

Court of King's Bench of Alberta

Citation: CNOOC Petroleum North America ULC v ITP SA, 2026 ABKB 582

Date: 20260820
Docket: 1701 07427
Registry: Calgary

Between:

CNOOC Petroleum North America ULC

Plaintiff

- and -

ITP SA, Sunstone Projects Ltd, and Wood Group Canada, Inc

Defendants

- and -

Stresstech Engineering Inc

Third Party

**Reasons for Decision
of
Associate Chief Justice
D.B. Nixon**

I. Introduction

[1] The underlying action involves a pipeline failure on July 15, 2015 (the “Pipeline Failure”). In its capacity as the Plaintiff, CNOOC Petroleum North America ULC (“CNOOC”) issued a Statement of Claim against several parties, including Sunstone Projects Ltd and Wood Group Canada, Inc (collectively, the “Wood Group”) and ITP SA (“ITP”).

[2] This is a complex litigation matter that I have been case managing for some years during which several applications have been filed by the parties. The action has been set for trial to begin in October 2026. This decision deals with an application from Wood Group and a cross-application from CNOOC seeking to strike expert reports tendered by the other party for alleged issues in respect of the compliance with the complex case litigation plan (“CCLP”).

II. Background

[3] After years of case management involving several applications, including an application to delay the trial by a year (which I granted some years ago), the parties are scheduled to begin the trial in October of 2026.

[4] Due to the many applications and unavoidable delays related to them, the CCLP has been amended at several points by the parties and this Court. On March 10, 2026, CNOOC and Wood Group agreed to revised deadlines for the expert reports. The primary reports would be circulated on March 23, 2026, with rebuttal reports due by July 21, 2026, and the surrebuttal reports due by August 21, 2026.

[5] On March 23, 2026, CNOOC served seven expert reports, including expert reports by Phil Kormann (the “Kormann Report”), Eireann Rochefort (the “Rochefort Report”) and Iain Weir-Jones (the “Weir-Jones Report”). ITP served two expert reports, including one by Mike Hylton (the “Hylton Report”). Wood Group did not serve any primary expert reports on or before March 23, 2026.

[6] In conjunction with the exchange of rebuttal reports on July 21, 2026, Wood Group served three rebuttal expert reports to respond to the Kormann Report, the Rochefort Report and the Weir-Jones Report. These rebuttal reports are the expert report of Greg Bridgewater, the expert report of Michael J. Dowhopoluk (the “Dowhopoluk Report”) and the expert report of Marc LaMontagne (collectively the “Wood Group Rebuttal Reports”).

[7] In reviewing matters, I noted that the Wood Group Rebuttal Reports included references to other primary reports as well, such as the Hylton Report. The Wood Group Rebuttal Reports were not written as one-to-one rebuttals.

[8] On July 21, 2026, CNOOC also served a rebuttal report to the Hylton Report by Greg Lamberson (the “Lamberson Report”). Although it was in response to the expert report served by ITP, the Lamberson Report includes extensive commentary regarding Wood Group’s standard of care.

[9] Wood Group raised issues with the Lamberson Report arguing that it is actually a new primary report that should have been served in March 2026. Wood Group also asserts that the Lamberson Report raises so many new issues that it cannot be considered a rebuttal report. As a result, Wood Group brought an application to strike the Lamberson Report in full, or to strike the “primary” portions from it.

[10] CNOOC for its part argues that the Wood Group Rebuttal Reports raise several new primary arguments and that this has violated the deadlines set out in the CCLP. CNOOC takes the position that Wood Group bears the primary onus on issues such as contributory negligence and the commentary regarding the obligations of CNOOC as the primary operator of the pipeline. CNOOC is asserting these positions because it is of the view that the Wood Group Rebuttal Reports should have been served back in March 2026.

[11] CNOOC argues in its cross-application that if Wood Group seeks to strike the Lamberson Report, the only fair response is to apply to strike the Wood Group Rebuttal Reports for missing the March 2026 deadline. As such, CNOOC is arguing that the Wood Group Rebuttal Reports are disguised primary expert reports.

[12] In the alternative CNOOC requests that the deadline to respond to the Wood Group Rebuttal Reports be pushed back from August 21, 2026 until September 21, 2026. Further, in the alternative, CNOOC seeks to be allowed to have the content of its surrebuttal report in the form of a rebuttal report, thereby allowing it to include issues not raised in the initial expert's report as per *Rule 5.35(2)(b)* of the *Alberta Rules of Court*, Alta Reg 124/2010 ("*Rule*").

[13] Counsel for Wood Group contacted the Court on July 24, 2026 raising the issue of this pre-trial application. During the July 29, 2026 case conference, counsel for CNOOC confirmed that it would be bringing a cross-application.

[14] On July 30, 2026, I determined that I should hear these applications so as to ease the transition to the trial judge and enable this issue to be resolved as efficiently as possible.

III. Issues

[15] The issues underlying this hearing are framed as follows:

- a. Should the Lamberson Report be struck in its entirety, or portions of it redacted, for failing to comply with the CCLP deadlines?
- b. Should the Lamberson Report be struck in its entirety, or portions of it redacted, for violating Rule 8.16?
- c. Should portions of the three challenged Wood Group Rebuttal Reports be struck for failing to comply with the CCLP deadlines concerning the delivery of expert reports bearing a "primary" onus?
- d. Should I make an order amending the CCLP to extend the deadline for surrebuttal reports?
- e. What is the meaning of "new issues" for the purposes of a surrebuttal report under Rule 5.35(2)(c)?
- f. Should I make an order permitting CNOOC to file surrebuttal reports to the three challenged Wood Group reports in the form of a rebuttal report under Rule 5.35(2)(b)?

IV. The Law

[16] These two applications largely centre around the interplay of *Rules 5.35* and *8.16*.

[17] *Rule 5.35* states:

- 5.35(1) If a party intends to use the evidence of an expert at trial, the expert's report must be served in the sequence described in subrule (2).
- (2) Unless the parties otherwise agree or the Court otherwise orders, experts' reports on which a party intends to rely must be served in the following sequence:
- (a) the party who bears the primary onus of proof must serve on each of the other parties the report of that party's expert;
 - (b) the other party or parties must serve their expert's rebuttal report, if any, and may include in the report issues not raised in the initial expert's report;
 - (c) the party who served the initial expert's report may serve a surrebuttal expert's report that responds only to the new issues raised in the rebuttal report

[18] *Rule 8.16* states:

- 8.16(1) Unless the Court otherwise permits, no more than one expert is permitted to give opinion evidence on any one subject on behalf of a party.
- (2) If 2 or more corporate parties are affiliates within the meaning of the term "affiliate" in the Business Corporations Act and the corporate parties cannot agree, the Court may direct which of the corporate parties may call an expert witness.

[19] *Rule 5.35* replaced *rule 218.1* when the *Rules* were revised in 2010. Under the previous *rule 218.1*, there was significant debate in the caselaw regarding whether expert reports were to be exchanged simultaneous or sequentially. Justice Slatter in **Wade v Baxter**, 2001 ABQB 812 helpfully outlined the distinctions between these two approaches at paras 57-71. Ultimately, he preferred the sequential approach.

[20] The Alberta Law Reform Institute ("ALRI") recommended that expert reports be exchanged sequentially: see Alberta Law Reform Institute Consultation Memorandum 12.3 (the "ALRI Report"). The ALRI Report concluded that the sequential approach held numerous advantages and should be adopted in the new rules because it allowed for more efficiency and improved focus on the actual matters at issue. The ALRI Report also commented that it would be appropriate for rebuttal reports to raise new issues that were not raised in the primary report. However, the ALRI Report suggested that surrebuttal reports only be allowed to respond to new matters arising from the rebuttal report: paras 19-20. The sequential approach was captured in the drafting of current *Rule 5.35*: see also **Stewart Estate v TAQA North Ltd**, 2012 ABQB 87 at para 12 and **Signalta Resources Limited v Canadian Natural Resources Limited**, 2018 ABQB 904 at paras 8-11.

[21] Under *Rule 5.35(a)* there is no explicit mention of which party must provide their expert reports first. Instead, that *Rule* refers to whichever party "bears the primary onus of proof". As noted in Reed & Poelman, *Civil Procedure & Practice in Alberta*, 2025 Edition (LexisNexis Canada Inc, November 2025), at 224, "the touchstone for delivery of the 'initial' report is the party bearing the 'primary onus of proof' on the issue on which the expert's evidence is tendered."

[22] The party that bears the primary onus, however, is not always clear: **Wade** at para 72; **Stewart Estate** at para 12. **Wade** cites to statement in **Freyberg v Fletcher Challenge Oil and Gas Inc**, 2005 ABCA 46 at para 75 that “burden of proof in civil cases is not immutable but is to be determined in reference to assumed knowledge and fairness”. However, whether this applies in the context of the onus for the exchange of expert reports has not been conclusively decided: **Stewart Estate** at para 14.

[23] Consistent with the commentary in the ALRI Report, a rebuttal report is not confined solely to what was raised in the primary expert report. A rebuttal report also may raise new issues: **Rule 5.35(b)**; **Stewart Estate** at para 17; **Ford v Jivraj**, 2026 ABKB 473 at paras 13-14. These expert reports should not, however, “become a means for a party to split disclosure of its case or to merely confirm or reinforce earlier evidence in its primary expert reports”: **Signalta Resources Limited** at para 12.

[24] As noted by Justice Romaine in **Stewart Estate**, “the emphasis in these new rules is on a fair and workable process for disclosure.” This is not achieved with either an overly rigid or expansive read on the procedure for expert report exchange. In considering the overall context, it is important to remember that “[t]he purpose of the expert report process is to encourage meaningful pre-trial disclosure and help focus the issues”: **Signalta Resources Limited** at para 15.

[25] Turning to **Rule 8.16**, it exists to “prevent the abuse, expense, and delay caused by the excessive use of expert evidence where unnecessary to assist the Court in arriving at a just result”: **Smith v Obuck**, 2018 ABQB 849 at para 18. An alternative way for the Court to address this issue is to query “whether to permit any overlap or duplication of expert evidence for the same party to remain on the trial record”: **CNOOC Petroleum North America ULC v 801 Seventh Inc**, 2023 ABKB 214 at para 10 [**801 Seventh #1**].

[26] **Rule 8.16** prevents a party from calling more than one expert where the experts are giving opinion evidence on the same subject matter. That said, the Court has jurisdiction to override the **Rule**: **Vu v Hope**, 2017 ABQB at para 31.

[27] These **Rules** are also framed by the foundational **Rule 1.2**. As this is a pre-trial application to exclude expert reports, I must exercise caution in my role as the case management justice so as not to impede on the proper authority of the trial judge: **Condominium Corporation No 0321365 v Prairie Communities Corp**, 2017 ABQB 359 at para 5; **CNOOC Petroleum North America ULC v 801 Seventh Inc**, 2022 ABQB 284 at para 10. As such, I am not considering admissibility of these reports more broadly within the expert evidence framework established in **R v Mohan**, 1994 CanLII 80 (SCC), [1994] 2 SCR 9 and refined in **White Burgess Langille Inman v Abbott and Haliburton Co**, 2015 SCC 23. As noted in **801 Seventh #1** at para 14, when dealing with a **Rule 8.16(1)** application, the four **Mohan** factors going to threshold admissibility are best addressed within the trial in the ordinary course of events.

V. Analysis

[28] I turn to consider each of the issues as framed above.

A. Should the Lamberson Report be struck in its entirety, or portions of it redacted, for failing to comply with the CCLP deadlines?

[29] Wood Group seeks to strike the Lamberson Report. It argues that CNOOC failed to comply with the CCLP deadlines concerning the exchange of expert reports and this report is contrary to *Rule 5.35*. The position of the Wood Group is that the Lamberson Report is in reality a primary report. It advances this argument because it asserts that the Lamberson Report brings the Wood Group's standard of care into issue, which Wood Group argues is a matter on which CNOOC bears the primary onus.

[30] Wood Group further argues that CNOOC is attempting to split its case in a fashion that prevents Wood Group from being able to respond. Wood Group also contends that it is inappropriate for Mr. Lamberson to have authored this report because any of the three other experts relied on by CNOOC for the different issues of standard of care could have written the rebuttal report.

[31] In response, CNOOC argues that Wood Group has ignored the fact that the Lamberson Report is responding to the Hylton Report. As mentioned above, it was ITP that served the Hylton Report on CNOOC. Interestingly, the Hylton Report raised the issue of the Wood Group standard of care.

[32] CNOOC argues that Mr. Lamberson response was properly within the scope of a rebuttal report, agreeing with certain portions of the Hylton Report and outlining other issues within his knowledge. CNOOC also argues that it did not have the obligation to speculate over what ITP or Wood Group would have said in their respective primary or rebuttal expert reports (if any), and that the Lamberson Report was a proper rebuttal report. Further, CNOOC notes that Mr. Lamberson was best suited for this rebuttal report because he is an expert in "project management, construction management and pipeline integrity", unlike the other areas of expertise of the initial expert reports.

[33] Based on my review of the evidence and analysis of the law, I dismiss the application to strike the Lamberson Report, either in whole or in part. I make this determination because I find the Lamberson Report, when read in conjunction with the Hylton Report, responded appropriately to the contents of the Hylton Report. Further, the new areas raised were not beyond the scope of a rebuttal report under *Rule 5.35(2)(b)*.

[34] In my view, Mr. Lamberson was entitled to respond on the issue of standard of care of Wood Group. I am of that view because there is no rule or authority requiring that one of the experts who had written the primary reports had to write this separate rebuttal report in response to one provided by ITP. This can be analogized to the situation in *Ewashko v Hugo et al*, 2024 ABKB 621 at paras 6-10, where the court rejected the argument that a surrebuttal report must be written by the initial expert. As a penultimate comment on this topic, I give no weight to the argument that the Lamberson Report is suspect because he was hired two years ago. This has no bearing on whether he is an appropriate expert. Finally, I reject the argument by Wood Group that this was inappropriate case splitting by CNOOC because I do not find that it was merely seeking to confirm or reinforce the primary reports.

[35] Wood Group asserted in its Brief the prejudice it suffers on the premise that the Lamberson Report "is not a rebuttal to anything Wood Group has tendered, yet makes allegations directly at Wood Group". Wood Group then hypothesizes that it has no ability to

respond to this report. On the other hand, CNOOC makes the argument that Wood Group is entirely entitled to serve a surrebuttal report to the Lamberson Report, indeed providing Wood Group an advantage of having the final right of reply.

[36] Setting aside that a rebuttal allows for raising new issues, I note that the above reference sequence is in the ordinary course of matters. The decision of the Wood Group to not file a primary report does entail that it may not have a right of surrebuttal. This result simply demonstrates that in this case there likely should have been more discussion and crafting of the appropriate content and approaches for the expert reports beyond the deadlines concerning serving the expert reports on the other parties. That said, I also recognize that the sequencing of reports as outlined in *Rule* 5.35 is premised on a simple plaintiff/defendant scenario. As drafted, the *Rule* does not address the circumstances that can arise when there is more than one defendant, other than a reference to the rebuttal right of “the other party or parties” under *Rule* 5.35(2)(b) (emphasis added).

[37] I further note that the examples of cases in which expert reports were struck for lateness raised by Wood Group, such as *Ingram v Alberta (Chief Medical Officer of Health)*, 2022 ABQB 137 and *Monument Machine Shop Ltd v Calibre Drilling Ltd*, 2018 ABQB 857, had far more serious delays and prejudicial circumstances. Even if I had found that this was not a proper rebuttal report, striking the Lamberson Report would have been a severe remedy that would not have been justified in these circumstances.

B. Should the Lamberson Report be struck in its entirety, or portions of it redacted, for violating *Rule* 8.16?

[38] Wood Group argues in the alternative that the Lamberson Report is contrary to *Rule* 8.16 because Mr. Lamberson is the fourth standard of care expert brought on by CNOOC. Wood Group accepts for the purposes of this application that the initial experts had different focuses for their initial reports, but argues that Mr. Lamberson is simply duplicating the work of these other experts.

[39] Wood Group highlights that Mr. Lamberson had been hired over two years ago. It asserts that CNOOC inappropriately had Mr. Lamberson laying in wait to pile on with the other experts. I addressed this assertion above, and I again give no weight to the point advanced by Wood Group.

[40] CNOOC responds that, as mentioned above, Mr. Lamberson’s expertise in project management sets him apart in dealing with the question of standard of care in responding to the Hylton Report. CNOOC advances this point because Michael Hylton has extensive experience in pipeline project management. CNOOC also argues that there will likely be overlap of some sort in a complex case like this, but that the report is sufficiently focused and is not “piling on” or duplicative.

[41] Based on my review of the evidence and analysis of the law, I find that the Lamberson Report does not run afoul of *Rule* 8.16. I make this determination because Mr. Lamberson’s expertise is separate from those of CNOOC’s initial experts. As noted in **801 Seventh #1**, another case that involved several experts, significant damages claims, and magnitude and complexity, it becomes almost impossible to avoid some overlap: at para 18. This will occur because “each expert speaking on the common subject matter has opined on the common matter from the perspective of their own distinct training, experience, and resulting expertise”: para 18.

Similar to **801 Seventh #1**, I do not find that there is disproportionality between the parties as to number of experts: para 20.

[42] I also find that *Rule* 8.16 is not so specific as to relate solely to an issue at large. There can be a subset of specific subjects within a certain issue. An example arises in this case because the parties would not argue that there should only be one expert for negligence writ large.

[43] This pipeline failure case involves complex litigation that engages questions requiring the assistance of experts at multiple stages of the project. As such, the standard of care can encompass different subjects at various levels.

[44] As a general comment, the focus of the standard of care will depend on the specific circumstances of the case. Most cases will not involve as many experts as this complex pipeline failure case will demand. Indeed, numerous experts may not assist the parties. As noted by Justice Jeffrey, “the Court does not determine issues involving the assistance of experts by a show of hands. Presenting a greater number of the experts on a point does not help a party succeed on that point”: **801 Seventh #1** at para 21.

[45] This question ultimately will fit more appropriately within the ambit of the trial judge while dealing with the other questions of admissibility of expert opinion, as well as the weight to apportion to the expert reports.

[46] In conclusion, I restate that I find that the Lamberson Report does not violate *Rule* 8.16. As a result, the Lamberson Report should not be struck for that reason.

C. Should portions of the three challenged Wood Group Rebuttal Reports be struck for failing to comply with the CCLP deadlines concerning the delivery of expert reports bearing a “primary” onus?

[47] CNOOC argues that Wood Group bore the onus of proving its argument of contributory negligence. It points to the text of *Rule* 5.35(2)(a) stating that “the party who bears the primary onus of proof must serve on each of the other parties the report of that party’s expert”. They argue that contributory negligence is an issue on which the party claiming it bears the primary onus of proof.

[48] CNOOC conceded that a strike is an extreme remedy, but as this was sought by Wood Group in reference to the Lamberson Report it stated in its brief “what’s good for the goose is good for the gander.” As such, I do not consider this claim to have been abandoned by CNOOC and will still consider it.

[49] Wood Group submits that the approach suggested by CNOOC would effectively return us to the era of “simultaneous disclosure”. That approach was rejected by Justice Slatter in **Wade**.

[50] Wood Group argues that since it simply pleads contributory negligence as a defence there was no need for it to produce a primary expert report on this matter on or before March 23, 2026. Further, it is of the view that CNOOC must first establish a *prima facie* case against Wood Group. If CNOOC fails to establish a *prima facie* case, Wood Group would not need to lead any evidence or expert reports at all because it would have no onus or burden to address.

[51] Wood Group further argues that before it produced a primary expert report it would need to be aware of the specific case CNOOC is mounting against it to ensure the Wood Group experts are able to consider issues, such as whose conduct actually led to those causal events and

loss. While I need not make any finding on this particular point, the Wood Group argument has considerable merit.

[52] Based on my review of the evidence and analysis of the law, I find that the Wood Group Rebuttal Reports were appropriate rebuttal reports. As a result, those reports do not fail to comply with deadlines in the CCLP. I make this determination because the issue of onus can be a fine line. Although ITP submitted initial expert reports, that does not determine the issue. I am of the view that the discussion by Justice Slatter in *Wade* remains particularly helpful in assessing the scope of *Rule* 5.35, even though it was in the context of former rule 218.1.

[53] As noted by Justice Romaine in *Stewart Estate*, “the questions of which party bears what onus of proof, and on what issue, and the differences between onus of proof and evidentiary onus relating to a particular issue are not always incontrovertible or clear”: at para 12. Contributory negligence is a good example of an issue in which the answer is neither incontrovertible nor clear. The fact that ITP decided to file a primary expert report on this issue illustrates this precise point.

[54] Reasonable minds can disagree on whether this is a case which places the onus on the Defendants for contributory negligence. Counsel for ITP noted that it did not take a position on whether Wood Group should have filed the Wood Group Rebuttal Reports as primary reports. The ITP decision to file the Hylton Report was based in part on its own third party claim against a co-defendant.

[55] CNOOC points to the commentary in Lewis Klar et al, *Remedies in Tort* (Toronto: Thomson Reuters Canada, 2026) at §17:1, online: (WL Can) for the proposition that “[t]he burden of proving the defence of contributory negligence lies on the defendant.” And also, that “[t]here must be evidence and proof put forward that persuades the court on a balance of probabilities.” Bearing this in mind, I am not convinced at this juncture that this means it will always be the case for the purposes of an expert report concerning the question of contributory negligence such that the defendant will have the primary onus. It will depend on the circumstances.

[56] I note the commentary in Reed & Poelman at 224 that the primary onus of proof will typically lie with the plaintiff, but this is not always the case. Counsel for Wood Group suggested an interpretation of *Rule* 5.35 that involved a very nuanced reading of the *Rule* having to do with onus of proof generally in the case as separated from specific issues. I reject this interpretation. I do not read the use of the definite articles in the *Rule* as indicating such a rigid approach.

[57] Instead, I am of the view that under *Rule* 5.35(1)(a), the question of “primary onus of proof” will depend on the circumstances of a specific case. It may be that in some cases it will lie with a party raising a defence of contributory negligence. As noted for the delivery of expert reports in the commentary of Reed & Poelman at 224 “the touchstone for delivery of the ‘initial’ report is the party bearing the ‘primary onus of proof’ on the issue on which the expert’s evidence is tendered.” [emphasis added]

[58] This question will depend on the specific circumstances of each case. As such, it is not advisable, particularly in the short timelines of the present case, to attempt to establish a framework for every sort of issue. Instead, I will simply note that although in this case I find that the expert report for contributory negligence did not need to be filed as primary report, that does not entail that there is no case in which an expert report concerning contributory negligence will

not be considered a primary report. Further, there may well be a strategic choice to file the expert report as a primary report even though it may not necessarily be one.

[59] In the event that I am wrong, and the Wood Group Rebuttal Reports are venturing into wholly new areas, costs remain an appropriate remedy and can be dealt with after the fact: **Ford** at para 14. I am not satisfied that these would be so prejudicial that its effects cannot be cured within the trial.

[60] Further, I echo the commentary of Justice Romaine in **Stewart Estate** at para 15:

As noted in **Wade**, the previous rules with respect to disclosure of expert evidence were “prejudice-based”, and the new rules are no different. The prejudice to the defendants of excluding this evidence, particularly if the plaintiffs are correct in their assertion that the defendants bear the onus of proof of these issues, would be enormous.

The same considerations apply here, such that even if the Wood Group Rebuttal Reports should have been served as primary reports, they should still be considered by the trial judge. I make this determination particularly because the Wood Group Rebuttal Reports relate to an issue that CNOOC concludes is fundamental to Wood Group’s defence.

[61] In conclusion, I find that the Wood Group Rebuttal Reports were appropriately served as rebuttal reports. I make this determination because those reports were not outside the deadlines in the CCLP. As a result, I dismiss the application to strike the Wood Group Rebuttal Reports.

D. Should I make an order amending the CCLP to extend the deadline for surrebuttal reports?

[62] In the submissions leading up to the hearing, there appeared to be a disconnect between the parties as to who was entitled to make a surrebuttal report. In my view, much of the confusion in these applications stems from the structure of this action.

[63] *Rule 5.35* was designed with the ‘standard’ adversarial context of two opposing parties. The sequential approach laid out there applies cleanly to such a situation. However, the standard framework gets muddled by a situation such as this where there are multiple parties with divergent interests.

[64] In particular, I note that CNOOC suggested in its response Brief to the Wood Group application that Wood Group was in fact in an advantageous position because it could submit a surrebuttal report to the Lamberson Report. That would provide Wood Group with the last word on the subject. That said, *Rule 5.35(2)(c)* clearly states that it is the initial party who served the expert report who may serve a surrebuttal report. Under this reading, Wood Group would not be permitted to file a surrebuttal report to the Lamberson Report. Further, ITP would not be able to file a surrebuttal report to the Dowhopoluk Report.

[65] This arrangement under *Rule 5.35* can be altered by agreement of the parties or by order of this Court. When asked about this during the hearing, the parties were in agreement that this was within my authority as case management judge to make such an amendment to the CCLP.

[66] Based on my review of the evidence and analysis of the law, I find that the fairest response to this issue is to extend the deadline under the CCLP to September 21, 2026. Further, Wood Group is permitted to serve an expert report in the form of a surrebuttal report to the Lamberson Report. Similarly, ITP is permitted to serve an expert report in the form of a

surrebuttal report to the Dowhopoluk Report. There will be no further reply reports to these and no new issues are to be raised within the surrebuttal expert reports.

E. What is the meaning of “new issues” for the purposes of Rule 5.35(2)(c)?

[67] The question of what is the meaning of a “new issue” to be responded to within the ambit of a surrebuttal under Rule 5.35(2)(c) consumed much of the argument during the hearing. As a result, I requested the parties submit additional materials and scheduled a follow-up hearing for discussion on this matter. I thank the parties for their contributions in respect of this matter.

[68] In considering the content of surrebuttal reports, Justice Eamon in **Signalta Resources Limited** made the following comments at paras 11-15 which I find apposite here and are worth reproducing in full:

R 5.35 (2) (c) is not limited to alternative theories advanced in a rebuttal report. It refers to a new issue. In my view, this formulation is analogous to the rules respecting rebuttal cases. Lederman, Bryant and Fuerst, *The Law of Evidence in Canada* (4th ed, 2014) at para 16.211 describe this rule:

At the close of the defendant’s case, the plaintiff has the right to adduce rebuttal evidence to contradict or qualify new fact issues raised in defence. The general rule in civil cases is that matters which might properly be considered to form part of the plaintiff’s case in chief are excluded...”

A surrebuttal report must not become a means for a party to split disclosure of its case or to merely confirm or reinforce earlier evidence in its primary expert reports. As with presentation of a case at trial, there is a duty (paraphrasing from the language in **Broda v Broda**, 2001 ABCA 151 at para 6) to use due diligence to put all one's case in at one time and not split it. As observed in **Allcock Laight & Westwood Ltd v Patten**, [1967] 1 OR 18, 1966 CanLII 282 (CA) at pp 21-22:

It is well settled that where there is a single issue only to be tried, the party beginning must exhaust his evidence in the first instance and may not split his case by first relying on prima facie proof, and when this has been shaken by his adversary, adducing confirmatory evidence: *Jacobs v. Tarleton* (1848), 11 Q.B. 421, 116 E.R. 534. That case was considered by this Court and the principle therein enunciated was applied in *R. v. Michael*, 1954 CanLII 101 (ON CA), [1954] O.R. 926, 110 C.C.C. 30, 20 C.R. 18. The rule is now so well settled that it requires no further elaboration. It is important in the trial of actions, whether before a jury or a Judge alone, that this rule should be observed. A defendant is entitled to know the case which he has to meet when he presents his defence and it is not open to a plaintiff under the guise of replying to reconfirm the case which he was required to make out in the first instance or take the risk of non-persuasion.

Similar considerations apply to Rule 5.35. It is meant to avoid surprise and encourage parties to ensure that their expert has provided adequate disclosure of

the substance of his or her opinion in its primary report. It should also be applied, like the rule against case splitting, to avoid “the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning” (Wigmore, *Evidence* (Chadbourn rev, 1976), § 1873, p 672).

There may in some cases be a fine line between matters which are merely confirmatory and those adduced to meet new issues. Wigmore (ibid at p 672) states:

... Everything relevant as part of the case in chief would naturally have already been put in; and a rebuttal is necessary only because, on a plea in denial, new subordinate evidential facts have been offered or because, on an affirmative plea, its substantive facts have been put forward or because, on any issue whatever, facts discrediting the proponent’s witnesses have been offered. To discriminate between the first of these classes and the opponent’s testimony merely denying the same facts that the proponent’s witness had originally affirmed, is no doubt often difficult, and it is then not easy to say whether the proponent’s testimony in rebuttal might or might not as well have been put in originally; yet the principle involved is clear....

An example offered by Wigmore is the case of evidence offered to impeach the opponent’s witness, for example by way of bias, self-contradiction or the like (ibid at pp 678-679).

The purpose of the expert report process is to encourage meaningful pre-trial disclosure and help focus the issues. The Rule should not be applied so rigidly as to force a party tendering a primary report to speculate about what a rebuttal report might contain, or advance excessive commentary and information simply to avoid arguments that it is case splitting. There may be a fine line between matters which are merely confirmatory and those which genuinely arise from some alternative theory or new dimension raised in the opposition’s rebuttal report. It will often be helpful to inquire whether the point ought to have been anticipated by the party tendering the primary report and whether the surrebuttal is carefully focussed on providing only new evidence.

[69] The parties emphasized that there has been little discussion of what is meant by the phrase “new issues” in surrebuttal. Given the lack of judicial direction concerning the meaning of this phrase, the parties raise the spectre of returning before this Court yet again following the exchange of surrebuttal reports in order to challenge those reports for exceeding their scope. They ask this Court to opine on this in order to hopefully reduce the chance of this occurring even nearer to the beginning of trial in a complex case that has already been adjourned once.

[70] The parties both relied extensively on the ALRI Report. However, it is worth recognizing that the ALRI Report included minimal guidance on surrebuttal reports. The recommendation for the sequential method of expert report exchange simply noted that “[i]t would also be appropriate for the rules to provide for surrebuttal to respond only to new matters arising from the rebuttal report: ALRI Report at para 20.

[71] This is not the appropriate case in which to outline a definitive framework for what is encompassed by “new issues” for all applications of *Rule* 5.35(2)(c). The issue of what is a “new issue” will depend on the specific circumstances of each case and will usually be fairly straightforward to determine.

[72] This issue appears to have arisen, in part, due to the structure of this litigation. The fact that there are multiple Defendants has led to the difficulties. These challenges have arisen in this case because “new issues” have been raised in rebuttal reports that do not directly involve the writer of the primary report or were raised in expert reports by parties that are not directly adverse in interest to one another.

[73] Both CNOOC and Wood Group submitted appendices with examples of specific paragraphs from their respective expert reports that they argued over whether those would qualify as “new issues” for the purposes of surrebuttal reports. I do not find it appropriate to speculate on any of these excerpts to make hypothetical comments on what would or would not be a new issue for the purposes of a surrebuttal. In my view, that would confuse the issue at this stage insofar as no surrebuttal reports have been served.

[74] I echo the concern raised by Justice Eamon in ***Signalta Resources Limited*** at para 15, where he stated that the *Rule* should not be read so rigidly so as to “force a party tendering a primary report to speculate about what a rebuttal report might contain, or advance excessive commentary and information, simply to avoid arguments that it is case splitting.” My concern is that following Wood Group’s suggestion would lead to this exact rigid approach. I am further of the view that CNOOC’s suggested framework would lead to a reading of *Rule* 5.35(2)(c) that is too broad.

[75] In my view, until the surrebuttal reports are served, it is not possible to determine whether they are properly within the scope of *Rule* 5.35(2)(c). Indeed, the parties recognized that such an exercise would not be feasible at this stage until the surrebuttal reports have been served. Notwithstanding that recognition, the parties asked for some guidance or guardrails as to how to read the *Rule* as the surrebuttal reports are prepared.

[76] It should be noted that any guidance of this issue should be read with an understanding that it will depend on the circumstances of the case. I do not believe it is necessary to define either “new” or “issue” as these terms are commonly understood, nor is it necessary to elaborate a set of new guidelines. In my view, this question has already been effectively explained by Justice Eamon in ***Signalta Resources Limited***.

[77] The comment I would make as to what is meant by “only... new issues” is to highlight that surrebuttal reports may respond to alternative theories or new dimensions raised in rebuttal, however it should ensure it is carefully focused on only responding to those new issues. It should neither be reiterating the primary report nor simply expanding or emphasizing it. However, an expanded discussion may be permissible where it appears reasonably necessary to respond to matters of which the primary report expert would not have been aware: ***Signalta Resources Limited*** at para 66. A surrebuttal report should neither make new allegations nor should it be case splitting. On some occasions, “[t]here may be a fine line between matters which are merely confirmatory and those which genuinely arise from alternative theory or new dimension raised in the opposition’s rebuttal report.”: ***Signalta Resources Limited*** at para 15.

[78] There was debate during the hearing as to what to make of the comments of Justice Lema in *Ewashko*. I will simply note in that case that the defendants did not argue that the third report “fell outside the bounds of a proper surrebuttal report”: at para 8. As such, I take that decision to stand for the proposition that a surrebuttal report does not need to be written by the same person as the one who wrote the primary report, and that his comments regarding “true surrebuttal” are largely obiter. To the extent that *Ewashko* stands for the proposition that merely elaborating on a primary report is appropriate surrebuttal, I would reject that position.

[79] I reiterate that the above guidance is high level and is by no means an exhaustive list. My determinations are simply meant to help guide the parties in this case in an effort to narrow the issues between them and serve appropriate surrebuttal reports by the new deadline of September 21, 2026. As all parties are keenly aware, the commencement of this long trial is fast approaching, being October 13, 2026.

F. Should I make an order permitting CNOOC to file surrebuttal reports to the three challenged Wood Group Rebuttal Reports in the form of a rebuttal report under Rule 5.35(2)(b)?

[80] In my review of the evidence and analysis of the law, I do not find that CNOOC should be permitted to file a surrebuttal report to the Wood Group Rebuttal Reports that is in the form of a rebuttal report. Since I determined that the Wood Group Rebuttal Reports were properly in the scope of rebuttal reports, CNOOC is not permitted to respond with a report that goes beyond the limited scope of a surrebuttal. I see no reason at this stage to expand the scope of what CNOOC may respond to beyond a surrebuttal report. As I noted above, this case is fast approaching trial, and all the parties should be focused on narrowing the issues between them and not raising new issues on the eve of what is expected to be a lengthy and complicated proceeding.

VI. Conclusion

[81] Turning to the issues as raised above, I determine as follows.

- a. Should the Lamberson Report be struck in its entirety, or portions of it redacted, for failing to comply with the CCLP deadlines? No, for the reasons outlined above.
- b. Should the Lamberson Report be struck in its entirety, or portions of it redacted, for violating Rule 8.16? No, for the reasons outlined above.
- c. Should portions of the three challenged Wood Group Rebuttal Reports be struck for failing to comply with the CCLP deadlines concerning the delivery of expert reports bearing a “primary” onus? No, for the reasons outlined above.
- d. Should I make an order amending the CCLP to extend the deadline for surrebuttal reports? Yes, for the reasons outlined above. The parties are to follow the guidelines I offer above to assist with ensuring the surrebuttal reports fit within Rule 5.35(2)(c). For enhanced clarity, Wood Group is permitted to serve a surrebuttal report within these guidelines to the Lamberson Report. ITP is permitted to serve a surrebuttal report within these guidelines to the Dowhopoluk Report.

- e. What is the meaning of “new issues” for the purposes of a surrebuttal report under Rule 5.35(2)(c)? The meaning of a "new issue" for the purposes of a surrebuttal report will depend on the specific circumstances of each case. See my more detailed comments above.
- f. Should I make an order permitting CNOOC to file surrebuttal reports to the three challenged Wood Group reports in the form of a rebuttal report under Rule 5.35(2)(b)? No, for the reasons outlined above.

[82] The parties raised the possibility of submitting another application to deal with the issue of whether the surrebuttal reports are properly within the scope of *Rule 5.35(2)(c)*. I will await this surrebuttal application if filed before determining whether that should be properly before me as the case management justice or whether that should be transferred to the trial justice.

[83] I thank the parties for their able submissions throughout these applications.

VII. Costs

[84] The parties shall bear their own costs for these applications.

Heard on the 14th and 17th day of August 2026.

Dated at the City of Calgary, Alberta this 20th day of August 2026.

D.B. Nixon
A.C.J.C.K.B.A.

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