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Avoiding Discovery Obligation Pitfalls

Key Takeaways

It's important to comply with your production and discovery obligations when making decisions to exclude certain documents during the discovery process. Otherwise, your client may find themselves in a predicament before trial where leave from the court is required to rely on a document. Further, if the court allows your client to rely on a late produced document, the court may impose cost consequences. As discussed in the decision of *Premform Limited v Heights Rental Construction*¹, the court's decision to grant leave is discretionary and the onus is on the party seeking the indulgence to show: (i) a reasonable explanation for the failure to comply with the relevant discovery rules *and* (ii) that granting leave will not cause prejudice to the opposing party.

Background:

In *Premform*, the admissibility of the document at issue was a bid estimate. The plaintiff, *Premform* had deliberately decided not to produce the bid estimate in its affidavit of documents. *Premform* had also refused to produce the document in response to a question at the examinations for discovery. Following the examinations for discovery, *Premform* produced an expert report that relied on the bid estimate. The opposing party objected to the use of the bid estimate without leave of the court. Thereafter, *Premform's* counsel wrote to opposing counsel to advise that because the bid estimate had been produced, the prior refusal was no longer in place. *Premform* then also served a supplementary affidavit of documents which listed the bid estimate.

Premform therefore brought a motion for directions on the late production and admissibility of the bid estimate, and if necessary, sought leave to rely on the document at trial. The two issues on the motion were (i) whether *Premform* required leave, and (ii) if so, whether leave should be granted.

Lessons Learned from *Premform*

Issue 1: Whether *Premform* required leave to rely on the bid estimate?

In respect of the first issue, the Court concluded that as the bid estimate was not captured by either rule 30.07 or rule 31.09(1), *Premform* required leave to rely on the bid estimate. The Court considered the following in its analysis:

1. **Rule 30.02(2) of the *Rules of Civil Procedure* requires disclosure of every document relevant to any matter in issue that is or has been in the possession, control or power of a party.** In this case, there was no dispute that *Premform* had the document in its possession at the time its affidavit of documents was served.
2. **Relevance is determined by the pleadings.** In this case, the court found that the statement of claim put at issue the actual impact of the additional work claimed by *Premform*, which therefore included *Premform's* plan in comparison to the actual work. Proper quantification of damages was also at issue. Therefore, the bid estimate was relevant based on the pleadings and ought to have been produced.
3. **Rule 30.07 does not apply where a deliberate decision is made to exclude certain documents.** Rule 30.07 requires a party to serve a supplementary affidavit of documents when it *comes into* possession of new relevant documents after the initial production of documents or otherwise *discovers* that the original affidavit of documents is inaccurate or incomplete. As *Premform* made a deliberate decision not to produce the document, rule 30.07 therefore did not apply.
4. **Resiling from a refusal may not qualify as correction.** The court held that rule 31.09(1) requires a party to *subsequently* discover that an answer on an examination for discovery is incorrect or incomplete in

¹ *Premform Limited v Heights Rental Construction Inc.*, [2023 ONSC 955](#) [*Premform*]

order to permit correction. In this case, there was no subsequent discovery of information to correct or complete a response. Instead, Premform's expert wanted to rely on the document. Further, Premform gave a refusal without an explanation for the refusal. Accordingly, the Court held that Premform did not provide a response on the refusal that was capable of being corrected or completed within the meaning of rule 31.09(1).

Issue 2: Whether Premform should be granted leave to rely on the bid estimate?

In respect of the second issue, the Court accepted the explanation of Premform as reasonable and concluded there was no non-compensable prejudice to the opposing party. Therefore, Premform was permitted to rely on the document. However, Premform's conduct did not go unsanctioned and Premform was ordered to pay for the costs of a re-examination on a full indemnity basis and costs of the motion.

1. **The Rules restrict a party's ability to introduce new favourable evidence at trial without first obtaining the court's permission.** Rule 30.08(1) provides that a party who fails to disclose or produce a favourable document in compliance with the *Rules* may not use the document at trial, except with leave of the trial judge. Rule 31.07(2) provides that a party who fails to answer a proper question during the examinations for discovery may not introduce new information at trial, except with leave of the trial judge.
2. **Obtaining the Court's permission is a two part test, and the decision is discretionary.** Rule 53.08 was substantively amended last year. A party seeking an indulgence must now show: (i) a reasonable explanation for the failure to comply with the relevant discovery rules and (ii) that granting leave will not cause prejudice to the opposing party that cannot be compensated for by costs or an adjournment or cause any undue delay in the conduct of the trial. In respect of the first element of the test regarding a reasonable explanation, the Court found that while the opposing party had put forward a strong argument as to why Premform's explanation was not "reasonable", the Court nevertheless accepted Premform's submission that its explanation was not unreasonable. In respect of the second element of the test, prejudice, the Court found that there was no non-compensable prejudice. While the opposing party had a procedural right to understand the case to be met, Associate Justice Robinson found that a further examination ameliorated the prejudice caused by the failure to produce the bid estimate. Also, there was no undue delay as the actions were not ready for trial scheduling.
3. **The Court needs to have a realistic and meaningful concern about the opposing party being unfairly taken by surprise at trial.** The Court found that this was not a case where late disclosure had given rise to realistic or meaningful concerns that the opposing party were being unfairly taken by surprise at trial and noted that this principal remains instructive.
4. **Non-compliance shall not be without sanction.** Rule 30.08(2) provides broad discretion to determine an appropriate remedy. In this case, the Court ordered required Premform to pay full indemnity costs for the further examinations and the opposing party's costs of the motion were claimable in the cause.



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