



Empowering Class Counsel with eDiscovery Strategy

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At the Forefront of **Discovery**

When it comes to documentary discovery in class actions, defence counsel appear to hold all the cards. As defendants control the vast majority of potentially relevant documents, as class counsel, you may feel that you are at the mercy of the defendants' eDiscovery tactics, which may be to selectively disclose or withhold relevant documents, or, equally problematically, to produce a document dump.

By leveraging recent caselaw and eDiscovery best practices, we propose to turn the tables. With a pointed and strategic approach to discovery, you can claim control by ensuring that you are armed with the crucial evidence to prove your case, or that you get to settlement approval with the evidence to convince the Court that your proposed settlement is fair, reasonable and in the best interests of the class.

This paper recommends that class counsel become proactive in the discovery process, from the initial planning stage through to production. It explores how to identify critical data sources, negotiate search methodologies, address document dumps and use analytics for trial or in support of settlement approval. Employing a strategic technology-focused approach can mitigate the informational power imbalance between counsel, reduce delays and secure the necessary evidence. Outlined below are key strategies and the supporting caselaw for proactive positioning to minimize defence tactics that often obfuscate the discovery process.

Plan and consult

While discovery planning has long been encouraged and even required by judges, Rules of Court, civil practice guidelines and best practices, such as those embodied in the *Sedona Canada Principles*¹, enforceability has been more challenging. Recently, however, judges have been cracking down on the obligation to truly plan for discovery with opposing counsel. Class counsel can now forcefully insert themselves into the defendants' identification and collection efforts, at the very beginning of the process. A wait and see approach is not only impracticable in today's information landscape, it can lead to discovery delays and costly and time-consuming discovery disputes, at best, and an inability to obtain the crucial evidence needed to prove your case, at worst.

Counsel can now be armed with the "blunt statement" made by Justice Marion in the 2024 case, *H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd*:

Long-gone should be the days when parties in disputes involving a significant number of electronic records quietly retreat to their respective corners without joint planning or consultation and then serve their affidavit of records. As this case illustrates, that is a recipe

¹ *The Sedona Canada Principles Addressing Electronic Discovery*, Third Edition, 23 SEDONA CONF. J. 161 (2022), 2022 CanLIIDocs 1167

for disproportionate delay and expense, inefficiencies, missteps, missed expectations, and missed opportunities. It appears a modern and more blunt statement from this Court may be of assistance.

Therefore: in order to comply with their joint obligations under the above-noted Rules, parties in matters involving a material number of electronic records are obligated to engage in discovery planning and consultation early in litigation. This should occur on an ongoing basis, to identify and attempt to reach consensus or agreement on a discovery plan and protocol that addresses identification, preservation, scope, gathering, compilation or processing, review, disclosure, and production of electronic records.

Non-exhaustively, parties should consider jointly planning and consulting about:

- (a) specific records production issues they foresee;
- (b) specific records (or types or categories of records) they expect to be included or excluded by both sides;
- (c) specific custodians of records or other non-custodian specific repositories of electronic records (for example, records in electronic file folders or electronic document management systems) they expect to be included or excluded;
- (d) proposed search terms and other technology-enabled record gathering, narrowing and culling methodologies;
- (e) procedures and expectations for removal of duplicate or clearly irrelevant records;
- (f) how the parties expect potentially privileged records to be handled (including, potentially, agreed procedures for clawing back inadvertently disclosed privileged records);
- (g) redaction and confidentiality procedures;
- (h) record review procedures, including the possibility of jointly hosted databases which allow access by both parties for review;
- (i) production format protocols, including file types, provision of “original digital records” (or what has historically been referred to as “native” format, including in Practice Note No. 4) or some other format, record information fields and records bundling;
- (j) the use of e-discovery professionals, including the possibility of jointly retained e-discovery professionals or neutral-party data hosting; and
- (k) expected timelines for the production and review of documents.²

² *H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd.*, 2024 ABKB 424 at para 35-7 [“H2”]

Ask basic questions about sources of information

Justice Marion's list is a useful checklist for information that will be required for an appropriate and fulsome plan. However, at the very outset of the litigation, class counsel can keep it simple by meeting with defence counsel and getting answers to some basic questions:

1. What electronic systems and data sources are available, and which are expected to be the richest sources of information relevant to the dispute?
2. Is each source accessible, and if not, why not?
3. Are there any legacy systems or offline data archives that store relevant information?

Understanding the potential sources of relevant data is critical for the initial planning. Only once this is done can class counsel begin negotiating about or agreeing to the scope and method of collection suggested by defence counsel. Resisting the urge to say “give me everything” is important when trying to establish an efficient discovery process. It is equally important to obtain key information about document sources from defence counsel prior to productions. Only once you know the potential sources are you in a position to insist on collection from specific sources and agree to ignore less important or more inaccessible sources.

A useful document to consult when trying to understand the possible sources of defence documents is “Checklist for Interview with Client IT Representative”, published in 2021 by the Digital Evidence and E-Discovery Working Group.³ While prepared as a document to assist with questioning one's own client, it contains a useful summary of the key sources that a corporate defendant should be considering. Armed with general information about key sources, class counsel can push defence counsel to be transparent about data sources and insist that they be equipped with knowledge of appropriate search methodologies for each source.

Once you understand the various sources of information, you can then turn to each source to discuss the search parameters and methodology for collecting from each source. Agreement with counsel on the scope and method of collection should be an iterative process, to avoid both underproduction and overproduction, and to understand timelines for receiving data from specific sources. For example, search terms are particularly problematic when searching for communications like email or chat, and parties should not consent to collection of emails or text communications by search terms. In addition, most email systems are not indexed and do not search attachments. Further, people tend to communicate informally and often cryptically in

³ See <https://digital-evidence.ca/model-precedents/>. Kelly Friedman and Martin Felsky of Heuristica were on the drafting team for this particular precedent document.

electronic communications so as to render search terms wholly ineffective. In short, parties should resist the practice of agreeing in advance to search terms for collection, as they are ineffective both from a technical and substantive perspective.

Reject document dumps

In our experience, particularly in the class action context, overproduction frequently causes problems for class counsel. Sometimes parties are intentionally trying to bury class counsel, other times parties simply do not want to spend the time and money looking for the relevant documents. The latter happens more frequently when defence counsel may not be sufficiently familiar with technology and do not know how to apply cost-effective strategies for sifting through their information to prepare a proper production set. Regardless of the motive, the sheer volume and complexity of data can overwhelm class counsel. When faced with a document dump, you have two choices – use analytics to help assess the data and find the relevant information yourself (despite the existence of large volumes of irrelevant information) or push back and insist on proper production.

Class counsel, with team members having advanced technology skills, can certainly use analytics to find the relevant information, just as you would with your own documents. However, the time spent dealing with documents will increase your costs, and the cost may not be recoverable (if the class action is successful, those costs will simply reduce class counsel's net return). All Rules of Court in Canada provide that the initial cost of production is to be borne by the producing party. Accordingly, class counsel should demand proper production and appropriately visit the costs on the producing party. There is now case law that can be relied on to push back and insist on a proper production.

Overproduction often arises in cross-border litigation, when defence counsel simply want to provide the productions they made in any companion U.S. litigation. This approach may seem practical. However, because the legal disclosure obligations are different, productions in the U.S. tend to be much broader than in Canada, even if there is not any malice intended by the document dump.

In Canada, we have a positive obligation to produce relevant documents and, while too often ignored, a corresponding obligation to withhold non-relevant documents. This principle was underscored in a recent Ontario decision, *Gowing Contractors Ltd v. Walsh Construction Company Canada*⁴.

⁴ 2023 ONSC 4407 ["Gowing"]

In the Gowing case, the defendant produced 750,000 records, replete with irrelevant information. The plaintiff brought a motion for a further and better affidavit of documents that would eliminate the irrelevant material. The evidence of the plaintiff was that eDiscovery counsel spent approximately 40 hours to identify that at least 25% of the production set was irrelevant. The defendant argued that the discovery plan was vague, so that they had to be over-inclusive, and the plaintiff should simply use technology to weed out the irrelevant documents with their own searches. The Court disagreed. At paragraph 28, the Court noted,

[w]hile there will always be some small level of irrelevant documentation in a large production set, such a large amount of irrelevant document production is egregious. It is the primary function of the producing party to do the work of deciphering what documents in its power, possession and control are relevant, and to produce them with an affidavit of documents;

With respect to the vagueness of the discovery plan, the Court commented, at paragraph 30, that the plan “does not, however, in my view, detract from the primary obligation of the producing party to decipher and produce only relevant documents. I find that Walsh has not met this obligation.”

In the result, Walsh was not only ordered to re-do the production (an expense likely in excess of \$500,000), but it was also ordered to pay over \$52,000 for costs of the motion, as well as the costs incurred by Gowing in analyzing the non-relevant documents and preparing the evidence for the motion.

Identify gaps

Regardless of whether the production was narrow or a document dump, class counsel will want to do a gap analysis to ensure that defendants have produced what was substantively agreed upon and is needed to assess the claim and damages. In our experience, on settlement approval, class counsel are compelled to convince the approval judge that they, in their reasoned professional opinion, believe the settlement is fair and reasonable. Because of this, we have seen class counsel waste time with unfocused production motions looking to turn over every stone.

A focused approach using analytics to analyze opposing productions is the best way to see if any important documents appear to be missing and to arm class counsel with the evidence needed on a motion to explain how you know the data is “missing”. We have the technology; we simply must use it strategically.⁵

⁵ Specific functionality of eDiscovery tools, such as communication analysis and keyword expansion, are particularly helpful in this regard.

Prepare for oral examinations

Technology can similarly be leveraged in preparation for oral examinations. Analytics can be used to readily target information, for example, to identify documents received by a particular witness, at particular points in time, in conversations with specific individuals, and/or on particular topics. It is no longer the case that class counsel has to use brute force to review huge volumes of documents, or every document, in order to simply find general topics to explore. Oral discovery can be pointed once the crucial documents to be put to a particular witness are isolated and then put into context using technology.

Bring a motion

There are common practices on the part of defence counsel that no longer need to be tolerated by class counsel. As discussed above, the Gowing case can be relied on for fighting back against document dumps and the H2 case can be relied upon to compel transparent planning. There are many other bad practices that class counsel can counteract.

A. Avoid time-wasting redactions

Defence counsel might delay production, or claim certain production is disproportionate, on the basis that they must redact personal information from the document set prior to production. In *Marsella v. BDBC*⁶, Master Abrams was clear that redactions are most often unnecessary given that privacy interests are protected by the common law implied undertaking and the deemed undertaking rule. In this case, the plaintiff provided additional protection to the defendants by also offering an undertaking as follows:

[I]f the plaintiff or her lawyers intend (1) to rely in court upon (a) the information in the documents now redacted, or (b) any portions of the transcript of the discoveries that contain information now redacted from those documents, or (2) to file any document with the court that references the information now redacted, notice will first be given to BDBC and to any persons identified in or to whom the redactions relate, so that they might make argument as to terms of disclosure or a sealing Order.

Providing such an undertaking is a useful strategy to avoid delays or proportionality arguments regarding redactions that are simply unnecessary, as most of the documents proposed for redaction will never make it into a court record.

⁶ 2021 ONSC 3276 (CanLII)

B. Argue waiver of privilege

Class counsel should likewise not be too quick to agree to send back allegedly inadvertently produced privileged documents. In 2015, in *Canadian Imperial Bank of Commerce v. The Queen*,⁷ the court was faced with the question of whether privilege had been waived on documents where the review was outsourced to an eDiscovery (non-law firm) provider and the instructing law firm claimed that the documents were produced because they were wrongly coded. The Court did not accept that this constituted an inadvertent production and found that privilege was waived. At paragraph 184, the Court stated,

[w]hile I am sympathetic to CIBC's position that the documents were wrongly coded, the fact is that CIBC engaged this third-party provider because it was the most efficient avenue to review the disclosure, both in terms of time and cost. To now say that they need more time, and to incur more costs, to further review the documents after they have already been coded is, at the least, incompatible with its previous position. CIBC made a choice, and both CIBC and the Respondent were forced to work with that choice.

More recently, in *CNOOC Petroleum North America ULC v ITP SA*⁸, the Alberta Court of King's Bench found waiver of privilege over thousands of documents. In this case, the plaintiff was seeking the retrieval of thousands of records it claimed were privileged and inadvertently produced. Justice Dixon notes that CNOOC had put in place a document review process involving two different third-party providers. While the plaintiff implied that that review process was flawed, they put forward no evidence in that regard. The Court held that a party has to live with the process they chose to protect privilege and, as the documents were intentionally produced with no immediate attempts to retrieve them, privilege was waived.

C. Insist on original digital format

If defence counsel propose to deliver productions in any form other than the format in which they were originally created (historically referred to as "native" format), it is strongly recommended that class counsel demand original digital formats. Original digital format is the best practice and the cheapest alternative. Original digital format requires no additional time, effort, or money to produce (because files do not have to be converted or imaged). In addition, the receiving party can load them into any review platform they wish, perform analytics on the documents, and even

⁷ 2015 TCC 280 (CanLII)

⁸ 2022 ABKB 683 (CanLII) ["CNOOC Petroleum"]

convert them into images or paper if they wish! The *Sedona Canada Principles* explain the benefits of original digital format as follows:

For a number of reasons, ESI [Electronically Stored Information] 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.⁹

In *Kamlu Engineering Inc. v Cadorin Homes*¹⁰, Kamlu attempted to serve documents in a single PDF file and the Court found that was completely unacceptable (at para 22):

[A] single file production is not compliant with the intent or spirit of my order, or frankly with the reasonable expectations of parties in civil litigation. I ordered that productions be made available in an electronic format “accessible to the receiving parties”. “Accessible” did not simply mean in a format that could be opened. It meant meaningful accessible, which includes ensuring that productions are delineated and correlated to the affidavit of documents. In the current age of e-discovery, a single pdf of all productions is, in my view, essentially useless.

Similarly, in *2038724 Ontario Ltd. v Quizno’s Canada Restaurant Corp.*¹¹, Perell J. rejected Quiznos’ argument that they were not required to produce Excel spreadsheets in Excel format because they had been produced in the format contemplated by the discovery plan, TIFF format. Perell J. was “not impressed with Quiznos’ purely technical argument” (at paragraph 131) and found that if the documents were readily available in Excel format, they should be produced again in that format.

In *Questor Technology Inc v Stagg*¹², the Court of Queen’s Bench of Alberta cited the Quiznos case and made an even stronger statement about the need for original digital format (at paragraph 114):

Where records exist in multiple formats, including their native format, they must be produced: *Bard v Canadian Natural Resources*, 2016 ABQB 267 at para 96 [Bard], citing *2038724 Ontario Ltd v Quizno’s Canada Restaurant Corp.*, 2012 ONSC 6549 at

⁹ Supra, note 1 at p 267

¹⁰ 2023 ONSC 2940 (CanLII)

¹¹ 2012 ONSC 6549 (CanLII)

¹² 2022 ABQB 578 (CanLII)

paras 128-131[Quizno's]. The production of documents in non-native format is not as meaningful and does not permit the plaintiff to take full advantage of available technology as documents available in their native format: *Gamble v MGI Securities*, 2011 ONSC 2705 at para 22.

As well, hosting fees associated with imaged documents are significantly higher for all parties and can have a significant impact on the usefulness of some analytics. It is no longer acceptable for a party to insist on using a platform that will only produce imaged documents or does not have functionality like email threading.

D. Insist on the use of appropriate technology

Delay and increased costs can also be the result of defence counsel not utilizing up to date technology such as email threading, deduplication, and machine learning. Principle 7 of the *Sedona Canada Principles*, along with decisions like H2¹³, can be used to compel parties to use technology to minimize duplicative production, increase speed and accuracy, and decrease costs. With the available technology and increased ease of use, it has become increasingly difficult for defence counsel to make compelling proportionality arguments based simply on large volumes of documents. Understanding the appropriate costs and the latest technology methods and innovations can arm class counsel with the ability to demand more and better production.

E. Proffer compelling evidence

Regardless of the motion being brought, it is crucial to arm yourself with the necessary evidence. In the discovery context, courts in Canada no longer accept bald statements about a process being too expensive, or data being inaccessible, or documents being omitted from production. If defence counsel asserts that the defendant ought not to have to make certain production because of proportionality, it must tender convincing evidence.¹⁴ Similarly, on motions for further production, evidence must be proffered to establish a basis, beyond speculation, that the further documents

¹³ Supra, note 3 at paras 78-85

¹⁴ *Dell Chemists (1975) Ltd. v. Luciani et al*, 2010 ONSC 7118 at para 5 (CanLII): "I also understand and appreciate Mr. Cosgriffe's argument regarding proportionality. In order to succeed on that basis, however, a party must present cogent evidence to show that the evidentiary value of the new information or documents being sought is eclipsed by the cost of eliciting it or them. That is not done simply by invoking the concept of proportionality in the abstract, as has been done here." See also *Way v. Schembri*, 2023 ONSC 5425 at para 44 (CanLII)

sought actually exist and will be probative.¹⁵ In the CNOOC Petroleum case¹⁶, where the court found waiver of privilege, it was critical that the party provided no evidence on what efforts were made to protect privilege.

Take control

Class counsel should no longer allow defence counsel to control the discovery process and exploit the uneven bargaining power that comes with possession of the key documents and knowledge of defendants' IT systems. With sound technology and counsel skilled to use it, class counsel can and should insert themselves into the discovery process before the defendants begin document identification and collection with the explicit purpose to make the discovery process more streamlined, efficient and cost-effective for everyone while still extracting the most probative evidence. Moreover, when defence counsel are offside best practices, there is now case law supporting targeted motions. A proactive approach is likely to reduce delays, avoid costly discovery disputes, and provide class counsel with access to key evidence early in the process.

¹⁵ See *Gamble v. Black & McDonald Limited*, 2020 ONSC 811 (CanLII) and *Triple-K Consult Ltd. v. Bombardier Inc.*, 2024 ONSC 1408 (CanLII)

¹⁶ *Supra*, note 6