

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Collingwood Investment Ltd. v. Masita
Korean Cuisine Ltd.*,
2025 BCSC 570

Date: 20250328
Docket: S240002
Registry: Vancouver

Between:

Collingwood Investment Ltd.

Petitioner

And

Masita Korean Cuisine Ltd., Youngsoon Kim

Respondents

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for the Petitioner:

C. Shen

Counsel for the Respondents:

R. Kim

Place and Date of Hearing:

Port Coquitlam, B.C.
February 10-11, 2025

Place and Date of Judgment:

Vancouver, B.C.
March 28, 2025

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I. INTRODUCTION

[1] Before me is a first-stage application by a landlord under s. 18 of the *Commercial Tenancy Act*, R.S.B.C, c. 57, [CTA]. This is the initial step required to obtain a writ of possession. The proceedings are brought in relation to the lease of premises at 6516 Kingsway, Burnaby, BC (the “Premises”). Unlike the situation in many cases, the respondents appeared to oppose this preliminary application.

[2] The respondents offered no fewer than eight bases for opposing the application.¹ However, I find that it is only necessary to address the abuse of process argument.

II. BACKGROUND

[3] The respondent Masita Korean Cuisine Ltd. (“Masita”) leased the Premises from the petitioner Collingwood Investment Ltd. (“Collingwood”) for use as a restaurant. The exact form and terms of the lease are disputed.

[4] The petitioner relies on an executed written lease, which it says exhaustively defines the relevant terms of the relationship between the parties (the “Written Lease”). The Written Lease is between Collingwood as lessor and Masita as lessee, with Ms. Kim as guarantor. The Written Lease provides for a five-year term, commencing on July 1, 2018, and ending on June 30, 2023. It is dated March 2, 2019.

[5] The Written Lease includes the following terms:

7. OVERHOLDING:

If the Lessee shall continue to occupy the Leased Premises after the expiration of the Term granted hereby and the Lessor shall accept rent, the new tenancy thereby created shall be deemed to be a monthly tenancy and shall be subject to the covenants and conditions contained in this Lease

¹ The respondents argued that: (1) by distraining for rent arrears the petitioner had negated its earlier notice of termination; (2) the petition was an abuse of process and should be stayed; (3) the petition should be referred to the trial list; (4) the application materials were insufficient; (5) the application materials had flaws that could not be cured; (6) the respondent was not properly served with the notice of termination; (7) the notice of termination was flawed because it envisioned continued occupancy; and (8) the notice of termination and notice to quit were improperly served at the same time.

insofar as the same are applicable to a tenancy from month to month save and except that the rental payable shall be as determined by the Lessor.

...

11. REPRESENTATIONS:

The Lessee agrees that it has leased the Leased Premises after examining the same and that no representations, warranties or conditions have been made other than those expressed herein, and that no agreement collateral hereto shall be binding upon the Lessor unless it be made in writing and signed on behalf of the Lessor.

[6] There is no express right of renewal set out in the Written Lease. Given this, the petitioner states that after June 30, 2023, Masita became a month-to-month tenant in accordance with the overholding provision in paragraph 7. The petitioner seeks to terminate such overholding and asserts that it has provided proper notice to do so.

[7] The respondents argue that the Written Lease does not accurately reflect the terms of the lease entered into by the parties. Their position is that the parties entered into an earlier lease agreement around June 2018, which lease included an option for Masita to renew the lease for a further three years after the initial five-year term expired (the “Oral Lease”). The respondents state that the parties intended for the Oral Lease to be memorialized in a written document; however, while an earlier draft version of the Written Lease included the renewal term, this term was subsequently removed from the final Written Lease by the petitioner. The respondents say that Ms. Kim signed the Written Lease without reviewing it. She had limited English proficiency at the time and was unaware that the renewal term had been removed.

[8] The respondents also assert that the parties agreed to a new lease in October 2022 (the “2022 Lease”). The 2022 Lease is allegedly for a term of five years between July 1, 2023, and June 30, 2028, and included an option for Masita to renew for a further three years. The respondents say that the petitioner agreed to memorialize the terms of the 2022 Lease in a written contract, but has so far failed to produce the contract for execution. The respondents say that they relied on the 2022 Lease in making certain improvements to the property between 2022 and 2023.

[9] On August 15, 2023, Collingwood entered into a contract to sell the Premises. The buyer’s obligation to complete the contract was subject to Collingwood delivering a written notice by November 30, 2023, that it could terminate Masita’s tenancy. To comply with this clause, on September 30, 2023, Collingwood delivered a letter to Masita, purporting to terminate the month-to-month tenancy, effective November 30, 2023.

[10] On November 15, 2023, counsel for Masita emailed Collingwood in response, refusing to vacate the Premises:

In or about June 2023, the Tenant and the Landlord entered into an agreement (**the “Agreement”**) that was partly in oral and partly in writing with respect to lease of the Premises.

The Agreement contained all the terms of the 5-year lease agreement ending on June 30, 2023, with the following modifications to the terms:

- The Tenant shall have and hold the Premises for and during the term of five years commencing from July 1, 2023, and ending on June 30, 2028;

....

Accordingly, this letter constitutes notice in writing to the Landlord that our client will not vacate the Premises by November 30, 2023.

Instead, we hereby demand that, by December 15, 2023, the Landlord:

- Cancel the Termination Notice and honor the term of the Agreement of five years ending June 30, 2028; and
- Provide to the Tenant a draft written contract that memorializes the terms of the Agreement for the Tenant’s review and acceptance.

...

[11] The petitioner chose not to comply with the respondents’ demands. The petitioner moved forward with its efforts to remove the respondents from the Premises. The petitioner points to two letters dated December 1, 2023 which the sole shareholder and director of Collingwood, Ms. Lily Yip, says were delivered to Masita on that date. The first letter, titled “Notice of Termination,” states that the month-to-month lease has been terminated, effective November 30, 2023. The second letter is titled “Notice to Quit”. It demands that the Lessee and any other occupant quit and deliver up vacant possession of the Premises to the Lessor immediately.

[12] Given the outcome of this application, it is essential to note that on November 29, 2023, Collingwood filed a notice of civil claim in the New Westminster registry under court file S-251775, naming Masita and Ms. Kim as defendants (the “New West Action”). The relief sought in the New West Action was an order that Masita vacate the Premises by noon on November 30, 2023, and costs. The New West Action relied upon the “Law of Contract” and alleged that Masita was in anticipatory breach of the lease by refusing to vacate. That same day, Collingwood also filed a notice of application seeking an order that Masita vacate the Premises and applied to be heard on short notice the next day.

[13] The short-notice application was opposed by the respondents and denied by Associate Judge Robertson.

[14] On December 21, 2023, the respondents filed their response in the New West Action. The response relies on the purported Oral Lease and 2022 Lease, and alleges that Collingwood is in breach of contract for attempting to retake possession before the expiry of the 2022 Lease. That same day, the respondents filed a counterclaim seeking: a declaration that Masita has the right to use and occupy the Premises in accordance with the 2022 Lease; an order for possession; an injunction to restrain Collingwood from taking possession of, or disposing of, the Premises; in the alternative, general and special damages in lieu of specific performance of the 2022 Lease; a certificate of pending litigation; interest; and costs. The counterclaim alleges that, as a result of Collingwood’s breach, Masita has suffered a loss of anticipated profits due to being unable to obtain an appropriate business loan, as well as legal expenses and further damages to be identified prior to trial. The counterclaim also alleges that Collingwood has been unjustly enriched by improvements made to the Premises.

[15] On January 2, 2024, the previous counsel for Collingwood confirmed receipt of the counterclaim and stated that they intended to file a response to it after their return to the office on January 29, 2024. No response was ever filed, and no further action has been taken in the New West Action. However, it has not been discontinued by the petitioner.

[16] Notably, the present petition was only filed on January 2, 2024. Within it, the petitioner seeks a declaration that the respondents are wrongfully in possession of the Premises and a writ of possession pursuant to ss. 18-21 of the *CTA*.

[17] On January 23, 2024, the respondents filed their response to the petition. The response seeks dismissal of the petition with costs and alleges that the petition constitutes an abuse of process in light of the pending New West Action.

[18] The petitioner continues to occupy the Premises. The petitioner says that the contract to sell the Premises collapsed. That said, the petitioner asserts that the previous buyer remains interested in the Premises, but that further negotiation will not occur until the issues between the parties are resolved.

III. ANALYSIS

[19] I will first discuss the framework for proceedings under ss. 18-21 of the *CTA* before turning to the respondents' determinative abuse of process argument.

A. Sections 18-21 of the *CTA*

[20] A landlord can obtain a court order for possession of its premises through either an action for possession or through the summary procedures available under the *CTA*: Richard Olson, *Commercial Tenancy Handbook* (Toronto: Thomson Reuters) (loose-leaf updated 2024) at § 8:27, E:1. The author states:

In order to utilize either procedure, there must be or have been a tenancy, and the tenant must be in possession. Both involve a two-step process whereby the court first considers whether the landlord has the right to have the matter inquired into, and second, whether an order for possession should be granted. The statutory pre-requisites must be strictly complied with, if an application for possession is to be successful.

However, an action for possession (see §§ 8:1 et seq.) may have sufficient advantages that it should be considered as an alternative to proceeding under the *Commercial Tenancy Act*. In some circumstances, such as when the relationship of landlord and tenant does not (or may not) exist, an action for possession would be more appropriate. Further, a landlord may claim damages or other relief, as well as possession in an action.

A landlord proceeding under the summary provisions of the *Commercial Tenancy Act* may only obtain an order for possession. Further, in a proceeding under the *Commercial Tenancy Act*, an order for possession may

be refused for technical irregularities under the *Commercial Tenancy Act*, which would not otherwise be applicable.

It should be noted, however, that a claim for possession brought in an action may take much longer than proceeding under the summary provisions of the CTA. For example, an application under Rule 9-7 may appear to be identical with the usual practice under ss. 18-21 of the CTA, but there are significant differences. In particular, s. 21 contemplates witnesses, whereas Rule 18A requires an order of the court for witnesses to testify. There are also notice requirements under Rule 18A and Rule 51A (which are not applicable to *Commercial Tenancy Act* applications) which must be met.

[Emphasis added.]

[21] The Court in *G.W.G. Woodcrafters Ltd. b. Bourque*, 2022 BCSC 2228, provides a helpful summary of the process under ss. 18-21 of the CTA:

[5] The legislative framework for tenancies, including the termination of tenancies, in British Columbia differs for commercial tenancies and residential tenancies.

[6] The termination of commercial tenancies is governed by the process and the remedies set out in ss. 18 to 21 of the CTA. Those sections set out a two-stage summary procedure by which a landlord may seek a writ of possession where a commercial tenant wrongfully refuses to go out of possession of leased premises.

[7] The first stage requires the Court to determine, on affidavit evidence, whether the tenant appears to wrongfully hold premises and that the landlord is entitled to possession. If so, the Court shall appoint a time and place to finally determine the issues: CTA, ss. 18-19.

[8] The second-stage hearing is described in s. 21. It provides, in part:

21(2) If the tenant appears at the time and place, the court shall, in a summary manner, hear the parties, examine the matter, administer an oath or affirmation to the witnesses adduced by either party, and examine them.

(3) If after hearing and examination it appears to the court that the case is clearly one coming under the true intent and meaning of section 18, and that the tenant wrongfully holds against the right of the landlord, then it shall order the issue of the writ [of possession] under subsection (1) which may be in the words or to the effect of the form in the Schedule; otherwise it shall dismiss the case, and the proceedings shall form part of the records of the Supreme Court.

[9] At the second stage hearing, the burden is on the tenant to show cause why they ought not to be compelled to vacate the premises: *Broadway-Heb Property Inc. v. Renegade Productions Inc.*, 2019 BCSC 1693 at para. 35.

B. Abuse of Process

[22] Among their many arguments, the respondents allege that the present petition constitutes an abuse of process and should be dismissed given the existence of the New West Action.

[23] Justice Fitzpatrick summarized the general framework for abuse of process complaints in British Columbia in *Concord Kingsway Project Limited Partnership v. Ivanhoe Cambridge II Inc.*, 2017 BCSC 282 [*Concord*]:

[42] Although the doctrine of abuse of process arises at common law, it is also codified in our *Supreme Court Civil Rules*. Rule 9-5(1)(b) and (d) provide:

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a ... petition ... on the ground that

...

(b) it is unnecessary, scandalous, frivolous or vexatious,

... or

(d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[43] The test under Rule 9-5(1)(b) or (d) is whether it is “plain and obvious” that the proceeding is as described in (b) or otherwise an abuse of process under (d): *Freshway Specialty Foods Inc. v. Map Produce LLC*, 2005 BCSC 1485 at para. 43; *Shuswap Lake Utilities Ltd. v. Mattison*, 2008 BCCA 176 at para. 35.

[44] Many courts have, consistent with *Behn*, described abuse of process as a wide concept and that the scope of the doctrine is open. Certainly, well recognized categories include where the proceeding serves no useful purpose or where there are “multiple or successive proceedings which cause or are likely to cause vexation or oppression”: *Babavic v. Babowech*, [1993] B.C.J. No. 1802 at para. 18.

[45] The *Law and Equity Act*, R.S.B.C. 1996, c. 253 also confirms the inherent jurisdiction of this Court to control its process by granting remedies to avoid multiple proceedings concerning the same matter in controversy:

Avoidance of multiplicity of proceedings

10. In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought

forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

[Emphasis in original.]

[24] *Concord* concerned a dispute between property developers. In 2015, Ivanhoe brought an action against Concord, its affiliate Concord Pacific Investments, and Sears Canada, seeking to prevent the redevelopment of certain lands which it alleged would violate a restrictive covenant. Concord filed a response in this first action. The parties engaged in unsuccessful settlement negotiations, and the action lay dormant for approximately nine months. In 2016, Concord and Sears brought their own petition naming Ivanhoe as a respondent, which challenged the enforceability of the restrictive covenant. Ivanhoe alleged that the petition was an abuse of process given its earlier 2015 filing, and applied for a stay.

[25] Justice Fitzpatrick agreed that the proceedings were similar, although not identical:

[34] The Petition clearly engages the same issues as those set out in the Action, including the issues raised by Concord, Investments and Sears in their Response to Civil Claim. The principal relief sought in the Petition is a declaration that Concord *is not bound* by the provisions of Article 10 of the ROA. This is essentially the converse of the principal relief sought by Ivanhoe in the Action, namely, a declaration that Concord *is bound* by the ROA and Amended ROA vis-à-vis Ivanhoe.

[35] Some differences between the Action and the Petition are evident:

- a) the Action seeks a determination that Concord is bound by the *entirety* of the ROA and Amended ROA. Concord and Sears, however, are seeking a determination *only* that they are not bound by Article 10 or 10(b) of the ROA;
- b) Concord and Sears are defendants in the Action, but petitioners in the Petition;
- c) Investments is a defendant in the Action. It is not clear why Investments was not named as a petitioner in the Petition, even though it is the party that entered into the APS to acquire the Sears Lands from Sears (and then subsequently assigned its interests under the APS to Concord by the Assignment and Assumption of Purchase Agreement); and

d) the Petition seeks certain specific orders related to the Principal Relief sought in the Action, matters which are pleaded by Concord and Sears in the Action.

...

[95] In my view, looking at the substance of the dispute between the parties (per *Freshway Specialty Foods*) there is little doubt that the Action and the Petition can be described, perhaps not as “parallel” proceedings, but as mirror images of each other. The parties are essentially the same. The factual basis for both the Action and the Petition are identical. The same questions, issues and remedies are raised in both the Action and Petition, with the dispute raised in the Petition essentially being subsumed with that raised in the Action. Any distinctions as between the Petition and the Action are minor or “cosmetic”: *Lacharity* at para. 26.

[26] Justice Fitzpatrick reviewed previous cases where a party’s commencement of additional actions in relation to the same dispute was found to have constituted an abuse of process:

[49] In *Dixon v. Stork Craft Manufacturing Inc.*, 2013 BCSC 1117, there were two separate proposed class actions in British Columbia involving essentially the same defendants and allegations, and likewise prosecuted by the same law firm, albeit with two separate groups of plaintiffs. Justice Gaul stayed one of the actions for reasons found at paras. 61-68, finding that the action was vexatious or an abuse of process. He stated:

[68] On the evidence before me, I find the claims being advanced in the *Dixon Action* are practically a mirror image of the *Dodd Action* in that they essentially repeat and expand upon the claims made in the *Dodd Action*. The facts alleged in both actions are essentially the same as are the principal defendants. While the plaintiffs in each action are nominally different, I find they are clearly associated and working in concert to advance overlapping claims in this jurisdiction.

[50] Similarly, in *Drover v. BCE Inc.*, 2013 BCSC 1341, Justice Weatherill stayed a British Columbia class action where several plaintiffs in Saskatchewan had already commenced a “virtually identical class action”, finding that the B.C. action was an abuse of process (at paras. 46, 57-58)

[51] The final case Ivanhoe relies on is *Lacharity v. University of Victoria Students’ Society*, 2012 BCSC 1819. The facts in that case have some similarity to those before me. The petitioners were undergraduate students at the University of Victoria, who were members of a student group known as the Access Association of Disabled Students (“Access”). They filed a petition to challenge certain actions of the Students’ Society relating to the use of student fees. Access had previously filed a petition in 2011 concerning the same issues. The Students’ Society then successfully applied to have the 2011 petition converted into an action. The action was extant at the time that the second petition was filed in 2012, although no steps were actively being taken in the action. The students in the second petition were not named parties to the first proceeding (though they were members of Access). The

Students' Society brought an application in the second petition to stay that proceeding on the basis of abuse of process.

[52] Justice Goepel (as he then was) concluded that the second petition dealt with the same underlying factual matrix, involved substantially the same parties and sought the same substantive relief in the earlier petition (at paras. 26-27). He concluded that it was an abuse of process and he stayed the second petition until the earlier petition/action was heard and determined (at para. 28).

[53] Of particular note in *Lacharity* is the court's consideration of the petitioners' arguments, which are strikingly similar to those advanced by Concord and Sears on this application. The petitioners argued that the issues raised in the second petition were narrow and discrete, and could be determined without the necessity of an expensive and cumbersome trial process (at paras. 15-16). Justice Goepel rejected those arguments, holding that the referral of the first petition to the trial list did not necessary [sic] mean that a full trial was required since it was possible that it could, in certain circumstances, be determined in a summary manner (at para. 30).

[27] Justice Fitzpatrick found that bringing the latter petition was a tactical decision to avoid the effect and structure of the earlier proceeding:

[63] Concord and Sears' overarching argument is that they are simply asking the court to decide a "time sensitive, discrete issue of contractual interpretation ... in an efficient, cost-effective, time-sensitive manner", consistent with the objectives of Rule 1-3(1). They point to authorities which they say apply to the interpretation of restrictive covenants (as they describe Articles 10 and 12) and contend that these legal principles are "straightforward and uncontroversial".

[64] Concord and Sears submit that their approach is consistent with the comments found in *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701 at para. 49, where Justice Ballance noted that "the mere existence of a bona fide triable issue may not, of itself, be enough to warrant conversion to the trial list", particularly when "practical considerations such as costs and timeliness militate against ordering a conventional trial."

[65] If they had chosen to do so, Concord and Sears certainly could have filed responses or a counterclaim in the Action to more fully flesh out the issues they now raise in the Petition. In my view, this was clearly a tactical decision and an attempt to avoid the full trial process in the Action, such as occurred in *Lacharity*.

[66] I also find that Concord and Sears are attempting to be "in the driver's seat" in terms of dictating the procedures to resolve the issues. By commencing the proceeding by petition, Rule 22-1(7)(d) then requires that Ivanhoe apply and meet the test to have the applicable matter referred to the trial list (see for example, *Boffo Developments* at paras. 47-49). In addition, under the Petition, Ivanhoe would have to seek a court order to allow it other pre-trial procedures only normally allowed in an action, such as discovery of

documents and examinations of witnesses under Rules 7-1 and 7-2: see Rules 16-1(18) and 22-1(4).

[67] If the same issues raised in the Petition had been raised in the Action (to the extent they are not already), Concord and Sears would have had certain options toward determining what they describe as straightforward and discrete issues. Such options include proceedings on a point of law, summary trial, summary judgment and a special case. In that event, Concord and Sears would have had the onus to convince the court that any of these procedures were appropriate, unless Ivanhoe consented. To that end, by filing the Petition, Concord and Sears have effectively curtailed Ivanhoe's ability to proceed with the normal pre-trial procedures available to it in the Action and without having to satisfy the court that a summary determination is appropriate.

[28] Justice Fitzpatrick stated that the issue was not “a question of a race to the courthouse steps. Rather, it is a consideration, particularly from the court’s point of view, as to which process better serves the interests of justice towards allowing a proper and fair determination of the issues”: para. 80. Justice Fitzpatrick found a strong argument that the interpretation of the contract required evidence that could only be obtained through normal pre-trial procedures. Furthermore, although the petition sought an interpretation of only the restrictive covenant, the action sought an interpretation of the entire contract. Since the restrictive covenant needed to be interpreted in light of the contract as a whole, allowing the petition to proceed created a risk of inconsistent and conflicting decisions: paras. 81-83. Ultimately, Fitzpatrick J. found that commencing the petition constituted an abuse of process and that it should be stayed: para. 96.

[29] The respondents say that *Concord* is perfectly analogous to the present case. They point out that the petitioner seeks identical relief in the New West Action and the present petition and that the two proceedings involve the same parties. The respondents complain that, after successfully defending against the short-notice application in the New West Action and filing a response and counterclaim, they are now being forced to defend a new, separate proceeding seeking the same relief.

Further, they argue that the present petition is unnecessary as the petitioner could have brought the ss. 18-21 application within the New West Action.²

[30] Recently, the Supreme Court of Canada addressed the issue of abuse of process in the context of multiple proceedings in *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4. The Court stated:

[33] The doctrine of abuse of process is concerned with the administration of justice and fairness (*Behn*, at para. 41). The doctrine engages the inherent power of the court to prevent misuse of its proceedings in a way that would be manifestly unfair to a party or would in some way bring the administration of justice into disrepute (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37; *Behn*, at para. 39; *Abrametz*, at para. 33).

[34] In *Abrametz*, this Court reiterated that abuse of process is a broad concept that applies in various contexts (para. 34, citing *Toronto (City)*, at para. 36, and *Behn*, at para. 39). The Court noted that the doctrine of abuse of process is “characterized by its flexibility. It is not encumbered by specific requirements, unlike the concepts of *res judicata* and issue estoppel” (para. 35, citing *Behn*, at para. 40, and *Toronto (City)*, at paras. 37-38).

...

[38] A multiplicity of proceedings which engage the same issues can amount to an abuse of process. In the foundational case of *McHenry v. Lewis* (1882), 22 Ch. D. 397, Sir George Jessel observed that: “. . . it is prima facie vexatious to bring two actions where one will do” (p. 400). Examples of where a multiplicity of proceedings has amounted to an abuse of process include: where two parallel class actions involving the same parties were brought in two different jurisdictions (*Englund v. Pfizer Canada Inc.*, 2007 SKCA 62, 284 D.L.R. (4th) 94, at paras. 38-40); where plaintiffs initiated multiple actions claiming Aboriginal and treaty rights over the same land and natural resources (*Dixon v. Canada (Attorney General)*, 2015 ABQB 565); and where the plaintiffs provided “no viable explanation” for bringing a second action that duplicated the issue of ownership of a trade name which encapsulated the original defendants (*Cashin Mortgages Inc. v. 2511311 Ontario Ltd.*, 2024 ONCA 103, 170 O.R. (3d) 107, at para. 14).

[39] However, the fact that there are two or more ongoing legal proceedings which involve the same, or similar, parties or legal issues, is in itself not sufficient for an abuse of process. As this Court recognized in *Toronto (City)*, “[t]here may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system” (para. 52). Similarly, there may be instances where parties have a valid reason for bringing separate, but related, proceedings; in such cases, a multiplicity of proceedings can serve to enhance the administration of justice (see, e.g., *Birdseye Security Inc. v. Milosevic*, 2020 ONCA 355, at paras. 20-22). The inverse can also be true:

² Although ss. 18-21 proceedings under the CTA are typically brought by petition, the respondent points to two cases where they were brought in an action: see *Mount Seymour Park Housing Cooperative v. Williamson*, 2003 BCSC 1261 at paras. 26-27 and *Allen v Khinda*, 2022 BCSC 815.

pleadings do not need to be identical in order for a multiplicity of proceedings to amount to abuse of process (see, e.g., *Dixon*, at para. 85; *Fillion v. Degen*, 2005 MBCA 58, 195 Man. R. (2d) 2, at para. 23).

[40] Thus, the abuse of process analysis does not end when multiple or similar proceedings exist. Rather, the analysis needs to focus on whether allowing the litigation to proceed would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice, as discussed above. Where, for example, having duplicative proceedings would waste the resources of the parties, courts and witnesses, or risk inconsistent results and therefore undermine the credibility of the judicial process, this can amount to an abuse of process.

[31] In *Saskatchewan (Environment)*, there were three separate proceedings brought by the Métis Nation – Saskatchewan (“MNS”) against the province. First, there was a 1994 action for Aboriginal title and rights, which had been stayed. Second, there was a 2020 action challenging Saskatchewan’s general policy of refusing to consult regarding claimed Aboriginal Title (the “2020 Action”). Finally, a 2021 application for judicial review was filed, challenging the issuance of certain permits on the grounds of failure to consult (the “2021 Originating Application”): paras. 7-19.

[32] The Court assessed whether the 2021 Originating Application was an abuse of process given the two other existing proceedings. The province argued that the 2021 Originating Application addressed the same subject matter and involved the same underlying issue as the 2020 Action: whether Saskatchewan had a duty to consult with MNS. The Court found that although there was an overlap between the two proceedings, there was no abuse of process:

[59] Does this amount to an abuse of process? I would say no. As I explained earlier, an abuse of process requires more than some overlap of issue; it must threaten the integrity of the adjudicative process or another fundamental principle, such as consistency, finality, or judicial economy (*Toronto (City)*, at para. 37). At present, the overlap between the 2020 Action and the 2021 Originating Application does not give rise to these concerns. The 2021 Originating Application is a proper mechanism for MNS to challenge Saskatchewan’s issuance of the NexGen permits and for MNS to pursue an interim remedy for the potential breach of its claimed Aboriginal title and commercial harvesting rights. It would be a misuse of the doctrine of abuse of process, in effect, to immunize from judicial review actions taken by Saskatchewan that might impact MNS’s claimed Aboriginal title and commercial harvesting rights. I note that a decision on an application for summary determination in the 2020 Action is pending; when that decision is

rendered, it will inform the resolution of the questions in the 2021 Originating Application.

[60] Regarding the finality of litigation, there is potential for inconsistent outcomes should the 2020 Action and the 2021 Originating Application continue in parallel and yield different answers to the question of whether Saskatchewan has a duty to consult on Aboriginal title and commercial harvesting rights. However, this potential inconsistency might be better addressed through case management...Striking pleadings for abuse of process is a drastic remedy that “should be granted only in the ‘clearest of cases’, when the abuse falls at the high end of the spectrum” (*Abrametz*, at para. 83, quoting *Blencoe*, at para. 120). The option of case management to avoid a potential inconsistency of decisions makes clear that this is not a case where such a “drastic remedy” is to be contemplated.

[33] The respondents argue that it is in the interests of justice to dismiss the present petition in favour of the New West Action. They claim that the present dispute is complex, requiring a determination of which lease is the true lease, and that pre-trial discovery and document disclosure is necessary. The respondents rely on *C&A Mink Ranch v. Schalles*, 2015 BCSC 2184, where a petition under the CTA was referred to the trial list since the court was unable to determine, based on the affidavits, whether the arrangement was a lease and, if so, what the terms of the lease were. The court determined that resolving the dispute required an assessment of credibility and pre-trial procedures: paras. 31-46. The court noted that “[b]efore the court can assess whether the lease or agreement can be terminated pursuant to the Act, the court must determine the terms of the lease or agreement that govern the parties.”: at para. 26.

[34] A court can indeed impose trial-like procedures in a petition proceeding under the CTA: *Jacklin Property Limited v. MV Fitness International Inc.*, 2022 BCSC 814 at paras. 51-65, 71-84. In *Jacklin Property*, the court ultimately referred an application for consolidation of the petition with the tenant’s separate action to the judge who would consider the second-stage hearing: para. 83.

[35] Returning to the present case, the petitioner concedes that the two proceedings deal with substantially the same issues. Further, the petitioner’s new counsel says that they are unsure exactly why the petitioner originally proceeded by way of action. They suspect that it was likely a mistake and that the present petition

was filed when the petitioner realized that the summary procedure under the CTA could be utilized. The petitioner argues that it has not undertaken multiple proceedings for any strategic or nefarious purpose. They say that there is no abuse of process, and therefore, they should be allowed to proceed with the present petition.

[36] The petitioner notes that courts often allow multiple proceedings to proceed without comment. They cite *The Owners, Strata Plan VIS2030 v. Ocean Park Towers Ltd.*, 2014 BCSC 264 [*Ocean Park*], where the landlord's first-stage application under s. 18 was allowed to proceed despite the fact that the tenant subsequently filed an action and sought consolidation: paras. 1-3. However, *Ocean Park* is not particularly helpful for the petitioner, as no abuse of process argument was advanced in that case.

[37] *Concord*, on the other hand, is a strong precedent supporting the respondents' position. I am not persuaded by the petitioner's argument that *Concord* is distinguishable because different parties brought the proceedings. If anything, this makes the abuse of process argument more compelling in the present case, in that it is the petitioner alone who created unnecessary overlap.

[38] I find that bringing the present petition constitutes an abuse of process and that the petition should be dismissed for the following reasons:

- a) The petitioner brought the New West Action before the present proceeding.
- b) The New West Action remains active.
- c) The two proceedings address the same issues, involve the same parties, and the petitioner has effectively sought the same remedy in both.
- d) The New West Action is broader in scope, as it now includes the respondents' counterclaim.

- e) I have concerns about the petitioner's explanations and disclosure. The decision to bring multiple proceedings arguably appears to be more the result of error than a strategic decision, as in *Concord*. However, the petitioner has not put themselves in a position to advance this position with particular force given that the petitioner has not discontinued the New West Action and failed to provide a direct explanation in the evidence for why it has not done so.
- f) In any event, abuse of process is more concerned with the integrity of the judicial process than the motive of the parties: *Concord* at para. 41.
- g) I accept that allowing the present petition to be advanced instead of the New West Action is unfair to the respondents. The respondents successfully opposed the short-notice application in the New West Action. They responded to the New West Action. They filed a counterclaim. The petitioner was represented by counsel and decided to initiate the New West Action at the outset. The respondents, having responded and filed a counterclaim, are entitled to have this dispute determined in that proceeding.
- h) This is not a situation where multiple proceedings will "enhance, rather than impeach, the integrity of the judicial system". Instead, this is a situation where allowing parallel proceedings "would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice": *Saskatchewan (Environment)* at para. 39-40. Inconsistent outcomes are possible if both proceedings are allowed to move forward.
- i) It is in the interests of justice to dismiss this petition and allow the New West Action to proceed. This is a complex matter in which the guaranteed availability of comprehensive pre-trial procedures is appropriate. There are challenging issues, including questions about which lease is the valid one, whether it was made in writing or orally, and whether there are issues of

non est factum that render the enforceability of any written lease invalid. It is not a simple matter of interpreting an agreed form of written contract.

- j) Summary procedures will remain available to the petitioner in the New West Action should the evidence support their use.

IV. CONCLUSION

[39] The petition is dismissed as an abuse of process in favour of the existing New West Action already brought by the petitioner.

[40] Unless there are facts or arguments of which I am unaware, the respondents shall be entitled to their costs of the petition. If either counsel wishes to advance argument for a different costs disposition, they may arrange to argue the point before me at 9 a.m. via MS Teams on a mutually agreeable date.

“The Honourable Mr. Justice Branch”