclusion in two ways.

[53] First, the clause combines the titles of the *Controlled Drugs and Substances Act* and the *Narcotic Control Regulations* as though, together, they form one piece of legislation. The *Narcotic Control Regulations* are a set of regulations made under the

CDSA. The CDSA is the enabling act for the *Regulations*. This improperly cited reference reflects poor drafting and creates ambiguity with respect to the relevant legislation and attached schedules that purport to inform the meaning of the exclusion.

[54] Second, the exclusion is ambiguous with respect to which particular substances trigger the exclusion. The wording refers to "... marijuana or any other substance falling within Schedule (Section 2) of the *Controlled Drugs and Substances Act Narcotic Control Regulations* ..." (emphasis added). At first glance, it appears as though the exclusion refers to a schedule of the CDSA; however, the CDSA has eight schedules which are numbered I – VIII. It is more likely that the exclusion refers to the single schedule of the *Regulations*, as its title—"Schedule (Section 2)"—matches the language of the exclusion.

[55] In *Pietrangelo*, the plaintiff raised this problematic wording to demonstrate that the exclusion was uncertain or ambiguous, correctly pointing out that "... there are no 'Controlled Drugs and Substances Act Narcotic Control Regulations,' and ... there is no such thing as a 'Schedule (Section 2),' in the *Controlled Drugs and Substances Act*": *Pietrangelo* at para. 91. The plaintiff argued that this language cannot yield a clear meaning where it fails to make a clear reference to specific controlled substances. Justice Ducharme responded by explaining, "[t]here are, in fact, eight Schedules, Schedules I to VIII, enumerated under the statute, and together they constitute an integral part of the legislation. Schedule II lists Cannabis and its derivatives, including cannabis resin": *Pietrangelo* at para. 91. With respect, Justice Ducharme did not consider the plaintiff's submission that the wording was inconsistent with the legislation. Even so, Justice Ducharme concluded by finding that the wording in the third subcategory was "unclear [and] inaccurate" and "faulty and confusing": *Pietrangelo* at paras. 95–96.

[56] In the case at hand, the judge acknowledged that the exclusion clause contained "unclear, inaccurate wording" and a "faulty and confusing reference" to the CDSA and the *Regulations*, as found in *Pietrangelo*. However, the judge went

on to find there was no ambiguity to resolve. Upon following *Pietrangelo* and separating the clause into three distinct subcategories, she found that any ambiguity in the third subcategory did not taint the first or second subcategories: at paras. 23–24.

[57] I agree with the appellant that the exclusion clause is not enumerated into subcategories nor is it visually separated into subcategories. In my view, dividing the exclusion into subcategories, acknowledging one subcategory to be poorly drafted but not tainting the others, effectively rewrites the clause—to the disadvantage of the insured. Further, separating the clause into distinct elements, and interpreting those elements separately, directly contradicts the general principles of contract interpretation the judge cited just a few paragraphs before—“... the court should give effect to clear language, reading the contract as a whole ...”: *Progressive Homes* at para. 22 (emphasis added).

[58] It is my view that, respectfully, the judge erred when she interpreted the exclusion by separating the clause into subcategories and by relying on the analysis in *Pietrangelo*, and the “evidence” from that case, to find the exclusion to be unambiguous. I disagree and find the exclusion to be ambiguous. Following *Progressive Homes*, where there is ambiguity, and where the general rules of construction fail to resolve the ambiguity, the policy must be construed *contra proferentem*—that is, coverage provisions must be interpreted broadly and exclusion clauses narrowly, against the insurer.

[59] It is my view that the general rules of construction do not resolve the ambiguity. Insurance contracts must be interpreted as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law: *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029 at 1045, 1990 CanLII 92. In the case at bar, it surely cannot be said that the average person would instinctively read the exclusion as containing “... three distinct subcategories of excluded coverage; each ... separated by the disjunctive ‘or’ ...”: at para. 17. Nor can it be said that the

average person would be capable of correctly parsing a reference to incorrectly cited legislation and its accompanying regulations and schedules.

[60] In resolving ambiguity, where more than one interpretation is supported by the text of a policy, the court is directed to consider the reasonable expectations of the parties, and to avoid an interpretation that would give rise to a result that is unrealistic or that would not have been in the contemplation of the parties. In my view, the appellant has shown an alternative reasonable interpretation of the policy that is supported by the text of the policy; that is, that the exclusion was aimed at limiting the risks associated with the cultivation of illegal drugs. Since the appellant’s cultivation was not illegal nor did it create unusual risks, the appellant could reasonably expect the exclusion did not apply. I accept that the appellant did not give evidence about his expectations but it is reasonable for an insured party to expect that an exclusion, which is drafted in a way that targets illegal activity, would not apply to their legal use of property.

[61] Underpinning the *contra proferentem* rule is the principle that ambiguity should be resolved against the insurer as the party who has the benefit of drafting the policy. If an insurer wishes to narrow coverage, they are free to do so “... any way they wish, provided they do so clearly, explicitly, and in a manner that does not unfairly leave the insured uncertain or unaware of the extent of the coverage”: *Martin v. American International Assurance Life Co.*, 2003 SCC 16 at para. 29. I note that it remained open to Gore—after this identical exclusion was at issue in *Pietrangelo* in 2010 and was found to be “unclear”, “inaccurate”, “confusing”, and “faulty”—to reword the exclusion to resolve potential ambiguity. Gore could have explicitly excluded from coverage properties used for *any* possession or cultivation of marijuana—illegal or licensed—to make certain the insured would be aware of the extent of the coverage. However, Gore declined to do so.

[62] I have concluded that the judge erred in finding that the exclusion was unambiguous. In my view, the exclusion is ambiguous for the reasons stated, applying the general rules of construction does not resolve the ambiguity, and

when construed *contra proferentem*, the exclusion clause does not apply to remove coverage for the loss.

[63] In light of this conclusion, it is not necessary to address the remaining grounds of appeal. However, the question of whether the appellant would be entitled to be relieved from forfeiture under s. 32 of the *Act* raises important issues about the application of the legal test set out in *Marche* and I consider it important to address it to some extent.

2. Is the exclusion unjust or unreasonable pursuant to s. 32 of the *Act*?

[64] Section 32 of the *Act* is a remedial provision that provides relief from forfeiture in circumstances where a court finds an insurance term or condition to be unjust or unreasonable, either on its face or in its application. Section 32 falls under “Part 2 – General Insurance Provisions” of the *Act* and states the following:

Unjust contract provisions

32 If a contract contains any term or condition, other than an exclusion prescribed by regulation for the purposes of section 33 (1) or established by section 34 (2) or (3), that is or may be material to the risk, including, but not restricted to, a provision in respect of the use, condition, location or maintenance of the insured property, the term or condition is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried.

[65] Relief from forfeiture refers to the power of a court to protect a person against the loss of an interest or right because of a failure to perform a covenant or condition in an agreement or contract: *Kozel v. The Personal Insurance Company*, 2014 ONCA 130 at para. 28. Relief from forfeiture is equitable in nature and purely discretionary. To grant relief from forfeiture, the insured must establish: (1) that the court has the authority to grant relief from forfeiture; and (2) that the circumstances warrant the granting of relief.

[66] In *Marche*, the leading authority on relief from forfeiture, Chief Justice McLachlin (as she then was) held that relief from forfeiture provisions are remedial in nature and their purpose is “... to provide relief from unjust or unreasonable

insurance policy conditions ...”: *Marche* at para. 13. She found that relief from forfeiture provisions “... should be given a broad interpretation” to ensure they accord with their purpose “... to protect the public against unjust or unreasonable insurance conditions”: *Marche* at paras. 13 and 34.

[67] The Court in *Marche* held that relief from forfeiture provisions apply to conditions that are “... unreasonable in their application or draconian in their consequences” and not just to conditions that are unreasonable on their face: *Marche* at para. 10 (emphasis removed). Chief Justice McLachlin found it made little sense to conclude that the section only applied to statutory conditions on their face, stating that “... the legislature could hardly have intended to empower trial judges to declare unreasonable on their face conditions that the legislature has made mandatory for all contracts of insurance”: *Marche* at para. 9. Instead, Chief Justice McLachlin held that the remedial nature of such provisions better accorded with an interpretation that relief from forfeiture provisions apply where the terms or conditions produce unjust or unreasonable results: *Marche* at paras. 10–11.

[68] Unjust or unreasonable results may flow from a breach of statutory conditions (for example, where an insured fails to inform the insurer of a material change in risk) or from the operation of an exclusion clause. The appeal at issue involves the operation of an exclusion clause, rather than the voiding of a policy due to a breach of statutory conditions. However, the legal principles governing the application of relief from forfeiture where there has been a breach demonstrate the nature and scope of this equitable remedy. For example, it is contrary to the principles of utmost good faith to apply s. 32 where there has been deliberate concealment by the insured of material changes to risk: *Schellenberg v. Wawanesa Mutual Insurance Company*, 2020 BCCA 22 [*Schellenberg*] at para. 58.

[69] In *Schellenberg*, this Court found that applying s. 32 in circumstances where the insured had deliberately concealed a material change in risk would be contrary to the principles of utmost good faith. In this case, the Schellenbergs were operating a licensed medical marijuana grow operation in an outbuilding of the insured

property. After a fire (unrelated to the marijuana grow operation) destroyed the upper storey of the outbuilding, an adjuster discovered the outbuilding was being used to cultivate marijuana and the electrical system had been extensively upgraded. The insurer voided the policy on the basis that the Schellenbergs had failed to notify the insurer of the material change in risk (the grow operation and upgraded electrical system), and that had it known of the change in use, it would have declined to endorse the policy.

[70] At trial, the judge determined the Schellenbergs had known the changes were material to their insurance, which constituted a breach of a statutory condition: 2019 BCSC 196 [*Schellenberg BCSC*] at para. 98. She found that the insurer had properly voided the policy on the basis of the breach and dismissed the appellant’s claim. Importantly, the trial judge found it was “clear” that Mr. Schellenberg had not only known of the change in risk, and that it would be significant to coverage, but he had intentionally misled the insurance broker regarding the changes: *Schellenberg BCSC* at para. 100.

[71] On appeal, the Schellenbergs sought relief from forfeiture under s. 32 of the *Act* for the first time. Writing for the Court, Justice Abrioux considered the Schellenbergs’ argument that voiding the policy due to the discovery of the legal grow operation and the electrical upgrades, which were not causally connected to the loss, was unjust and unreasonable. The Schellenbergs relied on *Mah v. Wawanesa Mutual Insurance Company*, 2012 ABQB 577 (reversed on another point: 2013 ABCA 363), where the trial judge stated, “[i]t is generally unjust and unreasonable for a court to give effect to a breach which is not causally connected to the loss ...”: *Mah* at para. 30, citing *Marche v. Halifax Insurance Co.*, 2002 NSSC 62. Justice Abrioux found that *Mah* was not compelling authority for the Schellenbergs’ argument, as the loss in *Mah* was casually connected to the breach and the insurer had received actual notice of the change material to the risk.

[72] Justice Abrioux held that it would be contrary to the principles of utmost good faith to apply s. 32 because the Schellenbergs had deliberately concealed the material changes in risk from the insurer. These facts, Justice Abrioux found, “... do not justify what, at its core, is equitable relief”: *Schellenberg* at para. 58. The Court dismissed this ground of appeal.

[73] Turning to the case at hand, the trial judge declined to grant relief under s. 32 to find coverage for the appellant. The judge stated four reasons for concluding that the exclusion was not unjust or unreasonable:

- a) The exclusion was unambiguous.
- b) The excluded activity did not cause the loss, per the reasoning in *Schellenberg*.
- c) The exclusion did not discriminate against people who hold licenses to grow marijuana for medical purposes, as it excluded coverage for all marijuana-related uses.
- d) Applying the underwriting rationale as cited in *Pietrangelo*, there was a rational, defensible basis for the exclusion, which is the central question, and not whether the exclusion was unfair to the appellant.

[74] In my view, the judge’s analysis on each point engaged the reasoning cautioned against in *Marche*—she considered “... the condition in the abstract ... without regard to its effects when applied ...”: *Marche* at para. 34. She found that because the wording of the exclusion was not ambiguous, it was not unfair. She found that the exclusion was not discriminatory because the exclusion applied in all circumstances involving marijuana-related uses. Relying on the underwriting rationale adopted from *Pietrangelo*, she found that Gore had a rational defensible basis for the exclusion. Throughout her analysis, the judge considered the exclusion generally and failed to consider whether the operation of the exclusion, in these particular circumstances, resulted in an unjust or unreasonable result for the appellant.

[75] The judge also improperly relied on *Schellenberg* to find that a lack of causal nexus does not support a finding that the exclusion was unjust or unreasonable. She cited *Marche* for the proposition that "... a policy breach need not be causally connected to the loss": at para. 64. Further, she failed to consider that the distinction between a breach of a statutory condition (as in *Schellenberg*) and the operation of an exclusion clause (as in this case) may be relevant. As explained below, these two situations differ despite the judge's statement that "... this distinction is not relevant to an assessment of whether a term or condition ... is unjust or unreasonable ...": at para. 63.

[76] The Schellenbergs were cultivating some 300 marijuana plants and had upgraded their electrical system to support the operation, while the appellant in this case was cultivating 25 plants in accordance with a lawful authorization that permitted up to 73 plants. Importantly, the Schellenbergs were found to have intentionally concealed the material change in risk from their insurance broker, which was not a finding in this case. Had the judge recognized the relevance of this distinction, she likely would have distinguished *Schellenberg* instead of relying on it.

[77] The judge concluded her s. 32 analysis by stating, as held in *Pietrangelo*, the question was not whether the exclusion was unfair to the appellant, but whether the insurer had a rational, defensible basis for its existence. The judge accepted that the same underwriting rationale advanced in *Pietrangelo* applied in the case at bar, and found the exclusion was not unjust or unreasonable. However, that rationale was based on a concern that Gore not be exposed to claims for loss or damage to properties used for illicit, socially harmful acts, and the facts involved the tenant of an insured who embarked on an inherently dangerous chemical exercise, converting his marijuana to an oil with the use of butane gas, which ultimately caused an explosion. In my view, the underwriter's evidence from *Pietrangelo* cannot ground the findings in this case, which involve different circumstances in a different time frame.

[78] Based on the reasons for judgment in *Pietrangelo*, and that is all that was provided to the judge here, the underwriter was not asked to justify the application of the exclusion to licensed marijuana grow operations. In my view, relying on the evidence from *Pietrangelo* was not only misplaced, but also does not answer the question about the application of the exclusion clause to the marijuana-related activity at issue here. Further, the question of whether the insurer has a rational, defensible basis for the exclusion does not override the question of whether the exclusion was unfair. A proper analysis under s. 32 requires consideration of both questions.

[79] Respectfully, the judge did not apply a broad interpretation of s. 32 that properly accords with "... the broad remedial purpose of the provision to protect the public against unjust or unreasonable insurance conditions": *Marche* at para. 34. In my view, she did not consider the outcome at all—except to state that the result was "harsh". The judge concluded at para. 71 that "... unfairness alone does not make this result unjust or unreasonable" but failed to discuss how the result was unfair and why that unfairness did not rise to a level warranting relief under s. 32.

[80] Here, the appellant was using medicinal marijuana to relieve chronic and debilitating pain experienced following back surgery. He sought and obtained a license that permitted him to grow up to 73 marijuana plants. He had 25 plants at the time of the fire. While not determinative, the cause of the fire had nothing to do with his marijuana plants, as the trial judge found, and there was no suggestion that the appellant misled or misrepresented the insurer in any way. Further, the judge relied heavily on the underwriter's evidence from an Ontario case where the same exclusion was at issue in different circumstances. In my view, these circumstances support a finding that it would be unjust or unreasonable to give effect to the exclusion.

[81] If it were necessary to do so, I would grant relief from forfeiture under s. 32 of the *Act*.

Disposition

[82] For the reasons set out above, I have concluded that the exclusion clause, properly interpreted, does not apply to remove coverage for the loss. I would therefore allow the appeal.

“The Honourable Justice Winteringham”

I AGREE:

“The Honourable Madam Justice Fisher”

I AGREE:

“The Honourable Justice Griffin”