When is an Expert Report Provided "Late"?

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Overview

There are no timelines set out in the Alberta *Rules of Court* as to when expert reports must be exchanged. Rule 5.35 establishes a process for the sequential exchange of reports. Prior to their repeal, the former Alberta *Rules of Court* did have a timeline on expert reports; the process set out a simultaneous exchange of expert reports, and this process did have a deadline (120 days before the date the trial was to begin, the parties must have exchanged expert reports). However, as eloquently stated by Rooke J (as he then was) in ***Sherstone v. Westroc Industries Ltd.***, 2000 ABQB 787, this process was the cause of a lot of jurisprudence. He stated:

> As intimated above, I have for a long time been of the view that a sequential filing is the fairest procedure, but have had no success in convincing the Rules of Court Committee of that logic. Thus, we remain with a simultaneous rule, and the problems it causes for the parties and the Court. Under the simultaneous filing regime, each party must clearly comprehend the issues on which experts might opine, and guess at the strategy of one's opponent. If that guess is wrong, one is limited to rebuttal. And, if in the course of rebuttal, the expert goes beyond what is truly rebuttal, as in this case, the opposite party has no automatic right to respond. It is left with having to either apply to have the court deny the non-rebuttal part of the responding opinion, or to apply for the opportunity and time to provide a rebuttal to that part. The result, if the former is granted, is to limit fairness in the presentation of expert opinions. The result, if the latter is granted, is to go to a form of sequential filing, which the rule contradicts in the first place. Moreover, the necessary delay to accomplish this may delay the trial (para 16).

The new 2010 *Rules of Court* established the sequential exchange of expert reports that Rooke J was advocating for.

As stated by Eamon J in ***Signalta Resources Limited v. Canadian Natural Resources Limited***, 2018 ABQB 904 at para 9, the purpose of the advance notice of expert opinions through the sequential exchange of expert reports is:

> (a) preventing disruption of the trial through adjournments that are often necessary when litigants are taken by surprise;
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> (b) saving expense by dispensing with the need to have experts testify when there is really no dispute;
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> (c) avoiding late amendment of pleadings;
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> (d) preparing on the basis of knowledge of the case to be met;
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> (e) settling issues within the trial;

(f) shortening trials; and

(g) enabling the experts to prepare their evidence more thoroughly and helpfully.

With the removal of the time frame from the rules, the parties are left to determine their own pace of the litigation, with the only guidance being that the plaintiff, generally carrying the primary onus of proof (rule 5.35(2)(a)), should be the first to serve an expert report. Otherwise the only time constraint relating to the exchange of expert reports is the requirement under rule 8.4(3) that reports be exchanged before a trial can be scheduled, which is incorporated into Form 37 of the Alberta Rules of Court (per K.G. Nielsen J ***in Drapaka v. Patel***, 2013 ABQB 247 at para 21).

As K.G. Nielsen J further notes in ***Drapaka***:

> **55** Although the timelines from Former Rule 218.1 are not contained in Rule 5.35, the purpose of Rule 5.35 remains the same. It is designed to prevent one party from surprising the other with expert testimony. The emphasis is on a fair and workable process for disclosure: ***Stewart Estate v. TAQA North Ltd.***, 2012 ABQB 87, [2012] AJ No 188 at para 19. It requires parties to give notice of their expert evidence and to waive litigation privilege in time to allow the other side to know the case he or she has to meet and to allow a reasonable chance to respond. As stated by Slatter J., as he then was, "It allows the experts to focus on what is truly in dispute. The rule was never intended to be a chess game between counsel": ***Wade v. Baxter***, 2001 ABQB 812, 302 AR 1 at para 52.

<u>Relevant Rules of Court</u>

The relevant rules of the Alberta *Rules of Court*, AR 124/2010 with respect to expert reports are rules 5.34; 5.35; 5.36; and 5.38:

> **Service of expert's report**
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> 5.34 An expert's report must
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> (a) be in Form 25 and contain the information required by the form, or any modification agreed on by the parties, and
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> (b) be served in the sequence required by rule 5.35.
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> **Sequence of exchange of experts' reports**
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> 5.35(1) If a party intends to use the evidence of an expert at trial, the expert's report must be served in the sequence described in subrule (2).
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> (2) Unless the parties otherwise agree or the Court otherwise orders, experts' reports on which a party intends to rely must be served in the following sequence:

(a) the party who bears the primary onus of proof must serve on each of the other parties the report of that party's expert;

(b) the other party or parties must serve their expert's rebuttal report, if any, and may include in the report issues not raised in the initial expert's report;

(c) the party who served the initial expert's report may serve a surrebuttal expert's report that responds only to the new issues raised in the rebuttal report.

Objection to expert's report

5.36(1) A party who receives an expert's report must notify the party serving the report of

(a) any objection to the admissibility of the expert's report that the party receiving the report intends to raise at trial, and

(b) the reasons for the objection.

(2) No objection to the admissibility of an expert's report is permitted at trial unless

(a) reasonable notice of the objection was given to the other party, or

(b) the Court permits the objection to be made.

. . .

Continuing obligation on expert

5.38 If, after an expert's report has been provided by one party to another, the expert changes his or her opinion on a matter in the report, the change of opinion must be

(a) disclosed by the expert in writing, and

(b) immediately served on each of the other parties.

In the former Alberta *Rules of Court,* AR 390/68, rule 218.1 expressly speaks to the time limit for serving expert reports:

218.1 Notice to adduce expert evidence

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 the expert's report, signed by the expert, on which the party intends to rely.

218.1(2) The party serving the expert's report may, at the same time, also serve notice of intention to have the report entered as evidence without the necessity of calling the expert as a witness.

218.1(3) The expert's report shall be entered as evidence at the trial unless, within 60 days after service of the notice under subrule (2) or such further time as the Court allows, the other party serves a statement

(a) setting out those parts of the report which that party will not agree may be entered as evidence in writing in this way, and

(b) giving reasons why that party cannot agree.

218.1(4) Agreeing to have the expert's report entered as evidence without calling the expert as a witness is not, by itself, an admission of the truth or correctness of the evidence submitted.

Jurisprudence

The interplay between the former rule 218.1 and new rule 5.35 was discussed by Eamon J in ***Signalta Resources Limited v. Canadian Natural Resources Limited***, 2018 ABQB 904. In this case, both sides delivered primary, rebuttal, and surrebuttal expert reports; the defendant took issue with two of the plaintiff's surrebuttal reports. The plaintiff brought an application for directions resolving the defendant's objections to the reports. Eamon J considered rule 5.35 at paras 8-10:

> This rule was rewritten from Rule 218.1 of the amended 1968 Rules of Court. Much case law preceding the 2010 Rules was occupied with the issue whether the 1968 Rules required sequential or simultaneous delivery of expert reports, and whether a rebuttal report could merely critique a primary report or could advance alternative theories. Many cases adopted the sequential approach to delivering expert reports: a rebuttal report could advance alternative theories, and therefore, surrebuttal reports could be allowed in the Court's discretion.
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> R 5.35 arose from the Alberta Law Reform Institute's recommendation that expert reports be exchanged sequentially. In the Alberta Law Reform Institute Consultation Memorandum 12.3, a Committee of the Institute identified at para 7 the following purposes of advance notice of expert opinions:
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> (a) prevent disruption of the trial through adjournments that are often necessary when litigants are taken by surprise;
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> (b) saving expense by dispensing with the need to have experts testify when there is really no dispute;
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> [sic] avoiding late amendment of pleadings;
>
> (c) preparing on the basis of knowledge of the case to be met;
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> (d) settling issues within the trial;
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> (e) shortening trials; and

(f) enabling the experts to prepare their evidence more thoroughly and helpfully.

The Committee decided to recommend the sequential method of exchanging pre-trial expert reports. Consequently, as the Committee recognized, surrebuttal reports are necessary:

> [20] With the sequential method, it is appropriate for rebuttal reports to raise new issues not raised in the primary report in addition to addressing matters arising from the primary report. It would also be appropriate for the rules to provide for surrebuttal to respond only to new matters arising from the rebuttal report.

Eamon J held that a surrebuttal report is not a means for a party to split disclosure of its case or to merely confirm or reinforce earlier evidence in its primary expert reports. Rule 5.35 is meant to avoid surprise and encourage parties to ensure that their expert has provided adequate disclosure of the substance of his or her opinion in its primary report:

> **The purpose of the expert report process is to encourage meaningful pre-trial disclosure and help focus the issues.** The Rule should not be applied so rigidly as to force a party tendering a primary report to speculate about what a rebuttal report might contain, or advance excessive commentary and information simply to avoid arguments that it is case splitting. There may be a fine line between matters which are merely confirmatory and those which genuinely arise from some alternative theory or new dimension raised in the opposition's rebuttal report. It will often be helpful to inquire whether the point ought to have been anticipated by the party tendering the primary report and whether the surrebuttal is carefully focused on providing only new evidence [emphasis added] (para 15).

On the facts, Eamon J was satisfied that the plaintiff was not case splitting, but rather its expert was genuinely and reasonable responding to new issues raised by the defendant's expert. In the result, the objections were dismissed, and the application was granted on its terms.

A recent Alberta case wherein the courts considered the issues of late submission of expert reports is ***Brenenstuhl v. Caldwell***, 2019 ABQB 210. The plaintiff objected to the admission of two opinions sought to be given by two of the defendant's expert witnesses. One of the witnesses proposed a new theory of causation that was not contained in either his initial expert report or his rebuttal report; the other was to give evidence regarding the turn-around time in Alberta in the year 2000 in relation to a renal biopsy report ordered by a nephrologist. Five days before the trial, the defendant's counsel sent an email to plaintiff's counsel advising that a new medical theory might be put forth. Shelley J considered rule 5.38 and sided with the plaintiff:

> Having had twelve years to think about the issue of causation, and having provided two written opinions that he could not determine a cause for the asystolic arrest, Dr. Williams's development of a new theory on the eve of trial required more in the way of communication than the vague email sent by Mr. Hembroff on January 30th. At a minimum (and indeed it would have been a minimum), the January 30th email ought to have advised that the reason Mr. Hembroff was

> suggesting that Dr. Overgaard consider this medical condition was that Dr. Williams was going to advance this as a new theory of causation, contrary to his prior written opinions (para 12).

Shelley J held that it would be prejudicial to the plaintiff to admit the new evidence, and it would not be a proper exercise of the court's discretion to allow the defendant to put forth the new theory. With respect to the other expert, Shelley J held that the timing of the biopsy reports was very much a live issue and the plaintiffs experts had provided their opinions on it; it would not prejudice the plaintiffs to allow the expert's opinion on the matter to be admitted.

While this case does not expressly state a time limit for admissibility of an expert report, the court does state that five days prior to trial is insufficient notice to allow the admission of an expert report.

In ***Steward Estate v. TAQA North Ltd.***, 2012 ABQB 87 the plaintiffs delivered primary expert reports followed by the defendants delivering rebuttal reports in accordance with a litigation plan. The plaintiffs called only one of their experts at trial, then argued that the defendants could not call evidence to rebut experts they did not call. The defendants applied for admission of their experts' evidence. Romaine J held that the plaintiffs' objection to the admission of the evidence must fail:

> **The first reason why the plaintiffs' objection must fail is Rule 5.36, which requires the party receiving an expert report to provide reasonable notice to the other party of any objection it may have to the admissibility of the report at trial.** Notice the day before trial with respect to the reports of Mr. Schorning and Mr. Freeborn and almost three weeks into trial in the case of the report of Mr. Seth is not reasonable notice of objection, particularly given that the state of affairs that gave rise to the objection was created by the plaintiffs [emphasis added] (para 9).

Romaine J discussed rule 5.35 dealing with expert disclosure:

> It is clear from the language of new Rule 5.35 that the sequential approach to expert disclosure has won the day. Rule 5.35 describes the sequence of service of expert reports that are intended for use at trial. It is essentially a service rule, and it was followed by the parties to this litigation. It is true that Rule 5.35(2)(a) provides that the party who bears the primary onus of proof must serve that party's report on the other parties first in sequence, but the questions of which party bears what onus of proof, and on what issue, and the differences between onus of proof and evidentiary onus relating to a particular issue are not always incontrovertible or clear (para 12).

Romaine J held that even if the defendants were in error for failing to file simultaneous "primary" reports, the evidence was relevant to trial, and excluding it for a technical failure to comply with an order of service procedural rule would be a heavy price for the defendants to pay:

> I do not agree that the reports cannot stand alone. While they respond in part to issues raised in opinions given by the plaintiffs' expert witnesses, they present additional information and new and competing theories. While certain parts of the reports would have to be disregarded if the plaintiffs' expert reports were not in evidence, they are in part original reports on the issues in

question in that they reflect the independent analysis of the expert. I did not find it necessary to read the plaintiffs' expert reports to evaluate this submission.

In summary, the emphasis in these new rules is on a fair and workable process for disclosure. The comments of Slatter, J. at paragraph 52 of *Wade* [***Wade v. Baxter*** (2001), 302 AR 1] with respect to the purpose of the old rules on expert disclosure remain valid with respect to the new rules:

> **The purpose of Rule 218.1 is obvious. It is designed to avoid one party surprising the other with expert testimony...The rule is designed to require parties to give notice of their expert evidence (i.e., waive the privilege) in time to allow the other side a reasonable chance to respond, and to know the case he or she has to meet. This avoids unnecessary adjournments, and leads to more just results. It allows the experts to focus on what is truly in dispute. The rule was never intended to be a chess game between counsel....** [emphasis added] (paras 18-19).

Romaine J held that the plaintiffs could not have been surprised by the admission of the evidence. However, the plaintiffs' application to reopen their case to respond to the expert evidence was granted.

Forms 37 and 39 of the Alberta *Rules of Court*

A further consideration is introduced by Form 39 of the Alberta *Rules of Court* - the "Confirmation of Trial Date" form. Within Form 39, the parties confirm that they are ready to proceed to trial: all witnesses have been finalized and agreed to by both parties, and no more Questionings or interlocutory applications can take place. In Form 37, the "Request for a Trial Date", which must be filed prior to Form 39, the parties must confirm at part 5 (b) that all expert reports have been exchanged. Given that Form 37 must be filed prior to Form 39, it may be considered by the court that expert reports are "late" if they are served after confirmation in Form 37 that all expert reports had been exchanged.

In ***Global First Ltd. v. 1237007 Alberta Ltd.***, 2014 ABQB 288 the parties were required to file a Form 39 confirming their readiness to go to trial by February 20, 2014. On February 17, counsel for the defendant wrote counsel for the plaintiff indicating that one of their expert reports was still not complete, but he asked the plaintiffs to file the Form 39 regardless. Counsel for the plaintiff agreed. On April 28, the defendant sent over the completed expert report (trial was set to begin on May 20). Counsel for the plaintiff responded, indicating that the report had been expected two months earlier and stated they would not have enough time to prepare a rebuttal report; they applied for an adjournment of the trial date. Burrows J held:

> Each of the lawyers here blames the other. Counsel for the Plaintiffs says that counsel for the Defendants failed to provide the expert report in the few weeks promised on February 17. Counsel for the Defendants says that counsel for the Plaintiffs knew that an expert report was coming and did nothing until it was received on April 28 to suggest that the delay was a problem. Counsel for the Defendants submits that the Plaintiffs should be forced to go ahead with the trial.
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> In my view this trial must be adjourned. Justice requires that the Plaintiffs have the chance to marshal evidence to respond to the expert report they have received. I accept that the 10 days remaining before trial are not sufficient for that purpose. The Defendants will suffer little prejudice as a result of the delay (paras 13-14).

In the result, the trial was adjourned. While no specific deadline is mentioned, the court held that less than one month before trial was too late to serve a party with an expert report.

In his decision, Burrows J commented on how frustrating the situation was:

> Normally it is reasonable for court officers to have confidence that lawyers who make such representations will live up to them. Normally it is reasonable for court officers to schedule scarce judicial resources in reliance on lawyers' representations. Normally lawyers do not make such commitments unless they are sure they can meet them. Normally having made such a commitment lawyers will move heaven and earth to ensure that they are met (para 12).

In ***Monument Machine Shop Ltd. v. Calibre Drilling Ltd.***, 2018 ABQB 857 the defendant served an expert report in September 2015 in relation to the counterclaim; in December 2015 the defendant by counterclaim served a rebuttal report; and in February 2016 the defendant filed Form 37 requesting a trial date and certifying that all expert reports had been exchanged. The matter was set down for trial for two weeks beginning in September 2018. In June 2018, less than 11 weeks prior to the trial, the defendant served a surrebuttal expert report. The defendant by counterclaim, with the support of the plaintiff, brought an application to adjourn the trial. Dario J held:

> Second, it has taken Calibre's expert two and a half years to provide a surrebuttal report. While I have some difficulties with the reasons provided by Stress Engineering's lead engineer for why he is requesting additional time, the lateness of this report in all the circumstances supports a finding that the report should not be allowed. The lateness of the report also negates some of the purposes of the timelines set out in the *Rules* which include to discourage surprise and encourage settlement: William A. Stevenson & J.E. Côté, *Civil Procedure Encyclopedia* (Edmonton, AB: Juriliber, 2003) at page 46-27. In denying the admission of the report, I note that:
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> (a) if there are any new opinions or calculations in the report, the other parties are entitled to an opportunity to fully review these new positions; and
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> (b) if this report merely confirms the same opinions he had in the initial report, this can be stated at trial and may be subject to cross-examination while the witness is on the stand (para 20).

Dario J further held that to allow a late surrebuttal expert report (after the filing of a Form 39) may negate some of the intent behind the timelines set out in the *Rules of Court*, including to discourage surprise and encourage settlement. Rather than grant a further adjournment to allow the other party to properly respond to the expert report, its use was not permitted.

Dario J held that in light of the lateness of the report, the statements made to the court regarding trial readiness, and other potential issues identified with the report, the otherwise permissible comments of the expert could still be expressed to the court at trial: excluding the report would not unfairly limit the expert.

> I agree that Calibre's expert can make some of the arguments it set out in the surrebuttal report while providing his evidence during cross-examination, and the fact that surrebuttal report cannot be entered at trial does not limit his ability to provide certain of the statements in response, including for example, clarifications around his methodology in response to comments in the rebuttal expert report. In each instance, the other parties are at liberty to raise their objections to any such comments from the expert at trial and the court will address them at that time (para 14).

Thus it seems that, while the rules no longer prescribe filing dates for expert reports, an expert report can, in the circumstances, be found by the judge to be filed "late", and remedies can be invoked such as an adjournment of the trial to allow the other side to respond to the expert report, a striking of the report from consideration at trial, or leave granted to reopen the case to address the expert evidence.

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