

# The Parameters of Pre-Certification Document Discovery Cannot be Circumvented through an Improper Request to Inspect Documents

February 06, 2020

## Background

Ontario's class actions law requires that the focus of criteria for certification involve documentary and oral discovery pre-certification. The onus remains with the party seeking documents to explain why they are relevant for the certification process. In the context of a pre-certification interlocutory motion, the Ontario Superior Court in [Harris v. BMW Canada Inc. et al](#) recently examined the manner in which Rule 30.04(2) may be used as a distinct tool, although in limited circumstances, to compel documentary production in a class action.

## Court Decision

In the case before the court, the plaintiff served a Request to Inspect Documents referred to in the defendants' pleadings. The demand was made after the pleadings closed and prior to the certification motion. The request, however, was denied. The court agreed with the defendants that the Request to Inspect constituted an improper request for unspecified documents or intangible things that were not documents or were not memorialized into a document.

The court rejected the plaintiff's submission that compliance with a Request to Inspect under Rule 30.04(2) is mandatory and that the court has no discretion to refuse enforcement, and held that the court retains such discretion under Rule 30.05 on the basis of "immateriality, irrelevance, prejudicial effect, overcoming probative value, disproportionality, untimeliness, and privilege" (para 53). In exercising its discretion to refuse production, the court highlighted that parties cannot use Rule 30.04(2) to circumvent the limitations around pre-certification discovery; the requesting party must discharge its onus of explaining why the documents requested are relevant to the issues on certification.

The Court ultimately refused to enforce the Request to Inspect because it was disproportionate and amounted to premature documentary discovery. The Court found

that the documents requested were not required to plead, as the pleadings had closed. The Court also remarked that the plaintiff did not require the documents for discovery and that many of the documents it sought to inspect were documents the plaintiff already had in his possession (with many of these being included in his motion material).

## Outcome

In setting out the appropriate parameters of pre-certification discovery, the court commented favourably on the fact that the defendants had filed a Statement of Defence, **which it described as a “rare occurrence” and helpful to the certification process.** Once a defence has been filed, a court can consider whether the plaintiff requires a response to its Request to Inspect in order to plead a reply. If they are not required for it to plead, a party seeking to enforce a Request to Inspect in the context of a pending certification motion will need to explain the relevance of such requested documents to the issues for certification.

By

[Glenn Zakaib](#), [Edona C. Vila](#)

Expertise

[Class Actions](#), [Disputes](#), [Automotive](#)

---

## BLG | Canada’s Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

[blg.com](http://blg.com)

### BLG Offices

#### Calgary

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T 403.232.9500  
F 403.266.1395

#### Ottawa

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

#### Vancouver

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

**Montréal**

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

**Toronto**

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.