

Pleadings struck in \$100 million claim due to party's repeated failure to produce relevant documents (Way v. Schembri)

Appeals | Claim | Litigation | Litigation & Dispute Resolution

19 February 2025

In civil litigation, the parties have a fundamental obligation to produce all documents that are in their possession, control or power which are relevant to the issues in dispute. The Court of Appeal for Ontario has described this obligation as lying at the “heart” of the rules governing actions in the Superior Court of Justice. The consequences for failing to produce relevant documents in a timely manner can be severe, as demonstrated by the decision of a motion judge in *Way v. Schembri*, 2025 ONSC 946 (CanLII).

The motion arose during a 15-year-old dispute between the plaintiff (Way) and the defendant (Schembri) regarding a real estate development joint venture. Schembri and Way had formed a company to pursue real estate development opportunities and entered into a shareholders' agreement to govern its operations. The parties' relationship broke down in 2008 and led to two related proceedings: an action commenced by Schembri and certain associated companies in 2010 and a second one brought by Way and associated companies in 2012. The two actions were being tried together and shared common discoveries.

Among other things, Way alleged that Schembri breached a right-of-first-refusal (ROFR) clause in connection with at least 26 properties in the Kitchener-Waterloo area that Schembri developed without first offering the opportunities to their joint company. The actions involved claims of over \$100 million in damages.

In 2017, Schembri brought a motion for summary judgment to dismiss Way's action on the basis that the ROFR claim was unenforceable. In September 2018, during a cross-examination, Schembri was asked to produce documents relating to the lands at issue. Schembri refused to do so on the basis that his motion would, if successful, dispose of the Way action. However, he also undertook to deliver a supplementary affidavit of documents that would include the outstanding documents if his summary judgment motion was not successful.

In February 2019, the court granted Schembri's motion for summary judgment and dismissed Way's action. Way successfully appealed and the Court of Appeal reversed the dismissal in November 2020: *Way v. Schembri*, 2020 ONCA 691 (CanLII).

Shortly after the Court of Appeal's 2020 decision, Way's counsel wrote to Schembri's counsel, advising that he was now required to produce the outstanding documents forthwith and that the actions could not move forward until he did so.

In January 2021, Schembri's counsel advised that Schembri would not produce the outstanding documents because he was seeking leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. Way's counsel responded to note that an application for leave does not stay an obligation to comply with an undertaking. The Supreme Court of Canada dismissed the application for leave in April 2021.

By 2024, no significant progress had been made in the actions and Schembri had not fully produced the required documents. At a case conference in February 2024, the court made a peremptory order directing Schembri to produce documents in respect of two properties by April 30, 2024, with the remaining outstanding documents to be produced by August 30, 2024.

After these deadlines were missed, Way moved for an Order striking Schembri's defence and dismissing the related action brought by Schembri.

Under [Rule 30.08\(2\)](#) of the Ontario *Rules of Civil Procedure*, the court may dismiss an action or strike out a statement of defence due to a party's failure to produce documents in compliance with the *Rules* or failure to comply with a related order of the court.

The motion judge referred to the applicable principles affirmed by Court of Appeal for Ontario in *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, 2020 ONCA 310, at paragraphs 50-55, which address the court's discretion under [Rule 30.08](#).

Among other considerations, the court should consider six "common sense factors" in deciding whether to strike the pleading: (i) whether the failure was deliberate; (ii) whether it was "clear and unequivocal"; (iii) whether there is a reasonable explanation for default, along with a "credible commitment to cure the default quickly"; (iv) whether the default is material or minimal in nature; (v) the extent to which the breaching party remains in default; and (vi) the impact on the court's ability to "do justice in the particular case".

At paragraph 42 of the [decision](#), the motion judge noted that while orders to dismiss a claim or strike a party's defence are exceptional, "they play an important role in protecting the legal system from delay and indeed maintaining the integrity of the justice system by reinforcing the importance of compliance with court orders."

In reviewing the history of the proceedings, the motion judge found that the factors overwhelmingly favoured the extraordinary remedy of ending Schembri's proceedings.

In the motion judge's view, Schembri's affidavit confirmed that he did not take any material steps to comply with his undertaking to produce the documents until after the peremptory order was made in February 2024. Even after the peremptory order was made, Schembri continued to take inadequate steps to comply with his obligations. Despite needing to review potentially millions of documents, he initially only assigned a single employee to assist, on a part time basis, with a review for relevance.

The motion judge commented that Schembri could have sought to vary the timetable order if technical issues outside his control were the real cause of his failure to comply with the order. Instead, he ignored the peremptory order. Schembri's counsel attempted to characterize Schembri's failure to promptly fulfill his disclosure obligations as a business decision. In response to this submission the motion judge stated: "It was not. It was disregard of a court order."

Overall, the motion judge found that each of the factors identified by the Court of Appeal in *Falcon Lumber* supported Way's position. In the motion judge's view, Schembri had consistently "ragged the puck" with regard to his documentary disclosure obligations, and either chose not to comply or devoted insufficient resources to meet his obligations. Schembri's breaches were deliberate and unequivocal, they seriously delayed the proceeding and threatened to undermine the administration of justice.

As a result, the motion judge concluded that the appropriate and proportionate remedy as provided by the Rules was to grant the relief sought by Way and strike Schembri's statement of defence and his claim in the two related proceedings.

The decision demonstrates the severe consequences that may result from a party's failure to comply with their obligations to disclose relevant documentation in a civil proceeding. While the result may be extraordinary and based on the specific circumstances at issue, parties generally should be mindful that the remedy is potentially available in all similar situations. A PDF version is available for download [here](#).

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com