Court of Appeal File No.: 16-17-CA

IN THE COURT OF APPEAL OF NEW BRUNSWICK

BETWEEN:

MR. BRYAN SUTHERLAND

APPELLANT (Plaintiff),

- and --

DR. MOSES ALATISHE,

RESPONDENT (Defendant).

RESPONDENT'S SUBMISSION

on behalf of the Respondent (Defendant), Dr. Moses Alatishe

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(Defendant), Dr. Moses Alatishe

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PART II – FACTS

1. The Appellant's Submission does not contain a concise statement of the relevant facts. As a result, the Respondent will state the facts as he believes them to be.

2. The Respondent (Defendant), Dr. Moses Alatishe, is a psychiatrist practicing in Moncton, New Brunswick.

3. In March 2006, Dr. Alatishe had his first encounter with the Appellant (Plaintiff), Bryan Sutherland, when he was admitted to the Moncton Hospital's psychiatric unit as a voluntary patient. Mr. Sutherland who was then 18 years of age, had been diagnosed with mental illness several years earlier. He and his parents were reporting violent thoughts, hearing voices, racing thoughts, anxiety, mood swings and an inability to function at school. He was ultimately diagnosed with schizophrenia and a differential diagnosis of bipolar disorder. Dr. Alatishe treated the Appellant in hospital during his five-week admission and continued to follow him after his discharge, until late 2009, when the Appellant, on his own accord, ceased taking his prescription medications and slowly phased out his therapy sessions with Dr. Alatishe.

4. On January 20, 2015, nearly 9 years since his hospitalization and more than five years since he had ceased taking his medications, the Appellant filed an action against the Respondent, alleging, *inter alia*:

(a) Fraud on the basis that he was allegedly misdiagnosed with brain diseases;

(b) Poisoning on the basis he was allegedly administered and prescribed mind-altering medications and prescription drugs;

(c) False imprisonment on the basis he was allegedly kept in the hospital against his will;

(d) Defamation on the basis he was allegedly told he was very sick and had serious brain diseases;

(e) Libel on the basis that his condition was recorded in his medical chart;

(f) Breach of contract on the basis that he was allegedly guaranteed results which were not achieved and because his personal health information was allegedly disclosed to his parents without his consent;

(g) Breach of informed consent on the basis he was allegedly not informed that he did not suffer from a brain disease;

(h) Negligence and malpractice on the basis of an alleged failure to recognize that his symptoms were actually side-effects of prescription drugs;

(i) Breach of fiduciary duty on the basis that he was allegedly coerced by Dr. Alatishe into taking prescription medications and because third parties were allegedly coerced by Dr. Alatishe into approving further medical treatment for him; and

(j) Professional misstatement on the basis that he was allegedly told he was very sick, had physical brain diseases and needed lifelong medical treatment, which he now disputes.

5. Mr. Sutherland's lawsuit is based on his belief that, in the absence of any objective findings, i.e. abnormalities on his CT Scan or in his bloodwork, he could not be properly diagnosed with mental illness. He asserts that, because those objective tests were negative, this somehow proves he was not mentally ill. And so, if he was not sick, he should not have been prescribed medications ("poisons") and he should not have been hospitalized ("imprisoned").

6. It is Mr. Sutherland's allegation that the numerous diagnoses rendered by his physicians since 2001 are all wrong, as they are based on subjective assessments and analyses, which he feels are invalid in the absence of physical, objective findings. Mr. Sutherland

dismisses the legitimacy of psychiatry because it does not rely on objective "proof."

7. Moreover, Mr. Sutherland is of the view that his diagnoses were founded upon the presence of symptoms which were all side effects caused by the prescription drugs he was taking, and not due to an organic mental illness.

History of the litigation

8. On June 8, 2015, Justice George Rideout heard a motion brought by the Respondent for the appointment of a litigation guardian and to strike the claims of the Appellant's parents and grandparents (as there was no cause of action).

9. On July 16, 2015, the Justice Rideout issued his decision. He struck the claims of the Appellant's parents and grandparents but did not to appoint a litigation guardian.

10. In his decision, in addition to addressing the litigation guardian issue, Justice Rideout advised the Appellant that he would require expert witnesses to prove his case. At paragraph 39 of the decision, the Court said:

> *[39] Mr. Sutherland has prepared his claim and it is a complex one. While he is competent to bring the action on his own,* ***he is dealing with complex issues which will require the hiring of expert witnesses to support his allegations****. Rather than a litigation guardian* ***he****, as would any non-legally educated person,* ***needs advice on what he must prove and how it must be proved.*** *But this, in my mind, does not point to Mr. Sutherland requiring a litigation guardian under Rule 7.01(d).*
>
> [Emphasis added]

11. After this preliminary motion, the lawsuit proceeded in the normal course. On December 1 and 2, 2015, Examinations for Discovery took place.

12. Two months later, on February 9, 2016, the Appellant wrote to the Respondent's solicitor, indicating his intention to file a "Certificate of Readiness" in the coming days and to set the matter down for trial.

13. On February 11, 2016, counsel responded to the Appellant, objecting to setting the matter down for trial on the basis that all pretrial matters were not complete. First, he advised that the Appellant had not yet provided answers to all the undertakings given at the Examination for Discovery. Secondly, counsel reminded the Appellant that the matter could not go to trial without expert evidence from a qualified and similarly-trained physician supporting the Appellant's allegations of medical malpractice. Counsel concluded his letter by advising the Appellant that since it appeared he did not intend on retaining an expert, the Respondent would file a motion for summary judgment on the basis that the claim did not give rise to a reasonable cause of action.

14. On February 19, 2016, the Appellant forwarded a draft "Trial Record" to counsel, advising that he was ready to set the matter down for trial.

15. On March 4, 2016, having received no expert report from the Appellant, the Respondent moved for summary judgment on the basis that the Appellant could not proceed to trial without expert evidence, and also on the basis that the Appellant's claim was statute-barred pursuant to the *Limitation of Actions Act*, SNB 2009, c L-8.5 (the "LAA").

16. The Appellant filed an affidavit in response to the motion. In it, he contested the motion and deposed, among other things:

> *1. THAT I am the Plaintiff.*
> *2. THAT I am the Respondent to the Defence's 2nd Motion.*
> *3. THAT I contest the Defence's Motion.*
> *4. THAT Summary Judgment should not be granted to the Defendant Dr. Moses Alatishe.*
> *5. THAT my claim certainly HAS MERIT.*
> *6. THAT My action was commenced well within the Limitation Period [...]*
> *7. THAT I do disclose a Cause of Action and I do intend to call Expert Witnesses AT TRIAL.*
> *[...]*

17. Justice Rideout heard the motion on May 25, 2016 and the Court issued its decision on June 1, 2016. With respect to the statute of limitations defence, the Court relied on the discoverability principle and held that it was not clear at what point the Appellant knew or ought to have known that his claim arose, and so that issue should be determined after hearing all the evidence, i.e. at trial.

18. However, the Court dismissed the claim against Dr. Alatishe on the basis that the Appellant must lead expert evidence in the field of psychiatry, attesting to the doctor's alleged failure to meet the appropriate standard, and the Appellant had not done so.

19. While the Court held that Dr. Alatishe had established that he was entitled to summary judgment, Justice Rideout went on to say that an injustice would be done to the self-represented Appellant if summary judgment was granted immediately. The Court therefore gave the Appellant an additional two months to arrange for an expert witness in the field of psychiatry who would opine on the issues before the Court. Justice Rideout wrote that: "*Mr. Sutherland must*

immediately deal with the issue of an expert or an injustice will be done to Dr. Alatishe."

20. The Court's instructions were explicitly clear and found at paragraphs 29, 30 and 31:

> *[29] Consequently, I give two months to Mr. Sutherland to either arrange for an expert witness* ***in the field of psychiatry*** *to provide an expert opinion on the issues before this Court or not. Mr. Sutherland must advise Dr. Alatishe's legal counsel the name of the expert, his particular expertise and generally what the expert opinion will be. Once the expert opinion is available, Mr. Sutherland must comply with Rule 52 and Dr. Alatishe will be given sufficient time to consult with an expert and give his notice under Rule 52 to Mr. Sutherland. Once the above is complete, the matter shall proceed to trial.*
>
> *[30] Should Mr. Sutherland fail to provide the above within the two-month timeframe as outlined, Dr. Alatishe is granted the requested Summary Judgment without further motion to this Court.*
>
> ***DISPOSITION***
>
> *[31] The Plaintiff, Bryan Sutherland, is given two months to arrange for the required expert evidence and if he should fail to do so the motion for Summary Judgment will be granted. In the interim, the motion for Summary Judgment is adjourned for two months from the date of these reasons.*
>
> [Emphasis added]

21. The matter went before the Court nearly four months later, on September 23, 2016. Within the two months provided by Justice Rideout, the Appellant had retained two witnesses, namely a retired neurologist from California as well as a lay-witness. Like Mr. Sutherland, the neurologist, Dr. Fred Baughman, challenged the very legitimacy of psychiatry as a discipline, but he did not establish the standard of care of a psychiatrist. The Court issued its written decision on September 28, 2016 and held that the Appellant's witnesses were

not properly qualified to give expert evidence on the appropriate standard of care of a psychiatrist. The Court therefore confirmed the Summary Judgment and struck the Appellant's claim. At paragraph 15 of the decision, Justice Rideout wrote:

> *[15] As I indicated in my previous decision, Dr. Alatishe has established his right to a Summary Judgment. I gave Mr. Sutherland almost four months to deal with this matter and he has failed to retain an expert in the field of psychiatry who can attest to the standard of care required of a psychiatrist. Therefore I confirm the earlier Summary Judgment striking the claim of Bryan Sutherland. I will explain why.*

22. The Respondent obtained summary judgment and the Appellant's Notice of Action with Statement of Claim attached was struck and dismissed. Judgment was registered on October 5, 2016.

23. Dissatisfied with the decision, on October 21, 2016, Mr. Sutherland filed a Notice of Motion with the Court of Queen's Bench seeking to set aside and/or vary Justice Rideout's decision.

24. Despite being advised by counsel for the Respondent that the proper forum for the relief he sought was the Court of Appeal, the Appellant forged on with his motion at the Court of Queen's Bench.

25. The motion was returnable on January 13, 2017, before Justice Ouellette, who ruled that he was *functus officio*.

26. On January 13, 2017, at the hearing of the motion, the Appellant provided the Respondent with a copy of a new report, prepared by Dr. Robert Carroll. That report, which is contained in the Appellant's Book of Essential References, was not before Justice Rideout and was produced some 3 months after Justice Rideout rendered his final decision.

27. Following Justice Ouellette's decision, the Appellant sought to file a Notice of Appeal on or about February 8th, 2017. However, the Appellant was well outside the time limits for filing an appeal, and therefore sought an extension.

28. On April 21, 2017, Mr. Sutherland's motion for an extension of time to appeal was heard on April 21, 2017, and on August 29, 2017, this Honorable Court granted the extension.

29. The Appellant is now asking to introduce fresh evidence, namely an amended report of Dr. Fred Baughman (neurologist), the report of Dr. Robert Carroll (psychiatrist) and the report of Dr. Brenda LeFrançois (psychologist). The Respondent has not yet been provided with the Notice of Motion as of the date hereof.

30. Mr. Sutherland's Notice of Appeal contains 40 grounds and his Supplementary Notice of Appeal contains an additional 26 grounds. They are summarized as follows:

(a) Expert evidence is not required to prove his case;

(b) He now has four expert reports, including a new report from Dr. Robert Carroll (fresh evidence);

(c) His expert in neurology can properly opine on the standard of care of a psychiatrist;

(d) His claim is based on an allegation that he does not suffer from a "brain disease" as opposed to a mental illness, and that Dr. Baughman, a neurologist, was therefore a proper expert;

(e) Justice Rideout misinterpreted Rule 52 as it does not require that a party call an expert and it does not specifically reference a psychiatrist, therefore any physician will suffice;

(f) There is a distinction between having a case which has merit and being able to prove that the case has merit;

(g) Even though, according to the Appellant, expert evidence was not required, he acted in good faith in marshalling expert evidence; and

(h) He is entitled to his "Day in Court", which is guaranteed by the Charter of Rights and Freedoms, and he alleges that he is being discriminated against on the basis of his mental status and his ability to pay for an expert.

PART III – RESPONDENT'S POSITION

31. The Respondent submits the issues before this Court are as follows:

(a) Should the Appellant be permitted to provide further evidence to this Court, namely the amended report of Dr. Fred Baughman, as well as the reports of Dr. Robert Carroll and Dr. Brenda LeFrançois, when this evidence was not before the Court appealed from?

(b) Did the motions judge err in granting summary judgment to the Respondent?

(c) Did the motions judge err in failing to find that the Appellant's action was statute barred pursuant to the ***Limitation of Actions Act***, SNB 2009, c. L-8.5?

Law and Argument

32. This submission will first address the preliminary matter of the admissibility of fresh evidence (in particular, the reports from Drs. Carroll and LeFrançois as well as the amended report from Dr. Baughman), followed by submissions in opposition to the Appellant's appeal and finally, submissions on the Respondent's cross-appeal relating to the *Limitation of Actions Act*.

A. Further evidence should not be admitted on appeal

Rule 62.21(2) of the Rules of Court prescribes the circumstances in which further evidence may be received on appeal. It states:

Further Evidence

(2) The Court of Appeal or a judge thereof may receive evidence

(a) on interlocutory applications,

(b) as to matters which have occurred after the date of the order or decision appealed from, and

(c) on special grounds, upon any question of fact.

33. The criteria to be met for admission of further evidence on appeal is set out by the jurisprudence of this Court and of the Supreme Court of Canada (SCC).

34. As stated by the SCC in ***Palmer v The Queen***, [1980] 1 SCR 759 at p 775 (the test cited and applied by this Court)[1]:

> *(1) The evidence should generally not be admitted if, by **due diligence**, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see McMartin v The Queen, [1964] S.C.R. 484].*
>
> *(2) The evidence must be **relevant** in the sense that it bears upon a decisive or potentially decisive issue in the trial.*
>
> *(3) The evidence must be **credible** in the sense that it is reasonably capable of belief, and*
>
> *(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have **affected the result**.*
>
> *[Emphasis added]*

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[1] See, e.g., ***Doiron v. Wilcox***, 2012 NBCA 70 at para 20.

35. A similar three-point formulation of this test has also been frequently cited by this Court,[2] emphasizing the following criteria:

> *1) It must be shown the evidence could not have been obtained with **reasonable diligence** for use at the trial;*
>
> *2) The evidence must be such that, if given, it would probably have an **important influence on the result** of the case, although it need not be decisive; and*
>
> *3) The evidence must be such as is presumably to be believed, or in other words, it must be **apparently credible**, although it need not be incontrovertible.*
>
> [Emphasis added]

36. Under both formulations of the test, the criteria to be met are cumulative: all criteria must be satisfied. Furthermore, the test is strictly applied. The principle of finality militates against permitting further evidence on appeal. As explained by this Court in ***Ryan v Law Society (New Brunswick)***, [2000] NBJ No 540 (CA):

> *14. Rule 62.21 gives the Court very broad discretionary powers. But as has been established by the authorities there is a restrictive three-part test which the Appellant must meet. As well this Court should not relax the criteria so as to facilitate an unsuccessful litigant's desire to retry a case. ...*
>
> *18. A review of the law would indicate that the rule of due diligence will be strongly adhered to in civil matters but less so in criminal cases. In civil matters there must be finality. If courts were to permit new evidence with alacrity, litigation would be prolonged and there would never be the assurance that a matter is finally concluded. [...]*
>
> [Emphasis added]

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[2] See, e.g., ***New Brunswick (Workers' Compensation Board) v McCarthy***, [1982] NBJ No 309 (CA) at para. 4; ***Gautreau v. Saulnier***, 2014 NBCA 22 at para. 6; ***Ryan v Law Society (New Brunswick)***, [2000] NBJ No 540 (CA) at para. 13.

37. Similar considerations are articulated by Donald Brown in the loose-leaf publication ***Civil Appeals*** (Toronto: Thomson Reuters, 2017):

> ***Adjudication of most civil disputes relies upon the adversary system, whereby the parties take full responsibility for presenting the evidence and arguments in support of their claims. This, coupled with a general social policy favouring finality in litigation ... militates against providing a further opportunity to the losing party to patch up any weaknesses in its case****. As has often been said, a trial is not a tea party, and while the resolution of disputes must be provided for,* ***it is also desirable that they be resolved with a minimum of cost and delay****. As well, given that the primary purpose of providing for an appeal is to correct error in the proceedings below, evidence that was not part of the record in the proceedings below is not usually relevant for that purpose. As one court has observed, "[I]t is difficult to justify reversing a decision based on evidence that was not presented to the decision-maker."*
>
> [Emphasis added]

38. It is respectfully submitted that the criteria for admission of further evidence are not met in this case.

Due Diligence

39. The first criterion to be met is that of due diligence. The party seeking to admit the evidence must show that, even with reasonable diligence, the evidence could not have been obtained and provided to the Court below.

40. To discharge this burden, the moving party must demonstrate when and how the evidence was obtained and why it could not have been obtained earlier. As explained by Brown, *supra*:

> *Leave to admit additional evidence on appeal is invariably required. In that regard, an application for*

> *leave will usually require affidavit evidence identifying the additional evidence, indicating* ***when and how it was discovered, and where it pre-dates the trial, explaining why it could not be discovered by due diligence or otherwise explaining the delay in bringing it forward, and pointing out its relevance, credibility, and materiality****.*
>
> [Emphasis added]

41. The due diligence criterion is not met when the "new" evidence sought to be admitted is an expert opinion based upon facts known at the time of the lower Court hearing. Indeed, case law across the country overwhelmingly confirms that an expert opinion based upon pre-existing facts is not "new" or "fresh" evidence, but rather merely a re-packaging of old evidence. For example:

(a) In ***R. v A. (J.)***, 2010 ONCA 491, the appellant appealed a verdict that he was guilty of sexual assault. The trial judge had referred to a bite on the complainant's finger as corroborating evidence of her testimony. After trial but prior to the appeal, the appellant obtained an expert report opining that the finger injury was not a bite mark. The ONCA declined the request to admit this evidence, holding that, with due diligence, it could have been obtained and tendered at trial (see paras. 29-32, 39).

(b) In ***M. (J.A.) v M. (D.L.)***, 2008 NBCA 2, a matter relating to spousal support, one spouse sought to introduce further evidence of a financial expert on appeal. This request was denied as such evidence could have been adduced at trial with due diligence (see para 10).

(c) In ***Kaban v Sett*** (1995), 107 Man. R. (2d) 225 (MBCA), a medical malpractice case, the appellant's experts accepted at trial that a certain incision was not infected. Subsequent to trial, the appellant discovered documents in the hospital file (which were in her possession prior to trial) to refute this. The appellant sought to introduce further evidence of her experts on appeal to the effect that they were no longer of the opinion that the incision was not infected. In refusing to admit this evidence, the MBCA held that it was not "fresh evidence" but rather merely "a new appreciation of old evidence" and

therefore the due diligence criterion was not met (at para. 7).

(d) In ***Terracan Capital Corp. v Pine Projects Ltd.***, [1993] 3 WWR 724 (BCCA), a lender sought summary judgment pursuant to a loan agreement. The chambers judge found that the loan agreement provided for criminal rate of interest, and awarded the lender judgment only for the principal amount loaned. On appeal, the lender sought to introduce a further actuarial report that was not tendered at trial. The Court refused to admit this opinion evidence, as it was not convinced that it could not have been obtained by diligent efforts prior to the hearing below (see paras. 14-15).

42. The reluctance of appellate courts to admit "fresh" opinion evidence on appeal is consistent with the principle of finality and the general unwillingness to admit any evidence – opinion or not – that could have been tendered before the court below.[3]

43. Indeed, the only case identified by the Respondent in which a court permitted a party to lead new opinion evidence on appeal was ***Ryan***, *supra*. In that case, the facts were unique and distinguishable from the present case. The appellant had been disbarred. Subsequent to his disciplinary hearing, he was diagnosed with a psychiatric condition that could help explain the improper conduct underlying his disbarment. In allowing this medical evidence to be introduced, the Court held that the medical condition was such that Mr. Ryan could not be held to the "reasonable diligence" standard (at para. 21). It further found that flexibility was merited given the severity of the sanction (disbarment and loss of livelihood).

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[3] For examples outside of the expert evidence context, see e.g., *G. (C.J.) v. T. (L.)*, 2011 NBCA 12 (evidence of post-separation financial expenses could have been obtained prior to trial); *MacDonald v. Sun Life Assurance Co. of Canada*, 2005 PESCAD 25 (affidavit evidence to support doctor's misconduct could have been obtained prior to trial); and *T. (A.H.) v. P. (E.J.)*, 1994 ABCA 140 (post-hearing character evidence could have been tendered at trial).

44. In the present case, the Appellant seeks to admit "fresh" reports from Drs. Carroll, LeFrançois and Baughman into evidence. The opinions are based upon facts (hospitalization of 2006 and subsequent treatment to 2009) that were known since before the Appellant filed his Statement of Claim. In sum, they are not new facts. Rather, they are merely "a new appreciation of old evidence."

45. Recall that in July 2015 the Appellant was advised by Justice Rideout of the need for expert evidence in order to prove his claim. In February 2016 the Appellant was advised by opposing counsel that the case could not proceed to trial in the absence of expert evidence from a psychiatrist. In March 2016, the Appellant was served with the Respondent's motion with a hearing date in June. In June 2016, the Appellant was given two months to obtain the required expert evidence to avoid summary judgment. The second hearing did not occur until September 28, 2016, well over a year after the Appellant was initially advised of the need for an expert in the field of psychiatry. He chose not to produce such an expert report in that timeframe and his claim was therefore dismissed.

46. In reviewing the "fresh evidence" proposed by the Appellant, it is evident that it was obtained after the dismissal of his claim. In particular, Dr. Carroll's report is dated December 20, 2016, nearly three months after Justice Rideout's final decision and more than 6 months after the initial hearing on the motion.

47. Similarly, the amended report from Dr. Baughman is dated January 3, 2017, more than three months after Justice Rideout's final decision and the report from Dr. LeFrançois is dated October 11, 2017, more than a year after Justice Rideout's final decision.

48. In sum, the Appellant's "fresh" evidence was produced after his claim was dismissed on summary judgment. After Justice Rideout

granted summary judgment, the Appellant cannot now attempt to patch up weaknesses in his case. As the Court of Appeal stated in ***Ryan***, *supra*: "*In civil matters there must be finality.*"

49. No explanation is provided by the Appellant as to why his "fresh" evidence could not have been obtained earlier. At the hearings before Justice Rideout, the Appellant maintained that he was not required to produce an expert report from a psychiatrist – not that he was unable to retain such an expert. He referenced an inability to afford an expert, yet he obtained a report from Dr. Baughman which aligns with his own belief that psychiatry is not a legitimate field of medicine - which has nothing to do with establishing the appropriate standard of care of a psychiatrist.

50. It is submitted that the Appellant is unable to demonstrate that the reports he seeks to have admitted as fresh evidence could not have been obtained and placed before the Motions Judge with the exercise of reasonable diligence. Following the appellate decisions above, the expert opinions based upon pre-existing facts are not "new evidence", but rather are merely a repackaging of old evidence. The Appellant opted not to marshall this evidence before the Motions Judge. The principle of finality, as embodied in the due diligence criterion, prevents him from doing so at this stage.

Relevance

51. Even if the due diligence criterion was met, the Appellant's expert reports fail to satisfy the relevance or credibility criteria of the evidence.

52. First, with respect to the opinion prepared by Dr. Robert Carroll the Respondent submits that report is of limited relevance or assistance to the Court.

53. Dr. Carroll is a psychiatrist from Los Angeles, California. He has practiced his entire career in California and there is no indication that Dr. Carroll has ever trained, held privileges or practiced medicine in Canada, let alone New Brunswick.

54. Also, Dr. Carrol's evidence relates to only two relatively minor aspects of the plaintiff's claim: 1) the sharing of personal health information with the plaintiff's parents, and 2) the question of whether some of Mr. Sutherland's physical complaints (mainly sexual dysfunction which adversely impacted his ability to masturbate) might have been linked to his anti-psychotic medications. Dr. Carroll did not address any of the other allegations, which are otherwise unsupported by appropriate expert opinion evidence.

55. The evidence of Dr. Baughman is not relevant as he is not able to, nor does he opine on the standard of care of a psychiatrist. Rather, he promotes his radical belief that psychiatry is an invalid field of medicine which is linked to "Big Pharma" and should not be a medical specialty. Regardless of the Appellant now having an amended report from Dr. Baughman, this does not change the fact that Dr. Baughman is not a psychiatrist and cannot opine on the appropriate standard of care in this matter. Ultimately, the Respondent submits that Dr. Baughman's evidence would not meet admissibility criteria set out by the SCC in ***R. v. Mohan***, [1994] 2.S.C.R.9, as it does not meet the basic test of reliability, as Dr. Baughman's opinion is radical and not genrally supported in the medical community.

56. Similarly, the opinion of Dr. Brenda LeFrançois, an academic psychologist, is not relevant to the material issues. Dr. LeFrançois is not a psychiatrist, nor has she completed medical school. Her opinion examines the actions of Dr. Alatishe, a psychiatrist, from her perspective as a psychologist, and particularly from her perspective

as a leading figure in the anti-psychiatry "Mad Studies" movement. Like Dr. Baughman, her proposed testimony likely would not meet the Mohan criteria. Simply put: Dr. LeFrançois is not an expert in the field of psychiatry and does not have the necessary qualifications to give opinion evidence in that field. Accordingly, Dr. LeFrançois's opinion is not relevant.

57. The Respondent submits that based on the legal principles with respect to summary judgment in medical negligence matters, the Appellant's evidence from Drs. Baugham and LeFrançois does not meet the apparent relevance test as neither are able to provide expert evidence on the appropriate standard of care of a practicing psychiatrist, and both "opinions" are inherently unreliable.

58. Furthermore, none of the Appellant's expert reports identifies the appropriate standard of care required of the Respondent in New Brunswick in 2006. There is no definition of the standard being used to determine the Respondent's alleged negligence and the comments with respect to the Respondent's treatment are devoid of detail. In sum, the Respondent submits the comments contained in the expert reports are wholly inadequate in establishing any negligence as against the Respondent.

Credible

59. The Respondent submits that the reports from the Appellant's experts are not credible as they are lacking in the necessary specifics to support the Appellant's allegations against the Respondent.

60. With respect to Dr. Carroll's evidence, his report is based on an incomplete record and therefore does not meet the credibility requirements. Dr. Carroll states that his opinion is based on:

> *[C]onversations I had with Mr. Bryan Sutherland over the telephone and a review of various records he provided me including a summary of his hospitalization at Moncton City Hospital from March 13, 2006 – April 20, 2006. I also reviewed outpatient records from the Community Mental Health Center at which Mr. Sutherland received treatment from the time of his discharge until 2010. In addition I reviewed reports written by Dr. Roger Crossman and Dr. Fred Baughman.*

61. Dr. Carroll admits in his report that he did not receive a complete copy of the Moncton Hospital records. Rather, he received a summary of Mr. Sutherland's hospitalization, prepared by Mr. Sutherland himself. He does not mention reviewing Mr. Sutherland's patient chart from the Respondent's private office or reviewing the transcripts from the Examinations from Discovery.

62. In short, the Respondent submits that Dr. Carroll's opinion, which is based on an incomplete record and conversations with the Appellant, does not meet the test for credibility in these circumstances.

63. Finally, the Appellant moves to have the amended opinion of Dr. Fred A. Baughman, neurologist, adduced as "fresh" evidence. However, Dr. Baughman's evidence is not new. Rather, it is a repackaging of evidence that has already been deemed inadmissible by Justice Rideout. In his September 28, 2016, decision, Justice Rideout canvases the law with respect to expert evidence and has this to say about Dr. Baughman:

> *[6] What became clear is that Dr. Baughman Jr. is not an expert in the field of psychiatry nor is Mr. Crossman. […]*
>
> *[7] Dr. Baughman Jr. reveals in his report a bias against the field of psychiatry holding views that psychiatry is simply supporting the pharmaceutical industry and is not a proper "specialty" of medicine. Roger H. Crossman does not have the necessary qualifications to give opinion evidence in the field of psychiatry.*

> *[...]*
>
> *[16] Dr. Fred Baughman Jr. is a neurologist not a psychiatrist. Turning to the principles set out in Mohan supra, the expert evidence to establish the standard of care is a material issue in this case and the evidence is not excluded by a policy rule, however, the evidence does not fall within the proper sphere of expert evidence. Dr. Baughman is not properly qualified to give expert evidence on the appropriate standard of care of a psychiatrist.*
>
> [Emphasis added]

64. The Respondent submits that Dr. Baughman's evidence does not meet the "apparently credible" test, and the same analysis and result would also apply to the report prepared by Dr. Brenda LeFrancois, whose views are radical and outside the spectrum of generally held beliefs within her discipline.

Important influence on the result

65. The Respondent submits Dr. Carroll's evidence is the only evidence that could meet the relevance test, as the Appellant's other experts are not psychiatrists and are unable to give opinion evidence on the standard of care of a psychiatrist.

66. For these purposes, then, only Dr. Carroll's evidence requires examination through the lens of the fourth criterion.

67. The Respondent submits that even if Dr. Carroll's evidence is held to be relevant, it would not have an important influence on the result of the case.

68. For one, the Respondent submits the weight attributed to his opinion and conclusions must be diminished given the fact that he has never trained or practiced psychiatry in Canada.

69. For example, the case of ***Leaker v. Porter***, [2001] B.C.J. No 162 (S.C.) concerned the expert opinion of a Seattle specialist in emergency room medicine about the standard of care to be expected of a general surgeon on call in the emergency room of a Victoria hospital. It was acknowledged that the expert had deficiencies in his knowledge about practices and resources in Victoria. The Court therefore qualified the expert with the deficiencies in knowledge going to the weight of his evidence. At paragraph 54, the Court said:

> *[54] Notably, however, Dr. Gibbs has limited knowledge about the standard of care for general surgeons in Victoria in 1992, related to appendicitis. He conceded that he does not have any specific knowledge concerning the type of CT scans that were available and readily used in Victoria in 1992 for abdominal problems. I do accept Dr. Gibbs' testimony that in 1992 the standard of care in the diagnosis of appendicitis was generally the same in Victoria as it was in Seattle. He testified that physicians in the two cities receive similar lessons in medical school and are exposed to the same seminars and journals during practice. I accept his testimony that the major difference in the treatment provided in the two cities is due to differences between the two cities in the availability of resources. Most importantly, Dr. Gibbs was unable to give an opinion about the use of CT scans in Victoria in 1992 for appendicitis and gall bladder problems in relation to the prevailing standard of care for diagnosis in Victoria.* ***While I allowed Dr. Gibbs to give his evidence, this lack of knowledge affects the weight of his evidence and the strength of his conclusions regarding the standard of care relevant to this case. I note the importance of an expert providing temporally and geographically relevant opinion evidence: see Humchitt v. Royal Inland Hospital****, (16 March 1995), Kamloops Registry, 19454, (B.C.S.C.) and Krangle et al. v. Brisco and Morrill, (9 May 1997), Vancouver Registry, C935347, (B.C.S.C.).*
>
> [Emphasis added]

70. Given that Dr. Carroll has no medical experience in Canada, the Respondent submits that the weight of his evidence as well as the strength of his conclusions on the standard of care would be diminished.

71. Secondly, there is nothing in the Dr. Carroll's report to indicate that the Respondent's treatment actually caused the complaints alleged in his Statement of Claim.

72. Dr. Carroll is critical of the Respondent's care because Dr. Alatishe allegedly did not inform the Appellant that the symptoms he was experiencing while in hospital in 2006 may have been side effects from the medication he was prescribed. But he does not state that the prescribing of such medications in the context of Mr. Sutherland's mental illness was inappropriate.

73. Dr. Carroll also says that the "hospital" should not have had conversations with the Appellant's parents without his knowledge or approval. Dr. Carroll does not allege this was a breach of the standard of care, nor does he cite any privacy law, rule or policy.

74. Although it is not entirely clear from reading Dr. Carroll's report, it would seem the only alleged breach of the standard of care was not knowing or disclosing the side effect profiles of the drugs the Appellant was prescribed.

75. However, Dr. Carroll does not make any link between that purported breach of the standard of care and any damages alleged. In sum, the element of causation is missing from Dr. Carroll's reports. And, as stated in the case of ***Branco v. Sunnybrook***, [2003] O.J. No. 3287 (Ont. S.C.J.), the plaintiff must lead expert evidence in respect of all elements of the cause of action, including causation.

76. Lastly, the Respondent submits that the only breaches suggested by Dr. Carroll, i.e. the failure to disclose the medications' potential side effects and speaking to the Appellant's parents without his consent, were known to the Plaintiff since 2006.

77. In particular, the side effects from prescription medication were discussed with the Appellant in the hospital and after his discharge in 2006. This is clear upon reviewing the Appellant's Amended Statement of Claim, at paragraph 63 and the Respondent's Affidavit of March 3, 2016, at paragraph 19.

78. With respect to the allegations that the Respondent spoke to third parties without the Appellant's consent, the Appellant admits in his Statement of Claim at paragraphs 69 and 70 to being aware of the third party meetings, being opposed to them, and being opposed to his exclusion from meetings involving his parents.

79. In light of the foregoing, Dr. Carroll's opinion with respect to the Respondent's breaches of the standard of care relates to facts and incidents that the Appellant knew about in 2006. As such, the Respondent submits they are statute-barred by virtue of the *Limitation of Actions Act*, *supra*, and consequently Dr. Carroll's opinion would not have an important influence on the result.

Conclusion

80. For the above reasons, it is submitted that the criteria to admit further evidence in the form of reports from Drs. Baughman, Carroll and LeFrançois are not met in this case. The Respondent respectfully requests that this Court decline the Appellant's request to admit further evidence.

B. Summary Judgment was appropriate

81. Dr. Alatishe was successful on his motion for summary judgment by showing that there was no genuine issue for trial because the Appellant had no expert opinion to support his allegations of medical malpractice against the Respondent.

82. The Appellant was required to put his best foot forward in order to defend the motion for summary judgment. The importance of this requirement was explained in ***Morrow v. Aviva***, 2004 NBCA 100, where Chief Justice Drapeau, following ***Cannon v. Lange***, 1998 CanLII 12248 (NB CA), said as follows:

> *Summary judgment is appropriate whenever there is "no reason for doubt as to what the judgment of the court should be if the matter proceeds to trial": Ripulone v. Pontecorvo (1989), 104 N.B.R. (2d) 56 at para. 13 (C.A.) and Cannon v. Lange et al. (1998), 1998 CanLII 12248 (NB CA), 203 N.B.R. (2d) 121 (C.A.). That pivotal question stands to be determined on the basis of the issues as defined by the pleadings, any relevant admissions in the record and the admissible evidence. Our Court has repeatedly endorsed that elementary proposition, which responding parties ignore at their peril.*
>
> *11 In Cannon v. Lange, at para. 21, the Court noted that the judge hearing a motion for summary judgment "has an obligation to consider not only the pleadings, but also any admissible evidence, namely statements of fact within the personal knowledge of the deponents, presented by way of affidavits and of any cross-examination on those affidavits ...". The Court added the following related observations at para. 23:*
>
> > *Common sense should move the parties to put their best foot forward on a motion under rule 22. Such a course of conduct is particularly wise for a respondent, since he or she has the most to lose. As stated by the Ontario Court of Appeal in 1061590 Ontario Ltd. v. Ontario Jockey Club et al. (1995), 1995 CanLII 1686 (ON CA), 77*

> *O.A.C. 196; 21 O.R. (3d) 547 (C.A.) at 557 [O.R.] in a vernacular expression, the respondent "must lead trump or risk losing." It will rarely be sufficient for the respondent to promise that evidence, which is admissible pursuant to rule 39.01(4), will be produced at trial: absent a compelling explanation, the respondent is required to produce admissible evidence which will prevent a conclusion that the action or defence is bereft of merit. I have no doubt that, where the ends of justice require, the court will allow all appropriate accommodations including leave to file further affidavit evidence.*

[Emphasis added]

83. In medical malpractice suits, jurisprudence has clearly established that "leading trump" means producing an expert report to establish a breach of the standard of care and causation. In the absence of such evidence, there will be no genuine issue for trial.

84. Despite clear jurisprudence on the issue, the Appellant continues to maintain that he does not require an expert to prove his case. He maintained before Justice Rideout that he would produce an expert at trial but did not require one on a "preliminary" motion. The Appellant is mistaken.

85. In ***Suserski v. Nurse***, 2006 CanLII 40677 (ON SC), the Plaintiff, Lydia Suserski, sued Dr. William Nurse in a medical malpractice action alleging the Defendant negligently performed an endometrial biopsy. The Defendant brought a motion for summary judgment to dismiss the Plaintiff's claim on the basis that the Plaintiff failed to produce any expert opinion evidence relating to the standard of care expected of the Defendant, or evidence that he breached such standard.

86. In ***Suserski***, like the within matter, the self-represented Plaintiff was advised by the Motion's Judge of the need for expert evidence. At paragraph 11, Justice Glithero wrote:

> *[11] On August 17, 2006 the parties appeared before me on the first return of this summary judgment motion, for the purpose of setting a hearing date.* ***At that time I advised Ms. Suserski that failure to obtain and produce expert opinion evidence could lead to her claim being dismissed.***
>
> *[...]*
>
> *[23] In the context of a medical negligence claim, if the respondent produces no admissible expert evidence in support of the claim, the court may draw inferences that the respondent has been unable to obtain expert evidence supporting the plaintiff's position: Claus v. Wolfman (1999), 1999 CanLII 14824 (ON SC), 52 O.R. (3d) 673 at 675 and 677, aff'd. on appeal (2000), 2000 CanLII 22728 (ON CA), 52 O.R. (3d) 680; Barber v. Mustard, [1993] O.J. No. 2872 at para. 8.*
>
> [Emphasis added]

87. The ***Suserski*** decision was confirmed on Appeal in ***Suserski v. Nurse***, 2008 ONCA 416 (CanLII)[4]. The Ontario Court of Appeal reiterated the necessity for an expert opinion at a motion for summary judgment, then noted the Plaintiff's ignorance of the Court's advice and additional time:

> *[5] The motion judge held correctly that without evidence capable of establishing these two essential aspects of their claim in negligence [that the doctor fell below the standard of care and that his treatment caused the injuries for which the plaintiff sought compensation] the plaintiff's action would inevitably fail.*
>
> *[6] It is important to note that* ***the plaintiffs****, who have been self-represented throughout,* ***have been***

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[4] Leave to appeal at the SCC was refused.

> ***repeatedly told that they require an expert's report in order to support their position***. ***Glithero J. adjourned the summary judgment for two months to allow them to obtain an expert report.*** *He then dismissed the action because they had not done so and explicitly pointed out their failure in this regard.*

88. In the instant case, the Appellant was advised both by the Court and by opposing counsel on several occasions that he would need expert evidence to support his claim. He repeatedly ignored that advice, taking the position that he did not need an expert or that he would produce one at trial. He was then provided additional time to obtain expert evidence from a psychiatrist, but ignored the Court's advice.

89. In ***Kurdina v. Gratzer***, 2009 CanLII 60403 (ON SC) Ms. Kurdina, a self-represented Plaintiff, was treated by the psychiatrist, Dr. Gratzer. Ms. Kurdina told him that she had been affected by brain waves and that she probably had a microchip embedded in her body. She requested a referral for an MRI, the removal of the chip by a neurosurgeon, or a letter stating that she was mentally healthy and stable. Dr. Gratzer refused these requests, diagnosed Ms. Kurdina as suffering from a psychotic illness and offered follow-up mental health care.

90. Ms. Kurdina subsequently commenced an action against Dr. Gratzer claiming damages for, among other things, a false diagnosis, continuous torture from psychological trauma because of stigma from being labeled a mentally disabled person and job deprivation.

91. The Defendant brought a motion for summary judgment on the basis that there was no genuine issue for trial.

92. To defend the motion, the Plaintiff filed reports from three witnesses who held a Ph.D. as well as one from a social worker and

another from a psychotherapist. She did not have any report from a psychiatrist, however.

93. Dr. Gratzer argued that those reports were not evidence of his falling below the standard of care as a psychiatrist. In other words, there was no evidence as to the standard of care of a psychiatrist and, therefore, no genuine issue for trial. The Court agreed.

94. In ***Kurdina***, Justice Perrell held that expert reports produced by the Plaintiff were irrelevant as her experts were not psychiatrists. The Court's comments with respect to the relevant issues are instructive.

> *[17] It should be pointed out that the issue before the court is not about the existence of psychotronic weapons or about how other professionals might treat Ms. Kurdina for her symptoms. Ms. Kurdina is entitled to her belief that such weapons exist and that she has been the victim of them.* ***The issue is whether Dr. Gratzer was negligent as a psychiatrist, and that is an issue that must be decided based on relevant evidence about the standard of care of psychiatrists.***
>
> *[18] Further,* ***it should also be pointed out that the issue before the court is not whether Dr. Gratzer, Dr. Shugar, or the whole discipline of psychiatry is wrong*** *in disregarding psychotronic weapons as a possible cause of mental disturbances.*
>
> *[19] I appreciate that based on the information that she has received from a variety of sources, Ms. Kurdina feels stigmatized and harmed by what she regards is a diagnosis based on deficient knowledge of the effects of psychotronic weapons, but* ***the standard of care of psychiatry is measured by the standard of care of practitioners of psychiatry and not by the standard of care of toxicologists or by practitioners of other disciplines of knowledge*** *that believe in the existence of effects from psychotronic weapons.*
>
> *[20]* ***None of the authors of the correspondence and reports in the material filed by Ms. Kurdina are qualified to offer an opinion on the standard of care***

> ***of a psychiatrist practicing in Ontario.*** *Indeed, they offer no opinion in this regard.*
>
> [Emphasis added]

95. In the instant case, the issue before the Court on summary judgment was not whether the Appellant was scientifically (or objectively) proven to have a brain disease, brain disorder, brain defect, brain disability, and/or brain abnormality. Nor is the validity of psychiatry as a legitimate field of medicine in issue.

96. The Respondent needed to show there was a genuine issue for trial. To do so, he needed to lead admissible expert evidence that Dr. Alatishe was negligent as a psychiatrist, and that issue could only be decided based on relevant evidence about the standard of care of a psychiatrist.

97. There was no evidence before the Motion's Judge that the Respondent fell below the standard of care of a psychiatrist. Accordingly, there was no genuine issue for trial. Summary judgment was the only appropriate result.

C. The Appellant's Claim is Statute Barred

98. The Respondent submits in his Cross-Appeal that the learned Motions Judge erred when he did not grant summary judgment on the basis of the ***Limitations of Actions Act*** (the "LAA").

99. It is submitted that, once the Respondent pleaded the LAA, the onus shifted to the Appellant at the motion for summary judgment to show that his cause of action was first discovered within the two year period prior to filing his action, i.e. after January 2013, and not before. This principle was articulated by the Ontario Court of Appeal in ***Soper (Guardian of) v. Southcott***, 1998 CanLII 5359 (ON CA):

> *Where a defendant pleads a statutory limitation period, the plaintiff has the burden of proving that the cause of action arose within the limitation period (Clemens v. Brown (1958), 13 D.L.R. (2d) 488 at p. 491, [1958] O.W.N. 200 (C.A.)).*

100. There is no indication in Justice Rideout's decision that he shifted the onus to the Appellant to show that his cause of action arose after January 2013 and furthermore, Justice Rideout does not indicate that the Appellant overcame that burden and if so, how.

101. Furthermore, the jurisprudence suggests that in a summary judgment motion where a limitation period has been raised as a defence, the plaintiff must provide an explanation for why he did not know or could not have known about the factual issues within the statutory time limit or within a reasonable time thereafter. This was discussed by the Nova Scotia Court of Appeal in ***Nova Scotia Home for Coloured Children v. Milbury***, 2007 NSCA 52 (CanLII):

> *[...] This is an important factor in a summary judgment application where a limitation period is raised by the defence. As stated by Ferrier, J. in Stell v. Obedkoff , 1999 CanLII 14815 (ON SC), [1999] O.J. No. 2312 (S.C.J.):*
>
> > *13 However, beyond the allegations, the plaintiffs have not adduced any evidence which gives rise to a factual issue regarding the question of discoverability.* ***No evidence has been provided indicating that there were unusual circumstances which prevented the plaintiffs from discovering the alleged negligence of the defendants,*** *nor has there been any suggestion that the defendants withheld a vital part of the evidence. No evidence has been provided to explain why the alleged negligence of the defendants could not reasonably have been discovered within the limitation period.*

[26] The comments on discoverability in the context of a summary judgment application in Jack v. Canada, [2004] O.J. No. 3294 (S.C.J.) are instructive:

> *81 Counsel have referred to legal authorities regarding the discoverability rule. Discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it or to sue. Peixeiro v. Haberman, 1997 CanLII 325 (SCC), [1997] 3 S.C.R. 549 (S.C.C.) at paras. 36 and 44.*
>
> *82 A cause of action arises for the purposes of a limitation period when the material facts on which the action is based have been discovered or ought reasonably to have been discovered, by the exercise of reasonable diligence. Central Trust v. Rafuse, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147 at p. 224; Peixeiro v. Haberman (1995), 1995 CanLII 932 (ON CA), 25 O.R. (3d) 1 at p. 4 (Ont. C.A.).*
>
> *83 The **rule of reasonable discoverability is to ensure that the plaintiffs have sufficient awareness of the facts to be able to bring an action.** The suggestion that a plaintiff requires a "thorough understanding" of such facts even after the action is brought, sets the bar too high. Similarly, to say that a plaintiff has to know the precise cause of her injuries before the limitation period started to run would also place the bar too high. K.L.B. v. British Columbia 2003 SCC 51 (CanLII), [2003] 2 S.C.R. 403 (S.C.C.) at para. 55-57; McSween v. Louis (2000), 2000 CanLII 5744 (ON CA), 187 D.L.R. (4th) 446 at p. 459 (Ont. C.A).*

84 The exact extent of one's loss need not be known before a cause of action can be said to have accrued. ***Once a plaintiff knows that some damage has occurred and has identified the tortfeasor, the cause of action has accrued.*** *Neither the extent nor the type of damage need be known. Peixeiro v. Haberman, supra, at p. 557.*

...

87 The facts upon which any plaintiff relies to fall within the discoverability rule must have an objective basis. ***Objective facts supporting negligence that were discovered at a later point in time beyond a limitation period are an absolute pre-requisite to the extension of the limitation period.*** *The extension of a limitation period is not driven by "wishes", "maybes", or "emotions" generated by a benevolent or well-intentioned source. Lalani v. Woolford, [1999] O.J. No. 3440 (Ont. Div. Ct.) at paras. 12, 16, 19; Morellato v. Wood (1999), 1999 CanLII 15040 (ON SC), 175 D.L.R. (4th) 753 (Ont. S.C.J.); affirmed at (1999) 1999 CanLII 18634 (ON CA), 187 D.L.R. (4th) 760 (Ont. C.A.).*

88 In order to establish that there is a genuine issue for trial with respect to Jack's claim that she did not have the requisite material facts available to her until "in and around 1994", ***Jack must adduce evidence to support her claim that the necessary information was not discoverable until that time. In my opinion, she failed to do so. Further, Jack must provide evidence demonstrating that there is a factual issue surrounding her failure to discover the alleged negligence before 1994 that requires resolution at trial.***

> ***Again, in my opinion, she has failed to do so.***
>
> *89 She has not provided any evidence on either point. Stell v. Obedkoff (1999), 1999 CanLII 14815 (ON SC), 45 O.R. (3d) 120 (Ont. S.C.J.) at pp. 123-125.*

[Emphasis added]

102. Applying the law to the case at bar, the Appellant was required to adduce evidence at the summary judgment motion indicating the circumstances which prevented him from discovering the alleged causes of action. The Appellant was also required to show why the Respondent's alleged breaches could not reasonably have been discovered within the limitation period.

103. The Respondent submits that the Appellant did not identify any facts which were discovered at a later point in time beyond the limitation period, which could not have been discovered through the exercise of reasonable diligence. On the contrary, the Appellant admits in his Statement of Claim that he was opposed to some of the Respondent's actions during his hospitalization of 2006, i.e. the meetings with his family members. He was aware of those facts in 2006, but only sued in 2015.

104. Given that there was no evidence to explain why the alleged negligence of the Respondent could not reasonably have been discovered within the limitation period, the Respondent submits that the Appellant's claim should have been dismissed on the basis that it was statute-barred by virtue of the LAA.

PART IV – ADDITIONAL ISSUES

105. There are no additional issues.

PART V – ORDER SOUGHT

106. The Respondent requests that the Appellant's appeal be dismissed with costs and that the Respondent's cross-appeal be granted.

All of which is respectfully submitted this 18th day of January, 2018.

STEWART McKELVEY
Solicitors for the Respondent

Robert M. Dysart

SCHEDULE "A"
LIST OF AUTHORITIES

1. ***Palmer v The Queen***, [1980] 1 SCR 759 at para. 34

2. ***Ryan v Law Society (New Brunswick)***, [2000] NBJ No 540 (CA) at paras. 36, 43 and 48

3. Brown, Donald. ***Civil Appeals*** (Toronto: Thomson Reuters, 2017) at para. 37

4. ***R. v A. (J.)***, 2010 ONCA 491 at para. 41 (a)

5. ***M. (J.A.) v M. (D.L.)***, 2008 NBCA 2 at para. 41 (b)

6. ***Kaban v Sett*** (1995), 107 Man. R. (2d) 225 (MBCA) at para. 41 (c)

7. ***Terracan Capital Corp. v Pine Projects Ltd.***, [1993] 3 WWR 724 (BCCA) at para. 41 (d)

8. ***R. v. Mohan***, [1994] 2.S.C.R.9 at paras. 55 and 56

9. ***Leaker v. Porter***, [2001] B.C.J. No 162 (S.C.) at para. 69

10. ***Branco v. Sunnybrook***, [2003] O.J. No. 3287 (Ont. S.C.J.) at para. 75

11. ***Morrow v. Aviva***, 2004 NBCA 100 at para. 82

12. ***Suserski v. Nurse***, 2006 CanLII 40677 (ON SC) at paras. 85, 86 and 87

13. ***Suserski v. Nurse***, 2008 ONCA 416v (CanLII) at para. 87

14. ***Kurdina v. Gratzer***, 2009 CanLII 60403 (ON SC) at paras. 89 and 94

15. ***Soper (Guardian of) v. Southcott***, 1998 CanLII 5359 (ON CA) at para. 99

16. ***Nova Scotia Home for Coloured Children v. Milbury***, 2007 NSCA 52 (CanLII) at para. 101

SCHEDULE "B"
RELEVANT PROVISIONS

Rules of Court

62.21(2) Further Evidence

(2) The Court of Appeal or a judge thereof may receive evidence

(a) on interlocutory applications,

(b) as to matters which have occurred after the date of the order or decision appealed from, and

(c) on special grounds, upon any question of fact.