

Court File No. CV-16-12345-CL

The Widget Company of Canada Ltd.

and

Widget Store of Ontario Inc.

ELECTRONIC TRIAL PROTOCOL

**Smith & Smith LLP ("Smith") and Davies Ward Phillips & Vineberg LLP ("Davies")
(collectively "the Parties")**

[This trial protocol provides for evidence to be submitted by way of Affidavit in advance of trial and witnesses to be examined on their affidavit evidence, as opposed to all evidence submitted viva voce]

Hardware for Mr. Justice Jones

1. Mr. Justice Jones will require the following items for use at trial:
 - a. iPad Air 2 (or more recent) – 128GB or larger with AppleCare
 - b. iPad keyboard
 - c. iPad case / sleeve
 - d. Stylus electronic pen
 - e. GoodReader or PDF Expert app

iTunes App Required for File Transfer

2. Each representative of the Parties who will have responsibility for the transfer of data to Mr. Justice Jones' iPad will install the iTunes app on his/her laptop.

Trial Record

3. Smith will serve and file an electronic version of the Trial Record.

Order of Witnesses

4. In order to facilitate data management in the most effective way, the Parties agree to inform each other as to the order of its witnesses within seven days of trial and, as necessary, to give 24-hour's notice of any changes to the order of witnesses.

Production of Expert Reports and Affidavit Evidence

5. The Parties agree that, in addition to assigning document identification numbers to all documents included in the trial record and/or documents to be put to witnesses on examination, document identification numbers will be assigned to (a) all expert reports and their appendices and (b) all affidavits and exhibits (if applicable).

Court Reporting

6. The Parties agree to retain a court reporting service that provides for realtime court reporting services with daily rough drafts to follow electronically.

File Transfer Protocol

7. The Parties agree to utilize a shared cloud storage and transfer folder labelled The Widget Company of Canada Ltd. v. Widget Store of Ontario Inc. (the "ShareFile Site") at the following internet location - <https://abcd.sharefile.com> - as the file transfer protocol between the Parties, and to monitor the documents referred to at trial. If Smith prefers to use its own cloud storage and transfer site (provided that site has unlimited capacity), Davies will utilize that site.
8. The Parties will assign a representative of each firm to manage its uploads to the ShareFile Site. In the event the Davies site is used, a Davies representative will be the Administrator for logistical purposes. The Administrator cannot be blocked from Smith's folders but (a) will undertake in writing not to access Smith's folders and, in any event, (b) Smith will be notified of anyone who accesses its folders.
9. As soon as is practicable and, in any event, at least five days prior to trial (or as the Trial Judge directs), each Party will be responsible for uploading its affidavit evidence under the following format:
 - a. 1st Level Folder Name: **Plaintiffs' Evidence in Chief**
 - b. 2nd Level Folder Name: **John Doe – Affidavit & Exhibits**
 - c. Within that folder:
 - i. **000-[Docid]-AFF-DOE**
 - ii. **001-[Docid] - EXH-DOE01**
 - iii. **002-[Docid] - EXH-DOE02, etc.**
10. As soon as is practicable and, in any event, at least five days prior to trial (or as the Trial Judge directs), each Party will be responsible for uploading its expert evidence under the following format:
 - a. 1st Level Folder Name: **Plaintiffs' Evidence in Chief**
 - b. 2nd Level Folder Name: **Expert Report w/Appendices**
 - c. Within that folder:

- i. 000-[Docid]-EXP
- ii. 001-[Docid] – APP01
- iii. 002-[Docid] – APP02, etc.

Set-up of Electronic Court Room

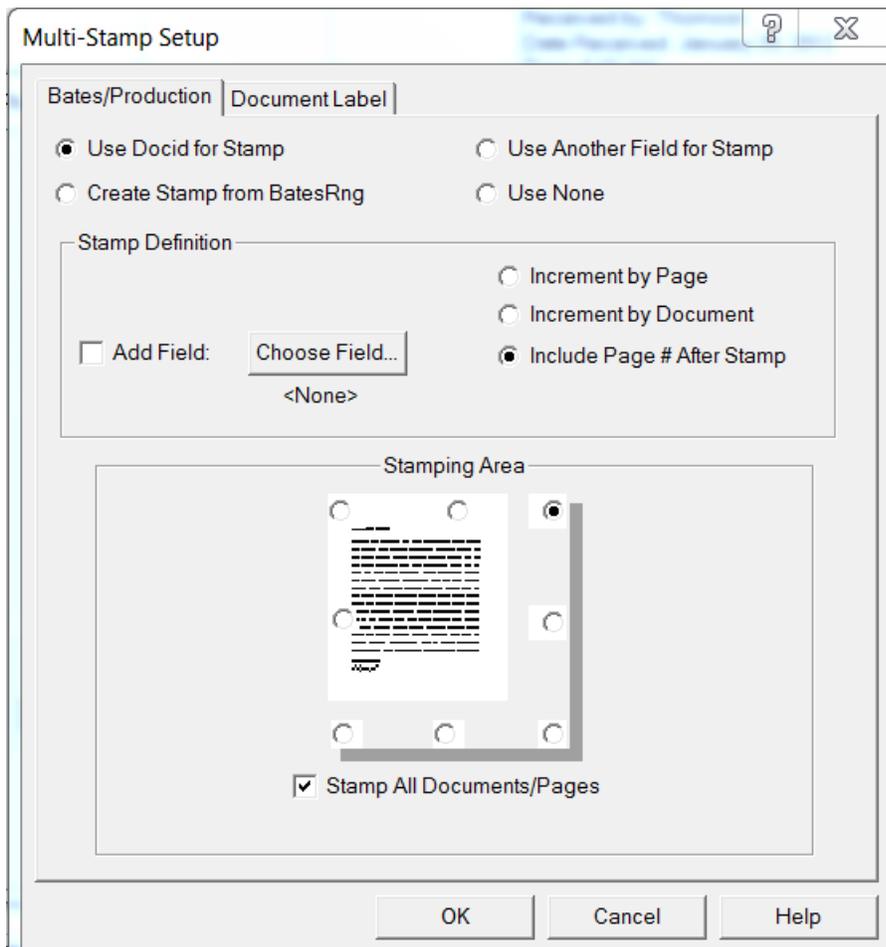
11. On being advised of the courtroom to be made available for the trial, a representative of Smith and of Davies will collaborate on the equipment and other requirements for that specific courtroom. This may include the supply of wiring/connectors, computer monitors and other hardware depending on which courtroom is assigned.
12. The Parties will seek the direction of the Scheduling Manager of the Commercial List, and obtain access to the courtroom on the weekend preceding the commencement of trial. The representatives of Smith and of Davies will cooperate in ensuring that the courtroom set-up meets the requirements of the Court, of the witnesses and of all Parties.
13. The Parties agree that a representative of each firm will sit at a counsel table at the back of the courtroom in order to display the documents.

For Delivery to the Trial Judge Prior to Commencement of Trial

14. Prior to trial or as the Trial Judge directs, the following will be provided to the Trial Judge:
 - a. iPad with keyboard, case and stylus as noted above. At the time it is delivered to the Trial Judge, the iPad will contain:
 - i. Trial Record as served and filed by Smith;
 - ii. All affidavit evidence; and
 - iii. All expert reports.

Coordination of Documents for Upload to Mr. Justice Jones' iPad

15. With the exception of Excel spreadsheets and other native documents, the Parties will create PDF versions of the documents it intends to put to witnesses as follows:



16. Each PDF will be labelled with a sequential tab number and the docid (Tab 001 – ABC0012345).
17. Before midnight on the day preceding any witness' examination in chief or cross-examination, each Party will create a folder on the ShareFile Site reflecting the name of the witness and whether it is the examination-in-chief or the cross-examination binder (for example, John Doe – Examination-in-Chief). Then each of the PDFs identified by the Party and labelled with tab and docid number will be copied into that folder.
18. A representative of each Party will arrive at court 45 minutes prior to the commencement of trial with a USB key containing the folders of PDFs it intends to put to the witness or witnesses scheduled for that day and will upload same to the Trial Judge's iPad. Access to the contents of each folder is granted to the opposing party on the commencement of the examination-in-chief or cross-examination of each witness.

Display of Documents at Trial

19. During examinations-in-chief/cross-examinations, designated representatives of the Parties will be responsible for displaying documents on all computer monitors in the courtroom and will be stationed together at one table at the back of the courtroom. Those representatives will control the iPad/laptops for displaying documents from that area.

Openings

20. If the Parties intend to submit written openings or use any presentation tools and wish the Trial Judge to have the ability to make notes on those electronic documents, those materials must be uploaded to the Trial Judge's iPad prior to the commencement of submissions.

Exhibits

21. If during the course of the day, a document not produced to date is put to a witness, that individual document will be assigned an alphabetical exhibit number by the Registrar, subject to any evidentiary objection. Such documents will be included in the Sharefile Site folder in the witness subfolder provided at the end of the day (see above), and will be named by exhibit number assigned, also subject to any evidentiary objection.

Authenticity

22. The Parties agree that all documents produced in documentary discovery are authentic and admissible, unless a Party otherwise contests authenticity. The Parties' agreement as to admissibility does not constitute an agreement as to the meaning or evidentiary value of any document.

Documents Referred to at Trial

23. At the end of each day of trial, the Parties' representatives will discuss the of documents put to witnesses that day. The representative of the examining Party will thereafter update the Sharefile Site folder to ensure it contains only PDF copies of all of the documents put to each witness that day, which collection will be marked as the next sequential numerical exhibit.

Confidentiality

24. The Parties acknowledge that the documents produced in this trial include "Confidential Information", as that term is defined by the Parties. To give effect to these procedures, the Parties agree as follows:

- a. All copies of documents containing Confidential Information to be referred to at trial, included in an Affidavit or written submissions or uploaded to the Sharefile site in accordance with this protocol shall be clearly stamped as such and identified as such;
- b. If a party wishes to rely on Confidential Information at trial, the following procedures apply:
 - i. *Affidavits*: If Confidential Information (that is not already redacted as part of the production process) is referred to in an Affidavit or a document attached as an Exhibit to the Affidavit, the party providing the Affidavit to the Court, counsel and the Parties must: (1) redact any information that is Confidential Information (and not already redacted during the production process) from the Affidavit filed with the Court and exchanged among the Parties; and (2) provide a separate confidential version of the Affidavit to the Court and counsel only, under seal, with the Confidential Information that the Party intends to rely on unredacted. This confidential version of any Affidavit, like any other Confidential Information, shall be governed by the procedures in any applicable Confidentiality Agreement. The Parties agree, subject to directions from the Court, that the confidential version of any Affidavit shall be sealed and marked "Confidential" in the Court file;
 - ii. *Uploading of Documents to the Sharefile Site*: If a Party intends to put Confidential Information (that is not already redacted as a result of the production process) to a witness, that Party must: (1) file the unredacted version of the document containing Confidential Information in a separate confidential folder when documents are uploaded to the Sharefile site in accordance with this protocol; (2) name the separate confidential folder within the trial subfolder (i.e. John Smith – Chief – Confidential). The Parties agree, subject to directions from the Court, that any document containing unredacted Confidential Information that is uploaded to the Sharefile site and becomes part of the Court file or trial record in accordance with this protocol shall be sealed and marked "Confidential" in the Court file;
 - iii. *Transcripts and Oral Evidence and Submissions in Court*: If a Party intends to refer to Confidential Information in oral evidence or submissions in Court, that Party shall advise the Court accordingly before referring to the Confidential Information and not proceed with the evidence or submission unless and until: (1) any person not entitled to hear or see the Confidential Information pursuant to the Confidentiality Agreement is excused from the courtroom; and (2) the Court reporter has the opportunity to start a separate confidential transcript. The Parties agree,

subject to directions from the Court, that any oral evidence referring or relating to Confidential Information shall be transcribed on a separate confidential transcript and any confidential transcript shall be sealed and marked "Confidential" in the Court file;

- iv. *Display of Documents in Court*: If a Party intends to refer to a document containing Confidential Information in oral evidence or submissions in Court, the version of the document displayed on the screens in the Courtroom shall be the most redacted version of the documents produced only. To the extent that a Party intends to refer to or rely on unredacted Confidential Information in a witness' evidence, that Party's representative in Court responsible for displaying documents shall provide a confidential, unredacted copy of the document to the witness, on an iPad, or in another format that is convenient to counsel and the witness. Counsel and the Court will also be able to access the unredacted confidential version of the documenting containing Confidential Information in the separate confidential folder for the witness uploaded to Sharefile and to Mr. Justice Jones' iPad. (If and to the extent permitted by the Confidentiality Agreement and the Order excluding witnesses, counsel may also provide a copy of the unredacted version of the document containing Confidential Information to experts or certain instructing clients present in Court). The Parties agree, subject to directions from the Court, that any unredacted version of a document containing Confidential Information shall be sealed and marked "Confidential" in the Court file;
- v. *Written Submissions*: If Confidential Information or a document containing Confidential Information (not already redacted during the production process) is referred to in written submissions, the Party providing the written submissions to counsel and the Parties must: (1) redact any information that is Confidential Information (and not already redacted during the production process) from the written submissions filed with the Court and exchanged among the Parties; and (2) provide a separate confidential version of the written submissions to the Court and counsel only, under seal, with the Confidential Information that the Party intends to rely on unredacted. This confidential version of the written submissions, like any other Confidential Information, shall be governed by the procedures in any applicable Confidentiality Agreement. The Parties agree, subject to directions from the Court, that the confidential version of any written submissions shall be sealed and marked "Confidential" in the Court file.

- c. The Parties agree to make best efforts to act reasonably and efficiently in their application of the above procedures to preserve confidentiality, to the extent possible without compromising confidentiality or their obligations under any applicable Confidentiality Agreement. For the purposes of the “Chess Clock Timing” (in section 25 of this Protocol), time spent on witnesses being excused to preserve confidentiality shall not be counted in the amount of time spent by a party, or debited from that party’s allocation of time.
- d. The Parties agree to confer before and during the trial, as necessary, to discuss proposals that will permit evidence to be led as efficiently as possible while maintaining the confidentiality of Confidential Information and Confidential Documents. Consent to proposals or protections to protect the confidentiality of Confidential Information shall not be unreasonably withheld. For the purposes of the “Chess Clock Timing” (in section 25 of this Protocol), any motions required to resolve issues concerning confidentiality shall be treated in the same way as any other motions – the time for the motion will come out of the time of the party that loses the motion, subject to the discretion of the Court.
- e. To the extent that any other issues pertaining to claims of confidentiality arise, the Parties will address those issues where practicable during the course of trial and, in any event, no later than 30 business days after the close of trial. The Parties agree that any documents subject to pending and / or disputed claims of confidentiality will be sealed and marked "Confidential" in the Court file pending resolution of the claim for confidentiality. Within 30 business days after the close of trial, the Parties will, through counsel:
 - i. confirm to the Court, for certainty, which documents should be sealed as part of the Court record; and marked "Confidential"; and
 - ii. collaborate on a list of all documents put to witnesses during the trial, identify the confidential documents on the list and update Mr. Justice Jones' iPad accordingly.

Chess Clock Timing

25. The Parties agree to the so-called “chess clock” method for allocating trial time. The following allocation of time has been agreed to: 50% of trial time to Smith and 50% of the time to Davies. [Assuming a 6-hour day and ten weeks/50 days of trial excluding closings, this amounts to 150 hours for Smith and 150 hours for Davies.]

Inherent Jurisdiction of the Court

26. The Parties agree that nothing in this protocol overrides the inherent jurisdiction of the Court to control its own process.

Date: **SMITH & SMITH LLP**
for the Plaintiff, The Widget Company of
Canada Ltd.

Per: _____

Date: **DAVIES WARD PHILLIPS & VINEBERG LLP**
for the Defendant, Widget Store of Ontario
Inc.

Per: _____