

“Automatic, Immediate and Ongoing”: The Court of Appeal Emphasizes the Fundamental Obligation of Litigants to Disclose Relevant Documents

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The Ontario Court of Appeal recently upheld the decision of a motion judge to strike out a statement of defence as a remedy for repeated failures to comply with judicial orders to produce requested relevant documents.

While the facts of the [Falcon Lumber Limited v 2480375 Ontario Inc.](#) are relatively extreme, in that the defendants had been so blatant in their failure to comply with multiple orders of the court over an extended period of time, the case highlights the fundamental obligation to disclose and produce relevant documents, and the principles guiding the exercise of a court’s discretion to strike out a party’s claim or defence for breaching this obligation.

Motion to Strike

The claim in this case was a debt claim for approximately \$131,000, a relatively modest amount of money. Part of the claim alleged that transactions undertaken by and among the defendants were intended to defeat the plaintiff’s claim as a creditor for the goods it had delivered.

The Court of Appeal noted that it was a type of claim that “would expect a reasonably prompt disposition on the merits.” However, this did not end up being the case because the plaintiff spent nearly three years trying to obtain proper documentary disclosure from the defendants about their dealings.

The motion judge outlined the defendants’ failure to comply with production orders:

- there had been 30 dates for motions, cross-motions, and case conferences;
- on most court attendances, the primary issue had been the failure to provide complete productions;
- 22 orders or judicial endorsements had been made;
- six court production orders had been made; and
- as of the date of the motion, the defendants still had not made full and complete production of relevant documents.

The motion judge found that the defendants had “willfully disregarded court procedure and orders for three years; done everything in their power to avoid an adjudication on the merits; and done everything they could to prejudice Falcon Lumber’s claim by failing to provide full disclosure” of the relevant transactions.

The motion judge refused to provide the defendants another opportunity to make proper production. In striking out the defendants’ Statement of Defence, the motion judge stated: “If the Rules and court orders can be ignored repeatedly and over a number of years without severe consequences, then there would be no point in having Rules or making orders on such motions.”

The motion judge ordered costs against the defendants' lawyers personally, stating:

The difficulty is that counsel must never forget they are also officers of the court and have duties to the court in connection with this responsibility. There comes a point when following instructions, makes counsel complicit in the flagrant disregard of the Rules and court orders. That happened here.

The Appeal

In upholding the motion judge's decision, the Court of Appeal emphasized the importance of the obligation to disclose and produce relevant documents to the proper and fair functioning of the civil litigation process.

It stated that parties to every action must comply with their document disclosure and production obligations without the need for a court to intervene to compel their adherence: a party's fundamental duty to disclose relevant documents is "automatic, immediate, and ongoing" and a party should not require court orders to obtain production.

The Court of Appeal also highlighted three requirements imposed by the *Rules of Civil Procedure* which emphasize the importance of the obligation to disclose and produce relevant documents:

- the obligation to disclose all relevant documents is not limited to documents upon which the party intends to rely to establish its claim or defence. A party must disclose "every document relevant to any matter in issue", whether or not the document helps or hurts the party's case [Rule 30.02(1)];
- in order to ensure that a party fully understands its obligation to disclose and produce all relevant documents, the party's lawyer must certify in the party's Affidavit of Documents that the lawyer has explained "the necessity of making full disclosure of all documents relevant to any matter in issue in the action" and "what kinds of documents are likely to be relevant to the allegations made in the pleadings" [Rules 30.03(4) and 76.03(4)]; and
- the obligation to disclose and produce is not a "one-time" obligation. It is a continuing one [Rule 30.07].

The Court of Appeal went on to note that the two major consequences to a party's failure to meet its disclosure and production obligations are: (i) increased litigation costs; and (ii) delays in the final determination of the case on the merits.

With respect to the principles guiding the striking out of pleadings for the breach of production obligations, the Court of Appeal outlined the following principles to guide the exercise of the court's discretion to strike out a party's claim or defence pursuant to Rule 30.08 of the *Rules*:

- The remedy is not restricted to "last resort" situations, and it does not have to be preceded by a party breaching a series of earlier orders that compelled better disclosure or production. However, courts usually want to ensure that a party has a reasonable opportunity to cure its non-compliance before striking out its pleading;
- A court should consider a number of common sense factors, including:
 - (a) whether the party's failure is deliberate or inadvertent;
 - (b) whether the failure is clear and unequivocal;
 - (c) whether the defaulting party can provide a reasonable explanation for its default, coupled with a credible commitment to cure the default quickly;

(d) whether the substance of the default is material or minimal;

(e) the extent to which the party remains in default at the time of the request to strike out its pleading; and

(f) the impact of the default on the ability of the court to do justice in the particular case.

- The merits of a party's claim or defence may play only a limited role where breaches of disclosure and production obligations are alleged as one would reasonably expect a party with a strong claim or defence to comply promptly with its disclosure and production obligations;
- In considering whether an order to strike out a pleading would constitute a proportional remedy in the circumstances, a court should consider:

(a) the extent to which the defaulting party's conduct has increased the non-defaulting party's costs of litigating the action, including the proportionality of those increased costs to the amount actually in dispute in the proceeding; and

(b) to what extent the defaulting party's failure to comply with its obligation to make automatic disclosure and production of documents has delayed the final adjudication of the case on its merits, taking into account the simplicity (or complexity) of the claim and the amount of money in dispute.

The Court of Appeal noted that in applying the principle of proportionality in the context of a motion to strike, the moment when a court may make the order to strike will come much earlier in a simple claim for a modest amount of money than it will in a complex case where millions are in dispute:

[The] goal of accessible civil justice cannot be achieved if courts allow defendants in modest monetary claims to remain in default of their fundamental production obligations for two years. Such cases should be disposed of on their merits within two years, not remain mired in production disputes and motions for two years.

Awarding Costs Against Counsel

The lawyers for the defendants sought leave to appeal the costs award against them.

The Court of Appeal agreed with the motion judge's finding that the lawyers had been complicit with their clients' flagrant disregard of the Rules and court orders, and denied the lawyers leave to appeal the costs award.

Conclusion

This case highlights the importance of documentary disclosure in litigation and provides clear guidance for courts in the exercise of their discretion to strike claims or defences where parties have failed to meet their disclosure obligations. It also demonstrates that lawyers need to be careful in toeing the line between following client instructions and assisting clients in conduct that disregards court rules and court orders. Ultimately, the fundamental obligation to disclose relevant documents is a key element to the fair and proper functioning of the civil litigation system and must be taken seriously by all litigants and lawyers.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific

situations, the reader should seek professional advice.

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