

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nadalini v. Mayana Adar Pharmacy
Limited,*
2026 BCSC 1365

Date: 20260722
Docket: S2830
Registry: Powell River

Between:

Ann Elizabeth Nadalini and Nadalini Pharmacy Ltd.

Plaintiffs

And:

**Mayana Adar Pharmacy Limited, Shema Pharmacy Ltd., Dirk De Villiers and
Ingrid De Villiers**

Defendants

- and -

Docket: S2916
Registry: Powell River

Between:

Mayana Adar Pharmacy Limited, Dirk De Villiers and Ingrid De Villiers

Plaintiffs

And

Nadalini Pharmacy Ltd. and Ann Elizabeth Nadalini

Defendants

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for the Plaintiffs in Action No. S2830
and the Defendants in Action No. S2916:

M. Ostensen

Counsel for the Defendants in Action No.
S2830 and the Plaintiffs in Action No. S2916:

I. Fleming
C. Veinotte
I. Suvorin
H. Fleming

Counsel for the Attendee, Ian Fleming:

S. Hamilton
S. MacDonald

Place and Dates of Hearing:

Powell River, B.C.
February 18-19 and
June 11-12, 2026

Place and Date of Judgment:

Powell River, B.C.
July 22, 2026

Table of Contents

I. INTRODUCTION	4
II. BACKGROUND	6
III. ANALYSIS	11
A. Withdrawal of the Affidavits	11
B. Cross Examination of Ms. McLaughlin.....	12
C. Disqualification of Counsel	13
D. Setting Aside the Subpoena Issued to Mr. Fleming	17
E. Waiver of Privilege.....	19
F. Responsive Statement and Examination	20
G. Other Relief Sought	20
IV. CONCLUSION	20
SCHEDULE A.....	22

I. INTRODUCTION

[1] Before me is an application by the plaintiffs in the lead action, *Nadalini et al v. Mayana Adar Pharmacy Ltd. et al* (“S2830”), for an array of conflict of interest remedies said to flow from:

- a) the filing of affidavits on substantive matters by a paralegal in defendants’ counsel’s office (the “Affidavits”); and
- b) defendants’ counsel’s alleged direct involvement in the substantive disputes between the parties.

[2] The defendants have filed their own application seeking to withdraw the Affidavits.

[3] Because the trial is scheduled for September 2026, these reasons are abbreviated. In summary, I order as follows:

- a) The defendants’ application to withdraw the Affidavits is dismissed;
- b) The plaintiffs may conduct a two-hour cross-examination of the Affidavits’ deponent, the paralegal Heather McLaughlin¹, on the following topics:
 - i. The sources of the information on the substantive topics addressed in the Affidavits as detailed in Schedule “A” to this judgment (the “Substantive Evidence”); and
 - ii. If Ms. McLaughlin has first-hand knowledge of any of the issues addressed in the Substantive Evidence, her evidence on those issues.
- c) Barring alternate arrangements being agreed to by the parties, Ms. McLaughlin will make herself available for examination on at least three

¹ Ms. McLaughlin used the last name Heppner for some of the Affidavits. However, I have used her current last name in this judgment.

dates over the next two weeks (the “Examination”). The plaintiffs may select their preferred date for the Examination from these options.

- d) Mr. Fleming may provide a responsive statement to the plaintiffs’ questions raised in their letter dated August 27, 2025, within the next two weeks. The plaintiffs have leave to seek further directions from the Court depending on any response received.
- e) If Ms. McLaughlin gives evidence on the Examination that:
 - i. she has first-hand knowledge of any of the Substantive Evidence, or
 - ii. Mr. Fleming is the source of any of the Substantive Evidence,Mr. Fleming is disqualified from acting further for the defendants.
- f) If Ms. McLaughlin gives evidence that Mr. Fleming is the source of any of the Substantive Evidence, the subpoena issued by the plaintiffs to Mr. Fleming (the “Subpoena”) is upheld. Otherwise, the Subpoena is set aside.
- g) The defendants are deemed to have waived privilege over any Substantive Evidence on which Ms. McLaughlin indicates she has first-hand knowledge or that the source of the information was Mr. Fleming. Further document production flowing from any such deemed waiver shall be provided within two weeks of Ms. McLaughlin providing such evidence; and
- h) If there is any dispute over the scope of the Substantive Evidence or the document production requirements arising from these orders, the parties may return to Court for further direction.

II. BACKGROUND

[4] This case involves a dispute between two pharmacists who operated out of retail premises known as “The Medicine Shop” at Unit 111-4871 Joyce Avenue, Powell River, BC (the “Premises”). Their disagreement has resulted in regulatory complaints, as well as claims of wrongful dismissal, corporate oppression, and breaches of contract.

[5] Ann Nadalini began working for the defendant, Mayana Adar Pharmacy Ltd. (“Mayana”), in or about 2019. The terms under which she worked for Mayana are contested. Ms. Nadalini says she was an employee. The defendants say there was a services contract with Ms. Nadalini’s personal services corporation, the plaintiff Nadalini Pharmacy Ltd. (“NPL”).

[6] Ms. Nadalini alleges that Mayana faced cash-flow problems in 2020 and that the defendants sought an investment from her. NPL became a 10% shareholder in Mayana. There is no dispute that the defendants sold 20 Class B and 20 Class C shares in Mayana to the plaintiffs for \$100,000 pursuant to a share purchase agreement (“SPA”). The proper interpretation of the SPA is contested, including whether additional implied terms exist and were breached.

[7] The relationship between Ms. Nadalini and the personal defendant pharmacist Dirk De Villiers began to deteriorate shortly after NPL’s investment in Mayana. The plaintiffs allege that on February 4, 2022, Ms. Nadalini was dismissed without cause. The fact and terms of such termination are disputed. The defendants instead allege that they ended the services contract with NPL on February 4, 2022.

[8] The plaintiffs allege that the defendants acted oppressively towards them as the relationship worsened, including by failing to repurchase their shares, and by failing to share funds received as a return of capital.

[9] The plaintiffs commenced action S2830 on May 5, 2022. The claim seeks remedies for the alleged wrongful dismissal and oppression.

[10] After filing S2830, Ms. Nadalini declined to sign the annual attestation (the “Attestation”) required to extend Mayana’s pharmacy licence, which was set to expire on September 30, 2023. Ms. Nadalini alleges that Mr. De Villiers’ ethical breaches prevented her from signing the Attestation. The defendants argue that Ms. Nadalini had a duty to sign the Attestation. This failure to sign resulted in difficulties for Mayana.

[11] On September 11, 2023, Ms. Nadalini was examined for discovery by Mr. Fleming, including as to the absence of any written employment contract or shareholders’ agreement between the parties:

Q. Yes. And -- and your -- you continually asked to be hired for 24 hours a week and the answer was no; correct?

A. No, I did not continually ask. I asked upon when I was first asking about working there. And I may have asked one more time when the other pharmacist retired. At negotiation for the share purchase agreement, that’s when it was stipulated that I would, if we went through with the share purchase agreement, I would be hired for 24 hours a week at a payment of \$5,000 a month. So that was discussed. It was decided not to make a formal document of that because [Mr. De Villiers] gave me his word, a gentleman’s agreement, that that’s indeed what he would do.

196 Q. Why didn’t you insist on a formal written agreement?

A. My lack of maybe business savvy. But also my trust in [Mr. De Villiers].

...

206 Q. Did you instruct your lawyer not to include that in the share purchase agreement?

A. The share purchase agreement is a separate document, as I understand it, to a partner’s agreement or an employment agreement. That would have been a different document that would have had to have been created and paid for. We chose not to get that created and paid for separate from the shareholders’ agreement. It’s not the same document as I understand it now.

...

499 Q. So you don’t have a shareholders’ agreement, do you?

A. I have a share purchase agreement.

500 Q. Yes, correct. I think to a non-lawyer that’s an understandable kind of confusion.

A. It is.

501 Q. But I am correct in that you do not have a shareholders’ agreement; correct?

A. Or an employment agreement or a partner's agreement in writing.

502 Q. Correct, okay.

A. But we have those agreements verbally.

503 Q. Okay. All right. So what are the terms of your shareholders' agreement that's verbal?

A. The shareholders' agreement itemizes my employment agreement.

504 Q. So the shareholders' agreement is the employment agreement?

A. That's my lack of knowledge for the -- for the naming of it, but I'm calling it an employment agreement. You call it a shareholders' agreement. I'm calling it an employment agreement.

[12] On September 27, 2023, Mr. Fleming wrote a letter (the "Letter") to Ms. Nadalini discussing Ms. Nadalini's continued resistance to filing the Attestation. The Letter stated, *inter alia*:

Because it is urgent, we will be taking steps this evening that will be expensive and irreversible.

[13] This Letter was followed by Mayana's September 30, 2023 decision to transfer its assets to the defendant Shema Pharmacy Ltd. ("Shema"). This transaction (the "Transaction") eliminated the need for Ms. Nadalini to complete the Attestation for Mayana because the new party operating the pharmacy was Shema, not Mayana.

[14] The plaintiffs complain that they were not permitted to vote on the Transaction, and that the Transaction was a fraudulent conveyance pursuant to the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163.

[15] On October 11, 2023, Ms. McLaughlin, a paralegal with Mr. Fleming's firm, filed an affidavit addressing several substantive matters in dispute, as detailed in Schedule "A" to this decision. As noted in Schedule "A", much of this evidence is unattributed. This affidavit was filed in support of an application to adjourn the trial set for January 15, 2024. This application to adjourn was granted by the Court.

[16] On February 22, 2024, Ms. McLaughlin filed a further affidavit addressing substantive matters, again as detailed in Schedule "A". And again, much of this

evidence is unattributed. This affidavit was filed in support of the defendants' response to the plaintiffs' application to add Shema as a defendant in S2830. This application was heard on February 26, 2024, and was allowed by the Court. The plaintiffs filed an amended notice of civil claim including Shema as a defendant on April 17, 2024.

[17] The defendants began their own claim alleging breaches of contract by the plaintiffs on August 30, 2024 ("S2916"). On November 25, 2024, an order was issued providing that S2830 and S2916 would be tried at the same time.

[18] On August 27, 2025, counsel for the plaintiffs sent Mr. Fleming a letter raising conflict of interest concerns arising from his involvement in the substantive matters at issue. Referencing Rule 7-5 of the *Supreme Court Civil Rules*, and the decision in *Stelmaschuk v. The College of Dental Surgeons*, 2017 BCSC 1371, the letter asked Mr. Fleming to provide:

... a responsive statement about the transfer of the assets and undertaking of Mayana Adar Pharmacy Ltd. to Shema Pharmacy Ltd. on or about September 30, 2023, and about your dealings with the College of Pharmacy relating to the 2023 attestation.

[19] On March 3, 2026, Mr. Fleming indicated that his response to the letter would be provided in the form of his response to any application.

[20] On September 5, 2025, the plaintiffs brought an application to disqualify Mr. Fleming from continuing to act for the defendants. This application before the Court (the "Plaintiffs' Application") was amended further to this Court's order on March 5, 2026. Beyond the issue of disqualification, the Plaintiffs' Application now also seeks, among other relief: (i) orders relating to the examination for discovery of the defendants, including answers to discovery requests and objections; (ii) orders concerning document disclosure; (iii) relief under the *Business Corporations Act* regarding the affairs of Mayana; and (iv) the striking of the defendants' response to civil claim.

[21] On November 21, 2025, Ms. McLaughlin filed a third affidavit addressing substantive matters, as detailed in Schedule “A”. Once again, much of this evidence is unattributed. This affidavit was filed in support of the defendants’ response to the plaintiffs’ application to compel Mr. Fleming to provide a responsive statement to the plaintiffs’ August 27, 2025 letter. This application was first considered on December 1, 2025, and resulted in the Court issuing certain disclosure orders.

[22] On January 6, 2026, the plaintiffs issued the Subpoena to Mr. Fleming. In response, on January 27, 2026, Mr. Fleming filed his own affidavit (the “Fleming Affidavit”) stating, *inter alia*:

31. My client informed me and further deposed to the fact that the transfer of assets from Shema to Mayana was handled by the law firm CR Lawyers, while the transfer of the licence was handled by Witten LLP who are counsel for the Medicine Shoppe franchise. Pursuant to the Order Made At Trial Management Conference by Associate Judge Dick on November 25, 2024 (the “Order”), counsel for the Plaintiffs has access to the entirety of the file of the law firm CR Lawyers and as I was not involved in those matters, as the Plaintiff is aware.

[23] On March 17, 2026, Mr. De Villiers swore an affidavit stating, *inter alia*, that “At all material times, Ian Fleming acted for me and the corporate defendants in his role as legal counsel.”

[24] On June 8, 2026, the plaintiffs provided a will-say statement from the plaintiffs’ corporate solicitor, Katya Buck, stating:

[Ms. Nadalini] had written to Rob Villani on May 11, 2020 regarding a shareholders agreement. [Ms. Nadalini’s] instruction to Rob referenced employment terms as well.

On May 28, 2020 I met with [Ms.] Nadalini regarding the purchase of the Mayana shares.

As [Ms. Nadalini] was an employee I recommended an employment agreement.

I recommended a shareholders agreement.

[Ms. Nadalini] instructed me to proceed. I drafted a shareholders agreement and employment agreement, based on [Ms. Nadalini’s] instructions.

On July 15, 2020 [Mr.] Fleming said that there was no need for written agreements. On July 16, 2020 [Ms. Nadalini] said that there was no need for written agreements.

However, [Ms. Nadalini] did not say that the drafting I had done was not what [Ms. Nadalini] and [Mr. De Villiers] had agreed to.

[25] On June 9, 2026, Mr. Fleming brought an application to set aside the Subpoena. Although this application had not yet fully crystallized at the time of the hearing before me, the plaintiffs agreed it was logical to consider it alongside their own application given the intertwined nature of the issues.

[26] The trial is set to proceed before me on September 28, 2026 for 13 days. As such, there is an urgent need to resolve the issues raised by the parties' respective applications.

III. ANALYSIS

A. Withdrawal of the Affidavits

[27] The defendants seek to withdraw the Affidavits.

[28] The proper approach to the question of whether an affidavit may be withdrawn was discussed by Master Brine in *P.G. v. L.S.G.*, 2004 BCSC 518:

[36] In summary, it appears that there is discretion in the court to order that affidavits filed in the court file may, upon application, be withdrawn. Among the factors to be considered by the court upon such an application are the following:

1. Was the affidavit filed by mistake?
2. Has the affidavit been used, in the sense of having been before the court, during the course of considering an application?
3. Is there a pending application before the court for which a party has indicated it intends to rely upon the affidavit?
4. Is the application to withdraw the affidavit made as a strategic or tactical decision to deny the other party access to relevant information or the ability to cross-examine the deponent?
5. Would the other party be prejudiced in any way by the withdrawal of the affidavit?
6. Are there policy considerations which would militate against a withdrawal of the affidavit?
7. Would the administration of justice be adversely affected by the withdrawal of the affidavit?

[29] Applying those factors here:

- a) The Affidavits were not filed by mistake. There is no admission of such an error in the defendants' materials.
- b) The Affidavits were used and were before the Court on a variety of applications.
- c) The Plaintiffs' Application seeks to rely on the Affidavits.
- d) I infer that the withdrawal application is brought as a strategic or tactical measure, given the negative impact the Affidavits may have on the defendants' position in the conflict of interest applications if they are not withdrawn. No other reason was given for seeking the extraordinary step of withdrawing the Affidavits.
- e) The plaintiffs would be prejudiced by the withdrawal of the Affidavits, as it would greatly reduce the weight of the evidence supporting the disqualification motion.
- f) There are policy considerations that militate against the withdrawal of the Affidavits since, absent such Affidavits, it may be impossible to investigate and determine the source of the Substantive Evidence.
- g) Given the adverse impact on the Court's ability to fully consider the respective applications, the administration of justice would be negatively affected by the withdrawal of the Affidavits.

[30] The weight of these factors weighs heavily against withdrawal, and I decline to grant the order.

B. Cross-Examination of Ms. McLaughlin

[31] Given the lack of disclosure of the source of the Substantive Evidence in the Affidavits, I find that a cross-examination of Ms. McLaughlin is necessary and appropriate, although it should be limited as set out above in paragraph 3.

C. Disqualification of Counsel

[32] Disqualification of counsel is an extraordinary remedy, to be approached with caution and rarely invoked: *Gichuru v. Purewal*, 2017 BCCA 281 at para. 17. Any remedy short of disqualification should be considered first, as the right of a party to be represented by counsel of their choice is an important element of our legal system: *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36 at para. 56.

[33] A lawyer's involvement in a case which leads them to be a material witness may cause them to be disqualified, based on the conflict between their duty to the Court and their duty to their client. In assessing whether such a conflict has arisen, the following factors should be considered:

- a) how likely the lawyer will be a witness;
- b) the materiality and significance of the lawyer's evidence;
- c) the likelihood of a real conflict or that the evidence will be tainted;
- d) the stage of the proceedings;
- e) the timeliness of the motion;
- f) the impact of removal of counsel on his or her client's right to be represented by counsel of choice;
- g) the good faith of the party making the application;
- h) the mode of trial (whether judge alone or judge and jury);
- i) who will call the counsel as a witness; and
- j) the current and past relationship between counsel and the parties involved in the litigation:

Axion Ventures Inc. v. Bonner, 2026 BCSC 90 at paras. 50–51.

[34] The mere potential that a lawyer will be called as a witness is not sufficient to disqualify the lawyer, and a decision against disqualification may be revisited later as circumstances develop: *Gardner v. Viridis Energy Inc.*, 2012 BCSC 19 at paras. 33, 36.

[35] The plaintiffs submit that Mr. Fleming should be disqualified because he and his firm have “entered the fray” through:

- a) the Substantive Evidence provided by Ms. McLaughlin in the Affidavits;
- b) the Letter;
- c) the Fleming Affidavit;
- d) Mr. Fleming’s decision to act for Mayana and against the interests of Mayana’s minority shareholder, NPL; and
- e) his direct involvement in the substantive disputes between the parties.

[36] Applying the careful approach to disqualification outlined above, I am not convinced that the evidence currently available supports the extraordinary remedy. More would be required. My orders above are designed to:

- a) allow for additional evidence to be gathered; and
- b) direct the appropriate outcome on disqualification depending on the results of that additional evidence.

[37] I find that this approach is the most appropriate remedy short of outright disqualification, and that it should be pursued before disqualification.

[38] Regarding the first alleged basis for disqualification, the cross-examination of Ms. McLaughlin and any responsive letter from Mr. Fleming should reveal whether Mr. Fleming or the firm is the source of any Substantive Evidence. If the firm is the source of such Substantive Evidence, it would have important material evidence on the matters directly at issue, and it should be disqualified. Having such evidence

would be a real concern for the proper operation of the trial, given the high likelihood that Mr. Fleming would be a necessary witness. That said, I am suspicious that the references to Substantive Evidence in the Affidavits may simply have been a sloppy way of flowing through the clients' own evidence, which would not be a basis for disqualification (although the firm's conduct may still be relevant to costs).

[39] As for the Letter, I do not find that its language supports the conclusion that Mr. Fleming is likely to be a material witness. I read the Letter as counsel simply channelling his client's position when he uses the word "we". Mr. Fleming is adopting a hard-line approach in the Letter, but taking an aggressive position on behalf of one's client does not mean that (1) the lawyer or the client intends to waive privilege, or (2) the lawyer has necessarily "entered the fray" to the extent that disqualification is necessary.

[40] As to the third basis, I do not find that the key paragraph from the Fleming Affidavit is sufficient to require disqualification, or to constitute a privilege waiver. Although the plaintiffs suggest that Mr. Fleming must have been involved in developing the plan for the allegedly oppressive asset transfer to Shema, they lack evidence to support such an allegation at this time. I find that the details cited above from the Fleming Affidavit are insufficient to allow me to infer that Mr. Fleming was directly involved in the Transaction or in developing the basis for pursuing it. This position may change based on the Examination, responsive letter, and potential further document production. But currently, I find myself unable to draw such an inference.

[41] In terms of the fourth basis, I agree with Mr. Fleming that the plaintiff's position that he ought to be disqualified because he is corporate counsel for Mayana is contrary to the jurisprudence. A company is a distinct legal entity from its shareholders, and it is a "fundamental error" to equate a corporation with its shareholders in matters of legal representation: *Bhatti v. Yellow Cab Company Ltd.*, 2023 BCSC 2530 at para. 30.

[42] On the fifth basis, the plaintiff alleges that Mr. Fleming has material evidence relating to (1) the formation of the SPA, (2) the decision not to have a written employment agreement or shareholders' agreement, (3) the Transaction, (4) the prospective sale of the business to third parties in 2023, and (5) Mr. De Villiers' dealings with the College. I find that the plaintiffs have not met the burden of establishing a disqualifying level of direct involvement arising from Mr. Fleming's conduct on these points, at least as the evidence sits presently. The plaintiffs' evidence about Mr. Fleming's involvement on these topics is largely conclusory and lacking in particularity. Furthermore, what is most relevant for the purposes of the upcoming trial is the interpretation of the SPA. There are no evident material issues regarding the SPA's formation (regarding which Mr. Fleming could potentially have some material information).

[43] As noted above, Mr. Fleming did briefly pursue a line of questioning during Ms. Nadalini's discovery regarding the absence of a written employment agreement. Ms. Nadalini's former corporate counsel, Ms. Buck, does state in her will say statement that it was Mr. Fleming who told her that an agreement was not necessary. While this raises a potential concern, it is notable that, on discovery, Ms. Nadalini did not rely on Mr. Fleming's advice (as communicated through counsel) as her explanation for the absence of an agreement.

[44] Examinations for discovery tend to be meandering and wide-ranging. It is not clear whether defendants' counsel will return (or will feel the need to return) to this evidentiary point again at trial. The issue is of limited relevance, as both parties agree that there was, in fact, no written agreement.

[45] Furthermore, Ms. Nadalini and Ms. Buck clearly had the ability to reject any suggestion from Mr. Fleming to better protect Ms. Nadalini's interests. Although there is a remote possibility of a credibility dispute arising at trial on this issue, I do not believe this risk has crystallized to a degree sufficient to justify depriving the defendants of their choice of counsel. The defendants will need to carefully evaluate

the risk of bringing this issue to the forefront at trial, as it could justify further remedial action at that time, and result in major costs consequences.

[46] Regarding Mr. Fleming's involvement in the Transaction, Mr. Fleming has filed an affidavit stating that a separate law firm handled same. Mr. Fleming's communications regarding this issue could reasonably be interpreted as counsel simply conveying his client's position and intent.

[47] The evidence regarding Mr. Fleming's role in the prospective 2023 sale of the business also lacks the materiality or relevance sufficient to support disqualification. Similarly, the evidence regarding Mr. Fleming's limited dealings with the College regarding the Attestation issue does not amount to his "entering the fray" to the extent necessary to support disqualification.

[48] On all the topics identified, the parties' own evidence is available and far more likely to be central to and determinative of these issues than Mr. Fleming's incidental involvement.

[49] That said, if Mr. Fleming is able and decides to continue acting for the defendants, he and his clients will need to be extremely cautious. Any effort to highlight, elevate, or pursue points on which Mr. Fleming has direct evidence could result in his later disqualification and major costs consequences.

D. Setting Aside the Subpoena Issued to Mr. Fleming

[50] As part of its authority to control its own processes, the Court has inherent jurisdiction to set aside a subpoena if it constitutes an abuse of process. In addition to this inherent jurisdiction, Rule 12-5(39) permits a person who has been served with a subpoena to apply to have it set aside on the grounds that compliance with it is unnecessary or would work a hardship. In determining whether a subpoena should be set aside under Rule 12-5(39), the onus is on the party proposing to call a witness to establish that the witness is likely to have material evidence. Counsel should not be allowed to issue a subpoena "to fish" for material evidence: *McMahon v. Harper*, 2017 BCSC 2328 at paras.176-179, 200.

[51] If there is no basis for a subpoena, in that none of the questions proposed to be asked of the witness relate to the matter in question in the litigation, then the subpoena is considered an abuse of process: *The Law Society of British Columbia v. Yehia*, 2009 BCSC 1759 [Yehia] at para. 16, citing *Williams and Williams v. Stephenson*, 2005 BCSC 450 [Williams].

[52] The onus on the party issuing the subpoena is significant when the proposed witness is counsel for the opposing party, as such subpoenas can cause substantial prejudice by interfering with the opposing party's lawyer-client relationship and choice of counsel. Issuing a subpoena to have counsel testify against their own client is something that ought not to be done except in the "most exceptional circumstances" where the administration of justice demands it: *R. v. 1504413 Ontario Limited*, 2008 ONCA 253 [1504413] at paras. 13–17. As explained in *McMahon*:

[177] The issuance of a subpoena is a serious step. It puts citizens to the inconvenience, and often the expense and lost income, of attending at court. When the person under subpoena is trial counsel, the issuance of a subpoena may require counsel to withdraw, as occurred here. That is a serious matter because it has the effect of interfering with the lawyer-client relationship and the client's choice of legal counsel.

[53] In *Wexler v. Bhullar*, 2006 BCSC 1466, aff'd 2007 BCCA 273, the Court noted:

[36] Where a party in a proceeding subpoenas counsel for the opposite party to give evidence and the subpoena is challenged, the court must carefully scrutinize the circumstances to determine whether that person's evidence is truly necessary to the proceeding or whether the opposing party has issued the subpoena for the improper and collateral purpose of disrupting the proceeding and causing prejudice to the opposing side. In such a case, the court may set aside the subpoena as an abuse of process. ...

[54] A party should not be deprived of their choice of counsel through the issuance of a subpoena without good cause: *Williams* at para. 56.

[55] In assessing whether the evidence of opposing counsel is necessary, the Ontario Court of Appeal held in *1504413* that it is appropriate to consider not just the

nature of the issue on which the proposed witness' evidence is sought, but also: the importance of that issue; the degree of controversy surrounding the issue; the availability of other witnesses or other sources of evidence; the potential disruption of the trial process; and the overall integrity of the administration of justice: para. 17. The Court will consider the extent to which the evidence sought is more easily available from the party itself, rather than their counsel: *Re Dominion Stores Ltd. and United Trust Co.*, [1972] 3 O.R. 662, 1972 CanLII 716 (H.C.J.).

[56] Applying these principles here, and consistent with my findings above, I find that the Subpoena should be set aside unless the cross-examination of Ms. McLaughlin or Mr. Fleming's response reveals that Ms. McLaughlin or Mr. Fleming is the source of the Substantive Evidence. Absent such disclosure, the "exceptional circumstances" required to support such an extraordinary subpoena are not present.

E. Waiver of Privilege

[57] The plaintiffs argue that the Affidavits effectively waive privilege over Mr. Fleming's file, and require further production.

[58] A waiver of privilege is established when the holder of privilege (a) knows of the existence of the privilege, and (b) voluntarily evinces an intention to waive the privilege. Waiver may also be implied by the conduct of a party, where the party advances a legal position which is inconsistent with the maintenance of privilege and fairness and consistency require the evidence to be produced: *Graham v. Canada (Minister of Justice)*, 2021 BCCA 118 at paras. 47–48; *Hainan Dehong Real Estate Development Corporation v. WestBay Partners*, 2022 BCSC 24 at para. 12.

[59] A waiver may be partial: *Biehl v. Strang*, 2011 BCSC 213 at paras. 64-68.

[60] Mr. De Villiers filed affidavit evidence disclaiming any intention to waive privilege, stating that "[any] references I have made to legal advice were general and contextual and were not intended to disclose the substance of that advice".

[61] Consistent with the findings above, I find that any waiver of privilege is limited to, and dependent on, defence counsel's firm being the source of Substantive

Evidence. My direction above regarding the conditional nature of any further disclosure order reflects this conclusion.

F. Responsive Statement and Examination

[62] The plaintiffs seek to examine Mr. Fleming given his alleged failure to provide a responsive statement pursuant to Rule 7-5. I find that, prior to ordering any examination of Mr. Fleming, it is appropriate to grant him an extension of time to respond. Mr. Fleming did not expressly refuse to respond, but indicated that his response would be provided in the form of his formal response to any application. In my view, his response should have been in the form of a letter that could serve as evidence, rather than embedded in a responsive court filing. Furthermore, it is not clear to me that any court filing relied upon by Mr. Fleming was in fact responsive to the issues raised.

[63] The Court will make itself available to hear any application for further directions arising from Mr. Fleming's response (or further failure to respond).

G. Other Relief Sought

[64] I note that (1) the plaintiffs' requests for directions regarding the defendants' discovery objections were resolved summarily during the hearing, and (2) the plaintiffs' application for other relief was adjourned generally due to the lack of available time.

IV. CONCLUSION

[65] Orders are granted as set out above.

[66] If the parties are unable to agree on costs, they may file written submissions as follows:

- a) The plaintiffs may file costs submissions at the earliest 30 days after completing the cross-examination of Ms. McLaughlin. The defendants may file costs submissions on the same timeline; and

- b) Each party shall have 15 days after receipt of the other party's primary costs submission to file a reply.

"Branch J."

SCHEDULE A

Substantive Evidence Referred to in the Affidavits

- 1) The 2019 agreement between Mayana and Nadalini:
 - a. October 11, 2023 affidavit at paras. 4, 6; and
 - b. February 22, 2024 affidavit at paras. 5–7.
- 2) The 2020 SPA between Mr. De Villiers, NPL and Nadalini:
 - a. October 11, 2023 affidavit at paras. 11–22;
 - b. February 22, 2024 affidavit at para. 13; and
 - c. November 14, 2025 affidavit at paras. 7–9.
- 3) The October 13, 2021, emails between Mr. De Villiers and Ms. Nadalini:
 - a. October 11, 2023 affidavit at paras. 7, 8, 10;
 - b. February 22, 2024 affidavit at paras. 8–10; and
 - c. November 14, 2025 affidavit at paras. 5–6.
- 4) The 2022 termination by Mayana of the relationship between Mayana and Ms. Nadalini:
 - a. October 11, 2023 affidavit at paras. 23–25;
 - b. February 22, 2024 affidavit at paras. 21–22; and
 - c. November 14, 2025 affidavit at paras. 10–12.
- 5) Ms. Nadalini’s conduct concerning the Attestation in 2023:

- a. October 11, 2023 affidavit at paras. 29–34.
 - b. February 22, 2024 affidavit at paras. 20–26; and
 - c. November 14, 2025 affidavit at paras. 15–18, 26–29.
- 6) The October 1, 2023, disposition by Mayana to Shema of all or substantially all of Mayana’s assets:
- a. February 22, 2024 affidavit at paras. 27–29; and
 - b. November 14, 2025 affidavit at paras. 38–41.