IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Cabana v. Newfoundland and Labrador*,
2018 NLCA 52
Date: September 14, 2018
Docket Number: 201601H0123

BETWEEN:

BRAD CABANA	APPELLANT

AND:

HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR	FIRST RESPONDENT

AND:

KATHY DUNDERDALE	SECOND RESPONDENT

AND:

TERRY FRENCH	THIRD RESPONDENT

Coram: Green, White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division (201201G5779)

Application Heard: February 16 & 17, 2017
Judgment Rendered: September 14, 2018

Reasons for Judgment by: Green J.A.
Concurred in by: White and Hoegg JJ.A.

Counsel for the Appellant: Self-Represented
Counsel for the First Respondent: Glen Noel Q.C. and Megan Taylor
Counsel for the Second Respondent: John Drover
Counsel for the Third Respondent: John Drover

Green J.A.:

[1] In a defamation trial, the plaintiff/appellant Brad Cabana sought and obtained a postponement of the continuation of the trial to enable him to appeal certain rulings of the trial judge. These rulings dealt with, amongst other things, access to and use at trial by other parties of certain clinical notes pertaining to Mr. Cabana's mental health that had been prepared by a psychologist and referred to by her during the giving of her evidence.

[2] In his notice of appeal, Mr. Cabana included as grounds of appeal matters arising from certain case management meetings as well as another decision made by the judge mid-trial relating to an application by Mr. Cabana for a publication ban on medical evidence to be adduced at the trial.

[3] One of the defendants/respondents, supported by the others, applied to this Court under rule 36 of the *Court of Appeal Rules,* NLR 38/16 to dismiss the appeal or to strike the notice of appeal on the grounds that the appeal was frivolous, vexatious or without merit or, alternatively, to strike the notice of appeal under rule 35 on the grounds that it is premature and should await the conclusion of the trial.

[4] Because of the nature of the applications and the way they were argued, this judgment must, of necessity, only deal with the appeal issues in the context of the standards applicable to applications to dismiss or strike on the grounds stated. To the extent that the applications are not successful there will have to be a full appeal on the merits at a later date.

Background

[5] The defamation action had been brought by Mr. Cabana against the provincial government,[1] a former Premier of the province and a former cabinet

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[1] The government was described in the style of cause as "Her Majesty The Queen in Right of the Government of Newfoundland and Labrador." Nobody took issue with this designation. While nothing in the appeal turns on this, it should be noted that the correct designation when suing the Crown in a civil case is "Her Majesty in right

minister alleging that he had been maliciously defamed by being called, amongst other things "a political scumbag" and a "political prostitute." In addition to claiming an amount of general damages that automatically flow from a successful defamation claim, he also claimed "punitive, aggravated and exemplary damages." Although not specifically referred to in his statement of claim, it became clear as the matter progressed towards trial that Mr. Cabana was including in his claim damages for exacerbation of an existing mental health condition that he alleged resulted from the attack on his reputation.

[6] The trial proceeded in two stages. The first part of the trial, held in early 2016, dealt with proof of the alleged defamatory words. Near the end of the first part of the trial, Mr. Cabana applied for a publication ban relating to the medical evidence to be adduced when the trial continued. This application was denied primarily on the ground that Mr. Cabana failed to adduce any evidence by way of affidavit or otherwise to support his assertions that he would suffer "serious debilitating physical or emotional harm" affecting his ability to pursue his claims, as opposed to "mere personal emotional distress and embarrassment" if the medical information was made public (*Cabana v. Newfoundland and Labrador*, 2016 NLTD(G) 137, 270 A.C.W.S. (3d) 90 at paras. 14, 18, 21; hereinafter, the *Publication Ban Decision*).

[7] The second part of the trial, which was held in December 2016, dealt with Mr. Cabana's evidence in support of his damages claim. Central to that portion of the trial was evidence from a clinical psychologist, Denise Butt, concerning consultations she had with and counselling she had given to Mr. Cabana relating to his mental health condition, which had arisen as a result of military service. In addition to assessing him with respect to making certain claims to the Department of Veterans Affairs, she also counselled him with respect to the impact of the alleged defamation on him.

[8] Before moving to how the evidence in court unfolded, it is necessary to set in context the efforts – or lack of efforts – that had been made prior to trial to obtain discovery of records and other information about Mr. Cabana's mental health status. Forms completed and forwarded to Veterans Affairs by Mr. Cabana with the assistance of Ms. Butt, as well as other documents relating to

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of Newfoundland and Labrador." See *Proceedings Against the Crown Act*, RSNL 1990, c. P-26, s. 10. The style of cause has been amended to accord with this designation. The Attorney General is charged with regulation and control of all litigation for or against the Crown or a government department. See *Executive Council Act,* SNL 1995, c. E-16.1, s. 4(4)(c). Henceforth, counsel for the government will be referred to as counsel for the Attorney General.

the Veterans Affairs claim were disclosed to the other parties. This came about as a result of a case management meeting. The parties differ as to how and what the case management judge (who was also the trial judge) said and did relative to this disclosure. Mr. Cabana says he was "ordered" to produce these records and, but for being required to do so, he would have resisted providing personal medical information that was unrelated to the defamation action. Counsel for the Premier and the cabinet minister says that there was no "order"; instead, it was a suggestion to Mr. Cabana that if he wanted to prove his claim relative to exacerbation of his mental health issue he would be well-advised to produce his records and place them in evidence. No transcript of the record of the case management meeting has been filed.

[9] An examination for discovery of Ms. Butt was held. Counsel for the Premier and the cabinet minister attended but counsel for the Attorney General (who was a different counsel than on the current application) did not. Ms. Butt was asked for her clinical notes of her interviews with Mr. Cabana. She refused to produce them. In fact, she also refused to provide them to Mr. Cabana. Mr. Cabana took the position that these notes were not within his custody or control and that he was therefore under no obligation to produce them to the other parties.

[10] Counsel for the Premier, cabinet minister and Attorney General made no further attempt to obtain production of the notes through the discovery process or by a separate application under rule 32.07(2) of the *Rules of the Supreme Court, 1986***.** Had they done so, they would have had to establish, in accordance with existing case law, that (i) the notes related to a matter in question in the litigation, (ii) they were necessary for disposing fairly of the proceeding or for saving costs and not injurious to the public interest, and (iii) the need for protection of any privilege (in this case, arguably physician-patient privilege) did not outweigh the need of the other side to have them for the purposes of the litigation. (See, *Carter v. Municipal Construction Limited* 2001 NFCA 58, 206 Nfld. & P.E.I.R. 181, affirming (2001), 204 Nfld. & P.E.I.R. 112 (Nfld. T.D.) and *Morrissey v. Quinlan*, 2002 NFCA 58, 217 Nfld. & P.E.I.R. 124). Counsel for the Premier and cabinet minister indicated on the hearing of the current application that he did not consider the notes to be significant enough to warrant any further procedures to attempt to obtain them.

[11] At some point before the second part of the trial continued, counsel for the Premier and the cabinet minister asked Mr. Cabana for copies of Ms. Butt's medical chart. The request was sent by email which contained a standard

boilerplate notation following the address of the sender that the message was "solicitor-client privileged and contains confidential information only for the person(s) named above." Mr. Cabana replied by email, without any indication his reply was to be regarded as solicitor-client privileged or confidential, and took the position that he did not have the records and he could not force Ms. Butt to produce the information, but added that "I won't fight any application you bring forward to fulfill what you need in that regard." As noted, counsel did not follow up with an application, nor did Mr. Cabana himself seek to gain access to the chart, notwithstanding that he was entitled to access and copy his treatment file, subject to limited exceptions, and to enforce that right by an application to Court if the treating professional refused to provide access voluntarily (*McInerney v. MacDonald*, [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415).

[12] That was the state of disclosure and discovery up to the point of commencement of trial. Mr. Cabana was not represented by counsel at the trial.

[13] During Ms. Butt's examination in chief, Mr. Cabana asked her the time period during which she had been involved in his counselling process. Ms. Butt responded by saying she would have to check exact dates by reference to her clinic notes which she had in her file. The judge interrupted her to ask if the notes had been disclosed. After being told by counsel for the Premier and the cabinet minister that they had not been disclosed, the judge asked if there was any objection to Ms. Butt continuing to refer to the notes during her testimony. The following exchange then occurred:

> MR. DROVER [Counsel for the Premier and the cabinet minister]: No
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> MR. NOEL [Counsel for the Attorney General]: I'd like to have a copy of the chart … if they're going to be referring to it in court.
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> THE COURT: Yeah. I am not sure why. The trouble is you weren't there then, Mr. Noel, and so in some respects you're kind of stuck with what you got aren't you? … [Y]ou reviewed the discovery transcript. I assumed that they were referred to at the time. You could have sought the document … at that time. … I'm surprised, you know, that … it wasn't disclosed. I mean it's a … part of the record. It's relevant. It's so relevant now that the witness is referring to it, so it should have been disclosed. … I think what I'm going to do is … allow the witness to refer to the document but I'm going to ask that it be provided to you at the break. Is that satisfactory?
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> MR. NOEL: That is satisfactory, my lord.

> THE COURT: Okay. Go ahead, Mr. Cabana.

(Transcript, December 7, 2016, p. 17.)

[14] The result of this exchange, in which Mr. Cabana was not invited to participate, was that all of the clinic notes in Ms. Butt's file were copied and provided to all parties to the litigation without any consideration being given, on a document-by-document basis, to their relevancy, their necessity for disposing fairly of the litigation or whether any physician-patient privilege[2] was unnecessarily being breached.

[15] Following the exchange, and pursuant to the judge's instructions, Mr. Cabana proceeded with his examination of Ms. Butt. Her evidence was given by reference to, and the reading out of, the notes in the file. At the mid-morning break and just prior to counsel for the Attorney General commencing cross-examination, Ms. Butt's notes were copied and distributed.

[16] Early into the cross-examination, in response to a question as to what was discussed in a particular consultation, Ms. Butt commenced her answer by reference to the copied notes. The judge interrupted to ask whether it was counsel's intention to have the notes entered as an exhibit, to which counsel for the Attorney General said yes. As a result the notes were entered as a composite exhibit and marked as Exhibit DB No. 4. There was no discussion as to the legal effect of the notes' entry as an exhibit (e.g. whether they were marked for identification purposes only, or as a convenient reference in case of attempted impeachment on a prior inconsistent statement, or as evidence of the truth of their contents). Thereafter, cross-examination proceeded, over Mr. Cabana's objection, by a detailed examination of what was contained in the clinic notes. Mr. Cabana questioned the "relevance" of going through the details instead of just questioning Ms. Butt about the conclusions she had expressed in her reports.

[17] The judge allowed counsel for the Attorney General to continue with a review of the notes on the basis that he was entitled to explore the foundation for the conclusions reached. The judge did say to Mr. Cabana, however:

> I'll permit it … [Y]ou keep an eye out for it and if it gets off track don't hesitate to request clarification and I'll try to keep an eye out for it as well.

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[2] Counsel for the Attorney General concedes that, applying the "Wigmore test", the information contained in Ms. Butt's files pertaining to her assessments of Mr. Cabana could be said to be privileged.

(Transcript, December 7, 2016, p. 54.)

[18] It appears that, by this statement, the judge was signaling to Mr. Cabana that if he thereafter was of the view that irrelevant material in the notes was being unnecessarily referred to during the cross-examination, he could renew his objection and that the judge himself would also attempt to act as a gatekeeper to ensure that any sensitive but irrelevant information in the file would not be disclosed unnecessarily. However, it was not made clear how control over unnecessary dissemination of irrelevant and otherwise personal information would be achieved, in view of the fact that the totality of the notes had already been provided to all parties without restriction (subject to the possible application of the implied undertaking rule), they had been entered into evidence as an exhibit (and were available to the media and the public on application) and the judge had, in the *Publication Ban Decision,* already refused to impose a publication ban on the trial evidence.

[19] Following two more objections by Mr. Cabana relating to other matters, counsel for the Attorney General complained that Mr. Cabana was “constantly objecting to the cross-examination” and thereby improperly “interfering” with it by “unduly objecting unnecessarily.” The judge told Mr. Cabana that counsel on cross-examination had “a pretty broad range” and that “you can’t jump up every time he asks a question.” Thereafter, Mr. Cabana made few objections.

[20] Ms. Butt was also cross-examined about certain questionnaires she filled out as part of her assessment of Mr. Cabana for the purpose of submission of his military medical claim to Veterans Affairs. These documents had previously been provided to counsel by Mr. Cabana following the case management meeting referred to earlier. Counsel for the Attorney General asked to have them marked as an exhibit. The judge specifically asked Mr. Cabana if he had any objection to this procedure, to which he answered no.

[21] Later in the day, Mr. Cabana raised a concern that since he had not seen Ms. Butt’s clinic notes at the time of his examination-in-chief he did not have the opportunity to examine Ms. Butt to the minute degree that counsel for the Attorney General had as a result of being provided with the copies before he started his cross-examination. The judge indicated, in response, that he would give Mr. Cabana wide latitude on re-examination to deal with matters relative to information in the notes that he did not have the opportunity to address during the original examination.

[22] When the trial resumed the following day, Mr. Cabana immediately raised an objection in the following terms:

> I am a self-represented litigant; I did not have an opportunity to really thoroughly analyze what transpired yesterday in the Court, especially in regard to Ms. Butt's notes and their allowance into evidence. And I believe there has been a serious breach of both privilege and procedural fairness.

(Transcript, December 8, 2016, pp. 1-2)

[23] Mr. Cabana took the position Ms. Butt's notes were protected by "doctor/patient" privilege and that if counsel for the other side wanted to get access to them he should have been required to make a formal application to obtain them, at which time he would have to justify access in accordance with the *Carter* criteria. By allowing him to have access to the notes in their entirety without any screening, the judge effectively allowed counsel's cross-examination to be expanded beyond what it should have been, to the prejudice of Mr. Cabana. He requested that:

> … the record be struck, the testimony from yesterday in regard to anything to do with any medical evidence that was not gotten at the Examination for Discovery which would be my doctor's notes, any applications … to the Veterans Affairs, any Veterans Affairs reports, any of those things which are privileged information regarding my medical history that weren't requested at Examination for Discovery and were short circuited and put through this court in a different manner.

(Transcript, December 8, 2016, p. 16)

[24] Subsequently Mr. Cabana withdrew his request to suppress the Veterans Affairs documents and limited his objection to Ms. Butt's clinic notes. Counsel for the Premier and cabinet minister, in response, asserted, on the basis of Mr. Cabana's email, referred to earlier, that Mr. Cabana had effectively consented to counsel having access to the notes when he indicated that he would not oppose an application to court to get discovery of them. Mr. Cabana, however, took the position that saying he "won't fight any application" to get the notes is not the same as consenting to their production. In other words, he had no objection to the other parties "trying" to get the notes; in effect, he still expected the court to make a proper ruling on the law with respect to that matter.

[25] Counsel for the Attorney General took the position that, whatever privilege existed with respect to the notes, once Ms. Butt began referring to them in her evidence to refresh her memory, they were subject to production

because they were relevant, Mr. Cabana having put alleged injury to his mental health in issue in the trial. He was entitled to test the foundation of Ms. Butt's opinion by cross-examining her upon the notes she had made of the assessments she had undertaken.

[26] The judge responded:

> … do you need more time, Mr. Cabana …? … There is more to [the] argument [than] meets the eye. There isn't any absolute right to these documents. [That] is clear … that documents produced in the course of a psychotherapeutic relationship can attract privilege. That privilege is subject to limits and one of the limits is production required through a defendant to respond to a claim such as you've brought here. … [A]nd there is a basis to your … argument and I want you to have an opportunity to present that fully, and … I don't want you to feel rushed in that [in] any way.
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> You're absolutely right. This was dynamic and it occurred quickly yesterday. … [T]o the extent that the Defendants ultimately seek the documents and receive the documents it would have been better had it been done in a more controlled environment so we could have considered all of the … implications. …
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> …[O]nce it's been determined that a privilege would attach, it's a question of balancing of … the expectation of privacy and the public policy and not disclosing against the Defendant's ability to meet the case. …
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> … It's not an awful [*sic*; should read 'all'] or nothing situation. And it may be that some of the records ought to be redacted or be excluded and not be able to be relied upon. And it is also possible that we should put some restrictions on the document such as sealing it and so on. So, those … are all live issues.

(Transcript, December 8, 2016, pp. 61, 62, 63, 69)

[27] The judge then adjourned the trial to the following morning to give both parties an opportunity to make submissions on the issues that were identified. He also made an immediate sealing order with respect to the notes as a "minimum condition." In response to Mr. Cabana's query as to whether he meant the sealing order to be "for posterity", the judge replied: "Absolutely, right. For tomorrow, Monday and posterity. It's nobody's business." (Transcript, December 8, 2016, p. 79).

[28] When the hearing resumed the following morning, the judge heard argument from the two counsel and Mr. Cabana on the issues discussed the previous day. The judge asked Mr. Cabana whether, if he decided that the notes

or part thereof should be disclosed, Mr. Cabana would like an opportunity to be heard, perhaps *in camera*, on whether some of the material should be redacted to protect Mr. Cabana's privacy or that of third parties. Mr. Cabana declined that invitation. He responded: "… the cows have already left and the gate's closed … [T]he damage is done" (Transcript, December 9, 2016, p. 106).

[29] In addition to making submissions that the notes should not have been given to the other parties or their counsel without careful scrutiny to ensure that only relevant material necessary for the defence of the claim should have been disclosed, Mr. Cabana also argued that the way in which the notes were made available to counsel and the parties without any attempt at redaction and without any restrictions on their further dissemination, and the way counsel for the Attorney General improperly (in Mr. Cabana's submission), sought access to the notes without apparently recognizing the legal requirements that had to be complied with before sensitive personal information subject to privilege could be ordered to be disclosed, amounted to a violation of his procedural right to a fair hearing and that the judge himself "had a part to play" in the violation of his rights. He stated

> … this is something that may … weigh personally on you … because it is, in my opinion, … that your actions permitted a violation of my Charter rights [which, Mr. Cabana had previously asserted, protected his privacy rights].

(Transcript, December 9, 2016, pp. 32-33)

[30] These submissions led Mr. Cabana to argue that the only way to remedy the situation would be for a mistrial to be declared based on improper conduct of counsel and the actions of the judge. It is clear from the submissions Mr. Cabana made at the trial and in this Court that he believed his privacy rights were seriously and unnecessarily breached by the decision to allow counsel full access to Ms. Butt's notes and that nothing could be done to rectify the situation in the sense of salvaging the trial. As he said to the trial judge, "I feel completely violated at this moment."

The Trial Judge's Decision 2016 NLTD(G) 199

[31] The trial judge reserved his decision and filed a written decision later (hereinafter the *Disclosure Decision*). He dismissed Mr. Cabana's application for a mistrial, refused to redact any material from the notes that had been disclosed and lifted the sealing order that he had made.

[32] The result of the decision was that the position remained precisely the same as it had been at the point when Ms. Butt's notes had been copied and given to counsel.

[33] In reaching his decision, the judge concluded that Ms. Butt's clinic notes "provide evidence of the clinical foundation for Ms. Butt's diagnosis of the Plaintiff" (para 12) and that once Ms. Butt went into the witness box and used the notes to refresh her memory "[t]hat resulted in them having to be provided to counsel for the First Defendant" (paras. 15-17).

[34] The judge also concluded that while it might have been preferable if steps had been taken by the defendants/respondents to obtain production of the clinic notes prior to trial, they were under no obligation to do so; accordingly, Mr. Cabana could not complain of being "ambushed" by the request at trial or being otherwise the victim of improper or oppressive behavior (paras. 13, 20, 21) because the defendants/respondents were entitled to gain access to the notes once Ms. Butt used them to refresh memory.

[35] The judge then went on to consider whether the notes should have been reviewed and possibly edited before providing them to counsel. He dealt with the issue in this way:

> [22] The Supreme Court of Canada has made it clear that the necessity for pre-trial production does not automatically negate the possibility of protection from full disclosure. That is, a party is not faced with an all or nothing approach. It is open to the Court to edit the documents to remove non-essential material and to impose conditions on who may see and copy the documents. Such a review is also aimed at protecting privacy interests of third parties (see *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157 at paragraph 33). Although arguably different factors may apply when production is ordered at trial, I am satisfied that such an exercise is appropriate here, too.
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> [23] Of course, in the absence of any objection by Mr. Cabana or Ms. Butt to production of the Progress Record [i.e. the clinic notes] at the time of its disclosure at trial, this may be an exercise in closing the barn door after the horse has fled. But I am advised by Court officials that the Progress Record in the Court file have not been viewed by anyone other than the parties. The Court has a process by which public access to exhibits is not permitted without the presiding judge being made aware of the request and providing authorization. Furthermore, at the commencement of Mr. Cabana's application for a mistrial I ordered the exhibit sealed pending this decision.
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> [24] I have reviewed the Progress Record. I asked Mr. Cabana if he would like an opportunity, in an *in camera* setting, to explain what if any parts should be redacted. He declined the invitation.

> [25] I recognize the private and sensitive nature of the contents of the Progress Record. Nevertheless I do not see anything in them that would be harmful to a third party. The Plaintiff mentioned that [Veterans Affairs Canada] is referred to in the notes and it is a third party. VAC is not the type of third party that is contemplated when the Court considers whether to redact information from a document. There is also passing comment in the Progress Record to other members of the Plaintiff's family. These are not of such sensitivity that they must be redacted.
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> [26] In any event, questioning Ms. Butt, or any other witness, on the Progress Record is limited by the requirement that all questions be relevant. Therefore, if it turns out that there is anything in the Progress record that is not relevant to the matters at issue in the trial, then questions in relation to them would be improper.
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> [27] Mr. Cabana's spouse is also mentioned in the Progress Record. She has already testified in this trial but he has requested, and has been granted, leave to recall her as a witness to provide evidence in support of his claim for damages. Consequently, she is not a person who requires protection from the Progress Record reference in these circumstances.
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> [28] I find there is no requirement of redaction of any part of the Progress Record...

[36] Having concluded that the clinic notes had been properly provided to counsel without redaction, the judge also concluded that the sealing order he had made at the outset of the application should be vacated because there was an "absence of any evidence as to harmful effects from disclosure of the Progress Record."

The Appeal

[37] Although the new *Court of Appeal Rules* no longer require that detailed grounds of appeal be set out in a notice of appeal, Mr. Cabana has nevertheless done so. [3] It is therefore against these stated grounds of appeal that the applications to dismiss or strike must be considered. Each one of the stated grounds of appeal must be filtered through the lens of the applications to determine whether they are meritless, frivolous or vexatious and whether, if not, the appeal should be allowed to proceed or should be deferred until the end of the trial.

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[3] For the purpose of applications to dismiss or strike under rule 36 (where it is necessary to have an understanding of the focus of the appeal to determine whether it may be frivolous, vexatious or without merit), if grounds of appeal are not stated in the notice of appeal, it will probably be incumbent on the appellant, in response to the application to dismiss or strike, to indicate to the Court, in a short written submission, what the proposed grounds are and why they have some merit and are not frivolous or vexatious.

[38] A determination that an appeal is frivolous, vexatious or without merit requires a conclusion that all potential grounds of appeal contemplated by the appellant do not rise above a frivolous, vexatious and meritless characterization. Accordingly, it is necessary to identify and address each of the grounds asserted by Mr. Cabana. I set them out *verbatim* from the notice of appeal:

> 1. **THAT** the Learned Trial Judge erred in law and discretion by breaching procedural fairness during the trial of the present matter:
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> (i) By ordering the production of the Plaintiff's personal military and civilian medical records be surrendered to the Defendants, in a case management meeting, without first viewing the evidence, redacting the evidence as necessary, and restricting the dissemination of the evidence before the Defendants received it into their possession, contrary to established case law;
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> (ii) By ordering the production of the Plaintiff's military and civilian medical records be surrendered to the Defendants, during a case management meeting, without first viewing the evidence to determine if there was a <u>necessity</u> for the evidence to fairly dispose of the matter contrary to *Rules of the Supreme Court of Newfoundland and Labrador, 1986* (hereinafter "*the Rules*"), Section 32.07(03);
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> (iii) By ordering the expert witness to turn over her medical notes to the First Defendant's counsel, at his request during trial, without first examining the evidence to ascertain its <u>necessity</u>, redacting the evidence, and restricting the dissemination of the evidence, contrary to *Rules of the Supreme Court of Newfoundland and Labrador, 1986* (hereinafter "*the Rules*"), Section 32.07(03), and established case law;
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> (iv) By failing to grant an adjournment to allow the Plaintiff to submit evidence in the publication ban application, *Cabana v. Newfoundland and Labrador, 2016 NLTD(G) 137*, contrary to the Honourable Trial Judge's power to do so under *the Rules*, Section 29.09, and 29.10, and responsibility to do so under the *Statement of Principles on Self-represented Litigants and Accused Persons*, Canadian Judicial Council, September, 2006 (hereinafter "*Statement of Principles*");
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> (v) By applying a different standard for admission of evidence to the Plaintiff and the Defendants;
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> (vi) By failing to do whatever was possible to provide a fair and impartial process and prevent an unfair disadvantage to a self-represented litigant, in this case the Plaintiff, contrary to the *Statement of Principles*;
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> (vii) By failing to hold accountable, or in any way remark, on the flagrant admission of the Third Defendant, during testimony, that he was making up testimony while sworn and on the stand, which the Plaintiff verily believes constitutes perjury and/or contempt of court;

(viii) By instructing counsel to not use "25" year old case law to argue the application which has this appeal as its result, and then using that same case law for his findings on privilege in the written decision;

(ix) By finding, in his decision *Cabana v. Newfoundland and Labrador, 2016 NLTD(G) 199*, December 12, 2016, paragraph 1, that the Second and Third Defendants defamatory statements were "comments" and that they occurred during a "political campaign", despite not having all the evidence before him in the former to reach such a legal determination, and having evidence before him in the latter to know that his finding was false;

(x) By permitting the use of privileged communications between the Plaintiff and the Defendants counsel to be used as evidence at trial in order to find consent by the Plaintiff to have his psychologist's notes released to the Defendants; and

(xi) By failing to properly apply a consent analysis to privileged communications between the Plaintiff and the Defendants.

2. **THAT** the Learned Trial Judge erred in law by breaching the Plaintiff's right to privacy as guaranteed by the *Charter of Rights and Freedoms*, Section 7 by releasing his personal medical information without first examining it, redacting it as necessary, and restricting its dissemination, which disclosed the Plaintiff's entire medical history to Defendants accused of reckless defamatory behaviour, and further damaging the Plaintiff unnecessarily by lifting an "after the fact" seal placed upon said documents.

3. **THAT** the Learned Trial Judge, as a result of his decisions outlined herein, has cast a reasonable perception of bias upon himself, and thereby threatened the Plaintiff's right to a fair trial.

[39] It will be noted that:

(a) Grounds 1(i), 1(ii) and 1(iv) relate to matters pre-dating the trial. It may well be that the time for appealing, whether they are treated as part of an uncompleted matter or as a final disposition, has expired. See rule 8(2). This point was not raised by any party on the current application; accordingly I will proceed on the basis that no time limit issue arises;

(b) Some of the grounds, 1(iii)1(vii), 1(viii), 1(ix), 1(x) and 1(xi) relate to discrete events during the trial or the reasons for judgment that is under appeal;

(c) By contrast to item (b), grounds 1(v), 1(vi) and 3 consist of complaints about trial process generally;

(d) Grounds 1(iii) and 2 relate to the specific matter for which an adjournment of the trial had been granted. They constitute the main focus of the contemplated appeal;

(e) Some statements in other grounds raise broad process issues such as breach of procedural fairness (1, preamble), failure to adjust trial process to take account of Mr. Cabana's status as a self-represented litigant (1(iv) and 1(vi)) and reasonable apprehension of bias (3);

(f) With respect to the allegations respecting Mr. Cabana's status as an unrepresented litigant, this puts in play a consideration of the degree to which the court must adjust its procedures, and opposing counsel must act, as an element of fairness, to accommodate the unique challenges that the presence of self-represented litigants sometimes present in the court process.

Considerations

(a) Mr. Cabana's Position as a Self-represented Litigant

[40] Before considering the details of the respondents' submissions relative to striking out or dismissing the appeal or staying the appeal on grounds of prematurity, it is necessary to consider whether and to what extent Mr. Cabana's position as a self-represented litigant is relevant to the issues under discussion.

[41] Certainly, in making his objections at the trial to the manner in which access to the psychologist's notes was obtained and used by the other parties, Mr. Cabana specifically raised his status as a self-represented litigant as an explanation for why certain indulgences should be made for his failure to raise objections at an earlier stage in the proceedings and also as support for a claim for pro-active assistance by the judge (Transcript, December 8, 2016, pp 1-2).

[42] Further, on this appeal, Mr. Cabana has specifically asserted as grounds of appeal the alleged failure by the trial judge to apply the Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused Persons* (September 2006; online: https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf; hereinafter, the *Principles* or *Statement of Principles*) with respect to failure to grant an adjournment despite a "responsibility" to do so (Ground 1(iv)) and the failure to do "whatever was possible to provide a fair and impartial process and prevent an unfair advantage to a self-represented litigant" (Ground 1(vi)).

[43] It becomes necessary, therefore, to consider whether any special principles are applicable to self-represented persons and, if so, what legal effect, if any, failure to comply with those principles may have on the outcome of the litigation.

[44] Traditionally, self-represented litigants were required to bear the full risk of appearing in court without legal representation. They were essentially required to fit into the system without much expectation that the system would or could accommodate any special needs or circumstances resulting from their lack of representation. Typical of this approach is the comment in *Lieb v. Smith* (1994), 120 Nfld. & P.E.I.R. 201 at 205 (NFSC TD) that "implicit in the decision to act as his or her own counsel is the willingness to accept the consequences that may flow from such lack of experience or training."

[45] That said, this Court has always recognized that there will come a point where the presiding judge must step in with at least minimal assistance in order to ensure a fundamentally fair adjudication. In *Janes v. Deer Lake (Town)* (1993), 110 Nfld. & P.E.I.R. 202 (Nfld. C.A.), this Court recognized the "extremely difficult position" in which the judge is placed in maintaining basic trial fairness when one side is unrepresented:

> On the one hand he [has] to be the arbiter of the fairness of the proceeding whose very nature is adversarial. On the other hand, the responsibility [is] imposed upon him of assuring that the case of one of the adversaries [is] being fully presented (para 40).

[46] This institutional concern to operate a court system where a level playing field is maintained has been underscored in recent years by the increasing numbers of self-represented litigants who are appearing in the courts. It is, to use Brown J.A.'s words in *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383, "the new reality" (para. 41). It is being increasingly recognized that a judge has a responsibility to be pro-active in the way he or she manages the litigation to ensure that a self-represented litigant can effectively present or defend against the case and, by means of that treatment, perceive the process as being balanced and fair. The role of the presiding judge, in the words of Monin J.A. in *Dewing v. Kostiuk*, 2017 MBCA 22, [2017] 6 W.W.R. 717, "has evolved" (para. 17):

> [17] … A judge in a civil proceeding has the obligation to ensure that the hearing over which he or she is presiding is fair to all parties whether represented or not. Where a party is self-represented, the judge has the <u>duty</u> to ensure that the SRL has the opportunity to <u>meaningfully</u> participate in the proceeding and has a reasonable opportunity to present his or her case.

(Emphasis added.)

[47] Far from requiring a self-represented litigant to, in the words of *Lieb*, "accept the consequences" of choosing to be unrepresented, the decision to represent oneself (which in many circumstances is a decision driven by financial or other limiting circumstances beyond the control of the litigant) can no longer be effectively regarded as a waiver of one's right to a fair trial.

[48] Fairness and meaningful participation are not achieved by treating each party in exactly the same way in accordance with attitudes and approaches that are designed for and applied in an era when all parties were legally represented. In this context, equal treatment is not fairness. It is not enough to provide procedural access to a system that may not, by virtue of the way it operates, provide fair substantive outcomes because it does not enable informed and meaningful participation by all participants. Active intervention may be required in order to level a playing field which would otherwise be skewed, by reason of lack of knowledge or unfamiliarity on the part of a self-represented litigant, in favour of a represented party.

[49] However, just as fairness may require pro-activity towards a self-represented litigant, there are risks to trial fairness, as perceived by another (represented) litigant by a judge engaging in such pro-action. There is a danger that the other party will perceive him- or herself disadvantaged in being represented if it appears that the judge is always "helping" the self-represented litigant and not the other side. The reality, however, *in a litigant-represented world*, is that such "help" from the judge is not required because the adjective law, properly applied and accessed by counsel, is itself designed to achieve balance and fairness. But that does not address the perception, as opposed to the reality, of fairness. The oft-quoted observation by Lord Hewart in *R. v. Sussex Justices, ex p. McCarthy*, [1924] 1 K.B. 256 that "… justice should not only be done, but should manifestly and undoubtedly be seen to be done", is as important for the represented, as well as the self-represented, litigant.

[50] To maintain both the reality and perception of fairness, therefore, the judge must strive to achieve a fine balance between the way he or she provides specialized treatment for the self-represented litigant and the application of the expectation of non-intervention that would otherwise apply. There is obviously no pat formula as to how that is to be achieved in a given case. It is context-specific and a matter of judgment, recognizing that in the application of general

principles rather that specific rules, there is always room for a margin of error, viewed from hindsight.

[51] The *Statement of Principles* (see Appendix A to this judgment for the full text) is designed to give substance, by way of guidance, as to the circumstances under and the degree to which pro-active assistance can and should be provided to self-represented litigants. They have been "endorsed" by the Supreme Court of Canada in *Pintea v. Johns*, 2017 SCC 23, [2017] 1 S.C.R. 470 (per Karatkasanis J. at paragraph 4). They have also been recognized, discussed or applied by appellate courts in Ontario (*Moore*), Manitoba (*Dewing*), British Columbia (*Cole v. British Columbia Nurses' Union*, 2014 BCCA 2), 371 D.L.R. (4th) 711) and in this province (*Young v. Noble,* 2017 NLCA 48 281 A.C.W.S. (3d) 408).

[52] They are principles, not a code of conduct (Note 2 to the Preamble). Thus, breach of them would not automatically result in reversible error. That said, although described as "advisory" (Note 2; *Dewing*, at para. 20), they use normative-sounding language ("should," "responsibility," "accountable").

[53] The *Principles* open with a statement of responsibility on the part of judges, court officials and members of the Bar amongst others "to ensure that self-represented persons are provided with fair access and equal treatment by the court" which includes "opportunities for all persons to understand and meaningfully present their case" (Statement "A") and promotion of "access to the justice system for all persons on an equal basis" (Statement "B"), with all participants in the system being "accountable" for understanding and fulfilling their roles in achieving the goals of equal access to justice, including procedural fairness" (Statement "C"). They recognize that "treating all persons alike does not necessarily result in equal justice" (Commentary #3 to Statement "B") and that therefore it is consistent with the requirements of judicial neutrality and impartiality for a judge to engage in "affirmative and non-prejudicial steps" relative to management of the case and the courtroom in order to address any potential of unequal treatment that might otherwise result (Commentary #1 to Statement "B"). This was stated as a positive obligation by White J.A. in *Young*:

> [34] … this Court has a duty to ensure that everyone is treated fairly and without discrimination. It is impossible to deny that there is an inequality when a self-represented litigant must argue a case against experienced counsel. The Court must take "affirmative and non-prejudicial steps" to address this, as explained in the CJC's *Statement of Principles* …

[54] Thus, although they are not to be treated as a code of conduct applicable unbendingly in all situations, the *Principles* must be treated as having some legal effect. While the Supreme Court did not elaborate on what was meant when they said they "endorse" the *Principles,* it must have involved at the very least recognition that they should be regarded as having some legal consequence. The Supreme Court of Canada is, after all, a court of law, not a court of social or moral convention.

[55] Certainly, in *Moore*, the Ontario Court of Appeal regarded the *Principles* as having normative legal effect. In that case, the trial judge misunderstood that the self-represented litigant intended to withdraw part of her claim. The misunderstanding occurred as a result of the judge's failure to clarify the self-represented litigant's intentions by inquiring further as to what she wanted to do. Rather than simply placing responsibility on the litigant to clarify her intentions, the Court declared that failure on the part of the trial judge to make "clear, unambiguous and comprehensive inquiries" of a self-represented litigant as to whether she was abandoning part of her claim and failing to inform her that that part of her claim would not otherwise be considered "resulted in an unfair trial", constituting reversible error (para. 47). Brown J.A. explained it this way:

> [47] … the trial judge did not make sufficient inquiries before concluding Ms. Moore had abandoned her claim for Unpaid Wages. Where the evidence of a self-represented party raises a question in the trial judge's mind about the specific relief the party is seeking, a trial judge <u>must</u> make the appropriate inquiries of the party to clarify the matter. Those inquiries <u>must</u> be made in a clear, unambiguous and comprehensive way so that several results occur: (i) the trial judge is left in no doubt about the party's position; (ii) the self-represented person clearly understands the legal implications of the critical choice she faces about whether to pursue or abandon a claim; and (iii) the self-represented person clearly understands from the trial judge which of her claims he will adjudicate.

(Emphasis added.)

[56] Thus, failure to follow the approach described in the *Principles* in a manner that renders the trial unfair can result in reversible error and lead to a new trial. See also *R. v. Tossounian*, 2017 ONCA 618, 140 W.C.B. (2d) 465 at paras. 37-39.

[57] It is noteworthy that the Court in *Moore* discussed the application of the *Principles* in the context of overall trial fairness. This makes sense because the *Principles*' focus is, as the operative statement following the Preamble says, on

responsibility to provide “fair access and equal treatment.” The same approach is evident in *Dewing,* but in that case, although acknowledging the applicability of the *Principles,* the conclusion reached by the appellate court was that “the procedure followed by the motion judge was not unfair” to the unrepresented litigant because the litigant understood the distinction between liability and damages and was aware of the requirement for evidence under oath respecting both issues (para. 30). In the circumstances, nothing further was required by the judge to make the trial fair.

[58] The Court in *Cole* also adopted a similar manner of dealing with the application of the *Principles*, holding that the “bare status” of a litigant as self-represented is not in itself a reason for affording different or special treatment. Reliance on the *Principles* must be grounded in the notions of equal access to justice which are their underpinning (para 38).

[59] The relevance of the *Principles*, therefore, is in respect of how they inform the notion of trial fairness and inform the exercise of procedural discretion in a given case. They stress the need for judicial pro-action and give examples of when a judge can and should intervene in appropriate situations to ensure that all parties have a fair and meaningful opportunity, based on accurate knowledge, to achieve a suitable outcome according to law. They make it clear that trial fairness is not to be judged solely by reference to whether there was procedurally equal treatment and equality of non-intervention. Rather, trial fairness, when dealing with a self-represented litigant, encompasses providing meaningful and informed opportunities to present one’s case in a manner that is not disadvantageous to the litigant given his or her unrepresented position using “affirmative and non-prejudicial steps” to tease out, if necessary, the real essence of the legal positions that are engaged and to take into account the special needs of a self-represented litigant when exercising procedural discretion.

[60] A judge assessing a matter through the lens of trial fairness and in exercising procedural discretion must therefore do so with the *Principles* as a filter. They give more concrete substance, meaning and focus to the notion of trial fairness and how to exercise discretion when dealing with a self-represented litigant. It is also worth noting, however, that the focus cannot be solely on the *Principles* in the abstract. The considerations affecting a self-represented litigant’s interests must be assessed according to the level of sophistication of the self-represented litigant in question and his or her particular needs. They must also be balanced against the interests of other parties when determining

whether trial fairness has been maintained or procedural discretion has been properly exercised.

[61] Accordingly, a failure to follow a statement in the *Principles* is not a justification, without more, for a mistrial or appellate intervention or reversal. For example, the failure to conduct a case management hearing – a subject dealt with in some detail in the *Principles* as a means of ensuring the self-represented litigant is in appropriate cases properly informed of procedure and of legal options facing him or her – would not in itself necessarily constitute legal error unless it can be shown that that failure materially affected the fairness of the trial process in a manner that could not be or was not rectified by subsequent events.

[62] It follows from this analysis that it is not sufficient to allege as a ground of appeal either in the notice of appeal or otherwise that a breach of the *Principles* has occurred, in the abstract. Such an assertion would not justify appellate intervention. The appellant must go further and assert or otherwise make apparent how failure to observe, consider or apply the *Principles* affected trial fairness or resulted in an unfair exercise of discretion resulting in materially unequal treatment affecting the self-represented litigant's access to equal justice.

[63] Accordingly, while it is appropriate to raise failure to observe, consider or apply the *Statement of Principles* as a ground of appeal, such failure does not necessarily result in reversal on appeal, only in the context of assertions that the non-compliance rendered the overall process unfair or affected the proper exercise of procedural discretion.

(b) Application to Dismiss the Appeal or Strike the Notice of Appeal Generally: Rule 36

[64] In bringing this application, the Attorney General has attempted a pre-emptive strike against the appeal by asking the Court to dismiss it without the necessity of going through the normal process of filing of factums and otherwise perfecting it before setting it down for hearing. It is worth noting, however, that a transcript of the trial relating to Ms. Butt's evidence and the legal arguments that followed has been filed and extensive argument in the form of a legal memorandum (a factum by any other name), including submissions on the merits has been presented by both the Attorney General and Mr. Cabana. Counsel for the Premier and cabinet minister did not file any material but associated himself with the arguments made by the Attorney General.

[65] Rule 36 provides in pertinent part:

> (1) A party to an appeal may apply at any time before or at the hearing of the appeal for an order
>
> (a) striking out the notice of appeal; or
>
> (b) dismissing the appeal
>
> on the grounds that
>
> (c) …
>
> (d) the appeal is frivolous, vexatious or without merit;
>
> (e) … or
>
> (f) …
>
> (2) An application to dismiss an appeal shall be heard and determined by a panel of not fewer than 3 judges sitting together.
>
> (3) A notice of appeal may be struck out by a single judge, and where a notice of appeal has been struck out, the appellant may apply within 6 months to have the notice reinstated for good reason.

[66] Subsection (1) of rule 36 is essentially a rescript of the former rule 57.17(1) of the *Rules of the Supreme Court, 1986* (the “former rules”) which governed procedure in the Court of Appeal prior to adoption of the current rules on October 17, 2016. Because of the congruence of language with the current rule, the case law interpreting and applying the former rule is still relevant to interpretation of the new rule (*Pearce v. Anderson*, 2017 NLCA 44 at paragraphs 11-12). That case law drew a distinction between an application to dismiss an appeal and one to strike out the notice of appeal on the grounds that the appeal was, in the words of rule 57.17(1)(d) (or the current provision, rule 36(1)(d)), “frivolous, vexatious or without merit.” The former was regarded as a disposition of the appeal on its merits whereas an application to strike the notice of appeal was regarded as more of a procedural disposition based on adequacy of pleadings.

[67] Several consequences flowed from this. The first was that because an application to dismiss involved a merits-based disposition, it required a panel of at least three judges to deal with it. This is now explicitly recognized in subsection (2) of the new rule. An application to strike, on the other hand, fell within section 10 of the *Judicature Act* (now s. 16 of the *Court of Appeal Act*,

SNL 2017, c. C-37.002) as being a matter "incidental" to and not requiring a final determination of, the appeal and could therefore be dealt with by a single judge. This also is now recognized in subsection (3) of the new rules. Because both the remedies of dismissal and striking out were put in issue on this application, the Court sat as a panel of three.

[68] The second consequence related to the approach to determination of an application to dismiss as opposed to an application to strike. The latter application was to be determined on a review, as a matter of form, of the notice of appeal in the context of the reasons for judgment of the court appealed from, to determine whether the asserted appeal grounds raised an arguable issue in relation to the judgment that was rendered, i.e. to determine whether it was "plain and obvious" that the appeal could not succeed (was "without merit") or was otherwise frivolous or vexatious.

[69] By contrast, an application to dismiss the appeal involved a merits determination by delving more robustly into the case, below the level of the notice of appeal, involving a consideration of the judgment below and the transcript , if available, to determine if there was any substantive merit in the appeal. The only limitations on being able to dismiss were (i) having a record that was sufficient to enable the requisite determination to be made; and (ii) a requirement that the appeal could only be dismissed if it was frivolous, vexatious or "without merit." With respect to the "without merit" standard, if there was an arguable case, in the sense of it not being "plain and obvious" that the appeal could not succeed, dismissal was not available; the case would have to go to a full appeal even if the court was doubtful of the chances of success.

[70] Counsel for the Attorney General invited the Court to consider a broader application of the "without merit" standard and, in effect, to treat a without-merit application as akin to a summary trial – a "summary appeal," as it were where, provided the record was adequate for the purpose, a determination could be made on the merits if there was no good reason to require the parties to go through the full procedure of setting down the case for a full appeal, He referred in this regard to this Court's decision in *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311 with its emphasis on proportionality, and the Supreme Court of Canada's decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 which stressed the importance of using attenuated procedures for merits determinations wherever possible as a means of making the court system more responsive and efficient, while still maintaining fairness to litigants.

[71] To accept this suggestion, however, would be to give to the phrase "without merit" in rule 36(1)(d) a considerably more expansive interpretation than hitherto was applied under the former rule. While the suggestion has its attractions, I would not be prepared to undertake such a revision of the scope of the rule without giving proponents of a contrary point of view an opportunity to have a full input into this debate. The way in which the issue came up in this case did not allow for that to happen. The idea, therefore, should be left for further consideration in a subsequent case or by the Rules Committee of the Court.

[72] I will therefore approach the application of rule 36(1)(d) in the same manner in which it was approached under the identically-worded former rule. That requires an identification of the issues raised on appeal and the grounds of appeal being relied on and an analysis of the judgment of the court below in the context of the available record to determine (i) whether the record is sufficient to allow a merits determination to be made and, if so, (ii) whether the appeal is frivolous, vexatious or without merit (in the sense of it being plain and obvious that it cannot succeed).

[73] This Court has discussed what would constitute a frivolous or vexatious appeal in *Walsh v. Johnson*, 2010 NLCA 6, 293 Nfld. & P.E.I.R. 101 at paras. 18-22. Although he made written argument that the appeal was frivolous and vexatious, counsel for the Attorney General indicated in oral argument that he was, however, primarily relying on the submission that the appeal was "without merit", in the sense of it being "plain and obvious" that the appeal could not succeed. He was content to rely on the notion that an appeal devoid of any merit is also, according to *Walsh*, a frivolous appeal. Although he suggested in his factum that Mr. Cabana's bringing the appeal at this time, in mid-trial, was done for an illegitimate or ulterior purpose and therefore constituted an abuse of the court's process (thereby making it a vexatious appeal), he effectively abandoned this submission in oral argument, since he conceded that Mr. Cabana may have had a legitimate reason to undertake the appeal.

[74] I will therefore address the question of whether the appeal is without merit first. The test for determining whether an appeal or notice of appeal should be dismissed or struck on this basis is, as stated in *Walsh* at paras. 15 and 17, and affirmed in *Pearce*, whether, following the applicable type of review, it is "plain and obvious" that the grounds of appeal cannot succeed.

(c) Application to Strike the Notice of Appeal for Lack of Merit

[75] An application to *strike of a notice of appeal* essentially involves, as noted in *Walsh*, a formalistic exercise focused on the notice of appeal or any statement by the appellant as to the proposed grounds of appeal in response to the application. It addresses the question: are there grounds of appeal stated that on their face, unless considered in the context of the reasons for judgment, disclose an arguable basis for interfering with the decision of the judge below? For example, if the stated grounds assert legal propositions that are contrary to legal principle or are unknown to the law or are obviously not material and could not affect the result, they can be struck out.

[76] In this case, a review of the grounds of appeal as stated by the appellant discloses a number of points that, assuming they can be sustained in argument, could result in a successful challenge to the decision respecting the release and admission of the psychologist's notes. It cannot be said those grounds are wholly without merit. This is so even with respect to Mr. Cabana's reliance on the *Statement of Principles* as grounds of appeal. He has tied his reliance on the *Principles* to an allegation that the trial judge "failed to do whatever was possible to provide a fair and impartial process and prevent an unfair disadvantage to a self-represented litigant." Accordingly, and subject to the comments in the succeeding paragraph, there is no basis for striking out many of the grounds in the notice of appeal simply on a formalistic review.

[77] The situation is otherwise, however, with respect to matters described in the notice of appeal as grounds 1(i), 1(ii), 1(vii), 1(viii), 1(ix), 1(x) and 1(xi). From a review of the statement of these grounds in the context of the reasons for judgment, it is clear, without needing to consider anything more, that these grounds cannot succeed. That would justify their being struck from the notice of appeal under rule 36(1)(a). However, because they also fail the more intensive review under rule 36(1)(b), it is best to defer the detailed analysis until those considerations are addressed.

(d) Application to Dismiss the Appeal for Lack of Merit

[78] On an application to *dismiss the appeal*, the analysis is, as stated in *Walsh*, "more intensive":

> [17] The analysis of the grounds of appeal for the purpose of determining potential merit is not limited to a consideration of the description of the grounds of appeal in the notice itself. Even if the notice of appeal sets out a ground of appeal in language which on its face appears to raise a potential ground, the court may inquire further to determine whether in reality there is any sustainable ground. The court may determine,

> from a review of the available record (such as the transcript of the proceeding in the court below and the judge's reasons) and from the absence of any demonstration from the appellant in written submissions and oral argument of the existence of specific arguable points supporting the bare ground as stated in the notice of appeal, that the appeal is doomed to fail and for that reason it is "plain and obvious" that it cannot succeed.

(i) Case Management Meeting "Orders"

[79] The first two grounds of appeal (1(i) and 1(ii)) relate to Mr. Cabana's assertion that he was "ordered" at a pre-trial case management meeting to produce to the other parties copies of his military and civilian medical records without first determining the necessity for doing so or without viewing and redacting the records as appropriate. Although no transcript of the case management meeting has been provided as part of the appeal record to verify precisely what was said, I am nevertheless prepared to accept the respondents' description of events, namely that the judge's comments were in the nature of advice to Mr. Cabana that if he wanted to prove his claim for damages for impact on his mental health condition, he would have to consider producing the records if he was going to place them in evidence at the trial. This is because the nature of a case management meeting does not contemplate making orders. It proceeds by way of discussion and consent (*Rules of the Supreme Court,* rule 18A.06(3)). If there is disagreement, the matter must be moved into chambers court "for full argument and decision" (rule 18A.06(6)). It is only at that point that an "order" can be made. That did not happen in this case. That is confirmed by the absence of any order in the court file. The fundamental premise on which these two grounds of appeal are based is therefore lacking. It can be said that that there is no chance of success with respect to these matters and they can be dismissed.

[80] That said, it may be possible that Mr. Cabana's impression that he was ordered to produce the records resulted from a misunderstanding on his part caused by a failure to appreciate the case management process. That could be due to a lack of proper explanation by the case management judge, in accordance with the *Statement of Principles*, as to the non-binding nature of the process and of the implications for Mr. Cabana flowing from his decision to accept or reject the judge's suggestions. The absence of the record of the case management meeting precludes any assessment in this regard at this time. To the extent that the record may indicate an impact on the fair trial process as

contemplated by the *Principles*, that could still be considered under the rubric of appeal ground 1(vi) as hereinafter discussed.

(ii) Publication Ban Decision

[81] The fourth ground of appeal (1(iv)) relates to the ruling in the *Publication Ban Decision*. The essence of this ground of appeal is that once the trial judge became aware that Mr. Cabana's application for a publication ban was deficient because he did not lead the type of evidence necessary to support a conclusion that he would suffer serious debilitating physical or emotional harm, he ought not to have proceeded to dismiss the application. Instead, considering Mr. Cabana's status as a self-represented litigant, he ought, in accordance with the *Statement of Principles*, to have explained to Mr. Cabana what would be necessary to ground his application and then adjourned the matter to give him time to attempt to provide that evidence.

[82] Mr. Cabana requested an adjournment to provide the evidence but the trial judge denied it.

[83] Amongst the advice in the *Statement of Principles* are the following:

- "… it is important that judges … facilitate, to the extent possible, access to justice for self-represented persons" (Commentary A.4).
- "Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case" (Principle B.2).
- "… non-prejudicial and engaged … courtroom management may be needed to protect the litigants' right to be heard. … [T]he presiding judge may: …(d) provide information about the law and evidentiary requirements" (Principle B.4).
- "Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices" (Principles "For the Judiciary" C.1).

[84] The judge dealt with Mr. Cabana's request for an adjournment in his decision as follows:

> [12] During his rebuttal at the end of the hearing, the Plaintiff expressed concern that if he had presented such evidence it would have been open to the public and would have defeated the purpose of the application. I reminded him that a case management meeting had been held specifically in respect of the necessary factual foundation for this application and that was his opportunity to raise any concerns he had with respect

> to the evidentiary burden that was upon him. I noted that the case law suggests that such evidence can be produced at a *voir dire* and such an option may have been available had he so requested. That case law was referred to in the brief filed on behalf of the Second and Third Defendants as was their submission that the application should be denied because of the insufficient evidentiary basis. I therefore denied the Plaintiff's late request for an adjournment to permit him to present supporting evidence at a later date.

[85] It appears from this passage that informational assistance had been provided to Mr. Cabana at a prior case management meeting. Whether or not the nature and extent of the assistance provided met the expectations in the *Principles* and whether the judge's characterization of what occurred is accurate cannot be ascertained at this point because no transcript of the case management meeting has been included as part of the appeal record. On its face, however, there appears to be a strong argument that Mr. Cabana's circumstances were considered by the trial judge in the course of exercising his discretion not to grant an adjournment on the basis that Mr. Cabana had already been given an opportunity to present his case properly. The decision to grant an adjournment is quintessentially a circumstance-specific discretionary decision and is not lightly disturbed on appeal.

[86] All that said, however, it is at least arguable that Mr. Cabana's circumstance as a self-represented litigant should have figured more prominently in the adjournment decision, causing the ordinary reaction not to grant an adjournment where opportunity to respond had already been provided, to be less emphasized in order to ensure that "responsibility to promote access the justice system for all persons on an equal basis" (*Principles,* Statement B) was achieved. While such a submission may not be successful at the end of the day, it cannot be said that it cannot succeed. The record is incomplete and the matter was not fully argued on these points.

[87] I would also add that, arguably, the potential impact of a reversal on appeal on this point could be significant. If, following an adjournment, Mr. Cabana would have been able to provide an evidentiary basis for the publication ban and such a ban would have been granted, it is certainly possible that Mr. Cabana might not have taken issue with the disclosure of Ms. Butt's file notes during her cross-examination and their being marked as an exhibit, since he would then have been spared the potential public disclosure of that information, something that was very much on his mind when he challenged their use on December 5th.

[88] Accordingly, this ground of appeal cannot be dismissed on a rule 36 application.

(iii) General Trial Management Issues

[89] The seventh and eighth grounds of appeal (1(vii) and 1(viii)) relate to matters pertaining to trial management (failing to hold the Third Respondent "accountable" by contempt or otherwise for his alleged admission of perjury, and instructing counsel not to use "25 year old case law" in argument and then relying on that case law for his decision) rather than to the merits of the decision with respect to medical record disclosure. While these matters, if accurate, might relate to issues of overall trial fairness and, by extension, possibly impugn the conduct of the trial judge, they cannot stand as independent grounds of appeal that could possibly lead to identification of error with respect to the disclosure decision on the merits. Insofar as they might be relevant to procedural fairness issues, they could still be raised as part of argument in that context but it is plain and obvious that they cannot succeed as independent grounds of appeal. They must be dismissed.

(iv) Choice of Judge's Descriptive Language

[90] The ninth ground of appeal (1(ix)) takes issue with the trial judge's use of language in the opening paragraph of the *Disclosure Decision*:

> [1] … The lawsuit stems from <u>comments</u> that were made about [Mr. Cabana] by the [Premier and cabinet minister] during a <u>political campaign</u> in 2011.

(Emphasis Added)

[91] Mr. Cabana asserts that the use of the words "comments" and "political campaign" were "findings" that were false. Presumably, he relies on this characterization to suggest that by describing the alleged defamatory statements merely as "comments" the judge had already decided, without hearing all the evidence, that the language used by the defendants was benign and was not a character assassination.

[92] It is evident from the judgment, however, that the judge was not making a finding on whether the words used were defamatory or not or whether they were maliciously used. He was, in an introductory paragraph, merely giving background context to the dispute. In fact, the choice of the word "comments," which was essentially descriptively neutral, was appropriate at that stage

because he was not at the point in the proceeding to decide whether the "comments" were defamatory. Further, whether or not the alleged defamatory words were uttered "during a political campaign" is not material to a finding as to whether they were capable of having a defamatory meaning. Even if the judge was incorrect in this regard, it could not have affected the result and in any event could have been subject to correction when further evidence was presented at the trial.

[93] I conclude, therefore, that it is plain and obvious that this ground of appeal cannot succeed and must be dismissed.

(v) Use of Email Communications as Evidence of Consent to Disclosure

[94] The tenth and eleventh grounds of appeal (1(x) and 1(xi)) challenge the judge's alleged reliance on the "privileged" email communications between Mr. Cabana and counsel for the Premier and cabinet minister as evidence of consent by Mr. Cabana to have the notes of Ms. Butt, the psychologist, released to the respondents. The trial judge dealt with this matter in the *Disclosure Decision* as follows:

> [18] The Plaintiff makes much of the fact that the Defendants did not bring a pre-trial application to the Court pursuant to Rule 32 for production of the progress record. In written communications between the Plaintiff and the Defendants, however, the Plaintiff indicated that he would not oppose such efforts, effectively consenting to the Defendants receiving it. Nevertheless, the Progress Record was not provided, even to the Plaintiff…
>
> …
>
> [20] Whether or not the Plaintiff consented to the defendants receiving the Progress Record, there was no requirement on counsel to seek its production prior to trial. Obviously, the situation that we now find ourselves faced with may have been avoided had that been done. But that in no way makes the conduct of counsel oppressive.

(Emphasis added.)

[95] It is clear that whether or not Mr. Cabana consented to the production of his records to the respondents was not material to the judge's decision. Even if

the email exchange was subject to some form of litigation or other privilege and even if the judge should not have referred to that exchange in his decision, it did not affect the outcome. Accordingly, there is no potential merit to these grounds of appeal and they should be dismissed.

(vi) Rulings and Procedures Respecting Use and Dissemination of Psychologist's Notes

[96] The third, fifth, sixth and twelfth grounds of appeal (1(iii), 1(v), 1(vi), and 2) all relate to some aspect of the *Disclosure Decision*. They either challenge the correct application of the legal principles necessary to make an appropriate decision (1(iii), 1(v) and 2) or the fairness of the process adopted by the judge in dealing with the issue (1(vi)).

[97] Mr. Cabana is taking the position on the appeal that the trial judge erred in law in not applying the *Carter* test to determine whether he should have permitted other counsel access to Ms. Butt's clinic notes, allowing them to be copied and marking them as an exhibit. He stresses that, as in the *Carter* test, before disclosure could be ordered, the judge would have had to find that the material related to the issues in the proceeding, was necessary to dispose fairly of the issues and did not unnecessarily invade his physician-patient privilege.

[98] Counsel for the respondents counter with the argument – accepted by the trial judge – that the *Carter* principles apply only to pre-trial discovery and that the applicable principle is the one that calls for a witness who testifies using notes to refresh memory, as Ms. Butt did in this case, to produce for inspection by the other parties those notes notwithstanding that they may have been, up to that time, subject to privilege (*Metropolitan Life Insurance Co. v. Frenette*, [1992] 1 S.C.R. 647, 89 D.L.R. (4th) 653; *Hay v. University of Alberta Hospital* (1990), 105 A.R. 276, 69 D.L.R. (4th) 755 (Alta. Q.B.); *Cornerstone Co-operative Homes Inc. v. Spilchuk* (2004), 72 O.R. (3d) 103, 7 C.P.C. (6th) 383 (Ont. S.C.)).

[99] However, notwithstanding the notion of implied waiver of privilege inherent in this principle, that does not authorize wholesale rifling through the papers of the witness and make it "open season" on whatever is in the file. There would still be a requirement of relevance to the issues in dispute and, in particular, to the matters about which the witness was testifying and relying on notes for the purpose of such testimony. It is those portions of the notes that are relevant to testing the reliability and truthfulness of what the witness is testifying

about and claiming to refresh her memory. See *R.* v. *Fast*, 2009 BCSC 1671, 90 M.V.R. (5th) 233. This process does not necessarily allow for a wholesale discovery of new information in the file, unrelated to the matters about which the witness was speaking; otherwise, a party could make up for failing to conduct pre-trial discovery and obtain full disclosure without the screening of the *Carter* principles. In *Fast* at paras. 64-66, the Court described the cross-examination on the produced notes as "excessive" because it extended to the fact that the document was silent on certain matters relating to the accused's view as to the adequacy of the legal advice he received, something that did not relate to the accuracy of the witness's memory, as refreshed. In a similar manner, in the current case, counsel cross-examined Ms. Butt on the absence of any reference in her notes to the impact of the alleged defamation on Mr. Cabana's mental health condition.

[100] Considering the importance of the privacy and privilege issues at stake, it is at least arguable, as Mr. Cabana submits, that the principles of document discovery relating to reliability, necessity and unnecessary breaching of privilege are and should be principles of general application, even at trial. It is arguable that these principles should therefore inform the analysis when determining whether and to what extent a witness should produce for inspection those documents in her file that were used for the purpose of refreshing memory. See *Fast*.

[101] In this case, the trial judge did not address any of these considerations when the issue came up in the trial. Mr. Cabana claims he was taken completely by surprise when this issue arose. Since the parties had not sought discovery prior to trial, he assumed (wrongly) they would remain private and he was not prepared to deal with the issue when it came up. Without seeking Mr. Cabana's input, the judge simply ordered the complete production and copying of the file. Counsel then used the contents of the file extensively in conducting a general cross-examination.

[102] The judge recognized that there were other considerations at stake when the matter was raised by Mr. Cabana the next day. As he said, "there is more to [the] argument [than] meets the eye. … [A]nd there is a basis to your argument". He then sought argument from all parties, including Mr. Cabana and allowed him further time to consider the implications and respond.

[103] In the *Disclosure Decision* the judge recognized that he need not take "an all or nothing approach." He stated:

> [22] … It is open to the Court to edit the documents to remove non-essential material and to impose conditions on who may see and copy the documents. Such a review is also aimed at protecting privacy interests of third parties (see *M.(A.) v. Ryan*, [1997] 1 S.C.R.157 at paragraph 33). Although arguably different factors may apply when production is ordered at trial, I am satisfied that such an exercise is appropriate here too.

[104] He did not, however, apparently conduct a relevancy-necessity-privilege analysis of the notes. Instead, acknowledging that the documents had already been disclosed and the exercise may effectively be "closing the barn door after the horse has fled," took comfort in the fact that the court registry had confirmed that since their disclosure no third party, including the media, had viewed them. He then proceeded to examine the records to determine whether any portions should be redacted, even though Mr. Cabana had declined to make submissions, in an *in camera* hearing, on that issue because "the cows have already left." The judge did not indicate the considerations that influenced him except to state that he did not see anything that would be harmful to a third party. He did not, for example, consider necessity and relevance. Instead, he contented himself with the observation that "if it turns out that there is anything in the Progress Record that is not relevant to the matters at issue in the trial, then questions in relation to them would be improper" (para. 26) and presumably could be objected to at that time. That conclusion did not, of course, address the possibility of disclosure and dissemination of the sensitive mental health records to others in the meantime.

[105] Whether the judge was correct in the approach he took is not a matter to be determined on a dismissal application under rule 36. That can only be done after full argument on a full record. What can be said at this stage is that one cannot say that it is plain and obvious that Mr. Cabana's legal submissions on these issues cannot succeed.

[106] The second prong of Mr. Cabana's argument relating to these grounds of appeal relates to issues of procedural fairness. The following points are to be noted:

- Mr. Cabana was not invited to speak to whether Ms. Butt's notes should be disclosed, copied and entered as an exhibit when the issue first arose. Had there been a fulsome discussion of the issues at that point, with appropriate adjournments to allow all parties to prepare, the issue of the "horse leaving the barn" may not have arisen

- The judge rejected Mr. Cabana's objection to the relevance of counsel's questioning based on the disclosed notes by simply cautioning him not to interrupt the flow of counsel's flow of questions. There appeared to be no attempt to determine whether relevance existed. At that point reliance was placed on the notion that once a witness uses notes to refresh memory, the other side is entitled as of right to have access to those notes.
- In marking the notes as an exhibit, no consideration appears to have been given to the legal effect of doing so nor to whether the notes were being used as "present memory refreshed" or "past recollection recorded." Arguably, depending on which category the notes fell into could affect whether they should have been entered as an exhibit and the use to which they could be put thereafter (see *Hodder (Guardian ad litem of) v. Waddleton* (1993), 110 Nfld. & P.E.I.R. 222, 42 A.C.W.S (3d) 415 (Nfld. S.C. (T.D.)).
- At the point when Mr. Cabana was asked whether he wished to make *in camera* submissions on whether there should be some redactions from the notes, there was no attempt to explain to Mr. Cabana what the implications of his choice not to do so would be, namely, the possible exposure and dissemination of the totality of the notes to the public if there were no redactions (something Mr. Cabana may not have been contemplating, given the sealing order made by the judge the day before).
- The previous point is important because at the close of proceedings the previous day following the making of a sealing order by the judge, Mr. Cabana had specifically asked whether the sealing order would be "for posterity" and the judge had signaled that it was. Arguably this gave comfort to Mr. Cabana that, whatever happened, the notes would have been protected from general public scrutiny. This may have influenced Mr. Cabana's decision not to make submissions on possible redactions.
- In the *Disclosure Decision*, the judge, without more, vacated the sealing order, thus exposing the notes to the full glare of potential public examination. Arguably, this possibility was not explained to Mr. Cabana in a way that made the consequences clear and presumably took him by surprise. Arguably, the principles discussed in *Moore* about making clear and comprehensive inquiries as to the position of a self-represented litigant, and

> whether he understands the legal implications of the choices he faces, may have application.

[107] Without expressing any opinion on whether the way in which the foregoing matters were handled constituted procedural unfairness, when viewed against the *Statement of Principles* or otherwise, it cannot be said that it is plain and obvious that the position of Mr. Cabana cannot succeed.

[108] Accordingly, the third, fifth, sixth and twelfth grounds of appeal should not be dismissed as part of the current application.

(vii) Reasonable Apprehension of Bias

[109] Finally, the thirteenth ground of appeal that must be considered (3) involves the assertion that "as a result of his decisions" the judge exhibited a reasonable apprehension of bias, thereby denying Mr. Cabana a fair trial.

[110] At the outset, it must be emphasized that a judge's rulings during trial, even if ultimately determined to be wrong, do not in themselves mean that the judge was biased against the party affected by those rulings. Something more must be demonstrated that the judge, for reasons extraneous to the case, favoured or appeared to favour one party over the other or closed his mind or appeared to close his mind to the potential merit of one party's position. Furthermore, even if it could be said that the judge failed to observe fully the ideas expressed in the *Statement of Principles* and thereby endangered a fair trial for that reason, that in itself would not indicate an apprehension of bias. Failure to follow the guidelines in the *Principles* may be due to inadvertence or a good faith attempt to follow the guidelines that with hindsight was not deemed adequate.

[111] Mr. Cabana has not suggested any connection between the judge and the other parties which might raise an apprehension of bias. Further, a review of the record does not disclose any conduct on the part of the judge that might indicate lack of impartiality. On the contrary, the record discloses many circumstances where the judge attempted to assist Mr. Cabana where he felt it was needed.

[112] This is not a case like a previous decision involving Mr. Cabana in another matter (*Cabana v. Newfoundland and Labrador*, 2014 NLCA 34, 356 Nfld. & P.E.I.R. 103, hereinafter the *Recusal Decision*), where statements by the judge during the hearing were considered by this Court to lead to the conclusion that the "reasonable and right-minded person at the back of the courtroom" would apprehend a possible bias. None of that exists here.

[113] I can see no basis for advancing the argument that, by his rulings or the way he spoke to or interacted with Mr. Cabana or generally conducted himself, the judge acted in a way that, viewed objectively, would raise an apprehension of bias. Accordingly, this ground of appeal should be dismissed.

(e) Availability of Appeal Remedies

[114] In addition to seeking an order that the evidence given by Ms. Butt on December 5, 2016 be struck from the record and that the medical records be declared inadmissible, "given the breach of procedural fairness", Mr. Cabana, in his notice of appeal, also asked for (i) reversal of "the decision appealed from," and (ii) replacement of the trial judge for the remainder of the trial by another judge.

[115] Inasmuch as the *Disclosure Decision* involved a dismissal of the totality of Mr. Cabana's application, which had included a motion for a mistrial, it is inherent in his request for reversal that he is asking this Court to do what Mr. Cabana asserts the trial judge should have done, namely, declare a mistrial.

[116] It is necessary, therefore, while considering whether the appeal or parts thereof be dismissed for lack of merit under rule 36, to address whether there is any potential merit to Mr. Cabana's claim that a mistrial should have been ordered or whether the trial judge should be replaced with another judge for the rest of the trial.

(i) Mistrial

[117] While one can appreciate that Mr. Cabana's mental health condition might well be exacerbated by the added anxiety associated with (in his view) an improper disclosure of personal health information that was not necessary for the trial of his claim, that in itself is not the test for declaring a mistrial. Nor is the existence of error on the part of the trial judge with respect to the rulings he or she makes.

[118] The general test for granting a mistrial is whether such an order is needed to prevent a miscarriage of justice based on all the surrounding circumstances. The question for consideration is whether the ability of the party prejudiced by one or more errors or irregularities is of such a significant scope that the party will be unable to present his or her case fully or receive a fair adjudication on the merits. It is a remedy of last resort. No other curative measure will rectify the problem (*Halsbury's Laws of Canada: Civil Procedure* (2012 Reissue) at 865-866). The focus is on the fairness of the trial, not on other extraneous potentially prejudicial considerations.

[119] In this case, assuming Mr. Cabana were to be successful on appeal, a ruling by this Court setting out the parameters of when and how a publication ban might be applied and when and how the psychologist's notes might be used and disseminated in the context of the trial would enable the trial to proceed as it should. There is nothing to indicate that Mr. Cabana would be prejudiced in presenting his case fully or that he would not otherwise receive a fair adjudication. As already indicated, there is no basis for asserting a reasonable apprehension of bias on the part of the trial judge which might require a complete retrial. A mistrial is not needed to rectify any of the issues that are still engaged on this appeal.

[120] In these circumstances, it is plain and obvious that a claim to the remedy of a mistrial, even if Mr. Cabana were to succeed on the remaining grounds of appeal could not succeed.

(ii) Replacement of Trial Judge

[121] In the *Recusal Decision,* this Court disqualified the applications judge from sitting on any future litigation involving Mr. Cabana because, in the view of the Court, a reasonable apprehension of bias had been established as a result of the conduct of the judge during the hearing (paras. 51, 55). The case therefore had to be heard by another judge.

[122] There must be some serious apprehended future procedural unfairness or the actions of the judge to date must exhibit a bias or apprehended bias that it would be regarded as procedurally unfair to allow him or her to continue to preside over the case.

[123] In the current case, such a situation does not exist. For reasons given previously, there is no basis to reasonably apprehend any bias on the part of the trial judge towards Mr. Cabana.

[124] It can safely be said, therefore, that even assuming Mr. Cabana were to be successful on the grounds of appeal still remaining to him, there is nothing in what has occurred to date that would justify removing the current trial judge and replacing him with another. This remedial claim, based as it is on what has happened to date, is bound to fail.

(f) Application to Strike the Notice of Appeal for Prematurity: Rule 35

[125] Having concluded that the some of the grounds of appeal should not be struck out or dismissed, it remains to consider whether the appellant should be permitted to proceed with his appeal on those grounds now or be required to wait until the trial has been completed.

[126] The issues that remain include: refusal to adjourn the publication ban application to enable an evidentiary basis to be presented; the application of the *Statement of Principles* and their impact on procedural fairness; and the disclosure, use and scope of dissemination of the clinic notes of Denise Butt. These issues are intertwined and have to be considered together. They form the core of the appeal.

[127] Since the adoption of the new *Court of Appeal Rules* in 2016, the requirement to obtain leave to appeal an interlocutory order has been done away with in most cases. This is a “fundamental change” (*S.M. v. J.B.*, 2016 NLCA 59, per Harrington J.A., at para. 3). It means that even orders in “uncompleted matters” (as interlocutory matters are now called and as the decisions in this case may be styled) may be appealed as of right, subject to the application of rule 35 which permits the respondent to such an appeal to apply to strike out the notice of appeal essentially on the basis that to proceed with it before the trial is completed would be premature.

[128] Rule 35 provides as follows:

> (1) Where an appeal is commenced in an uncompleted matter, a party may apply to have the notice of appeal struck on the basis that the appeal should not proceed until the matter has been completed because
>
> > (a) prejudice to a party may result if the appeal is heard before the matter is completed in the court appealed from;
> >
> > (b) hearing the appeal before the matter is completed in the court appealed from would result in delay, inconvenience or an inefficient use of judicial resources; or

> (c) there is good reason for delaying an appeal until the matter has been completed.
>
> (2) Striking a notice of appeal under this rule does not prejudice the right of the appellant to include the same issues in an appeal when the matter has been completed in the court appealed from.

[129] The policy of "fostering avoidance of trial delay" underlying the former rules requiring leave to appeal is the same under rule 35. Thus, there should be "good reason to allow the procedural flow of pre-trial proceedings to be interrupted by an interlocutory appeal" (*Young v. Noble*, 2016 NLCA 58, 411 D.L.R. (4th) 223 at paras. 17-21 and footnote 3). The main difference between the old and new rules is the starting point. Under rule 35, there is an unfettered right to file an appeal respecting an order in an uncompleted matter but once the other side applies for an order "that the appeal should not proceed until the matter has been completed," the focus quickly turns to considerations of whether the policy of avoidance of trial delay should or should not prevail in the special circumstances of the case at hand.

[130] As a general rule, a mid-trial ruling should not be appealed and dealt with before the end of the trial. As noted in *Young*, the comments of Marshall J.A. in *United Food and Commercial Workers Local 1252 v. Cashin* (1994), 124 Nfld. & P.E.I.R. 201, 52 A.C.W.S. (3d) 713 (Nfld. C.A.) at p. 109 are applicable to the analysis under rule 35:

> If decisions taken in the process of trial were appealable as a matter of right, litigation might never be brought to completion and disputes could be interminably protracted as trial courts waited on outcomes of appeals.

[131] Exceptionally, such appeals may be allowed to proceed before trial's end where, notwithstanding the disruption of the trial process, countervailing considerations are present. For example: material prejudice to the interests of the appellant (with corresponding minimal prejudice to the other side) if the appeal were not dealt with before the end of the trial; the resolution of a particularly difficult or important issue before the end of the trial would in fact facilitate the more orderly or simplified continuation of the trial; or the impact of extraneous considerations in the case would affect the appellant in a seriously prejudicial manner that would not be capable of being rectified by an appeal at the end of the trial.

[132] Is the current case an exceptional circumstance justifying a departure from the general rule? I believe it is in respect of the issues remaining to be considered.

[133] The fundamental concern of Mr. Cabana is with the use, distribution and potential publication of sensitive personal information about his mental health in a manner than may not be necessary for the resolution of the issues in the trial, or even if that information, or some of it, must be disclosed, protection of the rest of it. He seeks a proper balance of his privacy interests, the fair trial interests of all parties and the promotion of the open court principle.

[134] At present, if the trial judge's rulings were to stand until the end of the trial, portions of his mental health treatment history would be available for public scrutiny and comment as well as general use by counsel as if they had obtained pre-trial disclosure. If at the end of the trial, Mr. Cabana were to appeal an unfavourable trial result and be successful, in whole or in part, on the issue of the disclosure and use of his psychologist's clinic notes, or even if he was successful on the merits at trial, there would still have been, he says, unnecessary disclosure of his personal information that was not necessary to the proof of his claim. The personal impact on him and his privacy interests extends beyond the issues at stake in the trial. Success on a post-trial appeal would in effect be a pyrrhic victory. If Mr. Cabana is correct in his position, there will be considerable prejudice to him. The other parties have not asserted any specific prejudice except the general prejudice of having litigation hanging over their head for a longer period of time, if the appeal were heard now.

[135] It is also worth noting that Mr. Cabana specifically sought from the trial judge an adjournment pending this appeal and this was granted in the exercise of the judge's discretion. It cannot be said therefore that Mr. Cabana is using this appeal as a tactic to slow down the progress of the trial. He wishes the trial to be completed as well.

[136] Furthermore, resolution of the issue of whether and to what extent the psychologist's notes can be used in the trial would have the effect of settling a potentially significant legal issue, facilitating the proper direction of the remainder of the trial and potentially removing the possibility of an appeal at the end.

[137] Given the important privacy interests at stake and the imperfect ability to rectify the situation at the end of the trial if Mr. Cabana's position were to

prevail, I believe this is one of those exceptional cases where the better exercise of discretion is to allow the appeal issues to be heard now rather than waiting for the end of the trial.

Summary and Conclusion

[138] I would allow the respondents' application under rule 36 in part and dismiss the appeal in respect of the grounds stated in the notice of appeal as 1(i), 1(ii), 1(vii), 1(viii), 1(ix), 1(x), 1(xi) and 3. It is plain and obvious that these grounds cannot succeed. I would further dismiss the appellant's claim for the remedies of mistrial and removal of the trial judge with respect to continuation of the trial. It is plain and obvious, from a review of the record, that these remedial responses cannot succeed.

[139] I would, however, dismiss the respondents' application under rule 36 to dismiss the appeal with respect to the remaining grounds and allow the appellant to proceed with his appeal in respect of those matters, namely, 1(iii), 1(iv), 1(v), 1(vi) and 2. It cannot be said that it is plain and obvious that these grounds cannot succeed.

[140] I would further dismiss the respondents' application under rule 35 to strike out the remainder of the notice of appeal on grounds of prematurity. As noted at the beginning of this judgment (para. 4), because this matter was presented as an application to strike or dismiss, which involve lower standards when assessing merits then would be applicable on an appeal, there must be a full appeal hearing to fully assess the merits of the grounds that have not been struck out. Any party may therefore request to continue the appeal with respect to the grounds of appeal that have not been struck out and to seek directions with respect to the filing of additional appeal record materials and factums.

[141] Although success on these applications has been mixed, Mr. Cabana has succeeded in resisting the respondents' application with respect to the core issues in the appeal, namely, those directly affecting access to and use and dissemination of Mr. Cabana's medical records, together with the right to proceed with the appeal before the end of the trial. I therefore regard him as being substantially successful in this Court. I would award him party and party costs, including an amount equivalent to counsel fee calculated by reference to Column 1 of the Scale of Costs notwithstanding the fact that he is an unrepresented litigant (see *Cabana v. Newfoundland and Labrador*, 2016 NLCA

75 6 C.E.L.R. (4th) 48). I would not disturb the costs disposition made on the original hearing in front of the trial judge.

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J.D. Green J.A.

I Concur: ________________________________

C.W. White J.A.

I Concur: ________________________________

L.R. Hoegg J.A.

APPENDIX "A"

CANADIAN JUDICIAL COUNCIL
STATEMENT OF PRINCIPLES
ON SELF-REPRESENTED LITIGANTS AND ACCUSED PERSONS*

PREAMBLE

Whereas the system of criminal and civil justice in Canada is predicated on the expectation of equal access to justice, including procedural justice, and equal treatment under the law for all persons;

Whereas the achievement of these expectations depends on awareness and understanding of both procedural and substantive law;

Whereas access to justice is facilitated by the availability of representation to all parties, and it is therefore desirable that each person seeking access to the court should be represented by counsel;

Whereas those persons who do remain unrepresented by counsel both face and present special challenges with respect to the court system;

Therefore, judges, court administrators, members of the Bar, legal aid organizations, and government funding agencies each have responsibility to ensure that self-represented persons are provided with fair access and equal treatment by the court; and

Therefore, it is desirable to provide a statement of principles for the guidance of such persons in the administration of justice in relation to self-represented persons.

*Notes:

1. Throughout this document, the term "self-represented" is used to describe persons who appear withoutrepresentation. The use of this term is not meant to suggest inferences about the reasons the individual is without representation, nor the quality of their self-representation, and recognizes that some individuals prefer to represent themselves.

2. The Statements, Principles and Commentaries are advisory in nature and are not intended to be a code of conduct.

A. PROMOTING RIGHTS OF ACCESS

STATEMENT:

Judges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation.

PRINCIPLES:

1. Access to justice for self-represented persons requires all aspects of the court process to be, as much as possible, open, transparent, clearly defined, simple, convenient and accommodating.

2. The court process should, to the extent possible, be supplemented by processes that enhance accessibility, informality, and timeliness of case resolution. These processes may include case management, alternative dispute resolution (ADR) procedures, and informal settlement conferences presided over by a judge.

3. Information, assistance and self-help support required by self-represented persons should be made available through the various means by which self-represented persons normally seek information, including for example: pamphlets, telephone inquiries, courthouse inquiries, legal clinics, and internet searches and inquiries.

4. In view of the value of legal advice and representation, judges, court administrators and other participants in the legal system should:
   (a) inform any self-represented parties of the potential consequences and responsibilities of proceeding without a lawyer;
   (b) refer self-represented persons to available sources of representation, including those available from Legal Aid plans, *pro bono* assistance and community and other services; and
   (c) refer self-represented persons to other appropriate sources of information, education, advice and assistance.

COMMENTARY:

1. Informed opinion and research suggests that the numbers of self-represented persons in the courts are increasing. However, the average person may be overwhelmed by the simplest of court procedures.

2. Self-represented persons are generally uninformed about their rights and about the consequences of choosing the options available to them; they may find court procedures complex, confusing and intimidating; and they may not have the knowledge or skills to participate actively and effectively in their own litigation.[4]

3. Many self-represented persons have limited literacy skills, and many speak Canada's official languages as a second language, if at all. As a result, many self-represented persons tend to access information about the courts through means other than the written word. For this reason, it is essential that information be provided using other means, including videos and pictures. Further, having an official available to answer questions posed by self-represented persons should, to the extent possible, supplement pre-packaged materials.

4. Given these factors, it is important that judges, court administrators and others facilitate, to the extent possible, access to justice for self-represented persons.

5. Providing the required services for self-represented persons is also necessary to enhance the courts' ability to function in a timely and efficient manner.

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[4] Hann, Robert *et al.* *A Study of Unrepresented Accused in Nine Canadian Courts*. Ottawa: Department of Justice, 2003.

B. PROMOTING EQUAL JUSTICE

STATEMENT:

Judges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation.

PRINCIPLES:

1. Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.

2. Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.

3. Where appropriate, a judge should consider engaging in such case management activities as are required to protect the rights and interests of self-represented persons. Such case management should begin as early in the court process as possible.

4. When one or both parties are proceeding without representation, non-prejudicial and engaged case and courtroom management may be needed to protect the litigants' equal right to be heard. Depending on the circumstances and nature of the case, the presiding judge may:
   (a) explain the process;
   (b) inquire whether both parties understand the process and the procedure;
   (c) make referrals to agencies able to assist the litigant in the preparation of the case;
   (d) provide information about the law and evidentiary requirements;
   (e) modify the traditional order of taking evidence; and
   (f) question witnesses.

COMMENTARY:

1. It is consistent with the requirements of judicial neutrality and impartiality for a judge to engage in such affirmative and non-prejudicial steps as described in Principles 3 and 4. A careful explanation of the purpose of this type of management will minimize any risk of a perception of biased behaviour.

2. Judges must exercise diligence in ensuring that the law is applied in an even-handed way to all, regardless of representation. The Council's statement of *Ethical Principles for Judges* (1998) has already established the principle of equality in principles governing judicial conduct. That document states that, "Judges should conduct themselves and proceedings before them so as to ensure equality according to law."

3. However, it is clear that treating all persons alike does not necessarily result in equal justice. The *Ethical Principles for Judges* also cites *Eldridge v. British Columbia (Attorney General)*[5] on a judge's duty to "rectify and prevent" discriminatory effects against particular groups.

4. Self-represented persons, like all other litigants, are subject to the provisions whereby courts maintain control of their proceedings and procedures. In the same manner as with other litigants, self-represented persons may be treated as vexatious or abusive litigants where the administration of justice requires it. The ability of judges to promote access may be affected by the actions of self-represented litigants themselves.

[5] [1997] 3 S.C.R. 624 *per* LaForest, J. for the court at 667.

RESPONSIBILITIES OF THE PARTICIPANTS IN THE JUSTICE SYSTEM

STATEMENT:

All participants are accountable for understanding and fulfilling their roles in achieving the goals of equal access to justice, including procedural fairness.

PRINCIPLES:

For Both the Judiciary and Court Administrators

1. Judges and court administrators should meet the needs of self-represented persons for information, referral, simplicity, and assistance.

2. Judges and court administrators should develop forms, rules and procedures, which are understandable to and easily accessed by self-represented persons.

3. To the extent possible, judges and court administrators should develop packages for selfrepresented persons and standardized court forms.

4. Judges and court administrators have no obligation to assist a self-represented person who is disrespectful, frivolous, unreasonable, vexatious, abusive, or making no reasonable effort to prepare their own case.

For the Judiciary

1. Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.

2. In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court.

3. Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.

4. The judiciary should engage in dialogues with legal professional associations, court administrators, government and legal aid organizations in an effort to design and provide for programs to assist self-represented persons.

For Court Administrators

1. Court administrators should seek to provide self-represented persons with the assistance necessary to initiate or respond to a case and to navigate the court system.

2. In particular, court administrators should be given sufficient resources to be able to:
   (a) provide, on request, all public information contained in dockets or calendars, case files, indexes and existing reports;
   (b) provide, on request, access to or a recitation of relevant common, routinely employed rules, court procedures, and fees and costs;
   (c) provide, on request, information about where to find applicable laws and rules
   (d) identify and provide, on request, applicable forms and written instructions;
   (e) answer questions about how to complete forms, but not about how answers should be phrased;
   (f) define, on request, terms commonly used in court processes;
   (g) provide, on request, phone numbers for Legal Aid, lawyer referral services, local panels, or other assistance services, such as Internet resources, known to court staff; and
   (h) provide, to the extent possible, and in compliance with applicable law, appropriate aids and services for individuals with disabilities.

3. Court administrators shall not provide legal advice.

4. Court administrators should educate court personnel regarding the importance of public access to the courts and should provide training to court personnel as to how they should assist self-represented persons.

5. Court administrators should allocate the necessary resources to allow court personnel to provide meaningful assistance.

For Self-Represented Persons

1. Self-represented persons are expected to familiarize themselves with the relevant legal practices and procedures pertaining to their case.

2. Self-represented persons are expected to prepare their own case.

3. Self-represented persons are required to be respectful of the court process and the officials within it. Vexatious litigants will not be permitted to abuse the process.

For the Bar

1. Members of the Bar are expected to participate in designing and delivering legal aid and *pro bono* representation to persons who would otherwise be self-represented, as well as other programs for short-term, partial and unbundled legal advice and assistance as may be deemed useful for the self-represented persons in the courts of which they are officers.

2. Members of the Bar are expected to be respectful of self-represented persons and to adjust their behaviour accordingly when dealing with self-represented persons, in accordance with their professional ethical obligations. For example, members of the Bar should, to the extent possible, avoid the use of complex legal language. Members of the Bar may be guided by the Canadian Bar Association's *Code of Professional Conduct* and the codes of each jurisdiction (see Guiding Principle XIX (8))and references therein.

For Others

1. Government departments with overall responsibility for court administration should provide Legal Aid plans with sufficient resources to provide a proper range of required services for financially eligible persons, including: education, short-term information and advice, and representation.

2. In addition to providing representation, Legal Aid organizations should be encouraged to create flexible options and models for addressing the challenges of self-represented persons, including programs providing education and short-term information and advice.

3. Providers of judicial education should develop educational programs for judges and court administrators on broad-based methods of assisting and managing the cases of selfrepresented persons.

4. Government agencies with overall responsibility for court administration should provide courts with the resources and assistance necessary to train court administrators and to provide the funding necessary for them to provide meaningful, broad-based assistance to selfrepresented persons, including awareness and communications training.

5. Government agencies with overall responsibility for court administration should provide funding for self-help programs for self-represented persons, as well as for programs of assistance to self-represented persons, which falls short of representation.

COMMENTARY:

1. The adoption of these principles in individual courts should be guided, as much as possible,by statistical information about self-represented persons and their cases in each particular court jurisdiction.

2. The design of programs to assist self-represented persons should be a collaborative effort among the judiciary, the courts, the Bar, Legal Aid providers, the public, and relevant governmental agencies.

3. A key requirement is that court personnel understand the distinction between legal information and legal advice, which they are forbidden from providing. Legal advice would include, among other things, advising someone on whether or how to best pursue a case, and explaining the law (as opposed to the process, or distributing information on how to access the law). Research suggests that many court officials may be uncomfortable with providing assistance to self-represented persons for reasons that include uncertainty about how far they may go in answering questions from selfrepresented persons. Training of court personnel helps them to give meaningful assistance without giving legal advice. Training packages may include such elements as multi-step "protocols" for court personnel and scripts for answering frequently asked questions.

4. Education packages for judges may also include multi-step "protocols" which may include possible scripts for commonly experienced situations. Suggested language for judges typically covers the need to explain the process, the elements and potential consequences, the burden of presenting evidence, the types of evidence which may be presented, the rules governing non-lawyers assisting self-represented persons, and so on.

5. Self-help support for self-represented persons may include such elements as conveniently accessible (e.g., online) forms; "virtual libraries" containing Rules of Court, relevant law, and guidelines to the judiciary in issuing key types of orders or rulings; directions to courthouses; summaries of key areas of law; e-filing; clearinghouses for access to legal services; how-to pamphlets on how to prepare and present a case; and the like.

6. Scheduling should take into account the special challenges and needs of self-represented persons.