HEURISTICA
DISCOVERY COUNSEL LLP

May 21, 2025

The Honourable Justice Cary Boswell
Superior Court of Justice

Allison Speigel
Speigel Nichols Fox LLP

c/o Jennifer Smart (Jennifer.Smart@Ontario.ca)

Dear Justice Boswell and Ms. Speigel,

RE: Ontario Civil Rules Review Phase 2 Consultation Paper (the "Report")

Heuristica Discovery Counsel LLP[1] is a national law firm with a practice devoted exclusively to digital evidence and related legal issues. We appreciate the opportunity to provide input with respect to the proposals outlined in the Report, and we have chosen to focus our comments solely on digital evidence management issues, which we believe to be crucial to the successful implementation of a new Rules regime.

The Report identifies access to justice and the reduction of litigation costs as central objectives of civil justice reform in Ontario. These are important and necessary goals. However, in our view, the Report misses a critical opportunity to meaningfully advance those goals in the digital age. As legal professionals with deep expertise in electronic evidence management and analysis, we are concerned that the Report fails to grapple with the real driver of escalating discovery costs: not the volume of electronic documents, but the improper and inefficient handling of electronically stored information (ESI). This oversight undermines the Report's ambitions and risks entrenching rather than alleviating cost and complexity in modern litigation.

[1] Heuristica, with offices in Toronto and Calgary, is Canada's only national law firm whose practice is focused solely on digital evidence matters, including providing eDiscovery counsel advice, legal technology, evidence review management and services, and acting as an independent third-party solicitor. The genesis of Heuristica was the recognition that eDiscovery needed to be done more efficiently and cost-effectively, and with heightened legal skills.

What follows is our analysis of missed opportunities in the Report, together with practical, cost-effective alternatives grounded in current legal standards, technical realities, and best practices in digital disclosure.

1. The Report provides no guidance on proper management of ESI. A key variable which leads to increased costs is having no, or an incomplete, document exchange protocol, leading to inappropriate file formats for exchange and substantial disagreement. The default exchange format for ESI should always be original digital format.[2] For most document types, exchanging ESI in its original format is the cheapest, fastest and most useful way to both send and receive information. Once it is received in this way, it can be loaded into any review tool and put into any format of the recipient's choosing. Documents in their original digital format contain metadata that is used to locate and order those records in the disclosure evaluation process.

Original digital format is recognized as the gold standard by *The Sedona Canada Principles*. Principle 8 of *The Sedona Canada Principles* is that "The parties should agree as early as possible in the litigation process on the scope, format, and organization of information to be exchanged". The commentary under that rule emphasizes the importance of producing in original digital format:

> For a number of reasons, ESI should wherever possible be produced in original digital format. First, the original digital version is the truest, most accurate version of the document; second, original digital files are easier, faster, and cheaper to transfer, upload, and search than any other format; third, conversion to other formats entails the loss of information; and fourth, original digital versions contain all of the application-level and user-created metadata, some of which may be crucial to understanding the context and meaning of the files. User-generated metadata is information about the document that is entered by a user at the file level such as, for example, the fields that can be populated in the "Properties" tab of a Microsoft Office document. In addition, many kinds of electronic files contain information that can be lost if the file is simply converted to an image format. Examples of such information include that which is: (a) in spreadsheets, such as macros, formulas, conditional formatting rules, and hidden columns/rows/worksheets; (b) in presentations, such as speaker notes; (c) in word-processing documents, such as text-editing notations ("track changes"); and (d) in virtually all file types, such as comments, electronic sticky notes, and highlighting. Such information is as much a part of the document as the visible text and, in some investigations or litigation, can be highly relevant. Parties should therefore be prepared to produce files in their original digital format or explain why they prefer not to or are unable to do so.[3]

[2] There will be occasions on which images must be created, for example, to burn in redactions.
[3] *The Sedona Canada Principles Addressing Electronic Discovery, Third Edition*, 23 Sedona Conf. J. 161 (2022) at pages 267- 268 (2022 CanLIIDocs 11678)

Canadian courts have recognized that producing in original digital format should be standard. In *H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd.*, 2024 ABKB 424 at paras 48-9, Marion J. addressed this issue specifically:

> 4. Useable Disclosure
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> [48] As noted above, Sedona Canada 2022 provides that the parties should agree as early as possible in the litigation on the information to be exchanged and its format and organization. Where possible, and where relevant, material, and proportionate, electronic records should be searchable, in original digital format, and should include metadata: *Sedona Canada 2022* at 265-267; ***Questor Technology*** at paras 114-115 and 121; ***Spar Aerospace Limited v Aerowerks Engineering Inc***, 2007 ABQB 543 aff'd 2008 ABCA 47; ***Bard*** at paras 96-115.
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> [49] The point is that, unless disproportionate, meaningful disclosure in a useable format is required: ULCC Report at paras 9-13; ***Bard*** at paras 107-115; ***Spar*** at para 71; ***Banque Nationale*** at para 4. Producing records in an unusable format undermines procedural fairness and just results, does not help to narrow the issues in dispute, and threatens the ability of litigants and courts to understand the evidence: ***Bard*** at para 115.

Ontario judges have similarly emphasized the importance of original digital format. For example, in *2038724 Ontario Ltd. v Quiznos Canada Restaurant Corp.*, 2012 ONSC 6549 (CanLII), the Court ordered a party to reproduce documents in Excel format even though the discovery plan stated that productions would be exchanged in TIFF. Perell J. found that there would be no hardship or difficulty in providing the documents in original digital format, stating at paragraph 131, "I am not impressed with Quiznos' purely technicality [sic] argument. For the already produced documents, if there is a readily available copy in Excel format, then the document should be produced again in Excel format."

Producing evidence in its original digital format is critical because it constitutes the "best evidence" and is far easier to authenticate. This is especially important in an era of rapidly advancing artificial intelligence, where the ability to fabricate or manipulate digital content is growing. As a result, courts will increasingly require parties to meet the authentication standards set out in section 31.1 of the *Canada Evidence Act*.

In *Wang v. Liu*, 2023 BCSC 972 (CanLII), one party produced text messages in original digital format and the other party produced text messages as screen shots. Although the British Columbia Court admitted the screen shots into evidence, the court assigned to them *no weight whatsoever*, highlighting the practical consequences of failing to produce original digital evidence.

2. The Report proposes a Redfern process to ensure a sufficient documentary record for proceedings, however, the Redfern process was established 25 years ago in a paper-based world and requires reimagination for the digital world. The Redfern process was created to simplify document requests and balance fairness with costs, laudable goals that exist in present day litigation. In a paper-based world, it may have been efficient to reach into one's files to produce reliance documents and later reach back in to produce documents in answer to Redfern requests. However, in modern litigation involving large volumes of digital evidence, returning to the same corpus of data after one has already searched for reliance documents in the corpus is inefficient, increases costs unnecessarily, and in many cases will double the costs required for the document review process.

While there are always exceptions, one comprehensive review of digital documents is usually more efficient than review in multiples phases. Phased review results in having to re-review previously seen documents, leading to duplication of effort and increased cost. A single review enables consistent application of privilege, relevance, confidentiality, and proportionality standards across the full corpus. Finally, one review enables more accurate identification of responsive documents, because patterns, context, and relationships between documents often become clearer when reviewing a complete set of data.

While we do not endorse a phased approach to review for the foregoing reasons, we believe that a request-based production regime can operate efficiently so long as the requests are exchanged at the outset, and reviewing for reliance, adverse and requested documents is completed in one-step. Accordingly, our recommendation is that, after the close of pleadings, the parties should be required to exchange two lists of document categories, those document categories that they will be producing because they are material to the contested issues in the pleadings, and those documents that they request the other party produce because they are material to the contested issues. The parties should then be required to meet to discuss any issues arising from the exchanged lists of categories of documents proposed and requested.

For this reimagined Redfern process to be most efficient, we believe that the Rules should move to a materiality standard for all productions in a proceeding. Further, every document request should be qualified by materiality. With such an approach, we may be able to avoid document dumps. For example, when a party requests every communication between two individuals, the request would be automatically qualified by the Rules as being a request for only the *material* communications between those two individuals.

There will certainly be discovery disputes under any Rules regime with any standard for production. This brings us to a gap we have identified in the Report.

3. The Report does not acknowledge that there will always be discovery disputes regardless of the Rules put in place. The key is to have strong enforcement of the Rules, which the Report does not address. With scarce judicial resources, our strongly held view is that Ontario must move to a system of special masters or referees to resolve complex discovery disputes. In the United States, special masters are neutral third parties appointed under the *Federal Rules of Civil Procedure*. These "neutrals" are often experienced lawyers or retired judges with demonstrated expertise with electronic evidence disclosure and technology. The Ontario market is now sufficiently mature that we have lawyers with litigation experience and sufficient electronic evidence expertise. A one-step production process, overseen by a court-appointed discovery master, would go a long way to reducing the burden on the judiciary and provide the necessary expertise to the parties and the court.

The discovery master should have expertise regarding the time and effort involved when working with digital evidence, and this brings us to another issue the Report does not address.

4. The timetables set out in the Report do not allow for the unpredictable amount of time it can take to download data from client systems and upload the data into a review tool for counsel consideration. In our experience, fixed timetables are frequently undermined by delays inherent in digital processing and data transfer times, what we refer to as "computer time". The time it takes to download data from a system, such as Microsoft 365, varies significantly and depends on several factors. These factors include the size of each individual file and the total number of files (volume) being requested, the capacity and stability of the user's internet connection, and the overall demand on Microsoft's servers at the time of access. For example, performance may be slower during peak usage periods or scheduled maintenance. In essence, much like traffic on a highway, download speeds are influenced by both local conditions and broader system activity. Uploading the data into a review tool for analysis suffers from similar constraints. The size of each file, the format of each file, the variety of formats in the collection, the presence and complexity of metadata, network speed and hardware performance can all affect how quickly counsel can access the material. These "computer time" issues have nothing to do with how well-resourced counsel is or how many people are working to get the job done. A court-appointed master with technical expertise would be able to clarify for the court which delays are completely unavoidable because of technology, and which are caused by controllable factors.

We entirely agree with the Committee that reform is needed to reduce cost, promote efficiency, and advance access to justice, and we commend the Committee for its extensive efforts in this regard. However, no reform will be successful unless it squarely addresses the realities of digital evidence. The Report's silence on the appropriate handling of ESI, its

endorsement of an outdated document exchange model with no refinements, and its failure to propose a meaningful dispute resolution mechanism for disclosure conflicts risk replicating the very inefficiencies the proposals seek to eliminate. Producing documents in original digital format is not only best practice, it is the most effective way to ensure fast, cost-effective, and fair disclosure. A one-step, materiality-based production process, overseen by qualified discovery neutrals, would reduce disputes, lower costs, and support judicial economy. The reference in the current Rules to *The Sedona Canada Principles* was a valiant attempt at encouraging parties to be mindful of digital realities, but unfortunately, did not lead to meaningful behavioural changes among the bar. Today, discovery reform must be rooted in digital competence. Heuristica urges the Committee to revisit its recommendations with this imperative in mind.

Yours Truly,

Kelly Friedman, Chief LDI Officer and Senior Counsel

Heuristica Discovery Counsel LLP