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Ontario Rules of Pre-trial Documentary Discovery: Top Ten Reasons to Choose Ontario for Your Litigation

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- 1. *The Smoking Gun: You will Know the Facts of the Case Before You Enter the Courtroom.*** Evidentiary surprises in the form of last-minute documentary disclosure are frowned upon and generally inadmissible. Knowing the evidence of your case in advance allows you to make an informed analysis and appropriate recommendation to your client.
- 2. *This is not a Guessing Game.*** Producing relevant documents is an entrenched and automatic obligation of all parties. Good or bad, significant or not, all relevant documents must be produced. No motion is required and the parties do not have to guess whether documents exist. No list of documents is needed in the hope of requesting the right documents.
- 3. *The Vanishing Document: If the Document Previously Existed in the Party's Possession, Power or Control, its Existence must be Disclosed.*** Each party is obligated to prepare an affidavit of documents, listing and describing all relevant documents. The affidavit of documents also sets out relevant documents that were formerly in the party's possession, power or control, together with a statement as to their present location.
- 4. *Non-Parties Cannot Hide.*** If none of the parties have the relevant document in their possession, power or control, the court may, on motion by a party, order production for inspection of a document that is in the possession of a third party. The document must be relevant to a material issue in the action and it must be that it would be unfair to require the moving party to proceed to trial without having discovery of the document.
- 5. *The Shredder is not an Option.*** Parties must preserve documents. To this end, it is good practice to provide the opposing party with a litigation hold letter, putting your opponent on notice of this obligation. If the opposing party fails to preserve the documents, there may be sanctions, such as the drawing of an adverse inference related to the reason for the missing document or a further cause of action for the tort of spoliation.
- 6. *The Principle of Proportionality: There are Reasonable Limits.*** Although relevant documents in a party's possession, power or control must be produced, this duty is informed by the principle of proportionality. A \$25,000 lawsuit does not warrant disclosure of every single relevant document where the costs of such disclosure are disproportionate to the amount at

issue in the lawsuit. The court will consider the probative value of such documents versus the costs associated with their production.

7. Ontario has Advanced Rules of Electronic Discovery.

Electronic documents are now at the forefront of all litigation. This requires advanced rules of electronic discovery. Ontario has adopted the *Ontario Guidelines* and *The Sedona Canada Principles*, which provide best practices and outline the requirements for the scope and process of electronic discovery. These processes must be considered when preparing a discovery plan and schedule.

8. Trade Secrets can be Protected. There is no need to reveal your trade secrets to

a competitor. It is possible to obtain a confidentiality order that allows confidential and sensitive documents to be protected from competitors. This avenue, which must be obtained by way of a motion, provides protection against opponents who are on a fishing expedition to discover your client's business secrets.

9. This is not a Free Ride. Large, document-intensive files are costly and burdensome. Costs awards and possibly costs shifting prior to documentary disclosure impose consequences on the loser or on a party making excessive demands.

10. An Ontario Judgment is not an Empty Judgment. Canada has reciprocal enforcement of judgment legislation, which helps enforce foreign judgments in

Canada. Although you will need to check your own jurisdiction to understand how an Ontario judgment is enforceable in your country, Canada is a signatory to the *Hague Convention of 1965* on notification and service of judicial documents and the *Convention between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*. Absent extraordinary circumstances, Canadian judgments are also recognized in the United States.

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