**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Fana (DCD) Holdings Inc. v. Dartmouth Cove Developments Inc.*, 2017 NSSC 157

**Date:** 2017-06-07
**Docket:** Hfx No. 461513
**Registry:** Halifax

**Between:**

Fana (DCD) Holdings Inc., Robert Boutilier, Albert Andrews, Ross Cantwell, and Jason Jollimore

Applicants/Respondents

v.

Dartmouth Cove Developments Incorporated, The Anchorage at Dartmouth Cove Property Development Inc., and Francis F. Fares

Respondents/Applicants

**Judge:** The Honourable Justice James L. Chipman

**Heard:** May 31, 2017, in Halifax, Nova Scotia

**Counsel:** Blair Mitchell, for the Applicants/Respondents
John A. Keith, Q.C. and W. Matthew Saunders, for the Respondents/Applicants

**By the Court:**

## Overview

[1] Earlier this year, a group of shareholders sued a developer and two of his companies. In the main, they alleged oppression and chose to proceed by way of an application in court.

[2] Applications in court were made more readily available when the new Nova Scotia Civil Procedure Rules came into effect on January 1, 2009. Applications in court are normally heard on affidavits and cross-examination. The application route is designed to achieve lower cost and greater speed.

[3] Applications in court are to be contrasted with actions; the latter involve witnesses giving direct examination evidence in court. Party and non-party witnesses take the stand and in areas of contention, counsel are not permitted to lead the witnesses they call. Actions culminate with trials and the process typically takes longer than an application, both in court and in the time leading up to the hearing.

[4] This decision is with respect to a motion brought by the developer and his companies to change the proceeding from an application to an action. Given the particularities of this case, they argue that the application process does not suit the dispute. While acknowledging that the trial process generally takes more time, the moving parties argue that if this matter is not converted, it will end up taking more time than if it is left as an application.

[5] In resisting the application, the shareholders allege the opposing side is seeking to delay the proceeding. They assert the motion is tactical and say that the proceeding is well-suited to an application, which will end up saving time and money.

## Background

[6] The Applicants/Respondents (Investors) are shareholders of Dartmouth Cove Developments Inc. (DCDI). On March 16, 2017, the Investors filed a Notice of Application in Court alleging that as of June, 2010 they collectively invested $1,175,000 in DCDI. In the seven years since their investment, the Investors say DCDI and the other Respondents/Applicants, The Anchorage at Dartmouth Cove

Property Development Inc. (Anchorage) and Francis F. Fares (Mr. Fares), acted oppressively and unfairly prejudiced and disregarded their interests as shareholders. In particular, the Investors say DCDI, Anchorage and Mr. Fares (Mr. Fares and the Fares' Companies) have breached s. 5 of the Third Schedule of the *Companies Act*, R.S.N.S. 1989, c. 81 as amended.

[7] By Notice of Contest filed April 19, 2017, Mr. Fares and the Fares' Companies deny all of the allegations and request a dismissal, with costs.

[8] A Motion for Directions (MFD) took place before Justice Smith on April 25, 2017. During the MFD, Mr. Fares and the Fares' Companies advised of their wish to convert this matter from an application in court to an action. Accordingly, the Motion to Convert (MTC) was scheduled for May 31, 2017 and the MFD was then adjourned without day.

[9] In advance of the MTC, the Court received and reviewed briefs and cases filed by the parties. During the MTC, by consent, an additional case was provided to the Court. In terms of evidence, the Court received lawyers' affidavits from Blair Mitchell (sworn March 9), Marion Ferguson (sworn May 29) and W. Matthew Saunders (sworn May 17 and 30). The affiants were not cross-examined. At the hearing, two exhibits were entered by consent: a Fares & Co. Developments Inc. profile from the Registry of Joint Stock Companies (exhibit 1) and March 31, 2017 letter from John A. Keith, Q.C. to Mr. Mitchell (exhibit 2).

**Positions of the Parties**

MTC Applicants

[10] Mr. Fares and the Fares' Companies take the position that conversion of the application is warranted due to these factors:

1. The proceeding is factually complex, and will involve fact and expert witnesses for both parties;
2. The credibility of the parties' facts and expert witnesses will be fundamental to the resolution of the issues in the proceeding, including those in respect of the allegations of oppressive and unfair conduct, and bad faith by the Investors;
3. The Investors' case is dependant on whether the alleged representations were made – and oppressive conduct having taken place – all of which will be contested and depend almost entirely on

the oral evidence and documentary discovery of the various witnesses of the parties;

4. Important witnesses cannot be identified quickly and, indeed, even the Investors' list of witnesses is uncertain and incomplete, as indicated;
5. This proceeding cannot be ready to be heard in months;
6. It is unlikely that proceeding by way of application will be more efficient or less costly than by way of an action;
7. Multiple hearings will not be required; and
8. The alleged rights of the Investors will not be eroded over time. On this issue, it bears noting that the allegations of representations which gave rise to the alleged expectations were made more than seven years ago (i.e., prior to June, 2010).

MTC Respondents

[11] The Investors say the matter should remain as an application for a host of reasons, including:

1. So that the matter will not be unduly delayed;
2. In order to have Mr. Fares and the Fares' Companies produce documents in a timely manner;
3. That the credibility issues have been exaggerated by Mr. Fares and the Fares' Companies and a trial is not required to resolve them;
4. That Mr. Fares and the Fares' Companies have engaged in speculation about issues, which are not grounded in the pleadings;
5. The proceeding can be ready to be heard within months;
6. That the notion that there are other investors with germane interests is not rooted in the evidence;
7. Multiple hearings may well be required; and
8. Generally, Mr. Fares and the Fares' Companies have failed to demonstrate particulars of the evidence establishing the need for a trial over an application.

**The Law**

[12] Civil Procedure Rule (CPR) 6.02 governs a MTC. Given CPR 6.02(2), the onus is on the moving parties, here Mr. Fares and the Fares' Companies, to satisfy the Court that the application should be converted to an action. There is a presumption in CPR 6.02(2) in favour of an application; however, the presumption is rebuttable.

[13] On a MTC, under CPR 6.03, the moving parties must provide affidavit evidence in support of their argument. On this motion I have Mr. Saunders' two affidavits and the first one provides a detailed account of the nascent proceeding.

[14] In the 7.5 years since the advent of the new CPRs, the Supreme Court of Nova Scotia has dealt with MTCs on a number of occasions. In this application, the parties provided 14 cases dealing with MTCs, namely:

1. *Kings (County) v. Berwick (Town),* 2009 NSSC 398 – Justice Warner dismissed a MTC an application to an action;
2. *Brodie v. Jentronics Ltd.*, 2009 NSSC 399 – Justice Moir dismissed a MTC an application to an action;
3. *Monk v. Wallace*, 2009 NSSC 425 – Justice Murphy allowed a MTC an application to an action;
4. *Citibank Canada v. Begg*, 2010 NSSC 56 – Bryson J. (as he then was) dismissed a MTC an application to an action;
5. *Matheson v. Wood World Markets/Marches M*, 2011 NSSC 85 – Justice LeBlanc dismissed a MTC an application to an action;
6. *Jeffrie v. Hendricksen*, 2011 NSSC 292 – Justice Pickup dismissed a MTC an action to an application;
7. *Leigh v. Belfast Mini-Mills Ltd.*, 2011 NSSC 300 – Justice Duncan dismissed a MTC an action to an application;
8. *Boone v. Medusa Medical Technologies Inc.*, 2011 NSSC 492 – Justice A. Boudreau dismissed a MTC an application to an action;
9. *Milburn v. Growthworks Canadian Funds Ltd.*, 2012 NSSC 106 – Justice Murray allowed a MTC an application to an action;
10. *Guest v. MacDonald*, 2012 NSSC 452 – Justice Moir dismissed a MTC an application to an action;

11. *Nova Scotia v. Roué*, 2013 NSCA 94 – The Court of Appeal (per Fichaud, J.A.) upheld Justice Rosinski's decision to dismiss a MTC an application to an action;

12. *MacKean v. Royal Sun Alliance Insurance Company*, 2015 NSCA 33, (per Bryson, J.A.) allowed an appeal of Justice Wood's decision;

13. *Dr. Robert Hatheway Professional Corp. v. Smith*, 2015 NSSC 68 – Associate Chief Justice Smith dismissed a MTC an application to an action; and

14. *AtlanticSpark Professional Services Inc. v. Hryshyna*, 2016 NSSC 114 – Justice Pickup allowed a MTC an application to an action.

[15] When I review the above cases, it becomes clear as to the kinds of situations which drove judges to determine whether an application or action was best suited to their particular case. For example, the below sampling demonstrates the key factors. In *Kings (County) v. Berwick (Town)*, Justice Warner noted at paras. 32, 40 and 41:

> [32] In this case, the parties have clearly defined the issues. They are both fairly clear and focussed. There is no question that some extrinsic evidence is likely to be admissible and, as Mr. Shanks aptly sets out in his pre-hearing brief, citing Swan's text for this point, often the process, when the hearing is not before a jury, involves hearing the extrinsic evidence and then deciding whether it is admissible.
>
> …
>
> [40] Applications in court permit cross-examination, which can be unlimited. Cross-examination is the tool to test credibility in a trial and it is preserved in an application in court. Whether I suspect that direct examination in trials is overrated or not, it is my sense that the issues of facts in this proceeding relate more to reliability than credibility; in either event, the opportunity to cross-examine in the hearing of an application in court is more than enough to satisfactorily assess credibility.
>
> [41] There is no identification in the three affidavits of the Three Towns of a particular issue of credibility (as opposed to reliability) that could become so significant that it could not be satisfactorily dealt with by way of cross-examination. The issues in this case are focussed enough that the use of affidavits to present direct evidence will probably assist everyone in focussing on the relevant factual context and avoiding the irrelevant.

[16] Justice LeBlanc discussed the factors influencing his decision to dismiss a MTC an application to an action at paras. 11 and 17 of *Matheson v. Wood World Markets/Marches*:

> [11] I am satisfied that the underlying application is principally about the legal significance of agreed-upon events and the resulting relief and the quantification of damages. The parties confirm that the important witnesses have been identified. Furthermore, there is no evidence that the defendant cannot be ready in a matter of months. The parties have also agreed that it will take a maximum of five days to complete the proceeding. The plaintiff claims that would take no more than two days while the defendant estimates that the matter can be dealt with in five days.
>
> …
>
> [17] I note that if it becomes evident that this proceeding has become very complicated, including the question of whether the class proceeding should be certified in the context of this application and whether this application should be consolidated with the class proceeding, it may be appropriate re-consider the application to convert from application to action: see Citibank at para. 33.

[17] In *Guest v. MacDonald*, Justice Moir spoke of among other things, the critical aspect to the time to complete investigative work at paras. 32-34:

> [32] Rule 6 is complicated. In addition to requiring us to apply a principle of proportionality and layering that with competing presumptions, it offers four factors. Rule 6.02(5) reads:
>
> > On a motion to convert a proceeding, factors in favour of an application include each of the following:
> >
> > > (a) the parties can quickly ascertain who their important witnesses will be;
> > >
> > > (b) the parties can be ready to be heard in months, rather than years;
> > >
> > > (c) the hearing is of predictable length and content;
> > >
> > > (d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

> [33] The first three of these factors are consistent with a distinction that seems to be emerging from the authorities. We appear to distinguish cases in which the parties need much time to complete investigative work and those in which investigation could be wrapped up in months. Despite the argument made in *Langille v. Dzierzanowski*, see para. 23, proportionality does not appear to depend on complexity or the amount involved. *Kings (County) v. Berwick (Town)* involved much complexity and a large amount. Justice Murphy in *Monk* and the Chief Justice in *Langille* were more concerned about the investigative work still to be done in those medical malpractice cases: *Monk* at para. 20 and *Langille* at para. 23.
>
> [34] The last of the four factors needs to be understood in light of the proposition that cross-examination, rather than the rule against leading on direct, is the main tool for testing credibility: *Kings (County) v. Berwick (Town)*, para. 40 and 42; *Jeffrie v. Hendriksen*, para. 49 and 57.

[18] More recently, our Court of Appeal weighed in and Justice Fichaud's words in *Nova Scotia v. Roué* at paras. 19 and 48 spoke to the circumstances when the "traditional manner" of an action should prevail:

> [19] This new process, therefore, can serve as a very efficient tool, in appropriate circumstances. However, when considering its virtues, we must also be mindful that enhancements have been made to the action process. Murphy J. makes this point in **Monk v. Wallace**, 2009 NSSC 425:
>
> > 15 Although the expanded application route under the Rules is intended to offer prompt and more economical relief to parties who qualify for an application procedure, the Rules now also provide a more streamlined action procedure. Ms. Monk will not necessarily be subjected to inordinate delays and procedural hurdles because this matter will be determined through an action rather than by application. The action procedure now allows parties to identify trial dates much earlier in the process, involves less discovery examination, and facilitates the parties' cooperation to exchange information and have matters determined promptly. This case raises many disputed issues, and if the parties are unable to resolve their dispute by out-of-court settlement, I am convinced that the Respondents are entitled to the safeguards and benefits provided by trial procedures, which the Court also needs to fully assess all the issues.
>
> …
>
> [48] There are some proceedings where the classic trial procedures will be essential. For instance, it may be important that the judge hear the witnesses tell

> their stories in person, as direct evidence, instead of just reading the ink on the lawyer-assisted affidavits. Or it may be that important evidence rests with unfriendly witnesses, who will not sign affidavits, and must be required to testify by subpoena. These are just examples, not an all-inclusive list. It is for the motions judge, in weighing the criteria under Rule 6.02, to assess whether fairness steps to the fore on such matters, whether the application in court under Rule 5.07 can accommodate the concern with an adjustment to the procedure, or whether it is preferable, in the interests of fairness, that the matter be tried in the traditional manner.

[19] Finally, the Court of Appeal, per Justice Bryson noted the applicability of accessibility, proportionality, timeliness and affordability are always considerations in *MacKean v. Royal & Sun Alliance Insurance Company of Canada* at paras. 48 and 49:

> [48] In *Garner v. Bank of Nova Scotia*, 2014 NSSC 63, Associate Chief Justice Smith endorsed the comments in *Hryniak* and amplified them:
>
> > 34 During the hearing of this motion, I referred counsel to the recent Supreme Court of Canada decision in *Hryniak v. Mauldin*, 2014 SCC 7. In that case, the court, which was speaking in the context of a summary judgment motion, discussed a culture shift that must take place in relation to civil justice in Canada. It recognized that our civil justice system is premised upon an adjudication process that must be fair and just. The court went on to say, however, that undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes (see para. 24). It further stated that a fair and just process is illusory unless it is also accessible, proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure (see para. 28). ***While these comments were made in the context of a summary Judgment motion, in my view, they are applicable to all civil cases in Canada.***
> >
> > [Emphasis added]
>
> [49] I agree. The principles of accessibility, proportionality, timeliness, and affordability are applicable to all civil cases in Canada.

[20] CPR 6 and the cases considering the Rule demonstrate that on a MTC the matters that remain as or become applications tend to feature most of these factors:

- fewer parties

- discreet, clearly detailed issues, sometimes narrowed by agreement
- reasonable hearing estimates of relatively short duration (often five days or less)
- readily available key documents and the like, central to the dispute
- the parties being (realistically) ready for a hearing within a short timeline (usually within months, not years)
- situations involving comparatively little time to conduct investigative work
- agreement on admissible extrinsic evidence
- limited, if any, discovery required
- time being of the essence in bringing the matter forward to a hearing
- identifiable (typically party) witnesses with evidence conducive to affidavit form
- an absence of “unfriendly” witnesses, who might well be disinclined to swear affidavits
- generally, an uncomplicated proceeding

[21] For reasons that will become apparent in this decision, I am of the overwhelming view that the within litigation does not feature the factors listed above and therefore the moving parties have met their onus on the MTC the application to an action.

[22] Having regard to the referenced cases and the relevant CPRs, I am of the view that on a MTC, the moving party need only provide a description of the evidence it wishes to provide at the hearing. The moving party is not required to actually produce the evidence at this stage of the proceeding (see, for example *Jeffrie v. Hendricksen* at para. 13 and *Milburn v. Growthworks Canadian Funds Ltd.* at para. 20). Indeed, CPR 6.03 makes sense because to require otherwise would bog the MTC down. Further, it would be impractical to produce detailed evidence when there often would not have been fulsome production and discoveries. In any event, I find that Mr. Saunders’ May 17 affidavit effectively describes the anticipated evidence. From reading this affidavit I have an

appreciation of the kind of evidence which will likely be given at the ultimate hearing of this matter.

[23] In keeping with CPR 6.02, the cases confirm that on a MTC, the Court should engage in a three-stage analysis, which I have set out in the below section.

**Analysis**

Stage 1 – Are any of the presumptions in favour of an application applicable in this case, pursuant to CPR 6.02(3)?

[24] In answering the above question, I have fully reviewed the affidavits, Notice of Application in Court and Notice of Contest. On the basis of my review, I can find no presumptions in favour of an application. Indeed, I am of the view that the presumptions favour an action. For example, at para. 10 of his affidavit, Mr. Mitchell deposed:

> I do not believe that the application concerns alleged rights which could be eroded over an immediate time. The applicant would give prompt notice of any change.

[25] Whereas Ms. Ferguson's affidavit at para. 14 emphasizes the last part of Mr. Mitchell's para. 10, the Investors have not given notice of any change. Accordingly, the Court does not have any evidence that the Investors' alleged rights are in danger of being imminently eroded. In *Milburn v. Growthworks Canadian Fund Ltd.* at para. 16, Justice Murray stated:

> Rule 6.03(3)(a)'s purpose is that the erosion is sufficiently imminent such that the erosion will occur while waiting for a trial, something that would be significantly lessened by an application.

[26] Whereas the Investors, through their written and oral arguments say that Mr. Fares has "filibustered" and generally delayed matters over the course of three months, I do not find the evidence backs this up. Indeed, exhibit 2 and my consideration of the overall course of the file since inception demonstrate the contrary. Having said this, it must be acknowledged that Mr. Fares has yet to deliver all of the requested financial information. If this problem persists, no doubt the Investors will take steps to compel relevant production.

[27] Having examined all of the evidence, I can find nothing to suggest the Investors' substantive rights are being immediately eroded or will be eroded by the time it will take to bring the matter to trial. Indeed, the facts disclose the Investors

became shareholders approximately seven years ago. The alleged failure of Mr. Fares and the Fares' Companies to provide dividends and information dates back years. For example, the Investors have raised the notion that an April 29, 2014, shareholders' meeting (the precise nature of the meeting is in dispute) was deficient. This allegation obviously eclipses a period of three years.

[28] Given the evidence, it is my determination that if there has been an erosion of the Investors' rights, this has been going on for years. In the result, it cannot be said that there is anything approaching immediate erosion. There is nothing in the evidence to support the idea that a trial will cause erosion of the Investors' rights. In the result, it is my finding that neither of the presumptions favouring an application under CPR 6.02(3) have been met.

Stage 2 – Given my determination that no presumptions apply in favour of an application, are there any presumptions in favour of an action under CPR 6.02(4)?

[29] Given my finding that there is no presumption in favour of an application, CPR 6.02(4) requires me to consider other factors. The first factor (4(a)) pertains to a party who wishes a jury trial. Mr. Fares and the Fares' Companies have indicated they do not intend to exercise their right to a jury trial. Accordingly, the first factor is not applicable.

[30] The second factor (4(b)) reads:

> It is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

[31] Having reviewed the evidence, I am of the view that the second factor is applicable. In this respect, it would be unreasonable to require Mr. Fares and the Fares' Companies to disclose information about witnesses early in this proceeding. Indeed, the Investors have yet to disclose all of their witnesses because in their Notice of Application in Court they say that they expect to file affidavits of Ross Finlay (Fana principal) and Albert Andrews as well as, "such other affiants as may be identified by counsel". Furthermore, Mr. Saunders' May 30 affidavit demonstrates that the Investors are not the sole shareholders of DCDI. In this regard, I have reviewed exhibit A of Mr. Saunders' May 30 affidavit which discloses a copy of the shareholder register for DCDI. This document reveals in the order of ten shareholders other than the Investors. The other investors are obviously not parties to the proceeding; however, when I review the Notice of

Application in Court and Notice of Contest, it becomes clear to me that they have interests and expectations which are relevant to the matter. In this regard, I accept what Mr. Keith has argued at p. 12 of his brief:

> It will take time to consider the views and collect the relevant evidence of these non-parties who obviously have a stake in this proceeding as:
>
> 1. The Applicants [Investors] are seeking preferential treatment for themselves, beyond what is being offered or claimed by other investors holding the same class of shares; and
> 2. The Applicants [Investors] proposed relief is extremely serious and financially onerous. It could well compromise the expectations and interests of fellow investors holding the same class of shares.

[32] Furthermore, I accept the matter is likely to involve multiple issues of credibility beyond those between the parties. Though credibility issues are not determinative in a MTC, they should be weighed heavily. In *Leigh v. Belfast Mini-Mills Ltd.*, Justice Duncan found:

> [103] With respect to Rule 6.02(4)(b), it is apparent that there will be challenges to the credibility of the plaintiffs' witnesses, but it is premature to determine whether or how issues involving impeachment of credibility will arise. It would be unreasonable prior to the completion of document exchange and discovery examination to require the defendants to provide the early disclosure of complete witness information which is contemplated by the application procedure. This consideration is particularly important in this case, as both defendants predict that the issue of credibility, as it relates to the parties, additional witnesses of fact, and experts, will be fundamental to determining the outcome.

[33] In the result, I accept that Mr. Fares and the Fares' Companies should not have to waive their ability to withhold information about witnesses (as they may be called to impeach credibility) at this early stage of the litigation. In my view, it would be unreasonable to require any of the parties to provide early disclosure of complete witness information prior having documentary disclosure and discovery. Accordingly, I find the presumption in CPR 6.02(4)(b) clearly favours the proceeding to be converted to an action. In due course, when a Finish Date is established, the parties will be required to exchange and file witness lists by the time of the Finish Date.

Stage 3 – CPR 6.02(5) & (6) – Further review of factors favouring an application and relative cost and delay as between an action and an application

[34] The next stage my analysis requires me to review Rule 6.02(5) which lists four factors that favour an application. The first of these factors asks whether the parties can quickly ascertain who their important witnesses will be. Even at this early stage, each side has identified key witnesses in the Notice of Application in Court and Notice of Contest; however, this does not end the matter. We know from the DCDI shareholder register that there are further identifiable witnesses. As well, it is reasonable to believe that there are yet to be identified witnesses; i.e., prospective investors who ultimately chose not to become shareholders. On balance, I suspect it will take the discovery of several of the party witnesses, as well as perhaps interviews of other shareholders, before these potentially important further witnesses may be identified. In the final analysis, I am of the view that the parties cannot quickly ascertain who all of their important witnesses will be.

[35] The next factor asks whether the parties can be ready to be heard in months, as opposed to years. The former obviously favours an application in court and the latter an action. From the pleadings, it is clear that there are multiple parties. Given Mr. Saunders' May 17 affidavit, the Notice of Application in Court and Notice of Contest, I accept that the proceeding is factually complex and will be highly contentious. Given the factual issues in dispute and the apparent lack of documents addressing the Investors' allegations (as demonstrated through Mr. Saunders' May 17 affidavit), I believe it is most unlikely that the proceeding can be heard quickly. Given what I have reviewed, I suspect the matter will involve several lengthy discoveries and, on balance, it is my view that it will be sometime before the matter can be heard, thus an action is the preferred route.

[36] The next factor under Rule 6.02 asks me to consider whether the hearing is of predictable length and content. Investors' counsel has suggested a two-day application, whereas counsel for Mr. Fares and the Fares' Companies estimates a trial of five days or more. Having reviewed these estimates, it is fair to say at this stage that the matter is indeed not of a predictable length and content. Further, when I consider the pleadings and affidavit evidence, I conclude that the lengthier estimate is more realistic.

[37] The final factor under CPR 6.02(5) asks me to consider whether the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing through affidavit evidence,

permitted direct testimony and cross-examination. In my view, credibility (and reliability) will very much be in issue in this matter. For example, when I review para. 14 of the Notice of Application in Court, it becomes clear to me that there are in the order of a dozen allegations that are not tied to particular documents (such as financial statements, contracts, plans, circulars, etc.) which would readily allow the trier of fact to cross-reference them. To the contrary, it is my determination that this matter will involve credibility contests of the parties and other witnesses expected to be called. In the result, I am of the view that the traditional trial process will best allow the judge trying the case to assess reliability and credibility.

[38] Rule 6.02(6) provides that the relative cost and delay of an action or an application are circumstances to be considered. Having considered the entirety of the matter, I am of the emphatic view that it cannot be said this matter would proceed more efficiently and less expensively if by way of application. For instance, given the likely number of witnesses, I expect the time and costs associated with preparing to give testimony would be far less than if by way of affidavit. As well, there is no guarantee several potentially relevant witnesses would agree to author affidavits; it may well be that subpoenas will be necessary. Further, given the totality of what I have reviewed, I suspect that if I deny this application, the matter would lumber along and ultimately another MTC would be brought giving the same result, albeit later and at the cost of more time and money.

**Disposition**

[39] In all of the circumstances, I hereby order that:

1. The application in court filed by the Applicants/Respondents is hereby converted to an action;
2. The Notice of Application in Court shall constitute the Statement of Claim;
3. The Notice of Contest filed by the Respondents shall constitute the Statement of Defence; and
4. The Applicants/Respondents shall pay costs in the cause to the Respondents/Applicants in the amount of $1,500.

Chipman, J.