SUPREME COURT OF NOVA SCOTIA

Citation: *Rogers v. Nova Scotia (Health Authority)*, 2026 NSSC 137

Date: 20260428
Docket: Pic No. 469522
Registry: Pictou

Between:

Darlah Jean Rogers

Plaintiff

v.

Nova Scotia Health Authority, Dr. Stanislaus Prem Sequeira, Peter Ian, Dr. Midgley, Dr. Min Sun Lee, Kirstin Nicole, Dr. Moritz, and EMC Emergency Medical Care Inc.

Defendant

Decision on Plaintiff's Motion for an Order certifying a subpoena pursuant to the *Interprovincial Subpoena Act*

Judge:	The Honourable Justice Bryna D. Hatt
Heard:	April 7, 2026, in Pictou, Nova Scotia
Final Written Submissions:	April 22, 2026
Counsel:	Heather Wyse, for the Plaintiff Erin McSorley, for the Defendant

By the Court:

[1] The plaintiff made a motion for an order certifying a subpoena to be served on out of province witness, Alison McKeen, pursuant to *Interprovincial Subpoena Act*, S.N.S. 1996, c.1. The witness is an expert who filed a report under Rules 55.03 and 55.04 (hereinafter, the "MacKeen Report"). Very briefly, the MacKeen Report opined on issues related to the Defendant Nova Scotia Health Authority (hereinafter "NSHA") including whether NSHA met the requisite standard of care. In seeking a subpoena, the plaintiff relied upon the Civil Procedure Rules, specifically Rule 50 and 55.

[2] The MacKeen Report was not filed by the plaintiff but, rather, was filed by the Defendants Dr. Stanislaus Prem Sequeira, Peter Ian, Dr. Midgley, Dr. Min Sun Lee, Kirstin Nicole, Dr. Moritz, (hereinafter the "Defendant Physicians").

[3] The Defendant Physicians did not take a position in the motion.

[4] However, NSHA opposed the motion, submitting that the plaintiff's attempt to use an opinion report filed by another party was a means to circumvent the Civil Procedure Rules regarding experts and expert reports.

[5] NSHA observes that the motion is normally an *ex parte* motion, and as such limited its opposing position to identifying the inconsistency of the plaintiff's requested relief with the Civil Procedure Rules.

[6] NSHA provided notice that it intended to object at trial to the plaintiff leading or attempting to introduce the McKeen Report. The court identified it is the ability of the plaintiff to lead the expert report that is a consideration in the motion. As such, the court sought submissions from the parties as it relates to how the McKeen Report could (or could not) be used by the plaintiff, at trial. Specifically, the court asked to what extent one party can rely upon the expert report filed by another party when admissibility and qualifications are not challenged.

[7] The plaintiff and NSHA provided written submissions and supplemental submissions accordingly.

Background

[8] The action arises from the plaintiff's claim of medical malpractice and negligence against the Defendant Physicians and NSHA for the medical treatment she obtained. The action was originally scheduled for a month-long jury trial in June 2026. The finish date was February 26, 2026.

[9] Prior to the finish date and as indicated, the Defendant Physicians filed an expert report by Alison McKeen R.N. (McKeen Report), along with the required filings under Rule 55 for the expert. NSHA filed a rebuttal expert report in compliance with Rule 55.

[10] Both the Defendant Physicians and plaintiff named Ms. McKeen as an expert witness in their respective List of Witnesses; however, only the Defendant Physicians filed the report and corresponding expert representations and qualifications pursuant to Rule 55. The plaintiff neither engaged Ms. McKeen nor filed her report but seek to rely upon it.

[11] NSHA provided notice of intent to cross-examine Ms. McKeen on or before the finish date. No other party provided notice to cross-examine Ms. McKeen.

[12] No parties provided notice of challenge to the qualifications of Ms. McKeen or the admissibility of the McKeen Report.

[13] The plaintiff seeks to use the McKeen Report in its case in chief to assist in establishing breach of the standard of care in support of its action against NSHA. It is concerned, if it is unable to do so, NSHA will make a motion for non-suit at the close of the plaintiff's case.

[14] To this end, the plaintiff filed this motion to seek an out of province subpoena for Ms. McKeen to have her attend trial and testify in direct for the limited purpose of identifying the McKeen Report. The McKeen Report would then be marked as an exhibit. The plaintiff expressly states it has no intention to pursue any further direct, nor is the plaintiff seeking to cross-examine Ms. McKeen.

[15] All parties agree Ms. McKeen is not a fact witness.

[16] During deliberations on this motion, the plaintiff and Defendant Physicians settled. The action remains between the plaintiff and NSHA. Both the plaintiff and NSHA filed further written submissions on the motion with this change in circumstances contemplated.

Requested Relief

[17] The plaintiff seeks an order issuing an out of province subpoena for Ms. MacKeen, compelling her to attend trial, to be called as an expert witness to provide direct testimony for the limited purpose of identifying her report. Ms. MacKeen would then be subject to cross-examination from NSHA.

[18] The plaintiff argues the statutory considerations in section 7(1)(a) and (b) of the *Interprovincial Subpoena Act* are made out. This statutory test is set out as follows:

Out-of-Province service of subpoenas

7 (1) Where a party to a proceeding in any court in the Province causes a subpoena to be issued for service in another province of Canada, the party may attend upon a judge of the Supreme Court of Nova Scotia who shall hear and examine the party or party's counsel, if any, and, upon being satisfied that the attendance in the Province of the person required in the Province as a witness

(a) is necessary for the due adjudication of the proceeding in which the subpoena or other document has been issued; and

(b) in relation to the nature and importance of the proceedings, is reasonable and essential to the due administration of justice in the Province,

shall sign a certificate which may be in the form set out in the Schedule to this Act and shall cause the certificate to be impressed with the seal of the Supreme Court.

[19] Specifically, the plaintiff submits that Ms. MacKeen is required in the plaintiff's case in chief to enter the MacKeen Report, which is necessary for the proper adjudication of the action; and given the nature and importance of these proceedings, this approach and evidence is both reasonable and essential to the proper administration of justice.

[20] For the requested subpoena order to be granted, there must be the availability for the plaintiff to actually call the expert witness to testify. The Civil Procedure Rules at Rule 55 govern expert reports, expert witnesses, and their ability to provide direct testimony in court.

[21] The plaintiff recognizes that Rule 55 prohibits expert witnesses from providing direct testimony at trial, save the circumstances provided in 55.13 (2). The plaintiff relies upon Rule 55.13(2)(c), which states:

> 55.13 Testimony by expert
>
> (2) A party may not call an expert whose qualifications, and the admissibility of whose opinion, are admitted, unless one of the following applies:
>
> (a) the expert is also a fact witness and the direct examination is confined to the facts;
>
> (b) the party is notified, before the finish date, that another party requires the expert to be called for cross-examination;
>
> (c) the presiding judge is satisfied that justice requires that the expert testify.

[22] Alternatively, the plaintiff suggests that if the court is willing to permit the use of the expert report by the non-filing party, then it abandons the motion for an interprovincial subpoena.

Issues

[23] The key issues arising from the Motion for determination are as follows:

a. Can the plaintiff lead the filed McKeen Report in its evidence at trial?
b. Can the plaintiff call the Ms. McKeen to provide direct testimony?
c. Has the test been satisfied to issue an order for a subpoena under the *Interprovincial Subpoena Act*?

Law and Analysis

[24] Civil proceedings by nature are adversarial. Each party strategizes within the law and Civil Procedure Rules and develops positions and approaches which best support their desired outcomes. The Civil Procedure Rules form part of the framework that all parties are to follow. There are, on occasion, scenarios that are

not expressly contemplated by, permitted or prohibited by the Civil Procedure Rules. It is this situation that is now before the court.

[25] Put succinctly, can one party rely upon the filed expert report of another party when qualifications and admissibility are not at issue?

[26] Rule 55 of the Civil Procedure Rules governs expert witnesses and expert reports in civil proceedings. Justice Keith in *Morris v. Primmum Insurance Company,* 2026 NSSC 6, outlines the intent and purpose of Rule 55 of the Civil Procedure Rules stating at paragraphs 12-15:

> [12] 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 of Canada's related call for proportionality in civil litigation (*Hryniak v. Mauldin*, 2014 SCC 7, "**Hryniak**").
>
> [13] 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.

[14] 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;

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

[15] 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.

[27] Rule 55.02 provides that:

> A party may not offer an expert opinion at the trial of an action or hearing of an application in court unless an expert's report, or rebuttal expert's report, is filed in accordance with this Rule.

[28] This Rule only states that a party may not offer an expert opinion at trial unless an expert report is filed in accordance with the Rule. The Rule 55.02 does not expressly limit who can lead or rely upon that filed expert report.

[29] Rule 55.03 (1) provides that:

> A party to an action who wishes to offer an expert opinion, other than in rebuttal of an expert opinion offered by another party, must file the expert's report no less than six months before the finish date, or by a deadline set by a judge.

[30] This Rule requires that a party wishing to offer an expert opinion must file that expert report as prescribed. However, Rule 55 does not expressly prohibit another party at trial from leading or relying upon the expert report offered and filed by another party.

[31] Where the Rules do not expressly prohibit or permit, the court has considered the principles of statutory interpretation in its legal analysis.

[32] The Nova Scotia Court of Appeal has restated the statutory interpretation principles on numerous occasions. In *Sparks v. Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82, for example, the court stated:

> [24] The Supreme Court of Canada has reminded us time and time again that we are to take a pragmatic approach to statutory interpretation. Our approach must be both purposive and contextual. For example, in *Bell ExpressVu Ltd.*

Partnership v. Rex, 2002 SCC 42 at ¶ 26 Justice Iacobucci describes this "modern approach":

> [26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo& Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s.12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 , which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

…

[28] Then, if after applying a purposive and contextual approach, we are left with an ambiguity, we turn to other interpretative aids. Justice Iacobucci explains in *Bell ExpressVu Ltd. Partnership v. Rex*:

> 28 Other principles of interpretation - such as the strict construction of penal statutes and the "*Charter* values" presumption - only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Canada (Deputy Attorney General)* (1974), [1976] 1 S.C.R. 108 (S.C.C.), at p. 115, *per* Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (Ont. C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398 (S.C.C.), at p. 413; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53 (S.C.C.), at para. 46. I shall discuss the "*Charter* values" principle later in these reasons.)

[29] See also *R. v. C.(L.),* 2012 NSCA 107 at ¶ 41-43.

[30] As Justice Iacobucci adds, a provision will be ambiguous when, after a contextual and purposive analysis, we are left with two plausible meanings, both consistent with the legislation's intention. It is only then would we resort to other interpretative aids:

> 29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, *supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang* (1965), [1966] A.C. 182 (U.K. H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *Canadian Oxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 (S.C.C.), at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, *each equally in accordance with the intentions of the statute*, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".
>
> 30 For this reason, ambiguity cannot reside in the mere fact that several courts — or, for that matter, several doctrinal writers — have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and *thereafter* to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (*Willis*, *supra*, at pp. 4-5).

[31] All that said, at the end of the day, we should interpret legislation in a manner that is both reasonable and just. Ruth Sullivan in *Sullivan on the Construction of Statutes, supra,* explains at §2.9:

> At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. **An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.**
>
> [Emphasis added]

[33] The Nova Scotia Court of Appeal in *Delano v. Gendron*, 2019 NSCA 32, at paragraphs 12, 14 and 15, reiterates the Civil Procedure Rules are to be interpreted broadly to allow for contextual analysis, stating:

> [12] *Civil Procedure Rule* 94.01(1) provides that the Rules "must be interpreted in accordance with the principles for interpretation of legislation." It was recently held by this Court that an interpretative approach to statutory interpretation favouring a narrow textual analysis to the detriment of a broader and purposive contextual analysis constitutes an error (*Sparks v. Holland*, 2019 NSCA 3, at para. 69).
>
> …
>
> [14] This statement is correct (*Sparks v. Holland*, at para. 27). The modern principle of statutory interpretation applied to the interpretation of the *Civil Procedure Rules* requires the words of the Rules governing discovery to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Rules overall, their objects, and the intention of their drafters.
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> [15] The motions judge also correctly recognized the Rules "mandate conduct that is consistent with the just, speedy and inexpensive resolution of the proceeding", which has been identified by this Court as the "preeminent goal" of the Rules, informing their interpretation and application (*Homburg v. Stichting Autoriteit Financiële Markten*, at para. 41).

[34] First, in considering the specific language of Rule 55.02 and 55.03, and the language as part of the full Rule 55, it does not prohibit one party from leading the expert report of another party. It requires the reports to be filed in compliance with the Rule, but once filed, it does not directly limit the use by another party.

[35] The Rules provide specific requirements for an expert witness and expert evidence, such as written representations of their independence and willingness to participate in the proceedings. (Rule 55.01(c)). These representations are made to

the court. Therefore, once the expert report and written representations are filed, those experts are independent and not belonging to any party. Case law consistently directs there is no ownership in a witness or expert witness.

[36] The leading authority for the long-established maxim that there is no property in a witness or expert witness is Lord Denning in *Harmony Shipping Co SA v. Davis,* 1979 3 All ER 177 (C.A.). This principle was also recognized by Justice Jamieson (as she then was) in *Aly v. Personal Care Holdings Ltd.*, 2022 NSSC 108, stating:

> [33] **There is no property or ownership in an expert witness (with some very limited exceptions). An expert opinion is for the assistance of the court. The wording of Rule 55.04 setting out the required content of an expert report, highlights this point.** For example, Rule 55.04 states in part: "... the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party... the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court."
>
> [34] If the Plaintiff wished to rely on Dr. Gross' opinion, he could have inquired of Defendant's counsel to ensure the report was being filed. When it was not, the Plaintiff could have taken steps to ensure the evidence was properly before the court. …
>
> [Emphasis added]

[37] These conclusions are consistent with the basic propositions that independent experts are not dedicated to advocate for (or act in the service of) any particular party’s interest but, rather, are duty-bound to provide neutral and objective assistance to the Court.

[38] In this matter, there is no contest to threshold admissibility or qualification of the filed McKeen Report.

[39] NSHA has suggested that the McKeen Report can only be tendered into evidence by Defendant Physicians when (or if) they open their case, as the Defendant Physicians were the filing party. With respect, I reject this argument.

[40] A narrow interpretation of the Rules to only allow a party to use the expert report filed by another party once tendered by the filing party, effectively means that the plaintiff would never be able to rely upon the expert reports filed by another party. By contrast, the defendant would be able to rely upon experts reports of the plaintiff (or other defendants) that called their case before it. This unequal application of the ability to rely on filed expert reports is rooted in the sequence in which civil proceedings progress given the onus and burden of proof. To limit the use of a filed expert report to solely when tendered by the filing party, results in a prejudice and lacks any principled basis.

[41] A party chooses whether it will file an expert report in a proceeding. If it is filed, it must have accompanying written representations by the expert as contemplated in Rule 55.01. The expert report is filed with the court, and the written representations are made to the court. At this juncture, the offering or filing party

can no longer control if that expert report is tendered to the court by another party in the proceeding. Expert witnesses are generally prohibited from being called as a witness to give direct evidence, except as provided in Rule 55.13. The expert report is the direct testimony of the expert witness and should stand on its own subject to cross-examination and Rule 55.13. (*Naugle v. Cleary*, 2016 NSCA 56). If only the party that files the expert report can lead it, then it is allowing a party to assert ownership over the expert report and by extension the expert witness. This is contrary to the well-established principle of independence of expert witnesses and that no party has ownership in a witness. It also potentially interferes with the court's truth-seeking function which, of course, is a critical component of the judicial (including trial) process.

[42] To deprive the plaintiff's the ability to rely upon the expert report filed by the Defendant Physicians, is tantamount to denying the plaintiff's the ability to call a witness. Of specific importance is the fact the plaintiff identified Ms. MacKeen as a witness on its List of Witnesses filed in compliance with the Rules.

[43] It is acknowledged that while the parties can agree to expert threshold admissibility and qualifications, it is the court that is the ultimate gatekeeper. Admittedly, it is normally the filing party that engages the court in this screening

function, but there is no requirement in the Rules or common law, that only the filing party can do so.

[44] For greater clarity, this decision to allow the plaintiff to introduce or lead the McKeen Report, is still subject to the qualifications and admissibility gatekeeping function of the court.

[45] The court has considered whether the plaintiff should have also filed the McKeen Report with the court pursuant to Rule 55.03. To require each party intending to rely on the *same expert report* to independently file it, is a redundancy and serves no functional purpose. It is inefficient and serves no role in furthering the purpose of the Civil Procedure Rules. In this case, the Defendant Physicians filed the McKeen Report as they wished to offer the expert opinion. No party contested qualification or admissibility. Therefore, there is no contested impediment to it generally being before the court. The second essential component is that the plaintiff provided notice of its intention to rely upon Ms. McKeen and the McKeen Report, when it listed Alison McKeen on its List of Witnesses. Procedurally, all parties had notice of the McKeen Report when it was filed, that the plaintiff's List of Witnesses including Alison McKeen, and each had the opportunity to contest expert qualifications, admissibility, seek a rebuttal report and provide notice of intent to cross-examine.

[46] NSHA received the McKeen Report and engaged an expert to produce a rebuttal expert report, which was also filed with the court. NSHA also provided notice of intent to cross-examine Ms. MacKeen. It is difficult to ascertain what prejudice NSHA, or another party, would experience by allowing the plaintiff to rely upon the McKeen Report in its case in chief. If there is prejudice, it can be addressed with requests for leave to file further rebuttal reports and/or costs.

[47] If a party has provided notice of cross-examination of an expert witness, it cannot first lead the expert report and then expect to cross-examine that same expert. If a party tenders the expert report at trial, then the party is submitting the expert report as direct testimony. Only the remaining parties that provided notice of intent to cross-examine would have the ability to cross-examine the expert witness.

[48] In this matter, the plaintiff did not provide notice to cross examine Ms. McKeen. Instead, the plaintiff's listed her as a witness, indicating it intended to rely upon her evidence, and not disregard or challenge it.

[49] A conceptual prejudice for one party relying upon the expert report of another, is the exploitation of the resources of another party. Expert reports are expensive to obtain, as is their participation in proceedings. Even though there is no ownership in that witness, there is a financial expense and cost to having expert witnesses. A party

(including the plaintiff in this case) takes a significant risk when it seeks to rely upon the opinions that it hopes may be provided by another party. Indeed, if the hoped-for opinion does not materialize, the opportunity to file an essential opinion report may be lost. Moreover, if a party leads or relies on an expert report it did not file, there is potential for significant costs in favour of the party that retained that report. This premise is rooted in fairness and the adversarial process, that one party cannot rely on the fruit and financing of another party to support its case without being exposed to potential costs.

[50] During the deliberations on this motion, the plaintiff and Defendant Physicians settled the dispute. The remaining parties are the plaintiff and NSHA. The McKeen Report was an expert report filed by the Defendant Physicians. NSHA argues that where the Defendant Physicians are no longer parties to the proceedings, the McKeen Report is no longer capable of coming before the court at trial.

[51] Respectfully, I disagree for the same reasons outlined above. The parties may have changed, but it does not change that the expert reports were filed by a then-party in compliance with the Rules, the expert witness gave written representations to the court as to their independence and willingness to participate, and other parties relied upon that expert report. Witnesses, including expert witnesses, are not owned by any party. The Defendant Physicians are not entitled to remove or withdraw the

McKeen Report from the court file simply because they settled. The plaintiff named Ms. McKeen in its List of Witnesses and NSHA is deemed to have admitted McKeen's qualifications and the admissibility of her report.

[52] Where expert reports are intended to be the direct testimony of an expert witness, following the courts screening function, the report is the witness's testimony in chief. The plaintiff filed its List of Witnesses, which included expert witness Alison MacKeen. Meaning, all parties were aware from at least the finish date of the intention of the plaintiff to rely upon the McKeen Report. To prohibit the plaintiff from seeking to introduce the McKeen Report, would be to deprive the plaintiffs of access to a witness, which reiterates the concern of asserting ownership over a witness because the report was file by another then party.

[53] The court has interpreted Rule 55, in conjunction with the leading authorities on statutory interpretation, ownership of a witness and the purpose of the Civil Procedure Rules. However, even if this interpretation had not resulted in allowing the plaintiff to lead the McKeen Report, in these novel circumstances, I would have come permitted its use pursuant to the court's discretion in the conduct of a trial under Rule 2.03 of the Civil Procedure Rules.

[54] Rule 2.03 allows the court provides:

> 2.03 (1) A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:
>
> (a) give directions for the conduct of a proceeding before the trial or hearing;
>
> (b) when sitting as the presiding judge, direct the conduct of the trial or hearing;
>
> (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

[55] In this case, the court would have excused the plaintiff from not filing the McKeen Report and allowed it to be lead at trial by the plaintiff. In considering Rule 2.03(2), there is no benefit to extending the timeline to allow the plaintiff to file the same report, as it would only serve to jeopardize the trial dates and all parties have already had the McKeen Report for months.

[56] NSHA is the only remaining defendant in the proceeding and there is no basis to order an indemnification or expenses for NSHA to be born by the plaintiff in this motion. NSHA has already filed a rebuttal report, has filed its intention to cross-examine Ms. MacKeen and has been aware since at least the finish date of the plaintiff's intention to have Ms. MacKeen as an expert witness.

Direct Evidence and Interprovincial Subpoena

[57] Having made the forgoing ruling on the use of the expert report in this case, it is unnecessary to determine the motion for an interprovincial subpoena, as the plaintiff has submitted its intention to abandon the motion.

[58] In the motion, the plaintiff's relied upon *Harmony Shipping,* where Lord Denning allowed the subpoena for an expert witness to testify where that expert witness has advised both sides in the proceeding. It does not appear the *Harmony Shipping* proceeding was subject to the comparable Civil Procedure Rules, in particular Rule 55 and its interpretation in *Naugle v. Clarke,* that would prohibit direct testimony of an expert witness save the exceptions in 55.13. This is an important distinction. The procedural framework for obtaining an interprovincial subpoena for an expert, must still consider the way in which the expert is permitted to testify pursuant to the Civil Procedure Rules.

[59] The plaintiff can introduce the McKeen Report and, if admitted by the court following its gatekeeping function and Ms. McKeen is made available for NSHA cross-examination, it serves as the direct testimony of Ms. McKeen. Therefore, there is no argued need or exception for Ms. McKeen to provide other direct evidence.

[60] Accordingly, where the first threshold test pursuant to section 7(a) of the *Interprovincial Subpoena Act* is necessity. This is not satisfied. The motion for an order certifying a subpoena for an out of province witness is dismissed.

[61] Where NSHA had provided notice of its intent to cross-examine Ms. McKeen, she will need to be available for this purpose. There is no suggestion or evidence that she is unwilling to comply. Ms. McKeen's written representations confirm her willingness to participate in the proceedings. Should issues arise from this view, the decision on this motion does not preclude a fresh motion.

[62] Costs of the motion will be determined in the cause.

Hatt, J.