IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hui v. The Owners, Strata Plan BCS3702,* 2025 BCSC 1209

Date: 20250626
Docket: S00315
Registry: Abbotsford

Between:

Chi Yan Hui

Plaintiff

And

The Owners, Strata Plan BCS3702

Defendant

Before: The Honourable Justice Dion

Reasons for Judgment

Counsel for the Plaintiff:	D.E. Gruber S. Bourns
Counsel for the Defendant:	S. Bleay
Place and Date of Hearing:	New Westminster, B.C. May 27, 2025
Place and Date of Judgment:	Abbotsford, B.C. June 26, 2025

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Introduction

[1] This is an application by the Defendant, strata corporation asking that the Court decline jurisdiction over this action, and instead direct that the matter be heard by the Civil Resolution Tribunal ("CRT"). In the alternative, the Defendant seeks to have the action converted to a petition.

Background

[2] On or about October 4, 2005, the Plaintiff purchased a unit (the "Unit") in a residential building located at 1560 Homer Mews, Vancouver, B.C. (the "Building") as a presale from the developer. The Defendant is the strata corporation for the Building.

[3] On November 7, 2017, the Plaintiff applied for a building permit from the City of Vancouver to complete certain construction in the Unit (the "Building Permit"). On November 9, 2017, the Plaintiff requested that the Defendant consent to the Building Permit. Thereafter, the Plaintiff and Defendant engaged in negotiations concerning the Defendant's consent to the Building Permit, during which time the Plaintiff did not move into the Unit.

[4] In 2017, the City of Vancouver implemented a vacancy tax. In light of his ongoing negotiations with the Defendant regarding the Building Permit, the Plaintiff

submitted a complaint to the City, seeking an exemption from the vacancy tax for 2018. On or about September 30, 2019, the City rejected the complaint and confirmed that the vacancy tax assessed to the Plaintiff for 2018 was due and payable. The Plaintiff was again assessed a vacancy tax for the Unit in 2019 and 2020.

[5] On or about December 11, 2020, the City issued the Building Permit.

[6] On March 19, 2021, the Plaintiff commenced the underlying action by way of notice of civil claim, which was served on the Defendant on March 18, 2022.

[7] In the notice of civil claim, the Plaintiff alleges, among other things:

a) He had a reasonable expectation that the Defendant would not withhold its consent to the Building Permit for reasons unrelated to the construction that was the subject matter of the Building Permit; and

b) The Defendant did not negotiate in good faith and unreasonably withheld its consent to the Building Permit for a collateral purpose.

[8] On that basis, the Plaintiff seeks the following in the notice of civil claim:

a) a declaration that the Defendant was significantly unfair to the Plaintiff for the purposes of s. 164(1) of the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*]; and

b) an order that the Defendant compensate the Plaintiff for all loss and damage caused to him by the Defendant's significantly unfair conduct, pursuant to s. 164(2) of the *SPA*.

[9] The defendant filed its response to civil claim on April 26, 2024, denying the Plaintiff's claims.

[10] On May 28, 2024, the Plaintiff served a list of documents on the Defendant. On July 26, 2024, the Defendant served a list of documents on the Plaintiff.

[11] On September 11, 2024, the Plaintiff demanded, pursuant to Rule 7-11 of the *Supreme Court Civil Rules*, that the Defendant amend its list of documents. On

December 24, 2024, after a number of follow-up requests from the Plaintiff, the Defendant served an amended list of documents.

[12] The Plaintiff took issue with the Defendants amended list of documents and, on January 6, 2025, filed an application for production of the demanded documents, to be made on January 17, 2025 (the “Documents Application”). On January 16, 2025, the Defendant served a second amended list of documents, along with its response to the Documents Application. In that response, they challenged this Court as the proper venue for the underlying action and sought an adjournment in order to bring the present application to have the matter dismissed or stayed so that it could be heard in the CRT.

[13] Also on January 16, 2025, the Plaintiff filed a requisition to adjourn the Documents Application to January 21, 2025. On January 20, 2025, the Plaintiff wrote to the Defendant to advise that he intended to challenge its claims of privilege over certain documents listed in its second amended list.

[14] On January 21, 2025, the Defendant filed the present application, seeking orders that:

a) Pursuant to s. 16.1(1)(b) of the *Civil Resolution Tribunal Act,* S.B.C. 2012, c. 25 [*CRTA*], the Plaintiff’s action is dismissed on the basis that the CRT has specialized expertise in respect of the Plaintiff’s action.

b) In the alternative, pursuant to s. 16.1(c) of the *CRTA*, the Plaintiff’s action is stayed and referred to the CRT on the basis that all matters within the Plaintiff’s action are within the specialized expertise and jurisdiction of the CRT.

c) In the further alternative, pursuant to Rule 2-1(2)(b) of the *Rules*, the Plaintiff’s action is converted to a petition proceeding on the basis that the action is a proceeding authorized by legislation.

d) Costs of this application in any event of the cause payable forthwith.

Parties' Positions

The Defendant

[15] The Defendant submits that this Court ought to either dismiss or stay the action and refer the matter to the CRT pursuant to ss. 16.1 and/or 16.4 of the *CRTA*.

[16] The Defendant argues that the CRT has specialised expertise in respect of the Plaintiff's claim of significant unfairness, which is captured by s. 121 of the *CRTA*. It states that the CRT is to hear designated matters unless there exist exceptional circumstances, in the interests of justice and fairness, indicating that this Court should hear the matter. Further, it argues that ss. 16.1 and 16.4 presumptively bar a proceeding in this Court if the subject matter of that proceeding is one over which the *CRTA* deems the CRT to have specialized expertise: *Downing v. Strata Plan VR2356,* 2019 BCSC 1745 at paras. 27–29.

[17] The Defendant notes that this Court has determined that the CRT has jurisdiction to determine, and grant remedies for, claims of significant unfairness under s. 123(2) of the *CRTA*: *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164.

[18] The Defendant submits that, in the case at bar, none of the factors outlined in s. 16.3 of the *CRTA*, to be considered by the court in assessing justice and fairness, operate to transfer jurisdiction from the specialized expertise of the CRT to this Court. It notes that in the similar case of *Majithia v. The Owners, Strata Plan EPS 2884*, 2024 BCSC 1519, where the alleged significantly unfair action involved a strata corporation's refusal to approve alterations to a strata lot, the Court found that it was in the interests of justice and fairness for the CRT to adjudicate the claim.

[19] The Defendant submits that where, as here, all issues raised in a proceeding in some way deal with a combination of the application of the *SPA* and the decisions or actions of a strata corporation and its council, the appropriate venue for the proceeding is the CRT, not this Court. In fact, it argues that it would be unprecedented for this Court to assume jurisdiction over such a matter in the face of the Defendant's objection: *Downing* at paras. 35, 42 and 50.

[20] In the alternative, the Defendant submits that, if the matter is to proceed in this Court, it has been improperly commenced by way of notice of civil claim, as Rule 2-1(2) requires that a proceeding authorized by an enactment (in this case the *SPA*) be commenced by way of petition. It submits that this Court has a discretion to determine how best to remedy this procedural deficiency, and that the appropriate remedy in this case is to convert the action to a petition, given that the parties agree on the applicable law and the Plaintiff may apply for further discovery, if necessary: *The Redeemed Christian Church of God v. New Westminster (City)*, 2022 BCCA 224; *Young v. Veselic*, 2021 BCSC 1106.

The Plaintiff

[21] The Plaintiff submits that its claim under s. 164 of the *SPA* is within the jurisdiction of this Court: *1289083 B.C. Ltd. v Owners, Strata Plan*, BCS3215, 2025 BCSC 76 [*1289083 B.C. Ltd.*]. He argues that the Defendant has attorned to the jurisdiction of this Court to adjudicate the Plaintiff's claim.

[22] The Plaintiff submits that Rule 21-8 sets out the procedure to dispute the jurisdiction of this Court and that, if that procedure is not followed, the Court may find the party has attorned to the Court's jurisdiction: *Highline Mushrooms West Limited v. 1895742 Alberta Ltd.*, 2021 BCSC 2464; *Stewart v. Stewart*, 2017 BCSC 1532.

[23] The Plaintiff notes that attornment is a standalone basis for the assumption of jurisdiction and argues that, by filing a substantive defence and thereby inviting this Court to resolve the dispute between the parties on its merits, the Plaintiff has attorned to the jurisdiction of the Court: *Naturex Inc. v. United Naturals Inc.*, 2016 BCSC 1500; *Souhaibb v. Javed*, 2023 BCSC 584; *Nordmark v. Frykman*, 2019 BCCA 433; *VM Agritech Limited v. Smith*, 2024 BCCA 360.

[24] In support of that argument, the Plaintiff notes that, since April 26, 2024, the Defendant has engaged in the procedures for ascertaining facts under the *Rules* by issuing lists of documents and producing documents. It was not until January 2025, on the heels, the Plaintiff says, of its application to compel the Defendant to disclose relevant documents, that the Defendant advised that it planned to challenge this Court's jurisdiction to adjudicate the dispute. This, the Plaintiff argues, is a tactical decision and attempt by the Defendant to shield itself from the

production of the documents the Plaintiff requires to advance its claim. The Plaintiff argues that the Defendant's motion obstructs the path the parties have heretofore agreed to engage to resolve the dispute and inexcusably frustrates the object of the *Rules*. The Defendant should not be permitted to now "unattorn" itself from the jurisdiction of this Court: *Stewart*; *Nordmark*.

[25] In the alternative, the Plaintiff submits that it is not in the interests of justice and fairness for the CRT to adjudicate the claim: *CRTA*, s. 16.1. In particular, the Plaintiff argues that: (i) the issues raised by the claim are sufficiently complex to benefit from being adjudicated by this Court; and (ii) the use of electronic communication tools in the adjudication process of the CRT would be unfair to him in a way that cannot be accommodated by the tribunal: *CRTA*, s. 16.3(1)(c) and (f).

[26] The Plaintiff submits that, because a central feature of its claim for relief is that the Defendant "knowingly, intentionally and in bad faith caused the Plaintiff to incur the Vacancy Tax", witness evidence and credibility will figure front and centre. These, the Plaintiff argues, are issues that militate against referring the matter to the CRT. The Plaintiff commenced the action in this Court in an attempt to ensure that its claim was properly adjudicated through fulsome document discovery, examinations for discovery and cross-examination of witnesses, and *viva voce* evidence at trial. The CRT does not afford the same procedural advantages.

Discussion

Statutory Provisions

[27] The relevant provisions of the *CRTA* relied on by the Defendant are as follows:

> **Court must stay or dismiss certain proceedings**
>
> 16.1(1) Subject to subsection (2) and section 16.4 (1) and (2) [*bringing or continuing claim in court*], if, in a court proceeding, the court determines that all matters are within the jurisdiction of the tribunal, the court must,
>
> (a) in the case of a claim within the exclusive jurisdiction of the tribunal, dismiss the proceeding,
>
> (b) in the case of a claim in respect of which the tribunal is to be considered to have specialized expertise, dismiss the proceeding unless it is not in the interests of justice and fairness for the tribunal to adjudicate the claim, or

> (c) in any other case, stay or dismiss the proceeding, as the court considers appropriate, unless it is not in the interests of justice and fairness for the tribunal to adjudicate the claim.
>
> …
>
> **Considerations in the interest of justice and fairness**
>
> 16.3(1) For the purposes of sections 16.1 (1) and 16.2 (1), when deciding whether it is in the interests of justice and fairness for the tribunal to adjudicate a claim, the court may consider the following:
>
> (a) whether an issue raised by the claim or dispute is of such importance that the claim or dispute would benefit from being adjudicated by that court to establish a precedent;
>
> (b) whether an issue raised by the claim or dispute relates to a constitutional question or the *Human Rights Code*;
>
> (c) whether an issue raised by the claim or dispute is sufficiently complex to benefit from being adjudicated by that court;
>
> (d) whether all of the parties to the claim or dispute agree that the claim or dispute should not be adjudicated by the tribunal;
>
> (e) whether the claim or dispute should be heard together with a claim or dispute currently before that court;
>
> (f) whether the use of electronic communication tools in the adjudication process of the tribunal would be unfair to a party in a way that cannot be accommodated by the tribunal.
>
> (2) For the purposes of section 16.1 (2), when deciding whether it is in the interests of justice and fairness for the tribunal to make the determination referred to in that subsection, the court may consider the principle of proportionality.
>
> …
>
> **Claims within jurisdiction of tribunal for strata property claims**
>
> 121(1) Except as otherwise provided in section 113 [*restricted authority of tribunal*] or in this Division, the tribunal has jurisdiction over a claim, in respect of the Strata Property Act, concerning one or more of the following:
>
> (a) the interpretation or application of the Strata Property Act or a regulation, bylaw or rule under that Act;
>
> (b) the common property or common assets of a strata corporation;
>
> (c) the use or enjoyment of a strata lot;
>
> (d) money owing, including money owing as a fine, under the Strata Property Act or a regulation, bylaw or rule under that Act;
>
> (e) an action or threatened action by a strata corporation, including the council, in relation to an owner or tenant;
>
> (f) a decision of a strata corporation, including the council, in relation to an owner or tenant;
>
> (g) the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general

> meeting.
>
> (2) For the purposes of this Act, the tribunal is to be considered to have specialized expertise in respect of claims within the jurisdiction of the tribunal under this Division.
>
> …
>
> **Orders available in strata property claims**
>
> 123(1) In resolving a strata property claim, the tribunal may make one or more of the following orders:
>
> (a) an order requiring a party to do something;
>
> (b) an order requiring a party to refrain from doing something;
>
> (c) an order requiring a party to pay money.
>
> (2) In resolving a strata property claim described in section 121 (1) (e) to (g), the tribunal may make an order directed at the strata corporation, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights.

[28] The following provision of the *SPA*, relied on by the Plaintiff, is also relevant:

> 164(1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
>
> (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
>
> (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

Are the Claims Within the Jurisdiction of the Court or CRT?

[29] I agree with the Plaintiff that the claims advanced in his notice of civil claim properly fall within the jurisdiction of this Court pursuant to s. 164 of the *SPA*: see *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, leave to appeal to SCC ref'd, 34739 (19 July 2012).

[30] That being said, the fact that claims can be advanced in this Court under s. 164 of the *SPA* does not necessarily mean that they are not also matters within the jurisdiction of the CRT: *1289083 B.C. Ltd.* at para. 26.

[31] Here, I agree with the Defendant that the claims fall within s. 121 of the *CRTA* and are therefore also within the jurisdiction of the CRT. Specifically, the issues raised in the action relate to a combination of:

a) the interpretation or application of the *SPA* or a regulation, bylaw or rule under that Act (*CRTA* s. 121(a));

b) the common property of the strata (*CRTA*, s. 121(b));

c) the use an enjoyment of the strata lot (*CRTA*, s. 121(c)); and

d) the actions and/or decisions of the strata corporation, including the council, in relation to an owner or tenant (*CRTA*, s. 121(1)(e) and (f)).

(See *Downing* at para. 35; *1289083 B.C. Ltd.* at para. 23)

[32] I therefore conclude that the matters raised in the action could be pursued either before the Court or the CRT. Both s. 164 of the *SPA* and ss. 121–123 of the *CRTA* allow the relevant body to determine whether a strata corporation has acted in a significantly unfair manner, and both statutes allow for a monetary award to be issued if such a finding is made: *1289083 B.C. Ltd.* at paras. 27–32.

[33] The action is, in other words, one that can be said to fall generally under the concurrent jurisdiction of the CRT and this Court: see *Dolnik v. The Owners, Strata Plan LMS 1350*, 2023 BCSC 113 at para. 29.

Has the Defendant Attorned to the Jurisdiction of this Court?

[34] As above, the Plaintiff submits that by failing to file a jurisdictional response and alleging that this Court lacked jurisdiction to hear the Plaintiff's claims in compliance with the procedure set out in Rules 21-8(1) and (5), the Defendant has attorned to the jurisdiction of this Court to adjudicate the Plaintiff's claim and is thereby precluded from seeking to have this matter referred to the CRT.

[35] I cannot accept that argument. Put simply, the concept of attornment does not apply when jurisdiction already exists, as I have found it does in this case. As our Court of Appeal explained in *Nordmark*:

> [47] Attornment is a stand-alone basis for the assumption of jurisdiction: *Kriegman v. Wilson*, 2016 BCCA 122 at para. 29, 86 B.C.L.R. (5th) 1. It arises when a defendant is deemed to have submitted to the

> jurisdiction of a court that otherwise would not have jurisdiction over them by actions inconsistent with a denial of that jurisdiction: *Kraupner v. Ruby* (1957), 1957 CanLII 236 (BC CA), 7 D.L.R. (2d) 383 at 392 (B.C.C.A.), appeal quashed, [1957] S.C.R. viii; *Pope v. Pope*, 1940 CanLII 252 (BC SC), [1940] 2 D.L.R. 661 at 664 (B.C.S.C), appeal on other grounds dismissed, 1940 CanLII 246 (BC CA), [1940] 3 D.L.R. 454 (B.C.C.A.). Submission can be unintentional: *Edgar v. Ronald* (1994), 1994 CanLII 1226 (BC CA), 12 B.C.L.R. (3d) 194 at paras. 20–21 (C.A.). Put otherwise, a defendant can, by their actions, vest a court with jurisdiction the court otherwise would not have. Today attornment is captured by s. 3(b) of the CJPTA.
>
> [48] The concept of attornment does not apply when jurisdiction already exists. For example, it would be incorrect to say that a defendant ordinarily resident in British Columbia who files a defence to an action for damages arising out of a motor vehicle accident that occurred in British Columbia has attorned to the court's jurisdiction.
>
> [Emphasis in original.]

[36] In this case, the concept of attornment does not apply because this Court's jurisdiction over the Plaintiff's claim already exists by virtue of s. 164 of the *SPA*.

[37] I pause to note that *Nordmark*, like the rest of the cases cited by the Plaintiff on the issue of attornment, discusses jurisdiction in the sense of territorial competence, which is not in issue in this case. I was not provided any decision in which the concept of attornment was discussed in a matter falling within the concurrent jurisdiction of this Court and the CRT. Nevertheless, given the Plaintiff's reliance on Rule 21-8, I find Frankel J.A.'s discussion of that Rule in *Nordmark* instructive:

> [56] How then should Rule 21-8 be interpreted? This is a task to be approached keeping in mind the following statement by Chief Justice Finch in *Wong v. Wong*, 2006 BCCA 540 at para. 23, 61 B.C.L.R. (4th) 280:
>
> > It is trite law that the Rules of Court are made to promote justice, and that they should be interpreted in a manner most likely to do justice between the parties. The rules are the servants, and not the masters of the court: see *Bell v. Wood and Anderson*, 1927 CanLII 300 (BC SC), [1927] 2 D.L.R. 827 (B.C.S.C.); *Fenchurch Export Corp. v. Sitka Spruce Lumber Co.*, 1946 CanLII 233 (BC CA), [1947] 2 D.L.R. 139 (B.C.C.A.); and *Mussell v. Cronhelm* (1994), 1994 CanLII 1714 (BC CA), 111 D.L.R. (4th) 95 (B.C.C.A.).
>
> [57] It is clear Rule 21-8 was drafted having regard to the fact that jurisdiction (i.e., territorial competence) and *forum non conveniens* are distinct concepts. It is also clear that an *ex juris* defendant who wishes to challenge jurisdiction must follow the procedures set out in Rules 21-8(1) and (5) to obtain protection from attornment. However, I am unable to accept Mr. Manning's submission that Rules 21-8(1) and (2) must be read

> together and interpreted such that a party seeking only to have the court decline to exercise jurisdiction must nevertheless file a jurisdictional response and then, as required by Rule 21-8(5), serve a pointless notice of application challenging territorial competence or disputing a pleading or service.
>
> [58] Mr. Manning says that in Rule 21-8(2) the expression "a party referred to in subrule (1)" refers to a party that has been served and has filed a jurisdictional response. I do not agree. In Rule 21-8(1) the word "party" is modified by the clause "who has been served with an originating pleading or petition in a proceeding". The comma after the word "proceeding" signals the end of this modifying clause. In addition, it is notable that although a jurisdictional response is specifically stated to be a prerequisite to applications under Rules 21-8(1) and (3), it is not mentioned in Rule 21-8(2).
>
> [Emphasis added.]

[38] In sum, Rule 21-8 treats assertions that this Court does not have jurisdiction differently from assertions that this Court should decline to exercise its jurisdiction. In this case, the Defendant has made the latter and, regardless of how jurisdiction is acquired, Rule 21-8(2) alone applies when a party seeks a stay on the ground that this Court ought to decline to exercise that jurisdiction: *Nordmark* at paras. 50, 59. The Plaintiff cannot therefore be said to have attorned to the jurisdiction of this Court by virtue of a failure to comply with the procedure set out in Rule 21-8(1) and (5), when none of those principles apply.

[39] Further, even if I were to find that the Defendant had attorned to the jurisdiction of this Court, such would be entirely consistent with the Defendant subsequently asking that this Court decline to exercise that jurisdiction. As Frankel J.A. continued to explain in *Nordmark*:

> [59] …With respect to a person who has attorned, the following statement by Professor Stephen G. Pitel in "The Canadian Codification of *Forum Non Conveniens*" (2011), 7 J. Priv. Int'l. L. 251 at 256, is apt:
>
> > Seeking a stay is not a challenge to the court's jurisdiction, and so there is no inconsistency between seeking a stay and attorning. Indeed, attorning, which amounts to accepting that the court has jurisdiction, is entirely consistent with subsequently asking that court to decline to exercise that jurisdiction. Obviously, one would expect a motion for a stay to be brought in a timely manner, but that in itself is not a sufficient reason for holding that a defendant who attorns cannot seek a stay.

[40] That leaves Rule 21-8(2). Rule 21-8(2) provides a mechanism by which a party may apply to the court for a stay of proceedings on the ground that the court

should decline to exercise its jurisdiction in favour of a more appropriate forum: see *AtriCure, Inc. v. Meng*, 2020 BCSC 341 at para. 46. Here, the Defendant argues that the more appropriate forum is the CRT. As a result, the test to be applied and the factors to be considered in determining whether this Court ought to decline to exercise its jurisdiction over this matter are those set out in ss. 16.1–16.4 of the *CRTA*.

[41] To be clear, in rejecting the Plaintiff's argument on attornment and reliance on Rule 21-8(1) and (5), I am not suggesting that the Defendant's conduct following service of the notice of civil claim, and in particular the timing of its application to have this Court decline to exercise its jurisdiction, is irrelevant. Rather, I am of the view that such is more appropriately considered as a factor in my assessment of the interests of justice and fairness under the relevant provisions of the *CRTA*.

The Interests of Justice and Fairness

[42] Given my conclusion that the claims in the underlying action could be advanced under either statute (*SPA* or *CRTA*), and the CRT is a specialized tribunal in relation to such claims, the matter must be dismissed pursuant to s. 16.1(1)(b) of the *CRTA* "unless it is not in the interest of justice and fairness" for the CRT to adjudicate the claim: see *1289083 B.C. Ltd.* at para. 33.

[43] As Mr. Justice Brongers put it at para. 52 in *Dolnik*, ss. 16.1, 16.3, and 16.4 of the *CRTA* effectively impose a rebuttable presumption that the claim should be dismissed by the Court so that it can be heard by the CRT, unless it is not in the interests of justice and fairness for the Tribunal to do so. The result is that the Plaintiff effectively has the burden of proving a basis for maintaining the matter in court: *1289083 B.C. Ltd.* at para. 64.

[44] Section 16.3 sets out the factors that a court may consider as part of this evaluation. These factors are non-mandatory and non-exhaustive. The court can also consider the principle of proportionality: *Canadian Ramgarhia Society v. Panesar*, 2022 BCSC 751 at para. 31. Ultimately, the Court's determination of what the interests of justice and fairness require in the context of a particular claim will necessarily be informed by the circumstances of that case: *The Owners, Strata Plan VIS 1210 v. Ngai Estate*, 2024 BCSC 2232 at para. 37.

[45] I apply the factors most applicable to the present case below.

Is the Claim Complex?

[46] The Plaintiff raises this factor in s. 16.3(1)(c) alongside that in s. 16.3(1)(f) and argues that, taken together, those subsections ensure that the Court does not forfeit the disputant's right to procedural fairness if it declines to adjudicate the claim.

[47] More specifically, the Plaintiff submits that, because a central feature of his claim is that the Defendant "knowingly, intentionally and in bad faith caused the Plaintiff to incur the Vacancy Tax", witness evidence and credibility will figure front and centre. The Plaintiff explains that he elected to file the claim in this Court to leverage the procedural features of the Rules to ensure the dispute is properly adjudicated through fulsome document discovery, examinations for discovery and cross-examination of witnesses, and the presentation of *viva voce* evidence at trial.

[48] In *1289083 B.C. Ltd.*, Justice Branch set out competing considerations that arise when a party opposes referral to the CRT on the basis of procedural protections:

> [41] In terms of the CRT's ability to consider complex claims, courts have expressed concern about the extent of procedural protections available at the CRT. In *Downing v. Strata Plan VR2356*, 2023 BCCA 100 [*Downing BCCA*], the Court of Appeal remarked as follows in *obiter*:
>
> > [8] While the chambers judge correctly observed that the CRT frequently adjudicates disputes where there are conflicts in the evidence and adjudicators may exercise a discretion to convene an in-person hearing with oral testimony, a chambers judge hearing a s.121 application should, in my view, pay close attention to the fact that there are limited procedural safeguards at the CRT. In cases involving significant sums or other important issues, the potential limitation on a party's procedural rights before the CRT may militate against the referral.
> >
> > [Emphasis added]
>
> [42] I will obviously follow that direction. However, that said, there are tools available at the CRT which could be invoked to make the process more proportionate and responsive to a complex fact pattern and larger damages claim such as this. For example:
>
> > a) The CRT case manager may direct any or all parties to provide evidence respecting a matter that is relevant to an issue in the dispute, including requiring the evidence to be provided on oath,

affirmation, or in a manner authorized under the CRT Rules: CRTA s. 32.

b) Section 33 of the CRTA permits a party to serve a summons to require other persons to provide evidence.

c) Section 34 of the CRTA permits the CRT to require a person to provide evidence.

d) CRT Standard Rule 8.8 sets out a procedure for orders to produce evidence.

e) The CRT can order an oral hearing. If an oral hearing is ordered, CRT Rule 8.7 provides for the following:

i. If the tribunal orders an oral hearing, the party produces a witness list containing the names of the witnesses that the party intends to use to provide evidence at the oral hearing, and any other information the tribunal requires about the witnesses.

ii. Each party is given 7 days to provide their witness list to the tribunal.

iii. Every witness may be required to make a solemn affirmation before giving evidence at an oral hearing.

f) If there is an oral hearing, witnesses may be cross-examined: *1028677 B.C. Ltd. v. The Owners, Strata Plan LMS 1083*, 2024 BCSC 578 at para. 20.

g) While written arguments before the CRT are subject to character count limits, the CRT Rules allow a party to request that the limit be increased: CRT Rules 1.2(2) and 7.3(8).

h) More generally, the CRT has wide discretion over its own procedure: CRTA, s. 42; *Time Share* at paras.13-14.

[49] I do not consider the Plaintiff's allegations of bad faith conduct on behalf of the Defendant in withholding its consent to the Building Permit, and thereby intentionally causing the Plaintiff to incur the Vacancy Tax, to be so complex that they should be adjudicated by this Court. As this Court explained in *Majithia*, that is the kind of factual inquiry that falls squarely within the CRT's jurisdiction to determine in its assessment of whether the owners have been dealt with fairly. If that inquiry could not be fully resolved on the basis of a written record, ss. 39–42 of the *CRTA* permit the CRT to question parties and witnesses, and to convene an in-person hearing with oral testimony if appropriate: *Majithia* at para. 28.

[50] That being said, I note the Plaintiff's particular concern with document discovery in this case. As above, albeit in the context of his submissions on attornment, the Plaintiff argues that the Defendant's decision to seek to have this matter referred to the CRT came on the heels of the Plaintiff's application to

compel the Defendant to disclose relevant documents. This, he submits, reveals that this application is a tactical attempt by the Defendant to shield itself from the production of the documents the Plaintiff requires to advance its claim.

[51] Sections 32–34 of the *CRTA* provide a mechanism by which parties may serve a summons, and the CRT make orders, requiring the provision of evidence that is relevant to an issue in the dispute. Further, as the Defendant points out, CRT Standard Rule 8.8 provides the procedure by which requests and orders for production of records are to be made under s. 34 of the *CRTA*. Safeguards applicable to document discovery are therefore available at the CRT, although generally requiring an exercise of the CRT's discretion: *1289083 B.C. Ltd.* at para. 43.

[52] Nevertheless, I agree with the Plaintiff that the *Rules* offer a more robust process for document discovery. This is perhaps especially true in strata disputes under the *SPA*: see e.g. *Kayne v. The Owners, Strata Plan LMS 2374*, 2007 BCSC 1610 at paras. 6–15; *The Owners, Strata Plan NWS 1018 v. Hamilton*, 2019 BCSC 863 at paras. 21–27. As Justice Smith explained in *Kayne*:

> [6] It is important to keep in mind that this is not an application for documents pursuant to Rule 26 of the ***Rules of Court***. In such an application, the question is whether there are documents that are or may be relevant to the issues in dispute between the parties or which may lead to the discovery of such documents. A document may be relevant and produceable no matter how it is described or the purpose for which it is prepared if it happens to contain relevant information.
>
> [7] This is an application under the ***Act*** which sets out certain documents or categories of documents that must be kept and produced. The question of what relevance they have or do not have to any dispute between the petitioner and the corporation is really not relevant.
>
> …
>
> [11] The petitioner's position, as I understand it, is that the production is incomplete and the documents produced indicate the existence of other documents. In my view, the petitioner has misconceived the nature of the requirement under the ***Act*** and has approached this matter more as if it were a demand for production of documents in litigation.
>
> [Emphasis added.]

[53] Of note, there appear to be some circumstances in which the CRT is precluded from ordering a strata to produce documents falling outside the categories listed in ss. 35 of the *SPA* which may have been found relevant and producible by this Court under the *Rules*. For example, in *Hamilton*, an appeal of a

decision of the CRT, Justice Branch relied on *Kayne* to find that the Tribunal had exceeded its jurisdiction by ordering the strata to provide documents not included in s. 35 of the *SPA*:

> [25] I find that these circumstances did not imbue the CRT with jurisdiction to expand the Strata's document production obligations beyond s. 35.
>
> [26] The Strata accepts that if the CRT had been asked to consider whether there was "significant unfairness" under s. 123(2) (then s. 48.1(2) of the CRTA), and if it had concluded that there was unfairness, this finding may have provided a basis for a broader remedy. However, Ms. Hamilton's complaint did not claim significantly unfair actions under s. 123(2). Indeed, the CRT concedes that if the Tribunal Member had grounded her order in s. 123(2) without providing an opportunity for the Strata to advance argument on this point, this would have raised a procedural fairness concern: see *Gardezi v. The Positive Living Society of British Columbia*, 2019 BCSC 666 at paras. 58-62, 68.
>
> [27] Furthermore, if Ms. Hamilton had launched litigation in Supreme Court against the Strata, either under ss. 32-33 of the SPA (which addresses conflicts of interest), or under s. 164 of the *SPA* (which addresses significantly unfair treatment), such a process would broaden the scope of any possible order for document production. The court in *Kayne* acknowledged this. But Ms. Hamilton's application was brought before the CRT and was confined to ss. 35-36 of the *SPA*. As such, the CRT should not have gone beyond those sections to require broader document production. The decision to order production of documents not covered by s. 35 was inconsistent with existing case law, and was unreasonable.
>
> [Emphasis in original.]

[54] I acknowledge that neither Mr. Kayne nor Ms. Hamilton appear to have availed themselves of the document discovery procedures in ss. 32–34 of the *CRTA*. *Kayne* and *Hamilton* are also distinguishable from the case at bar insofar as the Plaintiff in this case *has* claimed that the Defendant acted significantly unfairly and thus, should this matter be referred to the CRT, document production may not be confined in the same way as an application under s. 35 of the *SPA*. In that respect, I note Justice Branch was careful to state in *Hamilton* that, had the CRT been asked to consider whether there was significant unfairness under s. 123(2) and concluded there was unfairness, that finding may have provided a basis for a broader remedy with respect to document disclosure (i.e. beyond the confines of s. 35 of the SPA): *Hamilton* at para. 26.

[55] That said, para. 26 of *Hamilton* suggests that a finding of significant unfairness would have to be made *before* a strata's document disclosure

obligations could be expanded, and is equivocal insofar as it suggests that such a finding "may" provide a basis for a broader remedy with respect to document disclosure. Further, it appears that even in cases involving claims of significant unfairness the CRT has interpreted *Kayne* and *Hamilton* as precluding the Tribunal from ordering stratas to produce records or documents beyond those set out in s. 35 of the *SPA*: see e.g. *Drew v. The Owners, Strata Plan 1692*, 2024 BCCRT 1107 at para. 85; *see also Hallman v. The Owners, Strata Plan KAS 1821*, 2021 BCCRT 1052 at paras. 60–61; *Tran v. The Owners, Strata Plan NW468*, 2022 BCCRT 575 at para. 141.

[56] None of this is to say that the documents sought by the Plaintiff could not be sought or ordered by the CRT under ss. 32–34 of the *CRTA*, if relevant to an issue in dispute. Rather, it is to highlight the more circumscribed document discovery process before the CRT and explain that, when considered in light of the Plaintiff's concern with and ongoing attempts to secure production of documents he maintains are necessary to advance his claim, such is a factor that in my view weighs against referring this matter to the CRT. That conclusion is only reinforced by the Plaintiff's stated intention to challenge the Defendant's claims of privilege over the documents included in its second amended list. As Justice Branch explained at para. 27 in *Hamilton*, "if Ms. Hamilton had launched litigation in Supreme Court against the Strata… under s. 164 of the *SPA* (which addresses significantly unfair treatment), such a process would broaden the scope of any possible order for document production." That is precisely what the Plaintiff has done in this case, and what he seeks to continue doing by opposing the present application and referral to the CRT.

Are the Parties Agreed that the Matter Should be Heard by the Court?

[57] There is no agreement that this matter should be heard by the Court.

[58] In its notice of application, the Defendant relied on *Downing* to argue that it would be unprecedented for this Court to assume jurisdiction over this matter in the absence of such an agreement: *Downing* at para. 50; see also *Canadian Ramgarhia Society v. Panesar*, 2022 BCSC 751 at para. 32. However, counsel informed me at the hearing that such is no longer the case as the Court in *Ngai* declined to refer a matter to the CRT despite a lack of agreement that the matter be heard by the Court.

[59] Further, I note that a lack of (or limited) precedent in the strata property context is not a bar where the Court must conduct an individualized assessment of what the interests of justice and fairness require in each case. Whether the parties agree the Court should exercise jurisdiction is only one factor that may be considered in that assessment; no single factor is determinative: see *Ngai* at para. 49.

Will the Electronic Communication Tools used in the CRT Adjudication Process be Unfair to the Petitioner?

[60] Beyond the Plaintiff's invocation of this factor alongside complexity and procedural fairness, as addressed above, I see no material disadvantage to the petitioner in having to engage in the electronic tools used by the CRT.

Which Decision-Maker's Process is More Proportionate to the Issues?

[61] As above, the principle of proportionality is a factor in deciding whether it is in the interests of justice and fairness for the CRT to adjudicate this claim. While the parties did not raise this issue, I find it useful to canvass in any event since doing so rounds out the applicable factors.

[62] In *Allard v. The Owners, Strata Plan VIS 962*, 2019 BCCA 45 at paras. 30-33, the Court of Appeal recognized that the procedural flexibility of the CRT accords respect for proportionality: see *1289083 B.C. Ltd.* at para. 47.

[63] The Plaintiff's claim for damages, while potentially larger than those normally considered by the CRT, does not militate in favour of retaining this matter in court. Unlike most matters over which the CRT has jurisdiction, the *CRTA* contains no monetary limit for strata claims. As a result, the legislature has by necessary inference mandated that the CRT should handle strata claims in any amount, large or small: *Yas v. Pope*, 2018 BCSC 282 at para. 14. In this respect, I note as Branch J. did in *1289083 B.C. Ltd.* at para. 50, that the CRT has adjudicated strata claims in the six-figure range: see e.g. *James MacArthur v. The Owners, Strata Plan K588*, 2016 BCCRT 2; *Trinden Enterprises Ltd. v. The Owners, Strata Plan NW 2406*, 2020 BCCRT 807; and *Garrows v. The Owners, Strata Plan LMS 445*, 2023 BCCRT 52.

Does the Timing of This Application Favour one Decision-Maker's Process Over the Other?

[64] As above, I am of the view that the Defendant's conduct following service of the notice of civil claim, and in particular the timing of this application, may be appropriately considered as a factor in my assessment of the interests of justice and fairness.

[65] The Defendant urged against this approach, relying on the following passages of *Hauck v. Kiem*, 2024 BCSC 388, where Associate Judge Krentz explained that:

> [23] The plaintiff also advances an abuse of process argument, as she notes that the defendant waited until June 2023 to raise the issue of the action being transferred to the CRT, which was shortly after they filed a jury notice in this Court.
>
> …
>
> [30] In *Carter v. Uytterhagen* (February 24, 2023), Vancouver Registry File No. M202798 (B.C.S.C.), Justice Branch determined that pursuant to s. 16.1(2)(a) of the CRTA, he had no other option but to stay the action as the cited section simply does not allow for considerations of fairness or timeliness to enter into the decision of whether or not the order should issue. He found support in the *Madden* decision, wherein Justice Funt issued a stay without finding it necessary to consider fairness or timeliness issues generally or any other factors specifically.

[66] While acknowledging that *Hauck* involved a motor vehicle injury claim, the Defendant says it is a case where the Court considered "similar sections" of the *CRTA* which effectively gave the Court the same powers to send the matter back to the CRT. As a result, it argues that *Hauck* provides authority that the timeliness is not a factor to be considered in my assessment of whether this matter ought to be stayed and referred to the CRT, especially because the litigation here is in its early stages.

[67] I disagree and find that *Hauck* is clearly distinguishable from the case at bar. As the passage above makes clear, both *Hauck* and *Carter* considered the relevance of timeliness within the context of s. 16.1(2)(a) of the *CRTA*, which relates to disputes involving "minor injuries" and precludes consideration of fairness and timeliness (or any factor for that matter). Here, because the matter arises under the *SPA* and falls within the concurrent jurisdiction of this Court and the CRT, s. 16.1(1)(b) applies and explicitly *requires* me to consider of whether or

not it is in the interests of justice and fairness for the CRT to adjudicate the claim. As a result, I cannot accept that *Hauck* precludes consideration of "fairness and timeliness" in this case. To the contrary, for the reasons that follow I find that, in the circumstances of this case, the timeliness of the Defendant's application is factor to be considered in the assessment of the interests of justice and fairness under the s. 16.1(1)(b) of the *CRTA*.

[68] The Defendant filed this application nearly three years after it was served with the Plaintiff's notice of civil claim, and nearly nine months after it filed its response to civil claim. In its response, the Defendant did not seek to have this matter dismissed or stayed and referred to the CRT. It was only after the Plaintiff filed the Documents Application that the Defendant served a second amended list of documents, adding documents over which the Defendant claims privilege, and argued that this Court was not the proper venue for this proceeding. The day before this application was filed and the adjourned Documents Application was to be heard, the Plaintiff advised the Defendant that it intended to challenge its claims of privilege over the additional documents listed in its second amended list. The Defendants then filed this application, seeking to have the matter dismissed or stayed and referred to the CRT.

[69] The timing of this application causes me some concern. When I asked why the Defendant did not bring this application sooner, counsel informed me that the issue of this Court's jurisdiction only came to the Defendant's attention in January of this year, when the Plaintiff filed the Documents Application. The Defendant explained that it was at that point in time that it "reviewed the applicable law" and realized the CRT had jurisdiction. Accepting that to be the case, the fact remains that nothing of substance has changed in the Plaintiff's claim since it was served on the Defendants in March 2022, nor in the nearly nine months between the Defendant's filing of its response to civil claim and this application. What has changed in that time is that the parties, and the Plaintiff in particular, have spent considerable time and money advancing the litigation in this Court, in part through the document discovery procedures set out in the *Rules*.

[70] While, as above, I acknowledge that the *CRTA* provides the CRT with powers to order production of evidence that is relevant to an issue in a dispute, there is no doubt that the *Rules* provide a more expansive discovery process: see *Kayne*; *Hamilton*. Here, that process is underway – lists of documents have been

served, demands have been made, and an application for further production has been filed and prepared. In such circumstances, I find that the Defendant's delay in bringing this application, the time and cost incurred in litigating the matter in this Court, and the likely impact of a referral to the CRT on the steps taken by the Plaintiff to date, are factors weighing against referring this matter to the CRT.

Final Assessment

[71] The following factors favour this matter being heard by the Court:

a) The matter would benefit from this Court's greater procedural safeguards, especially with respect to document discovery; and

b) The Defendant's delay in seeking to have the matter referred to the CRT, and the time and cost incurred in litigating this matter before this Court.

[72] The following factors favour this matter being referred to the CRT:

a) The matter is not particularly complex;

b) The parties do not consent to the matter being heard by the Court;

c) The case does not raise any particularly compelling issues of precedential value; and

d) The CRT has previously dealt with claims involving large amounts.

[73] Weighing the factors above, I am satisfied that the Plaintiff has provided a sufficient basis for maintaining the matter in court. The pleadings are filed and the document discovery process underway. The Plaintiff has gone to some lengths to avail himself of the procedures available under the *Rules* to obtain the documents he argues are necessary to pursue his claim. The Defendants, who appeared content to participate in that process, only filed this application the day before the Documents Application, including the Plaintiff's apparent challenge to the Defendant's claims of privilege, was set to be heard. In such circumstances, I cannot find that it is in the interests of justice and fairness to stay this proceeding and refer the matter to the CRT to adjudicate the claim.

Should the Matter be Converted to a Petition?

[74] As I have concluded that this matter will be heard by this Court, I must go on to consider the Defendant's submission that it was improperly commenced by way of notice of civil claim and ought to be converted to a petition.

[75] I agree with the Defendant that this proceeding was brought by the Plaintiff in respect of an application that is authorized by an enactment (s. 164 of the *SPA*) to be made to the court, and therefore that it ought to have been commenced by way of petition: Rule 2-1(2)(b); see e.g. *Choi v. Westbank Projects Corp.*, 2024 BCCA 410 at para. 27. I also agree that the appropriate remedy in the circumstances is found in Rule 22-7, and that the combined effect of Rule 22-7(1)–(3) is that the Plaintiff's failure to comply with the *Rules* in this case is to be treated as an irregularity, does not nullify the proceeding or any step taken in the proceeding, does not form a basis for setting the proceeding aside, and can be remedied by any order I consider will further the object of the *Rules*: see *Redeemed Christian Church* at paras. 73–74.

[76] In my view, Rule 22-7(4) is also significant in that it requires that any application seeking relief based upon a failure to comply with the *Rules* must be brought within a reasonable time and before the applicant has taken a fresh step after knowledge of the irregularity. As our Court of Appeal explained in *Standard Group Projects Inc. v. 0972672 B.C. Ltd.*, 2023 BCCA 205 at para. 49, "[t]his requires a party to act expeditiously to address an irregularity or breach of the *Rules* by another party rather than sitting back and waiting for a strategically advantageous time to raise the issue."

[77] In *Young*, the authority cited by the Defendant, Mr. Justice Crerar accepted that the plaintiff had advanced multiple claims by notice of civil claim that would ordinarily have been brought by way of petition. He nevertheless declined to convert the action to a petition because, in his view, it raised issues of fact and law not suitable for summary disposition and was therefore bound to return to the trial list:

> [54] …As the facts set out above make abundantly clear, this is not an ordinary case. It is not a simple matter of presenting uncontested facts in summary form by way of a petition supported by an uncontroversial affidavit to prove a will. It is clear, and it would be clear to both siblings at a very early stage, that this matter was destined for an order converting it to an action, with full rights of discovery, and directing it to the trial list.

> [55] *British Columbia (Milk Marketing Board) v. Saputo Products Canada GP / Saputo Produits Laitiers Canada SENC*, 2017 BCCA 247 at paras 43-52 sets out the law governing referral to the trial list:
>
> > [43] This Court has long held that proceedings brought by petition should be referred to the trial list when there are disputes of fact or law, unless the party requesting the trial is bound to lose: *[authorities omitted]*
> >
> > …
>
> [56] Applying *British Columbia (Milk Marketing Board)* and its cited authorities, there exist heavily disputed issues of fact and law inappropriate for summary disposition by way of a petition in chambers, and the plaintiff is not bound to lose.
>
> …
>
> [62] I accordingly excuse the commencement of these proceedings by way of an action rather than a petition, as *per* that rule, and retroactively confirm that the subject matter is appropriately brought by way of notice of civil claim, and referred to the trial list as per Rule 22-1(7)(d).

[78] In doing so, Crerar J. referred to *Thomas v. Thomas*, 2012 BCSC 842, where Justice Macauley reached the same conclusion and offered the following commentary on proceedings by petition:

> [32] I agree with the plaintiff that requiring her to recommence her proceeding by petition would inevitably lead to an application to transfer the proceeding to the trial list. The question of custom adoption, and perhaps others, is contested and incapable of being resolved on affidavit evidence.
>
> [33] Proceedings by petition are generally best suited for claims where the factual underpinnings are unlikely to be in dispute and there is a need for summary disposition. The petition procedure does not lend itself well to the resolution of disputed factual issues. The process is arguably anachronistic but necessary to maintain because many statutes require proceeding in that fashion.

[79] *Young* and *Thomas* therefore make clear that, in determining whether to convert an action to a petition, the Court ought to consider whether there are disputes of fact and law or issues of credibility such that the proceeding is nevertheless destined for trial and conversion would be a futile waste of the court's and parties' resources: see also *Toporowski v. MacLennan*, 2024 BCSC 1671 at paras. 38-41. That being said, some triable issues can now be addressed within a petition proceeding. As the Court explained in *Standard Group Projects*:

> [42] Recently, in *Cepuran v. Carlton*, 2022 BCCA 76, a five-justice division of this Court endorsed a more flexible approach to petition proceedings. In doing so, the Court departed from a line of authorities, most notably *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247,

> that had held that a petition must be referred to the trial list where there is a *bona fide* triable issue.
>
> [43] Justice Griffin, for the Court, noted a number of procedural reforms that have taken place to better streamline the litigation process and the enhanced focus on proportionality reflected in cases like *Hryniak v. Mauldin*, 2014 SCC 7. She found that when confronted with disputed issues of fact on a petition, it is open to the judge to make use of hybrid procedures, for example by permitting discovery or cross-examination on affidavits, to permit a fair determination without converting the proceeding to an action (at paras. 154–160).

[80] Averting to this more flexible approach, the Defendant submits that the appropriate remedy in this case is to convert the action to a petition in part because the Plaintiff can apply to this Court under Rule 16-1(18) "if further discovery is necessary". As the Court explained in *Cepuran*:

> [151] The authorities referred to in *Saputo* did not refer to the impact and meaning of R. 16-1(18), which was brought into force in 2010.
>
> [152] As set out above, R. 16-1 is the rule generally governing petitions, and R. 16-1(18) provides:
>
> > (18) Without limiting the court's right under Rule 22-1 (7) (d) to transfer the proceeding referred to in this rule to the trial list, the court may, whether or not on the application of a party, apply any other of these Supreme Court Civil Rules to a proceeding referred to in this rule.
>
> …
>
> [154] On its face, R. 16-1(18) allows the court to pick and choose to apply in a petition proceeding any number of procedures that apply in actions, such as discovery of witnesses or discovery of documents. For example, in *Liu v. Du*, 2021 BCCA 221, this Court in Chambers held that R. 16-1(18) can be relied upon to order production of documents in a petition proceeding without first converting the petition to an action (para. 32). Given that these procedures usually are only necessary to employ where an issue is in dispute, in my view R. 16-1(18) changes the landscape considerably from that considered by the authorities relied upon in *Saputo*.
>
> [155] Rule 22-1(4) is also relevant. Among other things, it permits cross-examination on affidavits in Chambers applications. In *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160, this Court noted that R. 22-1(4) applied to petitions…

[81] For the reasons that follow, I disagree with the Defendant that converting the Plaintiff's action to a petition is the appropriate remedy in this case.

[82] For one thing, there are key issues of fact in dispute. The Plaintiff's claim that the Defendant acted significantly unfairly rests in large part on its allegations

that the Defendant withheld its consent to the Building Permit for reasons unrelated to the construction that was the subject of the Permit, namely, to force the Plaintiff to concede unrelated disputes between the parties, and "knowingly, intentionally and in bad faith caused the Plaintiff to incur the Vacancy Tax". The Defendant denies any such conduct and submits that its consideration of the Building Permit application was duly based on material documents sought from the Plaintiff, as well as information and assurances in connection with the Building Permit application. This is a factual dispute on a central feature of the Plaintiff's claim. It formed the basis of the Plaintiff's demand for documents on September 11, 2024 and, ultimately, the Documents Application, which was outstanding at the time the Defendants filed the present application. It is, in my view, a triable issue.

[83] While I recognize that some triable issues can and should now be addressed within a petition proceeding, it is in my view worth noting that this proceeding was commenced, and has so far been conducted, as an action. As a result, I am not "confronted with disputed issues of fact on a petition" (see *Standard Group Projects* at para. 34) and the relevant question here is not (as in *Cepuran*) whether the matter can or should *remain* a petition proceeding despite the existence of disputes of fact or law which may require resort to procedures that apply in actions. The question is whether I should exercise my discretion to *convert* the matter to a petition proceeding despite disputes of fact which have already prompted the parties to resort to procedures available to them as parties to an action.

[84] To be very clear, in drawing this distinction I am in no way suggesting that litigants can, by incorrectly initiating what ought to be petition proceedings as actions, circumvent the modern flexibility of petition proceedings or approach to civil procedure more generally. As the Court explained in *Cepuran*:

> [159] The modern approach to civil procedure, as encouraged in *Hryniak*, is to allow parties and the trial courts to tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits. In my view, R. 16-1(18) and R. 22-1(4) work to reflect this modern approach within a petition proceeding.
>
> [Emphasis added.]

[85] Rather, I note this proceeding was commenced as an action to highlight that we are not "within a petition proceeding" and, as a result, the interests of

proportionality and access to justice do not necessarily favour proceeding by way of petition in this case. More specifically, I am not convinced that converting this action to a petition will streamline the litigation between these parties given where they are at in the process. The Plaintiff has already demanded and applied for further document production. I presume, should I convert his action to a petition, he would pursue the Documents Application and his challenge to the Defendant's claims of privilege by way of Rule 16-1(18), as the Defendant has invited him to do. Depending on the outcome of that application, I would expect others, for example, for oral discovery or cross-examination on affidavits under Rule 22-1(4). Put simply, in the circumstances of this case there is limited efficiency in converting the Plaintiff's action to a petition only to make the procedures appurtenant to an action available to him.

[86] Further support for continuing this proceeding as an action is found in Rule 22-7(4) which, as above, requires that any application seeking relief based upon a failure to comply with the *Rules* must be brought within a reasonable time and before the applicant has taken a fresh step after knowledge of the irregularity.

[87] As above, the Defendant filed this application nearly three years after it was served with the Plaintiff's notice of civil claim, and nearly nine months after it filed its response to civil claim. In that response, the Defendant did not seek to have this matter converted to a petition. Counsel informed me that the Defendant only became aware of the irregularity in January of this year, however, neither the substance of the Plaintiff's claim nor Defendant's counsel of record changed between the filing of the response and this application. The Plaintiff argues that the timing of this application makes clear that it is tactical attempt by the Defendant to shield itself from the production of documents the Plaintiff requires to advance his claim. Counsel for the Defendant assured me that, while he can see how the sequence of events leading to the filing of this application might give rise to such an argument, such is not certainly the case.

[88] While, as above, I have some concerns about the timing of this application, I cannot conclude on the materials before me that the Defendant sat back and waited for a strategically advantageous time to raise the issue. I am, however, satisfied that the Defendant failed to act expeditiously to address the irregularity and has thereby failed to bring this application in a reasonable time: *Standard Group Projects* at para. 49.

[89] On that basis, I decline to convert this action to a petition. Instead, as in *Young*, I excuse the commencement of these proceedings by way of an action rather than a petition and retroactively confirm that the subject matter is appropriately brought by way of notice of civil claim.

Conclusion

[90] For the reasons expressed above, the application is dismissed.

"Dion J."