Various Court Rules Causing

Confusion About Small Claims Disclosure

The document disclosure processes of the Small Claims Court are often described as easy enough for a self-represented layperson without legal training; however, even seasoned professionals can struggle in the attempt to understand what constitutes proper disclosure timing for matters proceeding within the Small Claims Court; and accordingly, laypeople may especially struggle to understand disclosure mandates.

Serve Early, Serve Often, Serve Late

To describe the ***Rules of the Small Claims Court***, O. Reg. 258/98 in regards to proper disclosure timing, perhaps the best rule of thumb is to '*serve early, serve often, and serve late*'; however, doing so can result in a waste of resources and perhaps beinterpreted by an opposing representative as an act of sharp practice

whereas to 'serve early, serve often, and serve late' may be, even when genuinely and innocently done, misperceived as a bombardment of documents intended to overburden and unnecessarily drive up costs.

Disclose With Pleading

The first references to disclosure of documents that lead to confusion are the requirements within the ***Rules*** applicable to pleadings which state:

> **Plaintiff's Claim,** Rule 7.01(2)2
> If the plaintiff's claim is based in whole or in part on a document, a copy of the document shall be attached to each copy of the claim, unless it is unavailable, in which case the claim shall state the reason why the document is not attached.
>
> **Defence,** Rule 9.01(2)2
> If the defence is based in whole or in part on a document, a copy of the document shall be attached to each copy of the defence, unless it is unavailable, in which case the defence shall state the reason why the document is not attached.
>
> **Defendant's Claim**, Rule 10.01(4)
> If the defendant's claim is based in whole or in part on a document, a copy of the document shall be attached to each copy of the claim, unless it is unavailable, in which case the claim shall state the reason why the document is not attached.

The problem here is in the lack of clarity with the wording of these ***Rules***. What exactly does the word "*based*" mean? While seemingly straightfoward, the word "*based*" is onfusing, especially whereas, per Rule 13.03, the subsequent Settlement Conference rules instruct disclosure of a document that may be "*relied*" upon at Trial; and accordingly, by the use of two different words, "*based*" and "*relied*", different meanings may then be imputed upon such words. The challenge arises whereas the ***Rules*** fail to provide definition for the each of the two words - or if without the intent for a different meaning for the two words, then the ***Rules*** fail to explain why there are two different words. In law, if there are two different words used, it is anticipated that there are two different meanings intended; but, what are those two different meanings?

Generally, it appears that Small Claims Court practitioners interpret '*based*' as meaning a document that gives rise to the cause of action and the meaning of '*relied*' as a document that assists in proving the cause of action. For example, where a claim is brought upon the breach of contract cause of action, it is reasonable to perceive that the word '*based*'' imputes the meaning that where the legal cause of action is breach of contract, any alleged breach may therefore be '*based*' upon the terms within a contract document and therefore the contract itself should be attached; however, this interpretation imputes a meaning that documents that may prove or demonstrate how it came to pass that the contract was breached are without need of disclosure at the pleadings stage. These secondary documents, which may prove how the breach of contract occurred, for example an expert report describing defects in workmanship that are less than the standards of workmanship required or perhaps a statement of account to show failure of payment of monies due, appear to fall within the parameters of a document that may be '*relied*' upon at Trial and therefore fall within the meaning of rules governing subsequent disclosure.

Subsequent Disclosure

As above, disclosure mandates at the time of pleading appear to state that only those documents upon which a claim or defence theory is '*based*' are subject to a requirement for disclosure at the time of pleading. Documents that may be '*relied*' upon at Trial appear as without a mandate for attachment to pleading documents. The first instance of mandate for service of documents that may be 'relied' upon appears at Rule 13.03(2)(a) which states:

> At least 14 days before the date of the settlement conference, each party shall serve on every other party and file with the court,
>
> > (a) a copy of any document to be relied on at the trial, including an expert report, not attached to the party's claim or defence ...

While Rule 13.03(2) appears as the final instructive rule regarding timing of service, Rule 18.02(1) appears as implying a subsequent allowance for service of documents thereafter whereas such states:

> A document or written statement or an audio or visual record that has been served, at least 30 days before the trial date, on all parties who were served with the notice of trial, shall be received in evidence, unless the trial judge orders otherwise.

Motion to Produce or Inspect

Disclosure mandates within the ***Rules*** are silent on the right of a party to seek an production or opportunity for inspection; accordingly, these issues are addressed by the common law; which until recently, remained in a state of flux and confusion with contradictory decisions from the lower courts (Small Claims Court and Divisional Court); however, the Court of Appeal, in the case of ***Riddel v. Apple Canada Inc.***, 2018 ONCA 590 confirmed that judges in the Small Claims Court do have such jurisdiction whereas it was stated:

> [3] Specifically, the *Rules of the Small Claims Court*, O. Reg. 258/98 (the "Rules"), especially r. 17.03, do not adequately cover the matter of the pre-trial inspection of property. As a result, where trial fairness and the interests of justice, including the expeditious and least expensive determination of a case on the merits, so require, Deputy Court Judges of the Small Claims Court have jurisdiction under r. 1.03(2) of the *Rules* to order the pre-trial inspection of property by reference to r. 32.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Previous cases on the issue still worthy of a review include ***Garg v. Raywal Limited***, 2014 CanLII 45320 (motion denied and deemed improper as lacking jurisdiction); ***Burke v. Lauzon Sound and Automation Inc.***, 2016 CanLII 16474 (motion allowed but purpose limited); ***Pope v. Sutton Premier***, 2013 CanLII 56750 (see paragraphs 13 to 16, motion denied and deemed unavailable).

Production, Third Party

What does appear very consistent is denial of any attempt to inport Rule 13.10 of the Rules of Civil Procedure and thus any opportunity to obtain an Order from the Small Claims Court for production by a third party. This issue was well addressed

in ***Elguindy v St. Joseph's Health Care***, 2016 ONSC 2847 (see paragraphs 27 to 28 for decision) as well as ***Schafer v. Wagner***, 2016 CanLII 90738 (see paragraphs 8 to 26 for reasoning and decision).

After Setting Matter Down

Whereas a party that sets a matter down for Trial implies readiness to proceed to trial, a subsequent Motion to Produce or Inspect is improper; ***Abdi v. Demello***, 2016 ONSC 4373 and ***Meloro Restaurants Ltd. v. Little Caesar of Canada Inc.***, 2012 ONSC 1870.

Inspection or Production

Recently in the case of ***York (Regional Municipality) v. McGuigan***, 2018 ONCA 1062, a traffic ticket provincial offences case involving a Motion to Produce, the Court of Appeal stated:

> [130] Nor was the prosecutor's invitation to view the user manual at the prosecutor's office sufficient. The first principle governing the manner of disclosure is that it be meaningful, in the sense that it be adequate to make full answer and defence. Disclosure of user manual instructions will be meaningful where the defendant can capture a precise record of the information. It will be meaningful if the information can be captured to be shared In consulting and preparing an expert witness, if necessary. And it will be meaningful if the defendant has access to a copy of that information during trial so that it can be used during the cross examination of the traffic officer, or as an exhibit, if appropriate. This is not a case where the interests of justice require inspection instead of production.

Accordingly, it appears clear that a limited inspection opportunity may be insufficient disclosure and actual production required. As indicated by the Court of Appeal, where availability of the document in question may need subsequent access by an expert witness, among other things, production rather than mere inspection is appropriate.

Summary Comment

The ***Rules*** on disclosure are extensive and can be confusing with various twists, turns, conditions, and exceptions, that can challenge even the most seasoned professionals. For these reasons, laypersons should obtain professional assistance when reviewing what should be disclosed, and when, as well as what should be sought from the opposing side.