SUPREME COURT OF NOVA SCOTIA
Citation: *Lehan v. Awad Estate*, 2026 NSSC 5

Date: 20260107
Docket: *Hfx*, No. 495722
Registry: Halifax

Between:

Claire Lehan

Plaintiff

v.

The Estate of Mahmoud Abdul Awad

Defendant

Decision

Judge: The Honourable Justice John A. Keith

Heard: December 19, 2025

Counsel: Charles J. Ford, for the Plaintiff
Christine Nault, for the Defendant

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BY THE COURT:

INTRODUCTION AND BRIEF CONCLUSION

[1] The following chronology regarding the filing of certain expert reports and related pre-trial milestones quickly distills the basic material facts for the purposes of this motion:

1. January 30, 2024: Defendant filed an expert report by Dr. David King (Neurologist) dated January 18, 2024.
2. February 2, 2024: Date Assignment Conference. The action was set for a ten-day trial beginning February 17, 2025. The Finish Date was November 3, 2025.
3. April 28, 2025: Plaintiff filed an expert report by Dr. Sarah Mitchell (Neurologist) dated September 17, 2019 with an addendum dated December 11, 2019.
4. June 3, 2025: All independent expert reports to be filed (six months prior to the Finish Date in accordance with Rule 55.03(1)). Neither party sought leave to change the Finish Date.
5. August 27, 2025: Defendant provided Plaintiff with an unfiled copy of a supplemental report from Dr. King. It was erroneously dated July 23, 2024. The supplemental report was filed more than three months after the deadline under Rule 55.03(1) (June 3, 2025) and, as well, less than three months prior to the Finish Date of November 3, 2025. As will be discussed in greater detail below, this three-month time frame is important as other parties have three months under the Civil Procedure Rules to file rebuttal reports. Defendant did not seek leave to file this report. However, it was agreed that that Dr. King's supplemental report considered new and material information that was only disclosed after Dr. King's original report was served and filed. It was further agreed that this new information prompted Dr. King to reconsider and alter his original opinions.
6. September 10, 2025: Defendant filed Dr. King's supplemental report. Again, it was erroneously dated July 23, 2024.
7. November 3, 2025: Finish Date.

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As of the Finish Date, neither party had communicated whether they admitted the qualifications of the other party's experts (Dr. King or Dr. Mitchell, as the case may be). However, both parties had notified the other of their intention to cross-examine the other party's expert.

Also on the Finish Date, Defendant filed an amended expert report by Dr. King solely for the purpose of correcting the date upon which it was completed. The original amended report stated that it was completed on July 23, 2024. In fact, it was completed on August 1, 2025. The Defendant states that the report is otherwise identical to that which was filed on September 10, 2025. Defendant did not seek leave to file this report.

Court Administration accepted the report for filing.

8. November 18, 2025: Plaintiff wrote to the Court raising issues regarding Dr. King's addendum. In a nutshell, Plaintiff consented to Dr. King's addendum subject to Plaintiff being able to file a rebuttal report by Dr. Mitchell.
9. December 9, 2025: Plaintiff filed Dr. Mitchell's rebuttal report dated December 8, 2025. Plaintiff did not seek leave to file this report. Court Administration accepted this report for filing.
10. February 17, 2025: Trial scheduled to begin.

[2] As indicated, Dr. King's supplemental report (including the November 3, 2025 addendum) was filed on the Finish Date of November 3, 2025. However, Dr. Mitchell's responding, rebuttal expert opinion report was filed after the Finish Date. The parties confirmed during the December 19, 2025 hearing that:

1. Neither party contested the proposed qualifications of either Dr. King or Dr. Mitchell to provide the opinion evidence contained within any of their expert reports listed above;
2. Neither party contested the admissibility of the expert opinion reports by Dr. King and Dr. Mitchell, listed above;
3. Both parties required the opportunity to cross-examine the opposing party's expert at trial; and
4. Both parties consented to the various expert reports listed above being tendered as exhibits at trial but, again, subject to cross-examination.

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[3] I convened a case-management hearing on December 19, 2025 to address the issues which had arisen regarding the late filing of expert opinion reports and the associated procedural implications. The various agreements which the parties were able to confirm during that hearing alleviated many of the lingering concerns. However, a question remained as to whether litigants are obliged to seek leave from the Court before filing new expert opinion reports after the Finish Date. Or can parties file expert reports at any time after the Finish Date without leave from the Court, subject only to the parties themselves agreeing (or consenting) to the late filing?

[4] In a scheduling coincidence, this motion was heard within two weeks of the following two other motions:

1. *Morris v. Primmum Insurance Company*, 2026 NSSC 6 involving a request to conduct limited direct examination of an expert; and
2. *McCallum v. Dennis*, 2026 NSSC 7 involving whether/when experts must be included on the list of witnesses a party intends to call at trial. There is a related question around providing notice of an intention to conduct cross-examination.

[5] All of these motions involved last-minute requests to depart from strict compliance with the rules surrounding expert evidence and suggested a degree of uncertainty as to how Rule 55 is applied.

[6] The applicable law and procedural rules for each motion are connected by certain foundational propositions which guide the interpretation of Rule 55 – Expert Opinion. It is helpful to begin the analysis from this broader perspective because it helps develop a more complete picture of the principles that inform Rule 55, which then guides consideration of the more specific issues.

[7] This decision begins with an examination of the application law and, more specifically: the essential nature of expert opinion and the corresponding procedural implications. This includes and analysis of when/how expert opinion evidence may be received at trial; and when/why experts are called as witnesses at trial. As a result, the "Law" section is identical in the corresponding sections of *Morris v. Primmum Insurance Company*, 2026 NSSC 6, and *McCallum v. Dennis*, 2026 NSSC 7.

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[8] The final section in each of these related decisions then diverges as the focus narrows when the law is applied to the circumstances of each case. In this matter, the key conclusions are:

1. Leave from the Court is required whenever a party seeks to file an expert opinion (including rebuttal) report after the Finish Date;
2. In this case, Dr. King's supplemental report was filed less than three months prior to the Finish Date and his corrected supplemental was filed on the Finish Date. The Plaintiff consented to the late filing conditional upon the Plaintiff being entitled to file a rebuttal report from Dr. Mitchell after the Finish Date. In the circumstances and given the qualified consent, leave was required to file both Dr. King's supplemental report and Dr. Mitchell's rebuttal report; and
3. Leave is granted *nunc pro tunc* to file Dr. King's corrected supplemental report and Dr. Mitchell's rebuttal report.

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LAW

[9] The trier of fact considers the admissible evidence; develops findings of fact based on that evidence; assesses what inferences may be properly drawn from those facts; and ultimately decides who (if anyone) is legally liable for an alleged injury.

[10] As indicated, the Court is tasked with the responsibility of drawing appropriate inferences. Thus, the judicial decision-making process typically does not allow witnesses to offer their opinions as to what inferences they might make. There are exceptions to this general rule. One such exception is for expert opinion in circumstances where the Court needs assistance understanding matters outside the knowledge or experience of an ordinary person so that appropriate inferences might be drawn based on those opinions (see *R. v. D. (D.)* [2000] 2 S.C.R. 275 (S.C.C.), at para. 49; and *R. v. K. (A.)* [1999] O.J. No. 3280 (Ont. C.A.)).[1]

[11] Consider the hypothetical example of a bridge collapse. The Court examines and weighs the evidence presented; makes findings of fact as to what occurred in the lead up to the collapse; and ultimately decides what inferences may be properly drawn from those facts to reach a final determination as to why the structure failed

[1] Another exception is for lay opinion, the limits of which are defined by the jurisprudence. See, for example, *McKinnon v Ocean View Manor Society*, 2025 NSSC 338, at paras. 29 – 33.

and whether anyone is legally responsible for that that failure. However, a highly specialized and technical understanding of physics and civil engineering is needed to understand when/how/why bridges experience catastrophic structural failure. Neither a judge nor jury nor any other ordinary, reasonable person possess that specialized knowledge. Experts may therefore be asked to provide aid in narrowing the gap in knowledge and expertise, and developing proper inferences. The Supreme Court of Canada has stated that an expert's role is "to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate" (*R v Mohan*, 1994 SCC 80 ("***Mohan***") at para. 25 quoting from *R v Abbey*, [1982] 2 S.C.R. 24 ("***Abbey***") at para 44. See also Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada, 2014) at 784).

[12] The help which experts provide to the Court is called an opinion. If the trier of fact accepts the opinion (including any factual assumptions embedded within in), it may be elevated into a binding factual inference which becomes incorporated into the Court's final determinations.

[13] While expert opinions are necessary, important, and commonplace in the judicial decision-making process, they also invite risk. Experts with impressive credentials may present in a polished manner and use impenetrable, technical jargon that tends to obscure or usurp (rather than aid and enlighten) critical analysis in the decision-making process. In *Mohan*, Sopinka, J. warned of the "… danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language … apt to be accepted … as virtually infallible" (para. 23). He added that "too liberal an approach could result in a trial's becoming nothing more than a contest of experts" (para. 28). In *R v Béland*, [1987] 2 S.C.R. 398, LaForest, J. similarly spoke of the perils which arise when expert opinion is wrapped in the "mystique of science" (at p. 434).

[14] Nova Scotia's Rule 55 – Expert Opinion was developed with these issues and concerns in mind. It seeks to both:

1. Preserve the inherent value of expert opinion evidence (i.e. helping a reasonable person of ordinary knowledge and experience appreciate the meaning and value of opinions which distill complex information) while guarding against the related risks; and
2. Fulfill Rule 1.01's overarching promise for a "just, speedy, and inexpensive determination of every proceeding" and the Supreme Court

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of Canada's related call for proportionality in civil litigation (*Hryniak v. Mauldin*, 2014 SCC 7, "***Hryniak***").

[15] To that end, much of Nova Scotia's Rule 55 - Expert Opinion was founded on (and can be explained by reference to) the following two simple propositions:

1. An expert's primary and overriding duty is to provide independent, candid, unbiased, and accurate testimony within their area of expertise. That duty is owed to the Court - not the party that engaged the expert or may be paying the expert's fee;
2. Absent exceptional circumstances, an expert's direct testimony (or evidence in chief) is contained entirely within their written report. This includes rebuttal expert opinion. Three necessary corollaries to this basic proposition are:
    a. An expert's written report should be delivered well in advance of (i.e. many months before) trial;
    b. Absent a dispute over the expert's qualifications or the admissibility of their report, the expert's report is tendered at trial and marked as an exhibit without the need to call the expert as a witness to prove the report; and
    c. An expert may be cross-examined but their ability to provide direct testimony (i.e. evidence beyond which is contained in their written report) is tightly controlled.

[16] These propositions achieve the aim of just, efficient and proportionate proceedings in several ways, including:

1. An expert's role is clearly defined and appropriately framed within the judicial decision-making process;
2. Because an expert's direct testimony is committed to writing and is disclosed well in advance of trial:
    a. The rules incentivize plain language and clearly communicating the opinion in a manner that can be understood by an ordinary, reasonable person;

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b. The likelihood of ambush or surprise is mitigated because there is greater certainty around the nature and scope of the expert opinion evidence to be presented at trial;

c. The likelihood of delay or a last-minute adjournment request to address expert evidence is similarly mitigated;

d. All other parties are afforded time to digest and respond to the expert opinion evidence – rather than having to assimilate, in real time, information that is, by definition, complex and/or outside the reach of an ordinary, reasonable person; and

e. The amount of time required to present expert evidence at trial is streamlined.

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[17] Several more specific procedural implications arise out of these basic propositions. In particular, the Rules include:

1. Detailed directions as to what must be contained in an expert report;
2. Clear deadlines as to when expert reports must be disclosed in advance of trial; and
3. Strict controls on when/why an expert may offer oral testimony at trial.

CONTENTS OF AN EXPERT REPORT

[18] This issue does not need to be examined in great detail here as it is not a point of controversy in these motions. For example, there is no motion under Rule 55.10 to exclude an expert report on the basis that it does not conform with the Rules. It is sufficient, therefore, to refer to Rules 55.03 and 55.04 which confirm what an expert report must contain. Generally speaking, an expert written report must contain sufficient information to:

1. Explain the opinion. This includes any assumptions or information upon which the opinion is based and the level of certainty with which the opinion is held; and
2. Expressly confirm the expert's understanding of their unique role and duty to the Court.

DEADLINES FOR DISCLOSING EXPERT OPINION EVIDENCE

[19] The starting point for reviewing the deadlines to disclose expert opinion evidence is the so-called Finish Date, as defined in the Rules.

[20] The Finish Date is a milestone of central importance for a civil action in Nova Scotia. It is set by a judge at the Date Assignment Conference when, among other things, trial dates are assigned. The Finish Date must be no less than 60 days prior to trial. (Rules 4.17(6)(b) and (c). See also Rule 94.10). Typically, the Finish Date is about three months before the first day of trial, taking into account how time is calculated under Rule 94.02(1) (i.e. 60 days under the *Civil Procedure Rules* translates to approximately three months)[2].

[21] The Finish Date denotes the day upon which all parties are deemed to have completed all pre-trial procedures and are ready for trial. (Rule 4.16(6)(c)) The Finish Date is also the date against which many other pre-trial deadlines are established. For example:

1. Witness lists must be filed by the Finish Date (Rule 4.18);
2. Admissions must be requested by the Finish Date (Rule 20.03); and
3. Parties are obliged to give notice of certain types of evidence that may be offered at trial by the Finish Date (Rule 51.02);

[22] In terms of disclosing expert opinion (including rebuttal) reports, the default deadlines for filing expert reports under the *Civil Procedure Rules* are set by reference to the Finish Date[3]. Thus:

1. A party offering an expert opinion, other than in rebuttal of an expert opinion offered by another party, must serve and file the report no less than six months before the Finish Date (Rule 55.03(1)); and
2. Rebuttal reports are due three months after receiving the initial expert report (Rule 55.03(2))

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[2] Under Rule 94.02(1), “A period of days in a Rule does not include any of the following: (a) the day the period begins; (b) a Saturday and Sunday in the period; (c) a weekday the office of the prothonotary at Halifax is closed during the period; (d) the day on which a thing is required, or first permitted, to be done.” Therefore, setting aside holidays, a period of five days roughly equates to one week.

[3] A judge has the discretion to establish different deadlines for serving and filing expert reports (i.e. different from the default deadlines under the *Civil Procedure Rules*). See Rules 55.03(1) and (2). Obviously, judge-imposed deadlines (as opposed to the default deadlines) must also be met. Trial dates may similarly be threatened if those deadlines are not met. It is not necessary to consider this issue further in this case because all parties agreed to abide by the default deadlines in the Rules.

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[23] Once the Finish Date is set, it cannot be unilaterally re-set without leave from the Court. By extension, the default deadlines for filing expert reports similarly cannot be unilaterally re-calculated. Thus, in *Conrad v AFL Manufacturing Limited*, 2018 NSSC 52, Smith, J. determined that when a trial is adjourned, a party cannot unilaterally presume that the Finish Date is also changed and/or that presume the deadlines for filing expert reports were changed (at paras. 43 – 46).

[24] That said, in my view, the *Civil Procedure Rules* must be interpreted with a reasonable degree of flexibility. For example, parties are obliged to make continuing disclosure of all relevant and non-privileged documents and electronic information. In a personal injury case, ongoing disclosure of medical information may contain new information that materially alters the conclusions made in a previously disclosed expert opinion report. Indeed, Rule 55.04(1)(e) requires an expert to:

> … notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

A rebuttal expert is subject to this same obligation (Rule 55.05(1)(a)).

[25] Prior to the Finish Date, <u>if all parties consent</u>, expert reports may be filed after the existing deadlines established either by default under the *Civil Procedure Rules* or by the Court. If all parties do not consent, expert reports may only be filed after the existing deadlines with leave from the Court. No party may unilaterally presume the entitlement to alter the deadlines for filing expert reports.

[26] After the Finish Date has passed, the concerns and priorities change. The parties may no longer assume control (with mutual consent) over the process. Judicial oversight is now required.

[27] In my view, leave from the Court is required if any party seeks to rely upon an expert opinion report filed after the Finish Date. Rule 51.03(1)(d) applies. It mandates that a judge must (the language in the Rule is mandatory) exclude expert opinion not disclosed under Rule 55 - Expert Opinion "…unless the party satisfies the judge that it would be unjust to exclude it." Any expert opinion report filed after the Finish Date would clearly not be disclosed in accordance with Rule 55.

[28] This conclusion is further supported by the effect of late filing. First, parties receiving new expert reports after the Finish Date are placed at a distinct

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disadvantage. They are now being forced to review and assimilate new expert opinion in the few months before trial and a time when the parties were supposed to have completed all pre-trial procedures. Concerns around trial fairness arise.

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[29] Second, filing expert (including rebuttal) reports after the Finish Date presumptively puts the trial dates at risk. Setting aside the need for advance notice, the filing of an expert report triggers certain interlocking procedural options and/or obligations which must be completed by the Finish Date – well in advance of trial. For example, the party receiving an expert report:

1. Has the option of asking the expert written questions and demanding answers to any proper questions, the scope of which is addressed in Rule 55.11(3). Those questions must be:
   a. Posed within 30 days (approximately six weeks) after receiving the report; and
   b. Answered within 30 days (approximately six weeks) after the questions are delivered to the expert.
2. Has the option of filing a rebuttal report within three months of receiving an expert report;
3. Must, on or before the Finish Date:
   a. Determine and communicate whether an expert's qualifications and the admissibility of the expert report will be admitted or contested; and
   b. Provide notice as to whether cross-examination of another party's expert is required.

[30] In addition, the party receiving an expert report has the option of asking that the report be excluded at the trial if it does not sufficiently conform with this Rule – subject to notifying the other party of the alleged deficiency "in a reasonable time". (Rule 55.10)

[31] If an expert opinion (including rebuttal) report is filed after the Finish Date, the Rules no longer provide a mechanism for determining how/when these procedural options can be asserted or how/when these procedural obligations must be met.

[32] This leave requirement exists regardless of whether:

1. The new opinion evidence is being disclosed because the expert is obliged under Rule 55.04(1)(e) to communicate any material change in their opinion based on, for example, newly discovered information. Clearly an expert is obliged to communicate any change in their opinion at the earliest reasonable date. Equally clear, an expert cannot be forced to defend an opinion they no longer hold. Regardless, where new expert opinion evidence is being filed after the Finish Date, procedural and substantive fairness demands that the Court become engaged; and
2. The parties consent to the late filing. Obviously, the parties' consent may be a factor (perhaps a significant one) in determining whether leave should be granted. However, the Court must still become engaged to assess trial readiness; to address the related procedural concerns discussed above that will necessarily arise; and otherwise to determine whether existing trial dates can be maintained.

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[33] The factors that may help guide the Court's discretion in assessing whether it would be "unjust to exclude" a written expert report which a party proposed to file after the Finish Date include, without limitation:

1. The nature of the proposed new opinion evidence and, for example, whether it represents:
   a. Entirely new opinions not previously disclosed; or
   b. A change from an original opinion previously filed due to, for example, a piece of information which was either unknown or whose impact was not considered when the report was prepared but is now seen as reasonably affecting the opinion. A related factor may be whether the new opinion should have reasonably been addressed when preparing the original report;
2. Balancing concerns around fairness against the Court's truth-seeking function. The following questions arise:
   a. Whether the parties consent to the late filing of expert opinion report;
   b. When the expert obtained the information that prompted the proposed, late opinion evidence;

c. Whether there was unreasonable delay in preparing and communicating the new opinion;

d. Whether the new opinion evidence conforms with the requirements of Rule 55 in terms of content;

e. How significant the proposed new opinion is to the ultimate issues in dispute;

f. Whether the new opinion evidence fundamentally altered the expert's views, or merely reinforces the expert's original opinion; and

g. To what extent excluding the proposed change prejudice the party seeking to introduce it, and to what extent would introducing the proposed supplemental opinion would prejudice another party. For example, would that other party's ability to file a rebuttal report be prejudiced? This final consideration should take into account the potential impact on trial dates and related pre-trial deadlines including, for example, constraints on the time for posing written questions (Rule 55.11), if reasonably required; constraints on a party's ability to seek an advance ruling under Rule 55.10, if reasonably required; the need for parties who receive late expert reports to make a determination as to qualifications and admissibility (Rule 55.13(1)); the need to provide notice of an intention to cross-examine witnesses (Rule 55.13(2); and potentially the need to formally establish a new Finish Date.

[34] Again, for emphasis, where a party proposes to tender new expert opinion evidence that reflects a material change in their existing opinions, the Rules oblige the expert to disclose any such change. Moreover, an expert cannot be bound to an opinion that they no longer agree with. However, that reality does not mean that another party is forced to accept any resulting prejudice, without remedy. Depending on the facts, potential remedies may include:

1. The expert's new opinion evidence is excluded and, as well, that any earlier opinion evidence is also excluded to the extent the expert is no longer holds that original opinion; or

2. The expert's new opinion evidence is allowed because it would be unjust to exclude it. However:

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a. The trial may need to be adjourned, with any related responsibility and associated costs allocated accordingly, or

b. The trial may be able to fairly proceed subject to whatever procedural adjustments (including costs) the judge deems reasonable.

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PROCEDURAL CONTROLS ON AN EXPERT'S ABILITY TO OFFER ORAL EVIDENCE AT TRIAL

[35] An expert (including rebuttal) report constitutes the expert's direct testimony or evidence in chief. The circumstances under which an expert may be called as a witness to give oral evidence at trial beyond that which is written in their report are exceptional in nature and tightly controlled.

[36] The language of Rule 55.13(2) is illustrative. It begins by stating that a party "may not call an expert whose qualifications, and the admissibility of whose opinion, are admitted, <u>unless</u> one of the following applies…." (emphasis added) In other words, absent a contest around qualifications or admissibility (discussed below), oral evidence outside the expert's written report is viewed as an exception.

[37] In a further signal that an expert's oral testimony at trial should be limited and exceptional, Rule 55.13(5) warns that the party who caused an expert to be called may be required to indemnify another party if calling an expert was "clearly unnecessary". Underscoring the restrictions on an expert's subsequent ability to verbally explain their report, it is notable that an expert is required to provide written answers to written questions but may not be discovered for examination (Rules 18.01(2), 18.13(5), and 55.11).

[38] For present purposes, the Rules admit the following exceptions under which an expert may give oral testimony at trial:

1. As indicated, an expert must be called to give evidence in chief where their qualifications or the admissibility of their report are contested (Rules 55.13(3) and (4));
2. An expert must attend at trial to be cross-examined where another party provides notice of their requirement for cross-examination prior to the Finish Date (Rule 55.13(2)(b)). In that event, the right of re-direct

examination also arises, bearing in mind the limited scope of re-direct; and

3. In rare and exceptional circumstances, the Court may grant leave for an expert to provide oral direct testimony beyond that which is contained in their written report where "justice requires that the expert testify" (Rule 55.13(2)(c)).[4]

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[39] Each of these exceptions is separately discussed below.

Direct Testimony on the Issues of Qualifications or Admissibility (Rules 55.13(3) and (4))

[40] Rule 55 does not contemplate calling an expert witness to prove their report unless the expert's qualifications or the admissibility of their report are contested (Rules 55.13(3) and (4)). Absent any such contest, the expert's report is simply marked as an exhibit and forms part of the trial record without having to call the expert as a witness to prove the report – subject to cross-examination, if proper notice is given.

[41] If qualifications or admissibility are contested, the oral testimony that the expert may offer is expressly limited to those issues which are in dispute (qualifications and admissibility).

[42] Rule 55.13(1) states that a party "must determine" by no later than the Finish Date whether the expert's proposed qualifications or the admissibility of the expert's report are admitted or contested. In the case of an independent expert report filed under Rule 55.04, the party receiving this report will typically have had about six months to make this mandatory determination, and a party receiving a rebuttal report will typically have had about three months.

[43] This determination must be communicated to all other parties. Concerns around qualifications or admissibility are not issues that should remain dormant or be kept secret or neglected in the lead up to trial. As indicated, expert reports and

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[4] There is a further exception where the expert is also a fact witness and their testimony is limited to those facts (Rule 55.13(2)(a)). That exception does not apply here. Specific narrow exceptions (and specific procedures) are also carved out for treating physicians and licensed nurse practitioners. See Rules 55.14 – 55.17. Again, this exception is not relevant to the matters raised in these motions. The caselaw governing treating physicians and licensed nurse practitioners includes *Ogilvie v. Windsor Elms Village for Continuing Care Society*, 2019 NSSC 349; *Brown v. Nova Scotia Association of Health Organizations Long Term Disability Plan*, 2020 NSSC 301; and *Kennedy v Smolenaars*, 2021 NSSC 43.

rebuttal reports are supposed to be exchanged and filed months before the Finish Date. Whether an expert's qualifications or the admissibility of their report is admitted or contested may significantly impact trial time. These issues are considered in light of Rule 1.01's overarching promise for a "just, speedy, and inexpensive determination of every proceeding" and the Supreme Court of Canada's call in *Hryniak* for proportionality in the interpretation and application of the Rules. Overall, efficiency, fairness, and proportionality all demand that parties be required to provide notice as to whether qualification or admissibility is contested by the Finish Date. On this, I also note that the deadline for making this determination is reasonable. All expert reports (including rebuttal reports) are typically served and filed months in advance of the Finish Date. The determination which a party is required to make under Rule 55.13(1) regarding qualifications and admissibility occurs over a very reasonable period of time (months) and could not reasonably be described as rushed.

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[44] Finally, the Court relies upon expert opinion because it needs help: help in understanding the evidence and help in drawing appropriate inferences. It would be unwise and unjust to tolerate unreasonable delay in communicating important decisions regarding expert opinion issues that, by definition, are inherently complicated, or to force parties who filed expert opinion report in accordance with the Rules to respond in an unduly compressed period of time, having regard to the complexity of the opinions in question. Basic procedural fairness demands that a party be given sufficient time in advance of trial to know whether an expert's qualifications or the admissibility of their report is contested or admitted – particularly when the other party making that determination has been given months to do so.

[45] The following potential scenarios arise:

1. An expert's qualifications or the admissibility of the expert's report is <u>admitted</u> by the Finish Date. In this case, there is no need to call the expert as a witness to prove issues that have been admitted. Rather, the expert's report is simply marked as an exhibit at trial. Note, that it may still be necessary to call the expert as a witness if appropriate notice was given under the Rules that cross-examination is required (Rule 55.13(2)(b)). I revisit the issue of cross-examination below. Regardless, the expert would be called solely for the purposes of cross-examination. Cross-examination may affect the weight to be

given an expert's opinion report but does not otherwise prevent the report from being marked as an exhibit at trial.

2. An expert's qualifications or the admissibility of an expert report is contested by the Finish Date. In this case, there are two potential procedural options. First, a party may move for an advance ruling under Rule 55.10 on the basis that an alleged lack of qualifications or the issue of admissibility constitutes a deficiency that demands the report be excluded. That motion must obviously be brought well in advance of the Finish Date and certainly cannot be brought after the Finish Date without leave.[5] Second, a party may wait under the Finish Date to provide formal notice that they contest an expert's qualifications or the admissibility of an expert report. In this event, the issue is resolved through a *voir dire* at trial where the expert must be called as a witness and the party seeking to introduce the report must:

   a. Where qualifications are contested "… prove the report through the expert, and conduct any supplementary direct examination" (Rule 55.13(3)). Note that any such direct examination is "supplementary" – reinforcing the points that the report is considered the expert's examination in chief or direct examination and that attempts to add to that evidence are tightly controlled;

   b. When admissibility of the report is contested, "… prove the report through the expert for the purpose of obtaining a ruling on admissibility, and conduct no further direct examination unless the presiding judge permits" (Rule 55.13(4)). Note that any such direct examination is "further" - reinforcing the same points described above.

In either event, the party seeking to tender the expert report must prove the expert's qualifications[6] or satisfy the Court as to the

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[5] Rule 55.10 is broader in scope and cannot be triggered to challenge an expert opinion report on the basis that, for example, it was not filed within the deadlines established under Rule 55.03; or failed to comply with the content requirements in Rule 55.04.

[6] As to the issue of qualifications, the assessment is relatively straightforward. A properly qualified expert is a person who "is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify" (*Mohan*, at para. 31). As such, this assessment becomes inextricably connected to the statement of proposed qualifications which must be attached to every independent expert report, including rebuttal reports (Rule 55.09).

admissibility requirements set out in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 ("***WBLI***")[7]. Failing that, the expert report is obviously excluded and may not marked as an exhibit at trial.

3. A party neither admits nor contests qualifications or admissibility by the Finish Date. In this case, the Rule must be interpreted to presume that the expert's qualification and the admissibility of their report are admitted. In this event, there is no need to call the expert as a witness to prove issues that have been admitted. The expert's report is simply marked as an exhibit at trial. Again, it may still be necessary to call the expert as a witness for cross-examination. However, the expert's attendance would be solely for the purposes of cross-examination.

   In support of this presumption, the election set out in Rule 55.13(1) is not only mandatory, but also binary: a party must either admit or contest qualifications and admissibility. A party is not entitled under the Rules to indefinitely reserve their right to contest the qualifications and admissibility. The consequences for not determining whether to admit or contest qualification and admissibility must fall upon the party which had responsibility for (and control over) the process. The party receiving an expert report is obliged to determine whether qualifications and admissibility are contested prior to the Finish Date. If that party fails to make this mandatory determination, efficiency, fairness, and proportionality all demand that the Rule be interpreted as presuming that qualification and admissibility are admitted, not contested. The law around qualification and admissibility is not complex and the required determination that must be made by the Finish Date is not onerous. A contrary presumption (i.e. that issues around qualification and admissibility are presumed to be contested, not admitted) injects unnecessary delay, cost and prejudice into the proceedings. Parties who file expert opinion reports in accordance with Rule 55 are entitled

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[7] As to the issue of admissibility, the expert opinion must be logically relevant to a material issue necessary and not contrary to any other exclusionary rule of evidence. In addition, the expert witness must obviously be properly qualified, which includes a demonstrable commitment to assist the Court (not a particular party) by providing evidence that is impartial, independent, and unbiased (Mohan, at paras. 22 – 32, and WBLI at paras. 30 – 32 and 52 - 54). At a further stage in the analysis, the Court assumes the role of "gatekeeper" where the trial judge "balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks" (WBLI at para 23). There may be an intermediary step where the underlying science is considered novel or contested (WBLI at para. 23). That issue does not arise in this case.

to certainty around these issues. It would be unfair and unjust to expect that these parties and the affected experts should continue to incur the time and costs preparing for a trial on the presumption that these important preliminary issues may remain subject to challenge until such time as another party unilaterally decides to confront these them. The Court should also not have to reserve trial time based on the presumption.

Under the Rules, parties receive expert reports months in advance of the Finish Date. It is reasonable to require notification as to whether qualification or admissibility are contested by no later than the Finish Date. After the Finish Date, the same essential reasoning summarized above otherwise applies.

There may be exceptional circumstances where this presumption might be rebutted. That determination may be made on a case-by-case analysis, depending on the particular circumstances.

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Oral Cross-Examination of an Expert (Rule 55.13(2)(b))

[46] This requirement is straightforward and subject almost entirely to a notice requirement. The party who served and filed an expert report may not call that expert as a witness unless they are "… notified, before the finish date, that another party requires the expert to be called for cross-examination." (Rule 55.13(2)(b)) Put slightly differently, the party receiving an expert report is entitled to cross-examination subject to providing appropriate notice of that requirement as at the Finish Date.

[47] This right to cross-examine an expert is subject to a minor complication: Rule 4.18(1) states:

> A party must, before the finish date, file a list of the witnesses, including the name of each witness, the party intends to call at trial, except a witness the party will call only to impeach the credibility of another expected witness.

[48] A question arises: where an expert's qualification and the admissibility of their report was admitted (or is deemed to have been admitted), is the party who filed the expert report entitled to presume that the report may be simply marked as an exhibit without the party having to call the expert to provide direct testimony?

[49] The short answer is qualified "yes". Assuming the party is not otherwise seeking leave to adduce oral evidence from the expert for their own purposes, there is no need to include the expert on their witness list because the report will be entered as an exhibit at trial without any further evidence being needed. However, this answer is qualified in the sense that the expert may still need to be called as a witness for the purposes of cross-examination if another party provides notice of its requirement for cross-examination under Rule 55.13(2)(b). The party providing notice of cross-examination is entitled to presume that the other party who filed the expert report will call the expert as a witness at trial to be cross-examined. Subject perhaps to rare and extraordinary circumstances (e.g. death or illness), if that expert is not called as a witness to be cross-examined, the expert report should not be entered as an exhibit at trial – even if qualifications and admissibility are otherwise admitted.

[50] Note that a party may not receive the required notice of cross-examination prior to filing its own witness list. This is because the deadline for filing the notice and the witness list is the same (i.e. the Finish Date). If necessary and as a matter of good practice, the party receiving a notice of cross-examination should amend or update their witness list as soon as reasonably possible to confirm that the expert will be called as a witness solely to be cross-examined.

[51] However, respectfully, this is largely a matter of form over substance – or procedural compliance over practical consequence. Regardless of whether the witness list is updated, the party who provides notice is still entitled to expect that the party who relied upon the expert opinion report will call the expert as a witness for cross-examination or risk having their report excluded. Absent any other extenuating and exceptional circumstance, where a party fails to update their witness list to include an expert who will be called for cross-examination:

1. Their expert report will not be automatically excluded; and
2. The party who fails to update their witness list will not have cleverly escaped the obligation to call their expert as a witness to be cross-examined.

"Justice Requires That the Expert Testify" (Rule 55.13(2)(c))

[52] For the reasons given above, the direct evidence of experts who testify in Nova Scotia is given through their written reports. Oral examinations in chief by the party calling the expert are the exception. That said, Rule 55.13(2)(c) expressly admits

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the possibility of an exception. It states that a judge may allow an expert to provide direct oral testimony where "justice requires". For example, a jury may benefit from hearing limited direct testimony from an expert, particularly if the underlying topic is exceedingly complex and incapable of being adequately explained in writing.

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[53] The circumstances in which this is permitted should be narrow and subject to strict controls. The language of Rule 55.13(2)(c) is important. The wording of the Rule does not allow oral direct testimony because, for example, it may be "in the interest of justice"; or because "justice would be served". Rather, the Rule can only be invoked where "justice requires". The word "requires" connotes a degree of urgency and necessity.

[54] Without limitation, the following factors may help guide the Court's discretion:

1. The content and scope of the proposed opinion evidence including:
    a. The degree to which the expert has provided adequate notice as to the anticipated content of the direct testimony – including compliance with the requirements of Rule 55.04;
    b. The degree to which the proposed testimony is required to explain and understand the opinion evidence. This raises issues around the Court's truth-finding function;
    c. The degree to which the proposed testimony comprises topics that either are adequately covered or should have been covered in the original report; and
    d. The degree to which the proposed testimony risks introducing entirely new topics and any related concerns regarding qualifications.
2. The extent to which the proposed testimony will work an unfairness or create procedural prejudice. Some of the questions may include:
    a. Whether the parties consent to the proposed oral testimony;
    b. The extent to which there has been delay in requesting that an expert provide direct testimony or evidence in chief;
    c. The extent to which the party seeking to introduce the proposed testimony will be prejudiced if leave is denied, and the extent

to which another party will be prejudiced if leave is granted; and

d. The potential impact on trial dates.

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Cross-Examination

[55] As mentioned, the other common exception to the general rule of not calling an expert at trial is where the expert is required for cross-examination. Rule 55.13(2)(b) states that a party may call an expert as a witness where they are "… notified, before the finish date, that another party requires the expert to be called for cross-examination."

APPLICATION OF THE LAW

[56] Dr. King's supplementary report was first filed within three months of the Finish Date. The Plaintiff (who received and are now required to address Dr. King's supplementary report) seeks to file a rebuttal report from Dr. Mitchell. Dr. Mitchell's rebuttal report was filed less than two months prior to the trial and after the Finish Date.

[57] The Plaintiff is prepared to consent to Dr. King's qualifications to provide the opinions expressed in his supplementary report and admit the admissibility of that supplementary report, conditional upon:

1. Dr. Mitchell's qualifications to provide the opinions expressed in her rebuttal report being admitted;
2. The admissibility Dr. Mitchell's rebuttal report being admitted; and
3. Dr. King being called as a witness for the purpose of cross-examination on all of his expert opinion reports and subject to Dr. Mitchell also being called as a witness to be cross-examined on all of her expert opinion reports.

[58] In the circumstances, the Defendant was required to seek leave to introduce Dr. King's supplementary report and the Plaintiff was required to seek leave to file Dr. Mitchell's rebuttal report.

[59] As to whether leave should be granted:

1. All parties agree that Dr. King's supplementary report confirms a material change in his opinion evidence and arose out of information that post-dated his original report. No party alleges that Dr. King's supplementary report does not conform with the Rules.
2. All parties agree that Dr. Mitchell's rebuttal report is appropriate in scope. No party alleges that Dr. Mitchell's supplementary report does not conform with the Rules.
3. No party contests Dr. King's or Dr. Mitchell's qualifications. No party contests the admissibility of their reports, subject to cross-examination.
4. All parties are confirmed that they will call Dr. King and Dr. Mitchell as witness at trial solely for the purpose of being cross-examined on their report.
5. No party alleges undue delay or suggests that the trial dates will need to be adjourned.

[60] In these uniquely collaborative circumstances:

1. Leave to late file Dr. King's supplementary and corrected report is granted; and
2. Leave to late file Dr. Mitchell's rebuttal report is granted.

Keith, J.

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