The Scope of Testimony by an Expert to Support an Expert Report

By Karin Buss and Bottom Line Research[1]

Introduction

You may find yourself in the position where one of the experts testifying on your client's behalf provided a very "bare bones" report. The expert stated the basic facts and his conclusions, with a few reasons in point form. Just how far can you go in asking him to elaborate at trial? How much latitude does an expert witness have to expand/explain a Rule 218.1 expert statement? Can the expert reply to evidence that emerges during the trial and the points made by the other side's witnesses? Can the expert refer to research reports and articles not cited in his/her expert report to support their opinion? The goal of this article is to answer these questions regarding the scope of testimony by an expert to support an expert report for you.

General principles

Part 15 of the Alberta *Rules of Court* governs the preparation and disclosure of expert reports. Rule 218.1 sets out the advance notice requirements:

> "218.1(1) A party intending to adduce expert evidence at a trial shall, not less than 120 days before the day the trial commences or such other time as may be ordered by the Court, **serve on other parties to the action**
>
> (a) **a statement of the substance of the evidence**, signed by the expert, including the expert's opinion, the expert's name and qualifications, and a statement from counsel setting out the proposed area of expertise for which qualification as an expert will be sought, and
>
> (b) **a copy of any expert's report**, signed by the expert, on which the party intends to rely." [Emphasis added.]

Rule 218.12 sets out the advance notice requirements for rebuttal reports:

> "218.12(1) A party who intends to call an expert witness in rebuttal to the matters mentioned in the expert report served under Rule 218.1 shall, not

> more than 60 days after service of the expert's report, **serve on every other party to the action**
>
> (a) **a statement of the substance of the rebuttal evidence**, signed by the expert, and
>
> (b) **a copy of any rebuttal report**, signed by the expert, on which that party intends to rely." [Emphasis added.]

William A. Stevenson and Jean E. Côté in *Civil Procedure Encyclopedia*, vol. 3 (Edmonton: Juriliber, 2003) ("CPE") at p. 46-26 note that Ontario and Alberta have comparatively brief Rules calling for advance notice of the contents of expert evidence. The general purpose of the Rules with respect to experts is to discourage surprise and encourage settlement. The Rules are intended to produce an orderly, timely exchange of competing expert opinions in the form of reports, in which the literature is reviewed (CPE, p. 46-27).

The report must set out the "substance" of the expert's opinion. Purvis J., in the oft-cited decision of *Commonwealth Construction Co. v. Syncrude*, [1985] A.J. No. 632, 64 A.R. 132 (Q.B.) set out the meaning of "substance" of the expert's opinion:

> "...'the substance of his opinion' in R. 218.1(1) is broad enough to include and is intended to include **not only the opinion but the factual information upon which that opinion is based**. The factual information should be specific enough to support the conclusion. It should be stated in much the same way as the witness's opinion will be expressed to the court when he gives his evidence.
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> ...
>
> ...**The basis upon which he arrives at that conclusion should also be stated** in order to comply with R. 218.1(1). ...
>
> **The basis of the opinion must be reasonably specific**..." [Emphasis added.] (at para. 22-24)

Thus, the substance of the expert's opinion must contain the expert's conclusions, the factual foundation upon which those conclusions are based, and the reasons or manner in which those conclusions were derived from the facts.

In the midst of the discussion on what amounts to the substance of the expert's opinion, Purvis J. also states that "the court **will expect him to substantiate his opinion when he gives evidence in court** and he should do the same when he prepares a statement as required by the rules" (at para. 23).

The law is clear that an expert can expand and amplify upon the contents of his or her report in court. The challenge is in applying this principle to the circumstances of each case. It is in the trial judge's discretion to decide whether the expert's oral testimony is an expansion of the contents of the report, or whether it opens up a new field or presents new ideas for which notice was not given in the report.

Expanding and amplifying on an expert report in oral testimony

Two early Ontario cases are frequently cited for the basic principle that an expert is free to expand and amplify in oral testimony upon the contents of his or her expert report: *Iler v. Beaudet*, [1971] O.J. No. 1688, [1971] 3 O.R. 644 (Co. Ct.) and *Thorogood v. Bowden*, [1978] O.J. No. 3547, 21 O.R. (2d) 385 (C.A.).

In *Iler*, the plaintiff filed medical reports under the Ontario *Evidence Act*. In oral testimony, the plaintiff's physician explained the written reports, but also gave testimony with respect to a new and substantial matter that was not contained in the reports-the physician provided information connecting the plaintiff's current condition with the motor vehicle accident and negated the impact of the plaintiff's pre-existing injury. The defendant objected on the basis that the medical reports did not disclose this evidence.

Zuber Co. Ct. J. agreed with the plaintiff that the doctor should not be restricted to the letter of his report: "The doctor who gives oral evidence may obviously expand and amplify his report." However, on the facts of the case, the report failed to disclose a new and substantial matter and the plaintiff was not allowed to adduce this evidence through the doctor at this time. The judge adjourned the hearing to allow the plaintiff to submit a report with this information and compensated the defendant through costs.

The Ontario Court of Appeal commented on this same issue several years later in *Thorogood*. The defendant argued on appeal that the trial judge ought to have declared a mistrial after the plaintiff's medical expert gave evidence as to the likelihood of the plaintiff developing arthritis and of the plaintiff's future need of an artificial hip joint when there had been no mention of these matters in the medical reports. The defendant argued that these were substantive new factors which the defendants were not prepared to meet, because they had received no prior notice.

LaCourciere J.A., in an oral judgment for the court, noted that the medical report contained the following statement:

> "This **disability will probably declare itself in more intensive symptoms at a later stage in his life** and currently is very limited as far as his participation in any vigorous exercises or contact sports." (at para. 4)

The appellate judge held that the medical expert's testimony should not be confined to the precise contents of his report. There is an implicit right to explain and amplify:

> "...a **medical expert is not to be narrowly confined and limited** to the precise contents of his report, but **he has a right to explain and amplify**. **What was done here**, in our view, with respect to the possibility of arthritis and a new hip joint, **was to expand on what was latent in the medical report, and it did not open a new field.** ..." [Emphasis added.] (at para. 4)

In the result, the appeal court found that the trial judge was correct in finding no prejudicial surprise and properly refused to declare a mistrial.

Thorogood was recently considered and applied by the Ontario Court of Appeal in *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*, [2000] O.J. No. 4428, 51 O.R. (3d) 97 (C.A.). The court considered Rule 53.03 of the Ontario *Rules of Court*, which is almost identical to the Alberta Rule 218.1 regarding expert reports. Ontario Rule 53.03 states:

> "53.03 (1) A party who intends to call an expert witness at trial shall, not less than ten days before the commencement of the trial, **serve on every other party to the action a report**, signed by the expert, setting out his or her name, address and qualifications and **the substance of his or her proposed testimony.**
>
> (2) No expert witness may testify, except with leave of the trial judge, unless subrule (1) has been complied with." [Emphasis added.]

The plaintiffs alleged negligence in the final stages of maternity care and in the delivery of their child who was born profoundly disabled. During trial, in examination in chief of the plaintiff's expert, plaintiff's counsel asked about the relationship between oxygen deprivation and fetal reserve. Plaintiff's counsel then asked about bradycardia (abnormally slow heart rate). Defence counsel objected on the ground that the concept of bradycardia did not appear in the expert's report. Plaintiff's counsel argued that the report dealt with the standard of care in treating an overdue mother and that the questions went to signs of fetal distress some hours before the delivery. The trial judge ruled that plaintiff's counsel could not pursue the bradycardia line of questioning because the expert report made no mention of when fetal distress was determined.

On appeal, the plaintiffs argued that their expert should have been allowed to explain bradycardia, since it is a sign of fetal distress and fetal distress was mentioned in their expert's report. They submitted that the trial judge erred in adopting an unduly narrow construction of Rule 53.03 and the meaning of "the substance of the proposed testimony".

The court quoted from *Thorogood* and made reference to *Iler*. The court then went on to explain the extent to which the expert can expand on his or her testimony:

> "...Further, while testifying, an expert **may explain and amplify** what is in his or her report but **only on matters that are 'latent in' or 'touched on'** by the report. An expert **may not testify about matters that open up a new field** not mentioned in the report. ..." [Emphasis added.] (at para. 38)

Ultimately, the application of the principle is a matter of discretion for the trial judge:

> "...trial judge must be afforded a **certain amount of discretion in applying Rule 53.03** with a view to ensuring that a party is not unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of an expert's report." [Emphasis added.] (at para. 38)

The appeal court found that the trial judge appropriately exercised his discretion in refusing to allow the evidence. The expert's report contained only the conclusion that the appropriate standard of care was to attach a fetal heart rate monitor on admission to indicate fetal distrees at the earliest possible point. The report did not refer to bradycardia, nor did it state the point at which fetal distress was determined, and did not deal with the "reserve capacity" that the fetus might have had.

Furthermore, the expert was qualified to give evidence as to the standard of care and the questions regarding bradycardia related to causation, thus the bradycardia questions were directed to an issue not addressed in the expert's report.

In a related ruling, the trial judge held that a different expert could not expand upon her testimony. The expert's one page report dealt with the presence of meconium as an indication of fetal distress. The plaintiffs tried to admit a more detailed report, too late, devoted to explaining why a placental abruption could not have resulted in severe birth asphyxiation.

The Court of Appeal found that the trial judge was correct in refusing to admit this second report, because the first report did not deal with abruption, thus the second report inappropriately opened up a "new field" not covered in the first report.

The principles set out in the above three Ontario cases were applied by Lee J. in *Edmonton (City) v. Lovat Tunnel Equipment*, 2000 ABQB 205, [2000] A.J. No. 378, 262 A.R. 215. In a complex lawsuit involving the failure of a piece of construction machinery, both plaintiff and defendant experts agreed that the profile of a faulty bearing had excessive clearance. Their opinions differed as to whether this clearance was caused by a manufacturer's defect or service-induced wear.

During examination in chief of the plaintiff's expert, plaintiff's counsel asked for the expert's opinion on something not contained in his report. The expert's report dealt with the potential causes of the extra clearance, but counsel's questions were about the effect of the extra clearance on the displacement of the bearing. Defence counsel objected to the question. Plaintiff's counsel argued that the effect of the excess clearance on the displacement of the bearing was an issue that arose naturally from the materials in the expert reports.

Lee J. found that a discussion as to the effect of the clearance was a separate issue from the cause of the clearance; it was not merely an elaboration of the opinions expressed in the reports.

He concluded that "to admit opinion evidence on a new issue that has not, at the very least, been adverted to in the expert's report would be to allow the mischief which the rules seek to remedy." (at para. 14)

The judge held that the evidence sought to be elicited was opinion evidence concerning a new issue, possibly a new theory of causation. The plaintiff did not provide the defendant with any advance notice of the expert's opinion regarding the effect of excess clearance, rather the issue arose for the first time in direct examination:

> "**This is not a case where an expert has modified his opinion to account for facts which he may have overlooked or misinterpreted** ... Nor can the opinion evidence in question be characterized as an amplification of the opinions expressed by Dr. Hamre in his reports. In the circumstances, I am not prepared to admit into evidence Dr. Hamre's opinion on the effect of the excess clearance." [Emphasis added.] (at para. 21)

In the result, Lee J. upheld defence counsel's objection to the question posed by counsel for the plaintiff.

See also *Wade v. Baxter*, 2001 ABQB 812, [2001] A.J. No. 1471, 302 A.R. 1 (Q.B.) in which Slatter J. also gave the plaintiff's expert permission to expand, in oral testimony, upon the scanty comments contained in his report:

> "...I also permitted Dr. Sendziak **to expand on his admittedly scanty comments on the Plaintiff's prognosis, on the basis that the Defendant would suffer no prejudice**, as Dr. Glasgow would be able to respond to that evidence." [Emphasis added.] (at para. 73)

Even more recently, the Manitoba Court of Appeal in *Knock v. Dumontier (c.o.b. GRD Electric)*, 2006 MBCA 99, [2006] M.J. No. 330, [2006] 11 W.W.R. 148 has weighed in on this issue, also citing *Thorogood* for the basic underlying principle. The plaintiff experienced a fire in her kitchen. She sued the defendant for negligent installation of electrical wiring. The trial judge accepted the theory presented by the plaintiff's expert regarding the cause of the fire – arc tracking from an improperly installed electrical outlet.

The plaintiff's expert realized, by reading the defendant's expert report, that he had misapprehended the layout of the kitchen. He did not revise his report, nor issue a supplementary report. Instead, he spoke to these issues in his testimony at trial.

The defendant argued that the trial judge erred in allowing the plaintiff's expert to give opinion evidence as to the origin of the fire, as it related to facts that were not contained in his report.

Steel J.A., writing for the majority, repeated the general principles that an expert is not to be narrowly confined and limited to the precise contents of his or her report, but has the right to explain and amplify so long as a new area is not pursued, the expert remains within the substance of his report and there is no prejudicial surprise to the other party.

On the specific facts of the case the court found that the substance of the expert's testimony did not change, he just incorporated the new facts into his original analysis:

> "When questioned about the change in the kitchen layout, Gillman **explained and amplified the contents of his report. The substance of his testimony did not change. There was no new explanation, thought process or theory as to the origin and cause of the fire.** Instead, he explained how the existence of the fluorescent light fixture and gable fit into his theory and did not undermine it. **The new evidence was considered in the context of his original conclusion.** On both his direct and cross-examinations, Gillman explained the basis upon which

> he formulated his opinion and explained why the new information did not change his opinion." [Emphasis added.] (at para. 56)

The judge repeated the underlying purpose of the rule: to ensure that a party is not unfairly taken by surprise by an expert on a point that could not have been anticipated by his or her report. In this case, the defendant acknowledged that they were aware that the plaintiff's expert had misapprehended the layout of the kitchen and they intended to cross-examine him on it. As such, the defendants were not taken by surprise.

Finally, the appeal judge reiterated that the ultimate decision as to whether or not the expert's testimony is an expansion or amplification vs. a new theory rests with the trial judge:

> "Lastly, it must be remembered that the decision as to whether a sufficient basis has been laid for the admission of an expert opinion rests in each case **in the discretion of the trial judge.**" [Emphasis added.] (at para. 58)

For a further example of what was deemed to be an expansion or amplification of the evidence, rather than a new field, please see *Saint-Clair v. Spiegel*, [2001] O.J. No. 6094, 31 C.C.L.T. (3d) 119 (S.C.J.) at para. 110-116, a medical malpractice action in relation to the diagnosis of breast cancer, in which the expert did not expressly refer to asymmetry in breast tissue. The expert referred to the distribution of parenchyma in the right breast, parenchyma being breast tissue. The court found that in the circumstances, it would be impossible for the expert to give evidence based on his report without a reference to asymmetry; it would be anticipated by the other side. As such, the expert's evidence could reasonably be characterized as an amplification of his original report.

Responding to the evidence that emerges during the trial and to the points made by other experts

In *Penn West Petroleum Ltd. v. Koch Oil Co.*, [1994] A.J. No. 47, 148 A.R. 196 (Q.B.) Fruman J. considered whether an expert could adjust his testimony based on the facts that were elicited throughout the trial. The plaintiff sued for damages arising from a fire and explosion

which occurred in heavy oil treatment and storage facilities. The plaintiff's expert sat through much of the plaintiff's case and heard evidence regarding the orientation of the gauge board that was different from the assumption he had made in his report. He had also assumed a different opening volume of oil in the middle tank. In his examination in chief at trial, the expert based his evidence on the new oil level reading and adopted the revised orientation of the gauge board.

Following the expert's testimony, defence counsel applied to exclude the evidence based on the reverse orientation of the gauge board, alleging prejudice and applied for a mistrial. Fruman J. denied both applications. The judge found that the expert changed his calculation of the starting volume of oil in the tank, but he did not change his theory as to the cause of the fire. There was no surprise to the defendants since the issue of the orientation of the gauge board was known to the defendants since discovery. Since the defendant's expert was present during most of the plaintiff's case, the judge gave permission for the defence expert to provide oral evidence regarding the reversed orientation of the gauge board as well.

Furthermore, the judge held that the question of the opening volume of oil, the amount of liquid unloaded and the height of the fire tube were all issues of fact to be determined by the court and not issues to be decided by the experts in any event.

This case makes it clear that an expert can adjust his or her testimony based on the facts that are revealed at trial, provided that his or her overall theory is not changed.

Similarly, in *Knock v. Dumontier (c.o.b. GRD Electric), supra*, the Manitoba Court of Appeal permitted the expert to adjust his testimony based on the new evidence regarding the layout of the kitchen (please see discussion above).

Similarly, it would appear that an expert can respond to the testimony of other experts so long as the foundation for the expert's comments are contained in the expert's own report. The general purpose of the Rule must always be considered: discouraging surprise and avoiding prejudice. So long as the expert's commentary is an extension or elaboration of his or her report, the other side cannot state that it was taken by surprise and thereby prejudiced.

Referring to reports and articles not contained in the expert report

The question of whether an expert can refer to reports and articles not contained in his or her expert report appears to be governed more by the laws of evidence than the Rules of Court. Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst discuss the use of authoritative literature in *Sopinka, Lederman & Bryant The Law of Evidence in Canada*, 3rd ed. (Toronto: LexisNexis, 2009) at p. 852, §12.200:

> "**Peculiar to the examination of experts is the utilization of textbooks. In support of any theory, an expert is permitted to refer to authoritative treatises and the like, and any portion of such texts upon which the witness relies is admissible into evidence.** Moreover, it appears that if a written work forms the basis of the expert's opinion, then counsel is allowed to read extracts to the expert and obtain his or her judgment on them. **The written view of the author thereby becomes the opinion of the witness.** If the witness does not adopt the writing as being authoritative and in accord with the witness' own opinion, nothing may be read from the text, for that would be tolerating the admissibility of pure hearsay. Chief Justice Harvey in *R. v. Anderson* (1914), 16 D.L.R. 203 (Alta. S.C.), explained why the opinion of an author not present in court and not acknowledged as authoritative by the witness is inadmissible as substantive evidence:
>
> > As all evidence is given under the sanction of an oath or its equivalent, it is apparent that textbooks or other treatises as such cannot be evidence. The opinion of an eminent author may be, and in the many cases is, as a matter of fact, entitled to more weight than that of the sworn witness, but the fact is that, if his opinion is put in the form of a treatise, there is no opportunity of questioning and ascertaining whether any expression might be subject to any qualification respecting a particular case." [Emphasis added] (at para. 12.200)

The learned authors refer to the judgment of Justice Beck in the same case, which sets out the basis for admissibility of texts as the foundation of the witness' own opinion:

> > "When a medical man or other person professing some science is called as an expert witness, **it is his opinion and his opinion only that can be properly put before the jury.** Just as in the case of a witness called to prove a fact, it is

> proper in direct examination to ask him not merely to state the fact, but also how he came by the knowledge of the fact, so in the case of an expert witness called to give an opinion, he may in direct examination be asked how he came by his opinion. **An expert medical witness may, therefore, upon giving his opinion, state in direct examination that he bases his opinion partly upon his own experience and partly upon the opinions of text-writers who are recognized by the medical profession at large as of authority. I think he may name the text-writers. I think he may add that his opinion and that of the text-writers named accords.** Further, I see no good reason why such an expert witness should not be permitted, while in the box, to refer to such text-books as he chooses, in order, by the aid which they will give him, in addition to his other means of forming an opinion, to enable him to express an opinion; and again, that the witness having expressly adopted as his own the opinion of a text-writer, may himself read the text as expressing his own opinion." [Emphasis added.] (at para. 12.201)

The authors go on to explain how learned treatises may be used in a similar way in cross-examination of an expert, to confront him or her with an authoritative opinion which contradicts the view expressed by the witness on the stand, although the witness can only be confronted with such a work if the expert first recognizes it as authoritative.

In *Privest Properties Ltd. v. The Foundation Co. of Canada Ltd.*, [1995] B.C.J. No. 2001, 128 D.L.R. (4th) 577 (S.C.), varied on other grounds [1997] B.C.J. No. 427, 143 D.L.R. (4th) 635 (C.A.), Drost J. at paras. 289-309 considered whether "learned treatises" used in the cross-examination of an expert could be later admitted for the truth of their contents. The case revolved around liability for the removal of asbestos in a commercial building. In cross-examination of the defendant's expert, plaintiff's counsel relied upon a series of treatises and papers on the subject of asbestos and asbestos-related diseases. The treatises and papers were authored by "experts" who did not testify before the court. After using them for cross-examination, plaintiff's counsel argued that the treatises should be admitted into evidence for the truth of their contents. Counsel took the position that the plaintiffs should be able to rely on the findings and opinions given in those treatises to support their claims.

Drost J. refused to accept the treatises for the truth of their contents. The judge cited the above quote from Sopinka, Lederman & Bryant's *The Law of Evidence in Canada*. The judge concluded that the treatises could be used for examination in chief and cross-examination purposes in the usual way, but could not be admitted for the truth of their contents:

> "...Our rules of evidence contain express provisions governing the admissibility of substantive opinion evidence and those rules should not, except in unique circumstances, be abrogated. Long and complex as this trial might be, learned and authoritative as the authors of the textual materials may be, the circumstances of necessity ... do not exist here, and, in my view, the conventional rules must apply. Accordingly, it is my conclusion that **no textual finding or opinion offered in chief or in cross-examination will be taken as substantive evidence unless an expert witness has accepted it and, in so doing, adopted it as his own.**" [Emphasis added.] (at para. 309)

It remains unclear, however, how these principles of the law of evidence interact with the Alberta Rules of Court regarding providing notice of the "substance of the opinion" of an expert witness. As discussed above, the substance of the opinion includes the facts, the conclusions, and the reasons for reaching those conclusions. The judicial interpretation of the substance of the opinion does not appear to expressly require a statement of the authorities upon which the expert may rely, although such a bibliography is often included in expert reports. Given the evidentiary rules that permit reference to textbooks and other "learned authorities" for the purposes of examination in chief and cross-examination it appears that this may be done, regardless of whether those reports were mentioned in the expert report.

Conclusion

It seems, then, that the general principles can be summarized as follows.

An expert is not to be limited to the precise contents of his or her report: *Iler v. Beaudet*, [1971] O.J. No. 1688, [1971] 3 O.R. 644 (Co. Ct.). An expert is free to explain and amplify his or her report in oral testimony, so long as the basis for the additional commentary is 'latent in' or 'touched on' by the report: *Thorogood v. Bowden*, [1978] O.J. No. 3547, 21 O.R. (2d) 385 (C.A.) at para. 4 or *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham,*

[2000] O.J. No. 4428, 51 O.R. (3d) 97 (C.A.) at para. 38. An expert may not testify about matters that open up a new field: *Marchand, supra* at para. 38 and *Knock v. Dumontier (c.o.b. GRD Electric)*, 2006 MBCA 99, [2006] M.J. No. 330, [2006] 11 W.W.R. 148.

The trial judge has the discretion to determine whether the testimony falls within this Rule. Ultimately, the trial judge must ensure that a party is not unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of the expert's report: *Marchand, supra* at para. 38 and *Knock, supra* at para. 58.

In Alberta, Lee J. applied these principles in *Edmonton (City) v. Lovat Tunnel Equipment*, 2000 ABQB 205, [2000] A.J. No. 378, 262 A.R. 215 to exclude oral testimony on a new issue. The judge held that it was not a case of the expert modifying his opinion to account for facts he may have overlooked or misinterpreted, nor could the evidence be characterized as an amplification of the opinions expressed in the expert reports. It was opinion evidence on a new issue that had not been adverted to in the expert's report. See also *Wade v. Baxter*, 2001 ABQB 812, [2001] A.J. No. 1471, 302 A.R. 1 (Q.B.) at para. 73.

An expert can respond to new evidence within the context of his or her original conclusion: *Knock, supra* at para. 56 and *Penn West Petroleum Ltd. v. Koch Oil Co.*, [1994] A.J. No. 47, 148 A.R. 196 (Q.B.). The expert can adjust his or her testimony based on the facts that are revealed at trial, provided that his or her overall theory is not changed. Similarly, it would appear that an expert can respond to the testimony of other experts so long as the foundation for the expert's comments are contained in the expert's own report.

The question of whether an expert can refer to reports and articles not contained in his or her expert report appears to be governed more by the laws of evidence than the Rules of Court. An expert is permitted to refer to authoritative treatises. Any portion of such texts upon which the witness relies is admissible into evidence. If the written work forms the basis of the expert's opinion, then counsel is allowed to read extracts to the expert. The written view of the author thereby becomes the opinion of the witness: Alan W. Bryant, Sidney N. Lederman & Michelle

K. Fuerst, *Sopinka, Lederman & Bryant The Law of Evidence in Canada*, 3rd ed. (Toronto: LexisNexis, 2009) at p. 852, §12.200.

It remains unclear, however, how these principles of the law of evidence interact with the Alberta Rules of Court. The judicial interpretation of the "substance of the opinion" does not appear to expressly require a statement of the authorities upon which the expert may rely, although such a bibliography is often included in expert reports. Given the evidentiary rules that permit reference to textbooks and other "learned authorities" for the purposes of examination in chief and cross-examination, it appears that it may be possible to introduce these reports even if they were not mentioned in the expert report. Yet the principles of avoiding surprise and prejudice remain, thus, it can be presumed that the authorities must be directly relevant to the opinion espoused by the expert in his report.

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[1] With thanks to Nicky Brink of Bottom Line Research for her original research and writing behind this article.