**IN THE COURT OF APPEAL**
**OF NEWFOUNDLAND AND LABRADOR**

**Citation**: *Cabana v. Newfoundland and Labrador,* 2020 NLCA 44
**Date**: December 22, 2020
**Docket Number**: 201601H0123

**BETWEEN:**

BRAD CABANA — APPELLANT

**AND:**

HER MAJESTY THE QUEEN 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 (2016 NLTD(G) 199)

**Appeal Heard:** April 11, 2019
**Judgment Rendered:** December 22, 2020

Filed December 22/20 MdB

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

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

**Hoegg J.A.:**

[1] In 2012 Brad Cabana issued a statement of claim against the respondents alleging defamation, negligence and breach of his rights under the *Canadian Charter of Rights and Freedoms*. The alleged causes of action arose from comments made by the third respondent Terry French, a member of the Newfoundland and Labrador House of Assembly at the time, during a call-in radio show, and the subsequent response of the second respondent Kathy Dunderdale, who was the Premier of the province at the time. The comments were made in the lead up to the 2011 Newfoundland and Labrador provincial election in which Mr. Cabana was a candidate. He claims damages for defamation and psychological injury.

[2] Mr. Cabana has represented himself since commencing his claim. The respondents have been represented by counsel throughout.

[3] Mr. Cabana's appeal involves challenges to certain mid-trial rulings of a Trial Judge, involving, amongst other things, litigants' privacy rights, promotion of the open court principle, and the fair trial rights of all parties in an action. Also engaged is the question of whether and to what extent the fact that one of the parties was unrepresented by counsel was a factor in the Judge's conduct of the proceeding.

## BACKGROUND

[4] The parties had exchanged documents in the usual course of litigation. In this regard, Mr. Cabana had provided the respondents with two one-page reports, dated February 10, 2016 and June 6, 2016 respectively, from his treating psychologist Denise Butt, to support his claim for damages. Ms. Butt was discovered by counsel for Ms. Dunderdale and Mr. French but not counsel for the Government. At her discovery, Ms. Butt was asked to produce her clinical chart respecting Mr. Cabana (the "chart"), but she refused to do so. No application was made to require production of the chart.

[5] The trial began on February 22, 2016. After five days of evidence related to the issue of liability, the trial was adjourned for the remaining evidence on damages and closing submissions. On the last day of the February hearing, Mr. Cabana advised the Judge that he intended to apply for a publication ban regarding his personal medical information. On April 8, 2016, Mr. Cabana applied for a publication ban over the evidence he intended to call in support of his claim for psychological injury.

[6] A case management meeting was held on April 26, 2016 at the request of the Judge to address Mr. Cabana's application. At case management, the Judge explained to Mr. Cabana that affidavit evidence supporting his requested relief must be filed with his application so that there is a basis upon which the application could be decided. The Judge suggested that Mr. Cabana might want to file an affidavit from his medical doctor but that he would "leave that entirely to you" (Transcript, April 26, 2016, at 13). He explained the distinction between the application (containing facts supporting the application and verified by affidavit) and the required accompanying memorandum of law (containing the legal argument applying the legal test for a publication ban to the verified facts). He further explained that deponents in affidavits would be subject to cross-examination and added:

> If you choose not to put her [Ms. Butt] at exposure of being cross-examined then that's entirely up to you. You present the evidence, but I can only decide based upon the evidence that's before me.
>
> (Transcript, April 26, 2016, at 14; Emphasis added)

[7] Also at case management on April 26, 2016, counsel for Ms. Dunderdale and Mr. French advised that he had requested additional medical information from Mr. Cabana, including the chart. Mr. Cabana advised it would be no problem for him to get the chart but said there may be difficulty getting his records from Veterans Affairs.

[8] Mr. Cabana did request the chart and subsequently advised the respondents that Ms. Butt refused to give it to him. No further action was taken by the respondents or Mr. Cabana in relation to production of the chart.

*The Publication Ban Decision* 2016 NLTD(G) 137

[9] Mr. Cabana's application for a publication ban was heard on June 7, 2016. The Judge noted that Mr. Cabana had not filed a personal affidavit verifying the information set out in his application, but suggested that this technical oversight

could be overcome by Mr. Cabana stating on the record that the facts alleged in his application were true. That was ultimately done. The Judge also noted that the Court Registry had not given notice to the media regarding Mr. Cabana's application as the Judge had requested. The Judge offered to set the matter over until the media had notice and an opportunity to appear, but Mr. Cabana wanted to proceed with the application. The Judge stated that if he were inclined to order a publication ban after hearing the parties, he would give notice to the media so they would have the opportunity to appear if they chose to do so. The record does not show any appearance by the media.

[10] Mr. Cabana then made his submissions. He argued that the medical information he would be tendering in support of his claim for psychological injury was private, and its dissemination beyond the courtroom would be further damaging to him and would be "creating more harm to the medical condition that already exists" (Transcript, June 7, 2016, at 24). He argued that his position presented an access to justice issue for people with mental health issues, in that the failure of courts to protect private medical information from publication amounts to a barrier for disabled persons to access the courts. He characterized the respondents' positions as advocating publication of his private health information so as to make litigants like him suffer personally for making claims.

[11] Counsel for Mr. French and Ms. Dunderdale argued the law respecting the open court principle and the high bar that had to be met by an applicant seeking a publication ban over evidence in a civil case. Counsel submitted that Mr. Cabana had not met that bar because he had not filed any medical or psychological evidence which provided an evidentiary basis upon which a publication ban could be ordered.

[12] Counsel for the Government supported the arguments made by counsel for Mr. French and Ms. Dunderdale. Counsel clarified that the respondents were not advocating that evidence respecting Mr. Cabana's personal health be published; rather, they were advocating that a publication ban on the evidence should not be imposed. Counsel argued that litigants who put their health in issue in a court proceeding implicitly agree to be bound by the *Rules of the Supreme Court, 1986* and the jurisprudence which require that evidence, often of a personal and private nature, be disclosed to support such a litigant's claim. Counsel also distinguished between distressing and embarrassing personal and private information and the kind of personal and private information which would pose a serious risk to the administration of justice if a publication ban were not ordered. Counsel argued that a simple diagnosis of post-traumatic

stress disorder (PTSD) or operational stress disorder does not meet the test for obtaining a non-publication order.

[13] The Judge asked counsel and Mr. Cabana if they had suggestions for the imposition of reasonable alternative measures to an outright publication ban. No suggestions were forthcoming.

[14] In rebuttal, Mr. Cabana reiterated his argument that the dissemination of private health information of a person who suffers from PTSD or severe depression or any other mental health issue is humiliating and stigmatizing, and that a publication ban over his private health information in this case was indicated. He stated that opposite counsel had already been provided with "120 plus pages of medical documents" respecting his condition (Transcript, June 7, 2016, at 64).

[15] The Judge indicated that he did not have the "120 pages of medical documents" to which Mr. Cabana referred. Mr. Cabana replied by saying "if the Court requires it then I could just simply submit to the Court that document" (Transcript, June 7, 2016, at 78).

[16] The Judge refused Mr. Cabana's request, saying "I'm not doing that" (Transcript, June 7, 2016, at 79). The Judge told Mr. Cabana that he had been advised at case management of the necessity for evidence to support his application, and also that he could have requested a *voir dire* at the current hearing to protect disclosure of his private health information until such time as a ruling on the publication ban was made, but he did not do so. The Judge reminded Mr. Cabana that he had presented his case as he thought it should be presented and that the hearing had already taken place. The Judge reserved his decision on the application.

[17] The Judge filed a written decision on July 28, 2016 (2016 NLTD(G) 137). In it, the Judge characterized Mr. Cabana's request to submit the additional medical information at a later date as a request for an adjournment. He said that:

> [12] ...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 in a *voir dire* and such an option may have been available had he so requested...

[18] The Judge denied Mr. Cabana's application, saying:

> [14] ...I have no evidentiary basis, expert or otherwise, for determining whether the Plaintiff would suffer mere personal emotional distress and embarrassment if his medical records are made public in the course of this trial or if he will be subject to serious debilitating physical or emotional harm that goes to his ability to pursue his claims...

[19] As a result, it was not necessary to give notice to the media.

[20] A formal order was filed forthwith, and Mr. Cabana did not appeal it. However, Mr. Cabana did challenge the Judge's July 28, 2016 decision in his appeal to this Court filed five months later.

[21] On December 7, 2016, the trial resumed.

*The Disclosure Decision* 2016 NLTD(G) 199

[22] Mr. Cabana tendered Ms. Butt to give expert opinion evidence respecting his claim for psychological injury. In direct examination, Ms. Butt testified she had provided psychological treatment to Mr. Cabana respecting his reaction to the remarks of Mr. French and Ms. Dunderdale which gave rise to Mr. Cabana's claim. Mr. Cabana asked Ms. Butt to "give the Court some context as to the time [she had] been involved in the process and what the process has been" (Transcript, December 7, 2016, at 15).

[23] Ms. Butt provided a detailed answer to this question, explaining to the Court the reason for her initial contact with Mr. Cabana, topics they discussed, his involvement with Veterans Affairs, the cause of his operational stress injury, and her treatment plan for him. In so doing, she consulted a document which she had with her on the witness stand.

[24] The Judge saw Ms. Butt consulting the document and inquired as to what it was. The following exchange occurred:

> The Court: So what are you referring to now?
>
> Ms. Butt: I'm just telling you my –
>
> The Court: No, but you're looking at something.
>
> Ms. Butt: Oh, this is my chart note. I was just trying to see the –
>
> The Court: Okay, so have they been disclosed.
>
> Ms. Butt: I gave you a file summary, my Lord, I didn't give my chart, chart notes –

...

In response to a statement by counsel for the second and third respondents that "they've never been disclosed and we didn't pursue them", the Judge then said:

> Yeah, the question, my only question is the witness is referring to a document. Do you have any objection to her doing so?
>
> (Transcript December 7, 2016, at 16)

[25] Counsel for Mr. French and Ms. Dunderdale said "no", but counsel for the Government, recently appointed to replace former Government counsel, said he would like a copy of the chart if Mr. Cabana and Ms. Butt were "going to be referring to it in court". Mr. Cabana made no comment. The Judge indicated surprise that the chart had not been disclosed, and ruled: "I'm going to allow the witness to refer to the document but I'm going to ask that it be provided to you at the break" (Transcript, December 7, 2016, at 17-18). Neither Mr. Cabana nor Ms. Butt objected to this plan. Ms. Butt's direct examination continued.

[26] At the morning break, copies of Ms. Butt's chart were provided to all parties. Mr. Cabana's direct examination of Ms. Butt continued, and when it concluded, counsel for the Government began cross-examining her. During cross-examination, Ms. Butt's chart concerning Mr. Cabana was marked as an exhibit. Mr. Cabana did not object. No attempt was made to define the legal effect of entering the chart as an exhibit or of the use to which the chart could be put in the rest of the proceedings.

[27] In fact, as subsequent events showed, in addition to Ms. Butt's chart references respecting the within matter, Government counsel's cross-examination focused on entries in the chart which related to psychological injury that Mr. Cabana sustained during his military service. Court broke for the day before cross-examination concluded.

[28] When Court resumed on December 8, 2016, Mr. Cabana stated his objection to what had transpired the previous day respecting the production of the chart and its admission into evidence. He reminded the Judge he was a self-represented litigant and did not have an opportunity to analyze and react to what had happened in Court the previous day. He submitted that the production order and admission of the chart into evidence was "a serious breach of both privilege and procedural fairness" (Transcript, December 8, 2016, at 2). He argued that the chart was protected by a privilege that he had not waived and that if counsel wanted to get access to the chart, they should have made a formal application

using the same criteria that would have been applicable for pre-trial document discovery. He also argued that he ought to have had the opportunity to see the chart before it was provided to all counsel, and that therefore he was denied the opportunity to directly examine Ms. Butt on the contents of the chart. Mr. Cabana suggested that the respondents deliberately chose not to apply for pre-trial production of the chart because they believed they would get it at trial regardless and that the respondents' approach in this regard was wrong.

[29] He requested that any evidence Ms. Butt had given the previous day which had not been given by her when she was discovered be struck from the record, including her evidence respecting Mr. Cabana's involvement with and applications to Veterans Affairs.

[30] In response to Mr. Cabana's concern that his direct examination of Ms. Butt was curtailed by not having had the chart beforehand, the Judge advised Mr. Cabana that he would be given wide latitude on his redirect examination of Ms. Butt respecting the contents of the chart.

[31] Discussion ensued between Mr. Cabana and the Judge, and opposite counsel commented from time to time. Counsel for Ms. Dunderdale and Mr. French asserted that Mr. Cabana had given him consent to apply for a copy of Ms. Butt's chart before the trial began (which had been mentioned during the case management on April 26, 2016), and offered to find the pertinent email correspondence and submit it to the Court, which he did.

[32] Both opposing counsel made submissions in response to Mr. Cabana's position. Amongst the submissions was the argument that once Ms. Butt began referring to her notes to refresh her memory, they were subject to production regardless of whether privilege previously existed, because Mr. Cabana had put his mental health in issue and the defendants were entitled to test the foundation of Ms. Butt's opinions by cross-examining her on the notes she had made of the assessments she had made.

[33] It became obvious to the Judge that Mr. Cabana needed more time to think through his position and refine his argument in light of the discussion and the jurisprudence that was referenced by opposing counsel. The Judge spoke to Mr. Cabana as follows:

> … 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 so 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.
>
> You're absolutely right. This was dynamic and it occurred quickly yesterday. … [T]o the extent that the Defendants ultimately did 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. …
>
> …[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. …
>
> … 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, at 61, 62, 63, 69)

[34] The Judge set the matter over to the next morning on Mr. Cabana's assurance that this would be sufficient time for him to prepare his submission. The Judge then sealed Ms. Butt's chart.

[35] Mr. Cabana made his submission on the morning of December 9, 2016. The thrust of his argument was that the chart was protected by privilege, and that it had been ordered produced before it had been vetted for irrelevant information and information respecting vulnerable third parties. He also argued that the respondents had waived their rights to production of the chart at trial by failing to apply for it pre-trial, that their counsel were incompetent, and that their counsel had deliberately set up an ambush of him. Mr. Cabana requested a mistrial or "a supplementary judgment" as a remedy.

[36] Opposing counsel made their submissions. Government counsel noted that Ms. Butt was qualified as an expert witness, and that her duty was to the Court. While both opposing counsel denied the allegations of ambush and incompetence made by Mr. Cabana, their submissions principally concerned the law respecting whether the chart was privileged and whether it ought to have been vetted before it was ordered to be produced. Counsel took the position that the chart was not privileged, that it was relevant to Mr. Cabana's claim, and that it was admissible. They acknowledged the vetting issue and said that in the circumstances the Judge ought to review the chart with a view to balancing the privacy interests of Mr. Cabana against the respondents' rights to access relevant information relating to his claim.

[37] In the course of opposing counsels' submissions, the Judge suggested entering into a *voir dire* to determine whether parts of the chart ought to be redacted, the point being that admissibility of at least parts of the chart could be revisited. The Judge asked Mr. Cabana if he would like the opportunity to explain what parts of the chart should be redacted. Mr. Cabana declined the Judge's offer, saying that it was like "closing the gate after the cows have left" (Transcript, December 9, 2016, at 75).

[38] The Judge also pointed out to Mr. Cabana that he could have obtained production of the chart himself before the trial began. Mr. Cabana replied saying that he had no reason to do so because he had no reason to doubt Ms. Butt's credibility. The Judge explained to Mr. Cabana that Ms. Butt's credibility was not the issue. Rather, the issue was that the chart was referred to by Ms. Butt during her testimony and it contained information relevant to Mr. Cabana's claim for psychological injury, making its production necessary for the other parties to understand and explore the basis for Ms. Butt's expert opinion.

[39] The Judge indicated that even recognizing the private and sensitive nature of the chart contents, he felt it had been properly disclosed. However, he wanted to review it himself to see "whether something needs to be addressed in it" and said he would take the weekend to do so (Transcript, December 9, 2016, at 106). He made it clear that he had not made a decision on Mr. Cabana's request for a mistrial, although he advised that when Court resumed on December 12, 2016, he could reject the request and rule the trial to continue forthwith in which case the parties ought to be prepared.

[40] On December 12, 2016, the Judge filed his written decision denying Mr. Cabana's request for a mistrial (2016 NLTD(G) 199). He ruled that the doctrine of privilege did not apply to the chart in the context of this case. He also ruled that when a witness refers to a document while testifying, the document is, as a matter of law, producible. As well, the Judge ruled that there had been no obligation on the respondents to apply for pre-trial production of the chart and that there had been no attempt by the respondents to ambush Mr. Cabana. The Judge also determined that upon his review of the chart, there was no part of it that would require redaction. He explained that he recognized the private and sensitive nature of the chart contents, but did not see anything in it "that would be harmful to a third party" (para. 25). He noted that Mr. Cabana's spouse was mentioned, but because she had testified and had received permission to testify again, she did not require any protection from the Court regarding the chart reference respecting her. In short, privilege did not apply and there was no breach of procedural fairness.

[41] Mr. Cabana then requested the proceedings be adjourned so that he could appeal the Judge's decision. The Judge granted Mr. Cabana's request.

**ISSUES**

[42] Mr. Cabana filed an appeal to this Court listing several grounds emanating from the Publication Ban Decision and the Disclosure Decision. The respondents subsequently applied to have Mr. Cabana's appeal struck. In *Cabana v. Newfoundland and Labrador*, 2018 NLCA 52 (the *Striking Out Decision*), this Court struck several of Mr. Cabana's grounds of appeal, but left five for consideration by way of full appeal. They can be restated as follows:

1. Did the Judge err in fact or law by ordering production of Denise Butt's clinical chart respecting Mr. Cabana without determining the necessity for doing so, redacting portions, or restricting its dissemination?

2. Did the Judge err in fact or law, fail to properly exercise his discretion, or fail to follow the *Statement of Principles on Self-Represented Litigants and Accused Persons*, Canadian Judicial Council, September 2006 [the "*Statement of Principles*"] by denying an adjournment to the appellant during the publication ban hearing so that the appellant could submit further evidence to support his claim for relief?

3. Did the Judge apply a different standard for the admission of evidence to the appellant than to the respondents?

4. Did the Judge fail to do whatever was possible to provide a fair and impartial process, and to prevent an unfair disadvantage to a self-represented litigant contrary to the *Statement of Principles*?

5. Did the Judge breach the appellant's section 7 *Charter* rights by ordering production of the appellant's medical records to counsel for the respondents?

## ANALYSIS

### 1. Did the Judge err in fact or law by ordering production of Ms. Butt's clinical chart respecting Mr. Cabana and its admission into evidence?

[43] Mr. Cabana alleges that the Judge erred by not asking Mr. Cabana specifically whether he objected to the production of the chart and by admitting it into evidence before reviewing it for redaction. He argues that the Judge's handling of the matter was procedurally unfair, but he does not argue that the chart required redaction nor does he say how he was prejudiced by its production and admission into evidence, although it can be inferred from his position that he claimed prejudice by the disclosure of personal and sensitive information.

[44] Other than Mr. Cabana's contention that he did not waive his privilege over the chart, the errors he alleges are of a procedural nature. He submits that:

(1) Ms. Butt merely glanced at the chart and a mere glance is not grounds for ordering production;

(2) The Judge intervened without any objection by opposing counsel, and ordered production of the chart without consulting him, thereby providing the respondents with an impeachment tool;

(3) The respondents are precluded from getting the chart at trial because they failed to apply for it pre-trial;

(4) The chart is protected by a privilege which he holds and which he did not waive; and

(5) The Judge ordered production and admission of the chart into evidence without first checking it for relevance and whether it contained information that ought to have been redacted.

#### *Access to and Use of Documents*

[45] Before dealing with the specific arguments made by Mr. Cabana relating to this ground of appeal, some general comments about access to and use of documents which an opposing litigant possesses or has control over are in order.

[46] In modern personal injury cases, experienced counsel usually sort out production of documents informally without the necessity of invoking formal

discovery processes. This is because they recognize that the discovery rules are "interpreted liberally to effect full disclosure" (per Hickman C.J.T.D. in *Bradbury v. Cabot Insurance Co.* (1988), 70 Nfld. & P.E.I.R. 310 at 314, Nfld. S.C.T.D.)). While privilege and public interest considerations may still foreclose disclosure, the real fight over documents is how and when an opposing party can make use of the documents during the trial.

[47] Where counsel are unable to agree on production issues, parties are thrown back on the legal principles and procedural rules – along with their limitations – that formally govern access to and use of documents of an opposing party. This is the current situation, given that the parties did not work out a mechanism for informal disclosure of Ms. Butt's chart and no application for pre-trial discovery of the notes and of other information in Mr. Cabana's psychologist's files pertaining to his mental health, clearly an issue in the case, was made. That said, however, at trial the respondents did seek access to the chart when Ms. Butt began referring to her notes while testifying.

[48] To determine what documents the respondents could have access to – and the use to which they could be put – will depend therefore on application of the legal principles and formal procedural rules that pertain to the following issues:

- Discovery and production of documents generally;
- Access to documents used to refresh memory;
- Use by the opposing party of documents used to refresh memory;
- Use of documents for the purpose of cross-examination on prior inconsistent statements;
- Use of documents for purpose of cross-examination generally;
- The circumstances when documents produced and used can be made part of the trial record; and
- The legal effect of making produced documents part of the record.

[49] In these areas it is always important to remember that having a right to access particular documents does not automatically confer a right to unfettered use of those documents. While rule 32.07 recognizes a broad right to obtain production of documents in another party's possession or under his or her

control, use of those documents at trial will be governed by more limiting considerations that relate to the purpose for which the document was obtained and the use to which it is proposed to be put. Thus, while documents will have to be produced (subject to certain exceptions like privilege) if they "relate" to any matter in question in the proceeding, they may only be proved and entered into evidence at trial for proof of their contents if they are relevant or material to an issue in dispute (See *Carter v. Municipal Construction Ltd.* (2001), 204 Nfld. & P.E.I.R. 112 (Nfld. S.C.T.D.), aff'd 2001 NFCA 58, 206 Nfld. & P.E.I.R. 181, for a discussion of this distinction).

[50] Documents obtained pre-trial may of course be used for other purposes such as impeachment of a witness on cross-examination using prior inconsistent statements, utilizing the procedures in the *Evidence Act*, RSNL 1990, c. E-16, s. 12. The process does not necessarily require the allegedly inconsistent prior statement being marked as an exhibit but the judge, in his or her discretion, may so require it, at least for identification purposes, subject to the application of the collateral fact rule.

[51] A prior inconsistent statement that is proved and marked as an exhibit may be treated as proof of its contents where necessity and circumstantial guarantees of reliability under the principled exception to the hearsay rule are established (*R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.)). Otherwise, it simply has the potential to affect, positively or negatively, the witness's evidence in the witness box and is not independent evidence. Of course, if the witness adopts the prior inconsistent statement it will then have evidential value.

[52] Where, as here, an opposing party does not seek and obtain production of documents pre-trial, or the production is not provided informally, the opportunity for access at trial to documents held by the other party or by other witnesses is limited. Apart from using a subpoena *duces tecum* to enforce the bringing of relevant documents to court, an opposing party could also attempt to invoke the production mechanism in rule 32.07 during the trial. There is nothing in the wording of the rule that would render these provisions inapplicable to a mid-trial application, although additional considerations relating to timelines and trial management might work against its use in a given case.

[53] These considerations would be in addition to the requirements that the document not be privileged and that the document is "necessary for disposing fairly of the proceeding or for saving costs and is not injurious to the public interest" (rule 32.07(3); *Carter*; *Morrissey v. Quinlan*, 2002 NFCA 58, 217

Nfld. & P.E.I.R. 124). Use of a subpoena and resort to rule 32.07 were not invoked by the respondents in this case relative to the records in Ms. Butt's files, so they had no right to see or use Mr. Cabana's chart for their own purposes prior to Ms. Butt's testimony.

[54] During Ms. Butt's examination-in-chief the Judge observed that she referred to her chart to answer a question about the time period during which Mr. Cabana's counselling occurred. This event triggered a discussion about whether opposing counsel should have access to the chart.

[55] Reference to notes prepared contemporaneously with a prior event, and which the witness believes to be accurate at the time they were made may be referred to by the witness in giving evidence. Distinctions are made in the case law between "present memory revived" and "past recollection recorded". In the former, the prior record is used as an *aide memoire* to trigger an existing memory. It is the witness's evidence in the witness box, not the document itself that is the evidence. In the case of past recollection recorded, however, the reference for the prior document does not have the effect of triggering present memory but the witness is nevertheless allowed to testify by reference to the document upon giving the assurance to the court that at the time the record was made the past recollection would still have been fresh and is believed to be accurate. In such circumstances, it is arguable that it is the document itself, subject to the witness's interpretation of it, that is the evidence, not the witness's recitation of it.

[56] In practice, the categories of present memory revived and past recollection recorded merge into each other. Frequently, a document can both trigger certain memories (usually a more general recollection of events) while at the same time not trigger any memory of specific details like dates. In the latter case, the document, not the revived memory, is the evidential source.

[57] In either circumstance (the revival of memory or the recitation of recorded memory) other parties can call for the production of the record to test, by cross-examination, the accuracy of the memory. In this way, a party can gain access to records to which they might not otherwise be entitled. Having obtained access to such records, it does not follow that those records can be used for any purpose. Use should be limited to the purpose of testing the accuracy and truthfulness of the memory that is being revived and recorded. As this Court observed in the *Striking Out Decision*:

> [99] … notwithstanding the notion of implied waiver of privilege inherent in this principle [of production of notes used to refresh memory], that does not authorize the 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 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…

[58] In the present case, and as previously noted, no attempt was made by the Judge, before jumping to the issue of marking the notes as an exhibit, to determine whether the issue was one of present memory revived (where the notes would not be regarded as evidential) or past recollection recorded (where they could be regarded as evidential), whether production of all or only a portion of the notes was required to enable the respondents to test the memory refreshment, the purpose of use of the notes (to test the reliability and truthfulness of the memories in issue, or for cross-examination on previous inconsistent statements generally), and if the notes were to be of general evidentiary use, whether they met the tests for general disclosure under rule 32.07(2) and relevance and materiality for entry into evidence as proof of their contents.

[59] The Judge recognized when Mr. Cabana raised, on the following day, concerns about the way in which the issue had been handled, saying "there is more to [the] argument [than] meets the eye… and so there is a basis to your argument" (Transcript, December 8, 2016, at 61-62). He then sought submissions from all parties and allowed further time to consider the implications.

[60] It is in this context that the specific arguments of Mr. Cabana on this appeal should now be considered.

***The Mere Glance Argument***

[61] The transcript of the proceedings on December 7, 2017 shows that prior to the Judge's inquiry, Mr. Cabana asked Ms. Butt what her relationship was with him, and to "give the Court some context as to the time you've been involved in the process and what the process has been" Ms. Butt answered the question as follows:

A. Okay, so Mr. Cabana contacted me and we had a meeting to discuss his service and related injuries due to service, so his point of contact for me was through a -- essentially like an employment assistance program that Veterans Affairs has set up on a national level for all veterans as a point of contact for mental health services. So, myself and Mr. Cabana met and he talked to me about his service and wondered if he had a service-related injury and specifically noting a rollover bus incident that he was involved in while travelling from Halifax, I think, to Gagetown, New Brunswick, and the bus had had an accident, and there was a rollover and he had sustained injuries from that. So, I talked to him about the process and told him what was involved, and he took some time to consider if he was ready to move forward on that, and we reconvened again within – I have to get the exact dates –

The Judge then noticed that Ms. Butt was referring to documentation in her hands. He asked Ms. Butt:

Q. So, what are you referring to now?

A. I'm just telling you my –

Q. No, but you're looking at something.

A. Oh, this is my chart note. I was just trying to see the - -

Q. Okay, so have they been disclosed?

A. I gave you a file summary, my lord. I didn't give my chart, chart notes - -

Q. No, you didn't give me anything, okay, so just be clear.

Mr. Drover then stated:

> They've never been disclosed. They've never been disclosed and we didn't pursue them. I had a look at them at the discovery and they're not like a regular doctor's chart, whereas, you know, someone comes in complaining of this, I observed that, the treatment plan was this. It is more like just some vague notes as placeholders for conversations around psychotherapy.

The Judge then said:

> Yeah, the question, my only question is the witness is referring to a document. Do you have any objection to her doing so?

(Transcript, December 7, 2016, at 15-16)

[62] Mr. Cabana stated in his factum that Ms. Butt had "studied a document in her possession while attempting to accurately answer historical questions… After several such questions, Justice Stack asked Ms. Butt what document she was studying."

[63] The transcript does not show how many times Ms. Butt turned her head to look at the chart or how long she looked at it before the Judge intervened. Mr. Cabana's description of the circumstance does not quite accord with the transcript. Nevertheless, it does suggest that Mr. Cabana acknowledges that Ms. Butt's reference to the chart was beyond a mere glance.

[64] Regardless of how long or how often Ms. Butt referred to the chart to assist her with her testimony, the fact that she referred to it at all was sufficient to justify the Judge's inquiry. Accordingly, Mr. Cabana's mere glance argument cannot succeed.

***The Judge's Intervention***

[65] Mr. Cabana argues that the Judge erred by intervening in Ms. Butt's testimony in the absence of an objection by opposing counsel and without consulting him. He contends the Judge effectively provided the respondents with an impeachment tool to be used against him.

[66] When an expert witness, or any witness, refers to a hand-held document while giving testimony, it is entirely within a judge's responsibility and authority to inquire as to the document's provenance and the purpose for which reference is being made to it. This is to ensure the relevance of the document to the matter at hand, the reliability of the witness's evidence and also to ensure that the document is that of the testifying witness and not hearsay.

[67] In carrying out the gatekeeping function, a judge must ensure that all parties in a litigation are treated fairly. In this case that would include the opportunity for the respondent to test the reliability of Ms. Butt's evidence by seeing the documentation on which her evidence was based. Judges exercise their judicial functions regardless of any litigant's or counsel's position on a presenting issue, they are not obligated to wait for objections from counsel or parties before intervening with a testifying witness, provided their intervention is not excessive and disruptive to a party's presentation of the case.

[68] Witnesses, especially expert witnesses, often refer to notes while testifying in order to refresh their memories, especially if their testimony involves significant detail. It is normal trial procedure in both civil and criminal

litigation that inquiries by counsel or the court are made in this regard, and that notes being referred to for the purpose of refreshing memory are made available for inspection by opposite parties if they have not already been disclosed. Such notes may be marked as an exhibit. The rationale for production of the notes was explained by Quinn J. in *Cornerstone Co-operative Homes Inc. v. Spilchuk*, [2004] O.J. No. 4049, 72 O.R. (3d) 103 (Ont. Sup. Ct.):

> [16] In my view, counsel cross-examining a witness is entitled to production of any document or notes (or item) that was reviewed (or examined) by the witness to refresh his or her memory before going into the box. It does not matter whether the act of refreshing occurred minutes, hours, days or months before testifying. Cross-examining counsel is entitled to production for the purpose of testing the reliability and truthfulness of the witness.

[69] Mr. Cabana argues that the Judge did not consult him before he ordered production of the chart. Counsel for Ms. Dunderdale and Mr. French argues that the Judge's question respecting whether the chart had been disclosed was asked of all parties including Mr. Cabana, and refers to the December 7, 2016 transcript of proceedings in this regard. The transcript shows that the Judge's question was not specifically directed to respondents' counsel. It could therefore be said to have been directed to all parties, including Mr. Cabana. However, as a self-represented litigant, Mr. Cabana may not have appreciated this. Further, the transcript does not take account of non-verbal courtroom communication, so it is possible that the Judge was addressing only counsel for the respondents when he posed his question. Regardless, Mr. Cabana, as a party, had the opportunity to speak up or object at that time if he had chosen to do so. He did not do so and, after the Judge's intervention, continued with his direct examination of Ms. Butt, who continued to consult the chart when answering his questions.

[70] Mr. Cabana's failure to speak up or object may have been interpreted by the Judge to mean that Mr. Cabana did not regard the production of the chart to be a problem. The Judge may be forgiven for thinking so, because he was aware that production of the chart was discussed at case management on April 26, 2016, and that Mr. Cabana stated he would request it from Ms. Butt. In any event, Mr. Cabana gave no indication that he was concerned about the chart being provided to the parties when the issue arose at trial, and neither did he register an objection when the chart was marked as an exhibit following the morning break.

[71] It was the next morning when he made his objection. By this time, the chart had been admitted into evidence and Government counsel's cross-examination of Ms. Butt was well underway. Government counsel's cross-examination brought out considerable information contained in the chart about Mr. Cabana's psychological condition resulting from causes other than the actions of the respondents.

[72] Mr. Cabana's concerns may have resulted from a less than full appreciation of the nature of the adversarial system and a lack of understanding of trial processes and procedures. All litigants, including those who represent themselves, know or ought to know that no one party controls what evidence will be adduced during a trial. Litigants must expect that evidence could be adduced that is harmful to their positions. Mr. Cabana was in a contested trial, and ought to have realized, regardless of his self-represented status, that he cannot control what evidence is adduced at trial and also that the respondents were entitled to explore and challenge the basis for his claims against them. Moreover, trials are fluid processes, and witnesses do not always perform as expected. In this regard, while Ms. Butt was called by Mr. Cabana to give her expert opinion as his treating psychologist, she was the Court's witness, and was therefore obligated to give full and candid answers to questions relevant to Mr. Cabana's psychological condition and her expert reports.

[73] When a witness is giving relevant testimony, whether as an expert or lay witness, and in doing so refers to documentation, the portions of the documentation being referred to can be presumed to be relevant, and subject to production. Otherwise, why would the witness be referring to it? Of course, questions of reliability of the documents as an accurate recording of the information remain. Further, the scope and content of the documents and whether they extend beyond what is necessary to test the accuracy and reliability of the witness's recollection must also be considered. In this case, the ultimate use of the chart by respondents' counsel in cross-examination of Ms. Butt extended beyond what was necessary to test her recollection of the dates of her consultations with Mr. Cabana. But, after the issue of production of the records was dealt with and before cross-examination started, Ms. Butt made extensive further reference to her chart in answer to other questions by Mr. Cabana in examination-in-chief. In these circumstances, it is not possible to say that subsequent use of the chart by opposing counsel in cross-examination was inappropriate. The decision in *R. v. Fast*, 2009 BCSC 1671, referred to in paragraph 57 above, can therefore be distinguished.

[74] In this case, Mr. Cabana tendered Ms. Butt to give expert evidence respecting her treatment of him in relation to psychological injury which he claims the respondents caused. Her opinion that Mr. Cabana's "sense of identity and his emotional health" were affected by the respondents' actions went directly to the live issue of whether the respondents' actions caused Mr. Cabana to suffer psychological injury. Ms. Butt had also treated Mr. Cabana for psychological injury he sustained during his military service, and information respecting this injury was noted in the chart. Counsel for the respondents attempted on cross-examination of Ms. Butt to separate the extent of psychological injury caused to Mr. Cabana by the respondents from that which he sustained during his military service. This was important to the respondents, because if they are found liable, they are only responsible for the psychological injury they caused, not injury Mr. Cabana suffered from other causes. Accordingly, cross-examination of Ms. Butt in relation to information respecting other causes for Mr. Cabana's psychological condition was relevant to Mr. Cabana's claim.

[75] It is important to note that while there may be other causes for Mr. Cabana's psychological condition, that does not mean that Mr. Cabana did not suffer injury as a result of the respondents' actions. Many claimants have suffered injury prior or subsequent to the injury alleged in an instant case, but that does not mean that those claimants were not injured as a result of the actions alleged in that instant case. The law provides litigants and courts with legal tools and principles to determine the nature and extent of injury resulting from allegations made in any instant case. In this case, the Judge explained to Mr. Cabana in Court, as well as in his written reasons, that the purpose of cross-examining Ms. Butt on the contents of the chart was not to attack her credibility, but to test the basis for her expert opinion that Mr. Cabana suffered psychological injury as a result of the actions of the respondents.

[76] In summary, Ms. Butt's evidence respecting Mr. Cabana's psychological condition and treatment as noted in the chart was relevant evidence pertaining to Mr. Cabana's claim for psychological injury and the opinions expressed in her expert reports. Given (as matters developed) Ms. Butt's general reliance on her chart throughout her evidence, it was not inappropriate for counsel to make general use of the chart for purposes of cross-examination.

[77] In the result, Mr. Cabana's argument that the Judge erred in intervening without objection from opposing counsel has no merit. Moreover, Mr. Cabana's allegation that the Judge facilitated advancement of the respondents' position

and handed them an impeachment tool to be used against him has no support in the record. I would not give it any effect.

***The Respondents' Failure to Apply for Pre-trial Production of the Chart***

[78] Mr. Cabana argues that the respondents were precluded from obtaining the chart at trial because they failed to apply for it before trial in accordance with the rule respecting document production.

[79] Counsel for the Government advised that he was not counsel of record when Ms. Butt was discovered. Coming late to the file, he said he did not want to delay the matter by making a pre-trial application for the chart because the litigation was well along and the trial date had already been set. Counsel for Ms. Dunderdale and Mr. French explained to the Court that his clients elected not to apply for pre-trial production of the chart because they determined that the information they had received in Ms. Butt's reports and her discovery evidence was sufficient for their purposes. In short, the respondents decided that they were content to proceed to trial without Ms. Butt's chart.

[80] There is no suggestion in the record that the respondents did not apply for pre-trial production of Ms. Butt's chart because they thought they would get it at trial anyway. Even if that were so, there is nothing wrong with such a strategy. In the course of litigation, litigants routinely make decisions about trial conduct informed by practicality, economy, strategy, and so on. While it was open to the respondents to apply for production of the chart pre-trial, there was no obligation on them to do so. It was also open to Mr. Cabana to apply for his own chart, given that the law is clear that he could have obtained it (*McInerney v. MacDonald,* [1992] 2 S.C.R. 138 (S.C.C.)). He did not do so. In any event, a party's decision not to apply for pre-trial production of documentary evidence does not preclude that party from applying for or obtaining such evidence at a later time, especially if circumstances present which make it appropriate to do so. As previously noted, the respondents could have invoked rule 32.07(2) even at trial as a means of gaining access to Ms. Butt's chart.

[81] Accordingly, the Judge did not err in failing to accept Mr. Cabana's argument that the respondents could not obtain the chart at trial because they did not apply for it pre-trial.

***Privilege***

[82] Mr. Cabana argued in this Court that he holds privilege over the chart and that he has not waived it. Therefore, he says the Judge erred in ordering its

production and admission into evidence. Mr. Cabana made this privilege argument in response to the respondents' application to strike his appeal. That argument did not survive as a ground of appeal in this Court's decision in the *Striking Out Decision*. Nevertheless, I will deal with it briefly because Mr. Cabana continues to make the argument.

[83] The Judge addressed the issue of privilege in the *Disclosure Decision* dated December 12, 2016:

> [15] No question of privilege arises in these circumstances. The law is clear that "...once in the witness-box, a physician is like any other witness and cannot claim privilege, that is to say he is compellable to testify about matters involving the patient even in the absence of the plaintiff's consent" (*Metropolitan Life Insurance v. Frenette*, [1992] 1 S.C.R. 647, quoting *Hay v. University of Alberta Hospital* (1990), 69 D.L.R. (4th) 755 (Alta. Q.B.) at p. 758). The same would hold true of a psychologist.

[84] It is a basic proposition that when litigants put their health in issue, relevant evidence respecting their health is *prima facie* admissible. A plaintiff seeking damages for injury or a defendant using health to defend a claim is expected to put forward medical evidence to support his or her position. Our legal system is evidence-based, and litigants are generally not permitted to maintain privilege over relevant health information, or to restrict the use of relevant evidence to that which favors only his or her position, by not consenting to disclosure of the information or claiming privilege over it.

[85] In this case, Mr. Cabana put his psychological health directly in issue. He therefore can be said to have implicitly waived any privilege he holds over the relevant information which Ms. Butt was in a position to provide.

***Ordering Production and Marking as an Exhibit Without Review***

[86] While Mr. Cabana can be said to have waived privilege over the relevant information pertaining to his condition contained in the chart, the chart could contain information irrelevant to Mr. Cabana's claim, or information harmful to third parties whose interests were not represented at trial. If that is the case, his implicit waiver may not cover that information.

[87] Health providers who testify, whether as expert or fact witnesses, usually keep charts documenting consultations with their patients, their diagnoses and treatment. When a patient's (usually a party's) health is in issue in a litigation, such charts are often sought, and when sought, they are usually obtained by

counsel for that patient/party with the consent of the party to whom the chart pertains, from the health provider. This is because information in the chart is relevant to the health issue in the litigation, and opposing parties have a right to that relevant information. When counsel obtains the chart from the health provider, counsel for the party would generally review it before disclosing the document to opposing counsel, and thereby become aware of potentially irrelevant information or information respecting vulnerable third parties contained in the chart. If the party is of the view that certain information ought to be redacted, the party's counsel and opposing counsel would likely sort out the issue before trial, either between themselves, or if there is disagreement, then by judicial determination. If the party does not co-operate in this process by providing consent to obtain the chart, the party who wants the chart can apply for a court order, and invariably the health provider is ordered to produce the chart to the applying party. Despite the above, sometimes relevance and third party issues arise at trial regardless of prior disclosure of a chart. If that happens, the contentious issues are dealt with at trial. In any event, it is the party to whom the chart pertains who would know whether some of its contents ought to be redacted, and is responsible for raising the issue.

[88] Mr. Cabana was Ms. Butt's client, and the chart pertained to him. He would have known what he disclosed to Ms. Butt in the course of their professional relationship and that this information could be in the chart. He also could have had access to the chart if he chose. It was not as if Mr. Cabana was blind-sided by unknown evidence.

[89] What makes this case different from the usual situation is that Mr. Cabana was representing himself and may not have appreciated how issues can unfold at trial or the relevance and importance of the chart to the litigation. In this case the chart had not been disclosed. Mr. Cabana, the party who put his health in issue and tendered the witness who possessed the chart, and the party to whom the chart pertained, had not seen the chart so had not reviewed it for relevance nor its potential to affect vulnerable third parties.

[90] Given that Mr. Cabana was representing himself, it could be argued that in this case it fell to the Judge to ensure that Mr. Cabana, or even the Judge, vetted the chart before ordering it disclosed. Such an argument could be made in reliance on the principle that a Judge should assist self-represented persons, as described in the *Statement of Principles on Self-Represented Litigants and Accused Persons*, adopted by the Canadian Judicial Council in September 2006 for the purpose of guiding judges and other participants in the justice system on how to promote access to the justice system for self-represented persons. On the

other hand, perhaps the Judge could be forgiven for having presumed that Mr. Cabana had no objection to it being produced. It was relevant in that Ms. Butt was referring to it, and Mr. Cabana did not seem concerned when the Judge inquired as to whether the chart had been disclosed. Neither did he voice any objection when the Judge ordered it produced, or later when the Judge marked the chart as an exhibit. In fact, in case management Mr. Cabana was agreeable to obtaining the chart from Ms. Butt at the request of the respondents.

[91] Whether the Judge should have taken over Mr. Cabana's responsibility to vet the chart pertaining to him is not an easy question to resolve. However, it is not necessary to resolve that issue because that is ultimately what occurred on December 8 after Mr. Cabana raised his objection to what had occurred the day before. In the result, there was no unfair disadvantage to Mr. Cabana.

[92] Mr. Cabana and opposing counsel were heard briefly on this issue on December 8 and fully on the issue on December 9, 2016. At no time did Mr. Cabana argue that portions of the chart were irrelevant or that any material be redacted. This was after he had received a copy of the chart and before the Judge adjourned the proceedings, sealed the chart, and reviewed it himself.

[93] Further, once Ms. Butt referred to her chart during testimony, the Judge was left with little choice but to order it produced, and allow its use by the respondents in the manner in which they did.

[94] In any event, the Judge reviewed the chart himself and determined that no redaction was required. Mr. Cabana does not challenge the Judge's decision and he does not argue that the chart contained irrelevant information or other information which ought to have been redacted. As matters transpired, the Judge's handling of the matter on December 7, 2016, did not result in an unfair disadvantage to Mr. Cabana.

***Need for Clarity in the Use of Ms. Butt's Chart***

[95] While I have concluded that Mr. Cabana's arguments on the treatment of Ms. Butt's chart cannot succeed, it is nevertheless appropriate to make some general comments respecting the treatment and use of the chart during the remainder of the trial. While failure to do so was not, in the circumstances, fatal to the trial, it would have been helpful for the Judge to have ruled on the matters identified in paragraph 58 above. If he had done so, it would have clarified how the documents which he ordered disclosed to the respondents and marked as an exhibit could be used.

[96] Accordingly, the following questions, amongst others, remain to be clarified by the Judge at trial:

- Is Mr. Cabana's chart in Ms. Butt's possession to be regarded as evidence to assist Ms. Butt's recollection (past recollection recorded)?

- Can the contents of the document be used without restriction for the purpose of cross-examination of Ms. Butt in the future or are they to be limited only to challenging the reliability of her evidence which was prompted by reference to the chart?

- Was the marking of the chart as an exhibit for identification purposes only or was it for the stand-alone purpose of the truth of its contents?

**2. Did the Judge err by denying an adjournment to Mr. Cabana to submit further evidence during the publication ban hearing?**

[97] In the *Publication Ban Decision* dated July 28, 2016, the Judge referred to Mr. Cabana's "late request for an adjournment to permit him to present supporting evidence at a later date" and stated why he refused it (para. 12).

[98] The Judge's characterization of Mr. Cabana's request as one for adjournment does not truly reflect the nature of the request. In order to properly address this issue on appeal, it is important to appreciate the nature and timing of the request, the context in which it was made, what would have been required to grant it, and whether not granting his request would have worked an injustice on Mr. Cabana.

[99] On June 7, 2016, when Mr. Cabana was nearing the end of his reply to the respondents' submissions, he said this:

> Is there a possibility also, Justice Stack, that given that you're going to leave this open to the media to come back and make submissions and so forth, is it possible at this point in time, because these gentlemen do have the evidence before them, both of them, that if the Court requires it that I could just simply submit to the Court that document?
>
> (Transcript, June 7, 2016, at 78)

[100] The "document" Mr. Cabana was referring to was the "120 pages of medical documents" which he said he had already provided to the respondents. The transcript suggests that Mr. Cabana was under the impression that because

the respondents already had it, he could simply submit this documentation to the Judge and the Judge could automatically consider it.

[101] The Judge refused Mr. Cabana's request, saying:

> No. No, I'm not doing that, I'm not giving you – this is – and that may be an issue, Mr. Cabana, but this was your chance to bring any evidence that you wished to bring. You brought an application. We had case management so we could discuss the particulars of it. If you had concerns about how you wanted to present your case, you could have addressed them there.

Mr. Cabana again spoke:

> Well, my concern was – I mean, as I said in here, like I'm speaking of PTSD in front of the media, then that evidence would therefore become in front of the media and would be – that would be –

And the Judge explained:

> I understand, but you did not raise that with me and even though we had a meeting. You could raise any concerns that you wanted at the meeting. You did not do that. You presented the case as you thought it ought to be presented and we've had our hearing today.

(Transcript, June 7, 2016, at 79)

[102] I would first observe that Mr. Cabana seems to have misunderstood the Judge's intention respecting the lack of notice to the media. What the Judge had said was if, after considering Mr. Cabana's application, he were inclined to grant the publication ban, he would give notice to the media to give them an opportunity to make submissions. The Judge proceeded in this manner in order to accommodate Mr. Cabana's desire to proceed with his application on the day scheduled, rather than postpone it to a later date when the Court could be assured that notice had been given to the media. Given that the media would be expected to oppose Mr. Cabana's application for a publication ban, the Judge's approach was practical, and had the added advantage for Mr. Cabana of not drawing media attention to the issue if it would not be necessary.

[103] Granting an adjournment or postponement of a trial is an exercise of judicial discretion. Of course judicial discretion must be exercised fairly and in accordance with principle. When an adjournment is requested, the burden is on the requesting party to show that not granting the request would work an

injustice on it (*Tarrant v. Manufacturers Life Insurance Co.* (1993), 113 Nfld. & P.E.I.R. 162, at para. 12 (Nfld. S.C.T.D.)).

[104] The discretionary nature of a decision to adjourn was reemphasized by Green J.A. in *Beanland v. Beanland* (1997), 151 Nfld. & P.E.I.R. 51 (Nfld. C.A.), who said:

> [17] In the end, it is a matter of discretion for the applications judge as to whether to adjourn or not, balancing the interests of the parties affected…
>
> [18] Because the authority to adjourn or postpone is within the judge's discretion, the exercise of that discretion will only be interfered with on appeal for "very compelling reasons"…

[105] The requests for adjournments in *Tarrant* and *Beanland* were to adjourn entire trials, not requests to adjourn proceedings during a trial to submit further evidence. Nevertheless, the principle of balancing the parties' interests through the lenses of fairness and justice set out in *Tarrant* and *Beanland* are equally applicable.

[106] In this Court Mr. Cabana submitted that his request required a brief and easy-to-accommodate adjournment, saying that the document had been back in his hotel room not far from the Court. He made no mention to the Judge of any witness who could tender the document, only that he wanted to "simply submit" it to the Judge for his consideration.

[107] Mr. Cabana's request was problematic. First, a 120-page document could not simply be submitted to the Judge for consideration. The documents came from somewhere and were authored by one or more persons. Such a series of documents, medical or otherwise, is neither automatically nor necessarily admissible evidence in a court proceeding. Unless other parties in the litigation consent to its admissibility, such a document must be tendered through a witness or witnesses – usually the author or authors of the documents – under affidavit (with availability for cross-examination) or otherwise, although if the document included hospital or business records, a record keeper could perhaps tender those records as an exception to the hearsay rule.

[108] Second, Mr. Cabana's request was made at the virtual conclusion of the hearing of his application. In order to accede to it, the Judge would have had to adjourn the proceedings to another date, and on that subsequent date, *if* Mr. Cabana were in a position to tender the 120-page document, give the respondents the opportunity to make submissions on whether he ought to receive

the document, balancing the parties' competing interests before deciding whether to do so. Even if the respondents consented to admission of the document into evidence, and the Judge decided to admit it on consent or for other reasons, the Judge would have to hear argument from Mr. Cabana as to how the document supported his application, hear submissions from the respondents as to whether the document supported the application, and then hear another reply from Mr. Cabana. Aside from the inevitable delay associated with finding a new date and giving the parties time to assess the relevance of the documentation to the application, acceding to Mr. Cabana's request would require practically a new hearing. Mr. Cabana had already been provided with a hearing, which had virtually concluded when Mr. Cabana made his request. In other words, his request was not a simple request with a simple solution – it was effectively a request for a second hearing.

[109] Something more must be said about Mr. Cabana's request. While the contents of the 120-pages of documents Mr. Cabana wanted the Judge to consider are not exactly known, it can be presumed from the record that the documents contained medical information respecting Mr. Cabana's psychological condition including injury he sustained while he was in the military, which he had provided to the respondents pursuant to regular document disclosure. In his request to simply submit the document, Mr. Cabana made no reference to how the document would support his application or whether it was evidence that could meet the test for obtaining a publication ban.

[110] The test to be met to obtain a publication ban was set out in *R. v. Mentuck,* 2001 SCC 76, [2001] 3 S.C.R. 442, at para. 32:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[111] The Court elaborated on the test in the subsequent paragraphs, saying that the concept of necessity in the first branch of the test includes a real and substantial risk that is well-grounded in the evidence which poses a serious danger to the administration of justice (*Mentuck,* at para. 34). The Court went

on to say that "judges should be cautious in deciding what can be regarded as part of the administration of justice" (*Mentuck,* at para. 35) and also emphasized that the relevant "rights and interests [of the parties] will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account ..." (*Mentuck,* at para. 37). The Court stated that "the presumption that courts should be open and [that] reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban" (*Mentuck,* at para. 39).

[112] The kind of evidence required to support the ordering of a publication ban in a civil case was considered by the Ontario Court of Appeal in *M.E.H. v. Williams,* 2012 ONCA 35. In *Williams*, a wife seeking a divorce was seeking a publication ban over evidence respecting her fragile psychological state and personal affairs given the notoriety of her husband and the significant media interest in her case. The motions judge granted her request, but the Ontario Court of Appeal allowed an appeal on the basis that granting the publication ban on the evidence proffered by the wife was unreasonable.

[113] The wife had tendered her psychiatrist who provided expert opinion evidence that not ordering a publication ban would have a deleterious effect on her health. The doctor testified that the wife had a "very tenuous hold on her mental health and is a mere shadow of her usual self" (para. 47) and that there was a very real risk to her fragile recovery given the "unwanted, undeserved and unproductive efforts of media to meddle in her private life" (para. 54). The appellate court noted that the psychiatrist's opinion was not supported by an affidavit from the wife, and neither did the evidence rise to the level required to meet the first branch of the *Mentuck* test, that being that a serious risk to the proper administration of justice would exist in the absence of a publication ban being ordered.

[114] The Supreme Court of Canada also considered this evidentiary issue in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567. *Bragg* involved a young plaintiff's defamation suit resulting from serious cyberbullying. She sought permission to use a pseudonym in the litigation so as not to reveal her identity as well as a publication ban respecting the fake Facebook profile that she alleged bullied her. The Court ruled that she could use a pseudonym in her litigation, as the evidence supported objectively discernable harm to A.B. if she was not permitted to proceed anonymously and that A.B.'s case involved not just her personal interest, but societal interest, supported by social science research in protecting the "inherent vulnerability of children".

However, the Court denied the girl's request to ban publication of the Facebook content because "the public's right to open courts and press freedom prevail with respect to the non-identifying Facebook content" (*A.B.*, at para. 30).

[115] In this case the Judge had told Mr. Cabana in case management on April 26, 2016 that evidence to support his application was required, and that he might want to consider getting an affidavit from his doctor. Mr. Cabana may not have understood this information, although I note that he seems to have understood something from that case management because on May 12, 2016 he filed an amended application which differed substantially from his initial application filed on April 8, 2016. In his initial application for a publication ban he simply recited the facts respecting his defamation claim, whereas in his amended application he asserted that he had suffered severe psychological injury while serving in the Canadian Armed Forces, and argued that exposure of his personal medical information would add further "humiliation and stigmatize him even further than the defendants' actions have already done" and "cause irreparable harm to his mental and physical health, and affect his dignity as a person". Neither Mr. Cabana's initial nor his amended application was accompanied by a supporting affidavit.

[116] It may be that Mr. Cabana did not fully appreciate the legal bar he had to overcome in order to obtain a publication ban. This was despite him having been informed by the Judge in case management on April 26, 2016 of the requirement for evidence, and also despite Mr. Cabana having received (several weeks before the hearing) the briefs filed by the respondents which set out the applicable law and the legal test required to be met in order for a publication ban to be ordered.

[117] In any event, Mr. Cabana's request to simply submit the 120-page document did not suggest that the document would contain or even touch on evidence that could support a finding of a serious risk of harm to the proper administration of justice, which is what is required to establish the first branch of the test for a publication ban. In short, Mr. Cabana did not show, or even argue, that the document could, let alone would, be of probative value to his application. As the applicant, it was his burden to do so. The 120-pages of documents focused on his personal health which would not necessarily have assisted the Judge in deciding the legal issue. The Judge presumably accepted Mr. Cabana's short statement in his amended application that he believed publication of his health information would hurt him, but that was not what the Judge had to decide. Accordingly, it was not demonstrated that the 120-pages of

documents previously disclosed to the respondents would have been of much, if any, probative value to his application.

[118] In the result, Mr. Cabana has not demonstrated that the Judge's denial of his request to "simply submit" the 120-page document would work an injustice on him. In fact, the nature and timing of his request and what would have been required to grant it might actually have worked an injustice on the respondents, not Mr. Cabana. As well, the probative value of the document was questionable at best. In balancing the parties' interests through the lenses of fairness and justice, I see no compelling reason to interfere with the Judge's decision to deny Mr. Cabana permission to simply submit the 120-pages of documents to him.

### 3. Did the Judge Apply a Different Standard for the Admission of Evidence to the Appellant than the Respondents?

[119] The admissibility of the evidence in a legal proceeding is governed by many different rules and dependent on many different factors. The relevance of proposed evidence to the issues in a case, its reliability, the circumstances surrounding its provenance and its tendering, and the balancing of its probative value versus resulting prejudice are all factors to be considered.

[120] While the issue of potentially different standards for admissibility of evidence was left for consideration by this Court in the *Striking Out Decision*, Cabana did not make any submissions on it in his factum or oral argument. It appears that this ground of appeal may relate to a contention that the Judge applied a different standard to admitting Ms. Butt's chart into evidence than he did when he was considering whether to admit the 120-pages of documents into evidence. To the extent that this may be so, the issues respecting admissibility of the chart and the 120-pages of documents have been addressed above in accordance with the respective governing principles.

### 4. Did the Judge err by Failing to do Whatever was Possible to Provide a Fair and Impartial Process and Prevent an Unfair Disadvantage to Mr. Cabana?

[121] The governing principle is that our legal system must be fair to all parties. This principle is expressed in the preamble to the *Statement of Principles* as "equal access to justice, including procedural justice, and equal treatment under the law for all persons". The rules, procedures, and jurisprudence of our legal system are informed by fairness to all parties. Application of the substantive law does not differ between litigants who are represented and litigants who

represent themselves. Judges have the responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation.

[122] The presence of self-represented litigants in the civil courts in increasing numbers was recognized by Brown J.A. in *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383, as the "new reality" (para. 41). The legal system has to accommodate the dynamic presented by this new reality if it is to maintain its objective of providing equitable and fair treatment for all litigants.

[123] Based on the *Statement of Principles* and the developing jurisprudence, there is a heightened recognition on the part of judges of the need to try to level the playing field for self-represented litigants by providing information and guidance, both procedurally and substantively, to enable them to access and participate in the adjudication process in a meaningful way.

[124] One of the ways this new approach can be fostered is by factoring the special needs of self-represented litigants into consideration in the exercise of discretion which, by its nature, involves balancing interests and prejudice of the litigants to achieve an overall fair result. Another way is to provide, through educative explanation, the legal frameworks to enable self-represented litigants' cases to be effectively presented.

[125] This Court discussed the role of the *Statement of Principles* in guiding judges with respect to the nature and extent of intervention to assist self-represented litigants in the *Striking Out Decision* (see paras. 40-63). It emphasized that the justification for assistance to a self-represented litigant is grounded in notions of trial fairness, quoting from *Dewing v. Kostiuk,* 2017 MBCA 22, where Monnin J.A. wrote:

> [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 duty to ensure that the SRL has the opportunity to meaningfully participate in the proceeding in the hearing and has a reasonable opportunity to present his or her case.

[126] In the *Striking Out Decision*, this Court summed up the approach as follows:

> [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...
>
> ...

> [59] The relevance of the *Principles* ... is in respect of how they inform the notion of trial fairness and inform the exercise of procedural discretion in a given case...
>
> [60] A judge assessing a matter through the lens of trial fairness and in exercising procedural discretion must ... do so with the *Principles* as a filter. They give 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 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 the 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. ... [It] 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.

[127] Delivering trial fairness requires an individualized approach in every case. What is said to a self-represented litigant must not become formalistic exercise. There is no standardized "script". It must be tailored to the circumstances of each case.

[128] At the same time, in regard to providing assistance and explaining the law to self-represented litigants, judges must carefully avoid being, or even appearing to be, overly accommodating to a self-represented litigant, especially if it is at the expense of or prejudice to other parties.

[129] It is also noteworthy that litigants who represent themselves "are expected to familiarize themselves with the relevant legal practices and procedures pertaining to their case" and "to prepare their own case", as the *Statement of Principles* says. In this regard, see para.13 of *Clark v. Pezzente,* 2017 ABCA 220, at para. 13.

[130] In this case, the Judge, both before and during the trial, explained points of legal procedure and the basics of certain applicable legal principles to Mr. Cabana in order to accommodate his unrepresented status. There can be no doubt that the Judge was sensitive to the specific dynamics of conducting a trial where one party is unrepresented by counsel. Several case management meetings were held with the parties before trial to discuss issues of specific concern. Transcripts of those meetings show that the Judge took time to attempt

to explain a number of matters to Mr. Cabana which would not have been necessary if he had had been represented by counsel. Further, throughout the trial, the Judge from time to time stopped proceedings to explain certain matters to Mr. Cabana and what their implications would be if Mr. Cabana made tactical decisions one way or the other.

[131] More specifically, in relation to the issues in this case, after seeing his application for a publication ban, the Judge called a case management meeting to address the serious deficiency in Mr. Cabana's application by explaining to him the requirement to file evidentiary support for his request. When the hearing commenced, the Judge permitted Mr. Cabana to attest to the truth of the contents of his application in Court in order to overcome his failure to file a supporting affidavit. As well, the Judge proceeded with the hearing on June 7, 2016 in the absence of the media at Mr. Cabana's request.

[132] At trial, the Judge stated he would give wide latitude to Mr. Cabana on his redirect examination of Ms. Butt when the issue respecting the chart arose. He also gave additional time to Mr. Cabana to make his argument regarding the production of the chart and he offered to hold a *voir dire* on the issue. Although Mr. Cabana declined the *voir dire*, the Judge sealed the chart on his own motion until he decided the issue. Furthermore, when Mr. Cabana raised concerns about the use of the chart, the Judge effectively reopened the issue, heard from the parties and reconsidered the matter, including conducting a consideration of whether portions of the chart should be redacted to preserve privacy. In my view, these accommodations demonstrate that the Judge was alive to Mr. Cabana's self-represented status, and that he was assisting him in accordance with the *Statement of Principles*.

[133] Viewing the matter holistically, I am satisfied that the manner in which Mr. Cabana was dealt with by the Judge did not affect the fairness of the trial process in a manner that could not be or was not rectified by subsequent events (*Striking Out Decision*, at para. 61).

**5. Did the Judge err by Breaching Mr. Cabana's section 7 Charter rights by ordering Production of his Medical Records to Counsel for the Respondents?**

[134] Mr. Cabana argues in his factum that the Judge breached his section 7 right to privacy by ordering the release of his personal medical information "without first examining it, redacting it as necessary, and restricting its dissemination…". In his oral submission, Mr. Cabana did not press this

argument in the context of section 7, resting it instead on his arguments addressed at paragraphs 43-44 above.

[135] Section 7 of the *Charter* guarantees the rights "to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Mr. Cabana's case does not raise any issue respecting his rights to life or liberty. While I would not foreclose the possibility that the right to security of the person could be jeopardized by the unlawful disclosure of personal medical information, Mr. Cabana did not make such an argument. Neither does the record show that his security of the person was infringed. Consequently, I would give no effect to this ground of appeal.

## DISPOSITION

[136] In the result, I would dismiss Mr. Cabana's appeal. Inasmuch as this will result in remitting the case to the Judge for continuation of the trial, I would suggest that in order to provide clarity for the future, the Judge should address the matters referred to in paragraphs 45-59 and 95-96 of these reasons and make appropriate rulings on the use and evidentiary effect of Ms. Butt's chart during the rest of the trial.

## COSTS

[137] Costs in this Court generally follow the outcome of an appeal. Mr. Cabana has lost his appeal. Although he appeared without a lawyer, Mr. Cabana is not an inexperienced litigant. The respondents have incurred costs. I therefore see no reason to depart from the usual principle that the respondents shall have their column 3 taxed costs of the appeal. I would make no costs order respecting the proceedings in the Court below.

L. R. Hoegg J.A.

I Concur:

J.D. Green J.A.

I Concur:

C.W. White J.A.