**TEMPLATE ANTON PILLER ORDER**

This Template Order is prepared in response to comments of the Supreme Court of Canada in *Canadian Bearings Ltd et al v Celanese Canada Inc et al*, 2006 SCC 36, which endorsed the development of model civil search and seizure Orders (a.k.a “Anton Piller” Orders) in Canadian jurisdictions. The Template Order is intended to provide guidance to the Alberta bench and bar solely with respect to orders for search, seizure and preservation of evidence and not orders that combine search and seizure relief with other remedies.

The objective of this Template Order is to permit preservation of evidence for use in civil legal proceedings while ensuring fairness of the civil search and seizure process to the Defendant. It contemplates further process after the authorized search with respect to return and maintenance of evidence seized. This Template Order does not alter the law with respect to Anton Piller Orders in the Province of Alberta and its terms may not be appropriate for all types of cases. Additional, alternative or related relief may be sought and obtained from the Court. In particular, the Template Order contemplates proceeding against a single Defendant. If the Order is sought against multiple Defendants, counsel should take care to ensure that the terms and conditions of the Order are appropriate on a per-defendant basis.[[1]](#endnote-1) In general, it is the responsibility of counsel to ensure that the proposed Order meets the requirements of their case and to provide evidentiary support and judicial authority for the relief sought, whether contained in this model order or otherwise.

The Template Order was prepared by the Template Anton Piller Committee \*\* which consisted of:

Munaf Mohamed – Bennett Jones LLP

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\*\* This Template Order was reviewed and approved by the Alberta Template Orders Committee (Alberta Committee), the membership of which was:

Darren Bieganek, Q.C., Jeremy Hockin, Q.C., David Mann, Rick Reeson, Q.C.,

Randal van der Mosselaer, Adam Maerov, Carole Hunter and Chuck Russell, Q.C.,

and Josef Kruger, Q.C. with input from Justice K.M. Horner, Justice K.M. Eidsvik,

and Justice K.G. Neilsen.

The assistance of the Members of the Judiciary on the Alberta Committee does not mean that there is an "arrangement" with the Court that any type of Order will be granted. In each application the discretion of the presiding Justice will be completely unfettered.

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| COURT FILE NUMBER | Clerk’s Stamp | | |
| COURT | COURT OF QUEEN’S BENCH OF ALBERTA | | |
| JUDICIAL CENTRE |  | | |
| PLAINTIFF(S) |  | | |
| DEFENDANT(S) |  | | |
| DOCUMENT | **ORDER TO ALLOW ENTRY AND SEARCH OF PREMISES** | | |
| ADDRESS FOR SERVICE AND  CONTACT INFORMATION OF  PARTY FILING THIS  DOCUMENT | |  |  | |

**DATE ON WHICH ORDER WAS PRONOUNCED: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

LOCATION WHERE ORDER WAS PRONOUNCED: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**NAME OF JUSTICE WHO MADE THIS ORDER: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**UPON** the *ex parte[[2]](#endnote-2)* application of the Plaintiff(s); **AND UPON** reading the Statement of Claim; **AND UPON** readingthe Affidavit(s) of [     ]; **AND UPON** reading the brief filed in support of this Application;[[3]](#endnote-3) **AND UPON** hearing thesubmissions of counsel for the Plaintiff(s); **AND UPON** noting the undertaking of the Plaintiff(s) to abide by any Order this Court may make concerning damages arising from the enforcement of this Order which is attached as Schedule “A” to this Order;

**IT IS HEREBY ORDERED THAT:**

**Definitions**

# For the purposes of this Order, the following terms shall have the meanings set out in this paragraph:

## “**Authorized Person(s)**” shall mean and include the following persons:

### the Independent Supervising Solicitors, as defined below;

### solicitors[[4]](#endnote-4) appointed by the Independent Supervising Solicitor pursuant to paragraph 3(b) of this Order to act as his or her assistants in carrying out the duties and obligations assigned to the Independent Supervising Solicitor in this Order;[[5]](#endnote-5)

### civil enforcement bailiffs as may be directed by the Independent Supervising Solicitors to attend and assist in conducing the search and seizure authorized by this Order (the “**Bailiff**”); and

### representatives of [name of company/individual] retained by the Plaintiff and to be directed by the Independent Supervising Solicitors to attend and assist in conducting the search and seizure authorized by this Order for the purpose of [Identify the purpose and specialized training of any persons appointed to assist. Examples may include accountants, computer forensic specialists, or private investigators] (the “**Technology Consultant**”).[[6]](#endnote-6)

## “**Electronic Media**” means:

### any computer hardware or computer-related equipment capable of creating or storing information in electronic or magnetic form including, but not limited to hard disks or drives, CDs, DVDs, smartphones, USB drives, magnetic tapes, Flash Media, integral RAM or ROM units, PDAs or portable storage devices and any other permanent or transient storage devices;

### any electronically stored communications or messages, including any of the Evidence for Seizure that may be found in electronic mail (“e-mail”) or other correspondence;

### any internet or “Cloud” based storage under the control of the Defendant;

## “**Evidence for Seizure**”[[7]](#endnote-7) means any and all physical and electronic representation of any information, document, data, text, graphic, email communication, internet relay chat communication, or other item that is or is capable of being represented or reproduced visually or by sound, or both, that relate to, or may relate to, the categories listed in Schedule “B” to this Order;

## “**Person in Apparent Control**” means the person appearing to the Independent Supervising Solicitor to be in control of the Premises, which may or may not be the Defendant. The Person in Apparent Control must appear to the Independent Supervising Solicitor, acting reasonably, to be at least 18 years old;

## “**Premises**” means [address], including but not limited to any home, structure, storage facility, outbuilding, garage and motor vehicle[[8]](#endnote-8) that is at, on or near the address that is owned by, used by, or in the custody or control of the Defendant;

## “**Potentially Privileged Records**” means:

### Evidence for Seizure over which a Person in Apparent Control, the Defendant, or any other person served with or with knowledge of this Order has asserted a claim of privilege, confidentiality, or commercial sensitivity and which has been provided to the Independent Supervising Solicitor pursuant to paragraph 12(c); and

### Evidence for Seizure segregated and sealed by the Independent Supervising Solicitor in accordance with paragraph 34 through 39 of this Order.

## “**Independent Supervising Solicitor**” means the law firm of [name of law firm], [address], [telephone number], with [name of solicitor] serving as principal solicitor.

**Appointment of Independent Supervising Solicitor**[[9]](#endnote-9)

# The Independent Supervising Solicitor, having consented to the appointment, is hereby appointed to supervise the search and collection of Evidence for Seizure authorized by this Order and to perform such other duties assigned to the Independent Supervising Solicitor in this Order.

# The Independent Supervising Solicitor:

## shall act as an officer of the Court in observing and performing the duties assigned to the Independent Supervising Solicitor in this Order and, in implementing those duties, acknowledges that he or she is not acting as counsel for the Plaintiff, the Defendant, or any other person served with this Order; and

## shall have the authority to appoint further solicitors as his or her assistants who shall, acting under his or her supervision, be permitted to assist the Independent Supervising Solicitor in carrying out the duties and obligations assigned to the Independent Supervising Solicitor in this Order.

# The Independent Supervising Solicitor’s reasonable fees and disbursements, on a solicitor-client, full indemnity basis, that are incurred in carrying out his or her duties under this Order shall initially be paid by the Plaintiff, without prejudice to the right of the Plaintiff to seek recovery of those costs from any other party.[[10]](#endnote-10)

# The Independent Supervising Solicitor shall continue to act as an officer of the Court after this Order is executed for the purposes of dealing with matters arising out of the execution of this Order, as reasonably required, until discharged by the Court.[[11]](#endnote-11)

**Service of Materials**

# This Order may only be served, and the initial entry to the Premises may only be made, between 9:00a.m. and 5:00p.m., Monday through Friday, and not on a statutory holiday.[[12]](#endnote-12)

# Upon attendance at the Premises to enforce this Order, the Independent Supervising Solicitor shall forthwith serve upon the Person in Apparent Control with:

## a filed copy of this Order;

## a filed copy of the Statement of Claim in this Action;

## all affidavit(s) relied upon in support of the application for this Order; and

## a separate copy of the “Notice” attached as Schedule “C” to this Order.[[13]](#endnote-13)

# The Independent Supervising Solicitor shall as soon as reasonably practicable thereafter:

## inform the Person in Apparent Control in plain, everyday language, of the nature of this Order;[[14]](#endnote-14)

## inform the Person in Apparent Control that (s)he and the Defendant have the right to consult legal counsel regarding the nature and effect of this Order;

## inform the Person in Apparent Control that both (s)he and the Defendant have the right to assert privilege, confidentiality or commercial sensitivity over documents or things found on or at the Premises or elsewhere;[[15]](#endnote-15)

## inform the Person in Apparent Control of their cooperation and disclosure obligations as set out in paragraph 16; and

## specifically draw to the attention of the Person in Apparent Control to the “Notice” attached as Schedule “C” to this Order.

# If serving the Person in Apparent Control does not constitute serving the Defendant, then the Plaintiff must serve the Defendant with the materials described in paragraph 7 as soon as reasonably practicable. If the Defendant is not initially present at the Premises but attends at the Premises at any time during the execution of the Order, the Independent Supervising Solicitor shall then serve the Defendant with the materials described in paragraph 7 and shall then provide them with an explanation of the Order as set out in paragraph 8.

# If the Person in Apparent Control requires the assistance of an interpreter, the Independent Supervising Solicitor shall make reasonable efforts to provide for such interpretive assistance. The two (2) hour period for obtaining legal advice as set out herein shall not commence until the Independent Supervising Solicitor is reasonably satisfied that the Person in Apparent Control understands the explanation of this Order provided pursuant to paragraph 8.

# The Person in Apparent Control may, for a period not to exceed two (2) hours from the initial service at the Premises, refuse entry to the Premises at which (s)he is served to all Authorized Persons except the Independent Supervising Solicitor while (s)he seeks legal advice regarding the nature and effect of this Order and the rights the Defendant and anyone else may have to assert privilege.[[16]](#endnote-16) If the Person in Apparent Control wishes to exercise this right, (s)he must inform the Independent Supervising Solicitor of his or her intention to do so and keep the Independent Supervising Solicitor informed of the steps being taken.

# During the two-hour period for obtaining legal advice:

## the Person in Apparent Control must grant the Independent Supervising Solicitor entry to the Premises to take such steps as deemed necessary by the Independent Supervising Solicitor to secure and preserve any Evidence for Seizure or items, locations or devices where Evidence for Seizure may be located, and ensure that no steps are taken to destroy, alter, delete, hide, deface, erase or otherwise dispose of the Evidence for Seizure;

## the Person in Apparent Control, and any other person served with this Order or with knowledge of this Order, is enjoined and prohibited from taking any steps to destroy, alter, delete, hide, deface, erase or otherwise dispose of or part with possession or control of any Evidence for Seizure or cause any other person to do so at any time, including during the two-hour period for seeking legal advice; and

## the Person in Apparent Control, and any other person served with this Order or with knowledge of this Order, may identify and segregate records over which they wish to claim privilege,[[17]](#endnote-17) confidentiality, or commercial sensitivity and shall provide those records to the Independent Supervising Solicitor to be dealt with by the Independent Supervising Solicitor in accordance with paragraphs 34 through 39 of this Order.

# The Independent Supervising Solicitor may abridge the two-hour period for obtaining legal advice if the Independent Supervising Solicitor determines that legal advice has been obtained and there is no reason for further delaying the search under this Order, or if the Independent Supervising Solicitor determines that the Person in Apparent Control or any other person served with this Order are not making reasonable efforts to obtain legal advice. Similarly, the Independent Supervising Solicitor may extend the two-hour period for obtaining legal advice if the Independent Supervising Solicitor deems such extension reasonably necessary in all the circumstances.[[18]](#endnote-18)

# For clarity, the two-hour period for seeking legal advice referenced in the preceding paragraphs begins to run in respect of each of the Premises when the first Person in Apparent Control at that Premise is served with the Order and the original two-hour period applies to the Defendant even if they are subsequently served during that two-hour period.

# **Entry of Premises**

# Upon the earlier of a Person in Apparent Control being served with this Order obtaining legal advice, stating that (s)he is not obtaining legal advice, or the Independent Supervising Solicitor determining that the period for obtaining legal advice established above has expired, and once the Independent Supervising Solicitor determines that the Person in Apparent Control has had a reasonable opportunity to assert claims of privilege, confidentiality, or commercial sensitivity in respect of the Premises, the Person in Apparent Control shall forthwith grant entry[[19]](#endnote-19) and permit re-entry into the Premises during the times and in the manner specified in this Order to the following Authorized Persons for the purposes of searching for, identifying, inspecting, locating, photographing, videotaping, listing, preserving, reproducing, imaging, accessing, retrieving and removing into the custody of the Authorized Person, or the Independent Supervising Solicitor where a claim of privilege, confidentiality, or commercial sensitivity is asserted, any and all Evidence for Seizure:

## up to three (3) representatives of the Independent Supervising Solicitor;

## up to two (2) representatives of the Bailiff, if required; and

## up to two (2) representative of the Technology Consultant, as required, to assist in the searching for, identifying, inspecting, locating, preserving, reproducing, imaging, accessing, retrieving and removing Evidence for Seizure from any computer system, photocopier, scanner, facsimile machine, technological device, hardware, software or related storage medium found on the Premises.[[20]](#endnote-20)

# **Cooperation and Disclosure Obligations of the Defendant and Person in Apparent Control**

# For the purposes of the search authorized by this Order, the Defendant [or if a corporation, “the Defendant and its officers, directors, employees and agents”] and anyone else acting on behalf of the Defendant, and the Person in Apparent Control, shall, to the extent they are reasonably able:

## identify, disclose, describe the whereabouts of, deliver up, and grant unrestricted access to the Authorized Persons to any and all items within the categories of Evidence for Seizure and particulars of the means of access thereto, whether such items are located at the Premises or elsewhere, in printed or electronic or other format, including but not limited to Internet-accessible data, and whether in the possession, custody or control of the Defendant or any third party;[[21]](#endnote-21)

## disclose to the Authorized Persons:

### their full and proper names, telephone numbers, street and postal addresses, including the addresses at which registered mail sent to them will be received;

### any other names by which any of them may be known;

### any other addresses or telephone numbers at which they may from time to time be reached; and

### the identity and contact information, including names, telephone numbers, street, email and postal addresses, of any third party who is in possession, custody or control of any of the Evidence for Seizure;

## unlock, open and make available to the Authorized Persons every part of the Premises within their respective possession, custody or control;

## provide all keys, identification codes, passwords, usernames, pass phrases, or any other similar information or knowledge required to permit the Authorized Persons to search for, identify, locate, decode, access, decrypt, copy and/or remove the Evidence for Seizure (collectively “**Passwords**”), including but not limited to use of any verification device to reply to challenge/response security mechanisms, and encryption tools required to access and decrypt electronic Evidence for Seizure, however stored, and whether physically located at the Premises or elsewhere;[[22]](#endnote-22)

## under the supervision of the Independent Supervising Solicitor, make reasonable efforts to contact and obtain Passwords from persons not present during the search and provide Passwords so obtained to the Authorized Persons; and

## render any necessary assistance to the Independent Supervising Solicitor and the Authorized Persons to enable them to effectively carry out their responsibilities under this Order.

# **Conduct of Search of Premises**

# Upon being granted entry to the Premises pursuant to paragraph 15, the Authorized Persons may search for, identify, inspect, locate, preserve, access, retrieve and seize all Electronic Media and hard copy materials that contain, or in the opinion of the Independent Supervising Solicitor, acting reasonably, may contain, Evidence for Seizure.[[23]](#endnote-23)

# The Independent Supervising Solicitor shall make a complete copy of all Electronic Media and hard copy materials that contain, or in the opinion of the Independent Supervising Solicitor may contain, Evidence for Seizure, while at the Premises, and shall return the original hard copy materials and Electronic Media to the Person in Apparent Control immediately after copying is complete.[[24]](#endnote-24)

# Notwithstanding paragraph 18 above, and provided paragraph 21 is complied with, if the Independent Supervising Solicitor considers it impractical to copy any hard copy materials or Electronic Media that contain, or in the opinion of the Independent Supervising Solicitor may contain, Evidence for Seizure, while at the Premises, the Independent Supervising Solicitor may remove[[25]](#endnote-25) such items, or portions thereof, from the Premises for a period of up to 7 days, or such further period agreed to by the parties in writing or ordered by the Court, for the purposes of:

## making a true copy of the hard copy materials;

## taking a mirror image, “Bit-Stream Image”, “Virtual Copy” or full, true copy of the Electronic Media; and

## conducting a search of the Electronic Media for the retrieval of any and all electronic data or information that constitutes Evidence for Seizure.

# Upon expiration of the 7 day period for copying, the Independent Supervising Solicitor shall return the original hard copy materials and Electronic Media to the persons from whom it was seized or their solicitors.[[26]](#endnote-26)

# Prior to removing any Evidence for Seizure seized under this Order from the Premises, the Independent Supervising Solicitor:

## must have, and provide to the Person in Apparent Control, a list of the Evidence for Seizure to be removed.[[27]](#endnote-27) Evidence for Seizure can be listed in bundles or by category if it is not practicable to list each piece of Evidence for Seizure individually, provided that there is a reasonable and reliable methodology employed for determining exactly which pieces of Evidence for Seizure were copied, imaged, photographed, videotaped or removed. If the Independent Supervising Solicitor is removing Electronic Media, including a copy or image thereof, from the Premises, the contents of the Electronic Media need not be listed in detail if not reasonably practicable. Rather, the Independent Supervising Solicitor shall list the computer, device, hardware, software or other storage medium being removed;

## must provide to the Person in Apparent Control an acknowledgement of receipt of the Evidence for Seizure removed; and

## must allow the Person in Apparent Control an opportunity to check the list of Evidence for Seizure to be removed to ensure that it correctly lists what is being taken,[[28]](#endnote-28) and the Person in Apparent Control must confirm in writing, upon demand of the Independent Supervising Solicitor, whether the list of Evidence for Seizure to be removed from the Premises accurately reflects the Evidence for Seizure removed or to be removed in accordance with this Order.

# The Independent Supervising Solicitor may permit the search to proceed and may remove Evidence for Seizure from the Premises without compliance with paragraph 21 of this Order if he or she deems it impracticable to comply with that section, but shall include in any report to the Court pursuant to paragraph 45 the basis for invoking this paragraph.[[29]](#endnote-29)

# The Independent Supervising Solicitor, the Plaintiff and all Authorized Persons shall take reasonable steps to ensure that no damage is done to the Premises, any Electronic Media, anything seized or present at or in the Premises, or anything accessed while conducting the search authorized by this Order.

# Following the service of this Order on the Person in Apparent Control, no one shall enter the Premises during the execution of this Order except the Authorized Persons, the Person in Apparent Control, the solicitors for the Person in Apparent Control or the Defendant, and the Defendant, unless otherwise agreed by the Independent Supervising Solicitor.[[30]](#endnote-30)

# The Person in Apparent Control shall allow the Authorized Persons to remain on the Premises to discharge their duties as set out in this Order until 9:00 p.m. on the day the search is commenced and, if the search is not completed by that time to re-enter the Premises on subsequent day(s) between the hours of 9:00 a.m. and 9:00 p.m. to complete the search in accordance with the terms of this Order.

# Despite the foregoing, the search may continue beyond 9:00 p.m. on any day with the consent of the Person in Apparent Control or, if present, the Defendant, until the search is complete.

# **Assistance in Keeping the Peace**

# The [name of police services with jurisdiction over the Premises], and any other police services having jurisdiction may attend to keep the peace while this Order is being executed, but may not otherwise assist or participate in its execution.[[31]](#endnote-31)

**Restrictions on the Search Authorized by this Order**

# All parties having notice of this Order shall ensure that the search and collection of evidence authorized by this Order is carried out only under the supervision of the Independent Supervising Solicitor or those solicitors appointed by the Independent Supervising Solicitor pursuant to paragraph 3(b) of this Order, and in the presence of the Person in Apparent Control unless the Person in Apparent Control refuses to be present or waives his or her right to be present during the search.[[32]](#endnote-32)

# The Authorized Persons shall not make a video, photographic, or similar recording of the execution of this Order unless:

## either the Defendant, [or if a corporation, “the Defendant and its officers, directors, employees and agents”], or anyone else acting on behalf of the Defendant, or the Person in Apparent Control, or both, first commences recording the search;

## the Defendant or Person in Apparent Control, or both, consent in writing to such recording; or

## the video, photographic or similar recording is:

### of the state of the Premises prior to commencement or at completion of the search;

### of the state of the Premises at the commencement or at completion of any day on which the search is undertaken, if the search is undertaken over multiple days;

### of the state of any computers or other electronic storage media prior to, during, or upon completion of any search, inspection, or reproduction of same; or

### for purposes of identification of any computers or other electronic storage media or of the Evidence for Seizure.

# Any Authorized Persons who make a video, photographic or similar recording of the search, of the Premises, or of the Evidence for Seizure, shall deliver such recording to the Independent Supervising Solicitor upon completion of the search, and the Independent Supervising Solicitor shall retain it in his or her custody unless the parties agree otherwise in writing or the Court otherwise orders.

**Prohibited Acts**

# Unless otherwise ordered by the Court, the Person with Apparent Control, the Defendant, and any person served with this Order or with knowledge of this Order shall not:

## part with the possession or control or otherwise dispose of any Evidence for Seizure, except to the Authorized Persons or the Independent Supervising Solicitor in accordance with the terms of this Order;

## hide, destroy, discard, erase, alter, delete, or deface, in any manner, any Evidence for Seizure in their power, possession or control, whether such item is in or on the Premises or elsewhere;[[33]](#endnote-33)

## directly or indirectly remove any Evidence for Seizure from the Premises;

## for the duration of the search touch, activate, or operate any of the computer equipment on the Premises either locally or remotely from any location away from the Premises or access or alter any text, graphics, electronic data, or other content of any electronic mail, or internet relay chat communications, or other information, instructions, or data stored in any location remote from the Premises that may constitute the Evidence for Seizure; and

## for the duration of the search, disclose or discuss by any medium or form of communication the existence or contents of the Order with any third party except their legal counsel, or inform any third party, directly or indirectly, by any medium or form of communication, that the Plaintiff might commence legal proceedings or serve such Order on any such parties.[[34]](#endnote-34)

# 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 or her behalf, or on his or her instructions, or with his or her encouragement or acquiescence, or in any other way.

# Unless this Court first grants leave to do so, neither the Defendant nor the Person in Apparent Control, nor any other person, may directly, or indirectly, commence legal proceedings against the Independent Supervising Solicitor for any reason arising out of the operation or enforcement of this Order.

**Handling of Evidence Claimed to be Privileged, Confidential or Commercially Sensitive**[[35]](#endnote-35)

# Any Evidence for Seizure over which a claim of privilege, confidentiality, or commercial sensitivity, is asserted by the Person in Apparent Control, the Defendant, or any other person served with or with knowledge of this Order, shall be provided forthwith to the Independent Supervising Solicitor.

# If the Independent Supervising Solicitor is satisfied that any Evidence for Seizure identified or provided to him or her is privileged, confidential, or commercially sensitive, or is in any doubt as to a claim of privilege, confidentiality or commercial sensitivity made in respect of such Evidence for Seizure, or part of that Evidence for Seizure, then the Independent Supervising Solicitor shall keep such item or items separate, confidential and sealed in a receptacle and shall not share the contents of that Evidence for Seizure except as provided for in paragraph 39 until such time as the privilege, confidentiality or commercial sensitivity can be confirmed by counsel and, if necessary, adjudicated by the Court.

# If a claim of privilege, confidentiality, or commercial sensitivity is asserted over any Evidence for Seizure stored on Electronic Media, the person asserting the same shall inform the Independent Supervising Solicitor of the claim of privilege, confidentiality, or commercial sensitivity forthwith. If the Independent Supervising Solicitor is satisfied that such Evidence for Seizure stored on Electronic Media is privileged, confidential, or commercially sensitive or is in any doubt as to a claim of the same made in respect of such Evidence for Seizure, or part of that Evidence for Seizure, the Independent Supervising Solicitor shall thereafter inform the other Authorized Persons that a claim of privilege, confidentiality, or commercial sensitivity has been made over an item or items on the Electronic Media, following which the Technology Consultant shall refrain from accessing the contents of the Electronic Media except in accordance with directions from the Independent Supervising Solicitor. The Independent Supervising Solicitor shall give such directions or otherwise take such steps as the Independent Supervising Solicitor deems necessary, based on his/her own knowledge and experience, the advice of the person claiming the privilege, confidentiality, or commercial sensitivity, counsel for the person claiming the privilege, confidentiality, or commercial sensitivity and the knowledge and experience of the Technology Consultant, to assess or protect the claim of privilege, confidentiality, or commercial sensitivity while maintaining the effectiveness of this Order. Without limiting the generality of the foregoing, the Independent Supervising Solicitor is authorized, if the Independent Supervising Solicitor deems appropriate, to have the Technology Consultant image or copy the entire Electronic Media and to provide that image or copy to the Independent Supervising Solicitor for further handling.

# However, if the Independent Supervising Solicitor is satisfied that there is no foundation for a claim of privilege, confidentiality, or commercial sensitivity to be made in respect of any Evidence for Seizure or part of that Evidence for Seizure, then the Independent Supervising Solicitor shall direct that the Evidence for Seizure be handled in accordance with the provisions set out in this Order for gathering and handling of other non-privileged Evidence for Seizure.

# The Authorized Persons are not required to review the Evidence for Seizure or to assert claims of privilege, confidentiality, or commercial sensitivity on behalf of any party, but are directed to be mindful of issues of privilege, confidentiality, or commercial sensitivity in respect of the Evidence for Seizure. If at any time during activities governed by this Order any Authorized Person comes across any Evidence for Seizure that the Authorized Person believes may be privileged, confidential, or commercially sensitive, the Authorized Person shall provide such Evidence for Seizure to the Independent Supervising Solicitor, and it shall be dealt with in accordance with paragraphs 34 through 39 of this Order.

# The Independent Supervising Solicitor shall provide any person who has asserted privilege, confidentiality, or commercial sensitivity over Evidence for Seizure, or their solicitors, with reasonable access to the Evidence for Seizure over which that person asserted privilege, confidentiality, or commercial sensitivity for the purposes of reviewing and making copies, or asserting or assessing claims of privilege, under the supervision of the Independent Supervising Solicitor or such person designated by the Independent Supervising Solicitor for such purpose.

# The provision, delivery, disclosure or transmittal of Evidence for Seizure pursuant to the terms of this Order shall not constitute, nor be deemed to constitute, a waiver of any privilege.

**Custody of, Access to, and Use of Evidence Seized During the Search**

# The Independent Supervising Solicitor shall take custody of all copies of Evidence for Seizure seized pursuant to this Order and shall maintain custody of those items until further Order of the Court or written agreement of the parties.

# The Plaintiff and its representatives and solicitors are not, after completion of the search, entitled to inspect the Evidence for Seizure seized and held in the custody of the Independent Supervising Solicitor pursuant to this Order, unless the Defendant from whom the Evidence for Seizure was seized consents or the Court otherwise Orders.[[36]](#endnote-36)

# The Evidence for Seizure shall be used by the Plaintiff only for purposes of this action, unless the parties agree otherwise in writing or the Court orders otherwise.[[37]](#endnote-37)

# The Plaintiff, and all Authorized Persons, shall keep confidential all information embodied in all items inspected, removed, delivered up, or copied during or as a consequence of the search unless the parties agree otherwise in writing or the Court orders otherwise.[[38]](#endnote-38)

**Duties of the Independent Supervising Solicitor Following the Search**

# Unless otherwise ordered by the Court, the Independent Supervising Solicitor shall, within ten (10) business days of implementing this Order, prepare a report[[39]](#endnote-39) that describes the execution of this Order, including who was present at the execution, identification of the Person in Apparent Control, identification of the Authorized Persons, a copy of the list of the Evidence for Seizure taken into the custody of the Independent Supervising Solicitor, and a description of any act by any person which the Independent Supervising Solicitor believes may be in contravention of this Order, and serve a copy of the report to the parties, or their solicitors of record, and file a copy of the report with the Court.

**Effective Date of Order**

# This Order binds the Defendant and every other person who obtains notice of the Order, as of the time the Defendant or person first receives notice of the Order, and whether or not the Defendant or person has been served with a copy of the Order.

# The terms of this Order shall remain in force and be effective for fourteen (14) days and, subject to paragraphs 3, 4, 5, 33, 40, 40, 41, 42, 43, 44, 48 and 49 which shall continue in full force and effect until terminated by the Court, shall thereafter terminate unless the Plaintiff returns to the Court on or before the expiration of that fourteen (14) day period to apply to continue this Order.[[40]](#endnote-40)

**Court Review and Further Orders**

# Anyone affected by this Order, including the Independent Supervising Solicitor, may apply to the Court at any time to vary or discharge it, or so much of it as affects the person so applying, or seek directions in respect of any of its terms, or to request that the Plaintiff be required to post security for the undertaking [or vary the amount of security], on giving no less than twenty-four (24) hours’ notice to the Plaintiff’s solicitor of his or her intention to do so, but this Order will remain in force until the earlier of its termination pursuant to paragraph 46, or further Order of the Court, even if such an application is pending.[[41]](#endnote-41)

# All applications to vary, discharge, or seek directions with respect to this Order, or arising out of the issuance or enforcement of this Order, including the issue of costs, shall be heard by the Judge who issued this Order with the exception of:

## urgent matters for which the Judge is not available; or

## as otherwise directed by the Judge.

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| Justice of the Court of Queen’s Bench of Alberta |  |

**Schedule “A”** – **Undertaking as to Damages**

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| --- | --- | --- | --- |
| COURT FILE NUMBER | Clerk’s Stamp | | |
| COURT | COURT OF QUEEN’S BENCH OF ALBERTA | | |
| JUDICIAL CENTRE |  | | |
| PLAINTIFF(S) |  | | |
| DEFENDANT(S) |  | | |
| DOCUMENT | **UNDERTAKING BY PLAINTIFF(S)** | | |
| ADDRESS FOR SERVICE AND  CONTACT INFORMATION OF  PARTY FILING THIS  DOCUMENT | |  |  | |

I, [name of person or of person authorized by corporate Plaintiff to give undertaking], undertake [or I am authorized by the corporate Plaintiff to give its undertaking and it does hereby undertake] to abide by any Order that this Court may make as to damages in the event that the Court is hereafter of the opinion that the Defendant, or any other person served with this Order, has sustained damages by reason of this Order which the Plaintiff is liable to pay.

DATED at the City of \_\_\_\_\_\_\_\_\_\_\_, in the Province of Alberta, this \_\_\_\_\_ day of [month], [year].

|  |  |  |
| --- | --- | --- |
|  |  | **●**  **Per:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**  **●** |

**Schedule “B” – Categories of Evidence for Seizure**

The Evidence for Seizure consists of all documents and articles within the following categories:

**Schedule “C” – Important Notice to the Person in Apparent Control of the Premises and to the Defendant**

# The Order of Mr./Madam Justice [Name] dated [date] (“Order”) requires you to allow the Authorized Persons, in the presence of the Independent Supervising Solicitor, to enter the premises at [address], in the Province of Alberta to search for, and remove or copy the Evidence for Seizure specified in the Order. “Evidence for Seizure” is a term defined in the Order.

# The Order requires the Defendant, people acting on behalf of the Defendant, and the person who appears to the Independent Supervising Solicitor to be in control of the Premises, to provide certain information regarding the Evidence for Seizure to the Independent Supervising Solicitor and the Authorized Persons, and to hand over for examination and removal or copying the Evidence for Seizure.

# The Authorized Persons and Independent Supervising Solicitor are identified in the Order, which will have been given to you with this Notice. The Order includes limitations on the rights of the Authorized Persons in conducting the search and protections for you.

# The Authorized Persons and Independent Supervising Solicitor 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.

# You should read the terms of the Order very carefully. You are entitled to have the Independent Supervising Solicitor explain what this Order means in plain, everyday language. If you require the assistance of an interpreter, you should advise the Independent Supervising Solicitor that you require interpretive assistance.

# You are entitled to seek legal advice from your own lawyer regarding this Order and the rights you may have, including the right to claim solicitor-client privilege. You may refuse to permit the search to begin, initially for up to two hours, while you consult a lawyer but you must immediately obey all terms of this Order requiring preservation of the Evidence for Seizure. The Independent Supervising Solicitor has the discretion to agree to extend the period for you to consult a lawyer if there is reason to do so. While you can refuse to permit the search to begin while you consult your lawyer, you must immediately permit the Independent Supervising Solicitor, and/or those assisting him or her, to have access to the Premises, and must permit the Independent Supervising Solicitor to take steps he or she determines appropriate to preserve the Evidence for Seizure until the search begins.

# The Independent Supervising Solicitor has been appointed by the Court, is attending to supervise enforcement of the Order as an officer of the court, and does not advise or represent the Plaintiff. You may address any questions you have about the Order to the Independent Supervising Solicitor. However, the Independent Supervising Solicitor is not your lawyer, no solicitor-client relationship exists or is created between you and the Independent Supervising Solicitor, and the Independent Supervising Solicitor may disclose your discussions to the Authorized Persons or the Court or both.

# You are entitled to refuse initial entry to the Premises by the Authorized Persons before 9:00 a.m. or after 5:00 p.m., or at any time that is not a business day.

# If you disobey this Order, you may be guilty of contempt of court and may be fined or imprisoned. Furthermore, if you fail to cooperate as required by the Order, the Court may draw negative inferences from that failure that could prejudice the Defendant in the Court proceedings.

# You are at liberty to apply to this Court to set aside or vary this Order upon giving no less than 24 hours’ notice to the Plaintiff’s solicitor of your intention to do so.

Dated: [Month/Day/Year]

I acknowledge receipt of a copy of this notice.

|  |  |  |
| --- | --- | --- |
| Acknowledged and delivered in the presence of:    Witness Signature  Name:  Address: | )  )  )  )  )  )  )  ) | Recipient  Name:  Address: |
|  |  |  |

1. [↑](#endnote-ref-1)
2. It is trite law that an applicant proceeding without notice to the opposing party is required to act with the utmost good faith and make full, fair and candid disclosure of all non-confidential, non-privileged material facts known to the applicant, including facts which would militate against the application: *Secure 2013* at paras 41 – 46. These duties extend to counsel for the applicants: *Secure 2013* at para 61; *Celanese Canada Inc v Murray Demolition Corp*, 2006 SCC 36 (“*Celanese*”) at para 36. Failure to comply with these obligations may result in the order being set aside: *Secure 2013* at paras 47 – 48; *Peters & Co v Ward,* 2015 ABCA 6 at para 11; *Capitanescu v Universal Weld Overlays Inc*. (1996) 192 AR 85 (ABQB) at para 30; *Duke Energy Corp v Duke/Louis Dreyfus Canada Corp*, 1998 ABCA 196 at para 4. [↑](#endnote-ref-2)
3. Filing a brief is not mandatory, but is a recommended best practice to be followed. [↑](#endnote-ref-3)
4. Students-at-Law are not designated as officers of the Court under section 102 of the *Legal Profession Act,* RSA 2000, c l-8. For that reason, only solicitors should be appointed by the Independent Supervising Solicitor to assist in carrying out the terms of the Order. [↑](#endnote-ref-4)
5. The persons who may conduct the search and seize evidence should be specified in the order: *Celanese* at para 40(2)(iii). [↑](#endnote-ref-5)
6. Independent specialists, such as accountants or computer forensics experts, may be required to assist in the search. However the presence of such specialists does not alter the requirement that a solicitor attend as an officer of the court: *Fila Canada Inc v Jane Doe,* [1996] 3 FC 493 (“*Fila*”) at para 14. If the Anton Piller order contemplates additional authorized persons other than the Independent Supervising Solicitors having access to the seized documents, the Anton Piller order should impose an obligation on those authorized persons to maintain the confidentiality of information obtained as a result of the order: *Secure 2013* at para 108. [↑](#endnote-ref-6)
7. The scope of records to be seized under the Anton Piller order must be clearly identified and be “no wider than necessary”: *Secure 2013* at para 90; *Celanese* at para 40(1)(iii). [↑](#endnote-ref-7)
8. Given the need to search for electronic documents and the now common use of portable electronic devices such as cell phones and tablets, the inclusion of a motor vehicle in the definition of the premises is likely justified: *Regal Ideas Inc v Haus Innovations Inc*, 2016 BCSC 1883 at para 23. [↑](#endnote-ref-8)
9. The Anton Piller order should appoint a supervising solicitor who is independent of the plaintiff or its solicitors and is to be present at the search to ensure its integrity. The key role of the independent supervising solicitor is “to ensure that the execution of the Anton Piller order, and everything that flowed from it, was undertaken as carefully as possible and with due consideration for the rights and interests of all involved”: *Celanese* at para 40(1)(i). See also *Fila* 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.” [↑](#endnote-ref-9)
10. The expense to the plaintiff of an Independent Supervising Solicitor has not persuaded the court that one need not be present: *Fila* at paras 11 – 12; *Richel v Stevenson*, 1998 ABQB 1039 at para 20 (in obiter). [↑](#endnote-ref-10)
11. The order should make it clear that the responsibilities of the Independent Supervising Solicitor continue beyond the search itself to deal with matters arising out of the search, subject of course to any party wishing to take a matter back to the court for resolution: *Celanese* at para 40(3)(i). [↑](#endnote-ref-11)
12. The search should ordinarily take place within regular business hours when counsel for the party about to be searched is more likely to be available, and extra sensitivity to timing should be employed when the Premises is a private residence: *Grenzservice Speditions GmbH v Jans,* (1995) 15 BCLR (3d) 370 (“*Grenzservice*”) at para 97; *Celanese* at para 40(2)(i). 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: *Sulphur Experts Inc v O’Connell*, 2000 ABQB 875 (“*Sulphur*”) at para 26. 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. [↑](#endnote-ref-12)
13. *Celanese* at para 40(2)(iv). [↑](#endnote-ref-13)
14. The defendant is entitled to have the terms of the Order explained in “layman’s language” and to have explained that the anton piller order is a civil remedy, and not a search remedy: *Ontario Realty Corp v P Gabriele & Sons Ltd* (2000) 50 OR (3d) 539 (ON Sup Ct J) (“*Ontario Realty*”) at para 20; *Computer Security Products Inc v Forbes,* [1999] OJ No 4573 (ON Sup Ct J) at para 42; *Celanese* at para 40(2)(iv). [↑](#endnote-ref-14)
15. The Person in Apparent Control and/or the defendant must have the right to assert privileges and to be advised of that right and of those privileges, particularly the solicitor-client privilege and the privilege against self-incrimination: *Grenzservice* at para 97. [↑](#endnote-ref-15)
16. *Celanese* at para 40(2)(v); *Ontario Realty* at para 40(3); *Adobe Systems Inc v KLJ Computer Solutions Inc,* (1999) 166 FTR 184 (FCTD) (“*Adobe Systems*”) at para 43(2); *Sulphur* at para 27. [↑](#endnote-ref-16)
17. *Ibid.* [↑](#endnote-ref-17)
18. The Independent Supervising Solicitor should be prepared to extend the two-hour time limit as reasonably necessary to ensure that their right to counsel is a meaningful one: *Sulphur* at para 27. [↑](#endnote-ref-18)
19. A hallmark of the Anton Piller order is that it does not permit entry to the Premises. Rather, it compels the defendant to permit entry or face the consequence of being in contempt: *Ontario Realty* at para 17; *Adobe Systems* at para 33. In addition, a defendant risks the drawing of an adverse inference if he or she has denied entry and evidence is not forthcoming at a later date: *Adobe Systems* at para 33. [↑](#endnote-ref-19)
20. The persons who may conduct the search and seize evidence should specifically be limited in number: *Celanese* at para 40(2)(iii); *Adobe Systems* at para 43(1); *Nintendo of America Inc v Coinex Video Games Inc*, [1983] 2 FC 189 (“*Nintendo*”) at para 18. [↑](#endnote-ref-20)
21. *Bavaria Autohaus (1997) Ltd v Beck,* 2011 ABQB 727 (“*Bavaria*”) at para 24(5). [↑](#endnote-ref-21)
22. A similar direction was made in *Canadian Derivatives Clearing Corp v EFA Software Services Ltd*, 2001 ABQB 425 (“*Canadian Derivatives*”) at Appendix, paras 5, 8 and 9. [↑](#endnote-ref-22)
23. The Court in *Secure 2013* notedat para 94 that this clause is broad, as it authorizes the seizure of all records that relate to, or may relate to, the Evidence for Seizure. Counsel should consider whether, in the circumstances of their case, this clause should be narrowed. [↑](#endnote-ref-23)
24. *Adobe Systems* at para 43(3); *Celanese* at para 40(1)(vii); *Ontario Realty* at para 40(8). [↑](#endnote-ref-24)
25. 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 in advance of enforcement, counsel should address this issue in the motion materials and amend the terms of this Order to suit the circumstances of their case. [↑](#endnote-ref-25)
26. The order should provide that the materials seized be returned to the defendants or their counsel as soon as practicable: *Celanese* at para 40(1)(vii). Depending on the circumstances of the case and the nature of the Evidence for Seizure, counsel should consider whether it is necessary or prudent to impose an obligation on the Defendants’ solicitors to preserve the original Electronic Media that was seized upon its return. [↑](#endnote-ref-26)
27. *Adobe Systems* at para 43(4); *Nike Canada Ltd v Jane Doe,* (1999) 177 FTR 18 (FCTD) (“*Nike Canada*”) at Appendix A, paras 12 and 14; *Celanese* at para 40(2)(vi). If the Order is sought against multiple defendants at separate locations counsel should consider amending the terms of the Order to preserve a defendant’s privacy and his or her right to assert claims of solicitor-client privilege and irrelevance before disclosure to other defendants in the litigation. It may be appropriate to restrict delivery of the list of Evidence for Seizure and the Independent Supervising Solicitor’s receipt to the Person in Apparent Control present during the search, the Plaintiffs and the Authorized Persons that conducted the search, and the specific defendant from whose Premises the items were seized (i.e. each defendant would not get the list and receipt for items seized from the Premises of other defendants). [↑](#endnote-ref-27)
28. *Celanese* at para 40(2)(vi). [↑](#endnote-ref-28)
29. *Celanese* at para 40(2)(vii). [↑](#endnote-ref-29)
30. If the Order is being executed on a business premises, counsel should consider whether this clause ought to be revised, or removed if it is not necessary in the circumstances of the case, as it could cause significant disruption to an ongoing business if no one is permitted to enter the business premises following service of the Order until the conclusion of the search. See for example, the Court’s comments in *Secure 2013* at para 80(g)(i). [↑](#endnote-ref-30)
31. The police must not participate in enforcement of the Order. This term may not be appropriate in all cases and should be included only where there are reasonable grounds to believe a breach of the peace may occur as a result of enforcement of the Order. It may be appropriate to revise the clause to provide that the police may, in their discretion, leave the Premises while the Order is being executed if, in their discretion, they are believe a breach of the peace is not likely to occur as a result of enforcement of the Order. [↑](#endnote-ref-31)
32. *Celanese* at para 40(2)(ii); *Ontario Realty* at para 40(7). [↑](#endnote-ref-32)
33. A similar direction was made in *Canadian Derivatives* at Appendix, para 10 and in *Nike Canada* at Appendix A, para 7. [↑](#endnote-ref-33)
34. This type of “gag order” may be reasonable where the plaintiff requires the information obtained through execution to secure assets or evidence located elsewhere or to maintain the element of surprise when there are multiple defendants or when the order is being executed at different premises: *Titan Sports* at para 20. If a gag order is included in the Order, counsel should consider whether it is also necessary to take other steps to preserve the element of surprise, including requesting the Court to temporarily list the matter on any Court lists, records or monitors under a pseudonym, such as *A v B,* and temporarily sealing the court file, in which case counsel should consider whether they meet the test for a sealing order (see *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41). [↑](#endnote-ref-34)
35. Terms setting out the procedure for dealing with solicitor-client privilege or other confidential material should be included in the Anton Piller order with a view to enabling defendants to advance claims of confidentiality over documents before they come into the possession of the plaintiff or its counsel, or to deal with disputes that arise: *Secure 2013* at paras 106 – 107; *Celanese* at para 40. This model Order is not designed to address searches of a lawyer's office. Where a lawyer’s office is searched, special consideration must be given to issues of privilege and confidentiality and special provisions made which are not contemplated by the terms of this Order. [↑](#endnote-ref-35)
36. The primary purpose of an Anton Piller Order is evidence preservation: *Celanese* at para 52. Accordingly, the plaintiff may be prohibited by the Order from accessing the Evidence for Seizure (see for example, *Bavaria* at para 24(7)), and in those cases, may need to apply to the Court for access to the Evidence for Seizure seized and held in the custody of the Independent Supervising Solicitor on notice to the defendant. 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 be provided with access to information regarding the customers and suppliers of the defendants: *Titan Sports* at para 19. 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 permitted to access all documents over which no such claim is made (see for example *DIRECTV, Inc v Zed Marketing, Inc et al*, 2005 CanLII 7256 (ONSC). [↑](#endnote-ref-36)
37. In *Celanese* at para 40(1)(v), the Court suggested a “limited use clause”. See also *Ontario Realty* at para 40(6); *Nintendo* at para 17; and *Bavaria* at para 24(8). Such a clause may not be appropriate in every case. When broader use of documents seized on an Anton Piller order is sought that goes beyond the subject litigation and the usual implied undertaking rule, the justification for doing so should be specifically addressed in the affidavit materials and submissions: *Secure 2013* at para 113. [↑](#endnote-ref-37)
38. When persons other than the Independent Supervising Solicitor will have access to the Evidence for Seizure, the Order should have a term requiring those persons to maintain the confidentiality of information obtained as a result of the order: *Secure 2013* at para 108. [↑](#endnote-ref-38)
39. *Celanese* at para 40(3)(ii). [↑](#endnote-ref-39)
40. Anton Piller orders are generally time limited: *Celanese* at para 40; *Secure 2013* at paras 109 – 110. [↑](#endnote-ref-40)
41. *Celanese* at para 40(1)(vi); *Adobe Systems* at para 43(6); *Nintendo* at para 20. [↑](#endnote-ref-41)