

# KEEPING CURRENT

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## Late document disclosure may cause trial delays, adjournments, and dismissals

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Parties involved in civil litigation are required to produce all relevant documents in their possession, control or power to the opposite side. The Court of Appeal for Ontario has stated that “[t]he fundamental obligation to disclose relevant documents and produce those that are not privileged should be performed automatically by a party, without the need for court intervention”: *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, [2020 ONCA 310 \(CanLII\)](#), at para. 43. Delays or refusals to comply with the documentary production rules can derail the progress of an action. Waiting until the commencement of trial can have even more serious consequences, the least of which is an adjournment and delay of the trial.

In *Cave v. Hovsepyan*, [2021 ONSC 4140 \(CanLII\)](#), at the opening of trial, the defendants requested an adjournment because the plaintiff had produced for the first time, the day before trial, a laptop computer and its contents. The plaintiff's claim was for past and future income loss arising from a motor vehicle

accident, and the laptop had been used for his work and had not been previously disclosed as a potential source of documents. While the plaintiff thought that the laptop was not functional, and only told his lawyer about it shortly before the trial, a computer technician was able to extract 2 gigabytes of data, containing 14,133 files in 2,172 folders. The defendants requested an adjournment to allow for the opportunity to review the newly disclosed material and conduct a further examination of the plaintiff.

Justice A. Sanfilippo noted that the defendants' request for an adjournment was well-founded in [Rules of Civil Procedure](#) relating to the procedural right to documentary production, inspection and examination, particularly [Rules 30.02](#), [30.03](#), [30.04](#), [30.06](#), [30.07](#) and [30.08](#). The defendants were entitled to have the new productions as part of their trial preparation. And importantly, the defendants had no role in this late production issue and were otherwise ready for trial. There was little excuse for the plaintiff's lack of compliance with his documentary disclosure obligations. As

a result, the adjournment was granted and the defendants were awarded costs thrown away in an amount to be determined at trial.

In *Pinnock v. Pinnock*, [2021 ONSC 4155 \(CanLII\)](#), Justice A. Finlayson addressed a party's attempt to introduce new documents on the fourth day of a matrimonial trial during the midst of cross-examination of the husband by the wife's lawyer. The husband sought an adjournment on the basis that this amounted to a form of trial by ambush. In balancing the interests of the parties, Justice Finlayson [reasoned](#) as follows:

I accept that counsel is entitled to be a zealous advocate for his client. It is also well known that the right to cross-examine is a fundamental principle. However, neither of these two principles operates in a vacuum, or to the exclusion of other well-known principles that apply in family law litigation. I agree with the husband, that the manner in which the wife proposes to continue the cross-examination, is unfair to him.

In Justice Finlayson's view there were no less than seven reasons why the introduction of the documents in the middle of cross-examination was unfair:

1. The obligation to produce relevant documents, fully and comprehensively, is a fundamental principle enshrined in the case law in family litigation due to the tremendous amount of time and expense that is often involved in establishing the financial circumstances of the spouses.
2. The *Family Law Rules* contain numerous rules directed at the importance of early and complete disclosure to enable the court to do justice, which is the court's primary obligation.
3. Further, in contrast to ordinary civil litigation, the *Family Law Rules* emphasize resolution, mediation and ways to save time and expense in proportion to the complexity of the issues, as the rules "embody a philosophy peculiar to a lawsuit that involves a family": *Frick v. Frick*, [2016 ONCA 799](#) at para. [11](#).
4. Justice Finlayson noted that while factual and other matters sometimes arise for the first time during the course of a trial, which will lead to new documents being obtained and produced, that is not what transpired. Rather, the wife's lawyer had obtained documents while preparing for trial but had not produced them until the middle of the husband's cross-examination.
5. Further, months before the trial, the husband's lawyer had requested "any and all evidence" of the wife's claim. Even had he not done so, the wife had a duty to provide the documents as soon as they were obtained as part of her ongoing disclosure obligations.
6. The documents were not solely being used for impeachment of the husband but went to the core issues in the case relating to the wife's evidence, and ought to have been obtained and produced well in advance of the trial preparation process itself (e.g. at settlement conferences).



7. Lastly, there is a positive obligation on the parties in family law cases to produce relevant documents, early and proactively, even without a formal affidavit of documents being requested or required.

There was a further evidentiary issue with the new documents, which were mostly police occurrence reports and real estate records, in that they were not necessarily admissible. The wife's lawyer argued that the documents were admissible as business records under the Ontario [Evidence Act](#). However, sections 35(2) and (3) of the [Evidence Act](#) require seven days' notice to the other party, and the husband was entitled to production of the document in advance of the trial. There was no notice and no production and the husband's counsel had therefore not had the opportunity to consider whether oral evidence from the record keeper was required.

In the result, Justice Finlayson determined that the wife's litigation strategy to introduce the documents during cross-examination was unfair to the husband. The trial was adjourned to a future date on terms that provided for the use and examination of the new documents by both parties at the continuation of the trial.

Lastly, in ***Herman's Building Centres v. Belaousoff***, [2021 ONSC 413 \(CanLII\)](#), Justice K. Tranquilli granted an order striking the defendants' statement of defence as a result of their failure to produce a proper affidavit of documents. During two years of litigation, the defendants produced no documents whatsoever, yet filed affidavit evidence on the motion in response to the motion to strike which confirmed the existence of relevant information. Defendants' counsel made a mystifying suggestion that it was "*quite possible*" that the defendants could not produce documents that they did not have. The

evidence demonstrated that the defendants' non-compliance was "material, deliberate and unequivocal." They did not offer a reasonable explanation for the non-compliance and failed either to remedy or to offer a credible commitment to remedy their non-compliance, despite ample opportunity to do so prior to the motion.

The striking of a pleading is an extraordinary remedy but is within the discretion of the court as determined in the context of the particular case, and was appropriate given the conduct of the defendants. Further, Justice Tranquilli reasoned that striking the statement of defence was a proportionate remedy in an action for a construction debt of \$32,731.23, which should have progressed beyond the discovery phase by the time that this motion was heard, and "notwithstanding the pandemic."

These decisions illustrate some of the consequences that may be levied due to a party's failure to disclose and produce relevant documents in a timely manner. The sanctions can range from costs to the most serious remedy of all, a dismissal of a party's case without any determination on the merits. At the least, a failure to produce relevant documents will raise the ire of a court and lead to delays which are rarely in anyone's interests.

### Contact us

If you have a litigation matter and are in need of legal advice, please contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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