

Court of King’s Bench of Alberta

Citation: Nova Oculus Canada Manufacturing ULC v Sather, 2026 ABKB 616

Date: 20260903
Docket: 2301 02211
Registry: Calgary

Between:

NOVA OCULUS CANADA MANUFACTURING ULC

Applicant/Appellant/Respondent

- and -

JUSTIN SATHER, MACUMIRA MEDICAL DEVICES
INC., WALTER O’ROURKE, KARMATAR
CONSULTING INC., JANE DOE, JOHN DOE and ABC
CORPORATION

Respondent/Applicant

Reasons for Decision
of the
Honourable Justice C. Dario

Introduction

[1] There are two applications before the court. The first application is brought by Mr. O’Rourke in his personal capacity and as sole shareholder and officer of Karmatar Consulting Inc. (KCI) (collectively, the “O’Rourke Defendants”) seeking leave to provide written interrogatories rather than be subjected to questioning. The questioning relates to a summary trial or trial of an issue (the “Trial”) to address the issues around a Release, Assignment Agreements, and consequential ownership of an Invention (each term defined below).

[2] The second application is brought by Nova Oculus Canada Manufacturing ULC (**Nova**) to obtain declarations waiving privilege over documents in the legal file of Maverick Law, former counsel to MacuMira Medical Devices Inc (**MacuMira**) and Justin Sather (who I will collectively refer to as the “**MacuMira Defendants**”), and to obtain further disclosure from the MacuMira Defendants.

Background

[3] Nova was involved in the development of a biomedical device and system (the “**Invention**”) developed to treat an eye disease known as age-related macular degeneration. In April 2018, the United States Securities and Exchange Commission (SEC) filed a complaint against Peter Pocklington, one of the Directors of Nova, and other individuals involved in Nova (the “**Complaint**”). The Complaint asserted Pocklington founded and *de facto* controlled Nova. Pocklington had previously been sanctioned for securities fraud in Arizona and was involved in raising funds for Nova US. Pocklington was subsequently charged by the SEC due to concealing his role in Nova US, his wife’s indirect ownership of the majority shareholder of Nova US, Pocklington’s involvement in fundraising for Nova US, and misappropriating and misusing some of the \$14 million USD raised. SEC’s final judgment, effective October 2021, required him to pay disgorgement of profits and interest, as well as a significant penalty totalling over \$1.4 million USD.

[4] During this period, Nova was contractually bound to MacuMira, or its predecessor, an investor in the Invention, to meet certain development and approval milestones relating to the Invention. The MacuMira Defendants say MacuMira became entitled to a repayment of \$1 million because Nova failed to achieve the required development and approval milestone by the specified date. They further say Nova was not in a position to make that payment, and that the SEC proceedings in the United States impaired Nova’s ability to raise further capital. Nova has not responded to those assertions. The MacuMira Defendants submit that, absent a different negotiated arrangement, Nova would have been rendered insolvent.

[5] From May 2017 to December 2022, Mr. O’Rourke was President and Chief Financial Officer of Nova. Through a services agreement, KCI and O’Rourke held the role of Chief Executive Officer of Nova. On October 27, 2020, the O’Rourke Defendants, purportedly on behalf of Nova, assigned certain proprietary rights, including intellectual property rights, of the Invention to the MacuMira Defendants (the “**2020 Assignment Agreement**”), which assignment agreement was amended on September 1, 2022 (the “**Amended Agreement**”, collectively with the 2020 Assignment Agreement, the “**Assignment Agreements**”). The consideration paid or exchanged for the assignment of interests in the Invention is not addressed in this Decision, however, under the terms of the Assignment Agreements, Nova would receive ongoing compensation for procedures conducted with the Invention. The principals of Nova, including Mr. Pocklington, did not find out about the Assignment Agreements until some time later. The O’Rourke Defendants were subsequently dismissed by Nova from their various roles on December 7, 2022.

[6] On February 16, 2023, Nova brought an action (the “**Action**”) against the “**Defendants**”, being the O’Rourke Defendants and the MacuMira Defendants. In its Statement of Claim, Nova alleged ownership over certain proprietary rights, including intellectual property rights, to the Invention.

[7] Nova alleges the assets and interests transferred by the Assignment Agreements constituted all or substantially all of Nova's assets, and that Mr. O'Rourke made the Assignments without proper corporate authority as he did not obtain shareholder approval.

[8] On March 1, 2023, Nova executed a Full and Final Release (the "**Release**") in favour of the O'Rourke Defendants, whereby Nova covenanted to discontinue the Action against the O'Rourke Defendants and any party that may claim contribution and indemnity from the O'Rourke Defendants. The next day, on March 2, 2023, Nova and Mr. O'Rourke executed a Memorandum of Understanding (**MOU**). Nova subsequently treated the Release and MOU as void due to alleged non-compliance by O'Rourke with the terms of the MOU. The validity of the Release and MOU are issues for the Trial, as is the question of whether the Release applies to the MacuMira Defendants, as they have filed a crossclaim against the O'Rourke Defendants for contribution and/or indemnity.

[9] On April 24, 2023, the O'Rourke Defendants filed a Statement of Defence in response to Nova's claim. The O'Rourke Defendants contend that the proprietary rights claimed by Nova were validly and irrevocably assigned for good and valuable consideration, including the payment of royalties and other fees, to MacuMira by way of the Assignment Agreements.

[10] The ultimate relief Nova seeks in the Action is a judgment setting aside the Assignment Agreements and the Release, a declaration that Nova is the rightful owner of the Invention, and an award of damages.

APPLICATION 1: EVIDENCE BY WRITTEN INTERROGATORIES

[11] The first issue is whether Mr. O'Rourke, either in his personal capacity or on behalf of KCI, should be exempted from the requirement to attend oral questioning pursuant to Rule 5.24(a) of the *Alberta Rules of Court*, [Alta Reg 124/2010](#) and instead be permitted to be questioned by way of written interrogatories, pursuant to Rules 5.22(b), 5.24, and, to the extent not already caught by those Rules, 5.3(1)(b).¹

[12] Mr. O'Rourke had participated in remote questioning on three prior occasions: August 2023 on his affidavit, March and September 2025 on the Affidavit of Records (relevant to the second application in this Decision). Questioning was scheduled to continue in January 2026, however the day before, questioning was cancelled by counsel for Mr. O'Rourke. In March 2026, Nova's counsel was advised Mr. O'Rourke would not be able to attend due to medical issues, and later that month advised he could not continue with in-person oral questioning on advice of his doctor but could provide written answers to questions. A week later, they provided Nova's counsel a letter from Dr Garside. Nova's counsel responded that the letter was not a sufficient basis for being excused from oral questioning.

[13] In this Application, the O'Rourke Defendants submit an affidavit of Dr Garside sworn May 7, 2026, in which Dr. Garside indicates she is the primary care physician of Mr. O'Rourke. She provides a medical opinion that the "stress of providing evidence under oath by way of questioning

¹ Rule 5.3(1)(b) allows the court to modify or waive any right or power under a rule in Part 5 or make any order warranted in the circumstances, if the expense, delay, danger, or difficulty in complying with the rule would be grossly disproportionate to the likely benefit.

by opposing lawyers would create a reasonable likelihood of serious injury to Mr. O'Rourke's health, and in particular his heart condition." She provides a medical recommendation that he be permitted to provide evidence by way of written interrogatory.

[14] In the letter attached to this affidavit, Dr. Garside further specifies she has been Mr. O'Rourke's primary care physician since 2022. She notes he has a complex medical history and is medically frail. He is a heart transplant recipient and is currently living with progressive idiopathic pulmonary fibrosis. He has also been treated for skin cancer and receives regular psychiatric care as part of his ongoing medical management. She suggests the stress and demands associated with participating in questioning would be detrimental to his health, and that in her medical opinion, he should avoid situations that are likely to cause significant emotional or physical stress, because they could negatively impact his overall health and medical stability.

The Parties' Positions:

The O'Rourke Defendants' Position

[15] The O'Rourke Defendants argue the law allows a party to be excused from oral examination where: there is a likelihood of serious injury from submitting to oral examination; and the party seeking the waiver provides persuasive medical evidence to that effect: *Ms. R v WA*, [2001 ABQB 853](#) [*Ms. R v WA*] at paras [22](#), [23](#), [24](#) and [49](#); *Gouin v Gouin*, [2006 ABQB 96](#) [*Gouin*] at para [16](#). As a case with facts similar to those in the present matter, they cite *Grebely v Economical Mutual Insurance Co*, [2003 ABQB 547](#) [*Grebely*]. In *Grebely*, the plaintiff's physician indicated that the plaintiff was under a great deal of stress as a result of legal proceedings, and the plaintiff was at an increased risk of cardiac consequences associated with the stress from the discovery process. The Court in *Grebely* held that the word "danger" in Rule 216.1(1)(b) (now Rule 5.3(1)(b)) was intended to address this type of situation. The O'Rourke Defendants state the Court ordered written interrogatories in lieu of oral examinations for questions related to information seeking in light of the risk to the plaintiff's health: *Grebely* at paras [5](#), [6](#).

[16] The O'Rourke Defendants suggest that Nova will not be prejudiced: responses to written interrogatories are still under oath, concerns of Nova of deficient responses can be remedied by follow-up questions, with the opportunity to seek further questioning (oral or written) pursuant to Rule 5.28. Thus, Nova will not suffer any loss to their ability to advance their claim. This is an appropriate case to direct the use of written interrogatories.

[17] The MacuMira Defendants contend that Mr. O'Rourke's live testimony is not central to the issues before the court, including whether Mr. O'Rourke had the authority to sign the Assignment Agreements. They assert evidence at the Trial will be largely documentary, particularly regarding the following issues: i) the authority of Mr. O'Rourke, ii) any shareholder approval requirement for such assignment, iii) the consideration Nova received from MacuMira for the Assignment Agreements, and iv) the applicability of and compliance with the Release and MOU. In contrast, paragraph 38(c) of the MacuMira's Statement of Defence says:

O'Rourke expressly or impliedly represented to [the MacuMira Defendants] that he had the necessary corporate authority and approvals to execute the [2020] Assignment Agreement, which representations [the MacuMira Defendants] relied upon.

[18] The Defendants state Nova's legal understanding of the test is incorrect: the test is not that only in the clearest of cases should written interrogatories be allowed to replace oral questioning; rather the test is whether the evidence supports that there is a likelihood serious injury would result from oral questioning.

Nova's Position

[19] The Respondent, Nova asserts that Mr. O'Rourke is a central witness, and his credibility is relevant. To not require him to testify would be highly prejudicial given the loss in spontaneity and immediacy of oral discovery which are central to its truth-seeking function. Further, without dynamic, unscripted, and immediate answers, the responses will be less candid, potentially impacting their truthfulness. There may also be a potential impact on subsequent credibility assessments when compared to responses provided through written interrogatories. Nova asserts the medical information provided is insufficient in light of the importance of this testimony. The evidence provided does not establish O'Rourke's circumstances as the clearest of cases: *Rajalingam v Nanji*, [2022 ONSC 3561](#) [*Rajalingam*] at paras [64](#) and [65](#); *Ferrara v Roman Catholic Episcopal Corp. for the Diocese of Toronto in Canada*, [\[1996\] OJ No 2164](#), 2 CPC (4th) 64 [*Ferrara*] at paras [15](#) and [16](#); cited and adopted in *Rajalingam* at para [64](#).

Analysis

[20] Central considerations in determining whether to exempt a party from oral testimony include the importance (or centrality) of that testimony to the issues before the court, and how persuasive is the justification for excusing the witness from testifying.

Centrality of the Evidence

[21] I find that Mr. O'Rourke's testimony is central to the issues to be determined at the anticipated Trial. His credibility is material to a principal issue in dispute. The court will be required to determine the validity of the Assignment Agreements, including whether Mr. O'Rourke had authority to enter into those agreements on Nova's behalf. The court may also be required to consider what, if anything, Mr. O'Rourke communicated to the MacuMira Defendants about any limits on his authority, and whether the MacuMira Defendants were otherwise aware of those limits. Mr. O'Rourke may have direct evidence on those matters, including through communications he sent, received, or heard concerning his authority or any questions raised about it.

[22] The parties have provided substantially conflicting evidence about what was known concerning Mr. O'Rourke's authority and what representations, if any, were made to the MacuMira Defendants. Mr. Sather, on his own behalf and on behalf of MacuMira, states that he believed Mr. O'Rourke had the authority required to enter into the Assignment Agreements, that Mr. O'Rourke had complied with any necessary internal authorization processes, and that Mr. Sather acted in good faith. Nova, by contrast, relies on statements they say were made by Mr. O'Rourke suggesting that he knew he lacked the necessary authorization and he believed the Assignment Agreements were unenforceable. Nova further says that Mr. O'Rourke confirmed he advised the MacuMira Defendants of the limits on his authority, and that the MacuMira Defendants nevertheless asked him to sign the 2020 Assignment Agreement because Mr. Sather told him the court might later confirm the assignment.

[23] Given the conflict in the parties' positions, and the extent to which some of the evidence may be hearsay, Mr. O'Rourke's own evidence is important to clarifying the issues. I accept Nova's submission that his testimony is central to the matters to be determined, and that there is meaningful value in obtaining that evidence through live questioning, where answers may be tested in a more immediate and responsive manner.

[24] The disclosure from the MacuMira Defendants suggests that, after the 2020 Assignment Agreement and around the time of the March 2023 Release and MOU between Nova and Mr. O'Rourke, Mr. O'Rourke may have been discussing or entering into separate arrangements with both Nova and MacuMira relating to the further development, marketing, or commercialization of the Invention. Those matters may require further exploration. Live questioning is likely the most effective means of doing so, particularly where the questioning may depend on Mr. O'Rourke's answers. There may also be other areas in which his evidence is important and difficult to assess adequately through written interrogatories alone.

[25] The court proposed proceeding by way of a trial of an issue because the validity of the Assignment Agreements and the enforceability of Mr. O'Rourke's Release are central to the dispute as a whole. Given the importance of Mr. O'Rourke's evidence to those issues, the evidentiary basis required to excuse him from live questioning must be correspondingly strong.

Persuasiveness of the Justification for allowing Written Interrogatories

[26] The evidentiary basis required to excuse a party from live questioning must be assessed in light of the importance of the evidence in the particular case. Here, because Mr. O'Rourke's evidence is central to the issues to be determined, the O'Rourke Defendants must provide a persuasive evidentiary foundation for substituting written interrogatories. The authorities indicate that substantial medical evidence may be required even where the evidence sought is less central than it is here.

[27] In **Ms. R v WA**, the witness, Ms. J, was the youngest of four sibling plaintiffs who alleged sexual, physical, and emotional abuse by their parents. The applicant in that case sought orders requiring her to attend for one or more independent expert assessments and an examination for discovery. Ms. J opposed those processes on the basis that they would cause severe psychological stress and a likelihood of significant and lasting harm. Although her evidence appeared *prima facie* to be important to the litigation, the issues in dispute were not whether she had been abused, but the extent of the abuse. There was also other evidence capable of establishing the abuse alleged, which was said to have occurred when Ms. J was between two and five years old. Those factors reduced the centrality of her evidence to the issues for trial.

[28] An even stronger differentiator from the present case, however, is the nature and strength of the medical evidence before the court. In **Ms. R v WA**, the Court observed at paragraph 23 that doctors could not be expected to opine with certainty that injury would result from attendance at discovery, and that certainty was not the applicable test. Rather, the applicant was required to demonstrate a likelihood of serious injury if required to attend for questioning. The issue, then, is what evidence is sufficient to establish that likelihood. The onus to provide a persuasive evidentiary basis rests on the applicant:

The onus rests with the party seeking waiver of oral discovery to establish by persuasive medical evidence that the Plaintiff is unable to attend for discovery (*F. (J.) v. Roman Catholic Episcopal Corp. for the Diocese of Toronto and Canada* (1996), 2 C.P.C. (4th) 64 (Ont. Gen. Div.)).

[*Ms. R v WA* at para [22](#).]

[29] In *Ms. R v WA* at para [3](#), the evidence before the court of the plaintiff's medical condition consisted of affidavits, medical and psychological reports from both sides, and nine days of evidence during which many experts on each side proffered opinions and testified with respect to Ms. J.'s past, current, and likely future condition. While evidence to that degree is not required in every case, the record before the Court in *Ms. R v WA* is not at all similar to the evidence provided by Mr. O'Rourke in this case, which is comprised of a two-page affidavit and one-page letter of Mr. O'Rourke's primary care physician. In *Ms. R v WA*, despite the amount of evidence already before the court, the Justice determined that based on the conflicting evidence, he needed more information in order to make a final determination and ordered a court appointed expert be retained prior to making a determination.

[30] In *Gouin*, the defendant to the action sought to be excused from oral questioning, and instead complete written interrogatories. His evidence was going to be taken *de bene esse*. The Court was provided an affidavit by the treating physician indicating the medical issues he was currently suffering, and noted the witness could "suffer a stroke, heart attack or have a severe recurrence of asthma" if required to submit to oral discovery. She advised he was in daily pain, requiring Morphine and Gabapentin every six hours, and that the participation in the lawsuit already caused a setback to his physical health. She was cross-examined on her affidavit and produced her office chart for Mr. Gouin. The Court commented on the fact there was no exploration during the cross-examination on the degree of likelihood of the medical consequences the defendant could suffer. However, she did address whether accommodations such as half-day sessions, would permit such questioning. A week later, the plaintiffs filed an opposing medical opinion by a physician who had reviewed the affidavit, transcript of cross-examination, and the medical chart, but had never met the witness. That doctor's opinion was that the risk of the outcomes suggested was low. Similar to *Ms. R v WA*, the Court in *Gouin* directed a court appointed medical expert be retained given the unsatisfied onus of proof: *Gouin* at paras [19](#) and [21](#).

[31] The O'Rourke Defendants note that Nova did not cross-examine Dr. Garside on her affidavit or medical letter. They submit that the medical evidence should therefore be accepted as uncontested. I do not accept that submission. Nova's position on this application is that the medical evidence is insufficient to justify excusing Mr. O'Rourke from live questioning. In any event, the court must be satisfied that an adequate evidentiary basis exists before releasing a central witness from live questioning, particularly where the proposed alternative may affect the trial judge's ability to assess the evidence.

[32] The case relied upon by the O'Rourke Defendants as being the most similar to the present case is *Grebely*. In that case, the plaintiffs were suing the defendant contractors for water damage to their home and business. One of the plaintiffs, Mr. Grebely, provided a letter from his doctor indicating the plaintiff had underlying medical problems that put him at risk from a cardiac

perspective, that he was under a great deal of stress as a result of the recent legal proceedings, which had already caused anginal chest pain quite frequently. The doctor recommended a minimization of factors that increase the risk. The doctor states “Although it is difficult to anticipate with certainty the consequences of continuing with the discovery process, one would expect that the fact that he is having increasing angina would place him at increased risk of cardiac consequences with the increased stress this is adding to him”: **Grebely** at para [1](#). The plaintiff proposed written interrogatories followed by oral questioning for 1 or 2 days to minimize the number of days he had to be under the stress of questioning. In **Grebely**, the Court directed written interrogatories (focused on information seeking) *followed by oral questioning*. Notably, given the nature of the litigation, the Court found that the defendants would not be prejudiced in their ability to defend by using written interrogatories: **Grebely** at para [5](#). This along with the fact that the plaintiff was already experiencing chest pains are differentiating factors from the present case, and yet, the Court put no limits on the defendant’s ability to cross-examine in oral questioning: **Grebely** at para [6](#).

Nova cites Ontario authorities in support of its position that a party should be excused from oral questioning only in the clearest cases, where avoiding a significant risk of harm outweighs the opposing party’s entitlement to due process under the Rules: **Rajalingam** at paras [64](#) and [65](#). This test was similarly applied in **Ferrara** at paras [15](#) and [16](#); cited and adopted in **Rajalingam** at para [64](#)). Those cases also affirmed the onus rests squarely with the party seeking waiver of oral discovery to establish by persuasive medical evidence that the plaintiff is unable to attend for discovery.

[33] I find that in Alberta, the test to be applied is whether there is a real risk of serious injury from submitting to oral examination; and the onus is on the party seeking the waiver to provide persuasive medical evidence to that effect: **Ms. R v WA** at para [24](#)². I agree with the Court in **Ms. R v WA** that, where experts are testifying, no specific formula is required in their testimony. It is up to the court to draw reasonable inferences from their testimony as to whether there is a real risk of serious injury. The issue in the present case is whether the evidence is sufficiently persuasive to support such finding.

[34] I assess the medical evidence in light of the applicable evidentiary burden and the centrality of Mr. O’Rourke’s testimony. Dr. Garside identifies Mr. O’Rourke’s diagnoses and describes him as medically frail, with particular concern about his heart condition. However, the evidence does not provide detail about the stage, severity, or progression of his conditions. Nor does it include objective clinical information, a clear explanation linking oral questioning to a probable acute medical harm, or an assessment of the risk if questioning were to proceed with accommodations. In particular, the evidence does not address whether moderated, time-limited, or virtual questioning would be unsafe, or why those measures would be insufficient. On the record before

² From **Ms. R v WA** at para 24:

Finally, it has been raised by the Defence that one or all of the Plaintiff’s experts in their testimony did not specifically indicate that the Plaintiff suffered a real risk of serious injury if she submitted to the medical examination, or a likelihood of serious injury if she submitted to the examination for discovery. I am satisfied that experts need not use any formula in their testimony provided that the import of what they say establishes the real risk or likelihood that is required. It is for the Court to draw reasonable inferences from the expert’s testimony, and if the Court concludes that the reasonable inference is that there is a real risk of serious injury, that meets the tests.

me, the O'Rourke Defendants have not demonstrated that oral questioning in a modified virtual format would pose an unacceptable medical risk.

[35] Dr. Garside does not identify current symptoms or functional limitations that would affect Mr. O'Rourke's ability to participate in questioning, such as shortness of breath, oxygen desaturation, or chronic coughing. The evidence does not include objective clinical information addressing his condition at rest as compared with speaking, pulmonary function test results, or specialist notes bearing on his ability to give evidence. Again, not all of such evidence would be required in every case; these are examples of additional objective evidence that could assist in persuading the court of the risk.

[36] Dr. Garside states that questioning could pose a significant risk to Mr. O'Rourke's health and could be medically destabilizing. However, the evidence does not explain the nature or likely duration of any such destabilization, whether the risk would be transient or more serious, or whether it could be mitigated through medical or procedural supports, such as oxygen or other assistance. Nor does the evidence explain what has changed since Mr. O'Rourke last participated in remote questioning in September 2025. Although Nova did not cross-examine Dr. Garside on these matters, the O'Rourke Defendants bear the onus of demonstrating that oral questioning is not workable.

[37] Dr. Garside's opinion that questioning would pose a significant risk to Mr. O'Rourke's health is an important consideration and is not taken lightly. However, the evidence provided does not indicate what form of questioning was described to her by Mr. O'Rourke, including whether she understood the proposed process to involve ordinary in-person questioning or questioning with accommodations similar to those previously made available to him. The evidence does not indicate that Dr. Garside considered whether those or additional accommodations could reduce the risk to an acceptable level.

[38] Dr. Garside's evidence identifies both physical demands and emotional stress as factors that may affect Mr. O'Rourke's heart condition. Her recommendation is that he avoid situations likely to cause significant emotional or physical stress. That concern must be considered. At the same time, the physical demands of questioning typically can be reduced through appropriate accommodations, and the stress associated with giving evidence may also be mitigated to some degree by a structured and moderated process.

[39] Accommodations that could be considered in this case include:

- Testifying remotely by video in comfortable surroundings;
- Short questioning sessions;
- Frequent breaks;
- Testimony with oxygen support (if appropriate); and
- A partial testimony by written interrogatories, followed by oral questioning on the issues pertaining most critically to credibility. (A hybrid approach, like in *Grebelly*)

[40] In a case such as this, potential accommodations should be considered and commented on by the opining physician, and addressed by the court, before a central witness is excused from live questioning. Given the apparent importance of Mr. O'Rourke's testimony, the court must be satisfied that oral questioning would create a serious risk to his health even if appropriate accommodations were implemented.

[41] I accept that the stress associated with questioning cannot be eliminated entirely, and that litigation may negatively affect a participant's well-being, at least in the short term. However, general assertions of stress or feeling overwhelmed are not sufficient to displace the usual entitlement to oral questioning: *Cinciruk v Mlazga*, [2007 ABQB 298](#) at para [11](#).

[42] In short, having regard to the centrality of Mr. O'Rourke's anticipated evidence, the O'Rourke Defendants' onus on this application, and the prior use of remote questioning with accommodations, I am not satisfied that the record provides a sufficient basis to excuse him from live questioning. The medical evidence does not adequately address any material change in his condition since the September 2025 questioning, nor does it explain why reasonable accommodations would be insufficient to permit some form of live questioning. The request to proceed by written interrogatories in place of live questioning is therefore denied, subject to the further accommodations for a hybrid approach to questioning directed by the Court below.

[43] Although the preceding conclusions are sufficient to dispose of the request to replace live questioning with written interrogatories, I also note that the record raises concerns about delay in completing Mr. O'Rourke's questioning and in responding to undertakings. To the extent those concerns are established, they do not assist the application to substitute written interrogatories for live questioning. They do, however, inform the conditions that should accompany any modified or hybrid questioning process, including timelines for written answers and safeguards to ensure the process remains efficient and responsive.

[44] Given the accommodations proposed by Nova, the medical concerns identified by Dr. Garside, and the availability of a hybrid process in appropriate cases, I exercise my discretion to direct a modified procedure under Rule 5.24(b). Mr. O'Rourke may answer some examination questions by written interrogatories in advance, on a short timeline, with the balance of questioning to proceed orally. Consistent with the approach in *Grebely*, Nova may determine which questions should first be answered in writing, with a focus on information-seeking questions. That process does not preclude Nova from asking different or follow-up questions in oral questioning. Given the prior procedural history and concerns about responses to undertakings, the scope of written interrogatories will remain within Nova's discretion and have a short response timeframe.

[45] The purpose of this procedure is to reduce the amount of time Mr. O'Rourke must spend answering questions orally. It may also assist where some questions require him to review timelines or documents on matters that do not materially engage credibility. Addressing those questions in writing may reduce the stress associated with having to respond immediately in oral questioning.

[46] The court does not limit the total length of questioning. However, consistent with Nova's proposal, questioning shall proceed in intervals of no more than 20 minutes. This may be extended at Mr. O'Rourke's discretion at the end of each 20-minute period. No day of questioning shall

exceed four hours unless Mr. O'Rourke agrees at the end of that period. The parties shall schedule a day of rest, or additional rest days by agreement, between questioning days, bearing in mind any scheduling constraints.

[47] If the parties cannot agree on the structure of the questioning, they may request a further attendance before me to clarify the terms of the procedural order. In the absence of a medical opinion addressing the proposed accommodations, the parties may agree to different or additional accommodations if appropriate.

[48] If Mr. O'Rourke's medical circumstances materially change, or if the modified questioning process gives rise to medical concerns not addressed on the present record, he may return to court for further directions supported by additional medical evidence.

[49] With respect to undertakings from the September 25, 2025 examination of Mr. O'Rourke not yet responded to, the O'Rourke Defendants shall serve their responses within 30 days of this Decision or 15 days from service of the Order emanating from this Decision, whichever is later. The terms of the Order shall include a show-cause review hearing date should the undertakings not be fulfilled by that date, subject to the appropriate method of service.

APPLICATION 2: FURTHER DISCLOSURE

[50] In the second application, Nova seeks a declaration that the MacuMira Defendants waived privilege over documents in the legal file of its prior counsel, Maverick Law, and to obtain further disclosure from the MacuMira Defendants.

[51] The MacuMira Defendants state that Maverick Law was retained only by MacuMira's predecessor, Nova Macula Medical Devices Inc., to negotiate and provide legal representation in relation to the October 27, 2020 Assignment Agreement (the "**2020 Assignment Agreement**"). The MacuMira Defendants state that Maverick Law was not retained by any other party. MacuMira further states that it later retained its current counsel, BD&P, to provide legal representation in relation to the September 1, 2022 Amended Agreement (the "**Amended Agreement**").

[52] At the relevant time, Mr. O'Rourke was Nova's President and Chief Financial Officer and a director. He acted, or purported to act, on Nova's behalf in relation to the Assignment Agreements. He did not retain Canadian counsel for Nova in relation to those agreements. In his affidavit, Mr. O'Rourke suggests that Nova's counsel for the Assignment Agreements was Stinson [Leonard Street LLP] in the United States. In questioning, however, he confirmed that he did not retain any counsel. The disclosure suggests that communications concerning the 2020 Assignment Agreement occurred directly among Mr. O'Rourke, Mr. Sather, on behalf of MacuMira, and Maverick Law. It does not appear that Stinson became involved until September 1, 2022, the effective date of the Amendment Agreement.

[53] Nova states that Stinson did not become aware of the transaction until September 1, 2022, when an Australian patent attorney contacted Stinson about the change in ownership of patents associated with the Invention to MacuMira. Nova further states that Stinson counsel then discussed the assignment with Mr. O'Rourke and later relayed comments from notes of that conversation. Those comments included statements to the effect that Mr. O'Rourke believed Mr. Pocklington would be angry when he learned of the assignments, that Mr. O'Rourke feared he might be fired,

and that he knew there was an issue about whether he had authority to enter into the transaction on Nova's behalf. The Stinson counsel's notes are not in evidence.

[54] On November 24, 2022, Nova (meaning Nova's shareholder(s) and/or directors other than Mr. O'Rourke) learned of the Assignment Agreements. There may be a dispute between the parties regarding who were the other directors of Nova at that time, if any. Nova provided a copy of an email that Mr. O'Rourke sent to Mr. Pocklington and another acting or former director (Lance Eldred) from November 24-25, 2022, prior to his termination, admitting:

- a. "I did it alone because it was in the best interest of the company and because if you wished to challenge the legality you could say you had no knowledge."
- b. "I would never have agreed to this if I thought it was enforceable."
- c. "I get my own legal opinion. My guys say there is no way I have the authority to assign the assets of the company without consent. I tell Justin [Sather] this. His group still wants to proceed with the threat and the agreement. Their belief is that if this went to court, my actions would be exonerated because the company was going broke, was under SEC investigation, and I acted in the best interests of the shareholders, including Peter [Pocklington]."

[55] Nova alleges that the O'Rourke Defendants engaged in breaches of duty and other wrongdoing by effecting a secret sale of all or substantially all of Nova's assets to MacuMira without authorization or shareholder approval. Nova further alleges that all Defendants knew Mr. O'Rourke lacked authority to enter into an agreement for the sale of all or substantially all of Nova's assets without shareholder approval, which he did not seek. Nova says that, in connection with the transfer, the Defendants sought advice from Maverick Law about the legitimacy of an agreement entered into on that basis. Mr. O'Rourke, acting or purporting to act on behalf of Nova, was a recipient of, or participant in, several of those communications.

[56] Nova submits that it has had difficulty obtaining a complete Affidavit of Records from the MacuMira Defendants. When disclosure was provided, Nova says the initial production was incomplete. Nova had been seeking further disclosure since July 2023. It later received an additional 51 documents and raised concerns about the parties to whom BD&P had been providing legal advice. A further tranche of 130 pages was delivered to Nova on May 22, 2026, shortly before this Application. Nova maintains that the production remains incomplete.

[57] The record suggests that Maverick Law's process for identifying records for production was limited to the use of one or more electronic search terms. Nova is concerned that the entire file was not reviewed for disclosure. That concern has some force. The record does not disclose what search terms were used, whether the terms were sufficiently broad, whether the search would capture variations or misspellings, or whether it addressed any physical file materials not included in the electronic file. Nova also submits that, given the circumstances of this case, some materials that ought to have been produced may have been withheld on the basis of an overly broad or incorrect application of solicitor-client privilege.

[58] Nova asserts that Maverick Law provided advice concerning Mr. O'Rourke's authority to commit Nova to the 2020 Assignment Agreement despite the absence of shareholder approval, and that Maverick Law's legal opinions or advice were shared with the O'Rourke Defendants.

[59] By way of example, Nova relies on a draft of the 2020 Assignment Agreement containing comments from Dave Ryan, Mr. Sather, and Mr. O'Rourke. Section 12 addresses Nova's representation and warranty that it had the right to enter into the agreement and was the beneficial owner of all rights, title, and interest in the intellectual property relating to the Invention. In the comments to that section, Mr. O'Rourke stated, in substance, that if Maverick Law had not already provided an opinion, "we are looking for an opinion to prove due diligence was done." Mr. Sather responded that this was a good idea and asked whether Mr. Ryan could provide "us" with a letter to that effect. It is not clear from that exchange, or from other comments in the draft, whether "we" and "us" referred to the O'Rourke Defendants and the MacuMira Defendants collectively, to Nova or MacuMira individually as applicable. Mr. Ryan responded that he had concerns about providing such an opinion given unexpected circumstances encountered in previous transactions, but that he could provide a letter assessing the chain of title to Nova's ownership of the intellectual property. In his covering note to Mr. O'Rourke and Mr. Sather, Mr. Ryan indicated that he would work on that opinion promptly. None of the Defendants produced the opinion letter referenced in this communication.

[60] Nova submits that the contemplated opinion related to Mr. O'Rourke's authority to enter into the 2020 Assignment Agreement on behalf of Nova, which opinion is central to the issue before the court. I am not satisfied the record supports that conclusion. The comments appear directed more so to due diligence concerning Nova's representation about ownership of the intellectual property. Even so, the exchange remains relevant. If Maverick Law was being asked, at Mr. O'Rourke's request, to provide diligence support or a legal opinion for a representation made by Nova, that may bear on the nature of the communications and the parties for whom the advice was being provided. Alternatively, if the diligence was intended for MacuMira, Mr. O'Rourke's use of "we" to describe the need to prove that diligence had been done may require further explanation, given that Nova and MacuMira were contracting parties with potentially conflicting interests under the proposed agreement. Nova is not in this Application asserting that Maverick Law was engaged by or acted on behalf of Nova.

[61] Nova also relies on other materials which, it says, show that Maverick Law provided advice to Mr. Sather, as MacuMira's representative, concerning Mr. O'Rourke's authority to enter into the 2020 and 2022 Assignment Agreements, and that this advice was shared with O'Rourke. The O'Rourke Defendants produced several emails, including a September 20, 2021 email forwarded to Mr. O'Rourke by Mr. Sather, which set out Maverick Law's responses to questions from Mr. Sather. This included the following excerpt:

Justin - see the below. This was to go out Thursday but I see it's still in my outbox. Once you have had a chance to look at it let me know if you want to book a call to flesh anything below out.

[repeating Sather's question to Ryan]

- Does Peter's resignation strengthen our position'? is there anything else we can do to strengthen our position?

[Ryan's answer]

- I don't have an empirical answer for this. but based upon the press release, if it is the case that the original investors are being compensated, then that would certainly limit or end any ability they would have to try to take action against anything north of the border. ...

[62] The following exchange is from Mr. Sather's examination relating to the 2022 Assignment Agreement:

Q. Did Maverick Law provide advice to you and Walter [O'Rourke] concerning Walter's authority to enter into the 2022 assignment?

A. Yes.

[63] The context for this question and answer is limited. In another excerpt from Mr. Sather's questioning, he states that he is not aware of any conversations between Maverick Law and Mr. O'Rourke that did not include him. He also does not recall any conversations with Mr. O'Rourke concerning potential challenges to the 2020 Assignment Agreement.

[64] Nova also provided an excerpt from Mr. O'Rourke's questioning. In that excerpt, Mr. O'Rourke testified that he did not receive a copy of the Maverick Law legal opinion, but referred to a discussion or communication involving someone at Maverick Law. Mr. O'Rourke's response is not entirely clear. Read in context, I understand Mr. O'Rourke to be saying that he did not advise Maverick Law of Nova's full business circumstances, but that Maverick Law nevertheless indicated that, if the Assignment Agreements were challenged on the basis that he lacked authority, the challenge could be successfully defended because the agreement was in Nova's business interests, regardless of the outcome for Mr. O'Rourke personally. He subsequently confirmed he did not have any written communications from Maverick Law to this effect. Mr. Sather, in his questioning, did not recall any such conversation.

[65] Nova also provided an email from Mr. O'Rourke to Mr. Sather that appears to relate to the communication Mr. O'Rourke described in his questioning. In that email, Mr. O'Rourke relayed his understanding of Maverick Law's position on the likely outcome if the Assignment Agreements were challenged:

They [other directors/shareholders of Nova] ask to see the [Assignment Agreements]. I believe this can be problematic. There is no doubt I do not have the authority to make such a substantial deal without the knowledge and consent of the largest shareholder. This deal will be challenged. Maverick acknowledges that, and I think they are correct in assuming we will win that challenge.

This email is from April 21, 2022, long after the 2020 Assignment Agreement was in place.

[66] Mr. O'Rourke states that he did not locate communications from Maverick Law about potential challenges to the Assignment Agreements or how to strengthen the Defendants' position.

Mr. Sather does not recall any such discussions with Mr. O'Rourke and Maverick Law, and both state that they did not receive the Maverick Law opinion addressing section 12 of the 2020 Assignment Agreement. Those denials and the evidence of limited recollection are relevant, but they do not resolve Nova's disclosure concern. The record contains communications suggesting that advice or an opinion may have been sought or provided on issues related to authority, due diligence, or potential challenges to the Assignment Agreements. In these circumstances, Nova argues further steps are warranted to determine whether all responsive, non-privileged communications have been produced.

[67] Nova submits the MacuMira Defendants have put their understanding of Maverick Law's legal advice at issue in this action. The relevant provisions of the MacuMira Defendants' statement of defence are at paragraphs 38 and 39, which state:

[38] These Defendants deny that the [2020] Assignment Agreement or [Amended] Agreement required shareholder approval, and in the alternative state that:

- (a) The [2020] Assignment Agreement and [Amended] Agreement did have the required shareholder or corporate approval;
- (b) They believed reasonably and in good faith that O'Rourke had the necessary corporate authority and approvals to execute the [2020] Assignment Agreement; and
- (c) O'Rourke expressly or impliedly represented to them that he had the necessary corporate authority and approvals to execute the [2020] Assignment Agreement, which representations these Defendants relied upon.

[39] The [2020] Assignment Agreement and [Amended] Agreement were validly made in the ordinary course of Nova's business (among other things to profit from the Invention), for valuable consideration with MacuMira, a party dealing in good faith and operating at arm's length from Nova.

[68] Although these pleadings do not expressly refer to legal advice, they place in issue the MacuMira Defendants' understanding of the approval requirements for the Assignment Agreements. This includes their asserted belief that any required approvals had been obtained, whether based on Mr. O'Rourke's representations or on some other basis.

Relief Sought

[69] In light of concerns that production remains outstanding and the issue around knowledge of authority to enter the Assignment Agreements, Nova seeks a number of remedies:

- 1) A declaration that no solicitor-client privilege exists over records, information or legal advice provided by Maverick Law to the MacuMira Defendants that was communicated to or involved either or both of the O'Rourke Defendants about the 2020 Assignment Agreement and/or the Amended Agreement.

- 2) A declaration that the MacuMira Defendants have waived solicitor-client privilege over certain topics relating to Maverick Law's legal advice about the Assignment Agreements. Those topics being:
 - a. Mr. O'Rourke's authority to enter into the Assignment Agreements;
 - b. The requirement for and existence of Nova shareholder approval (or lack thereof) for the Assignment Agreements;
 - c. Potential challenges to the Assignment Agreements and an assessment of the likelihood of success of those challenges; and
 - d. Strengthening the Defendants' position to defend the Assignment Agreements,
 - e. collectively the "Topics".
- 3) An Order directing the MacuMira Defendants to produce all the documents disclosed on their Schedule 2 involving Maverick Law, which were shared with or involved Mr. O'Rourke and/or KCI.
- 4) An Order directing the MacuMira Defendants to produce all the documents disclosed on their Schedule 2 involving Maverick Law, related to the Topics.
- 5) An Order directing the MacuMira Defendants to request their file from Maverick Law and produce all records which relate to the Topics or records which were communicated to or involved Mr. O'Rourke and/or KCI, and provide a further and better Affidavit of Records.
- 6) An Order directing the MacuMira Defendants to provide all the records on which they still maintain a claim of privilege to the Court after complying with the above orders for review and determination of the privilege claimed on the records remaining on their Schedule 2.
- 7) Enhanced costs as a result of repeated incomplete disclosure on the part of the MacuMira Defendants.

[70] To facilitate the relief sought in item 6, Nova proposes that the parties jointly recommend a referee for appointment by the court to review the privilege claims. The referee would report back to the court if issues or disputes arise, and the court would then determine whether privilege has been properly maintained over the disputed documents. Nova proposes that the MacuMira Defendants bear the referee's costs in the first instance, on the basis that their disclosure history made the review necessary.

Issues

[71] The issues before the Court are whether some or all of the Maverick Law records should be produced notwithstanding the claim of solicitor-client privilege, and whether the circumstances warrant court inspection of any records over which privilege continues to be asserted.

[72] Nova's requested relief concerns two general categories of documents: first, communications to or from Maverick Law that were shared with, received by, or involved the O'Rourke Defendants, including notes of discussions in which Mr. O'Rourke was present; and second, portions of the Maverick Law file that were not communicated to the O'Rourke Defendants but address the identified Topics.

A. Waived Privilege due to Third Party Disclosure

[73] For the first category of documents, solicitor-client privilege does not protect communications between the MacuMira Defendants and Maverick Law that were shared with or received by the O'Rourke Defendants, or are notes of a conversation in which they participated. A privileged solicitor-client communication may lose that protection when it is disclosed to a third party: *Royal Bank v Lee*, [1992 ABCA 166](#) at paras [16-17](#); *Pinder v Sproule*, [2003 ABQB 33](#) at para [23](#) (accidental or inadvertent disclosure is not a waiver); *Stewart Red Angus Farms v Lethbridge (City)*, [1989 ABCA 55](#) at para [1](#). No party argues that any disclosure to Mr. O'Rourke was accidental or inadvertent.

[74] In addition to exceptions of accidental or inadvertent disclosure, the courts also recognize solicitor-client communication may preserve privilege in instances of "common interest privilege". Common interest privilege can arise where parties share privileged communications because they are aligned in interest against a common adversary: *YBM Magnex International Inc. (Re)*, [2000 ABCA 284](#) at para [18](#). This exception is not alleged here nor is it made out on the record. While Mr. O'Rourke was in discussion with the MacuMira Defendants and Maverick Law, these communications were made on behalf of Nova, who is adverse in interest to MacuMira in the negotiation of the Amendment Agreements and as well in this litigation.

[75] Accordingly, any solicitor-client privilege over communications between Maverick Law and the MacuMira Defendants was waived to the extent those communications were shared with, received by, or involved the O'Rourke Defendants. Those communications must be produced, to the extent they have not already been produced. The MacuMira Defendants do not oppose that direction and say the required production has now been made.

[76] Some of that material appears to have been included in the additional production provided through the MacuMira Defendants' 180-page addition to the updated Affidavit of Records. That production included Maverick Law notes, drafts, and emails sent to or from Mr. O'Rourke, or recording communications in which he was present. Nova remains concerned that the production may not be complete and seeks a court process, such as through a referee, to confirm that all required, non-privileged documents have been produced.

[77] The MacuMira Defendants oppose the appointment of a referee to review communications solely between Maverick Law and the MacuMira Defendants as they remain subject to solicitor-client privilege. They do not oppose a direction requiring Maverick Law to confirm that the complete file has been reviewed and that all producible records have been produced, subject to any proper claim of privilege. In the alternative, they do not oppose the appointment of a referee, provided Nova bears the cost in the first instance and the review is limited to communications shared with, or received by, an O'Rourke Defendant, and to notes recording communications in which Mr. O'Rourke was present.

[78] In light of the circumstances of this case, I direct Maverick Law to confirm that the complete file has been reviewed and that all producible records have been produced, subject to any proper claim of privilege. Subject to the directions in the remainder of this Decision, I appoint a referee for the limited purpose of ensuring production of all communications shared with or received by, an O'Rourke Defendant, and to notes recording communications in which Mr. O'Rourke was present. The cost of the referee at first instance shall be borne by Nova. I will address the appropriate referee process at the end of this Decision.

B. Implied Waiver

[79] The balance of this decision addresses Nova's second category of requested disclosure: portions of the Maverick Law file that were not communicated to the O'Rourke Defendants, but that address the identified Topics.

Nova's position:

[80] Nova argues that the Defendants knew Mr. O'Rourke lacked authority to enter into the Disputed Transactions. It says the MacuMira Defendants sought and relied on advice from Maverick Law about the legitimacy of agreements entered into in those circumstances. Nova further notes that the O'Rourke Defendants were recipients of, or participants in, several related communications. Production of documents sent to, received by, or involving an O'Rourke Defendant has already been addressed in the preceding section.

[81] Nova further submits that Maverick Law advised on issues that are central to this litigation, including Mr. O'Rourke's authority to commit Nova to the Disputed Transactions and the absence of shareholder approval. Nova says the MacuMira Defendants relied on that advice during the negotiation and execution of the Assignment Agreements and have now placed those matters in issue by pleading that they acted in good faith and reasonably relied on Mr. O'Rourke's authority. On that basis, Nova argues that any privilege over legal advice concerning those Topics has been waived.

[82] Nova also submits that Schedule 2 contains insufficient information to permit it to understand the nature of the records listed or the basis on which the MacuMira Defendants object to production, contrary to Rules 5.7 and 5.8: *H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd.*, [2024 ABKB 424](#) [*H2 Canmore*] at para [50](#). Nova further submits that, where proportionate, records should be produced in all available formats, including native electronic formats, so that the disclosure is usable and searchable in its original data format: *Questor Technology Inc v Stagg*, [2022 ABQB 578](#) at paras [114-115](#); *H2 Canmore* at paras [48-49](#).

The MacuMira Defendants' Position:

[83] The MacuMira Defendants submit that the relief Nova seeks is extraordinarily wide-ranging. It includes declarations that they have waived solicitor-client privilege over certain documents in Maverick Law's file, an order requiring a further and better Affidavit of Records, and a process for review of the Maverick Law file by a referee or the court to determine whether further production is required.

[84] The MacuMira Defendants submit that, despite seeking broad relief, Nova has failed to provide evidence in support of its position, relying instead on the allegations set out in its pleadings. Nova undertook only minimal cross-examination on the MacuMira Defendants' Affidavit of Records, and that cross-examination provided no evidence of the MacuMira Defendants' failure to comply with their disclosure obligations under Rules 5.1 and 5.6. They further submit Nova did not set out the proper legal tests for much of the relief it seeks, and for those aspects where it did, it fails to properly apply the test.

[85] The MacuMira Defendants submit that Nova's present application largely repeats concerns, allegations, and relief previously advanced against their current counsel, BD&P, in relation to the 2022 Amended Agreement. They rely on Nova's prior unsuccessful application concerning BD&P as context for their position. However, the present application raises different issues and rests on a different factual record. Nova does not allege that Maverick Law acted for Nova or Mr. O'Rourke in relation to the Assignment Agreements. Rather, Nova advances two narrower propositions:

First, Nova says that privilege has been waived over communications shared with, received by, or involving the O'Rourke Defendants. That proposition is consistent with the ordinary rule that privilege may be lost when privileged communications are voluntarily disclosed to a third party.

Second, Nova says the record shows discussions involving Mr. Sather, Mr. Ryan, and, at least in some respects, Mr. O'Rourke concerning Mr. O'Rourke's authority to enter into the Assignment Agreements. Nova argues that the MacuMira Defendants cannot plead a good faith belief in Mr. O'Rourke's authority while maintaining privilege over all legal advice relating to the identified Topics.

[86] The MacuMira Defendants object to Nova's request for records on the vague basis that they may involve legal advice on the identified Topics or may pertain to Mr. O'Rourke. They also dispute Nova's submission that privilege has been waived over legal advice provided to them on those Topics. Instead, they argue that the evidence on which Nova relies comes largely from MacuMira's own production, which, in their submission, confirms that communications from Maverick Law received by or involving Mr. O'Rourke have already been disclosed.

[87] The MacuMira Defendants also submit that Nova has not met the threshold for producing a further and better Affidavit of Records: *Canadian Natural Resources Ltd v ShawCor Ltd*, 2013 ABQB 230 [*ShawCor*] at para 19, rev'd on other grounds 2014 ABCA 289; *H2 Canmore* at paras 46 and 53. A further and better Affidavit of Records may be required only where there is some factual foundation establishing that the requested records exist: *Honourable Patrick Burns Estate Memorial Trust v P. Burns Resources Limited*, 2015 ABQB 459 at para 28; *Shawcor* at para 19.

The Law:

[88] The burden of establishing waiver of privilege is a heavy one: *JL Energy Transportation v Alliance Pipeline Limited Partnership*, 2021 ABQB 223 [*JL Energy*] at para 20. Solicitor-client privilege is "zealously guarded": *JL Energy* at para 19. Nova therefore bears a substantial burden in seeking to establish waiver in these circumstances.

[89] Before the Court may require the MacuMira Defendants to produce solicitor-client records, the evidence must establish one of the following:

- (a) The MacuMira Defendants have expressly waived their privilege over those records; or
- (b) The MacuMira Defendants have implicitly waived their privilege over those records, having both:
 - (i) Known of the existence of the privilege; and
 - (ii) Voluntarily evinced an intention to waive that privilege

Rumancik v Hardy, [2022 ABCA 345](#) [***Rumancik***] at para [10](#).

[90] Although the governing principles are readily stated, their application is fact-specific and often nuanced.

[91] The MacuMira Defendants bear the initial onus of establishing privilege. Once privilege is established, the onus shifts to Nova to prove the privilege has been waived: ***JL Energy*** at para [19](#); ***ShawCor*** at para [36](#). Nova submits that privilege does not attach to communications made for the purpose of furthering unlawful conduct: ***Solosky v The Queen***, [1979 CanLII 9 \(SCC\)](#), [1980] 1 SCR 821 at 835, 837. In the alternative, Nova says any privilege that would otherwise attach has been waived by the MacuMira Defendants' evidence and pleadings.

[92] The MacuMira Defendants deny any express waiver of solicitor-client privilege. On this record, there is no evidence of express waiver. Nova must therefore establish implied waiver. That requires proof that the privilege-holder knew of the privilege and voluntarily evinced an intention to waive it: ***Rumancik*** at para [10](#); ***JL Energy*** at para [19](#).

[93] The MacuMira Defendants rely on the principle that solicitor-client privilege "cannot be abrogated by inference" and that "clear, explicit and unequivocal language is required in order to lift it": ***Lizotte v Aviva Insurance Company of Canada***, [2016 SCC 52](#) at para [64](#). Nova's assertion that the records may concern relevant topics, or may involve Mr. O'Rourke, is not sufficient on its own to establish waiver. Nor is the potential usefulness of privileged information to an adversary's case sufficient to displace privilege: ***Rumancik*** at para [9](#).

[94] A party may be granted further and better disclosure if it can explain or prove that the records it seeks likely exist, are relevant and material, that the request is not a fishing expedition based on unrealistic or speculative premises, and that the disclosure is proportional: ***H2 Canmore*** at paras [53](#) and [54](#). With respect to the items marked as merely "Litigation Privileged", the parties are to apply the same level of rigor with respect to the description of the items on their respective production schedules: ***H2 Canmore*** at paras [48](#) and [51](#).

[95] The MacuMira Defendants assert the fact that Maverick Law provided advice to the MacuMira Defendants during the events giving rise to Nova's claim does not, by itself, waive privilege. That remains so even if the MacuMira Defendants relied on the legal advice during the events giving rise to Nova's claim (in other words, acted in light of legal advice during those events). Implied waiver may arise, however, where:

1. a party voluntarily puts its state of mind at issue, as distinct from cases in which the state of mind is put in issue by the party seeking to have the privilege waived;
2. a party relies upon privileged communications to ground a claim or base a defence; or
3. a party attempts to support an argument that it acted in good faith based upon undisclosed legal advice.

JL Energy at para [21](#)

[96] The MacuMira Defendants submit that their pleadings would have to do one of three things: (i) voluntarily put their state of mind in issue by relying on specific legal advice on a matter in issue; (ii) rely on privileged communications to ground a claim or defence; or (iii) assert that they acted in good faith based on legal advice. Stated another way, they say the relevant dividing line is whether they have used the receipt of legal advice as a substantive element of, or material fact in, their claim or defence: **JL Energy** at para [21](#); **Rumancik** at para [11](#); **Nixon v Timms**, [2012 ABQB 65](#) at para [14](#); **One York Street Inc. v. 2360083 Ontario Limited**, [2026 ONCA 176](#) [**One York Street**] at para [40](#).

[97] That submission does not fully capture the first scenario, which concerns state of mind. Some cases confirm that waiver may arise where a party voluntarily puts its state of mind in issue by relying on specific legal advice: see, for example, **Creative Career Systems Inc. v Ontario**, [2012 ONSC 649](#) [**Creative Career Systems**] at para [26](#). However, reliance on specific legal advice is not necessarily a mandatory element in every state-of-mind case.

[98] For clarity, I address the three scenarios separately: first, reliance on privileged communications; second, state of mind; and third, good faith. The same facts may engage more than one scenario, and some authorities discuss the governing principles without assigning them to a discrete category. I have organized the analysis in this manner to assist in applying the authorities to the present record.

[99] After considering the doctrine of implied waiver, I will address how fairness guides the analysis and applies to the matter at hand. Finally, I will address how Nova's argument pertaining to alleged unlawful conduct leading to a waiver of solicitor-client privilege is unfounded.

1. Reliance upon Privileged Communications

[100] Privilege may be waived where a party relies on privileged communications to ground a claim or advance a defence. **JL Energy**³; **Petro Can Oil & Gas Corp. v Resource Service Group**

³ In that case the defendants attempted to summarily dismiss the claim based on limitations. It submitted fragments of a memo prepared by prior plaintiff counsel (Mr. Bright) and previously shared with both parties to suggest the plaintiff's prior knowledge of the alleged contractual breach. The plaintiff responded by providing an affidavit of Mr. Bright to correct misapprehensions that could arise. The Court found that Bright affidavit went further than just clarifying and contextualizing the portions of the previously disclosed memos excerpted by the defendants. Rather, Bright made categorical statements about what he and others at the plaintiff company knew about the defendants' use of the technology in the subject pipelines, and how and when they knew it. The court found that, although it was the defendants that raised portions of this memo initially (thereby raising the question of state of mind), by providing

Ltd., [1988 CanLII 3474 \(ABQB\)](#), 90 AR 220 (ABQB) at para [10](#); *Alberta Wheat Pool v. Estrin*, [1986 CanLII 1785 \(ABQB\)](#), 75 A.R. 348 (Q.B.) at para [24](#); *Hansen v Stierle*, [\[1996\] BCJ No 941](#) (BCSC), 62 ACWS (3d) 676 at para [9](#); and *Marion v Wawanesa Mutual Insurance Co*, [2004 ABCA 213](#) at para [8](#); are examples of courts evaluating this category of waiver. This scenario is not directly engaged here. The MacuMira Defendants do not rely on legal communications received from their own counsel as the basis for their position regarding Mr. O'Rourke's authority to enter into the Assignment Agreements.

[101] Rather, the evidence includes statements by Mr. O'Rourke, who was not the client, that he relied on advice from another party's counsel, Maverick Law. To the extent communications were disclosed to or shared with Mr. O'Rourke, privilege is addressed under the first issue above concerning waiver by third-party disclosure. The separate question of whether the MacuMira Defendants rely on Mr. O'Rourke's evidence is addressed under the remaining scenarios.

2. State of Mind

[102] Privilege may also be waived where a party voluntarily puts its state of mind in issue, as distinct from cases where state of mind is put in issue by the party seeking production: *Rumancik* at para [12](#).

[103] There is often analytical overlap between state-of-mind waiver and waiver arising from reliance on privileged communications to ground a claim or defence. In state-of-mind cases, fairness and consistency guide the inquiry into whether privilege has been impliedly waived: *Simcoff v Simcoff*, [2009 MBCA 80 \[Simcoff\]](#) at para [26](#). A mere reference to having obtained legal advice is not enough. Waiver requires more than disclosure that advice was received; it requires reliance on that advice, or on the party's understanding of its legal position, as part of the claim or defence: *Simcoff* at para [27](#); *Myron v Kwinter*, [2009 ABQB 128](#) at para [25](#); , citing *Stuart Olson Construction Inc. v Sawridge Plaza Corp.*, [1995 CanLII 9211 \(ABQB\)](#), 34 Alta LR (3d) 417 at para [21](#), aff'd [1996 ABCA 404](#), 193 AR 174.

[21] ... Solicitor-client privilege is not waived by disclosing that a solicitor's advice was obtained. It is waived when the evidence shows that the client by his words or actions held a view or followed a course because of advice given to him or perhaps not given to him by his counsel and that he relied on this act or omission for resolution of an issue at trial.

[104] That is the clearest route to waiver, but it is not the only way in which a party's state of mind may engage waiver of solicitor-client privilege. The starting point remains that acknowledging receipt of legal advice, without more, is insufficient.

and relying upon information in the dismissal application, the plaintiff waived privilege over certain information. Among other findings, the Court held:

[75] [The plaintiff] has chosen to establish these asserted facts to support its case by leading the evidence of its former counsel.

[77] Having elected to rely upon the Bright Affidavit, [the plaintiff] must be taken, by implication, to have waived claims of privilege attaching to the information upon which Mr. Bright's asserted understanding of the facts is based.

[105] ***Creative Career Systems*** involved arguments concerning both state of mind and reliance on legal advice. The defendants pleaded that, in refusing to register certain private career colleges, they acted in good faith, in accordance with the law, and pursuant to their statutory obligations. On questioning, they acknowledged receiving legal advice before taking a position on the plaintiffs' registration applications and provided factual background for that advice, but refused to answer questions about its substance. The Court addressed the issue as one of state of mind. At paragraph 26, the Court stated:

“...if a party places its state of mind in issue with respect to its claim or defence and has received legal advice to help form the state of mind, privilege will be deemed to be waived with respect to such legal advice”: *Bank of Leu AG v. Gaming Lottery Corp.* [1999] O.J. No. 3949 (S.C.J.) at paras. 5-11; *Toronto Dominion Bank v. Leigh Instruments Ltd.* (1997), 1997 CanLII 12113 (ON CTGD), 32 O.R. (3d) 575 (Gen. Div.); *Woodglen & Co. v. Owens* (1995), 1995 CanLII 7070 (ON CTGD), 24 O.R. (3rd) 261 (Gen. Div.); *Lloyd's Bank of Canada v. Canada Life Assurance Co.* (1991), 47 C.P.C. (2d) 157 (Ont. Gen. Div.).

[106] At paragraph 30, the Court stated that deemed waiver, and the resulting obligation to disclose a privileged communication, require two elements: first, the presence or absence of legal advice must be relevant and material to the claim or defence; and second, the party who received the advice must make receipt of that advice an issue in the claim or defence. This analysis overlaps with waiver arising from reliance on privileged communications.

[107] Further consideration of implied intention is warranted. A party does not waive privilege merely by stating that legal advice was received, or even that advice was considered during the events in issue. The question is whether the party has used the legal advice, or its understanding of its legal position, as a substantive element of the claim or defence. Paciocco, Paciocco and Stuesser state the point this way in *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020), at p. 293:

The issue of implied waiver **often** arises when one party puts their state of mind into issue and explains that state of mind by mentioning the legal advice they may or may not have received – **for example**, by claiming to have signed an agreement without legal advice when there is evidence that they in fact obtained advice, or by alleging that they acted in good faith upon the advice of legal counsel. [Emphasis added.]

This passage provides examples theoretically applicable to each of the three waiver categories, not just the state-of-mind category.

[108] In ***United States of America v Friedland***, (1996) 30 O.R. (3d) 568 at p 572, [1996 CanLII 8213](#) at para 12 (ONSC), Sharpe J (as he then was) referred to the following passage from *Wigmore on Evidence* (McNaughton rev., 1961), vol. 8, para 2327, as guidance on waiver by implication:

What constitutes a waiver by implication?

Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not

only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended the result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final. ...

[109] The Ontario Court of Appeal summarized the principle in *One York Street* at paragraph 40:

The “voluntary intention” or “implied intention” referred to by Wigmore and in the deemed waiver jurisprudence does not require an intention to waive privilege. Rather, it refers to the voluntary decision by a party to rely on the receipt of legal advice as part of their claim or defence **or to rely on their understanding (or lack of understanding) of their legal position as part of their claim or defence**: *Creative Career*, at para. 29; *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 1983 CanLII 407 (BC SC), 45 B.C.L.R. 218 (S.C.), at para. 10; *Nova Scotia v. Cameron*, at para. 61; Sidney N. Lederman, Michelle K. Fuerst & Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis, 2022), at paras. 14.168-14.170. Where a party has voluntarily relied in their claim or defence on receipt of legal advice **or their understanding of their legal position**, that reliance gives rise to a deemed waiver of privilege because it would create an unfair litigation advantage to allow the party to inject their understanding of their legal position into the claim or defence while shielding legal advice that bears on those assertions. The party’s reliance on legal advice, or on their understanding (or lack of understanding) of their legal position when they, in fact, received legal advice on the relevant issue, is inconsistent with maintaining privilege over that advice. [Emphasis added]

[110] The Court in *One York Street* at para 45 further held that whether a party has put its understanding of its legal position in issue is necessarily case-specific. The analysis may be affected by the party’s conduct of the litigation, the nature of the claims and defences, the factual foundation for them, and whether the party’s conduct makes it unfair to maintain privilege.⁴

[111] At paragraphs 46 to 48, the Court observed that many waiver cases involve a party expressly relying on the fact that it received legal advice as part of its claim or defence. However,

⁴ *One York Street* at para 45:

The assessment of whether a party has relied on legal advice or their understanding (or lack of understanding) of their legal position such that consistency and fairness require it be treated as a deemed waiver of privilege is necessarily a case-specific analysis. This is so because the analysis is based on a party’s conduct of the litigation, the nature of the legal claims and defences and factual basis for them, and whether in the particular circumstances it would be unfair to maintain the privilege because the party’s actions are inconsistent with maintaining the privilege: Gourlay, at p. 497; Paciocco, at pp. 292-93; *Roynt Capital Inc. v. Repeatseat Ltd.*, 2015 ONSC 1108, 125 O.R. (3d) 596 (Div. Ct.), at para. 84.

that is not the only circumstance in which waiver may arise. Waiver may also occur where a party relies, as part of its claim or defence, on its lack of understanding of its legal position about an issue in the litigation, while having received legal advice on that issue at the relevant time: **One York Street** at para 49. That is Nova’s argument here. Nova submits that, by pleading reliance on Mr. O’Rourke’s representations about his authority to enter into the Assignment Agreements, the MacuMira Defendants have put their understanding of their legal position in issue. Nova says it would create an unfair litigation advantage to permit the MacuMira Defendants to rely on that asserted understanding while shielding legal advice that may bear directly on it. Fairness considerations in this context are addressed later in this Decision.

[112] The MacuMira Defendants answer that **Rumancik**, at paragraph 11, rejects the broader approach advanced by Nova:

Voluntary intention is not found in “the mere fact that during the events giving rise to the claim or defence, the party received legal advice, even if the party relied on the legal advice during the events giving rise to the claim or defence”: *Creative Career Systems Inc v Ontario*, 2012 ONSC 649 at para 27. To justify a finding of implied waiver, it must be shown that the party actively relied on that advice to support their claim. The waiver of the privilege occurs when the party uses the receipt of legal advice as a substantive element of or material fact in his or her claim or defence: paras 29, 31. [Emphasis added.]⁵

[113] **Rumancik** arose in a context where the parties had not had a full opportunity to argue privilege, and there was some uncertainty about the type of privilege being asserted. The Court’s comments were therefore necessarily general, and the appeal turned on the adequacy of reasons. It is not clear from the context whether paragraph 11 was directed specifically to state-of-mind waiver or to another waiver scenario. In paragraph 11, the Court cites **Creative Career Systems** paras 27, 29 and 31, which case speaks to the intention aspect of both reliance on privileged communications and state of mind. At paragraph 12, the Court addressed state-of-mind waiver, noting that it may arise where a privilege-holder places its mental state in issue and relies on legal advice to justify or explain that state of mind. The Court cautioned that, in some kinds of actions, state of mind will almost always be in issue. At paragraph 13, referring to negligent misrepresentation as discussed in **Soprema Inc v Wolrige Mahon LLP**, 2016 BCCA 471 [**Soprema**] at paras 52-53, the Court states:

... An element of negligent misrepresentation is reliance on the misrepresentation – reliance being a state of mind. Any legal advice received could inform that state of mind. If privilege could be waived merely because state of mind is at issue and

⁵ This narrower approach appears to be advocated in Adam M. Dodek in *Solicitor-Client Privilege* (Markham: LexisNexis Canada Inc., 2014) at §7.131: “When a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice. To displace the privilege there must be an affirmative allegation that puts the party’s state of mind in issue by the privilege holder. Simply putting state of mind at issue without reliance on legal advice does not suffice for waiver.” [Emphasis added] Implicit in this formulation is a requirement that the state of mind that the party places in issue relates to their understanding of their legal position, however, it is much more limited than in the case law reviewed in this Decision.

legal advice is acknowledged, nearly every negligent misrepresentation plaintiff would be deprived of solicitor-client privilege.

[114] Although **Rumancik** may appear to limit state-of-mind waiver, it must be read in context. The Court was concerned that privilege not be lost merely because state of mind is an element of the claim and the party received legal advice that could have informed that state of mind. That is different from a case in which a party puts in issue its understanding of its legal position at the relevant time. The timing and subject matter of the advice are therefore important. **Rumancik** should not be read as requiring, in every state-of-mind case, that a party expressly rely on legal advice before waiver can arise. Such a reading would be inconsistent with the broader authorities on implied waiver. The more precise question is whether the party has put its understanding of its legal position in issue in a manner that makes it unfair and inconsistent to maintain privilege over advice bearing on that asserted understanding. **Soprema**, which is cited in **Rumancik**, is consistent with that approach and was one of the authorities considered in **One York Street**. **One York Street** at para 49 expanded on when state-of-mind waiver may occur:

...It is this reliance by a party on their state of mind in relation to *their understanding of their legal position* that gives rise to a deemed waiver of privilege as a matter of consistency and fairness. This is because a party who injects their understanding of their legal position into a case by relying on it in their claim or defence cannot then shelter legal advice which might be used to challenge *their assertions about their understanding of their legal position*.
[emphasis added]

[115] **Doman Forest Products Ltd. v GMAC Commercial Credit Corp.**, 2004 BCCA 512, provides an earlier articulation of this principle and is referred to in both **Creative Career Systems** at paragraph 28 and **One York Street** at paragraph 33. In **Doman**, the Court considered whether privilege over legal advice had been waived. At paragraph 28, it held that it is not enough to constitute waiver that a pleading puts a party's state of mind in issue, or and that the party's state of mind may have been influenced by legal advice. There must be the further element that the state of mind involves the party's understanding of its legal position in a way that is material to the lawsuit. Put another way, the presence or absence of legal advice must itself must be material to the claim or defence to the lawsuit before questions about that advice become relevant.

[116] Read together, these authorities indicate that state-of-mind waiver may arise where a party actively relies on legal advice to support a claim or defence, or where the party relies on its understanding of its legal position at the relevant time about an issue in the litigation and there is legal advice at the relevant time that may bear on that asserted understanding.

[117] The question, then, is what is meant by a party's "understanding of its legal position." The following cases are instructive.

[118] **One York Street** was an appeal from a Divisional Court decision restoring a motion judge's finding that the tenant had waived privilege. The tenant had signed a lease for a term of three years and, the next day, signed multiple extensions resulting in a 20-year term. After its store failed, the tenant alleged that it had relied on extra-contractual representations by the landlord, including representations about foot traffic in the shopping centre. The tenant pleaded that it would not have entered the lease had it not relied on those representations. The motion judge found that

the tenant had put its state of mind in issue, including its understanding of whether the representations were binding and could be relied upon as guarantees. The motion judge considered it “manifestly unfair” to require the landlord to proceed to trial without disclosure of the tenant’s solicitor’s file. At paragraph 19, the Court noted the motion judge’s view that, if the alleged representations were fundamentally important to the tenant’s decision to enter the lease, it was critical to know whether the tenant had received legal advice about those representations at the time.

[119] The tenant argued that its defence and counterclaim did not depend on either the existence or absence of legal advice, and that the mere possibility it received advice during negotiation and execution of the lease could not amount to waiver. The landlord argued that waiver does not require an express reference to legal advice in the pleadings. It is enough, the landlord submitted, that the claim or defence relies on the party’s understanding of its legal position.

[120] The motion judge concluded that the tenant relied on alleged representations regarding foot traffic by the landlord, and the tenant claimed this affected its understanding of its legal rights under the lease. At paragraph 48, the Court of Appeal held that the same principles apply where a party: (i) relies on receipt of legal advice about an issue in the litigation as an element of its claim or defence; or (ii) relies on its lack of understanding of its legal position about an issue in the litigation as an element of its claim or defence, despite having received legal advice on that issue at the relevant time. As noted, at paragraph 49, the Court stated that a party who injects its understanding of its legal position into a case by relying on it in a claim or defence cannot then shelter legal advice that may be used to test that asserted understanding.

[121] There are several other authorities that apply this as legal test for state-of-mind privilege cases. Three of these are similarly reviewed in **One York Street** as illustrating this point: **Rogers v Bank of Montreal**, [1985 CanLII 141 \(BCCA\)](#), [1985] 4 WWR 508 (BCCA) [**Rogers**], **Roynat Capital Inc. v Repeatseat Ltd.**, [2015 ONSC 1108 \[Roynat\]](#), and **Soprema**.

[122] In **Rogers**, BMO placed a defaulting customer into receivership. The customer sued both BMO and the receiver, and they commenced third-party proceedings against each other. The case involved a party asserting that it made a decision in reliance on professional advice from another party. Evidence established that there was a significant legal decision made to the contrary of the receiver’s advice some months earlier. The receiver denied detrimental reliance and sought disclosure of correspondence between the bank and its solicitors at the relevant time so that it could test what advice BMO had received from its own lawyers in the face of a claim of reliance on the receiver’s advice.

[123] The Court upheld the order requiring disclosure. Although BMO had not relied on, or even referred to, its own legal advice, by pleading of reliance on the receiver’s legal advice, in circumstances where it had also received its own advice, it became inconsistent to maintain privilege over its own advice. The Court further found that the defence relied upon by the bank necessarily involved an inquiry into its “corporate state of mind”: **Rogers** at 10. The issue was not merely what BMO knew, but whether it had been induced to take steps in reliance on the receiver’s advice on legal matters. By advancing that position, BMO voluntarily put its legal knowledge at the relevant time in issue. Disclosure was therefore ordered: **Rogers** at 10-11; **One York Street** at paras 51, 53.

[124] In **Rogers**, the Court noted that there was limited Canadian authorities on point, but adopted the reasoning of the District Court of Columbia in **US v Exxon Corp.**, [94 FRD 246](#) (1981) [**Exxon**]. At page [10](#) of **Rogers**, the Court stated:

... a client waives his attorney-client privilege when he brings suit or raises an affirmative defence that makes his intent and knowledge of the law relevant: *United States v. Exxon Corporation* [1981] 94 F.R.D. 246, at p 248 citing *Anderson v. Nixon*, 444 F.Supp. 1195, 1200 (D.D.C. 1978), ...

[125] The Court in **Exxon** said at [248](#):

Most courts considering the matter have concluded that a party waives the protection of the attorney-client privilege when he voluntarily injects into the suit the question of his state of mind. For example, in *Anderson v. Nixon*, 444 F. Supp 1195 ... Judge Gesell stated that as a general principle ‘a client waives his attorney-client privilege when he brings suit or raises an affirmative defence that makes his intent and knowledge of the law relevant’.

[126] and at [249](#):

Exxon’s affirmative defenses necessarily revolve around whether Exxon, did, in fact, primarily or solely rely upon a particular DOE regulation or communication when the company made its pricing decisions. Thus, the only way to assess the validity of Exxon’s affirmative defenses, voluntarily injected into this dispute, is to investigate attorney-client communications where Exxon’s interpretation of various DOE policies and directives was established and where Exxon expressed its intentions regarding compliance with those policies and directives. There is no other reasonable way for a plaintiff to explore Exxon’s corporate state of mind, a consideration now central to this suit. [Quoted in *Rogers* at 392-3; emphasis added]

[127] Applying the analysis set out **Rogers**, BMO voluntarily put its state of mind in issue by asserting that its understanding of its legal position on a relevant issue was formed in reliance on advice or representations from a third party, despite evidence that it had received advice on the same legal issue from its own counsel. This parallels the MacuMira Defendants’ state of mind regarding its legal understanding of the enforceability of the Assignment Agreements.

[128] In **Rogers**, BMO alleged it relied on the receiver for *BMO’s* ability or authority to place customer into receivership. Comparatively, the MacuMira Defendants claim they relied upon Mr. O’Rourke’s representations that he had the authority to sign and the agreements would be binding, possibly without requiring shareholder approval. This parallel is not exact when comparing the legal position in issue. The facts in **One York Street** more closely parallel the facts regarding the legal position at issue in this case.

[129] The MacuMira Defendants plead that the Assignment Agreements did not require Nova shareholder approval. In the alternative, they plead that they reasonably or in good faith believed Mr. O’Rourke had the necessary corporate authority and approvals to execute the Assignment Agreements, or that Mr. O’Rourke expressly or impliedly represented that he had such authority

and approvals, and that they relied on those representations. They also plead that the Assignment Agreements were made in the ordinary course of Nova's business.

[130] While some may dispute the findings in **Rogers**, the Supreme Court did not. In **R v Campbell**, [1999 CanLII 676 \(SCC\)](#), [1999] 1 SCR 565 [**Campbell**], at para [69](#), the Court summarized the finding in **Rogers** as follows:

It appears the court in *Rogers* found that any privilege with respect to correspondence with the bank's solicitors had been waived as necessarily inconsistent with its pleading of reliance, even though the bank itself had not referred to, much less relied upon, the existence of advice from its own solicitors.

[131] The Supreme Court went on to note that the case before it was stronger than **Rogers**. It did not question the result in **Rogers**. Although **Campbell** may be better understood as a good-faith reliance case, the Supreme Court's discussion confirms that the reasoning in **Rogers** remains a relevant part of the waiver analysis.

[132] **Roynat** is another case on point. It was one of the three cases discussed in detail in **One York Street: One York Street** at para [54](#). **Roynat** involved a financing transaction in which the plaintiffs advanced funds to a corporate defendant on certain conditions. One condition required the defendant corporation to raise additional equity before the loan funds were advanced. The plaintiffs alleged that the corporate defendant's law firm confirmed the condition had been satisfied, and that the plaintiffs relied on that confirmation in advancing the funds. The plaintiffs then sued the law firm for negligent misrepresentation. On questioning, the plaintiffs' representative refused to answer questions about advice the plaintiffs had received from their own lawyers concerning the alleged confirmation. **One York Street** summarized the result at paragraphs [55](#) and [56](#) as follows:

[55] [...] By pleading reliance on the alleged confirmation of the equity fund condition by the defendant's law firm, the plaintiffs put in issue their state of mind in relation to their legal position about the confirmation. Maintaining privilege over legal advice that the plaintiffs received from their own lawyers about whether the equity fund condition had been satisfied would be inconsistent with the plaintiffs' assertion that they relied on the defendant's law firm's representation because, if the plaintiffs' own lawyers provided them with legal advice on the same issue, their reliance on the defendant's law firm's alleged confirmation would not be reasonable. [citations omitted]

[56] A deemed waiver was found in *Roynat* despite the plaintiffs not pleading reliance on their own legal advice because they relied in their claim on their state of mind with respect to their legal position. Allowing the plaintiffs to shield their own legal advice on the issue of the equity fund confirmation would be unfair to the defendant law firm and inconsistent with the plaintiffs' claim that it relied on a representation from that firm.

[133] **Soprema** is the third case discussed in **One York Street**. In **Soprema**, the plaintiff sued an auditor for negligent misrepresentation based on alleged false representations about financial statements. The plaintiff alleged reliance on those representations in deciding whether to purchase shares. While the Court found no waiver on the facts, that result is still consistent with the principle

discussed above because the plaintiff had not put its understanding of its legal position in issue. Its alleged reliance concerned the financial position of the company, not the plaintiff's legal position. It is not enough that a party's state of mind is relevant in a general sense. The state of mind must concern the party's understanding of its legal position on an issue in the litigation before deemed waiver may arise. At paragraph [28](#), the Court stated:

I am of the view it is apparent that the cases which actually find waiver typically involve a party voluntarily making its own understanding of the law, or its reliance on legal advice it received, a material issue.... Indeed, on my review of the cases, there is a weighty argument that underlying the reasoning in those cases is the view that a party will impliedly waive privilege only if it has voluntarily put in issue its understanding of its legal position. It is in those circumstances that it would be inconsistent with the conduct of the party to maintain privilege and unfair to do so, because in those circumstances maintaining privilege would indeed confer an "unfair" litigation advantage. [Emphasis added by Justice Copeland JA in *One York Street* at para 59.]

[134] These authorities clarify that an express reference to legal advice, or to the absence of legal advice, is not always required before waiver may be found, although such a reference will often make the reliance easier to identify. The question is whether the party relies, as an element of its claim or defence, on its understanding of its legal position on an issue in the litigation, rather than on its legal position in a general sense: *One York Street* at paras [60-61](#). If it does, fairness and consistency may make it improper for the party to maintain privilege over legal advice received on the same issue.

[135] Further, the case examples confirm that the party who has raised the state-of-mind issue need not do so in his or her pleadings. The matter may be raised in affidavit evidence or discovery (or even in a related proceeding to which the privilege-holder is party): see also *National Bank Financial Ltd. v Potter*, [2007 NSSC 22](#) at paras [9-10](#); *Soleil Hotel & Suites Ltd. v Soleil Management Inc.*, [2007 BCSC 1420](#) at para [26](#), citing *Western Assurance Co. v Canada Life Assurance Company* [1987 CanLII 4259 \(ONHCJ\)](#), 63 OR (2d) 276 (Ont SC); *Conrad v. Arichat Metal Fabrication Ltd.*, [2022 NSSC 278](#) at paras [12](#) and [55](#).

Application to the present case:

[136] Whether the required shareholder or corporate approval existed for the 2020 Assignment Agreement or the Amended Agreement is a legal issue to be determined at trial. A sub-issue to that determination is whether either agreement required shareholder approval. Considerations relevant to that determination are whether the assets and interests assigned under either agreement constituted all or substantially all of Nova's assets, and whether the transactions resulting from these agreements were effected in the ordinary course of Nova's business: *Business Corporations Act*, RSA 2000, c B-9, s 190. The nature of the Amended Agreement, and therefore the required authorizations, may differ from those required for the 2020 Assignment Agreement.

[137] Depending on those determinations, and on the authority conferred on Mr. O'Rourke in his various capacities, whether Mr. O'Rourke had authority to enter into the Assignment Agreements is also an issue for trial.

[138] In their pleadings, the MacuMira Defendants alternatively allege that they reasonably and in good faith believed Mr. O'Rourke had the necessary corporate authority and approvals to execute the Assignment Agreements. They also plead that Mr. O'Rourke expressly or impliedly represented that he had that authority and those approvals, and that they relied on those representations.

[139] In light of the foregoing analysis and the facts of this case, those pleadings put in issue the MacuMira Defendants' understanding of their legal position. To the extent Maverick Law provided advice about whether shareholder approval was required, or whether Mr. O'Rourke had authority to enter into the Assignment Agreements without further corporate approval, that advice may bear directly on the MacuMira Defendants' pleaded reliance on Mr. O'Rourke's representations. The same advice may also bear on their pleaded reasonable and good faith belief that he had the requisite authority and approvals. It would be inconsistent with those pleaded positions to maintain privilege over legal advice from their counsel that addressed those specific issues.

[140] Accordingly, in addition to any production required because of prior disclosure to Mr. O'Rourke, the MacuMira Defendants are directed to produce advice they received from Maverick Law before entering into the 2020 Assignment Agreement that addresses:

- the requirement for, or existence (or non-existence) of, Nova shareholder approval for the Assignment Agreements;
- Mr. O'Rourke's authority to enter into the Assignment Agreements; and
- any opinion from Maverick Law regarding paragraph 12 of the draft 2020 Assignment Agreement, to the extent the opinion addresses Mr. O'Rourke's authority to enter into that agreement on Nova's behalf. If the opinion was previously shared with Mr. O'Rourke, the shared opinion is producible in full.

[141] The opinion regarding paragraph 12 is producible only because there is evidence that such an opinion was contemplated. If the opinion concerns title to the Invention, production is not required unless it was already shared with Mr. O'Rourke.

[142] Issues at trial may include whether the MacuMira Defendants knew that the assets and interests assigned under either agreement constituted all or substantially all of Nova's assets, and whether the transactions were effected in the ordinary course of Nova's business. To the extent Maverick Law provided opinions or advice before the 2020 Assignment Agreement on those issues, that advice shall also be produced.

[143] For clarity, production of such opinions, if they exist, does not determine whether the MacuMira Defendants reasonably and in good faith believed that Mr. O'Rourke had or obtained the requisite authorizations, including shareholder approval. There are also considerations of the state of Nova's business at the relevant time and whether that had implications on the ambit of O'Rourke's decision making authority. Those remain issues for trial. Production is required because the MacuMira Defendants have put in issue their understanding of the legal requirements for enforceability and the reasonableness of any reliance on Mr. O'Rourke's representations.

[144] The Court does not direct disclosure for the period after execution of the 2020 Assignment Agreement. On the present record, it is not clear when the MacuMira Defendants became aware of potential issues with Nova’s authorization to enter into either of the Assignment Agreements. It is therefore not appropriate, at this stage, to require production of later legal opinions on that issue. This limitation preserves solicitor-client confidentiality while requiring disclosure of advice relevant to the period in which the MacuMira Defendants’ state of mind is most directly in issue.

[145] Nor does the Court require the MacuMira Defendants to disclose records responsive to the other topics requested by Nova, namely:

- potential challenges to the Assignment Agreements and assessments of the likelihood of success of those challenges; and
- steps to strengthen the Defendants’ position in defending the Assignment Agreements.

[146] Those topics are too broad. They could encompass challenges by other of Nova’s creditors or interest groups arising from the circumstances involving the United States Securities and Exchange Commission and Nova’s principals. They could also include internal issues facing MacuMira, including matters involving its own shareholder group and any payout expectations arising from the pre-existing agreement between Nova and MacuMira. They are not sufficiently tied to the limited waiver found above.

3. Good Faith

[147] Privilege may be waived where a party seeks to support an assertion that it acted in good faith by relying on undisclosed legal advice. **Campbell**, is a leading authority addressing this form of waiver.

[148] This form of waiver is not engaged in this case even though the MacuMira Defendants in their pleadings make reference to good faith. Their pleading is that they “believed reasonably and in good faith that O’Rourke had the necessary corporate authority and approvals to execute the [2020] Assignment Agreement.” A pleading that they acted in good faith, or that it was reasonable to believe on agency principles that Mr. O’Rourke had authority, does not itself waive privilege. Waiver on the basis of good faith may arise only if the party actively relies on legal advice to support the claim or defence: **Campbell** at para [70](#).

[149] In **Campbell**, the issue was whether an RCMP reverse sting operation amounted to an abuse of process. The RCMP advanced a good faith argument on the basis that it had acted on legal advice from a Department of Justice lawyer: **Campbell** at paras [6](#), [70](#). The Supreme Court held that, once the RCMP relied on that legal advice to support its good faith position, the advice became a genuine issue in the proceeding and privilege over the relevant communications was waived: **Campbell** at paras [46-48](#), [67](#), [70-71](#), [76](#).

[150] The MacuMira Defendants put their state-of-mind in issue by putting forward they believed in Mr. O’Rourke’s assertions about his corporate authority. However, that is distinct from an implied waived arising because a party acted in good faith by relying on undisclosed legal advice. Here, there was no mention of legal advice that MacuMira relied upon in their assertion of acting in good faith.

[151] Unless the MacuMira Defendants rely on legal advice as the basis for their good faith position—for example, based on the advice from counsel, they had a good faith belief that Mr. O’Rourke had the requisite authorizations and/or did not require shareholder approval—their good faith pleading is not grounded in undisclosed legal advice. The evidentiary basis for that pleaded belief remains to be determined.

[152] Advice from counsel concerning the likelihood that a court would uphold the Assignment Agreements despite alleged authorization issues remains privileged. So long as the MacuMira Defendants do not rely on that advice to justify their conduct while also shielding it from disclosure, they remain within the principles governing solicitor-client privilege: *R v McClure*, [2001 SCC 14](#) at para [35](#); *Campbell* at para [70](#). The MacuMira Defendants have not suggested that their good faith belief is based on legal advice.

[153] By maintaining their claim of solicitor-client privilege, the MacuMira Defendants also limit the position they may take at trial. They may not later assert that their good faith belief in Mr. O’Rourke’s authority or in the existence of the requisite authorizations was based on advice received from their counsel without risking disclosure of those communications.

Unlawful Conduct

[154] Nova also argues that privilege is lost where communications fall within the unlawful-conduct exception. In *R v Fox*, [2026 SCC 4](#) at para [31](#), the Supreme Court confirmed that solicitor-client privilege does not extend to communications made for the purpose of furthering unlawful conduct:

...The [solicitor-client] privilege does not extend to communications that are criminal in themselves or that have the purpose of furthering unlawful conduct, because such communications form no part of a lawyer’s professional role (*Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, at para. 10; *Pritchard*, at para. 16; *Solosky*, at pp. 835-36).

[155] The same principle is reflected in *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, [2008 SCC 44](#) [*Blood Tribe*]. In that case, a dismissed employee sought access to employment information because she suspected the employer had improperly collected inaccurate information and used it to discredit her before its board. Although disclosure was initially ordered by the Privacy Commissioner and upheld by the superior court, the appellate court reversed that result, and the Supreme Court dismissed the appeal.

[156] The Supreme Court emphasized that solicitor-client privilege must remain as close to absolute as possible and yield only in clearly defined circumstances: *Blood Tribe* at para [9](#). The Court confirmed that privilege does not attach to communications that are criminal in themselves or intended to further criminal purposes: *Blood Tribe* at para [10](#). The Court described that exception as rare and found that it was not engaged on the facts before it.

[157] Similarly, in *Solosky v The Queen*, [1979 CanLII 9 \(SCC\)](#), [1980] 1 SCR 821 at 835, the Supreme Court affirmed that communications are not privileged where a client seeks legal

assistance to facilitate the commission of a crime or fraud. In such circumstances, the communication is not protected whether the lawyer is an unwitting participant or a knowing one.

[158] In this case, the Court is already requiring production of communications involving both Maverick Law and Mr. O'Rourke, as well as selected other production. If there were further communications between the MacuMira Defendants and their counsel about the Topics, it would be too broad on this record to characterize those communications as criminal, furthering unlawful conduct or as made in furtherance of fraud. Whether the transactions themselves amounted to unlawful conduct, theft or fraud, as Nova alleges, has not been determined. The ownership of the Invention and the enforceability of the Assignment Agreements remain issues for trial.

[159] As a referee may be reviewing the disputed records in any event, any explicit indication that a communication was made to further fraudulent or criminal conduct can be brought to the Court's attention. On the present record, however, the unlawful-conduct exception has not been established.

Fairness

[160] Nova submits that deemed waiver arises here because the MacuMira Defendants rely on their understanding of their legal position. Nova says it would be unfair to permit them to advance that understanding as part of their defence while withholding legal advice that may bear directly on it. The MacuMira Defendants respond that this submission amounts to an impermissible fairness override of solicitor-client privilege. They rely on the principle that class privileges, including solicitor-client privilege, are not displaced by a general balancing of fairness: **0678786 BC Ltd. v Bennett Jones LLP**, [2021 ABCA 62](#) [*Bennett Jones*] at para [22](#).

[161] I accept that solicitor-client privilege is not subject to a general fairness override. The issue here, however, is not whether privilege should yield because disclosure would be fair in a broad sense. The issue is whether the MacuMira Defendants have implicitly waived privilege by the way they have advanced their defence. In that analysis, fairness and consistency are relevant because they assist in determining whether the privilege-holder's litigation position is incompatible with maintaining privilege: *Hirsch v Lethbridge*, [2024 ABCA 170](#) at para [40](#); *S & K Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, 45 BCLR 218, [1983 CanLII 407 \(BCSC\)](#) at paras [6](#), [10](#). The authorities recognize limited circumstances in which a party's litigation position may be inconsistent with maintaining privilege, including where a party impugns counsel's conduct, relies on counsel's instructions or advice, or otherwise places its understanding of its legal position in issue while withholding communications that bear on that asserted understanding: *Nova Scotia (Attorney General) v Cameron*, [2019 NSCA 38](#) at para [46](#); *Graham v Canada (Minister of Justice)*, [2021 BCCA 118](#) at paras [47-48](#); *PetroFrontier Corp v Macquarie Capital Markets Canada Ltd.*, [2022 ABCA 136](#) at paras [45-46](#); *Rumancik* at para [10](#); *Brown v Clark Wilson LLP*, [2014 BCCA 185](#) at paras. [37-38](#), 372 DLR (4th) 495.]

Disposition:

[162] Although Mr. O'Rourke, in his capacity as a director and officer of Nova, received certain communications from Maverick Law, that circumstance does not waive the MacuMira Defendants' privilege over the entirety of Maverick Law's file concerning the Assignment Agreements or the identified Topics. Privilege is waived through disclosure only as to the specific

disclosed communications, including shared or disclosed legal advice. To the extent privileged communications were shared with or received by, or are notes taken of a meeting in which an O'Rourke Defendant was present (collectively, the "**Disclosed Communications**"), the MacuMira Defendants have waived privilege over the Disclosed Communications. Those communications must be produced, if they have not already been produced.

[163] In addition to any production required because of prior disclosure to an O'Rourke Defendant, the MacuMira Defendants are directed to produce advice they received from Maverick Law before executing the 2020 Assignment Agreement that addresses:

- the requirement for, or existence (or non-existence) of, Nova shareholder approval for the 2020 Assignment Agreement;
- Mr. O'Rourke's authority to enter into the 2020 Assignment Agreement; and
- any opinion from Maverick Law regarding paragraph 12 of the draft 2020 Assignment Agreement, but only to the extent the opinion addresses Mr. O'Rourke's authority to enter into that agreement on Nova's behalf. If the opinion instead concerns title to the Invention (or topics other than Mr. O'Rourke's authority to enter into the agreement), production is not required. If the opinion was previously shared with Mr. O'Rourke, the shared opinion is producible in full.

The MacuMira Defendants have waived privilege over these communications.

[164] The MacuMira Defendants shall also produce opinions or advice from Maverick Law before executing the 2020 Assignment Agreement that address the issue of whether the assets and interests assigned under the agreement constituted all or substantially all of Nova's assets, and whether the transactions were effected in the ordinary course of Nova's business. The MacuMira Defendants have also waived privilege over these communications.

[165] Any items in this Decision for which the Court has determined privilege has been waived as set out in the prior two paragraphs (163 and 164) are collectively, the "**Additional Producible Communications**".

[166] No further disclosure is required on the topics for the period after execution of the 2020 Assignment Agreement. Nor does the Court require the MacuMira Defendants to disclose records responsive to the other Topics requested by Nova, namely:

- potential challenges to the Assignment Agreements and assessments of the likelihood of success of those challenges; and
- steps to strengthen the Defendants' position in defending the Assignment Agreements.

[167] The Court directs the MacuMira Defendants to request their file from Maverick Law in order to produce all records as directed by this Decision. Alternatively, subject to solicitor-client privilege as clarified in this Decision, the Court directs Maverick Law to confirm that all documents related to MacuMira's file regarding the Assignment Agreements have been produced, or to provide additional production, and specifically, the Disclosed Communications and

Additional Producible Communications. The costs arrangements for such review shall be determined between the MacuMira Defendants and Maverick Law.

[168] To the extent these directions alter the Affidavit of Records (AOR) required to be produced, the MacuMira Defendants shall provide a further and better AOR.

[169] The parties shall select, and I shall appoint a referee for the limited purpose of ensuring production of the Disclosed Communications and Additional Producible Communications. That referee shall be bound by a covenant of confidentiality to preserve solicitor-client privilege for any materials reviewed, whether intentionally or inadvertently, to assess whether a document should be produced in compliance with this Decision. The cost of the referee shall be borne by Nova at first instance. The ultimate costs for the referee will be addressed after the review is completed.

[170] After complying with the above directions regarding the Disclosed Communications and Additional Producible Communications, I direct the MacuMira Defendants to provide all the records remaining on their Schedule 2 on which they still maintain a claim of privilege to the Court (via the referee) for review and determination of the privilege claimed on the records.

[171] Should there be an issue of whether a document is producible, the parties have proposed a mechanism for resolution with the final step being review by the Court for a privilege determination, which process I am content to employ.

[172] The failure of the MacuMira Defendants to provide the Affidavit of Records in a timely and complete manner initially, necessitating in part this application, will be addressed when determining the costs for this application.

Heard on the 29th day of June, 2026.

Dated this 3rd day of September, 2026.

C. Dario
J.C.K.B.A.

Appearances:

Trevor McDonald and Bruna Kalinoski
for Justin Sather and MacuMira Medical Devices Inc.

Kourtney Pratt and Codie Chisholm
for Nova Oculus Canada Manufacturing ULC

Kevin Burron
for Walter O'Rourke, and Karmastar Consulting Inc.