

Commercial List No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)¹**

B E T W E E N

PLAINTIFF

-and-

DEFENDANT

**PRECEDENT ORDER TO ALLOW ENTRY
AND SEARCH OF PREMISES²**

¹ Prepared by the Commercial List Users' Committee of the Ontario Superior Court of Justice. The theory and approach behind this model order is to give the Courts and practitioners a guide for the use of such orders, while recognizing that the model order must be tailored to suit the particular circumstances of each case before the Court.

² The following order is a basic version of the standard *Anton Piller* Order (the "AP Order"). In some circumstances, such as where counterfeit goods are at issue, a more sophisticated order may be appropriate. Certain additional provisions that may be appropriate are identified in the footnotes accompanying the text.

NOTICE³

THIS MOTION, made without notice by the Plaintiff for an order requiring the Defendant, [] to permit representatives of the Plaintiff, its solicitors, and other necessary persons, to enter and remain in the premises of the Defendant for the purposes of identifying, inspecting, removing and preserving certain evidence set out in Schedule “A” hereto pertaining to [describe with specificity the matter at issue], was heard this day at [Address, City, Province].

ON READING the Statement of Claim, the Affidavit(s) of [], on hearing the submissions of counsel for the Plaintiff, and on noting the undertaking of the Plaintiff⁴ to abide by any Order this Court may make concerning damages arising from the enforcement of this Order,

Entry and Search of Premises

1. **THIS COURT ORDERS** that the Defendant, its officers, directors, servants, agents, employees, and anyone else acting on its behalf, and any person(s) appearing to be in charge of the premises⁵ known municipally as [list all addresses, vehicles and other places to be searched]

³ A notice to the defendants explaining the more salient points of the order in plain language is often included. See Appendix 1 for examples.

⁴ It has always been a condition of an AP Order that the Plaintiff give an undertaking to pay damages: *Universal Thermosensors Ltd. v. Hibben and Others*, [1992] 1 W.L.R. 840 (Ch.D). This undertaking can be given in an affidavit sworn by the Plaintiff, or, in the case of a corporation, one of its representatives with authority to bind the company. The Undertaking may not merely be an assertion that the plaintiff agrees to be bound by an undertaking of counsel: “a separate undertaking as to damages, directed to the court, properly executed by corporate officers who have the authority to do so should accompany the application”: *Club Monaco Inc. v. Woody World Discounts*, [1999] F.C.J. No. 1645 (F.C.T.D.). The Approach in the U.K. is to include the undertaking as a schedule to the Order: *Commercial Court Guide* Form 6th ed. www.courtservice.gov.uk, at “Schedule C” and the U.K. Practice Direction, [1996] 1 W.L.R. 1552 at “Schedule 3”.

⁵ The U.K. Practice Direction at clause 1(2) provides “This Order must be complied with either by the Defendant himself or by an employee of the Defendant or other person appearing to be in control of the premises and having authority to permit the premises to be entered and the search to proceed.” This phrasing is a change from the preceding U.K. Practice Direction, [1995] 1 All E.R. 52 which added the language “and having authority to permit the premises entered into”. The addition was based on *Bhimji v. Cadtwani*, [1991] 1 W.L.R. 989 at 997 (Ch.D.) which provided that an AP Order is an *in personam* remedy and that the mere fact that someone appears to be in control, does not give them the right or the responsibility to permit the search. However, the U.K., section 7(b) of the *Civil Procedure Act 1997* permits the Court to order that any person is required to permit entry which protects the Plaintiff from having its order frustrated by the non-attendance of the Defendant. Ontario has no analogous provision and therefore a requirement that only a person “authorized to permit the premises to be entered” could allow a Defendant to frustrate an AP Order by absenting him or herself.

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(“the Premises”) shall forthwith permit entry⁶ into the Premises to the persons authorized herein for the purposes of searching for, identifying, inspecting, preserving, reproducing, and removing into the custody of the Independent Supervising Solicitor⁷ (as defined in paragraph 2 herein), any and all documents, items, devices, equipment, and any component thereof, which are listed in Schedule “A” hereto (“the Evidence”)⁸ or which the Plaintiff’s solicitors believe to be the Evidence.⁹

2. **THIS COURT ORDERS** that for purposes of this Order, the Defendant and any person(s) appearing to be in charge of the Premises shall grant entry and permit re-entry¹⁰ into the Premises during the times and in the manner specified in this Order to the following persons, collectively or individually, at the same time or different times (such persons hereinafter collectively referred to as “Authorized Persons”):¹¹

⁶ A hallmark of the AP Order is that it does not permit entry to the Premises, except to an Independent Supervising Solicitor (see below). Rather, it compels the Defendant to permit entry or face the consequence of being in contempt: *Anton Piller KG v. Manufacturing Processes Ltd. and others*, [1976] 1 All E.R. 779 at 782-83 (C.A.); *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.* (2001), 50 O.R. (3d) 539 at paras. 7, 17 (S.C.J.). In addition, a Defendant also risks the drawing of an adverse inference if he or she has denied entry and evidence is not forthcoming at a later date: *Anton Piller KG, supra*; *Adobe Systems Inc. v. K.L.J. Computer Solutions Inc.*, [1999] 3 F.C. 621 at para. 33 (F.C.T.D.).

⁷ The *Commercial Court Guide* Form provides at paragraph 6 that the materials should be delivered into the safekeeping of the Plaintiff’s solicitors. We have not adopted the U.K. approach since we believe it is preferable for the seized Evidence to be retained by the Independent Supervising Solicitor.

⁸ The evidence sought should be specifically defined to ensure that the AP Order is not overbroad: *Nintendo Nintendo of America, Inc. v. Coinex Video Games Inc.*, [1983] 2 F.C. 189 at para. 11() (F.C.A.). For an example of a careful definition of the Evidence, see *Bardeau Ltd. et al. v. Crown Food Services Equipment Ltd. et al.* (1982), 66 C.P.R. (2d) 183 at 189 (H.C.J.).

⁹ [From time to time, cash may be found during the execution of an AP Order. As cash is generally not evidence, in most cases it should not be seized. However, in fraud cases, it may be argued that it is evidence of the proceeds of fraud and as such constitutes evidence that it should be seized: *Manufacturers’ Life Insurance Company v. High Park Medical & Rehabilitation Centre*, 2015 ONSC 5169 at para. 5. In cases where cash may be seized, the AP Order should address this issue explicitly, and it is best practice that the cash is counted by the ISS in front of the defendant so there is no dispute as to the amount.](#)

¹⁰ Re-entry is permitted in The *Commercial Court Guide* Form. The practical necessity of this is clear since searches can take many hours and sometimes days.

¹¹ Care should be taken to specify exactly who will be executing the AP Order: *Celanese Canada, Inc. v. Murray Demolition Corp.*, 2006 SCC 36 at para. 42; *Grenszervice Speditions Ges m.b.H. v. Jans*, [1995] B.C.J. No. 2481 (B.C.S.C.). It may be appropriate to specifically name the individuals who will be executing the AP Order if this is possible. It is also good practice for the Independent Supervising Solicitor to ensure that everyone participating in the search is identified and a list is kept of their names. Where there are several Premises, the number of Authorized Persons is for each premises: *Columbia Picture Industries v. Robinson*, [1986] 3 All E.R. 338

- (a) [specify number] representatives of the Plaintiff;
- (b) [specify number] solicitors, students-at-law,¹² or law clerks from the law firm of [] solicitors for the Plaintiff;
- (c) [specify number] solicitors from the law firm of [] (“the Independent Supervising Solicitor”), and such other persons as they may require;¹³
- (d) [specify number] of specialized individuals designated by the Plaintiff for the purpose of [identify purpose and specialized training as necessary];¹⁴ and

3. THIS COURT ORDERS that in the event the Defendant is served away from the Premises, the Defendant shall return immediately to the Premises to provide entry to the Authorized Persons.

3.4. THIS COURT ORDERS that the Independent Supervising Solicitor shall act as an officer of the Court in respect of the observance and implementation of the terms of this Order.¹⁵

at 353 (Ch.D.). It will not be appropriate in every circumstance for the Police to be present at the execution of the AP Order, however it may be appropriate in certain cases, particularly where the Defendants are involved, or alleged to be involved, in criminal or quasi criminal activities or where it is reasonably anticipated that there may be safety concerns. If the presence of the police is appropriate, a clause should be inserted under the heading “Execution of the Order” below. Suggested wording is: “THIS COURT ORDERS THAT the [district] Police Service and any other police services having jurisdiction be, and hereby are, authorized to keep the peace in the carrying out of this Order.” Even where it is appropriate to have police, their role of the police is restricted to ensuring “public order and the avoidance of a disturbance to anyone”: Gee, *supra* at 275-76, *Ontario Realty, supra* at para. 22.

¹² Students-at-Law are permitted to attend since they are officers of the court for some purposes: *Titan Sports Inc. v. Mansion House (Toronto) Ltd.*, [1990] 1 F.C. 448 at 460 (F.C.T.D.).

¹³ A “supervising solicitor who is independent of the plaintiff or its solicitors” should be appointed and present at the search to ensure its integrity: *Celanese Canada, supra* at para. 42. The expense to the Plaintiff of an Independent Supervising Solicitor has not persuaded the court that one need not be present: *Universal Thermosensors, supra* at 861; *Fila Canada Inc. v. Doe*, [1996] 3 F.C. 493 at paras. 11-12; *Richel v. Stevenson*, [1998] A.J. No. 1400 at paras. 18-21 (Q.B.) (in *obiter*). For the problems that can occur when an Independent Supervising Solicitor is not present, see *Grenszervice, supra* at para. 63.

¹⁴ Independent specialists, such as accountants or computer forensics experts, may be required; however the presence of such specialists does not alter the requirement that a solicitor attend as an officer of the court: *Fila, supra* at para. 14.

¹⁵ *Anton Piller KG, supra* at 783; *Universal Thermosensors, supra* at 861; and *Fila Canada, supra* at para. 16: “A solicitor as an officer of the Court, owes duties to the Court as well as to his or her client. Solicitors attend and supervise the execution of these orders to ensure that their boundaries are not exceeded and to be in a position to give the Court an accurate and complete description of what occurred. They have legal expertise and are expected to be able to explain to those enforcing the order and to those against whom it is being executed what is and is not allowed thereunder. This gives some assurance that the boundaries of the order will not be exceeded” *Universal Thermosensors* at 860. Prior to *Celanese Canada*, the Canadian cases required only that the Independent Supervising Solicitor be in a position to assist the Court if the AP Order, or the execution thereof, is challenged:

~~4.5.~~ **THIS COURT ORDERS** that all persons responsible for service and execution of this Order be entitled to take all necessary reasonable measures to enforce it and to reasonably prevent or remove any impediment to its execution.

~~5.6.~~ **THIS COURT ORDERS** that this Order may only be served and the initial entry to the Premises made between 9:00 a.m. and 5:00 p.m. on a weekday.¹⁶

~~6.7.~~ **THIS COURT ORDERS** that following the service of the Order on any person(s) appearing to be in charge of the Premises, no entry to the Premises shall be permitted unless there are present at the time of entry the Authorized Persons, or any of them, provided that one Independent Supervising Solicitor and such other persons as he may require are also present.¹⁷

~~7.8.~~ **THIS COURT ORDERS** that the Defendant, its officers, directors, servants, agents, employees, and anyone else acting on its behalf, and any person(s) appearing to be in charge of the Premises shall allow the Authorized Persons to remain on the Premises until further Order of this Court, to exercise their rights and discharge their duties as set out in this Order.¹⁸

~~8.9.~~ **THIS COURT ORDERS** that the Defendant, its officers, directors, servants, agents, employees, and anyone else acting on its behalf, and any person(s) appearing to be in charge of the Premises shall allow the Authorized Persons to record by audio, video or photograph the Evidence, the Premises, and all acts, conversations and discussions occurring in the course of the

Adobe Systems, supra at para. 45; *Fila Canada, supra* at para 16; *Nike Canada, supra* at Appendix, para 22. A report is only useful in the event of a challenge of the Order and the cost of producing one may not justify a requirement that one be prepared in every case.

¹⁶ The search should ordinarily take place within regular business hours and extra sensitivity to timing should be employed when the Premises is a private residence: *Universal Thermosensors, supra* at 860. However, “regular business hours” will vary from location to location and consideration should be given to the nature of the Premises and when they are likely to be open. Further, where the Premises is a private residence, entry may have to be made earlier than 9:00 a.m. to ensure that someone is available to grant entry. Where there is evidence that no one will be present between the hours of 9:00 a.m. and 5:00 p.m. on weekdays it may be necessary to permit entry at other times. If the time of entry is earlier than 9:00 a.m., the time period for seeking legal advice may have to be extended to ensure that the Defendant’s right to do so is a meaningful one: *Celanese Canada, supra* at para. 42. This provision only restricts “initial” entry and service; once these have been effected the search may continue beyond the time boundaries specified and re-entry must be permitted at any time: *Gee, supra* at 271.

¹⁷ Once consent is granted, it is good practice to have a representative from plaintiff’s counsel on the premises until the AP Order is completely executed.

¹⁸ *Gee, supra* at 271.

Authorized Persons' search of the Premises and that relate to this Order between the time this Order is served and the completion of the search, with the exception of communications between the Defendant and its solicitors.¹⁹

~~9.~~10. **THIS COURT ORDERS** that if it is deemed impracticable by the Independent Supervising Solicitor, in his or her discretion, to search for, identify, inspect or reproduce Evidence located on any of the Defendant's computers, digital or other storage media at the Premises, the Independent Supervising Solicitor shall be entitled to remove such electronic evidence into its possession for these purposes for a period of 72 hours or such further period as may be agreed to by the parties or ordered by the Court.²⁰

Rights of the Defendant and Persons Served

~~10.~~11. **THIS COURT ORDERS** that at the time of initial entry into the Premises, the Defendant and any person(s) appearing to be in charge of the Premises shall be served with this Order, the Statement of Claim herein, and a copy of the Motion Record containing the evidence by which the Order was obtained, with only one solicitor of the Plaintiff and the Independent Supervising Solicitor being present at the time of initial entry into the Premises.²¹

~~11.~~12. **THIS COURT ORDERS** that upon service of this Order, the person(s) served shall forthwith be advised in plain language²² by the Independent Supervising Solicitor of the nature of the Order and their legal rights, including the right to seek legal advice and to segregate documents over which legal privilege is claimed ("Privileged Documents"),²³ provided that they

¹⁹ *Titan Linkabit Corp. v. S.E.E. See Electronics Engineerings Inc.*, [1993] F.C.J. No. 208 at para. 3 (F.C.T.D.).

²⁰ There may be cases in which it is necessary to remove electronic media from the premises in order to copy them in an efficient way. However, the removal of electronic media such as network servers and computer hard drives may shut down all or parts of a business, and potentially expose a plaintiff to a claim for damages. If the removal of electronic media is proposed, counsel should address this issue in the motion materials.

²¹ *Nintendo of America, supra* at para. 11(a); *Bardeau, supra* at 190. If it is deemed appropriate for the police to attend to keep the peace, it may be appropriate for the officer to be present at the time of initial entry.

²² The defendant is entitled to have the terms of the Order explained in "layman's language" and to have explained that the AP Order is a civil remedy, and not a search remedy: *Ontario Realty, supra* para. 20; *Computer Security Products Inc. v. Forbes*, [1999] O.J. No. 4573 at para. 42 (S.C.J.).

²³ For example see: *Celanese Canada, supra* at para. 42; *Anton Piller KG, supra* at 783; *Grenszervice, supra*

do so forthwith, and while seeking legal advice and segregating Privileged Documents may refuse entry to the Premises for a period not to exceed two hours²⁴ to all of the Authorized Persons except for the Independent Supervising Solicitor and such other persons as he may require, who shall be and hereby are authorized to enter the Premises and take such steps as they deem necessary to secure and preserve the Evidence therein and ensure that no steps are taken to alter, deface, discard, conceal or destroy any of the Evidence while the Defendant and/or person(s) served are seeking legal advice.²⁵

~~12.~~13. **THIS COURT ORDERS** that the Defendant and its solicitors shall be entitled, although not obligated, to be present during the search.

~~13.~~14. **THIS COURT ORDERS** that any Privileged Documents identified as provided for in paragraph 9 shall be provided directly to the Independent Supervising Solicitor and sealed pending further order of the Court.

~~14.~~15. **THIS COURT ORDERS** that the Plaintiff's solicitor shall ensure that a list is made of all the evidence that is seized or delivered up pursuant to this order and shall serve a copy of that list on the Defendant or the Defendant's solicitors.²⁶

at para. 85; *Adobe Systems, supra* at para. 43 and *Ontario Realty, supra* at paras. 20, 40.

²⁴ The Independent Supervising Solicitor should be prepared to extend the two-hour time limit as reasonably necessary: *Gee, supra* at 272; *Bhimji, supra* at 1000.

²⁵ *Gee* refers to the problem of safeguarding the Plaintiff's rights and the effectiveness of the AP Order while ensuring that the Defendant's right to legal advice is meaningful. The proposed compromise is "entry but no search" where a "representative of the plaintiff remains on the defendant's premises to ensure that nothing untoward happens in the meantime with regard to the evidence which is the subject of the order": *Gee, supra* at 271-72. If the Defendant wishes to challenge the AP Order and refuses entry "the most practical way of proceeding would be to have the documentation at the location sealed, or, in the alternative, taken into possession of the person's counsel with the counsel and client undertaking that the material would not [be] returned to the client pending a return to the court to contest the issuance of the AP order": *Ontario Realty, supra* at para. 20.

²⁶ *Nike Canada Ltd v. Jane Doe*, [1991] F. C. J. No. 1523 at Appendix, paras 12 and 14 (F.C.T.D); *Adobe Systems, supra* at para 43(4); *Universal Thermosensors, supra* at 860; *Columbia Picture, supra* at 371. The list-making requirement must be strictly complied with, particularly if the seized evidence will be held in the custody of the Plaintiff's solicitors and not a neutral body: *Columbia Picture, supra* at 354; *Ritter v. Hoag*, [2003] A.J. No. 124 (Q.B). However, some Canadian cases appear not to require a list as well: *Bardeau, supra*; *Nintendo, supra*; *Ontario Realty, supra*.

Obligations of the Defendant and Persons Served

~~15.~~16. **THIS COURT ORDERS** that upon service of the Order, the Defendant and any person(s) upon whom the Order is served, shall forthwith disclose to the Authorized Persons and grant access and deliver up to the Authorized Persons any and all of the Evidence,²⁷ wherever situate, including but not limited to the whereabouts of all of the Evidence, whether under the possession, custody or control of the Defendant or any third party.²⁸

~~16.~~17. **THIS COURT ORDERS** that upon service of this Order, the Defendant and any person(s) upon whom the Order is served, shall forthwith render any necessary assistance to the Authorized Persons to locate, decode, access, and decrypt the Evidence and any and all information or electronic data to which the Authorized Persons may not have ready and immediate access, including the provision of all keys, identification codes, usernames, user ids, login names, passwords, passphrases, combinations or any other such information or knowledge necessary to achieve access thereto,²⁹ including, without limiting the generality of the foregoing, (1) all computers belonging to or used by the Defendant (including the personal laptop computers of the Defendant), and (2) all email accounts, including without limitation the email address [REDACTED], text messages, instant messenger or social media communications, private messages, and other communications relevant to the issues in the action, including all smart phones, personal data assistants, cellular telephones and other such devices used by the Defendant, wherever situated, for copying or imaging by the Plaintiff's representatives.³⁰

²⁷ In cases where there is a real risk that a defendant may, upon being served, immediately access computers remotely and destroy evidence, or direct others to do so, it may be appropriate to include a provision that the defendant shall immediately turn over any mobile devices to the ISS even prior to seeking legal advice. At a minimum, it is best practice for the ISS to ask the defendant to place his or her mobile devices in the plain view of the ISS while the order is being explained and while the defendant seeks legal advice. Counsel and the Court should consider whether such a provision would be warranted.

²⁸ *Bardeau, supra* at 189; *Dunlop Holdings Ltd. & Another v. Staravia* (1981), D. No. 1988 (C.A.). In piracy cases, the names and addresses of the Defendants' customers and suppliers may be requested: *Gee, supra* at 259-260; *Titan Sports, supra* at 459-460; *E.M.I. Limited and Another v. Sarwa and Haidar*, [1977] Fleet Street Law Reports 146 (C.A.); *Dunlop Holdings, supra*; *Columbia Picture, supra* at 367.

²⁹ *Commercial Court Guide Form*, para. 17; *Canadian Derivatives Clearing Corp. v. EFA Software Services Ltd.*, [2001] A.J. No. 653 at Appendix, paras. 5,8, 9 (Q.B.).

³⁰ In cases involving misappropriation of confidential information or trade secrets, the issue may arise as to whether a plaintiff may, on the execution of the AP Order, wipe (i.e. permanently delete) information from a

~~17.~~18. **THIS COURT ORDERS** that upon service of this Order, the Defendant and any person(s) upon whom the Order is served, shall forthwith render any necessary assistance to the Independent Supervising Solicitor and the persons assisting him to enable them to effectively carry out their responsibilities under this Order.

Custody of, Access to, and Use of Evidence Seized or Delivered Up

~~18.~~19. **THIS COURT ORDERS** that all Evidence seized pursuant to this Order, including the Privileged Documents, shall be held in the custody of the Independent Supervising Solicitor pending the trial of this action, or until such time as the Court orders otherwise.

~~19.~~20. **THIS COURT ORDERS** that the Defendant and/or its solicitors shall be provided with reasonable access to all Evidence in the custody of the Independent Supervising Solicitor for the purpose of examining and making copies of the said Evidence in the presence of a representative of the Independent Supervising Solicitor.³¹

~~20.~~21. **THIS COURT ORDERS** that the Plaintiff shall not be permitted to access the Evidence seized prior to the delivery of the Defendant's affidavit of documents, unless the Defendant consents or this Court orders otherwise.³²

defendant's electronic devices that the defendant is not entitled to possess. This issue is best dealt with on the return of the AP Order since an *ex parte* AP Order should not provide for wiping of any information except in extraordinary cases. In some circumstances, courts have permitted the deletion of confidential information from a defendant's seized computer, on the basis that the deletion be performed by forensic computer experts and those experts report the method and results of the deletion process to the court following deletion: see *9219-1568 Quebec Inc. v. Ramoutar*, 2014 ONSC 1954.

³¹ Ordinarily it is appropriate to include a clause providing the Defendant with access to the documents seized under the supervision of the Independent Supervising Solicitor. However, this may not be appropriate in certain cases, especially where the evidence seized is alleged to be the confidential information of the Plaintiff. See for example the AP Order that was made in *Celanese Canada Inc. et al. v. Murray Demolition Corp. et al.*, Court File 03-CV-250875-CM2.

³² The primary purpose of an AP Order is preservation: *Celanese Canada*, *supra* at para. 52. Accordingly, the Plaintiff will usually not have access to the Evidence seized until discovery. However, it may be appropriate in certain cases to provide the Plaintiff with access to the evidence seized. In particular, the Courts have held in counterfeit goods or piracy cases that the interests of justice required that the Plaintiff to be provided with access to information regarding the customers and suppliers of the Defendants: *Gee*, *supra* at 259-260; *Titan Sports*, *supra* at 459-460; *E.M.I. Limited and Another v. Sarwa and Haidar*, [1977] Fleet Street Law Reports 146 (C.A.); *Dunlop Holdings*, *supra*; *Columbia Picture*, *supra* at 367. In this type of case, the Courts have adopted a form of order in which the Defendants have a limited period of time to review the Evidence seized in the presence of the Independent Supervising Solicitor and assert claims of legal privilege and non-relevance, following which the Plaintiff is

~~21.~~22. **THIS COURT ORDERS** that the Evidence seized shall be used by the Plaintiff only for purposes of this action, unless the Court orders otherwise.³³

Prohibited Acts

~~22.~~23. **THIS COURT ORDERS** that unless otherwise ordered by this Court, the Defendant, any of its officers, directors, servants, agents or employees, and any person(s) served with this Order shall not directly or indirectly, by any means whatsoever:³⁴

- (a) remove any Evidence from the Premises, erase or delete from any means of electronic storage, or transmit any of the Evidence from the Premises, or alter, deface, discard, conceal or destroy in any manner any of the Evidence;³⁵ and
- (b) touch, activate, or operate any computer equipment, tablet, smart phone, or mobile device, either locally or remotely from any location, or access or alter any text, graphics, electronic data, information, or other content of ~~any web site or its databases or any electronic mail, newsgroup or Internet relay chat~~electronically stored information including any email accounts and messages, text messages, private messages, instant messenger or social media communications, websites or other information, instructions or

permitted to access all documents over which no such claim is made: *DIRECTV, Inc. v. Zed Marketing, Inc. et al.*, Court File No. 05-CL-5750, unreported (February 21, 2005) per Farley J.; *Bell ExpressVu Limited Partnership LLP v. 656706 Ontario Inc.*, Court File No. 05-CL-6113, unreported, (October 24, 2005) per Ground J. However, ordinarily, the issue of whether a plaintiff may access the evidence seized prior to discovery should be dealt with on the return of the order, and the practice in Ontario is generally to permit access on a motion to set aside: see *Bell ExpressVu Limited Partnership v. Rodgers (Tomico Industries)*, 2007 CanLII 50595 (ON SC).

³³ In *Celanese Canada, supra* at para. 42, the Court suggested a “limited use clause”. Such a clause may not be appropriate in every case. In particular, there may be cases in which the Plaintiff requires the Evidence to pursue parties related to the Defendant in an expeditious manner. It may also be appropriate for the AP Order to provide that the Plaintiff is entitled to use the Evidence seized in other proceedings, despite the deemed undertaking rule: *Gee, supra* at 258-260; *Titan Sports, supra* at 259-60; *Nintendo, supra* at para. 11(c); *Canadian Derivatives Clearing Corp. supra* at para. 56.

³⁴ It may also be appropriate to include a “gag order” preventing the Defendant from disclosing the existence of the AP Order or the underlying claim to anyone other than co-Defendants or its legal counsel where the Plaintiff requires the information obtained through execution to secure assets or evidence located elsewhere or to maintain the element of surprise when executing at different Premises: *Titan Sports, supra* at 459-60; *Gee, supra* at 249-55, or in a piracy case where the defendant might warn other potential defendants thereby frustrating the Order, *DIRECTV Inc. v. Toth et al.*, unreported, March 26, 2002, Court File No. 02-CL-226455 – CM3 (Ont. S.C.J.). *Gee* cites several sources of authority for the gag provision, including the fact that the court has the inherent jurisdiction to ensure that its orders are not rendered “futile and ineffective”. However, in *Universal Thermosensors, supra* at 860, the Court was critical of a gag order that lasted for one week. If a gag order is included, the Court File should also be sealed.

³⁵ *Bardeau, supra* at 190; *Canadian Derivatives Clearing Corp, supra* at Appendix, para. 10; *Nike Canada, supra* at Appendix, para. 7.

data stored in any location remote from the Premises that may contain or constitute the Evidence.³⁶

(c) disable, disconnect, or otherwise prevent or impede access to any data stored on any computers, network servers, email accounts, text messages, instant messenger or social media, smart phones, personal data assistants, cellular telephones, and other such devices, wherever situated.

~~23:~~24. **THIS COURT ORDERS** that, in order to give effect to the Order, any person who is ordered not to do something shall not do it personally, through others acting on his behalf, or on his instructions, or with his encouragement or acquiescence, or in any other way.

Variation/Discharge or Confirmation of Order

~~24:~~25. **THIS COURT ORDERS** that the terms of this Order shall remain in force and be effective for ten (10) days and shall thereafter terminate unless the Plaintiff returns to the Court on or before [], to apply to continue this Order.³⁷

~~25:~~26. **THIS COURT ORDERS** that the Defendant or any person with notice of this Order may apply to the Court at any time to vary or discharge this Order or so much of it as affects such person, but anyone wishing to do so shall provide the Plaintiff's solicitors with at least twenty-four (24) hours' notice thereof.³⁸

Report to the Court

~~26:~~27. **THIS COURT ORDERS** that the Independent Supervising Solicitor, upon receipt of a request in writing from any party, shall within seven (7) business days of receiving such request, deliver a report which describes the execution of this Order, who was present at the execution, and what materials were reproduced and/or removed into the custody of the Independent

³⁶ *Canadian Derivatives Clearing Corp, supra.*

³⁷ Rule 40.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that ten (10) days is the maximum length of time an interlocutory injunction or mandatory order made *ex parte* may be granted. It may be appropriate for the Court to make an AP Order returnable in less than ten (10) days where the Court has a concern about abuse. Any person with notice of the AP Order has the added protection of being entitled to move to set the AP Order aside on 24 hours notice, even before its expiry.

³⁸ *Celanese Canada, supra* at para. 42; *Anton Piller KG, supra* at 783; *Konami Industry et al.v. Colour Wheels Electronic Ltd. et al.* (1985), 4 C.P.R. (3d) 231 (F.C.T.D.); *Nintendo supra* at para. 11(i).

Supervising Solicitor, and deliver a copy of the report to the parties, or their solicitors of record, and that the costs of the preparation of such a report shall be in the discretion of the Court as to quantum and the party who should bear them.

SCHEDULE “A”¹ - THE EVIDENCE

[This section should define the evidence in specific terms]

¹ Both the U.K. Practice Direction and the *Commercial Court Guide* Form provide the following schedules: (i) “The Premises”; (ii) “The Listed Items”; (iii) “Undertakings given to the Court by the Plaintiff”; (iv) “Undertakings given by the Plaintiff’s Solicitors”; (v) “Undertakings given by the Independent Supervising Solicitors”; and (vi) “Affidavits relied upon”. This approach has not been adopted in the Canadian jurisprudence.

Plaintiff

- and -

Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT TORONTO

ORDER TO ALLOW ENTRY AND
SEARCH OF PREMISES

Solicitors for the Plaintiff

APPENDIX 1

IMPORTANT:

NOTICE TO THE DEFENDANT¹

- (a) This Order orders you to allow the persons mentioned below to enter the premises described in the Order and to search for, examine and remove or copy the articles specified in the Order. The persons mentioned will have no right to enter the premises or, having entered, to remain at the premises, unless you give your consent to their doing so. If, however, you withhold your consent you will be in breach of this Order and may be held to be in Contempt of Court. The Order also requires you to hand over any of such articles which are under your control and to provide information to the Plaintiff's Solicitors, and prohibits you from doing certain acts. This part of the Order is subject to restrictions.
- (b) You should read the terms of the Order very carefully. You are advised to consult a Solicitor as soon as possible.
- (c) Before you [] the Defendant or the person appearing to be in control of the premises allow anybody onto the premises to carry out this Order you are entitled to have the solicitor and the Supervising Solicitor set forth in the Schedules at the end of this Order what it means in everyday language.
- (d) You are entitled to insist that there is nobody (or nobody except Mr.[] present who could gain commercially from anything he might read or see on your premises.
- (e) You are entitled to refuse to permit entry before 9:30am or after 5:30pm or at all on Saturday and Sunday.
- (f) You are entitled to refuse to permit disclosure of any documents which may incriminate you ('incriminating documents') or to answer any questions if to do so may incriminate you. It may be prudent to take advice, because if you so refuse, your refusal to permit disclosure may be taken into account by the Court at a later stage]
- (g) You are entitled to refuse to permit disclosure of any documents passing between you and your Solicitors or Patent or Trade Mark Agents for the purpose of obtaining advice ('privileged documents').
- (h) You are entitled to seek legal advice, and to ask the Court to vary or discharge this Order, provided you do so at once, and provided that meanwhile you permit the Supervising Solicitor (who is a Solicitor acting independently of the Plaintiff) to enter, but not start to search: see paragraph 3.

¹ U.K. Practice Direction, [1996] 1 W.L.R. 1552

- (i) If you [] the Defendant disobey and [any of your directors] maybe sent to prison or fined [and you may be fined] or your assets seized]
- (j) If any person with knowledge of this Order procures, encourages or assists in its breach, that person will also be guilty of Contempt of Court.

-OR-

IMPORTANT NOTICE TO THE DEFENDANT:²

- (a) This Order orders you to allow the persons mentioned below to enter the premises, outbuildings, and vehicles at [] (the “Premises”) to search for, examine and remove or copy the articles specified in the Order. This part of the Order is subject to restrictions. This Order also requires you to provide certain information regarding the specified articles to the Plaintiff’s solicitors and to hand over the specified articles which are under your control for examination and removal or copying, and prohibits you from doing certain acts. You should read the terms of the Order very carefully.
- (b) Before you or the person appearing to be in control of the Premises allow anybody onto the Premises to carry out this Order you are entitled to have the Independent Supervising Solicitor who serves you with this Order explain to you what it means in everyday language.
- (c) While the Independent Supervising Solicitor, as an officer of this Court, will explain the effect of this Order to you he or she is not providing legal advice to you and no solicitor-client relationship exists or is created between the Independent Supervising Solicitor and you or the person appearing to be in control of the Premises.
- (d) You are entitled to refuse to permit initial entry to the Premises before 8:00 a.m. or after 6:00 p.m. or at all on any day that is not a weekday.
- (e) You are entitled to seek legal advice regarding the nature and effect of this Order and of the rights you may have to assert including solicitor-client privilege and the privilege against self-incrimination found in s. 4 of the *Evidence Act*, RSBC 1996, c. 124. You may refuse to permit the search to begin for a short time while you consult your solicitor (not to exceed two hours, unless the Independent Supervising Solicitor agrees to a longer period).
- (f) You are at liberty to apply to this Court to set aside or vary this Order upon giving 24 hours’ notice to the Plaintiff’s solicitor of your intention to do so.

² This notice is the standard in British Columbia.

If you disobey this Order you may be guilty of contempt of court and may be sent to prison or fined or your assets seized.

-OR-

PENAL NOTICE³

If you, the Defendant, disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.

Any other person who knows of this Order and does anything which helps or permits the Defendant to breach the terms of this Order may also be held to be in contempt of court and may be imprisoned, fined or have their assets seized.

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³ *The Commercial Court Guide* Form 6th ed. www.courtservice.gov.uk.