

SUPREME COURT OF NOVA SCOTIA

Citation: *PCL Constructors Canada Inc. v. Town of Truro*, 2024 NSSC 437

Date: 20240925

Docket: Hfx No. 435886

Registry: Halifax

Between:

PCL Constructors Canada Inc.

Plaintiff

v.

Town of Truro and Municipality of the County of Colchester

Defendants

v.

Cameron Contracting Limited carrying on business as Camcon Precast

Third Party

Decision re: Motion to Strike Portions of the Rebuttal Expert Reports

Judge: The Honourable Justice John P. Bodurtha

Heard: September 5, 2024, in Halifax, Nova Scotia

Oral Decision: September 25, 2024

Written Decision: March 12, 2026

Counsel: William L. Ryan, KC, and John Shanks for the Plaintiff
Dennis James, KC, Grace MacCormick and Gabrielle Everest
for the Defendants
Cameron Contracting Limited, no appearance

By the Court (orally):

Background

[1] The Defendants seek an order (1) striking portions of the rebuttal expert report of Claire Miller, P. Eng and Andrew Huntley, Ph. D. that are not within the scope of rebuttal expert opinion and constitute a new expert report; and, (2) striking portions of the rebuttal expert report of Kurt Ruhland P. Eng commenting on the rebuttal expert report of Claire Miller, P. Eng and Andrew Huntley, Ph. D.

Facts

[2] On January 24, 2018, an Amended Notice of Defence and Counterclaim with Amended Statement of Counterclaim was filed by the Defendants in this matter to include defects identified in the construction of the stairs in the Rath Eastlink Community Centre's ("RECC") arena and pool area. The Plaintiff consented to the amendments and filed an Amended Notice of Defence to Counterclaim with Amended Statement of Defence to Counterclaim on March 7, 2018.

[3] On May 28, 2024, the parties participated in a Date Assignment Conference ("DAC"). At the DAC, the parties confirmed their intention to file expert reports related to the Amended Counterclaim and agreed that the expert reports would not be filed six months prior to the finish date of June 12, 2024. Following the DAC, a Consent Order was issued on May 30, 2024, requiring any expert reports to be filed by August 1, 2024, and any rebuttal expert reports to be filed by August 22, 2024.

[4] On August 1, 2024, the Defendants filed the expert reports of Geoff Axell for CBCL Limited ("CBCL"), dated November 27, 2018 (the "CBCL Report"), and the expert report of Lloyd Hussey for Vigilant Atlantic, dated May 7, 2024 (the "Vigilant Report"). The report of Marcel Deveau and Haysom Habib of Stantec Consulting Ltd. ("Stantec") dated October 2, 2017 (the "Stantec Report") was provided to the Plaintiff in March of 2018, and was the subject of a motion heard on September 5, 2024, during which, the Plaintiff, PCL Constructors Canada Inc ("PCL") agreed to the admission of the Stantec Report.

[5] On September 12, 2024, PCL filed a motion to permit the late filing of its rebuttal reports to the CBCL Report and the Vigilant Report. On September 19, 2024, counsel for the Plaintiff provided the Defendants' counsel with the rebuttal

expert report of Claire Miller, P. Eng and Andrew Huntley, Ph.D. for 30 Forensic Engineering (“30 FE”), dated September 16, 2024 (the “30 FE Report”), and the rebuttal expert report of Kurt Ruhland, M. Eng., P. Eng for MTE Consultants, dated September 17, 2024 (the “MTE Report”).

[6] On September 12, 2024, PCL filed a motion to permit the late filing of its Rebuttal Reports to CBCL and Vigilant.

[7] On September 13, 2024, PCL filed an affidavit of Claire Miller, P. Eng in support of its motion to permit the late filing. That affidavit confirmed that Ms. Miller was first contacted by PCL’s in-house counsel in July of 2024 and was formally retained by PCL on August 7, 2024.

[8] On September 16, 2024, the Defendants withdrew their objection to the late filings by letter to the Court. That letter expressly reserved the right to contest the scope of the rebuttal reports.

[9] On September 19, 2024, counsel for PCL, provided the Defendants with copies of the 30 FE Report and the MTE Report.

[10] The Defendants have brought a motion seeking that this Court strike portions of the 30 FE Report and the MTE Report for failure to comply with the requirements for a rebuttal expert report pursuant to Nova Scotia Civil Procedure Rule (“CPR”) 55.05.

Issues

[11] Whether portions of the 30 FE Report should be struck for noncompliance with CPR 55.05.

[12] Whether portions of the MTE Report should be struck for noncompliance with CPR 55.05.

Analysis

[13] CPR 55.05 sets out the content requirements of a rebuttal expert report and reads:

55.05 A rebuttal expert’s report must be signed by the expert and provide all of the following:

- (a) representations and information required in an expert’s report;

- (b) the name of the expert with whom the rebuttal expert disagrees and the date of that expert's report;
- (c) a quotation of the statement of opinion with which the rebuttal expert disagrees;
- (d) a statement that the rebuttal opinion is strictly confined to the same subject as the quoted opinion;
- (e) the rebuttal opinion and no further opinion.

[14] In *Graca v. Carter*, 2022 NSSC 107, the court stated that while the “subject” of the rebuttal expert’s quoted opinion should not be applied so rigidly as to confine the rebuttal expert’s opinion to essentially the same assumptions and conclusions as the original expert, concerns around trial fairness require that CPR 55.05 be interpreted strictly to ensure the scope of a rebuttal opinion is clearly defined and limited (paras. 54-56). The Court then set out the following factors that guide compliance with CPR 55.05 at para. 57:

[57] Overall, in my view, the following factors guide compliance around CPR 55.05(c) - (e):

1. There is no single form, boiler-plate form or formula which can be adopted in every report to automatically transform any opinion into proper rebuttal. Rebuttal opinion is obviously contextual and must adapt to the quoted opinion and the circumstances of the case;
2. The predominant purpose of expert rebuttal opinion is to respond to the original opinion. As such, it must remain centred around a disagreement with the quoted opinions. The focus of any alternate explanations, reasoning, inferences, or conclusions offered in rebuttal must similarly be connected to the quoted opinion. It is not, in other words, an opportunity to embark upon a fresh, wide-ranging examination into all of the issues in dispute and develop comprehensive reports with new opinions, disconnected from the original report;
3. The rebuttal expert report must:
 - a. Quote the opinion in question;
 - b. Confirm a disagreement with the quoted opinion;
 - c. Identify and explain the specific nature or basis of the rebuttal expert's disagreement with the quoted opinion. Examples include (but are not limited to) disagreements around:
 - i. the appropriate assumptions made in respect of the quoted opinion;

- ii. the reliability of any test or experiment which underpin the quoted opinion, including the data or output generated from any such test or experiment;
 - iii. the reliability or currency of any research used to develop the quoted opinion; and/or
 - iv. the appropriate methodology or the appropriate discipline (or area of expertise) needed to properly analyse the evidence.
- d. Articulate and explain why the nature of the disagreement exposes problems with the quoted opinion and leads to a different opinion which is preferable to the quoted opinion.
4. The party offering a rebuttal expert report is responsible for ensuring clarity in terms of explaining the path of reasoning which gives rise to the disagreement and, more generally, complying with the rules.

[15] In arriving at my conclusion, I have applied the factors laid out by Keith, J. in *Graca*.

Issue 1: Should portions of the 30 FE Report be struck for noncompliance with Rule 55.05.

[16] The 30 FE Report is not rebuttal expert opinion. It fails to comply with the requirements of CPR 55.05. The predominant purpose of the 30 FE Report is to provide independent expert opinions regarding the recommendations for the repair of the RECC stairs.

[17] The Defendants raise the following issues with the 30 FE Report, which are reproduced from their submissions:

1. The third paragraph in Section 1 of the 30 FE Report states,

“We were retained by Mr. William Ryan and Mr. John Shanks, both of Stewart McKelvey, to perform an independent engineering assessment of this matter. We were specifically requested to review the as-built construction of the stepped aisles and determine whether they complied with the applicable codes and standards, and to provide our recommendations for repair. We were also requested to review and provide commentary on the report authored by Mr. Marcel Deveau and Mr. Haysom Habib of Stantec Consulting Ltd., dated October 2, 2017 (the ‘Stantec report’), the report authored by Mr. Geoff Axell of CBCL Limited, dated November 27, 2018 (the ‘CBCL report’), the CBCL repair drawings,

and the report authored by Mr. Lloyd Hussey of Vigilant, dated May 7, 2024 (the ‘Vigilant report’).” [emphasis added in original]

This language used separates the independent assessment and recommendations for repair, from the actual review of the reports. This suggests that Ms. Miller and Dr. Huntley understood their task was to provide an independent assessment for their own expert opinion on repair recommendations, as well as a separate review the original expert reports.

2. Subsection 2.2 entitled “Investigation” re-iterates the above statement. Nowhere in the 30 FE Report is any reasoning given as to why an independent investigation was required based on the original expert opinions, or why the assumptions of the reports were being challenged. This suggests that the independent investigation was not responding to the assumptions or methods used in the original reports and was simply an independent report.

3. Structurally, sections 3-5 of the 30 FE Report include Ms. Miller and Dr. Huntley’s independent assessment and builds into the “Repair Recommendations” Section. All of this occurs independently from any review of the Stantec Report, the CBCL Report, and the Vigilant Report, with no mention or reference to any of the original reports in sections 3-5.

4. In paragraph 1 of Section 9 of the 30 FE Report, entitled “Conclusions”, Ms. Miller and Dr. Huntley, state their independent opinion resulting from their independent assessment. It is only after that that Ms. Miller and Mr. Huntley provide their conclusions rebutting the original reports and they do not connect to this first paragraph.

5. Ms. Miller and Dr. Huntley do not state that the rebuttal is strictly confined to the same subject as the quoted opinion as required by 55.05(d). This supports that finding that the predominant purpose of the 30FE report was to provide the independent opinions of Ms. Miller and Dr. Huntley.

[18] The Defendants argued that the sections referenced above in the 30 FE Report failed to comply with CPR 55.05. In particular, the 30 FE Report fails to provide a quotation or reference to the opinions of the original experts with which they disagree, and the authors do not limit their opinion to rebuttal opinion (CPR 55.05(c)-(e)).

[19] Sections 6 and 8 of the 30 FE Report, entitled “Review of Stantec Report” and “Review of the Vigilant Report, respectively, are proper rebuttal. However, both sections do not clearly reference or provide a path of reasoning connecting the independent opinions in sections 3-5 with the independent opinions in sections 6 or 8.

[20] I agree with the Defendants argument that where there is no path of reasoning or clear references made connecting the independent opinion with the rebuttal opinions then those sections should be struck. I disagree that the entirety of sections 3-5 of the 30 FE Report should not be admitted.

[21] In *Graca*, the court found the references made to earlier, non-compliant parts of a rebuttal report were too broad, non-specific, and indirectly related to the quoted opinions (paras. 70 and 73). In determining whether to exclude the non-compliant parts of the rebuttal report the court stated:

[71] Respectfully, it is not for the court to speculate as to what additional information or explanations might comprise or form the basis of Dr. King's complete rebuttal opinions. As indicated, expert opinion is admitted because the Court needs help understanding the subject matter. The court neither has the obligation nor the expertise to tell Dr. King what information forms the basis of his rebuttal opinions. It is for Dr. King, not the Court, to clearly articulate and explain his rebuttal opinion.

[72] This gives rise to a related concern and potential prejudice: using oblique references in rebuttal to introduce other opinions contained in a fresh, broad and independent report unnecessarily expands the scope of rebuttal opinion beyond what is permitted or justified under CPR 55.05. Again, where a party commits to tendering rebuttal opinion, that party is responsible for ensuring the rebuttal opinions are sufficiently clear to comply with CPR 55.05.

...

[22] It was the responsibility of the Plaintiff to ensure that the expert report complied with CPR 55.05 and any connections they intended to make with the independent assessment included in the 30 FE Report were clearly articulated.

[23] Section 7 entitled “Review of CBCL and Repair Drawings” is proper rebuttal response, however, it vaguely references section 5.1 at para. 4. The inclusion of human movement science and human movement literature contained in section 5.1 of the 30 FE Report goes beyond the original reports and is not proper rebuttal. The original reports focused on code compliance and measures to reach code compliance. In my opinion, a rebuttal report with a broad assessment of human movement literature goes beyond the opinion in the original report.

[24] In *Maritime Varsity Academy v. 3300819 NS Ltd*, 2024 NSSC 64, the court commented that the primary concerns relating to rebuttal reports under CPR 55.05 are about notice, trial fairness, and the refusal to admit late expert reports to which the other party would be unable to respond. The court also found that expert reports

under “the guise of a rebuttal report should clearly be rejected” (*Maritime*, at para. 13; *Graca*, at paras. 28-41).

[25] In the case before me, it was too late in the proceeding to file a new expert report without prejudice to the Defendants. The trial was to commence on September 23, 2024, and the 30 FE Report was not provided to the Defendants until September 19, 2024. To admit the non-compliant sections of the 30 FE Report would be prejudicial to the Defendants because they would not have time to prepare cross-examinations in response to the independent expert opinion.

[26] This Court has found that where portions of a rebuttal expert report are non-compliant with CPR 55.05, it is acceptable to redact the noncompliant sections from the rebuttal report at issue and allow the compliant sections to be admitted (*Graca*, at para. 73; *Maritime*, at para. 24).

[27] Following from the above, I find the following general principles regarding the rebuttal reports. Regarding the drawings contained in the 30 FE Report, these are not an opinion on themselves, they are a factual representation of the physical facility that is contained in the Defendants’ original reports. If the information contained in the rebuttal reports is an aid to understanding the rebuttal opinion, then I have no issue with its admission if it is not a free standing opinion.

[28] With respect to Issue 1, I find the following:

Section 1 entitled “Summary”

Paragraph 3 – Starting from “We were retained by ... and to provide our recommendations for repair.”; and,

Paragraph 4 – “...and our repair recommendations.”:

[29] The portions of these paragraphs are fresh opinions, and on their face are not rebutting the Defendants’ expert opinion reports. These portions shall be struck from the rebuttal report.

Paragraph 5 – “Based on our investigation, ... tread depth of 247 mm.”:

[30] This is fresh opinion and on its face is not rebutting the Defendants’ expert opinion reports. This portion is struck.

Subsection 2.2 entitled "Investigation":

[31] "We were retained by ... and to provide our recommendations for repair." is struck, the remainder is appropriate.

[32] The last paragraph can remain.

Section 3 entitled "Review of Provided Materials":

[33] This section will remain subject to any new opinions proffered from the authors in relation to the drawings. The experts may refer to the documents to rebut the opinions of the Defendants' experts but may not utilise these drawings to advance a new opinion. These will be admissible to the extent that they are strictly used for rebuttal. I require further context/submissions before being able to strike this entire section. For now, the pictures are factual representations of the rink and can remain.

Section 4 entitled "Site Examination":

[34] I refuse to strike this unless it can be shown that the measurements and photographs are not true rebuttal. The pictures are factual and support the rebuttal opinion regarding measurements taken on the site visit. The rebuttal expert is entitled to say, "I disagree with the primary report because the measurements were incorrect." That is proper rebuttal. For the rebuttal expert to then extrapolate and formulate an opinion based on the measurements would be a new opinion that could only properly be placed before the court in a primary report.

Section 5 entitled "Analysis":

[35] 5.0 - 5.1 – are struck.

[36] 5.2 – 5.3 - remain until further context/submission is provided. I cannot determine whether this is proper rebuttal given the short timeframe. The rebuttal expert does not link this to a statement from any of the Defendants' expert reports but perhaps I am missing the context given the time provided for my review. This section will remain for now, subject to further submissions as the trial proceeds. This is a judge alone trial, permitting me the ability to weigh the arguments and determine admissibility based on proper rebuttal.

[37] 5.4 – the repair recommendations are clearly new, fresh, opinion evidence that should be properly contained in an original expert report. This section is struck.

Portions of Section 9 entitled “Conclusions”:

[38] The Conclusion starting with “Based on our investigation...tread depth of 247 mm” is struck. This is a new opinion, it is not rebutting anything from the Defendants’ expert reports. It is not properly contained in a rebuttal report.

Appendix A:

[39] The drawings remain, as they are a factual representation based on the experts site visit.

Appendix B:

[40] This is an expert opinion containing repair drawings for stepped aisles. This is not rebuttal and is struck.

Appendices F and G:

[41] Appendices F and G falls under 5.4.1 Repair Scope which is not rebuttal expert opinion but a new opinion as to how to repair the alleged deficiencies. The appendices are struck.

Issue 2: Should portions of the MTE Report be struck for noncompliance with Rule 55.05?

[42] The Defendants argue that the portions of the MTE Report prepared by Kurt Ruhland, M. Eng., P.Eng. that provide commentary on the 30 FE Report, are not in compliance with CPR 55.05 and should be excluded.

[43] As stated above, in *Graca*, at para 57, “The predominant purpose of expert rebuttal opinion is to respond to the original opinion”. The Defendants argue that Mr. Ruhland’s rebuttal expert opinions commenting on the rebuttal opinions of Ms. Miller and Dr. Huntley do not constitute proper rebuttal expert opinion.

[44] Mr. Ruhland’s rebuttal expert opinion consists of comparing the Stantec Report, the CBCL Report, and the 30 FE Report, to provide opinion evidence on which report he prefers rather than expert opinion on the content of the reports.

[45] The Defendants submit that expert opinions are admitted to assist the Court in understanding a particular subject matter, not to provide the Court with an opinion interpreting which expert report before the Court should be preferred. I agree with this submission.

[46] CPR 55.04 speaks to the objectivity of the expert report:

55.04 (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:

(a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;

...

[47] In the attached "Notice of Civil Procedure Rule 55 Compliance" Mr. Ruhland confirmed that he was providing an objective opinion. However, his rebuttal opinions in the MTE Report do not reflect an objectivity. They focus on affirming the content of another rebuttal expert report rather than objectively assessing each of the original reports referenced.

[48] The Defendants laid out their concerns regarding Mr. Ruhland's objectivity in their brief:

- Paragraph 4 of the section entitled "General Discussion" provides no reasoning for Mr. Ruhland's opinion, such as the reliability of each method used, and why one might be preferable as required by (55.04(2)(b)).
- Paragraph 8.3 of the section entitled "General Discussion" provides an opinion of the rebuttal expert's preferred recommendations, but does not provide an assessment on the recommendations such as the methodology, costs, etc. It simply just gives deference to the 30 FE Report.
- Paragraph 10.3 of the section entitled "General Discussion" states that MTE does not have expertise in cost consulting and would recommend that a suitable estimate be obtained from a cost consultant or a contractor, however, they provide an opinion on the costs in the Vigilant Report in paragraph 10.2.
- Mr. Ruhland does not state that the rebuttal opinion is strictly confined to the same subject as the quoted opinion as required by 55.05(e), supporting the conclusion that the content of the MTE Report has extended beyond the scope by including commentary on the 30 FE [Report].

[49] Lastly, the Defendants argue, and I agree, that if portions of the 30 FE Report are redacted for failure to comply with CPR 55.05 it is reasonable to similarly

exclude any commentary from the MTE Report that references those redacted portions deemed inadmissible.

[50] Based on the above principles regarding rebuttal reports, I find the following with respect to Issue 2:

Item 9 of the section entitled “Reference Documents”:

[51] This is struck based on my earlier findings regarding the 30 FE Report.

Paragraphs 1 and 2 of the section entitled “General Discussion” where they reference the 30 FE Report:

[52] These are factual statements. They can remain as nothing turns on them.

Paragraph 4 of the section entitled “General Discussion” except where it says “MTE did not observe any of the measuring taking place”:

[53] This is not proper rebuttal; it is better characterized as advocacy or oath helping in support of the 30 FE Report and is struck.

Paragraph 6 of the section entitled “General Discussion” where it references the 30 FE Report:

[54] This is struck because it is not proper rebuttal.

Paragraph 6.4 of the section entitled “General Discussion” which references the conclusions of the 30 FE Report:

[55] The entirety of paragraph 6.4 which references the conclusions of the 30 FE Report is struck because it is not proper rebuttal.

Paragraph 6.4.1 of the section entitled “General Discussion”:

[56] This is struck because it is not proper rebuttal.

Paragraph 7 of the section entitled “General Discussion” except where it says “MTE has reviewed these conflicting deficiencies”:

[57] This is oath-helping for the 30 FE Report and is struck because it is not proper rebuttal, subject to counsel providing submissions that this is proper rebuttal rather than a reference to the 30 FE Report and that MTE prefers their opinion over the others.

Paragraph 8 of the section entitled “General Discussion” where it references the 30 FE Report:

[58] That reference will be struck.

[59] The references to the recommendations in the Stantec and CBCL reports are not objectionable and can remain.

Paragraph 8.3 of the section entitled “General Discussion”:

[60] This is struck because it is not proper rebuttal. There is no opinion given, just a statement that we prefer the 30 FE Report.

Paragraph 10.3 of the section entitled “General Discussion”:

[61] This is struck because it is not proper rebuttal.

The section entitled “Conclusions”:

[62] This is not proper rebuttal; it is better characterized as advocacy or oath helping in support of the 30 FE Report and is struck.

Conclusion

[63] Given the exceedingly short timeframe to review the materials, including the five expert reports, and considering issues and opinions within the reports I provided a bottom-line decision regarding what was proper rebuttal to the parties. However, there were sections of the expert reports that I could not say I fully understood, or that I could not properly weigh without further context and assistance from counsel as to whether the impugned parts were appropriate rebuttal.

[64] Therefore, these sections are presumptively struck out of the respective expert reports, however, I reserve the right to revisit this decision in the course of the trial if it is established that the relevant section in the rebuttal report relates to something raised in the primary report and/or further context allows me to find that these

sections are in fact proper rebuttal. Any such request to revisit this decision by either party must be made prior to the calling of the first expert witness.

[65] The Defendants are entitled to costs of this motion.

Bodurtha, J.