

ONTARIO E-DISCOVERY IMPLEMENTATION COMMITTEE

**MODEL DOCUMENT #9A:
DISCOVERY PLAN (LONG FORM)**

Purpose of the document

Rule 29.1 of the Ontario *Rules of Civil Procedure* requires parties to agree upon a discovery plan before proceeding with discovery.

The attached model long form discovery plan is a template for parties to use in setting out the terms of their agreed discovery plan in the action. This model discovery plan is intended to be used in conjunction with Model Document #9: Checklist for Preparing a Discovery Plan, which is a checklist of steps to be taken both before and during the negotiation of a discovery plan.

A short form model discovery plan is also available for use in appropriate cases (see Model Document #9B: Discovery Plan (Short Form)). Parties may find it helpful to use the short form of discovery plan in cases brought under Rule 76 or in matters involving relatively straightforward or narrow legal and documentary production issues. Both templates are designed to incorporate all of the elements of a discovery plan mandated by Rule 29.1.

For a more comprehensive model agreement dealing with discovery issues, see Model Document #1: Discovery Agreement. For an example of a letter agreement confirming the elements of a discovery plan, see Sample Document #1: Letter Confirming Discovery Agreement. The EIC has also prepared an Annotated E-Discovery Checklist (Model Document #8), which is a comprehensive checklist designed to address all of the steps to be taken with respect to the preservation, production and use of relevant documents in a litigation matter, with annotations throughout on how to minimize e-discovery costs.

Where parties cannot agree on a discovery plan and conclude that it is necessary to move before the Court for discovery relief, they are encouraged to use Model Document #10: Proportionality Chart (Document Production) to organize their submissions to the Court.

The discovery plan templates and all of the EIC's model documents and other publications are available on the Ontario Bar Association's website at:

http://www.oba.org/En/publicaffairs_en/E-Discovery/model_precedents.aspx

Overview of requirements of Rule 29.1

Rule 29.1.03(3) requires that the written discovery plan address:

- a. the intended scope of documentary discovery under rule 30.02, taking into account

- relevance, cost and the importance and complexity of the issues in the action;
- b. the dates for service of the parties' affidavits of documents;
 - c. the timing, cost and manner of production of documents by the parties and any other persons;
 - d. the names of discovery witnesses and information regarding the timing and length of the discoveries; and
 - e. any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.

In considering whether proposed steps in the discovery process are proportionate, parties must take into account the importance and complexity of the case, the amounts and interests at stake, and the costs, delay, burden and benefit associated with each step, among other things.

Rule 29.1.03(4) expressly directs parties to consult and have regard to *The Sedona Canada Principles Addressing Electronic Discovery* (the “*Sedona Canada Principles*”). The *Sedona Canada Principles* are a set of national guidelines for e-discovery in Canada, which reflect both existing legal principles and a set of identified best practices.¹

Rule 29.1 requires that the discovery plan be prepared in the early stages of the litigation, before discovery begins. Rule 29.1.04 also requires parties to update their discovery plan during the conduct of the action. Under Rule 29.1.05, the court may refuse to grant discovery relief or to award costs if the parties have not agreed upon or updated a discovery plan.

Note regarding use of this document

This model document has been prepared and made available to the public by the EIC for informational purposes. It is not provided as legal or technical advice and should not be relied upon as such.

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Feedback on EIC materials

The EIC welcomes comments on all of its model documents and other publications. Any comments or suggestions can be provided to Michele A. Wright at mwright4@toronto.ca.

[Court File No.]

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

[PLAINTIFF(S)]

Plaintiff(s)

-and-

[DEFENDANT(S)]

Defendant(s)

**DISCOVERY PLAN
(Dated as of [date])**

[NOTE TO USER OF THIS DOCUMENT: Read Model Document #9: Checklist for Preparing a Discovery Plan for important information on factors to consider in preparing a discovery plan. Refer also to Model Document #8: Annotated E-Discovery Checklist for detailed suggestions on the preservation, review, and production of relevant records. These model documents may be found at: http://www.oba.org/En/publicaffairs_en/E-Discovery/model_precedents.aspx.]

**1. Applicable
Procedural
Regime:**

- Commercial List
- Construction Lien Act
- Class Proceedings Act, 1992
- Estates List
- Simplified Procedure (Rule 76)
- Civil Case Management (Rule 77)
- Superior Court of Justice - ordinary regime

**2. Legal Issues
For
Determination
at Trial:**

*Use numbered
paragraphs. Include
specific references
to pleadings.*

For each party, identify:

Name of Party:

Causes of Action/Defences (*list individually*):

Legal Issues Raised by Each Cause of Action or Defence:

Heads of Damages Claimed:

3. Type & Location of Potentially Relevant Records:

Prioritize key custodians, record types, time frames, and locations to establish the parameters within which relevant records will be identified and retrieved.

For each party or other person identified as holding potentially relevant records, identify:

Name of Party/Person:

Authors/Custodians:

Types of Documents:

Where Located:

Relevant Time Frame:

File Types:

Other parameters:

4. Agreed Preservation and Retrieval Plan:

Prioritize.²

Consider anticipated volume of records, cost and resources required for preservation.

Are any urgent preservation steps required?

Are the proposed steps proportionate given the significance of the matters at issue?

What are the resources required to preserve and retrieve the records identified?

What is the anticipated cost of these steps?

For each party identified as holding potentially relevant records, identify:

Name of Party:

Steps to be Taken to Preserve and Retrieve Potentially Relevant Documents:

Anticipated Volume of Records:

For each person other than a party identified as holding potentially relevant records, identify:

Name of Person:

Steps the Person is to be Asked to Take:

Anticipated Volume of Records:

5. Agreed Search Parameters: ³

Search within records preserved.

Prioritize steps to be taken

Consider whether phased approach is appropriate. If so, set out protocol for phased search.

Consider anticipated volume of records, cost and resources required to conduct searches.

Are the proposed steps proportionate given the significance of the matters at issue?

Evaluate how to reduce any duplication of records captured?

What is the anticipated cost of these steps?

For each party or other person that will be preserving records that are to be searched, identify:

Name of Party/Person:

A. Review of Physical Records

Methodology for Review and/or Phased Review:

Anticipated Volume of Records:

Deadline to Complete:

B. Review of Electronic Records

Methodology for Review and/or Phased Review: ⁴

Anticipated Volume of Records:

Deadline to Complete:

6. Affidavits of Documents:

Establish common format for the schedules to the affidavits.

Format for the schedules: ⁵

Delivery deadline:

7. Agreed Production Exchange Protocol:

Prioritize to permit

Format for Exchange of Paper Records: ⁶

Deadline for production:

phased production where appropriate.

Consider anticipated volume of records, cost and resources required for production.

Use common protocols where possible.

Format for Exchange of Electronic Records:⁷

Deadline for production:

8. Protection Measures:

Identify measures to protect privilege, privacy, trade secrets or other confidential information (including inadvertently produced privileged documents)

9. Procedures to Confirm Record Authenticity/ Integrity:

Without prejudice to a party's right to object in good faith to a document's authenticity or integrity at a later date.

10. Cost Sharing Agreement:

11. Scope of Written Discovery:

Written discovery is prohibited in simplified procedure actions⁸.

Cannot conduct both written and oral discovery without leave (Rule 31.02) or by agreement.

For each party that will be conducting discovery by written questions, identify:

Name of Party:

Deadline for delivery of questions:

Deadline for delivery of answers:

Agreement as to scope of written discovery (if applicable):

12. Agreement Regarding Exchange of “Contextual Facts” in Advance of Oral Discovery:

For example: casts of characters, organizational charts, corporate structure charts, chronologies of events, IT infrastructure maps, information regarding the source of documentary productions, records retention policies

May be provided to streamline and reduce costs of discovery.⁹

For each party, identify:

Name of Party:

Describe what is to be provided:

Delivery Deadline:

**13. Oral
Discovery:**

*Limited to 7 hours
per examining party
unless parties
consent or leave of
court is obtained.¹⁰*

*For simplified
procedure actions,
oral discovery is
limited to 2 hours.¹¹*

For each party that is to be examined, identify:

Name of Party:
Name, Title and Employer of Discovery Witness:
Dates for Discovery:
Agreed Length of Discovery:
Agreed Number of Hours of Discovery for each Examining Party (*list each party and the number of hours they will examine the witness*):

**14. Other
Discovery:**

*Consider whether an
inspection of
property (Rule 32)
or a medical
examination (Rule
33) is appropriate.*

For each party that is to conduct an inspection or medical examination, identify:

Name of Party Inspecting or Examining:

A. Inspection of Property
Property to be Inspected:
Location of Property:
Agreed Date of Inspection:
Other Agreed Terms:

B. Medical Examination
Person to be Examined:
Physician or other Person Conducting Examination:
Location of Examination:
Agreed Date of Examination:
Other Agreed Terms:

**15. Other
Agreed
Terms:¹²**

Prepared and agreed upon by:

Identify Parties and Counsel

¹ A copy of the *Sedona Canada Principles* may be downloaded from www.thesedonaconference.org, where they are found under the list of publications for Working Group 7: http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs170 with the actual PDF at: http://www.thesedonaconference.org/dltForm?did=canada_pincpls_FINAL_108.pdf.

² In prioritizing steps to be taken to preserve records, the parties must consider proportionality factors, and the risks associated with not undertaking contemplated preservation steps. The proportionality principle requires parties to consider the amounts at issue, the importance of the case, the importance of various types of files, the total volume of material to be preserved, and other factors: see Rules 1.04(1.1), 29.1.03(3)(e), 29.2.03(1) of the Ontario *Rules of Civil Procedure* and Principle #2 of the *Sedona Canada Principles*. Guidance on proportionality considerations may also be found in the EIC's Annotated E-Discovery Checklist (Model Document #8) and Checklist for Preparing a Discovery Plan (Model Document #9).

³ See the EIC's Checklist for Preparing a Discovery Plan (Model Document #9).

⁴ Consider what processes will be used to reduce duplication among records, and to identify and remove irrelevant records. Consider also what processes will be used to identify privileged, personal, or commercially sensitive records. See the EIC's Checklist for Preparing a Discovery Plan (Model Document #9).

⁵ A recommended format would include: Unique document ID number (Alpha/numeric); Date of document; (YYYY/MM/DD); Document type (*e.g.*, memorandum, letter, contract, etc.); Author, Author Organization; Recipient, Recipient Organization; and type of privilege claimed (where applicable). If parties do not agree upon common format, set out alternative format/process to be used.

⁶ See the EIC's Checklist for Preparing a Discovery Plan (Model Document #9). Consider the following, for example:

- a. Are records to be provided as paper copies or scanned?
- b. If scanned, what format? (*Suggested default: Black and white single page TIF images with resolution of 300 dpi (dots per inch) with OCR generated text*)
- c. Common coding protocol for scanned documents? Production of records in a common format is important to facilitate the exchange of productions between parties.
- d. Should a third party service provider be engaged to facilitate production? Can one provider be agreed upon for both parties?

⁷ Electronic records should, whenever possible, be produced in electronic form. See the EIC's Checklist for Preparing a Discovery Plan (Model Document #9). Consider the following, for example:

- a. Will electronic records be produced in common format? (*Suggested default: Original or native format, if commonly accessible. Otherwise, black and white single page TIF images with resolution of 300 dpi (dots per inch) with OCR generated text*)
- b. Are there exceptions to the agreement to produce electronic records in this common format? Production of records in a common format is important to facilitate the exchange of productions between parties.
- c. Is production of metadata required? Can production of metadata be limited to date, author, recipients, and/or other specified fields?
- d. Is specific software or hardware required to permit electronically stored information to be inspected?

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- e. What, if any, queries or other steps may be required to interact with electronic data in order to create producible electronically stored information?
 - f. Should a third party service provider be engaged to facilitate production? Can one provider be agreed upon for both parties?
 - g. Is there a liaison person who can be contacted regarding technical issues?

⁸ See Rule 76.04(1).

⁹ Consider agreeing to exchange an outline in advance of the discovery of some preliminary contextual facts or technical areas to be covered. For example, information on the timeline for certain events, corporate organization and/or IT infrastructure organization, the names and titles of individuals involved, and relevant retention and back up policies.

¹⁰ See Rule 31.05.1

¹¹ See Rule 76.04(2).

¹² If the parties did not reach agreement on specific issues, methodologies, or processes, identify assumptions that will govern steps taken in the absence of such agreement. Also, if parties did not agree upon specific steps to be included due to burden, cost, delay or other factors, identify those steps. Parties should refer to the EIC's Annotated E-Discovery Checklist (Model Document #8) and Checklist for Preparing a Discovery Plan (Model Document #9).