

## AN UPDATE ON THE ALBERTA COURTS' APPROACH TO SURREBUTTAL REPORTS

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In 2004 Walter Kubitz and Barb Cotton reviewed the admissibility and scope of surrebuttal reports in this magazine<sup>2</sup> and concluded that the issue had not as yet been resolved by the Alberta courts. With the passage of time the approach of the courts seems clearer, and thus the above authors revisit the issue.

Time has established that the leading authority on the issue of the timing of production of expert reports generally, as well as on the issue of the scope of the rebuttal, is Justice Slatter's decision of *Wade v. Baxter*, [2001] A.J. No. 1471, 2001 ABQB 812, [2002] 3 W.W.R. 133, 98 Alta. L.R. (3d) 230, 302 A.R. 1. There is earlier contrary authority, notably Justice Rooke's decision of *Sherstone v. Westroc Industries Ltd.*, [2000] A.J. No. 926, 2000 ABQB 787, [2000] 11 W.W.R. 726, 84 Alta. L.R. (3d) 375, 269 A.R. 278, 8 C.P.C. (5th) 261. However, later decisions have preferred to adopt Justice Slatter's decision as authoritative.

Having regard to the issue of adjournment, it seems that the Court would likely not grant this relief unless it was proven that the opposing party truly needed more time to address the matters raised in the surrebuttal (*Higdon (Estate) v. Lawrence*, [2007] A.J. No. 79, 2007 ABQB 40, 406 A.R. 55, 45 C.C.L.I. (4th) 62, 36 C.P.C. (6th) 177).

In any consideration of Rule 218, one must keep in mind that the objective is to ensure that the Court has all of the evidence it requires:

Rule 218.1 of course gives the Court authority to grant leave to call a witness late. In our view, leave should be granted in a case where late

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<sup>1</sup> With thanks to Virginia Palsgrove of Bottom Line Research for her background research on this article.

<sup>2</sup> Walter Kubitz and Barbara E. Cotton, "Thorny Issues Regarding the Admissibility and Scope of Surrebuttal Reports" (2004), 71 *The Barrister* 11

notice remains adequate notice in terms of preparation. Wherever possible it is best that the trier of fact hear all relevant evidence. But that ideal must be tempered by the recognition that we must have a workable system. [*Lenza v. AMA Insurance*, [1990] A.J. No. 503, (1988), 42 C.P.C. (2d) 32, (1988), 74 Alta. L.R. (2d) 218 (Alta. C.A.) per Kerans J.A.]

However, trial by expert ambush is an evil to be avoided. Therefore the Rule should be applied liberally to achieve its goals:

11 The mischief was that before Rule 218.1 was adopted trials often became trial by expert ambush. A surprise expert witness, or an unanticipated position put forward by an expert witness at trial, could devastate the adversary, who might be unable to produce expert evidence to the contrary without applying for an adjournment. The trial judge, fearful of the chaos that can be produced in the administration of judicial assignments by the fragmentation of trials that could result from granting an adjournment in a number of cases, might reasonably refuse the adjournment. The adversary system was carried to its extreme in such a regime. It was commonly felt that the result could often be to drive the judge to arrive at his findings of fact on the basis of one-sided evidence. If the party caught by surprise found that judgment was given against him or her on the basis of that surprise expert evidence, to which his or her counsel had not had an opportunity to respond in an informed way, that party might well feel that the system had worked an injustice against him or her. [*Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*, [1994] A.J. No. 550, [1994] 9 W.W.R. 413, 21 Alta. L.R. (3d) 389, 159 A.R. 173, 28 C.P.C. (3d) 362 per Justice McDonald.]

In *Pocklington*, McDonald J. took a more flexible and purposive approach to the issue of whether expert reports should be produced simultaneously or sequentially in response to one another. He felt it was in the discretion of the Court to deal with the matter, or could be left to agreement between counsel.

36 However, it does not follow that a simultaneous, mutual exchange of reports should be ordered in the normal course of events as being the fair way. If the parties do not agree that that is the way, then whether the court should make an order requiring a simultaneous, mutual exchange of reports should remain in the discretion of the court. That discretion should be exercised in the light of the mischief which Rule 218.1 was intended to remedy, and the four purposes of Rule 218.1 stated in the *Commonwealth Construction* case, supra. [*Commonwealth Construction Company Ltd. v. Syncrude Canada Ltd.* (1985), 40 A.L.R. (2d) 89]

In *Sherstone v. Westroc Industries Ltd.*, Justice Rooke took the approach that expert reports must be filed simultaneously, and that a subsequent expert opinion may only be filed in direct response to an opinion advanced in the other party's expert report. It was clear, however, that Rooke J. did not feel that this process was as sensible as a sequential exchange of opinions framed in reply to prior reports. Nonetheless, Rooke J. was of the view that the Rules of Court were clear in their requirement for a simultaneous exchange of primary opinions rather than a sequential one. This approach would disallow rebuttals of any sort that do not directly address the opinions of the opposing party or even those which should have been anticipated in an earlier opinion:

25 The end result is, again absent agreement or a timely case management order in advance, that Alberta is left with a simultaneous system. The Bar and Bench must realize this and govern themselves accordingly. As McDonald, J. stated (at para. 17), "if one party to a lawsuit is not willing to follow that course of practice [agreed sequential filing], it is the right of that party to insist on the applicable rules being followed". The applicable rule to be followed, therefore, under this system, is that each party who wishes to provide opinion evidence on an issue, must, at the 120 day limit, file the expert's opinion that is expected to be required to prove its case or refute the case of the party opposite. Thereafter, the opposite party may file rebuttal opinions to those, but only as to rebut the other's opinion, not to provide a primary opinion, for which the time has passed.

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30 The bottom line in all of this is, as McDonald J. said at para 27 of *Pocklington*: "The rule should be interpreted so as to promote pre-trial disclosure, not to frustrate it." As the procedure adopted by the Defendant in placing primary opinions in a rebuttal report would frustrate the disclosure, I ruled that the Defendant's expert evidence in rebuttal be limited to what was truly rebuttal of the Plaintiff's primary opinions.

As to the scope of the rebuttal contemplated by the *Sherstone* and *Pocklington* cases, Justice Rooke noted as follows in *Sherstone*:

26 McDonald, J., at para. 21, in addressing a sequential filing [in *Pocklington, supra*] (he called it "serial procedure") stated:

My opinion is that the scope of "rebuttal" would permit (although not require) the defendant's expert to assert his or her opinion that a different theory of appraisal is valid and appropriate, even if the plaintiff's expert has not addressed that theory at all.

While that is quite appropriate, in my view, for an agreed or case management ordered sequential filing, it is not, however, consistent with a simultaneous filing. Rather, I am of the view that if the party wishes to advance a particular theory, in the absence of agreement or a case management order for sequential filing, it must opine as to that theory in a primary report. Otherwise, the opposite party has no basis to reply to that theory. To provide an example in this case, one of the issues was whether the deceased committed suicide as an intentional act, or, being depressed and taking intoxicating drugs and alcohol, merely took too much by accident, or whether there is some other explanation for his death. Neither party needed to wait on the other to opine on the applicable theory, and to do so in the guise of rebuttal, as the Defendant did here, was, in my view, inconsistent with the simultaneous filing rule.

27 However, this does not mean that a rebuttal report can only be filed if a primary report has also been filed on the same subject, or that the rebuttal report must be tied word for word to the primary opinion to which it responds. It must be, however, as the dictionary definitions state, limited to refuting the prior opinion and providing background and reasoning so as to refute; it should not provide alternative theories. At para. 31 of *Pocklington*, McDonald J. stated: "[R]ebuttal is not limited to a narrow attack on the alleged defects of the theory of the expert, but may consist of the rebutting expert's own theory". If he were talking of sequential filing (addressed by him in para. 21 above and para. 30), then I agree. However, if he were addressing simultaneous filing, I, with respect, disagree, because it does not allow the first expert to file a rebuttal opinion to the second expert's "own theory". . . .

Justice Slatter, in the case of *Wade v. Baxter*, took a different approach, preferring the sequential delivery of expert opinions with the initial filing by the party having the onus of proof. Justice Slatter specifically contemplated that in some cases, surrebuttal opinions would be necessary:

69 It follows that I accept *Pocklington Foods'* conclusion that a rebuttal report is not confined to merely commenting on the primary reports. A rebuttal report can fairly comment on the theories of the primary report, and provide competing theories to explain the phenomena

in issue. It is never very convincing or helpful for an expert to say "I disagree with that theory, but I have no competing theory to offer". This is particularly so where the expert takes a confession and avoidance approach, as happened when Dr. Glasgow admitted that the Plaintiff had a serious knee injury, but suggested a competing treatment that might alleviate her symptoms.

**70 Of course, the sequential approach to expert disclosure does require a more liberal approach to surrebuttal evidence. In some cases the plaintiff should be permitted to file a surrebuttal report, and in all cases the plaintiff should be encouraged to disclose in advance what the surrebuttal evidence will consist of.** In other cases it will be sufficient to permit the primary expert to comment on the rebuttal report during examination-in-chief. That is essentially what happened here when Dr. Sendziak was permitted to comment on the knee replacement option.

71 To summarize, as a practical matter one party should generally file their expert reports first. Generally it is the party who bears the burden of proof on the issue. The other party then files a rebuttal report. There is nothing wrong with that report raising new theories to explain the phenomenon under discussion. The concept of a "rebuttal" report should not be so narrowly construed that the rebutting expert must accept the way the original expert has defined the question. Even if a rebuttal report raises some new information, the other party has 60 days to react. Given that by definition all parties have experts retained and briefed, it will usually be possible for the primary expert to comment on the new dimensions to the issue. At any time an adjournment is available to a party who is truly surprised, and costs are always a possible remedy as well. There will be occasions when the rebuttal report really does venture into whole new areas of discussion and explanation. In those cases they should be treated as late original reports. However, where a medical practitioner simply offers an alternative method of treatment of a known injury, that in my view does not mean it is no longer a rebuttal report. (Emphasis added.)

Justice Slatter took the same approach to the scope of rebuttal in *Envirodrive Inc. v. 836442 Alberta Ltd.*, [2005] A.J. No. 747, 2005 ABQB 446, 7 B.L.R. (4th) 61:

137 The Defendants also objected to the Nichols Report on the grounds that it went beyond being a true rebuttal report. Both the Webster and the Nichols Reports address the same issue: the commercial reasonableness of the License. That is sufficient to make the latter a rebuttal report of the former: *Wade v. Baxter*, 2001 ABQB 812, 98 Alta. L.R. (3d) 230 at para. 69. The rebuttal expert does not have to use the same assumptions and

methods as the initial expert, as long as the essential issue addressed is the same.

In *Higdon (Estate) v. Lawrence*, [2007] A.J. No. 79, 2007 ABQB 40, 406 A.R. 55, 45 C.C.L.I. (4th) 62, 36 C.P.C. (6th) 177, a personal injury case, counsel for the plaintiffs served “updates” of expert economic reports prepared several years previously. The reports indicated that the defendant’s exposure to liability had increased significantly. The reports were served in the week that the trial was scheduled. The defendants sought an adjournment, which was denied. The mere fact of the delivery so close to trial did not automatically entitle the opposing party a right to an adjournment of the trial. Justice Lee, after considering the *Wade* case and other law on adjournments for the purpose of review of new expert reports, concluded that an adjournment was not necessary. Any issues arising from the new reports could be dealt with in written submissions after trial and by the defendants and their experts during trial.

26 The practice of updating economic reports should be discouraged if the result is manifestly late Rule 218.1 statements. On the other hand, if mere updating is the issue, a Court should not rule late reports inadmissible, and would rarely grant adjournments on account of them.

27 While the new reports are detailed, my conclusion is that both of the 2007 reports are merely updates, and should not be considered late Rule 218.1 statements.

28 It is my opinion that the Defendant could have anticipated the economic scenarios presented in the January 2007 reports on the basis of the August 2002 and 2004 reports. It is my conclusion that the January 2007 reports merely contain different calculations and rates, but are fundamentally still based on the same general analysis. The fact that the 2007 reports come to higher numbers, in some cases significantly higher number is merely incidental, or simply another approach to what I would describe as general number crunching.

It would seem that *Wade* has been accepted as authoritative by our Courts. In *Hopper v. Hopper*, [2005] A.J. No. 1825, 2005 ABQB 985, a party failed to produce medical notes underlying a medical report despite numerous orders to the contrary. Parts of the medical evidence were not produced until after the trial had commenced. The opposing party

objected to the receipt of the report as evidence. The Court accepted it, and in Justice McMahon's reasons are clear acceptance of the *Wade* case:

33 These are serious objections and in other circumstances may justify excluding the evidence. Here, however, I conclude that there is not sufficient prejudice arising from this non-compliance and late compliance to warrant the exclusion of the two reports and Ms. Ruddy's testimony. Where reasonable, a Court should strive to hear all relevant evidence. See *Wade v. Baxter*, [2001] A.J. No. 1471, 2001 ABQB 812 and cases there referred to.

The *Wade* case was also cited with approval by Justice Clark in *Jeerh v. Yorkton Securities Inc.*, [2004] A.J. No. 1514, 2004 ABQB 959, 362 A.R. 1, 15 C.P.C. (6th) 197, leave to appeal refused [2005] A.J. No. 146, 2005 ABCA 64, 49 Alta. L.R. (4th) 292, 363 A.R. 333, 15 C.P.C. (6th) 202, while dealing with another aspect of expert reports; and by Justice Veit in *Pryde v. Borkent*, [2004] A.J. No. 815, 2004 ABQB 471. [We note this latter case advocates adjournment in the case of late delivery of expert reports if necessary]. Watson J. also cited *Wade* with approval in *Raywalt Construction Co. v. Bencic*, [2005] A.J. No. 1811, 2005 ABQB 989, [2006] 8 W.W.R. 440, 58 Alta. L.R. (4th) 266, 386 A.R. 230 @ para. 76. Justice Parks adopted *Wade* in *Signalta Resources Ltd. v. Dominion Exploration Canada Ltd.*, [2007] A.J. No. 1203, 2007 ABQB 636 [which dealt with, *inter alia*, improper expert evidence that was not true rebuttal evidence but a matter of primary evidence]. Slatter J.'s interpretation of the underlying purpose of Rule 218.1 in *Wade* has been recently applied in *Robinson v. Fiesta Hotel Group Resorts*, [2008] A.J. No. 817, 2008 ABQB 457.

*Sherstone* has not enjoyed the same deference received by Justice Slater's decision of *Wade*. Apart from Justice Slatter's questioning reference to it in *Wade*, *Sherstone* is referred to in only 2 cases, both of which defer to *Wade* [*Pryde & Ibrahim*, both referred to above].

Thus it would seem that the matter is now resolved, and the approach in *Wade* regarding surrebuttal reports is the approach to be taken by the Alberta courts.

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