

**CITATION:** Dawkins v. Precision Resource Canada Ltd., 2024 ONSC 3514  
**COURT FILE NO.:** CV-21-664714  
**DATE:** 2024 06 18

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** HENRY DAWKINS, *Plaintiff*  
- and -  
PRECISION RESOURCE CANADA LTD., *Defendant*

**BEFORE:** Associate Justice Todd Robinson

**COUNSEL:** W. Anderson, *for the defendant (moving party)*  
R. Darrell, *for the plaintiff*

**HEARD:** February 6, 2024 (by videoconference)

**REASONS FOR DECISION**  
**(Motion to strike defence or compel further and better affidavit of documents)**

[1] This is a wrongful dismissal claim in which Henry Dawkins alleges that he was an employee of Precision Resource Canada Ltd. (“Precision”) and was wrongfully terminated after performing trucking services on behalf of Precision for five years. Precision’s position is that there was no employment relationship with Mr. Dawkins. Precision’s position is that it had a contract with Prompt Express Ltd. (“Prompt”), a company owned and operated by Mr. Dawkins, as an independent contractor.

[2] On this motion, Precision seeks an order striking Mr. Dawkins’ statement of claim for ongoing non-compliance with documentary discovery obligations or, alternatively, compelling a sworn further and better affidavit of documents. Precision takes the position that dismissal of this action is warranted by reason of Mr. Dawkins’ failure to produce all relevant documents in accordance with the requirements of the *Rules of Civil Procedure*, RRO 1990, Reg 190 (the “Rules”) and, more specifically, in accordance with the scope of documentary discovery expressly agreed by the parties in their discovery plan. Mr. Dawkins’ position is that this motion should be dismissed as disproportionate and unnecessary.

[3] Precision has made a very compelling argument for dismissing this action. I have seriously considered granting the request. Mr. Dawkins’ ongoing non-compliance is essentially unexplained in the record before me other than by unsubstantiated and self-serving statements made in Mr. Dawkins responding affidavit. However, taking into account the extent to which Mr. Dawkins has ultimately complied with his obligations in response to this motion, I have determined that, in

the circumstances, dismissing the action is not warranted, at least not without first providing Mr. Dawkins a further opportunity to comply with the production obligations to which he expressly agreed. I am accordingly ordering a further and better affidavit of documents on terms, as well as a revised deadline to complete examinations for discovery.

## ANALYSIS

[4] Discovery plans are an under-utilized tool in the discovery process. Far too commonly parties prepare and execute proforma discovery plans without meaningfully turning their minds to the genuinely disputed issues and the necessary and proportionate scope of productions and examinations for discovery in the circumstances of the particular litigation. The result is technical compliance with rule 29.1 of the *Rules*, not compliance with the spirit of that rule and the reasons for which it was enacted.

[5] That is not the case here. In this case, the parties specifically turned their minds to the scope of relevant production, agreed on it, and appended it to the discovery plan as a schedule. Notably, Mr. Dawkins agreed to produce specific documents organized into five separate categories: business records, mitigation efforts, offers of employment, mitigation income, and employment insurance benefits.

[6] The discovery plan contemplated exchange of the parties' sworn affidavits of documents by November 30, 2021. Mr. Dawkins served an unsworn affidavit of documents by that deadline. It disclosed various of Prompt's business records, but failed to provide a large number of the documents contemplated in the discovery plan, notably Mr. Dawkins' and Prompt's income tax returns. Subsequently, in March 2022, Mr. Dawkins served an unsworn supplementary affidavit of documents providing Prompt's corporate tax returns from 2016 to 2020. The remaining documents outlined in the parties' discovery plan were not disclosed in any of Schedule A, B, or C to either of the two affidavits of documents.

[7] In June 2022, Precision's lawyer raised his concern that Mr. Dawkins had failed to make full production of relevant documents. No cogent explanation was given by Mr. Dawkins for not producing the remaining agreed documents. Instead, he sought to proceed with examinations for discovery. Precision refused to do so until documentary discovery was complete.

[8] In January 2023, counsel for the parties discussed the documents and Mr. Dawkins' desire to proceed with examinations for discovery. Following that call, Mr. Dawkins' lawyer wrote an email to Precision's lawyer confirming that Mr. Dawkins "does not have in his possession or control the documents enumerated [in the] appendix in the Discovery Plan."

[9] Precision has listed the documents from the parties' discovery plan that remain outstanding from Mr. Dawkins at para. 19 of the supporting affidavit. No further documents were produced by Mr. Dawkins until his responding affidavit to this motion was served in January 2024. Subsequently, a second supplementary affidavit of documents was served the day before this motion was argued. Some of the outstanding documents have accordingly now been produced. Nevertheless, Mr. Dawkins' subsequent production is important on this motion. It underscores that the assertion made by his lawyer in January 2023 was incorrect.

[10] The obligation of every party to civil litigation is to produce every document relevant to any matter in issue that is in the possession, control or power of the party: subrule 30.02(2). An affidavit of documents must disclose “to the full extent of the party’s knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party’s possession, control or power”: subrule 30.03(1).

[11] Parties are expected to disclose not only documents in their current possession, but also those that are within their control or power. Further, parties must disclose relevant documents that were formerly in their possession, control or power, as well as providing a statement as to when and how possession, control, or power was lost and the present location of the documents. These requirements are expressly set out in subrule 30.03(2). They are also reflected in the prescribed forms for an affidavit of documents (Form 30A and Form 30B), which divide productions into Schedules A, B, and C following the categories in subrule 30.03(2).

[12] There is no question that Mr. Dawkins failed to comply with his production obligations in subrules 30.03(1) and (2). The scope of relevant productions was agreed between the parties. Precision has demonstrated that Mr. Dawkins did have documents in his control or power (albeit perhaps not in his immediate possession) that were not produced or disclosed in his affidavit of documents. Notably, all of Mr. Dawkins’ affidavits of documents fail to include a detailed Schedule C. At a minimum, the affidavits of documents ought to have outlined the documents that had been expressly contemplated in the parties’ discovery plan that were previously in Mr. Dawkins’ possession, control, or power, together with the statement required by subrule 30.03(2)(c) on when and how Mr. Dawkins lost possession or control of or power over them and identifying their present location.

[13] Mr. Dawkins’ explanation for not producing the agreed documents or addressing them in his affidavits of documents is bare, self-serving, and frankly unconvincing. In his responding affidavit, Mr. Dawkins suggests that his age, challenges in understanding the requests, and the volume of materials are all factors leading to “an unintentional delay in completing this requirement promptly.” He states, “I want to assure the court that I have diligently worked to gather and submit all necessary documents. Despite the challenges posed by the extensive documentation process, I have put in continuous effort to ensure the collection and submission of all relevant documents.”

[14] The problem with Mr. Dawkins’ affidavit is that his statements are entirely self-serving and unsubstantiated. Mr. Dawkins does not explain how the detailed list of documents appended to the discovery plan was difficult to understand. He does not provide any explanation of what he did to “diligently” gather and submit documents. He does not particularize any specific challenges or difficulties that he encountered when collecting documents. Mr. Dawkins does use his new accountant as part of his explanation, but it appears that his former accountant was used for both personal and corporate taxes. Mr. Dawkins does not explain how he was able to produce Prompt’s corporate tax records prepared by his former accountant in 2022, but was somehow unable to produce his personal tax records until 2024 (as part of his responding affidavit).

[15] This motion was argued over three years after the agreed deadline for productions. Mr. Dawkins provides no explanation for why the documents appended to his affidavit could not

have been produced sooner. He has also not explained why his lawyer advised in January 2023 that Mr. Dawkins did not have any further documents contemplated in the discovery plan when clearly he did.

[16] As discussed in *Broniek-Harren v. Osborne*, 2008 CanLII 19782 (ON SC), at paras. 28-29, litigants do not have an untrammelled right to have their case heard. Cases are administered and processed pursuant to the *Rules*. Non-compliance with the *Rules* creates a tension between the proper administration of justice and having disputes tried on their merits. For our civil litigation system to remain viable, the *Rules* cannot be ignored with impunity. The challenge for the court is to determine when non-compliance by a party reaches the point that it can no longer be excused.

[17] The Court of Appeal has characterized the obligation to disclose every document relevant to any matter in issue as being “at the heart of the rules governing actions in the Superior Court of Justice”: *Falcon Lumber Limited v. 2480375 Ontario Inc.*, 2020 ONCA 310 at para. 41. In my view, that is not an overstatement. Proper and fulsome disclosure of relevant documents plays a significant role in ensuring a fair judicial process.

[18] Subrule 30.08(2)(b) grants the court discretion to dismiss an action or strike out a statement of defence for failure to serve an affidavit of documents or produce a document for inspection in compliance with the *Rules*. In *Falcon Lumber Limited*, *supra*, at para. 57, the Court of Appeal summarized various principles that should guide the court’s discretion to strike out a party’s claim or defence under subrule 30.08(2)(b). They are as follows:

- (a) The remedy is not restricted to “last resort” situations, in the sense that it must 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;
- (b) A court should consider a number of common sense factors including: (i) whether the party’s failure is deliberate or inadvertent; (ii) whether the failure is clear and unequivocal; (iii) whether the defaulting party can provide a reasonable explanation for its default, coupled with a credible commitment to cure the default quickly; (iv) whether the substance of the default is material or minimal; (v) the extent to which the party remains in default at the time of the request to strike out its pleading; and (vi) the impact of the default on the ability of the court to do justice in the particular case;
- (c) 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; and
- (d) In considering whether an order to strike out a pleading would constitute a proportional remedy in the circumstances, a court should consider:
  - (i) 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

- (ii) 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.

[19] This is an action commenced under the simplified procedure in rule 76. That context is significant. An order to strike may 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. Simpler cases should spend less time in the court system and impose lower legal costs on the litigants than a more complex one: *Falcon Lumber, supra* at para. 56.

[20] Precision's arguments on how the foregoing principles should be applied in this case were well-articulated and very persuasive. As noted at the outset of these reasons, I have seriously considered dismissing Mr. Dawkins' claim.

[21] Mr. Dawkins' failure to produce agreed documents or address them in his affidavit of documents is, in my view, clear and unequivocal. He agreed to produce specific documents that were not produced. He failed to explain why documents that ought reasonably to be within his possession, control, or power, such as personal income tax returns, were not or could not be produced. Many of the agreed documents have been demonstrated on this motion to be important to a fair disposition of this action and are documents that were, in fact, in Mr. Dawkins' possession, control, or power.

[22] Mr. Dawkins submits that, like all litigants, he has an ongoing production obligation, which he has complied with by serving supplementary affidavits of documents. In my view, his ongoing production obligation is not an answer to why all relevant documents that are or were in his possession, control, or power have not been listed in his affidavits of documents.

[23] I also give no effect to Mr. Dawkins' submission that he is not in breach of any court order, which he seeks to contrast with Precision's refusal to proceed with examinations for discovery "arbitrarily and without cause". A court order is not a prerequisite for parties to comply with their obligations under the *Rules*, so the fact that Mr. Dawkins is not in breach of a court order does not assist him in excusing non-compliance with his production obligations. With respect to Precision, given the nature and extent of the gaps in Mr. Dawkins' affidavits of documents, Precision's refusal to proceed with examinations was neither arbitrary nor without cause. I do not fault Precision for insisting on complete documentary discovery in a simplified procedure action, which permits only abridged examination times, before proceeding with examinations for discovery.

[24] Mr. Dawkins' non-compliance has been inadequately explained, supporting Precision's argument that it may have been deliberate. In January 2023, Mr. Dawkins' counsel unequivocally stated that Mr. Dawkins did not have further relevant documents in his possession, control, or power, yet further production was made in response to this motion. In his responding factum, Mr. Dawkins argues that Prompt's business expenses are not relevant to damages for wrongful dismissal, yet Mr. Dawkins conceded their relevance by specifically agreeing in the discovery plan

to produce copies of all documents from January 2016 to present with respect to business expenses incurred by both Mr. Dawkins and Prompt. I also agree with Precision that some of the now-disclosed documents appear unfavourable to Mr. Dawkins' case. Regardless, even if not deliberate, there is no evidence before me supporting that Mr. Dawkins' non-disclosure was reasonably inadvertent.

[25] Mr. Dawkins remained in default of his production obligations, as framed by the parties' discovery plan, at the time this motion was argued (albeit that he provided some disclosure in response to the motion). Mr. Dawkins' was served with the notice of motion in January 2023, more than a year before this motion came on for a hearing. Mr. Dawkins had a significant opportunity to cure his non-compliance, yet did not do so and even now has not provided any clear commitment to cure it.

[26] This case is a close call. Nevertheless, I am mindful that Mr. Dawkins has partially complied with his agreed production obligations in response to this motion. In my view, he should be afforded a further opportunity to cure his non-compliance before striking out his claim.

[27] The record before me amply supports that further relevant documents within the categories agreed in the discovery plan do or likely exist within the possession, control or power of Mr. Dawkins, which have not been produced. Notably, the record supports additional documents do or likely exist with respect to the business expenses and operations of Prompt, the legal relationship between Prompt and Mr. Dawkins, and Mr. Dawkins' damages.

[28] I am accordingly granting Precision's motion, but on the basis of the alternative relief compelling a further and better affidavit of documents. Since the timetable agreed by the parties in their discovery plan has long since passed, I am also imposing a revised deadline to complete examinations for discovery in line with the timing agreed by the parties in their discovery plan.

## **DISPOSITION**

[29] For the foregoing reasons, I order as follows:

- (a) The plaintiff shall serve a sworn further and better affidavit of documents by July 31, 2024.
- (b) For greater certainty, the version of the affidavit of documents ordered in subparagraph (a) above shall consolidate all documents in the affidavits of documents already served, as well as clearly identifying all additional documents contemplated in Appendix A of the parties' discovery plan that are or were in the possession, control, or power of the plaintiff. All documents shall be organized in the affidavit of documents into Schedules A, B, and C with required information in accordance with subrule 30.03(2) of the *Rules*.
- (c) No document produced by the plaintiff shall be redacted unless a basis for redaction is clearly stated and an explanation for each redaction is provided with sufficient detail to permit examination on the redaction and for the court to consider any objection to the redaction.

- (d) The timetable agreed by the parties in their discovery plan is hereby varied and amended, such that the parties shall complete examinations for discovery by January 31, 2025, subject to any agreement of the parties to vary that deadline on mutual consent.
- (e) This order is effective without further formality.

[30] If either party requires a formal order, then a draft order approved as to form and content may be submitted to my Assistant Trial Coordinator for my review and signature.

## **COSTS**

[31] Costs outlines have been exchanged. Precision relies on an offer to settle, so I could not hear costs submissions at the time of the hearing. I encourage the parties to settle costs of the motion. If they cannot agree, then costs submissions shall be made orally by thirty (30) minute case conference hearing booked my Assistant Trial Coordinator (ATC), Christine Meditskos. Each party shall be entitled to ten (10) minutes of submissions, with Precision entitled to five (5) minutes of reply. Any case law or offers to settle relied upon by either side shall be exchanged, submitted to my ATC, and uploaded to CaseLines at least five (5) days prior to the hearing.

[32] The hearing for costs submissions shall be booked directly through my ATC within thirty (30) days of this decision being released, failing which the parties shall be deemed to have agreed on costs.

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**ASSOCIATE JUSTICE TODD ROBINSON**

**DATE:** June 18, 2024