

SUPREME COURT OF NOVA SCOTIA

Citation: *Cole v. Strum Environmental Services Limited*, 2023 NSSC 423

Date: 20231219
Docket: 406188
Registry: Halifax

Between:

Keith Cole, The Co-operators General Insurance Company, a body corporate

v.

Sure Air Systems Limited, a body corporate, Imperial Oil Limited and Mccoll-Frontenac Petroleum Inc., carrying on partnership as Imperial Oil, Stevens Burner Service Limited, a body corporate, Parrsboro Metal Fabricators Limited, a body corporate, Strum Environmental Services Limited, a body corporate

**DECISION ON MOTION TO LATE-FILE A RULE 55 EXPERT'S REPORT
AND/OR FOR AN ADJOURNMENT**

Judge: The Honourable Justice Joshua Arnold

Heard: December 13, 2023, in Halifax, Nova Scotia

Oral Decision: December 19, 2023

Written Decision: January 15, 2024

Counsel: Dillon Trider and Thomas Morehouse, for the Plaintiffs
Harry Thurlow, for the Defendant, Strum Environmental Services Limited

By the Court:

Overview

[1] The plaintiffs say that despite having missed the deadline for filing a Rule 55 expert's report, exceptional circumstances allow for late filing. They say that if this necessitates an adjournment, any prejudice can be cured with indemnity. The defendant objects to late filing and/or an adjournment. Both parties agree that the jury notice can be struck and the matter should proceed by way of a judge sitting alone. For the reasons that follow, the plaintiffs are prohibited from the late filing of the expert's report and the motion for an adjournment is denied.

Facts

[2] The history of the proceedings is described in the affidavit of Kevin Quigley at para. 6:

a. According to the Statement of Claim filed on August 23, 2012, on or about December 10, 2009, the Plaintiff Keith Cole discovered a leak in the fuel oil tank on his property located at occurring at 71 Chebogue Lane, Dartmouth N.S. (the "Property"). At the time, the Property was insured under a policy of insurance issued by the other Plaintiff, the Co-operators General Insurance Company ("Co-op"). After being notified of the loss, Co-op retained the defendant, Strum Environmental Services Limited ("Strum") to assess the fuel oil spill and carry out the clean-up.

b. According to correspondence between representatives of Strum and the adjuster for Co-operators exchanged in the aftermath of the oil spill, Strum initially estimated the costs associated with the remediation efforts to total \$150,000.00.

c. According to correspondence exchanged between representatives of Strum and the adjuster for Co-op, by December, 2010, the remediation was not complete and Co-op had paid Strum a total of \$609,764.34 excluding HST. Co-op ultimately fired Strum and retained another environmental firm, Stantec Consulting Ltd. ("Stantec"), to complete the remediation.

d. According to the Notice of Action and Statement of Claim and the Affidavit Disclosing Documents of the Plaintiff, on or about June 28, 2011, Co-op retained Gregory Hardy of Patterson Law with respect to pursuing a subrogated

claim in relation to the oil leak and pursuing a claim in its own right against Strum.

[3] After being retained by Co-op, Mr. Hardy retained engineer Matthew Allen of Giffen Koerth to provide an opinion on Strum's remediation work. He provided a report, prepared with Keith Stephen, another senior engineer:

f. According to the Notice of Filing Expert Report filed by the Plaintiffs in this matter on May 03, 2023, on July 16, 2012, Matthew Allen and his colleague Keith Stephen authored a report (the "Giffen Koerth Report") in which they opined, *inter alia*, that Strum did not employ industry accepted best practices in the remediation of the Property and, had industry accepted best practices been used, Co-op likely would have avoided \$217,650.00 in remediation costs it paid to Strum and its contractor and likely would have avoided all costs it paid to Stantec.

[4] Still represented by Mr. Hardy, the plaintiffs commenced an action for negligence against Strum on August 23, 2012. They changed counsel within the firm (Patterson Law) twice: on November 6, 2012 (Margot Ferguson) and October 30, 2018 (Robert H. Pineo).

[5] By November 8, 2018, all claims had been resolved against other defendants, and the plaintiffs elected trial by jury on August 16, 2021. A date assignment conference was held on January 7, 2022. The memorandum indicated that the legal issues were Strum's alleged negligence, causation, and quantum of damages. The memorandum also referred to expert witnesses, as Mr. Quigley states in his affidavit:

n. In the Memorandum, the expert witnesses for the Plaintiff are identified as "Chris Smith - cost to remediate spill" and "Mr. Griffin - environmental engineer on standard of care of defendant". Based on my review of the file, the Plaintiffs did not at any point in time retain an expert by the name of Mr. Griffin. The only expert retained by the Plaintiffs in relation to the standard of care of Strum were the authors of the Giffen Koerth Report.

o. In the Memorandum, with respect to the expert witnesses for the defendant, it states the defendant "intends to retain and provide reports on same two subjects as plaintiff". Based on my review of the file, I can confirm that no expert reports from the defendant had been received by the Plaintiffs prior to August 08, 2023.

p. In the Memorandum, no specific date was set for the filing of expert reports. Subject to my discussions with Mr. Thurlow in May and June, 2023 discussed below, it has been my understanding that the deadline for each party's expert reports was the default deadline under Rule 55.03.

[6] The matter was set down for a jury trial to commence on February 20, 2024. The finish date was November 8, 2023, meaning that the deadline for expert reports pursuant to Rule 55.03 was May 8, 2023.

[7] Mr. Quigley goes on in his affidavit to describe subsequent issues that emerged in respect of experts' reports. He was retained by Co-op on March 2, 2023. He received the file from Patterson Law, of which Mr. Pineo had most recently had carriage. He states that the file he received was incomplete. Additionally, the facts surrounding the problem with the Giffen Koerth Report and the attempt to file the Schifano Report late, as noted in Mr. Quigley's affidavit, are:

8. The file I received from Mr. Pineo was large, consisting of several banker's boxes full of documents. When I first reviewed the file, I realized that the file was not only large, but incomplete. The file I received did not contain the Plaintiffs' Affidavit Disclosing Documents, nor did it contain correspondence sent and received by Mr. Pineo concerning the matter.

[8] Having obtained the missing material by June 12, 2023, it next emerged that the plaintiffs had not filed any expert reports up to the point that Mr. Quigley was retained. He states in his affidavit:

11. Based on my review of the file, I was aware that the Plaintiffs had obtained the Giffen Koerth Report and no other reports on the issues of Strum's standard of care, causation, and damages.

12. Given the proximity to the deadline, I made the decision to file the Giffen Koerth Report on May 03, 2023 without first confirming the availability of the authors to testify at the trial.

13. After filing the Giffen Koerth Report, on May 08, 2023, I spoke to Mr. Matthew Allen by telephone to discuss the Giffen Koerth Report. Mr. Allen was one of the authors of the Giffen Koerth Report along with Mr. Keith Stephen.

14. During this telephone call, I was advised by Mr. Allen, and do believe, that since authoring the Giffen Koerth Report, he and Mr. Stephen had taken on roles outside of the engineering consulting industry and had not been involved in

engineering consulting for several years. During the phone call, it became obvious to me that Mr. Allen had little if any recollection of this matter and was very reluctant to testify.

[9] Mr. Quigley consulted LinkedIn profiles for Mr. Allen and Mr. Stephen, which also indicated that they had each moved on from Giffen Koerth. He thus resolved to secure a new expert report:

18. After this phone call, given Mr. Allen's and Mr. Stephen's change in status since authoring the Giffen Koerth Report, I took steps to secure a new expert to author a report in relation to the issues of Strum's standard of care, causation and damages. I contacted 30 Forensic Engineering, the firm formerly known as Giffen Koerth, about providing an expert to author a new report. After some back and forth during the month of May, 2023, I eventually retained Dr. Vito Schifano, a professional engineer and the Practice Lead of the Geotechnical and Mining Group at 30 Forensic Engineering for the task.

[10] Mr. Quigley describes in his affidavit discussions between the parties about extending the deadline for filing experts' reports:

19. On May 05, 2023, before I had advised him that we had filed the Giffen Koerth Report, Harry Thurlow, counsel for Strum, sent me an email suggesting that the parties mutually agree to extend the deadline for filing expert reports by a couple of weeks...

20. By May 25, 2023, Strum had not filed any expert reports in relation to this proceeding. I sent an email to Mr. Thurlow on May 25, 2023, in which I asked him, for the purpose of getting certainty on the new deadline for filing expert reports, when he expected to have his expert report ready. Mr. Thurlow responded by email, in which he indicated that he anticipated his report to be in the nature of rebuttal, thus making his deadline for filing August 08, 2023. This was the first indication I received that Strum's report was to be a rebuttal report. On May 29, 2023, I sent an email to Mr. Thurlow stating that we would be in touch when we expected to have our report ready...

21. I had a telephone call with Mr. Thurlow on June 05, 2023 about when we expected to have our expert report ready. After this telephone conversation with Mr. Thurlow, I sent Mr. Thurlow an email summarizing what we had discussed during the phone call... After sending this email, and prior to filing the report from 30 Forensic Engineering as set out below, I received no communications from Mr. Thurlow giving any indication that Strum would be objecting to the filing of the report from 30 Forensics Engineering on the basis that it was being filed past the deadline.

22. On July 05, 2023, we received the finalized report from Dr. Vito Schifano. I took steps to deliver the report to the court for filing on July 07, 2023. Attached hereto as **Exhibit “I”** is a true copy of the enclosure letter that was delivered to the court along with our Notice of Filing Expert Report. When I received the court issued copies of the report from the court, they were date stamped July 10, 2023. On July 14, 2023, I arranged to have the issued report delivered to Strum via Mr. Thurlow.

[11] It subsequently emerged that Strum was objecting to the Schifano report, claiming it was filed out of time:

23. On August 04, 2023, I received correspondence from Mr. Thurlow in which he advised that Strum was objecting to the admission of Dr. Schifano’s report on the basis that it was out of time. This was the first time Strum had indicated that it would be objecting to our expert report on the basis of it being filed passed the deadline.

24. On August 08, 2023, Strum filed the “rebuttal” expert report of Andrew Thalheimer, P. Eng of Dillon Consulting Limited. I have been advised by current counsel to the Plaintiffs, and do believe, that on August 10, 2023, the Plaintiffs provided verbal notice to Mr. Thurlow that it was objecting to the admission of its report on the basis that it does not comply with Rule 55.05.

25. I have been advised by current counsel to the Plaintiffs, and do believe, that on August 10, 2023, the Plaintiffs made it known to Strum that it intended on bringing a motion to have the report of Dr. Schifano admitted and to have Strum’s rebuttal report excluded. I have further been advised by current counsel to the Plaintiffs, and do believe, that between August 10, 2023 and September 15, 2023, the Plaintiffs held off filing the motion to allow the parties to engage in discussions with a view to potentially resolving the matter.

[12] The defendants rely on the affidavit of Katie O’Keefe in support of their position that they are blameless regarding this issue:

4. Mr. Thurlow advises me, and I do verily believe, that based on the representations noted above from Mr. Pineo, he prepared for discoveries and determined subsequent file strategy on the understanding that the case was going to be based on the opinions contained in the GK Report.

...

8. On March 20, 2023, Kevin Quigley of Burchell Wickwire Bryson spoke with Mr. Thurlow by telephone and advised that he had been retained by the Plaintiffs and was taking over the file from Mr. Pineo.

9. During the week of May 2 - 5, 2023, Mr. Quigley contacted Mr. Thurlow's office to request a copy of the Plaintiffs' disclosure which he had not yet found in materials transferred to him from Mr. Pineo. Mr. Thurlow was out of the country on vacation at the time but nonetheless replied by email on Friday, May 5, 2023 to advise that he was out of the office but would forward a copy of the Plaintiffs' Affidavit Disclosing Documents when he returned to the office on Monday, May 8. In this same email, Mr. Thurlow advised that the date for filing an expert report was also Monday, May 8. Mr. Thurlow offered, at that time, to extend the date for filing an expert report by two weeks so that Mr. Quigley could review the file materials before deciding whether he needed to file a motion for a more substantial reset of the timetable.

10. Unbeknownst to Mr. Thurlow at the time, the GK Report was filed on May 3, 2023, as a Rule 55 expert report...

11. On May 9, 2023, Mr. Quigley spoke with Mr. Thurlow by telephone again. Mr. Thurlow advises me, and I do verily believe, that in this call, Mr. Quigley advised that he learned the authors of the GK Report were no longer with that Firm and no longer in the business of preparing environmental remediation opinions. He further advised Mr. Thurlow that his intention was to see whether someone at the same engineering firm, which by then had changed its name to 30 Forensic Engineering, was prepared to adopt the GK Report opinions as their own and be available for testimony. Mr. Thurlow verbally agreed that this was a fair way to address the situation.

12. Further exchanges of email between counsel occurred between May 25-29, 2023 concerning the timeline for expert reports. Specifically, on May 25, Mr. Quigley wrote to Mr. Thurlow to ask for certainty around what the new date for filing an expert report would be. Mr. Thurlow replied on May 26 and pointed out that the Defendant's report is a rebuttal report to the GK Report and that the rebuttal deadline was August 8, 2023. On the same day, Mr. Quigley replied as follows:

“Thanks Harry. I expect we should not be long putting together our report from 30 Forensics (formerly Giffen and Koerth). I will check on timing and get back to you.

KQ”

13. On May 29, Mr. Thurlow followed up and advised Mr. Quigley that he could have a report in the first week of June. Mr. Quigley replied the same day saying:

“Thanks Harry. We will let you know once we have a date for ours.
Should not be too long.

KQ”

...

15. On June 2, 2023, Mr. Thurlow wrote to Mr. Quigley to advise that the Defendant’s report was sitting in draft but could be signed. In response, Mr. Quigley wrote on June 3, 2023, suggesting that Mr. Thurlow hold onto the report until the two of them could speak on the phone. That call occurred on June 5, 2023, after which Mr. Quigley sent an email to Mr. Thurlow the same day confirming that the 30 Forensic Engineering report would be completed by the end of June and that the Defendant’s report would not be filed until that time. Although not mentioned in the email, Mr. Thurlow advised me that his reasoning for holding the Defence report was to allow for any necessary adjustments based on the new author name, paragraph numbers, etc. so that the rebuttal report would align...

16. Mr. Thurlow told me, and I do verily believe that Mr. Quigley and Mr. Thurlow agreed to extend the deadline to file an expert report until the end of June 2023 so as to allow Mr. Quigley to have someone at 30 Forensic Engineering adopt the findings in the GK Report and testify to its contents. Mr. Thurlow advised me, and I do verily believe, that at no time did Mr. Quigley advise that he had abandoned the plan to have someone adopt the GK Report contents, nor did he ever point out to Mr. Thurlow that a rebuttal report to the GK Report would be irrelevant or unresponsive to a planned new report.

17. Unbeknownst to Mr. Thurlow, on June 8, 2023, Thomas Morehouse, an associate in Mr. Quigley’s office, wrote to Vito Schifano of 30 Forensic Engineering to request that he prepare a Rule 55 expert report (the “Schifano report”)...

18. In the letter, Mr. Morehouse requested Mr. Schifano’s expertise regarding the standard of care owed by Strum, whether Strum’s actions fell below the standard of care, whether Strum’s alleged breach of the standard of care caused the Co-operator’s to suffer damages, and the extent of the Co-operator’s damages, if any. The letter does not request adoption of the GK Report, nor does it mention

the GK Report at all. The letter requested that Mr. Schifano answer 16 questions not contained in the GK Report and prepare his own report.

19. The end of June passed with no replacement author report for the GK Report (which had been filed with the court as the Plaintiffs' Rule 55 report on May 8, 2023). Consequently, Mr. Thurlow did not file the Defendant's report as there was still plenty of time before the rebuttal deadline on August 8, 2023.

20. Mr. Thurlow received the Schifano report from Plaintiff's counsel on July 14, 2023; 9 weeks past the court appointed filing date and two weeks past the latest agreed date for a replacement author GK Report...

[13] Counsel for the defendants therefore objected to the Schifano report, as Ms. O'Keefe states:

21. In a letter to Mr. Morehouse on August 4, 2023, Mr. Thurlow objected to the new report explaining that the Defendant did not agree with Plaintiffs' counsel obtaining anything other than the agreed replacement author for the original GK Report opinions and that the Schifano report was filed past the deadline...

22. On August 8, 2023, the Defendant filed its expert rebuttal report to the GK Report. Attached as Exhibit "K" is the rebuttal report.

23. The rebuttal report was prepared to respond to the GK Report, not the Schifano report.

24. In an email dated November 8, 2023, Plaintiffs' counsel, Dillon Trider, indicated that the Plaintiffs no longer intend to rely on the GK Report. Attached as Exhibit "L" is the email.

Relevant Civil Procedure Rules

[14] Civil Procedure Rules 51.03, 55.02, and 55.03 deal with the exclusion of evidence for non-compliance with rules, and with filing deadlines for experts' reports, respectively:

51.03 Exclusion of evidence for non-compliance

(1) A judge who presides at a trial must exclude evidence of the following kinds, unless the party offering the evidence satisfies the judge it would be unjust to exclude it:

...

(d) expert opinion not disclosed under Rule 55 - Expert Opinion.

(2) A judge who admits evidence despite non-compliance with the Rules for notice, disclosure, or discovery must consider ordering the party proposing the evidence to indemnify each other party for expenses caused by the introduction of the evidence, including expenses resulting from an adjournment.

55.02 Report required

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.

55.03 Deadline for filing report

(1) 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.

(2) A party to an action who receives an expert's report stating an opinion the party contests, and who wishes to offer a rebuttal expert opinion, must file a rebuttal expert's report no more than three months after the day the expert's report is delivered to the party, or by a deadline set by a judge...

Law

[15] The parties referred me to the following cases:

1. *Corkum v. Sawatsky*, (1993), 126 N.S.R. (2d) 317 (S.C.T.D.), reversed, 126 N.S.R. (2d) 317 (C.A.);
2. *Fowler v. Schneider National Carriers Ltd.* (2000), 184 N.S.R. (2d) 212 (S.C);
3. *Caterpillar Inc. v. Secunda Marine Services Ltd.*, 2010 NSCA 105;
4. *Wareham v. Ross*, 2010 NSSC 140;
5. *Three Ports Fisheries Ltd. v. Jeffrie*, 2013 NSSC 224;
6. *Conrad v A.F.L. Manufacturing Limited*, 2018 NSSC 52;
7. *Nichols v. McGillis*, 2019 NSSC 85;

8. *Graca v. Carter*, 2022 NSSC 107;
9. *Aly v. Personal Care Holdings Ltd.*, 2022 NSSC 108;
10. *3021386 NS Limited v. Harding*, 2022 NSSC 174;
11. *Croft v Nemis*, 2022 NSSC 211;
12. *Seldon v. Berthier*, 2022 NSSC 239;
13. *LaMarche v Campbell*, 2022 NSSC 338.

[16] There is no real dispute regarding the legal principles that apply to this situation. The principles governing the late filing of a Rule 55 report were succinctly reviewed by Jamieson J. in *Aly v. Personal Care*:

[16] The *Civil Procedure Rules* set out the requirements that a party must meet in order to offer expert opinion at trial. Rule 55.02 says a party may not offer an expert opinion at trial unless an experts report is filed in accordance with the Rules. Rule 55.03 requires such report to be filed no less than six months before the finish date or by a deadline set by a judge. These Rules use wording that is imperative. They must be strictly followed...

[17] In *Banfield v. RKO Steel Ltd.*, 2017 NSSC 315, Justice Chipman stated that Rule 55 "must be strictly adhered to". I adopt his reasoning as follows:

[30] In my view, the Nova Scotia cases considering Rule 55 offer a narrow interpretation of what is permitted under the Rules. That is to say, collectively they stand for the proposition that Rule 55 must be strictly adhered to. For example, it has been held that under the narrative rule physiotherapy reports do not qualify as physician narratives. In the matter before me there has been anything but strict adherence. The remaining question is whether Dr. Carey might somehow be permitted to give limited evidence, perhaps as identified in *Bezanson*. In my view, Justice Boudreau's decision offers a very fine distinction between medical opinion provided for the truth of its contents and opinion admitted for the fact that it was given. In the circumstances of this case, I am of the view that it would be highly prejudicial and contrary to Rule 55 to permit Dr. Carey to give any evidence whatsoever. In this regard I am of the opinion that the evidence in question does not qualify under any statutory or common law exceptions to the rules regarding admissibility of expert opinion evidence. Even if it did, in the context of a jury trial, this would amount to providing expert opinion evidence through the "back door".

...

33. We have Rules for a reason. The Rules governing experts have been carefully crafted and the Plaintiff has not complied with them.

[18] In the present circumstances, no expert report has been filed with the court. The onus is on the party seeking to use opinion evidence at trial to identify the opinion and comply with the Rules. Filing an expert report with the court in accordance with Rule 55 is one of the mandatory pre-conditions to the admission of opinion evidence at trial. The specific requirements for expert evidence in the Rules are there for a reason: they are to ensure predictability, to provide consistency as to form of the opinion offered, to avoid surprise or ambush, to ensure scarce trial time is not lost due to the need for adjournments caused by late-filed expert reports and so on.

[19] The fact that the Gross Report was disclosed amongst the parties 19 months ago (but not filed), does not automatically render it admissible opinion evidence at trial. The Plaintiff must comply with the Rules. As Justice Brothers stated in *3021386 NS Ltd., supra*:

[44] Subject to limited exceptions, an expert is not permitted to be called as a witness to give direct evidence (Rule 55.13(2)). Nowhere in Rule 55 does it state that a report disclosed to a party but not filed in accordance with Rule 55 is admissible. This is consistent with the mandatory direction provided for in Rule 55.02.

[Emphasis Added]

[17] Concluding that the plaintiff had failed to comply with Rule 55, Justice Jamieson went on to consider whether it should be admitted despite the non-compliance. She referred to Rule 51.03(1)(d), which contemplates admission of non-compliant expert evidence where it would be “unjust to exclude it.” She continued:

[22] Again this Rule uses imperative language of ‘must exclude evidence’ although it provides the court with discretion to admit expert opinion evidence, if it would be unjust to exclude it. The party seeking to offer the opinion evidence bears the burden of satisfying the judge it would be unjust to exclude the evidence. For the following reasons, I am of the view it is a high burden.

[23] I note that exceptional circumstances have long been required both under the prior Rules and the current Rules when considering whether to admit late experts reports. Justice Saunders (as he then was), in *Corkum v. Sawatsky*, (1993), 118 N.S.R. (2d) 137, reviewed on other grounds, 1993 NSCA 201, spoke of the concept of exceptional circumstances when he refused to allow a plaintiff to introduce a late expert report. I note this decision was decided under the *Civil Procedure Rules* (1972) and specifically Rule 31.08 which stated:

31.08. (1) Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been

(a) served on each opposite party and filed with the court by the party filing the notice of trial at the time the notice is filed, and

(b) served on each opposite party by the person receiving the notice within thirty (30) days of the filing of the notice of trial, the evidence of the expert shall not be admissible on the trial without leave of the court.

[Emphasis Added]

[24] Under this prior Rule, Justice Saunders (as he then was) made it clear that it would only be in exceptional circumstances that late filing of an expert opinion would be allowed and that the burden of persuasion would be on the defaulting party.

44 It is not enough for the plaintiff to urge that leave be granted because defence counsel is sufficiently skilled, prepared and experienced to deal with its late introduction. The time prescribed by the Rule is there for a reason. *Margaret E. Miller v. Prest Brothers Limited* (unreported, S.H. No. 82796, November 6, 1992). Fairness and predictability demand that the Rule be applied strictly and fairly to all sides, save in exceptional circumstances.

45 There is a burden of persuasion upon the defaulting party to show that the interests of justice would merit its late reception. I heard no such submission during argument. Rather, Mr. Newton explained that it was a decision come by lately and that Ms. Gmeiner's report might be "helpful to the court". That is not reason to grant leave to waive the clear requirements of C.P.R. 31.08. The Rule is intended to avoid surprise or costly delay brought on by a request for an adjournment. Adherence to the Rule should promote settlement by giving each side sufficient time to address the content of an expert's report and obtain reasoned instructions which might lead to an early resolution. It was after all the plaintiff who pressed for trial during the term of the Supreme Court in Kentville. While much of the docket was taken with criminal jury trials I assigned the last days available to this case. In his Notice of Trial, Mr. Corkum certified his readiness and certified that all interlocutory steps had been taken. It was for all of these reasons that I rejected Ms. Gmeiner's report.

[25] Current Rule 55 is imperative. It requires strict adherence to the Rule or exclusion if the expert opinion is not disclosed as required. Rule 51.03 speaks of "must exclude evidence... unless the party offering the evidence satisfies the judge it would be unjust", whereas prior Rule 31.08 used the phrase "without leave of the court." I am of the view that the current Rules (55 and 51), when read together, speak of even stricter adherence to the requirements for expert opinions and even narrower possibilities for allowing late filed reports, than the prior Rules did.

[26] I note that Justice Wood (as he then was) in *Saturley v. CIBC World Markets Inc.*, 2012 NSSC 389, considered Rule 51.03 in the context of late

admission of documentary evidence, not expert opinion. He said that when considering whether it would be unjust to exclude evidence under Rule 51.03, an assessment of various factors should be undertaken including: the significance of the evidence; when the evidence was known; the explanation for the failure to disclose earlier; the prejudice from late disclosure; and the impact on trial. In essence, these factors speak to an exceptional circumstances analysis.

[18] Justice Jamieson concluded:

[42] I am of the view that Rule 51.03, when read with Rule 55, requires indisputable exceptional circumstances before concluding it would be unjust to exclude the opinion evidence. I am in agreement with Justice Ann Smith's comments in *Conrad v. A.F.L. Manufacturing Limited*, 2018 NSSC 52, concerning the type of situations that, depending on the circumstances, could qualify as possible exceptional circumstances under the current Rules. At para. 63 she stated:

63. ... In my view, exceptional circumstances could be where facts come into the knowledge of a party which could not, with reasonable diligence, have been learned in time to be included in an expert's report. Another exceptional circumstance could be where a plaintiff in a personal injury claim has a significant change in his or her health, such that new expert evidence would be needed to properly put the plaintiff's state of health before the trial judge. There may be many more circumstances which constitute exceptional circumstances, but the mere rescheduling of a trial, in my view, is not one of them.

[43] This is not a closed list. However, exceptional circumstances are just that, exceptional. They are circumstances that are outside of ones control or unforeseen, despite reasonable diligence. In assessing such circumstances, the courts analysis should include consideration of a number of factors, such as the significance of the opinion evidence the party seeks to admit / its probative value; when this evidence became known to the party; the explanation for its failure to file the opinion evidence earlier; the prejudice from the late expert opinion; and the impact on the trial. In short, it is not an easy route to a conclusion that it would be unjust to exclude a late filed expert opinion.

[Emphasis added]

[19] Additionally, in *Conrad v. A.F.L. Manufacturing Limited*, 2018 NSSC 52, Smith J., held that a party is not required to elicit a rebuttal report until it is clear that the opposing party's late-filed expert report will be admitted:

[66] Counsel for Kirk Anthony, Mr. Coles, Q.C. told this Court that if the Court ruled that the Roberts' Report was admissible, he feared that he would not have time to retain a rebuttal expert and have a report prepared in time for the

April, 2018 trial which is only one month away. That could mean a request for an adjournment of the trial dates. It is true that the defending parties have had the Roberts' Report since September 2017. That may mean that they have had an opportunity to digest it and obtain instructions as to whether to obtain a rebuttal expert should this Court rule that the report is admissible. However, it does not follow that the defending parties should have had to immediately retain experts in rebuttal in the circumstances. It was reasonable for them to wait for this Court's decision before spending the time and money to respond to an expert's report that was clearly latefiled. Further, they were put to the task of having to bring this motion so close to trial because of Plaintiffs' counsel refusal to concede that the Roberts' Report was filed late. She did so concede in her prehearing brief (as an alternative argument) and before this Court.

[Emphasis Added]

Analysis - Exceptional Circumstances

[20] The applicant has the onus of proving that there are exceptional circumstances that would allow late filing of the expert's report. In determining whether the applicant has met the onus of proving that there are exceptional circumstances, among the constellation of issues the court should consider, in this case the probative value of the report must be compared to the prejudicial effect of allowing its admission.

Probative value

[21] The plaintiff says that it cannot make its claim in negligence without Dr. Schifano's report. The probative value is significant.

Prejudicial effect

[22] The defendant points to a number of factors that it says fall under the broad heading of prejudicial effect:

1. If the report is admitted, it cannot proceed to trial without obtaining a rebuttal report;
2. It cannot obtain a proper rebuttal report between now and the currently scheduled trial dates; and
3. The trial would have to be adjourned, after the Finish Date, in order to accommodate the new report.

[23] Therefore, the prejudicial effect is significant. However, in simply comparing the probative value to the prejudicial effect, I am satisfied that the

prejudice to the defendant arising from an adjournment could be cured with a proportional indemnity, considering that the oil spill occurred in 2009, the claim was filed in 2012, and both parties essentially allowed the litigation to languish between 2012 and 2020. Neither party was in any sort of a huge rush to have the matter concluded. However, there are other factors for consideration.

[24] To show exceptional circumstances, the plaintiff also relies on: a) the last-minute change of counsel in March 2023; and b) the reluctance of the former experts to testify.

a) the last-minute change of counsel in March 2023;

[25] No evidence was provided to explain what led to the last-minute change in counsel. Between 2012 (when the Statement of Claim was filed) and 2023 (when counsel changed) the plaintiff was represented by various lawyers within Patterson Law. According to the court file, the litigation proceeded glacially. Otherwise, the court has little information to rely on. When Mr. Quigley took over the file, according to his affidavit, the file was in disarray, and, in an unusual turn of events, he had to obtain the Affidavit of Disclosing Documents from opposing counsel (Mr. Thurlow). Otherwise, his firm moved the matter along.

b) the reluctance of the former experts to testify;

[26] The plaintiff has provided no evidence explaining why there was no communication with the authors of the Giffin Koerth Report between 2012, when it was obtained, and May 2023, when Mr. Quigley discovered that the experts were reluctant to testify. There is a dispute between the parties as to what the discussion was between the lawyers when Mr. Quigley subsequently reached out to Mr. Thurlow about the expert report. According to the plaintiff:

[20] A few days prior to Mr. Quigley's conversation with Mr. Allen, on May 05, 2023, Harry Thurlow, counsel for Strum, had sent an email to Mr. Quigley suggesting that the parties mutually agree to extend the deadline for filing expert reports by a couple of weeks.

...

[24] On June 05, 2023, Mr. Quigley had a telephone conversation with Mr. Thurlow regarding the deadline for filing expert reports. After this telephone conversation, Mr. Quigley sent Mr. Thurlow an email summarizing what they had discussed during the phone call. That email is attached as Exhibit "H" to the Quigley Affidavit. In this email, Mr. Quigley stated that he confirmed with 30

Forensic Engineering that they would have their report completed by month's end, and he agreed that Strum's report from Dillon Consulting need not be filed until month's end. After sending this email, Mr. Quigley received no communications from Mr. Thurlow giving any indication that Strum would be objecting to the filing of the report from 30 Forensics Engineering on the basis that it was being filed past the deadline.

...

[27] On August 4, 2023, Strum provided notice to the Plaintiffs that it was objecting to the admission of Dr. Schifano's report on the basis that it was out of time.

[27] According to the defendant:

15. Throughout May 2023, Defence Counsel, W. Harry Thurlow and Mr. Quigley had two telephone conversations to discuss an issue with the GK report. The authors no longer worked for Giffen Koerth, and the firm had since changed its name to 30 Forensic Engineering. As such, it was decided that Mr. Quigley would contact 30 Forensic Engineering to determine whether a current employee would adopt the findings in the GK report and testify to its contents. Mr. Thurlow agreed that this would be a fair way to address the matter. The Plaintiff would get an extension to replace the author, but the Defendant would not be prejudiced by the delay because the underlying opinions to rebut (and which had always been represented as the basis for the case) would stay the same.

16. On June 8, 2023, Plaintiffs' Counsel, Thomas Morehouse, wrote to Vito Schifano of 30 Forensic Engineering to request that he prepare a Rule 55 expert report (the "Schifano report"). In a letter outlining the situation, Mr. Morehouse requested Mr. Schifano's expertise regarding the Standard of care owed by Strum, whether Strum's actions fell below the standard of care, whether Strum's, alleged, breach of the standard of care caused the Co-operator's to suffer damages, and the extent of the Co-operator's damages, if any. Additionally, Mr. Morehouse requested that Mr. Schifano prepare a report. There is no mention of the GK report in the request. Moreover, Mr. Morehouse asked Mr. Schifano to answer sixteen specific questions in his report that are not outlined in the GK report.

17. Plaintiffs' Counsel provided the Schifano report to Defence Counsel on July 14, 2023.

18. On August 4, 2023, Mr. Thurlow wrote to Plaintiffs' counsel setting out an objection to the late filing of the Schifano report. Mr. Thurlow specifically points out that the Schifano report does not comply with the agreement reached with Mr. Quigley that the new report was intended to allow replacement of the authors by someone who could adopt their opinions. Plaintiff's counsel have never dealt with this assertion which was placed directly before them in the August 4 letter. Mr. Quigley fails to mention the May 9, 2023 conversation he had with Mr. Thurlow in his affidavit and does not mention this aspect of their later

conversations generally. Nor does he deny in his affidavit that the conversation occurred in this way. Counsel are simply silent on this issue offering no response at all to the August 4 letter's assertion.

[As appears in original.]

[28] In relation to the circumstances surrounding obtaining the Schifano Report, the plaintiff says:

[18] In the midst of getting up to speed on the file, Mr. Quigley filed the Giffen Koerth Report on May 03, 2023. Mr. Allen later confirmed in a telephone call with Mr. Quigley, however, that since authoring the Giffen Koerth Report, he and Mr. Stephen had taken on roles outside of the engineering consulting industry and they had not been involved in engineering consulting for several years. Mr. Quigley got the sense during this phone call that Mr. Allen had next to no recollection of the matter and was very reluctant to testify. The LinkedIn profiles of Mr. Allen and Mr. Stephen, which are attached to the Quigley Affidavit as Exhibit "E", reflects what was represented to Mr. Quigley during this phone call.

[19] After hearing this news, Mr. Quigley immediately took steps to find another expert to author a report. As it was May 08, 2023 when Mr. Quigley realized that a new report would be required, it was readily apparent that any new report would be filed past the May 08, 2023 deadline for filing expert reports and an extension to the deadline was required.

...

[21] On May 08, 2023, Mr. Quigley reached out to 30 Forensic Engineering, formerly known as Giffen Koerthj the former firm of Mr. Allen and Mr. Stephen, about authoring a new report and Mr. Quigley ultimately retained Dr. Vito Schifano, a professional engineer and the Practice Lead of the Geotechnical and Mining Group at 30 Forensic Engineering for the task.

[22] As part of Dr. Schifano's retainer, Mr. Quigley requested that he review and incorporate relevant documents which had been created after Mr. Allen and Mr. Stephen authored the Giffen Koerth Report, including closure and other reports authored by the environmental firm which had completed the remediation work.

...

[25] Dr. Vito Schifano ultimately completed his report on July 05, 2023. Like the authors of the Giffen Koerth Report, Dr. Schifano concluded that Strum failed to follow industry accepted best practices in carrying out the remediation of the oil spill, Dr. Schifano's theory as to how Strum failed to follow industry accepted best practices, however, differed from that of the authors of the Giffen Koerth Report.

[29] According to the materials filed on this motion, the plaintiff did not merely ask a new expert from 30 Forensic Engineering to adopt the Giffen Koerth Report, as had been discussed with counsel for the defence. As noted by the defendant, on June 8, 2023, Plaintiffs' counsel in fact asked Dr. Schifano to essentially prepare a new report. The June 8, 2023, letter from Mr. Morehouse to Dr. Schifano states variously:

...

We confirm that we wish to retain you for the purpose of preparing a Rule 55 expert report ("Report") in this matter.

Our deadline for submission of the report to the Court is **June 30, 2023**- We understand that you intend to provide us with a draft copy of your report by **Tuesday, June 27, 2023**. We thank you in advance for the quick turnaround.

For your information the trial in this matter is scheduled for **February 20, 21, 22, 26, 27, 28, 29 & March 4, 5, 6, and 7, 2024**. As with any case, the matter may proceed to trial or may settle in advance of trial. In the event that a trial is required, we will be calling you to speak to the contents of your Report. Closer to the trial dates we anticipate being in a position to narrow the list of dates but request that for present purposes you maintain in your schedule those dates as available for the trial in this matter.

...

REQUIREMENT OF OPINION

We require your expertise generally to assist the Court in understanding the following:

- the standard of care owed by site professionals like Strum to entities who retain them, like Co-op;
- whether any of the steps taken by Strum in assessing and remediating the fuel oil spill at 71 Chebogue Lane fell below the standard of care it owed to Co-op;
- if Strum's conduct fell below the standard of care it owed, whether its breach of the standard of care caused Co-op to suffer damages; and
- the extent of Co-op's damages if any,
- We intend to seek to have you qualified as an expert in the field of Environmental and Geotechnical engineering and to give expert evidence with respect to the above noted issues.

...

QUESTIONS TO BE ANSWERED

1. What guidelines, and or codes governed Strum in its assessment and remediation of the fuel oil spill at 71 Chebogue Lane?
2. What, if any, obligation did Strum have to supervise the activities of Priority Environmental Services Ltd. with respect to its work in the assessment and remediation of the fuel oil spill at 71 Chebogue Lane?
3. What was the total cost to Co-op for the assessment and remediation work done by Strum and Priority Environmental Services Ltd. with respect to the fuel oil spill at 71 Chebogue Lane?
4. What was the total cost to Co-op for the assessment and remediation work done by Stantec and its remedial contractor with respect to the fuel oil spill at 71 Chebogue Lane?
5. What, if any, obligation did Strum have to delineate the vertical and lateral extents of subsurface fuel oil contamination before proceeding with remediation activities?
6. What, if any, obligation did Strum have to delineate the vertical and lateral extents of subsurface fuel oil contamination during remediation activities?
7. In your opinion, did Strum fulfill its obligation, if any, to delineate the vertical and lateral extents of subsurface fuel oil contamination *before* it proceeded with the remediation of the fuel oil spill at 71 Chebogue Lane? Explain.
8. If your answer to question 7 is “no”, in your opinion, what impact, if any, did Strum's failure have on the extent of the fuel oil contamination and/or the cost to Co-op to remediate the fuel oil spill?
9. In your opinion, did Strum fulfill its obligation, if any, to delineate the vertical and lateral extents of subsurface fuel oil contamination *during* the remediation of the fuel oil spill at 71 Chebogue Lane? Explain.
10. If your answer to question 9 is "no", in your opinion, what impact, if any, did Strum's failure have on the extent of the fuel oil contamination and/or the cost to Co-op to remediate the fuel oil spill?
11. What, if any, obligation did Strum have to determine whether the subsurface fuel oil contamination at 15 & 17 Skeena Street

originated from a recent or historic spill before proceeding with remediation activities?

12. In your opinion, did Strum fulfill its obligation, if any, to determine whether the subsurface fuel oil contamination at 15 & 17 Skeena Street originated from a recent or historic spill before proceeding with remediation activities?
13. If the answer to question 10 is “no”, in your opinion, what impact, if any, did Strum's failure have on the extent of the fuel oil contamination and/or the cost to Co-op to remediate the fuel oil spill?
14. Based on your review of the evidence, in your opinion, did Strum's conduct in assessing and remediating the fuel oil spill at 71 Chebogue Lane fall below the standard that you would expect of a reasonably prudent site professional?
15. If your answer to question 12 is "yes", in what ways did Strum's conduct fall below the standard that you would expect of a reasonably prudent site professional?
16. If your answer to question 12 is "yes", what impact, if any, did Strum's conduct have on the extent of the fuel oil contamination and/or the cost to Co-op to remediate the fuel oil spill?

[30] A last-minute change in counsel could result in a finding of exceptional circumstances. In this case, however, there is a void in the evidence that might allow for such a finding. I simply have no information as to what transpired between 2012 and 2023.

[31] Similarly, the last-minute loss of an expert could certainly be considered an exceptional circumstance. However, in this case, the facts that I have to rely on disclose that, with reasonable diligence, the plaintiff would have been aware sometime between 2012 (when the action was started) and 2020 (when the Date Assignment Conference was held) that the authors of the Giffen Koerth Report were no longer available or interested in testifying. Again, there is a complete void in the evidence in relation to why no action was taken in this regard between 2012 and 2023.

[32] There are no exceptional circumstances in this case that allow for the late filing of an expert's report.

Conclusion

[33] The plaintiff's motion to have the jury notice struck and to proceed to trial by way of a judge sitting alone, consented to by the defence, is granted.

[34] The plaintiff's motion to allow for the filing of the Schifano Report, or to allow for an adjournment and to set new dates for the filing of expert's reports, is denied.

[35] The trial will take place as scheduled commencing February 20, 2024.

Arnold, J.