

CANADA / JUDGMENT

Mamalilikulla First Nation v. Sewid

2025 BCSC 1917

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Supreme Court of British Columbia

DECIDED

2 October 2025

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2025 BCSC 1917 Mamalilikulla First Nation v. Sewid

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mamalilikulla First Nation v. Sewid,

2025 BCSC 1917

Date: 20251002

Docket: S14126

Registry: Campbell River

Between:

Mamalilikulla First Nation and the Chief and Councillors of Mamalilikulla First Nation acting on behalf of all other members of Mamalilikulla First Nation

Plaintiffs

And:

Harold James Sewid, Jami Sonja Kathleen Powell, and Colleen Winifred Perreault, also known as Colleen Winnifred Perreault

Defendants

Before: The Honourable Justice K. Wolfe

Reasons for Judgment

Counsel for the Plaintiffs:

D. Wu

C. North (August 13 and 14, 2024)

Counsel for the Defendant, Colleen Perreault:

S. Gabel

Counsel for the Defendant, Harold Sewid (by MS Teams):

N. Ross

(August 13, 2024)

No one appearing for the Defendant, Jami Powell

Place and Date of Hearings:

Nanaimo, B.C.

August 13-14, 2024 and

December 13, 2024

Place and Date of Judgment:

Campbell River, B.C.

October 2, 2025

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Introduction

- [1] This decision addresses two related applications brought before the Court on separate dates. The plaintiffs filed the first application. They seek to quash a subpoena that one of the defendants, Ms. Colleen Perreault, issued to the plaintiffs' long-time counsel, Mr. Declan Redman (the "Subpoena Application"). Ms. Perreault filed the second application. She seeks to disqualify Mr. Redman from continuing to act (the "Disqualification Application"). Both applications require consideration of whether Mr. Redman is a necessary witness for trial. The second application raises additional questions about whether there are independent reasons to disqualify Mr. Redman from continuing to act in these proceedings.
- [2] The underlying proceeding was commenced by notice of civil claim filed May 23, 2018. Pursuant to that claim, Mamalilikulla First Nation ("MFN"), and its Chief and Councillors acting in a representative capacity for the other members of MFN (collectively, the "plaintiffs") are suing the three individual defendants. At a high level, the claim alleges that, between January 1, 2012 and April 30, 2016, the defendants used their roles with MFN to enrich themselves by making unlawful and unauthorized payments to themselves and each other out of MFN funds. Mr. Redman has been counsel of record on the claim since it was filed.
- [3] However, Mr. Redman's involvement with MFN goes back much further than the filing of the claim in 2018. He has been involved in various ways with MFN since at least 2014. Beginning in 2014, Mr. Redman was one of the legal counsel who represented two individual MFN members before the Federal Court in an effort to bring about democratic elections for MFN. The Federal Court proceedings resulted in MFN holding elections for its Chief and Council on April 30, 2016 (the "2016 Elections"). The 2016 Elections were the first elections MFN had held since the 1980s. After the 2016 Elections, Mr. Redman was retained to assist MFN's newly-elected Chief and its Councillors during the transition period, as the new leadership of MFN took over governance and operations of the Nation.
- [4] In May 2016, as part of assisting with the transition after the 2016 Elections, Mr. Redman attended a meeting of the new MFN Council and also conducted separate interviews with two of the three defendants, Ms. Jami Powell and Ms. Perreault. Mr. Redman recorded those interviews. Both the transcripts and the audio recordings of those interviews were provided to the Court as evidence on these applications. While the interviews were also attended by the then newly elected Chief Councillor, Mr. Richard Sumner, and one other new MFN Councillor, those individuals did not actively participate. Mr. Redman arranged the interviews and conducted them, asking all the questions and presenting certain pre-determined documents to Ms. Powell and Ms. Perreault.

- [5] Ms. Perreault says the subpoena that she issued should be upheld as there is material evidence about the events around May 2016 that only Mr. Redman can provide. She says that evidence is primarily relevant to a limitation issue that arises from the combination of her further amended response to civil claim and the plaintiffs' reply, in which they plead the claims were not discovered (within the meaning of s. 12 of the Limitation Act, S.B.C. 2012, c. 13) before May 1, 2016.
- [6] While a decision upholding the subpoena would likely be sufficient to prevent Mr. Redman from continuing to act in this proceeding, Ms. Perreault says Mr. Redman should be disqualified in any event based, among other things, on alleged contraventions of the Code of Professional Conduct for Lawyers for British Columbia, his role acting both for and against MFN and Mr. John Powell (Chief Councillor of MFN at the time of the hearings before me), and the alleged conflict of interest inherent in the limitation issue.
- [7] The plaintiffs maintain the period after the 2016 Elections is not properly pleaded from a limitation perspective, but consented to the two applications proceeding as if it had been. The plaintiffs say Mr. Redman is not a necessary witness with respect to limitation issues; there are other individuals who can provide evidence about the events in May 2016 and what the plaintiffs knew when. The plaintiffs also characterize the subpoena as an abuse of process. They assert the manner and timing for the subpoena's issuance confirms it is a litigation tactic, designed to fish for information, delay the trial and deprive the plaintiffs of their long-time counsel. The plaintiffs say Ms. Perreault's other grounds for disqualification have no merit. The plaintiffs ask the Court to: allow the Subpoena Application to quash the subpoena; dismiss the Disqualification Application; and award special costs against Ms. Perreault, in any event of the cause, for both applications.

Issues

- [8] The two applications before the Court raise related, but legally distinct issues. Both applications centre on Mr. Redman's involvement with MFN leading up to and during the transition period after the 2016 Elections, including the extent of his knowledge about the plaintiffs' claims and, given the limitation issues, the point at which the claims became discoverable. The events in May 2016 are the focus.
- [9] Ms. Perrault says if the subpoena is upheld, she will call Mr. Redman as a witness. If he is a witness at trial, Mr. Redman will be unable to continue to act as counsel for the plaintiffs. Therefore, if the Court dismisses the Subpoena Application, that outcome will make it unnecessary for the Court to determine the Disqualification Application. Accordingly, Ms. Perreault says the Court should address the Subpoena Application first by determining if Mr. Redman likely has material evidence on an issue before the Court, and if the subpoena is an abuse of process.

- [10] When the parties were first before me in August 2024 on the Subpoena Application, the plaintiffs submitted the subpoena was a tactical attempt to preclude Mr. Redman from acting. The plaintiffs asserted Ms. Perreault ought to have filed the Disqualification Application earlier. However, the plaintiffs did not dispute that if the Court finds Mr. Redman to be a necessary witness and upholds the subpoena, in a practical sense, that will disentitle him from acting.
- [11] I agree the first issue to be decided is whether the subpoena should be set aside. Accordingly, I frame the substantive issues as follows:
- a) Should the subpoena be set aside either because Mr. Redman is not a necessary witness or the subpoena constitutes an abuse of process?
 - b) Are there separate grounds to disqualify Mr. Redman as counsel?
- [12] The plaintiffs seek special costs of both applications from Ms. Perreault on the basis of alleged litigation tactics, delay, abuse of process and unfounded allegations of misconduct. Ms. Perreault seeks special costs of the Disqualification Application. I will deal with costs after addressing the first two issues.

The factual context

The parties and the 2016 Elections

- [13] To situate the analysis that follows, it is helpful to provide the general factual context for the two applications before me. The claim itself is somewhat involved, but the majority of the facts relevant to the present applications can be simply stated.
- [14] MFN is a "band", as that term is defined in the federal Indian Act, R.S.C. 1985, c. I-5, with approximately 400 registered members. Prior to changing its name in mid-May 2016, MFN was known as the Mamalilikulla-Qwe'Qwa'Sot'Em Band. For ease, and without meaning any disrespect, I will use the name MFN throughout. Certain elements of the underlying claim engage historical disputes about how MFN came to have its current composition and membership, but those issues are not directly relevant to the applications before me. What is relevant (and does not appear controversial) is that there has been, and may continue to be, some division among the members of MFN.
- [15] MFN is currently governed by an elected Chief and Council. From the 1980s until April 30, 2016, MFN did not hold elections for the offices of Chief and Council. The claim alleges the Chief Councillor was an unelected member of a particular MFN family, and the Councillors were appointed.

- [16] In 2014, two individual MFN members, Mr. Sumner and Ms. Hazel Ettagiak, retained counsel to file an application for judicial review before the Federal Court. That application sought to challenge MFN's leadership (including certain objectives being pursued by MFN leaders at the time) and to attempt to compel democratic elections for MFN. Together with lead counsel Mr. Steven M. Kelliher, Mr. Redman represented Mr. Sumner and Ms. Ettagiak in the Federal Court proceedings.
- [17] The Federal Court proceedings were ultimately settled by way of a consent order negotiated at mediation. That order led to the 2016 Elections, which the evidence before me suggests was a contentious process. In the 2016 Elections, Mr. Sumner was elected as Chief Councillor and Ms. Ettagiak was elected as one of the other four Councillors, together with Ms. Edna Puglas, Mr. Powell and Mr. Gilbert James. Mr. Powell was the only member of the previous MFN leadership re-elected in the 2016 Elections. Mr. Powell was subsequently elected as Chief Councillor in May 2021. As noted, he was MFN's Chief Councillor at the time of the applications before me.
- [18] The defendant, Ms. Powell, was employed as the band manager or administrator for MFN for approximately 25 years. At certain points, she appears to have been employed in an acting, rather than permanent, capacity. Ms. Powell was on vacation at the time of the 2016 Elections, and her employment was terminated by a band council resolution dated June 6, 2016. Ms. Powell is Mr. Powell's sister-in-law; she is married to his brother.
- [19] From 2012 to 2016, the defendant, Ms. Perreault, worked as an independent contractor for MFN, providing accounting, auditing and other related services. A second band council resolution dated June 6, 2016 officially terminated Ms. Perrault's contract, but Ms. Perreault alleges Mr. Redman personally dismissed her before that date. The plaintiffs deny this occurred.
- [20] The third defendant, Mr. Harold Sewid, was the long-time Chief of MFN prior to the 2016 Elections.
- [21] The record before me revealed different narratives about what happened in the month or so after the 2016 Elections. For present purposes, I will briefly outline the different narratives to illustrate some of the evidence Ms. Perreault says only Mr. Redman can provide.
- [22] In his affidavit made July 18, 2024, Mr. Sumner deposes that when the new Council first attempted to move into the band office after the 2016 Elections, the doors were locked. He deposes that when Council finally got in to the band office, there were virtually no files or records, there were no transition memos, and the new Council was unable to access the office computers.
- [23] After gaining access to the computers, Mr. Sumner deposes the new Council found out there was "very little money in MFN's bank accounts". He deposes that initially, the only information the new Council had about MFN's operations came from Ms. Perrault; he does not indicate when that information was provided. Mr. Sumner deposes the new Council

relied on Ms. Perreault to provide information about finances and band management. He also says both Ms. Perrault and Ms. Powell "voluntarily" came to the band office later in May 2016 "to be interviewed by Mr. Redman", to answer questions that would assist the new Council to understand MFN's operations. He deposes the interviews were "amicable".

- [24] Ms. Powell did not participate in or file any materials for the hearings before me. The only information I have from Ms. Powell is drawn from the interview conducted by Mr. Redman. It is not clear how that interview was arranged or when. When interviewed by Mr. Redman on May 19, 2016, Ms. Powell indicated that although she was on vacation at the time of the 2016 Elections, she had offered to have calls to the band office forwarded to her cell phone or to cut her holidays short by a week so she could assist with the transition. She indicates that Mr. Sumner refused her offer to make herself available in this way. The transcript suggests Mr. Redman was asking Ms. Powell pre-prepared questions and that he presented a series of pre-gathered documents to Ms. Powell during the interview. During the interview, Ms. Powell repeatedly inquired and expressed concern about the status and security of her employment with MFN.
- [25] In her affidavit evidence, Ms. Perreault recalls Mr. Sumner calling to request that she come to the band office on or about May 3, 2016 to unlock the door. Her affidavit attaches phone records showing two calls from Mr. Sumner's phone number that day. She deposes that she attended the band office, but the new Council had already gained access and she simply turned off the alarm for them.
- [26] Ms. Perreault says Mr. Redman was there with the new Council; she knew who he was due to the Federal Court proceedings. Ms. Perreault says, in a private conversation that day, Mr. Redman advised her that her services were no longer required and she was being dismissed by the new MFN leadership. Ms. Perrault says she did not have any substantive discussions with anyone about MFN operations during that visit or later that day. She disputes the accuracy of a document disclosed by MFN, purported to be minutes of a meeting of the new Council held May 3, 2016, which suggest Ms. Perreault was present for parts of that meeting.
- [27] Mr. Sumner says the disputed document is generally consistent with his recollection of what occurred on May 3, 2016, but he does not recall who took the purported minutes. The plaintiffs have been unable to identify who created the disputed document and unable to find any drafts or notes from which it may have been created. Part of the disputed document is redacted based on solicitor-client privilege; it is said to speak to MFN's retention of legal services. Mr. Sumner deposes that Ms. Perreault's evidence about being dismissed in May 2016 is inconsistent with both his recollection and with the further work Ms. Perrault did for MFN on an audit that remained outstanding at the time of the 2016 Elections.
- [28] Ms. Perreault says she had already completed the audit preparation before the 2016 Elections because she anticipated MFN would end her contract if Mr. Sumner was elected Chief Councillor. Ms. Perrault says she did not do any further work for MFN after Mr. Redman dismissed her. She says, in any event, she could not have done further work for

MFN after May 3, 2016 because her server passwords stopped working that day and she lost access to all of MFN's data systems. She deposes she understood the locks to the band office were also changed that day.

- [29] Ms. Perreault says that on a date in May 2016 that she does not recall, but after she was dismissed by Mr. Redman, she received a call from Mr. Redman asking her to meet with him and the new Chief and Council to provide information about MFN's finances. She says she compiled financial information that she had into a summary sheet in preparation for the meeting. However, when she attended the band office on May 26, 2016 expecting to discuss the information she had prepared, Mr. Redman surprised her by asking if he could interview her and record the interview. Mr. Sumner and Ms. Puglas were present. Ms. Perreault deposes she was very uncomfortable with the idea of being interviewed and recorded but Mr. Redman pressured her into proceeding before he started the recording.
- [30] Ms. Perreault describes the interview lasting more than an hour, with Mr. Redman asking pre-prepared questions about her role and involvement, while referring to a book of pre-prepared documents, including print-outs of certain pages from MFN's general ledger. At the end of the interview, Ms. Perreault stated that the interview was not what she expected as she thought the meeting was to go over the information she brought. At an earlier point in the interview, Ms. Perreault asked to stop the recording; Mr. Redman refused saying "I don't really want to" and continued asking questions.
- [31] The exchange where Ms. Perreault asked to stop the recording was not reflected in the transcript of the interview that was before me in August 2024, but could be heard on the audio recording I was provided. Counsel for the plaintiffs conceded there was an error in the original transcript. Subsequent to the August 2024 hearing before me, counsel for Ms. Perreault requested the transcribers to listen to that portion of the transcript again and make any necessary corrections. The transcribers provided a corrected transcript to Ms. Perreault's counsel on November 5, 2024 which includes the full exchange. The corrected version of the relevant pages of the transcript were provided for the December 2024 hearing.
- [32] During the two interviews, Mr. Redman asks both Ms. Powell and Ms. Perreault detailed questions about their roles and responsibilities (and about each other's roles), how they worked together, and how MFN's finances were managed. Mr. Redman also asks detailed questions about specific payments that were made to each of Ms. Powell and Ms. Perreault, and about funds paid to Mr. Sewid as well. Ms. Perreault argues the interview questions canvassed the very issues that were ultimately reflected as allegations in the filed claim.
- [33] Mr. Sumner deposes the transcripts of the interviews Mr. Redman conducted for Council with Ms. Powell and Ms. Perrault generally accord with his recollection. I note his affidavit was sworn before the transcript for Ms. Perreault's interview was corrected. Mr. Sumner does not provide any further details about the interviews, other than deposing that the answers provided by Ms. Powell and Ms. Perreault in those interviews left him confused about who was responsible for what under the previous MFN leadership. Mr. Sumner

deposes the Council hired a new bookkeeper, Ms. Darlene Cook, who spent months gathering documents and learning MFN's accounting and administration systems, which was key to the new Council piecing together what had happened with MFN's funds. Unfortunately, Ms. Cook has since passed away.

- [34] The factual disputes about what occurred in May 2016, including what occurred at the May 3, 2016 meeting and the circumstances leading up to and surrounding Mr. Redman's interviews with two of the defendants, will be for the trial judge to resolve, on the basis of a more complete evidentiary record. The evidence filed before me in support of the Subpoena Application and the Disqualification Application is not sufficient to allow me to engage with those issues, nor would it be appropriate to do so.
- [35] It is not disputed that following the 2016 Elections, the new Chief and Council retained Mr. Kelliher and Mr. Redman to assist with the transition of MFN governance. The plaintiffs provided an affidavit from Mr. Kelliher as part of their response to the Disqualification Application. In his affidavit, Mr. Kelliher details some of the steps his firm took to assist MFN's new leadership with the transition, including attempts to obtain records and information about the management and operations of MFN under the previous leadership. Mr. Kelliher addresses the general reason for Mr. Redman's presence at the first meeting of the new Chief and Council on May 3, 2016. Mr. Kelliher also briefly deposes to the rationale for Mr. Redman's role in the interviews of Ms. Powell and Ms. Perreault on May 19 and May 26, 2016 respectively.
- [36] Mr. Redman filed the notice of civil claim on behalf of the plaintiffs on May 23, 2018, two years after the May 3, 2016 meeting of the new Chief and Council and the interview with Ms. Powell; the claim was filed just within two years of the interview with Ms. Perreault. As explained further below, the plaintiffs plead in their reply that s. 12 of the Limitation Act applies and their claims were not discovered until after April 30, 2016 or May 1, 2016. Accordingly, Ms. Perrault says it is critical to determine what MFN knew at what time in May 2016. Given his direct and key involvement in the events in May 2016, in a capacity that allegedly went beyond merely acting as legal counsel, Ms. Perreault says Mr. Redman has material evidence that is primarily relevant to the limitation questions the plaintiffs put in issue when they filed their reply, but also to her general defence to the claim.

Procedural history

- [37] The procedural history of this matter to date is somewhat complicated. Since the plaintiffs assert Ms. Perreault's delay in addressing these issues makes the issuance of the subpoena an abuse of process, I will provide an overview here and address any additional relevant details more fully in my analysis below.
- [38] As noted, the plaintiffs filed their claim on May 23, 2018; Mr. Redman is listed as counsel of record. The three defendants were originally represented by the same counsel, who filed a response to civil claim on July 31, 2018.

- [39] On October 6, 2020, former counsel for the defendants wrote to Mr. Redman to advise that, based on Mr. Redman's role in the May 2016 interviews, Mr. Redman may be required as a witness at trial and may need to withdraw as counsel. Former counsel wrote again on October 22, 2020 raising the prospect that Mr. Redman may be in a conflict of interest because he had acted for MFN when Ms. Powell and Ms. Perreault were still working there.
- [40] In his October 26, 2020 response, Mr. Redman disputed any controversy with respect to the interviews as they had been recorded and transcribed and could stand on their own. Mr. Redman provided a notice to admit seeking an admission about the authenticity of the transcripts. As former counsel for the defendants did not respond to the notice to admit, the authenticity of the transcripts is deemed to have been admitted. As noted above, however, the transcript of Ms. Perreault's interview had to be corrected.
- [41] The issue of Mr. Redman's involvement does not appear to have been pursued further by the defendants' former counsel. The matter was set for trial in the second week of May 2023. Shortly before the claim was to go to trial, former counsel for the defendants advised that he was required to withdraw due to a conflict of interest. He withdrew in early May 2023 and the trial dates were adjourned.
- [42] Ms. Perreault retained her current counsel in July 2023 to represent her separately from the other defendants; current counsel immediately focused on negotiating amendments to Ms. Perreault's response, including to plead a limitation defence. The plaintiffs consented to Ms. Perreault amending her pleadings based on existing pleaded facts, but opposed Ms. Perreault raising a limitation defence on the basis that the claim was discovered after the 2016 Elections. Ms. Perreault's further amended response was filed and served in February 2024.
- [43] Mr. Sewid also retained new counsel to represent him separately. Mr. Sewid's counsel observed the first day of the first application before me but did not participate or file materials and was not present for the second application. During the hearings before me, I was not advised if Ms. Powell was represented or not. The court file suggests she is (or at least was) separately represented, but as noted, Ms. Powell did not appear or file any materials, nor did any counsel on her behalf.
- [44] Beginning in late November 2023, Ms. Perreault's counsel raised renewed concerns about Mr. Redman's potential conflicts and ability to continue as counsel in several letters relating to Ms. Perreault's application to amend her pleadings and her requests for further document disclosure. In December 2023, Ms. Perreault filed a case plan proposal identifying possible future applications to disqualify Mr. Redman and subpoena him as a witness. In March 2024, Ms. Perreault filed her trial brief, again noting these issues and identifying Mr. Redman as a possible witness. In response to the issues being raised again in Ms. Perreault's trial brief, on March 21, 2024, Mr. Redman responded that the continued threats were improper and the plaintiffs would take steps to formally address the issue.

- [45] The issue of Mr. Redman's role came to a head at a trial management conference (TMC) before Justice Baird on March 25, 2024. Justice Baird set a deadline of April 5, 2024 for Ms. Perreault's counsel to take concrete steps by issuing a subpoena if she intended to call Mr. Redman as a witness at trial. Justice Baird also directed that any such subpoena be accompanied by an explanation of the evidence Ms. Perreault proposed to seek from Mr. Redman, so the basis for the subpoena could be considered. In part because of this issue, but also because inadequate trial time had been reserved, the two-week trial that had been scheduled for May 2024 was adjourned.
- [46] Pursuant to the TMC orders, on April 4, 2024, Ms. Perreault's counsel served a subpoena on Mr. Redman requiring his testimony at trial, accompanied by a letter setting out the areas of evidence proposed to be sought from Mr. Redman. The letter also reiterated other grounds which Ms. Perreault asserted would disqualify Mr. Redman from continuing to act. The April 4, 2024 letter specifically stated that if the plaintiffs sought to challenge the subpoena, Ms. Perreault would file a cross-application to disqualify Mr. Redman. At the same time, Ms. Perreault's counsel served Mr. Redman with a notice of intention to call him as an adverse witness.
- [47] On June 11, 2024, Ms. Perreault filed a notice of application seeking relief in relation to an outstanding demand for particulars. By that point, the plaintiffs had retained new counsel to address the subpoena; those counsel appeared before me on both applications. On June 13, 2024, the plaintiffs filed a notice of application to set aside the subpoena and notice to call an adverse witness. However, a dispute arose between the parties about whether the Court had made an order or otherwise imposed conditions at the TMC on the sequence of future applications. The plaintiffs asserted Baird J. had made an order that no other applications could be brought until the question of Mr. Redman's role had been addressed. Ms. Perreault disputed the Court had made any such order. As a result, the TMC order could not be settled.
- [48] On June 27, 2024, the parties appeared before Associate Judge Dick ostensibly in relation to Ms. Perreault's application regarding particulars. Given the dispute about the sequencing of applications, Associate Judge Dick adjourned Ms. Perreault's application and granted the parties leave to listen to the DARS recording of the TMC. The parties have done so. While Ms. Perreault maintains no order was made, she concedes Baird J. made comments to the effect that the subpoena issue should be dealt with before any others. Ms. Perreault says this dispute explains why, on receipt of the plaintiffs' application to quash the subpoena, she did not file a cross-application to disqualify Mr. Redman and seek to have it heard at the same time.
- [49] Due to the above dispute and counsel's schedules, the plaintiffs' application to quash the subpoena was not set for hearing until August 2024. It came before me on August 13 and 14, 2024. During that hearing, the plaintiffs took the position that if Ms. Perreault intended to seek to disqualify Mr. Redman, she ought to have brought a disqualification application earlier, so the two issues could be addressed together. In light of the evidence about the dispute after the TMC, I accept Ms. Perreault's explanation for why she did not do so. I

reserved judgment on the plaintiffs' application to quash the subpoena.

- [50] On September 27, 2024, while my decision remained under reserve, Ms. Perreault submitted a request to appear in relation to a pending application to disqualify Mr. Redman as counsel. Counsel for the plaintiffs consented to the request that I hear Ms. Perreault's proposed application to disqualify Mr. Redman. Ms. Perreault filed her application on November 18, 2024; I heard the application on December 13, 2024. As indicated to counsel at that time, given the common factual background and the interrelated nature of the issues, I consider it appropriate to address both applications in this one set of reasons.

Analysis

Issue 1: Should the subpoena be set aside?

- [51] The plaintiffs argue the subpoena issued to Mr. Redman should be set aside on two bases. First, they say Mr. Redman is not a necessary witness in relation to the issues for which Ms. Perreault seeks to call him. Among other things, the plaintiffs say there are transcripts of the interviews and other witnesses who can be called to testify to the relevant events and what MFN knew at that time. Second, the plaintiffs say the issuance of the subpoena constitutes an abuse of process. The plaintiffs rely on the Court's authority under the Supreme Court Civil Rules [Rules] and on the Court's inherent jurisdiction.
- [52] Ms. Perreault says Mr. Redman is likely to have material evidence, particularly in relation to when the plaintiffs' claims were discovered. She says despite her best efforts to obtain information relevant to the limitation issues in other ways (such as through demands for particulars and document requests), the plaintiffs have been unwilling or unable to provide that information. Ms. Perreault says this makes Mr. Redman a necessary witness. Ms. Perreault denies that the subpoena is an abuse of process, contending she has diligently pursued the issue since retaining new counsel and her attempts to obtain the information through other means have been thwarted.
- [53] I will first set out the legal tests before turning to my analysis of the two prongs of the plaintiffs' position.

The legal tests for quashing a subpoena

- [54] The parties agree on the legal tests to be applied when the Court is asked to set aside a subpoena. First, it is common ground that as part of its authority to control its own processes, the Court has inherent jurisdiction to set aside a subpoena if it constitutes an abuse of process: *De Sousa v. Kuntz*, 1988 CanLII 3016 (B.C.C.A) at para. 29.
- [55] In addition to the Court's inherent jurisdiction, R. 12-5(39) of the Rules permits a person who has been served with a subpoena to apply to court to set it aside:

Order setting aside subpoena

- [39] A person who has been served with a subpoena may apply to the court for an order setting aside the subpoena on the grounds that compliance with it is unnecessary or that it would work a hardship on the person, and the court may make any order, as to postponement of the trial or otherwise, it considers will further the object of these Supreme Court Civil Rules.
- [56] In determining whether a subpoena should be set aside, R. 12-5(39) allows the Court to take account of broader considerations, including those of the litigants and the person served with the subpoena: *De Sousa* at para. 29. However, it is worth noting that the plaintiffs did not expressly contend that the subpoena should be set aside on the basis that it would work a hardship on Mr. Redman. Their argument under R. 12-5(39) centres on necessity.
- [57] Both parties accept that where a subpoena is challenged, the party proposing to call the witness bears the onus of establishing that the proposed witness is likely to give material or relevant evidence on an issue before the Court: *Trans Mountain Pipeline ULC v. Mivasair*, 2022 BCSC 2241 at paras. 64-67 and 72-75; *McMahon v. Harper*, 2017 BCSC 2328 at para. 178; *Williams and Williams v. Stephenson et al.*, 2005 BCSC 450 at para. 56.
- [58] While issuing a subpoena is generally viewed as a serious step (*McMahon* at para. 177), both parties recognize that issuing a subpoena to opposing counsel engages different considerations than issuing a subpoena to a third party. Courts have described issuing a subpoena to have counsel testify against their client as something that ought not to be done except in the "most exceptional circumstances" where the administration of justice demands it: *R. v. 1504413 Ontario Limited*, 2008 ONCA 253 [1504413 Ontario] at paras. 15-17.
- [59] The reasons are obvious. Issuing a subpoena to opposing counsel may have potentially significant consequences; it may require the counsel to withdraw, disrupting the lawyer-client relationship and resulting in a party being deprived of their choice of counsel: *McMahon* at para. 177; *Williams* at para. 56. In such cases, the Court "must carefully scrutinize the circumstances to determine whether that person's evidence is truly necessary to the proceeding or whether the opposing party has issued the subpoena for the improper and collateral purpose of disrupting the proceeding and causing prejudice to the opposing side. In such a case, the court may set aside the subpoena as an abuse of process": *Wexler v. Bhullar*, 2006 BCSC 1466 at para. 36; *aff'd* 2007 BCCA 273.
- [60] While the parties focused their submissions almost exclusively on the subpoena, the plaintiffs' application also seeks to set aside the notice to call an adverse party that Ms. Perreault issued to Mr. Redman. R. 12-5(23) provides authority for the Court to set aside a notice to call an adverse party:

Application to set notice aside

- (23) The court may set aside a notice served under subrule (21) on the grounds that
- (a) the adverse party is unable to procure the attendance of the person named in the notice,

- (b) the evidence of the person is unnecessary,
 - (c) it would work a hardship on the person or the adverse party to require the person to attend the trial, or
 - (d) the person named in the notice is not a person referred to in subrule (20) (a) or (b).
- [61] Similar to the case with a subpoena, the Court may set aside such a notice on the basis that the evidence of the person is unnecessary. Further, the Court always has inherent jurisdiction to set aside a notice that is an abuse of process.

Analysis

- [62] Although there is some overlap between the two prongs of the plaintiffs' argument as to why the subpoena should be set aside, I will deal with each in turn, beginning with whether Mr. Redman is a necessary witness.

Is Mr. Redman a necessary witness?

- [63] In considering if Mr. Redman is a necessary witness, I must decide if Mr. Redman likely has evidence material to the issues to be raised at trial. Ms. Perreault says the primary issue on which Mr. Redman likely has material evidence is the question of when the plaintiffs discovered their claims, which goes to her limitation defence. Ms. Perreault says the limitation issues are raised both in her further amended response to civil claim filed February 26, 2024, and in the plaintiff's reply, filed March 11, 2024.
- [64] The plaintiffs maintain that Ms. Perreault's limitation defence as pleaded does not engage the period after the 2016 Elections. At present, Ms. Perreault merely pleads that all funds in dispute were paid to her on or before April 30, 2016, which is more than two years before the claim was filed. As a limitation defence is an affirmative defence, the plaintiffs say Ms. Perreault has failed to plead material facts that would establish the defence based on the claims being discovered in the period after the 2016 Elections. However, as noted, to avoid asking the Court to grapple with that issue at this time, for purposes of these applications only, the plaintiffs were prepared to proceed as if the period after the 2016 Elections is properly in issue on the pleadings. Accordingly, my analysis assumes there is a live issue as to whether the claims were discovered after the 2016 Elections.
- [65] On that basis, the plaintiffs say Ms. Perreault has not met her significant burden to prove Mr. Redman likely has evidence that is both highly material and necessary for the resolution of their claims, and that cannot be obtained other than through his involvement as a witness. The plaintiffs contend that because their claims are based in fraud and conversion, under s. 12 of the Limitation Act, their claims were not discoverable until they had actual knowledge of them. They say actual knowledge requires full awareness of the alleged loss or damage, that it was caused by one or more of the defendants, and that a court action is an appropriate response: *Lennox v. Lennox*, 2019 BCSC 938 at para. 45. While the plaintiffs admit the incoming Chief and Council elected in the 2016 Elections had suspicions of

financial mismanagement under the previous MFN leadership, they say suspicions or beliefs do not equate to actual knowledge: *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2020 BCSC 467 at paras. 10--15.

- [66] The plaintiffs say the members of the MFN Council elected in the 2016 Elections can, and are the appropriate individuals to, provide evidence about what the plaintiffs knew in May 2016 and after. They contend Ms. Perreault has failed to explain why it would be insufficient for her to question the relevant members of the Council about these issues, particularly given that Mr. Sumner and Ms. Puglas each attended the interviews with Ms. Powell and Ms. Perreault. They say Ms. Perreault has not made any efforts to question other Councillors.
- [67] With respect to Mr. Redman's involvement in or around May 2016, the plaintiffs contend any knowledge he may have had about the plaintiffs' claims cannot be imputed to the plaintiffs because the discoverability rules for when an agent discovers a claim on behalf of their principal do not apply to claims that fall under s. 12 of the Limitation Act. They rely on *Halston Hills Housing Co-operative v. Cameron*, 2022 BCSC 1808 [Halston Hills] at para. 41 for this proposition.
- [68] In any event, the plaintiffs say any information Mr. Redman may have shared with the plaintiffs in that regard would be covered by solicitor-client privilege. The plaintiffs accept that if a lawyer is acting in a managerial capacity for a client, communications and work that falls outside the solicitor-client relationship may not be privileged (see *Zarzour v. Canada*, 2001 CanLII 22316 (F.C.) at paras. 7-9). However, the plaintiffs deny Mr. Redman was acting in a managerial capacity for MFN at the relevant time. They say further that the nature of the questions Ms. Perreault seeks to ask Mr. Redman demonstrates she did not issue the subpoena to elicit highly material and necessary evidence, but rather to fish for information that might support the theories of her defence.
- [69] I accept that issuing a subpoena to opposing counsel is an exceptional step that is generally to be avoided. I also accept that when such a subpoena is challenged on the basis of necessity, the Court must carefully scrutinize the circumstances to decide if the evidence sought to be elicited through the subpoena is "truly necessary": *Wexler* at para. 36.
- [70] In *De Sousa*, the majority of the Court of Appeal cautioned that the discretion to set aside a subpoena on the basis of necessity should be exercised "with considerable restraint"; setting aside a subpoena requires the chambers judge to substitute their view of what is "necessary" for that of counsel and yet the chambers judge "will seldom have as complete an appreciation as counsel does of the benefits - both tactical and substantive - that a litigant may derive from calling a certain witness": *De Sousa* at para. 30. In *Rai v. Swali*, 2023 BCSC 1303, Justice Riley (as he then was), relied on this guidance in concluding, at para. 35, that "a fair measure of defence should be afforded to the determination of the party who served the subpoena that a particular witness will be necessary at trial". The majority in *De Sousa* suggested that it would "only be in a clear case" that a chambers judge would set aside a

subpoena as unnecessary: De Sousa at para. 30.

- [71] In assessing whether the evidence of opposing counsel is "necessary", the Ontario Court of Appeal suggested at para. 17 of 1504413 Ontario that it is appropriate to consider not just the nature of the issue on which the proposed witness' evidence is sought, but also: the importance of that issue; the degree of controversy surrounding the issue; the availability of other witnesses or other sources of evidence; the potential disruption of the trial process; and the overall integrity of the administration of justice. While that decision's articulation of the relevant factors has not previously been cited in British Columbia, the non-exhaustive list of considerations aligns with the scope of the Court's discretion under R. 12-5(39) and largely reflect the arguments advanced by the parties before me.
- [72] After carefully considering the specific circumstances of this case, and in light of the above guidance, for the reasons that follow, I conclude that Mr. Redman is a necessary witness for trial.
- [73] As indicated, the limitation issue, and specifically when the plaintiffs discovered their claims, is the primary issue for which Ms. Perreault asserts Mr. Redman has material and necessary evidence. The plaintiffs' reply pleads the claims were not discovered before May 1, 2016 and the plaintiffs have accepted, for purposes of these applications, that there is a live issue about whether the plaintiffs discovered their claims in the month or so following the 2016 Elections.
- [74] The record before me clearly demonstrates that the limitation issues are important, rather than peripheral, issues in these proceedings and that there is significant controversy surrounding them. All three defendants have pleaded some form of limitation defence. There were substantive exchanges between Mr. Redman and Ms. Perreault's current counsel when she sought to amend her response to civil claim to include a limitation defence. The filing of the plaintiffs' reply, with its reliance on s. 12 of the Limitation Act, also sparked more controversy and renewed concerns from Ms. Perreault's counsel about Mr. Redman's involvement in May 2016.
- [75] In my view, there are also significant factual disputes about what the plaintiffs knew by May 23, 2016, the date that was two years before the filing of the claim. While the plaintiffs maintain there is evidence that it took them a considerable period of time to piece together what occurred under the previous leadership, there is also some evidence before me that could be argued to suggest the plaintiffs' suspicions had crystallized into actual knowledge of their claims much earlier.
- [76] For example, in his examination for discovery as the representative of the plaintiffs, Mr. Powell (who was then the Chief Councillor of MFN) testified: "As soon as I realized - and I don't know how quickly that was, but fairly quickly after we were elected - that there was going to be a court action, I removed myself from any information around it because I feel I'm in a direct conflict, my brother being married to [Ms. Powell]" (Transcript of the Examination for Discovery of John Lawrence Powell (20 April 20 2023) p. 92, lines 20-25

(emphasis added)). Ms. Perreault asserts that Mr. Powell's testimony on discovery confirms the plaintiffs were fully aware of their claims by the time they passed the two band council resolutions on June 6, 2016, terminating Ms. Powell's employment and Ms. Perreault's contract. It will be for the trial judge to resolve these issues on a more complete evidentiary foundation, but these are clearly issues on which the parties do not agree.

- [77] With respect to other potential sources for the evidence Ms. Perreault seeks, I have considered the areas of evidence and questions Ms. Perreault's counsel identified in the April 4, 2024 cover letter that accompanied the subpoena and notice to call an adverse witness. I accept that the members of the MFN Council who were elected in the 2016 Elections may be able to provide some information with respect to what the plaintiffs knew at that time. I also accept that Mr. Sumner and Ms. Puglas, having attended the interviews that Mr. Redman conducted of Ms. Powell and Ms. Perreault, may be able to provide some information about those interviews, including what occurred before and after the recorded portions of the interviews. However, Ms. Perreault seeks other evidence that, in my view, is relevant to these issues and can likely only be provided by Mr. Redman.
- [78] For example, the transcripts of both interviews demonstrate that Mr. Redman had prepared in advance for the interviews, including by reviewing in some considerable detail various MFN records and financial and other documents. It is apparent Mr. Redman came to each interview with a prepared set of questions to ask based in large part on those documents. Ms. Perreault has requested on multiple occasions that the plaintiffs disclose the documents that Mr. Redman brought to and relied on during the interviews in May 2016. Ms. Perreault's counsel made a demand under R. 7-1(11) in a letter to Mr. Redman dated March 13, 2024, seeking the full copies of the books of documents used during both interviews as well as any notes taken by those in attendance.
- [79] It does not appear that Mr. Redman provided a specific response to that demand, but on March 21, 2024, he did commit to providing an updated list of documents within a week. That list had not been provided by the time the subpoena was issued on April 4, 2024. Through counsel retained on these applications, the plaintiffs took the position that Mr. Redman's status as counsel had to be resolved before other litigation steps, such as document disclosure, could be addressed. It is not clear to me if that position has been maintained while this decision was under reserve.
- [80] After receiving the Subpoena Application, on June 18, 2024, Ms. Perreault's counsel spoke with and then emailed plaintiffs' counsel on these applications in regards to Ms. Perreault's additional questions and requests. Among those requests was a repeated request for copies of the package of documents Mr. Redman used in his interviews with Ms. Powell and Ms. Perreault. Ms. Perreault's counsel also asked about the disputed document that purports to be minutes of the May 3, 2016 meeting of Chief and Council which Mr. Redman attended. She also asked if the plaintiffs were aware of other witnesses, besides Mr. Redman, who could speak to a number of the issues identified in the April 4, 2024 cover letter.

- [81] On July 17, 2024, plaintiffs' counsel on these applications sent a letter to Ms. Perreault's counsel taking the position that the additional requests were improper, but advising that "in good faith and out of professional courtesy", they had sought answers to the questions. Counsel's letter states "It will be unsurprising that due to the passage of time, the recollection of persons involved in the post-election period have faded, and as you know the person who would have much of this knowledge, Darlene Cook, has passed." I interpret this statement, in the context of the responses that follow, as a form of admission that there are few individuals left who know the details and there are frailties with the memories of those who remain.
- [82] In the letter, plaintiffs' counsel on these applications advises that the plaintiffs have been unable to identify who created the disputed document. In relation to the documents used in the interviews, plaintiffs' counsel asserts the binder was provided by Ms. Powell, but they have been unable to identify or locate all of the specific documents referred to in the two interviews. Plaintiffs' counsel asserts the nature of the documents suggest they were created by Ms. Powell or Ms. Perreault and have therefore already been listed.
- [83] Before me Ms. Perreault argued, and I accept, that Ms. Powell referred to a binder containing drafts of policy and governance documents she brought with her. But I also agree that during the interviews, Mr. Redman referred to multiple other types of documents, including print-outs of the general ledger and lengthy documents (more than 250 pages) apparently obtained from MFN's external accounting firm. The transcript suggests Mr. Redman provided these documents to Ms. Powell and Ms. Perreault, rather than the reverse.
- [84] There is no suggestion, either in the transcripts or in Mr. Sumner's affidavit, that Mr. Sumner and Ms. Puglas had or saw copies of the documents Mr. Redman put to Ms. Powell and Ms. Perreault, nor that they would be in a position to identify or describe them in any detail, or give evidence about when and where they were gathered. The transcripts also suggest Mr. Redman was directly involved in searching for documents at the band office and on the band office computers used by Ms. Powell and Ms. Perreault. I am satisfied that Mr. Redman would probably have material evidence about the documents he put to the two witnesses during the May 2016 interviews and how and when they were gathered, which goes to the limitation issue. I am likewise satisfied, on the basis of the evidence before me, that there are no other witnesses that can address this.
- [85] I am similarly satisfied that Mr. Redman likely has material evidence about how and when the interviews with Ms. Powell and Ms. Perreault were arranged, and about what was conveyed to each of those two defendants when they were asked to come in. Again, there is nothing in the transcripts or in Mr. Sumner's affidavit that suggests he or another member of Council were involved in making those arrangements. While Mr. Sumner deposes that "We asked Ms. Perreault and Ms. Powell to come answer questions", he does not identify who "we" is or provide any other details. This paragraph of his affidavit stands in contrast to the previous paragraph, where Mr. Sumner expressly states the two defendants "came to the office to speak with Mr. Redman" (emphasis added), rather than to speak with him and Ms.

Puglas. The notion that Mr. Redman arranged the interviews is consistent with Ms. Perreault's recollection that Mr. Redman called her to come for the meeting. However, as Ms. Perreault does not recall the details or the date of the call, this is another area where I am satisfied Mr. Redman likely has material evidence and there is no other source.

- [86] With respect to whether Mr. Redman's knowledge can be imputed to the plaintiffs, I do not accept the plaintiffs' assertion that the rules in s. 17 of the Limitation Act regarding discoverability of claims by an agent do not apply in the context of fraud and conversion claims said to fall under s. 12 of the Limitation Act. I do not read the decision in *Halston Hills* as supporting that proposition, either generally or in the context of that case.
- [87] The facts of *Halston Hills* are distinguishable. CIBC sought to impute to the plaintiff co-operative the knowledge of the defendant who was alleged to have committed the fraud against the plaintiff. While the plaintiff accepted that the defendant in question was its "agent", Justice Edelmann (as he then was) found that defendant was acting outside the scope of the agency relationship when she acquired knowledge sufficient to ground the conversion claim against CIBC. Knowledge acquired in that manner could not be imputed to the plaintiff (*Halston Hills* at paras. 38-40).
- [88] While that conclusion was sufficient to dispose of the limitation defence, the Court went on to say that even if the defendant had a duty to communicate the knowledge obtained through her fraudulent behaviour, her wilful concealment of her own fraud and wilful breach of any such duty, would mean the limitation period did not run until the plaintiff actually discovered the claim (*Halston Hills* at para. 41). This cannot be viewed as a general conclusion that knowledge of an agent can never be imputed to a principal in the context of a fraud or other claim falling under s. 12 of the Limitation Act. In the present case, there is no suggestion that Mr. Redman, as agent for the plaintiffs, wilfully breached his duty to communicate to the plaintiffs his knowledge about their potential claims in a way that would bring this case within the narrow ambit of para. 41 of *Halston Hills*.
- [89] Further, I am unable to conclude that all information obtained and shared by Mr. Redman with the plaintiffs in May 2016 would necessarily be covered by solicitor-client privilege. In my view, the nature of Mr. Redman's role for the plaintiffs in and around May 2016 - and specifically whether any of his involvement should properly be characterized as managerial rather than legal - is not sufficiently clear on the evidence before me.
- [90] I accept Mr. Redman had a role as legal counsel representing Mr. Sumner and Ms. Ettagiak in the Federal Court proceedings and this continued up to the 2016 Elections. Mr. Kelliher deposes that, after the 2016 Elections, the new Chief and Council retained his firm, including Mr. Redman, "to assist with and arrange for the orderly transition of power." Mr. Kelliher deposes that because of the distrust between the previous and incoming administrations, he thought it would be beneficial to have legal counsel present to conduct the meetings with Ms. Powell and Ms. Perreault to "facilitate the exchange of information" and "minimize the likelihood of conflict arising". Mr. Kelliher also deposes he told Mr.

Redman it was "important to create a clear record of the meetings" to avoid future disputes or misunderstandings about what information was shared and by whom.

- [91] In *R. v. Campbell*, [1999] 1 S.C.R. 565, the Supreme Court of Canada confirmed at para. 50 that not everything done by a lawyer attracts solicitor-client privilege. Instead, the Court recognized that, in some contexts, including where a lawyer has a long-standing relationship with a client, the lawyer may be asked to undertake other responsibilities that do not require legal training or expertise, but rather draw on their general knowledge of the client. If acting outside the scope of the solicitor-client relationship, communications between the lawyer and the client may not necessarily be privileged.
- [92] The Federal Court in *Zarzour* relied on *Campbell* in upholding a subpoena the applicant had issued to counsel for the Correctional Service of Canada (CSC). The issue arose in the context of a negligence action relating to the National Parole Board's decision to cancel the applicant's unescorted temporary absence from custody. The CSC employee who provided testimony before the National Parole Board referred to having discussed information about the applicant with legal counsel. Justice Pelletier held that the question of whether legal counsel "was consulted in her capacity as a lawyer or as a manager is one of fact which the judge hearing the case will have to decide"; he concluded counsel would have to obey the subpoena: *Zarzour* at para. 8.
- [93] Despite the existence of a retainer, it is not apparent to me that all of Mr. Redman's involvement assisting the new Chief and Council elected in the 2016 Elections falls within the scope of a solicitor-client relationship. Some of it appears much more in the nature of participating in management and operations due to familiarity with MFN gained from past work. For example, it is not clear that legal training or expertise would have been required to search the band office or its computers for documents, yet the transcripts of the interviews suggest Mr. Redman was directly involved in those activities. Presumably legal training would also not have been required to arrange the interviews.
- [94] Further, if the purpose of the interviews was in fact to allow the new Chief and Council to gather information about MFN's operations, it is unclear why Mr. Sumner and Ms. Puglas did not participate or ask questions to clarify their understandings. Mr. Sumner deposes that the answers left him confused, but the transcripts do not demonstrate that he took any steps while present to address those concerns.
- [95] Ms. Perreault raises numerous concerns about the context of the interviews, including asserted failures by Mr. Redman to advise either she or Ms. Powell that they may wish to obtain independent legal advice and to clarify that he was not representing their interests. Counsel for the plaintiffs on these applications suggested those steps were not necessary because Mr. Redman was conducting the interviews on behalf of MFN as Ms. Powell's employer and as a party to the contract with Ms. Perreault. But Mr. Redman does not draw this distinction. In fact, in the interview with Ms. Powell, Mr. Redman makes multiple comments that could be interpreted as indicating her continued employment is dependent

on her participation in the interview. This is the kind of potential power imbalance that independent legal advice is designed to address. If Mr. Redman was representing MFN as an employer and contracting party purely to gather information to assist with future governance, that may or may not fall within the solicitor-client role.

- [96] Ms. Perrault contends that to the extent the plaintiffs assert solicitor-client privilege should attach to any evidence Mr. Redman has regarding the May 2016 interviews, that supports her position that the plaintiffs had actual knowledge of their claims in May 2016 and potentially before the two-year cut-off date of May 23, 2016.
- [97] It is clear on the record before me that Mr. Redman was actively engaged and directly involved with the transition to the new MFN leadership during the period immediately following the 2016 Elections. I am satisfied Mr. Redman was not a casual observer or occasional consultant during the period of May 2016. However, as was the case in *Zarzour*, I am unable to determine with certainty whether his involvement was strictly in his capacity as legal counsel, or whether some of his responsibilities during that timeframe fall outside the scope of the solicitor-client relationship. As that will be a factual question for the trial judge to determine, I am not satisfied that all of the material evidence Mr. Redman can likely provide would be covered by solicitor-client privilege.
- [98] I appreciate that finding Mr. Redman to be a necessary witness for trial will disrupt the trial process and deprive the plaintiffs of their long-time counsel. I am conscious the Court will not lightly make decisions that result in such an outcome. I have not made this decision lightly. I have carefully considered the guidance set out above, in light of the unique circumstances of this case. Although I am not satisfied that Mr. Redman is a necessary witness for all of the issues identified by Ms. Perreault, in my view there are certain material purposes for which Ms. Perreault seeks to call Mr. Redman in relation to which I am satisfied he is likely to have relevant evidence and there are no other sources of that evidence.
- [99] While it is unusual to uphold a subpoena issued against a lawyer for the other side, it is not entirely without precedent. In *Law Society of British Columbia v. Yehia*, 2009 BCSC 1759, Justice Pitfield upheld a subpoena issued to former lead counsel for the Law Society of British Columbia. The former lead counsel no longer acted for the Law Society because he had been appointed to this Court. While Pitfield J. agreed that one of the purposes for which the respondent sought to call the former counsel as a witness was unnecessary, he was satisfied the counsel's evidence for the other two purposes was necessary in light of the issues at stake and the former counsel's direct involvement in those issues. I have similarly concluded that Mr. Redman is a necessary witness based on his involvement and the issues at trial.

Is the subpoena an abuse of process?

[100] The plaintiffs say, regardless of whether Mr. Redman is a necessary witness at trial, the Court should set aside the subpoena because it constitutes an abuse of process. The plaintiffs advance the following three main arguments in this regard, some of which overlap with their arguments addressed above:

- a) First, the weakness of Ms. Perreault's claims that Mr. Redman has necessary evidence and her lack of efforts to speak to other potential witnesses demonstrate the subpoena is tactical and a fishing expedition.
- b) Second, the subpoena was not pursued or issued in a timely fashion. Despite these issues having been identified by the fall of 2020, Ms. Perreault delayed in addressing them and (at least initially) refused to bring a formal disqualification application.
- c) Third, Ms. Perreault's allegations that Mr. Redman engaged in professional misconduct, provided inappropriate assistance to MFN, and is acting in a conflict of interest, are without foundation.

[101] Taken as a whole, the plaintiffs say Ms. Perreault's conduct leading up to and following the issuance of the subpoena demonstrates it was designed to fish for information, deprive the plaintiffs of their long-time counsel and further delay the trial.

[102] The doctrine of abuse of process engages the Court's inherent jurisdiction to prevent the misuse of its procedure in a way that would be manifestly unfair to a party or otherwise bring the administration of justice into disrepute: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37, cited in *McMahon* at para. 132. When considering abuse of process, the question depends primarily on an objective analysis of "the impact of the impugned conduct [on] the conduct of the case and on the reputation of the administration of justice": *McMahon* at para. 142. In *McMahon*, the Court concluded that the issuance of the subpoena so close to the trial date, without being able to demonstrate that the proposed witness had material evidence, amounted to an abuse of process; it was manifestly unfair to disrupt the lawyer-client relationship in those circumstances and it delayed the trial: *McMahon* at para. 225.

[103] The circumstances here are different than those in *McMahon*. I am not satisfied the subpoena amounts to an abuse of process in this case.

[104] As set out above, I have found that Mr. Redman is a necessary witness who is likely to have material evidence in relation to certain issues at trial and for which there is no other source of evidence. Having reached that conclusion, I do not find the subpoena to be purely tactical or a fishing expedition. Further, the record before me indicates that Ms. Perreault has made efforts to obtain evidence about some of those issues in other ways, such as through document disclosure requests, and the plaintiffs have been unable or unwilling to provide evidence that would obviate the need for Mr. Redman's testimony.

- [105] In terms of delay, I have set out the procedural history above. I accept that there was some delay between the issues being raised initially by the defendants' former counsel and the renewed efforts of Ms. Perreault's current counsel. I am not persuaded that the delay was a deliberate attempt to "lie in the weeds" and then disrupt the proceedings at a strategic point. I do not have evidence of the reasons why former counsel did not pursue the issues further. However, once Ms. Perreault's current counsel was retained and addressed the initial pressing issue of amending her response to civil claim to include a limitation defence, the correspondence demonstrates the issues were raised on multiple occasions with Mr. Redman.
- [106] Ms. Perreault was transparent from November 2023 until the parties received direction at the March 2024 TMC that she was contemplating applications to address Mr. Redman's status as counsel. However, given the limits of the amendments to Ms. Perreault's response that the plaintiffs would agree to, I accept that it was not until the plaintiffs filed their reply in March 2024 that Ms. Perreault's counsel considered the period after the 2016 Elections to have been put squarely in issue so that she could take concrete steps. Ms. Perreault complied with the orders from the TMC requiring her to file the subpoena and provide a detailed explanation; she actually provided the materials before the deadline. To the extent there were delays after the plaintiffs filed the Subpoena Application, I find they were attributable more to the usual challenges of balancing counsels' schedules and available court time. For the reasons previously stated, I am satisfied that Ms. Perreault's hesitation in filing the Disqualification Application stemmed from the dispute over whether Baird J. had made orders regarding sequencing of applications.
- [107] Finally, I do not consider the concerns Ms. Perreault has raised about the interview process and Mr. Redman's involvement to render the subpoena an abuse of process. As indicated above, the precise nature of Mr. Redman's involvement is not entirely clear on the evidence before me. As a result, the question of what Mr. Redman ought to have done in arranging and conducting the interviews, and in assisting the incoming Chief and Council in gathering information, is also not clear. It may be that Mr. Redman had obligations and fulfilled them, for example, in his conversations before the recordings began or when arranging the interview. But that evidence is not before me in a manner that would allow me to conclude Ms. Perreault's concerns are entirely without foundation.
- [108] I accept that the pathway to the issuance of the subpoena was not as clean as might have been hoped. However, that is the case for many aspects of this proceeding; it not solely limited to the issue of the subpoena. I am not satisfied that the subpoena has created manifest unfairness to the plaintiffs or that the circumstances of its issuance and pursuit would bring the administration of justice into disrepute. I conclude the subpoena is not an abuse of process.

Conclusion on Issue 1

- [109] I have determined that Mr. Redman is a necessary witness for trial, and the subpoena is not an abuse of process. As a result, the Subpoena Application is dismissed and the subpoena issued to Mr. Redman on April 4, 2024 is upheld.
- [110] As indicated, the parties did not spend a lot of time in their written or oral submissions on the notice to call an adverse witness. I accept Ms. Perreault's contention that, as an agent of the plaintiffs, Mr. Redman can be the subject of a notice to call an adverse witness. Rule 12-5(21) specifies the process a party must follow to issue a notice to call an adverse witness "to a person referred to in subrule (20) (a) or (b)". Rule 12-5(20) in turn confirms that a party may call as a witness at trial: (a) an adverse party (which is defined in R. 12-5(19)), or "(b) a person who, at the time the notice referred to in subrule (21) is served, is a director officer, partner, employee or agent of an adverse party."
- [111] In my view, my conclusions that Mr. Redman is a necessary witness and that the subpoena is not an abuse of process apply equally to the notice to call an adverse party. I find the notice should also be upheld.

Issue 2: Are there other grounds to disqualify Mr. Redman as counsel?

- [112] Both before and during the Subpoena Application, the plaintiffs asserted that Ms. Perreault ought to have filed an application to disqualify Mr. Redman so it could be heard at the same time. However, as noted above, the plaintiffs also took the position that at the March 2024 TMC, Baird J. ordered, or at the very least directed, that the parties could not bring any other applications until the issues with the forthcoming subpoena to Mr. Redman had been resolved. As that dispute between the parties had not been resolved before I heard the Subpoena Application, I accept that Ms. Perreault believed the Subpoena Application had to proceed first.
- [113] It is not clear what changed after I heard the Subpoena Application that led Ms. Perreault to file the Disqualification Application and the plaintiffs to consent to my hearing it. Regardless of the rationale, in the Disqualification Application, Ms. Perreault contends that, in addition to potential disqualification as a necessary witness, there are three additional grounds that should disqualify Mr. Redman from acting in any event. In particular, Ms. Perreault alleges that Mr. Redman: violated the Code of Professional Conduct of British Columbia when conducting the interviews in May 2016; is now acting for Mr. Powell despite having previously acted against Mr. Powell in the Federal Court proceedings; and is in a conflict of interest with MFN because he is the counsel that allegedly missed the limitation date.
- [114] The plaintiffs say all three bases lack merit, especially because removal of counsel is an extraordinary remedy, only to be granted in the clearest of cases, where there is a substantial risk of a compromised trial process.

- [115] I have concluded above that the subpoena must be upheld because Mr. Redman is a necessary witness at trial and the subpoena is not an abuse of process. As the plaintiffs conceded before me, and as the case law makes clear, this conclusion is sufficient to disqualify Mr. Redman from continuing to act: Williams at para. 56, as cited in McMahon at para. 179. Accordingly, it is not necessary for me to address whether there are independent bases on which to disqualify Mr. Redman and I decline to do so.
- [116] Before leaving the issue of disqualification entirely, I consider it appropriate to note that in reviewing the court file to finalize these reasons for judgment, I became aware that Mr. Redman filed a notice of change of solicitor on August 15, 2025. That notice indicates that Mr. Redman has joined the law firm of counsel who represented the plaintiffs on the two applications before me.
- [117] Given my decision to uphold the subpoena on the basis that Mr. Redman is a necessary witness for trial, I anticipate the parties will need to consider if Mr. Redman's present association with that law firm will impact any potential future involvement by the firm in this litigation. For example, it is possible the plaintiffs may have considered retaining the law firm that represented them on these applications if Mr. Redman were not able to continue. My decision to uphold the subpoena against Mr. Redman as a current member of that firm may give rise to concerns about whether that firm can act for the plaintiffs going forward. As that issue was not live nor raised before me, I make no determinations in that regard.

Issue 3: Is an order for special costs warranted?

- [118] The plaintiffs seek special costs against Ms. Perreault in relation to both applications, payable in any event of the cause. Ms. Perreault seeks special costs against the plaintiffs in relation to the Disqualification Application.
- [119] I have declined to address the merits of the Disqualification Application because of my conclusions about the Subpoena Application. As I have not grappled with the substance of the issues on the Disqualification Application, in my view, it would be inappropriate to address the parties' arguments about special costs of that application. I find the appropriate costs order on the Disqualification Application is that each party should bear their own costs.
- [120] That leaves the question of costs of the Subpoena Application.
- [121] On the Subpoena Application, the plaintiffs contend special costs are warranted because advancing unfounded allegations of professional misconduct or impropriety against opposing counsel may amount to reprehensible conduct deserving of rebuke. The plaintiffs also say special costs can be awarded where a party's conduct amounts to an abuse of process: Dyer v. Dyer, 2016 BCSC 1115 at paras. 53-54.

- [122] The plaintiffs say Ms. Perreault's decision to issue the subpoena, at the time and in the manner that she did, disrupted the proceedings and required an adjournment of trial and a change of counsel to address the issue. Coupled with unfounded allegations of misconduct and their assertion that the subpoena is an abuse of process, the plaintiffs say this Court should conclude, as did the Court in McMahon, that special costs of the Subpoena Application are appropriate.
- [123] Ms. Perreault disputes that any of her conduct in relation to the Subpoena Application rises to a level that warrants an award of special costs. She says she raised the subpoena issue in a concrete fashion immediately after the plaintiffs filed their reply. She contends the May 2024 trial dates were not lost solely due to the subpoena issue. Rather, the parties were not ready and insufficient time had been scheduled. Ms. Perreault agrees that the issue has "caused awkwardness" but maintains that is the unfortunate result of Mr. Redman having been so involved during the period of time that is critical to the limitation issue. Ms. Perreault says her concerns about Mr. Redman's potential conflicts and his conduct are not unfounded.
- [124] Special costs are an extraordinary, discretionary remedy. They are punitive rather than compensatory, and are awarded when the Court seeks to disassociate itself from conduct in the course of the litigation that is reprehensible and "deserving of reproof and rebuke": *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 56-57, citing *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17, 1994 CanLII 2570 (C.A.). There is a high threshold to establish that an award of special costs is warranted; the party seeking special costs must demonstrate exceptional circumstances to justify such an order: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73.
- [125] While I accept that making unfounded allegations of misconduct can attract an award of special costs in some circumstances, as indicated above, I do not have sufficient evidence before me to conclude, at this stage, that Ms. Perreault's concerns are entirely without merit. Based on the transcripts in particular, I do not find that Ms. Perreault's concerns are "obviously unfounded", were "recklessly made" or were "made out of malice"; there is at least an arguable case for some of the allegations advanced: *Roussy v. Savage*, 2020 BCSC 487 at paras. 19-21.
- [126] I have not found the subpoena to constitute an abuse of process. I am also not satisfied that Ms. Perreault's pursuit of the subpoena, when considered in the broader context of the procedural history of this matter, is conduct worthy of rebuke through an award of special costs. Unlike in *Mayer v. Mayer*, 2016 BCSC 615, Ms. Perreault has provided an explanation for the delay in taking certain steps. I dismiss the plaintiffs' request for special costs.
- [127] As Ms. Perreault has successfully defended the subpoena, I find she is entitled to her costs of the Subpoena Application, payable at Scale B, as costs in the cause.

Conclusion and summary of orders

[128] In conclusion, I make the following orders:

- a) The plaintiffs' application to set aside the subpoena and the notice to call an adverse witness issued to Mr. Declan Redman on April 4, 2024 is dismissed;
- b) Ms. Perreault is entitled to her costs of the plaintiffs' application, payable at Scale B, as costs in the cause;
- c) Ms. Perreault's application to remove Mr. Declan Redman as counsel of record and to disqualify him from continuing to represent the plaintiffs in this matter is dismissed; and
- d) The parties are to bear their own costs of Ms. Perreault's application.

"K. Wolfe J."

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Prepared on 28 October 2026 · Esheria